SECURED TRANSACTIONS LAWS OF NIGERIA AND CAMEROON THROUGH THE LENS OF ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE OF THE UNITED STATES OF AMERICA

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Abstract

One of the ways to achieve growth in any economy is by making credit available and accessible to consumers and business enterprises. However, there are several factors that could impede the availability of credit in the society; among which is lack of adequate legal framework for secured financing. There is a direct correlation between good legal framework for security devices – personal and collateral securities - and the availability of credit in a country. Indeed without adequate laws that guarantees to the creditor repayment of the loan by the debtor, availability of credit would only be confined to the realm of academic discuss. Armed with this realization, many countries have enacted and are also periodically revising their secured transactions laws with a view to among other things: expanding access to credit by making available wide arrays of personal property as collateral for loan; ensuring that access to credit is not cut-off to consumers and SME's in the society; providing efficient enforcement mechanisms for the realization of security in event of default as well as providing protection to debtors especially consumer debtors in the course of the credit transactions.

Regrettably, many countries in Africa are yet to come to terms with the fact that availability and accessibility of credit can galvanize economic growth and consequently, are lackadaisical about reforming their outdated secured transactions laws in this regard. It is against this background that this research examines the secured transactions laws of Nigeria and Cameroon with a view to analyzing the factors that have impeded the availability and utilization of credit in both countries and making recommendations on how to overcome these factors. Although the research will consider several other factors that hinder the grant of credit - i.e., social, political

and economic, this research focuses more on the inadequate legal framework for secured transactions and the imperatives of having good laws in both countries.

This focus of the research informs the choice of Article 9 of the United States Uniform Commercial Code – a developed model law on secured transactions - as the parameters for the analysis and proposals for reform of both Nigerian and Cameroon secured transactions laws. The suggested reforms, which include legal transplantation of the compatible elements of the United States secured transactions law to both countries, would serve as the basis for harmonizing both countries' laws in this field. Besides the attendant economic benefits on trans-border commerce between the two countries that would be engendered by the harmonization, the proposed reform would bring about adequate legal framework needed to make credit available and accessible and invariably stimulate economic growth in both economies.

Dedication

To the evergreen memory of my beloved Mother – **Priscilla Ozichi Nwogu** – who nurtured and earnestly believed in all my dreams. Even when my pursuit of an SJD meant that I had to be parted from her to move to a foreign country, she made this painful sacrifice with much love and expectation, but sadly, never lived to see this particular dream actualized.

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List of Abbreviations

ALI	American Law Institute
Article 9	Abridged reference to the Article 9 of the Uniform Commercial Code
ALL NLR	All Nigerian Law Report
BC	Bankruptcy Code
BEAC	Banque des Etats de l'Afrique Centrale
BN	Billion
BOFIA	Banks and Other Financial Institutions Act
CAC	Corporate Affairs Commission
CAMA	Companies and Allied Matters Act 2004
CAP	Chapter
CCPA	Consumer Credit Protection Act
CEAL	Center for Economic Analysis of Law
CEMAC	Economic and Monetary Community of Central African States
CJN	Chief Justice of Nigeria
CSCS	Central Securities and Clearing System
ECOWAS	Economic Community of West African States
EBRD	European Bank for Reconstruction and Development
ERNLR	Eastern Region of Nigerian Law Report
FAAN	Federal Airport Authority of Nigeria
FMBN	Federal Mortgage Bank of Nigeria
IPR	Intellectual Property Rights
JCA	Justice of Court of Appeal
JSC	Justice of the Supreme Court
LFN	Laws of Federation of Nigeria
NCCSL	National Conference of Commissioners for the Uniform State Laws
NEXIM	Nigerian Export and Import Bank
MFB	Micro-Finance Banks
MFI	Micro-Finance Institutions
NWLR	Nigerian Weekly Law Report
NLR	Nigerian Law Report
OAPI	Organisation Africaine De La Proprite Intellectuelle
OC	Official Comments to the Uniform Commercial Code
OHADA	Organization for the Harmonization of Business Laws in Africa
PMI	Primary Mortgage Institutions
PMSI	Purchase Money Security Interest
PPSA	Personal Property Security Act
SAN	Senior Advocate of Nigeria
SCNJ	Supreme Court of Nigerian Judgment
SGBC	Societe Generale De Banques Au Cameroon
SME's	Small (including Micro) and Medium Scale Enterprises or Entrepreneurs
UCC	Uniform Commercial Code
UNICITRAL	United Nations Commission on International Trade Law
USC	United States Code
WACA	West African Court of Appeal

WRNLR	Western Region of Nigeria Law Report

Introduction

„A hitel híja szinte minden mozgást elakaszt"[1]

Credit is the livewire of the development of any economy and the sustenance of lives of consumers and commercial enterprises in any society.[2] Indeed, the need for credit is imperative both for consumer[3] and business[4] financing in a society. For consumer financing, only few people in society[5] (if at all) can live without recourse to one form of credit or the other to finance their consumer purchases. However, the 'luxury' of the survival of few 'privileged' consumers without recourse to credit obviously does not apply to business enterprises.[6] In most cases, credit is inevitably needed for the commencement or expansion of micro, small, medium or large scale businesses, irrespective of the owners' personal savings and this is true even in countries where capital is readily available from the capital markets. Business enterprises need credit facilities from their suppliers or bankers to run efficiently.

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[1]Translated as follows – the lack of credit impedes virtually all economic activities. See Gróf Széchenyi István Összes munkái II. szerk. Iványi-Grünwald Béla (MTA, Budapest, 1930). He was one of the few Hungarians who understood the importance of credit to any economy owing to his contacts and visits to England at the begining of 19th century. The author is grateful to Tibor Tajti for the translation.

[2] See Cork Report on Insolvency Law and Practice (1982), Cmnd 8558, para. 10 cited by Robert Bradgate. Commercial Law (Butterworths, 3rd ed., 2000), p. 447. According to El-Dean, "Credit is the lifeblood of the economy." See Bahaa Ali El-Dean, Privatization and the Creation of a Market-Based Legal System: The Case of Egypt, (Koninklijke Brill NV, 2002), p. 80.

[3]See Bryan A. Garner, (ed.), Black's Law Dictionary, (Thomson West, 8th ed., 2004), p. 335 defines a consumer as "a person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes." Consequently, loan or sale credit obtained specifically for this purpose will be considered as consumer financing.

[4]In contradistinction to consumer, business on the other hand is defined as "a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." See Bryan Garner, Black's Law Dictionary, supra footnote 3, p. 211. Accordingly, any loan or sale credit obtained for the purpose of carrying out the foregoing objectives will be business or commercial financing. This research shall be using the terms business financing and commercial financing interchangeably.

[5]It is apt to state from the onset that society here relates only to a capitalist and not to socialist or communist societies. Relating society here to a capitalist society is apposite because all the three jurisdictions to be considered in this research – United States, Nigeria and Cameroon are all capitalist societies. However, in socialist or communist systems greater percentage of the population live without credits. People in these societies acquire new properties from their personal savings, inherited assets or from government subsidies (which in fact are taxpayers' moneys).

[6] Business enterprises here are used in a loose term to encompass all business forms; from sole proprietorships, various forms of partnerships, private limited liability companies, through public limited liability companies (otherwise called corporations in the United States).

In the 19th century, Daniel Webster and Gustave du Puynode [7] extolled the significance of credit to businesses. Their postulations on the importance of credit in the growth of an economy made over one and half centuries ago is still very relevant until date and was re-echoed by the very first address of the American President Barrack Obama to the joint session of United States congress on the impact of the recent financial and mortgage crisis on the United States economy.[8] Obama's statement succinctly captures the essence of a significant part of this research, and his dictum with that of Webster and Puynode restate one of the economic catalysts that has engineered growth and development of the western economies. Indeed the availability and maximal utilization of credit in the western world and the contrasting inadequate access of credit facilities in African economies may perhaps explain the obtrusive disparities in the growth and development of the economies of the western world and underdeveloped African economies. The demand for credit cuts across all strata of the society. Credits are not only limited to consumer and business financing; even governments[9] across the globe have sought credit from global

[7]In the first half of nineteenth century, Daniel Webster while elucidating on the significance of credit stated as follows: "Credit is the vital air of the system of modern commerce. It has done more, a thousand times, to enrich nations, than all the mines of the world. It has excited labor, stimulated manufactures, pushed commerce over every sea, and brought every nation, every kingdom, and every small tribe among the races of men to be known to all the rest; it has raised armies, equipped navies, and triumphing over the gross power of mere numbers, it has established national superiority on the foundation of intelligence, wealth, and well directed industry." Speech by Daniel Webster in the Senate of the United States on the 18th of March 1834, quoted by Henry Dunning Macleod, The Principles of Economical Philosophy Vol. 1 (Longman Green – Reader and Dyer, 2nd ed., 1872).

This position was not only held by Webster alone, also French M. Gustave du Puynode writer opined as follows regarding credit "However fruitful have been the mines of Mexico and Peru, in which for a long time after Columbus, seemed buried the fortune of the world, there is yet a discovery more precious for humanity, and which has already produced more wealth than that of America; that is the discovery of credit, a world altogether imaginary, but vast as space as inexhaustible as the resources of the mind." See De la Monnaje, du Credit et de l' Import p.110 quoted in Henry Dunning Macleod, The Principles of Economical Philosophy 2nd ed. (Longmans, Green-Reader, and Dyer, 1872).

[8]According to President Obama, "[…] you see, the flow of credit is the lifeblood of our economy. The ability to get a loan is how you finance the purchase of everything from a home to a car to a college education; how stores stock their shelves, farm buy equipment, and businesses make payroll […]." The speech is available on <http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress/ >; last visited on the 17th of April 2011.

[9] It should be noted that credits given to countries (sovereign debts) are not governed by the provisions of Article 9 of the United States Uniform Commercial Code. Yet that should not be understood that sovereign loans cannot be secured by the known security devices. It is also apt to add that countries and public institutions also rely on credit to

financial institutions.[10] Governments and public institutions[11] sell bonds in the bond market to raise credit. It can safely be concluded that the history of credit is the response of humanity in its quest to meet its financial obligations in the midst of financial limitations and constraints.

Credit can take either of two forms: loan credit or sales credit.[12] While the first is the loan of money by the creditor to the debtor usually with interest with an agreed scheduled date for repayment, a sales credit is the deferment of the price obligations for the purchaser until a later date.[13] However, for the purpose of this thesis, credit will encompass both loan and sales credit unless otherwise stated. Credit, (either loan or sale credit) can broadly be divided into secured and unsecured credit transactions. In its simplest terms, a secured credit is a credit granted to the debtor which has a form of 'tangible assurance' that in event of non-repayment, the secured creditor can look up to assets of the debtor to recover the debt,[14] while an unsecured credit is one which does not have these forms of assurances (collateral).[15]

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finance major projects for their citizens. By the 21st century it became a rule that governments raise debt by issuing fixed income securities to an increasing extent on international markets.

[10] Global financial institutions includes but not limited to World Bank, International Monetary Fund (IMF), International Finance Corporation (IFC) and Paris Club.

[11] Governments just like companies issue government bonds to big financial institutions, citizens or even citizens of other countries. These natural or legal persons buy these bonds, wait for their maturity and get their money back with interest.

[12] Jan-Hendrik Rover, Secured Lending in Eastern Europe Comparative Law of Secured Transactions and the EBRD Model Law, (Oxford University Press, 2007), p.7.

[13] See Roy Goode, Commercial Law, (Penguin Books, 2nd ed., 1995) p. 637; see also L. S. Sealy, R.J.A. Hooley, Text and Materials in Commercial Law, (Butterworth & Co. (Publishers) Ltd, 1994), p. 790.

[14] See Eva- Maria Kieninger, *Introduction: Security Rights in Movable Property Within the Common Market and the Approach of the Study* in EVA-MARIA KIENINGER (ed.), SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW, (Cambridge University Press, 2004), p. 7.

[15] According to Goode "The possession of a real right over one or more of the debtor's assets is what marks off the secured from the unsecured creditor." See Roy Goode, Commercial Law, supra footnote 13, pp. 640-641.

The focus of this research will be on secured transactions for two major reasons: *first* the United States, Nigerian and Cameroon[16] secured transactions laws that will be analyzed in this research only regulate secured financing; and *second* a greater percentage of credits from formal lending institutions granted to consumers and businesses debtors in the United States,[17] Nigeria and Cameroon are mostly secured credit.[18] It is against this milieu, that this research will therefore evaluate both the Nigerian and Cameroonian secured transactions laws from the perspective of Article 9 of the Uniform Commercial Code (hereinafter: Article 9), with a view to identifying the following: *first,* the weak points of the Nigerian and Cameroon secured transactions laws which have impeded significantly higher utilization of credit-based financing in these jurisdictions. *Second,* the research would examine the socio-economic, political and cultural challenges militating against efficient secured credit financing in Nigeria and Cameroon and the overall changes required to be made in these areas to have the compatible elements[19] of Article 9 transplanted to both jurisdictions. The potential benefit of using United States' secured transactions law – to wit, Article 9 – as a benchmark to measure and reform secured transactions laws in Nigeria and Cameroon is not just that these systems might be modernized by following the current best standards available; but at the same time, the laws of these two neighboring

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[16]It should be noted that the Cameroon secured transactions law treat suretyship and guarantee as secured transactions: i.e., collateral security, whilst under the U.S., secured transactions include only financing based on collateral security. Consequently, suretyship and guarantee are treated as personal security and not included in the U.S. secured transactions laws. Given this dichotomy, and the fact that this work would rely on the U.S. secured transactions laws as the bench mark, this research will therefore rely only on the U.S. classifications of secured transactions - collateral security – and hence suretyship and gurantees would not examined in this work.

[17] About 70 per cent of the United States Bank loans are secured credit. See Heywood Flesig, *Economic Functions of Security in a Market Economy* in JOSEPH NORTON, MADS ANDENAS (eds.,) EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS, (Kluwer Law International, 1998), p. 15.

[18] According to Heyood Fleisig et al, in low and middle-income countries between 70% - 80% of loans credit from formal financial sector are secured credit loans. See Heywood Fleisig, Mehnaz Safavian, Nuria de la Pena, Reforming Collateral Laws to Expand Access to Finance (World Bank, 2006), p. 1. In Nigeria also, banks and other formal lenders hardly ever give unsecured loan credit to their customers except overdraft facility on a short term tenor to trusted account holders, whose trust is determined by the customers' previous credit history.

[19] Compatible elements here mean rules, policies, categories of Article 9 that will fit into Nigerian and Cameroon secured financing realities.

countries would be harmonized as well. These will be catalysts for the growth and development to both economies.

1. Why the Countries of Focus: Economic and Legal Justifications for the Research

There are numerous reasons to undertake this comparative research[20] in the three jurisdictions. One of the reasons is that efficient secured credit financing laws facilitates economic growth.[21] A major prerequisite for credit financing to thrive well in any given economy is the availability of good secured transactions law. This point may not be made more vividly than was logically postulated by Mavosky when he stated, *"[…] economic development is impossible without investment, investment is impossible without lending, lending is impossible without security, and security is impossible without good legislation.*"[22] Such good secured transactions law will regulate the creation, attachment, perfection, priority and enforcement of secured credit transactions both in and outside bankruptcy.[23] All the above attributes of an efficient secured

[20] According to Wood, "Comparative law is no doubt useful to enrich one's understanding of one's own laws, to enhance awareness of the range of possible solutions, to help frame new laws with the benefits of the thinking and experience of other and without having to reinvent the basics, to promote the international harmony, to correct prejudices, to discover similarities which underlie the differences, or even to merely satisfy curiosity as an end to itself. But these laudable objectives must pale before the sheer urgency of being able to transact business in an atmosphere of knowledge rather than ignorance, so that transactions are not set aside or liabilities incurred by legal ambush, legal surprise, or legal incomprehension." See Phillip Wood, *World –Wide Security –Classification of Legal Jurisdictions* in JOSEPH NORTON, MADS ANDENAS (eds.,), EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS, (Kluwer Law International, 1998), p. 47.

[21] Bahaa believes that there is a direct correlation between adequate legal framework for secured transactions and lending policy and consequently absence of good legal framework on secured transaction militates against bank's lending policy and this impact negatively on the economy. See Bahaa El-Dean, Privatization and the Creation of a Market-Based Legal System: The Case of Egypt, supra footnote 2, p. 80.

[22]See Alexander Makovsky, *The Law of Secured Lending in Russia and the CIS*, in JONATHAN BATES et al. (eds.,) INTERNATIONAL CONFERENCE OF SECURED COMMERCIALLENDING IN THE COMMONWEALTH OF INDEPENDENT STATES, 4th - 5th November 1994, p.13 available at < http://www.ebrd.com/downloads/legal/facts/confer.pdf >; last visited on the 7th of April 2011.

[23] According to Cuming, "There is growing recognition of the importance of secured financing to modern business development and the expansion of markets for consumer goods. The availability of credit is a central feature of all modern economies, and states which hope to encourage strong domestic markets and maintain or develop strong internationally competitive economies must have legal infrastructures that facilitate secured financing transactions. This has been recognised by international lending organisations such as the World Bank and the European Bank for Reconstruction and Development which are showing increased interest in the secured financing laws of countries in

transactions law are provided in the Article 9. Although Article 9 may not be the best secured transactions law in the world, however it is undoubtedly a model law with developed features that have made secured financing efficient in the United States.[24] With the 1999 revisions of Article 9 in response to current business trends in credit financing, Article 9 is best suited to use for reforming the undeveloped Nigerian and Cameroon secured transactions laws.[25] This probably explains why Article 9 principles and policies have also influenced other countries' secured transactions laws.[26] A reform produces good results when done with a model law which has developed features in the given field of law. On the contrary, Nigeria and Cameroon have never had a thriving secured credit financing system. Though in Nigeria, various industries already exploit some aspects of what is covered by Article 9. One of the related problems is that due to the compartmentalization of the system that is not readily visible and one tends to disregard that besides fixed and floating charges, hire-purchases and even field warehousing transactions are known.

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which they provide loans." See R.C.C. Cuming, UNIDROIT: Restricted Working Group Responsible for Determining the Desirability and Feasibility of the Preparation by UNIDROIT of a Model Law in the General Field of Secured Transactions, (Rome, October 1994) available at <http://www.unidroit.org/english/documents/1994/study72a/s-72a-01-e.pdf > last visited on the 4th of April, 2011.

[24] See infra Chapters 2, 3 and 4 for the features of the Article 9 that has made it a model law.

[25] See infra footnote 403 for the detailed list of changes brought about by the revised Article 9 and their relevance to modern day financing.

[26] Australia, a common law country like Nigeria just passed a Personal Property Security Act in 2010 that was influenced by Article 9. The 1967 Ontario PPSA adopted Article 9 provisions. Eventually all other common law provinces of Canada' PPSA - British Columbia, Alberta, New Manitoba, Saskatchewan, New Brunswick PPSA's were influenced by Article 9. Even Quebec that operates civil law has a civil code in 1996 that is parallel to the PPSA and modelled after Article 9 UCC. See Karen Redman, International Trade – Service Providers International UCC Equivalents, published in The Metropolitan Corporate Counsel of October 4, 2010 available at < http://www.metrocorpcounsel.com/current.php?artType=view&EntryNo=11508 > last visited on the 10th of April, 2011; See R.C.C. Cuming , Second Generation Personal Property Security Legislation in Canada (1981-82) , 46 SASKA. L. REV. p. 5 (1982); Jacob S. Ziegel, Benjamin Geva, Ronald C.C.Cuming, Commercial and Consumer Transactions – Cases, Text and Materials, (Edmond Montgomery, Toronto 3rd ed., 1995). Article 9 also influenced the EBRD's Model Law on Secured Transactions. See John Simpson and Joachim Menze, Ten Years of Secured Transactions Reforms in European Bank for Reconstruction and Development, Law in Transition, p. 21 (2000). Even China's security interest in personal property is believed to have been influenced by Article 9. See Stefan Messmann, Protection of Property in China Changes under the New Chinese Legislation, Vol. 15 Zeitschrift fur Chinesisches Recht, Iss. 2. p. 113, (2008).

One of the main reasons for the underutilization of secured credit financing has been the absence of efficient secured transactions laws that would have galvanized secured financing by making more personal properties available as collateral and also guarantee prompt enforceability of securities. Whilst at present, Nigeria does not have any law on security interest in movable property,[27] credit should be given to Cameroon and 15 other countries in Africa for taking the step in the right direction by having a uniform law on secured transaction called OHADA Uniform Act Organizing Securities (hereinafter called Uniform Act on Securities).[28] This claim is valid even though the law falls short of the basic features of a proposed reformed secured

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[27] Except for what is contained in sections 166 – 182 of the Companies and Allied Matters Act 1990 which regulate company charges basically. However Lagos State in Nigeria has a Bill of Sale Law B2 Laws of Lagos State which governs voluntary transfer of right, interest or title in personal property, either by way of security or by absolute sale of the personal property. This law, which mirrored the English Bill of Sale Act of 1923 falls short of a good personal property security law. Writing on the effect of the above laws (the New Zealand's inherited English Bills of Sale and Company charges), Duggan and Gedye opined "The law relating to security over chattels and intangibles in the New Zealand is in a mess. […] The principal reason for the mess is that New Zealand inherited the English Bills of Sale Legislation (itself a mess) and the relevant provisions of the companies legislation (an incomplete security system) and adapted them to local needs, sometimes in a desultory way."Accordingly New Zealand enacted Article 9 inspired New Zealand Personal Property Securities Act in 1999. See Anthony Duggan and Michael Gedye, Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change, 27 Penn St. Int'l L. Rev. pp. 659 – 660 (Spring 2009).

It should also be note however that there is Hire Purchase Act in Nigeria but it does not create security interest in Nigeria interest because there is no grant of interest in the property from the debtor to the secured creditor. Consequently the use of retention of title mechanisms wherein the secured party retains title to the property pending the full payment of the purchase price does not create a security interest in Nigeria. See infra chapter 1 on the discussions on Hire Purchase Act and Equipment Leasing Act. However there is a proposed draft law on Security Interest in Movable Property in Nigeria by the Center for the Economic Analysis of Law. See infra pp. 132 – 133 for a brief discussion on this initiative.

[28] OHADA is a French acronym for '*L'Organisation pours l'Harmonisation en Afrique du Droit des Affaires*' meaning the Organization for the Harmonization of Business Laws in Africa. It is currently made up of sixteen African countries: Benin Republic, Equatorial Guinea, Guinea Bissau, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros Island, Congo, Gabon, Cote D'Ivoire, Mali, Niger, Senegal, Togo and Guinea. OHADA was established by a treaty signed initially by 14 member African countries on the 19th of October 1993 in Port Louis Mauritius. One of the guiding principles for the formation OHADA is among other things to harmonize the business laws within the contracting states "by the elaboration and adoption of single modern common rules adapted to their economies." In order to achieve the member countries' objectives, and to ultimately facilitate investment within the member states and also to attract foreign investment, the member states have harmonized business laws in eight different commercial areas. The issues covered by OHADA Uniform Act are as follows: general commercial law, corporate law and rules concerning different types of joint ventures, laws concerning securities (guarantees and collateral), debt recovery and enforcement law, bankruptcy law, arbitration law, accounting law, law regulating contracts for the carriage of goods by road amongst OHADA member states. OHADA web page is available a t < http://www.ohada.org/ > last visited on the 9th of April, 2011.

transactions law from Article 9 perspective and the obvious discrepancy that plagues Cameroon and these other countries on the written laws and their enforceability.[29]

The choice of these two African countries is influenced by several general and specific reasons. The first specific reason is that Nigeria is not only the country of origin of the researcher, but is also the most populous African country,[30]with tremendous potentials for economic activities that require credit financing. Whilst the inflow of foreign direct investment to the whole of Africa grew from $9bn in 2000 to $19b in 2001,[31] foreign direct investment to Nigeria alone in 2009 was $11b.[32] Nigeria can ill afford to have an unreformed secured transactions law. With the Credit Crunch still not abated completely in the western world, foreign investors in Nigeria may have to source for credit locally from Nigeria[33] in other to access part or all the funds needed for investment and the present secured credit transactions laws in Nigeria may not sustain the intricacies of such borrowings.

[29] See infra chapter 1 pp. 138 – 141 for the limitations of the Uniform Act on Securities under the general appraisal of the Act.

[30] Nigeria Census 2006 figures released by the National Population Commission placed Nigeria's population at about 144 million persons.

[31] See Chantal Dupasquier and Patrick Osakwe, Foreign Direct Investment in Africa: Performance, Challenges and Responsibility (African Trade Policy Centre, Work in Progress No. 21) available at < http://www.uneca.org/atpc/Work%20in%20progress/21.pdf >; last visited on the 10th of April, 2011.

[32] See Thisday Newspaper of 10th of April 2010 with the caption "$11bn FDI Flowed into Nigeria in 2009" available at < http://www.nigeriamasterweb.com/paperfrmes.html > last visited on the 10th of April 2011.

[33] Examples abound in Nigeria. Federal Government of Nigeria offered its 51% shareholding in NITEL (Nigerian Telecommunications Limited) for sale. A foreign company, Investors International (London) Limited, bided and won at the bid amount of $1.317b. Investors International (London) Limited sourced locally the sum of $100,000.000 (one hundred million dollars) to pay for the 10% non refundable bid deposit of $131.7 million for the Federal Government's shareholding in NITEL from a Nigerian Bank: First Bank of Nigeria Plc. Though Investors International (London) Limited paid the 10% non-refundable deposit of $131.7 million, the deal went sour as the IIL's bid was cancelled because the company could not pay up the remaining 90% of the bid amount within the 90 days period specified for the payment. Upon the cancellation of the bid, First Bank Nigeria Plc tried unsuccessfully to recover the amount of $100,000,000 advanced to the company as credit for which there was no adequate security.

One of the main reasons for the choice of Nigeria and Cameroon is that both economies are dominated by micro, small and mid-scale enterprises (hereinafter: SME's) whose accesses to credit are practically cut-off due to several reasons. One of such reasons are the unreformed laws which place emphasis on real property collateral as the most preferred collateral from business entities and individuals who want to access credits from financial institutions.[34] Unfortunately, most SMEs do not own real properties[35] and consequently, they could not obtain credits. Entrepreneurs and consumers alike have accordingly resolved this gap, by having recourse to indigenous forms of credit financing – the 'esusu' and 'njangi' micro-credit schemes.[36] Esusu and njangi are good credit financing devices; however they have limitations and cannot provide the much needed finance for the growth in neither of these economies.[37] As will be shown in this thesis, where appropriate mortgage and secured transaction laws are in place which facilitate the grant of credit to deserving borrowers in Nigeria and Cameroon, 'esusu' and 'njangi' micro-credit schemes could play complementary roles. A reformed secured transactions law which provides the use of wider range of assets - including personal properties - as collateral will restore access to credit to the greater majority SME's. All things being equal, that may enable

[34] According to Investment Climate Advisory Services/World Bank Group "While in the developing world 78 percent of the capital stock of a business enterprise is typically in movable assets such as machinery, equipment or receivables and only 22 percent is in immovable property, financial institutions are reluctant to accept movable property as collateral. Banks heavily prefer land and real estate as collateral." See Secured Transactions Systems and Collateral Registries (January 2010), p.7 available at < http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/PublicationMT_SecuredTransactionsSystems/$FILE/SecuredTransactionsSystems.pdf > last visited on the 30th of November 2010. See also Safarian, Fleising, Steinbuks, Unlocking Dead Capital The World Bank Group Private Sector Development Vice Presidency View Point Note Number 307, p. 9 (March, 2006).

[35] The cost of the purchase price of real properties in Nigeria is too exorbitant and these micro, small and mid-scale entrepreneurs whether operated by an individual or as a legal entity rent or lease properties as the need arises due to expense in owning real properties. A typical average undeveloped plot of land in Abuja metropolis for private use may cost between $50,000 - $300,000 depending on the location of the plot. A commercial plot will cost higher.

[36] See infra chapter 1 for detailed analysis of 'esusu' and 'njangi' micro-credit scheme. Suffice it to say that 'esusu' which is in pari-materia with 'njangi' micro-credit scheme consists of group of individuals who agree to make regular contributions into a pool. Such contributions are thereafter given to either a member or more members on a rotating basis until all the members have benefited from the pool.

[37] Besides the limitations on the amount that can be raised through this medium of credit financing, the moratorium is short thus making this type of credit financing inadequate to finance fairly long term investments. See infra chapter 1 for discussions on the shortfalls of 'esusu' and 'njangi' micro-credit financing.

them then to expand into medium scale and the medium scale entrepreneurs into large scale entrepreneurs. Ultimately, the economy will be better off and the quality of life of the people will improve.[38]

Another reason behind the choice of jurisdictions is that there is an increase in cross-border trade and business relations between Nigeria and Cameroon in recent times, the trend has seen many Nigerian banks that provide credit financing opening up branches in Cameroon.[39] It would be quite a challenge and at the same time an interesting endeavor to study the interplay of the laws governing credits transactions say for a Cameroon company which accesses credit from a Nigerian Bank in Cameroon but has its place of business in Nigeria, the enforcement of such credit transactions will of necessity transverse the conflict of law issues.

[38] See John A. Spanogle, The Financing of Small Businesses A Functional Analysis of Three Legal Models, Working Paper No. 412 (2008), p. 1; available at SSRN: < http://ssrn.com/abstract=1144848 >; last visited on the 16th of April 2011.
[39] Examples of the Nigerian banks that have branches in Cameroon include United Bank for Africa (UBA) Plc, Oceanic Bank Plc, Ecobank Plc as well as Union Bank of Cameroon.

The unique reason for the choice of Cameroon[40] is that the country is an OHADA member state; consequently a study of Cameroonian secured transactions law is a study of the secured financing laws of all OHADA member countries. Africa has not been fully integrated like the European Union despite the initiative and intent of the African leaders few years ago in forming the African Union,[41] nevertheless trade and commerce is growing amongst African states and

[40] The southern part of Anglophone Cameroon was part of Nigeria until 1961 when it merged with francophone Cameroon to form the Federal Republic of Cameroon. The country was renamed in 1972 as United Republic of Cameroon and later in 1984 renamed as Republic of Cameroon. The reason why the English speaking part of Cameroon was still part of Nigeria was that the English speaking part of Cameroon was administered by the British Colonial government along with Nigeria as part of the entity called Nigeria whilst the French part of Cameroon was administered by France. With independence of Nigeria on October 1st 1960, the Anglophone Cameroon held a referendum where the majority of them opted out for a reunification with their Francophone brethren. The result of the unification is that in Cameroon, there are only two out of the ten regions that are Anglophone Cameroon namely Bamenda and Buea whilst the rest (Ngaoundere, Yaounde, Bertoua, Maroua, Doula, Garoua Ebolowa and Bafoussam) are francophone Cameroon.

Cameroon has dual received legal system (French and English), with the English common law applying to the Anglophone Cameroon and French civil law applying to the Francophone Cameroon. Indeed the Supreme Court Civil Procedures that applies to the Anglophone Cameroon was culled from the laws of Nigeria 1948 and it is boldly written on the cover page of the Supreme Court Civil Procedure Rules. The OHADA Uniform Acts which was originally written in French is widely received in the Francophone Cameroon while the lawyers and the courts in the Anglophone Cameroon still prefer to use the English common laws in their domain.

However, in criminal matters all the regions both the Anglophone and francophone Cameroon use the same criminal code. There is a presently a paradigm shift now and lawyers in the English speaking part of Cameroon are beginning to under-study the provisions of OHADA Uniform Acts with a view to beginning to use the Act.

[41]The African Union (AU) is an intergovernmental organization consisting of fifty-three African States. Established in 2001, the AU was formed as a successor to the amalgamated African Economic Community (AEC) and the Organization of African Unity (OAU). Eventually, the AU aims to have a single currency (the Afro) and a single integrated defense force as well as other institutions of state, including a cabinet for the AU Head of States. The purpose of the Union is to help secure Africa's democracy, human rights, and a sustainable economy, especially by bringing an end to intra-African conflict and creating an effective common market. Information on the formation of African Union and its mandates are available at African Union homepage at < http://www.africa-union.org/root/au/index/index.htm > last visited on the 14th of September 2010.

Apart from OHADA Business Law which has 16 African Countries as members operating Uniform Business Laws, there are other regional groups like the COMESA-Common Market for Eastern and Southern Africa with the following member countries: Burundi, Comoros , Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe with its mission to "Endeavor to achieve sustainable economic and social progress in all member States through increased co-operation and integration in all fields of development particularly in trade, customs and monetary affairs, transport, communication and information , technology, industry and energy, gender, agriculture, environment and natural resources." COMESA homepage is available at < http://about.comesa.int/lang-en/overview/vision last visited on the 14th of September 2010.

Also there is the Economic Community of West African States -ECOWAS made up of 15 West African States namely: Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Article 3 (1) of the ECOWAS Treaty provides as follows "The aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standard of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the this underscores the need for a comparative study of laws that may have impact on trade and commerce in Africa.

As already stated, this research will explore ways of using Article 9 to reform the laws of Nigeria and Cameroon. By using Article 9 to reform the two jurisdictions by means of legal transplantation of compatible elements of Article 9 to Nigeria and Cameroon, there are bound to be some uniformity in the reformed laws of the two jurisdictions which would lead to harmonization. Harmonization can be effected in several ways including legal transplantation of a model law to the jurisdictions which is sought to be harmonized.[42] Harmonization of laws - in the area of commercial laws is not a new phenomenon. Not only that it has been on the front burner of many legal discourses, also it has indeed been actualized in many continents of the world.[43]

In Africa there are many regional blocs that have tried to harmonize laws applicable to their member states. As already stated earlier, one such regional harmonization is the Organization for the Harmonization of Business Laws in Africa (OHADA) – the French speaking countries of sub-Saharan Africa. Interestingly Cameroon is a founding member of the group and the Cameroon secured credit transactions law that this research seeks to reform is the OHADA

African continent." ECOWAS homepage is available at < http://www.ecowas.int/ > last visited on the 14th of September 2010.

[42] See Roy Goode, *Reflections on the Harmonization of Commercial Law*, in ROSS CRANSTON & ROY GOODE (eds.), COMMERCIAL AND CONSUMER LAW – NATIONAL AND INTERNATIONAL DIMENSIONS, pp.6-7 (Clarendon, Oxford 1993). Goode identified other forms of harmonization to include the followings: a multilateral convention without a uniform law as such; a multilateral convention embodying a uniform law; a set of bilateral treaties; community legislation; a codification of customs and usage promulgated by an international non-government organisation; international trade terms promulgated by an NGO; model contracts and general contractual conditions; as well as restatements by scholars and other experts.

[43] For example Article 9 itself is one of the laws that have been harmonized in the United States having been adopted by all the fifty states with minimal changes.

Uniform Act Organizing Securities directly in force in all fifteen OHADA member countries. In effect, any reference made to the Cameroon secured credit laws is made to all the other member countries that make up OHADA.[44]

Interestingly, the harmonization of the secured transactions laws in Nigeria and Cameroon has engaged the minds of legal practitioners and industry practitioners in Africa. There have been calls for the extension of the OHADA Uniform Acts to common law countries in West Africa; particularly to Nigeria and Ghana. Besides the academic writings advocating for the harmonization of OHADA Uniform Acts and the common laws of Nigeria and Ghana,[45] there have been meetings and conferences going at different times both in Nigeria and Ghana with legal experts from OHADA member states aimed at working out the possibility of harmonizing the OHADA Uniform Acts with the Nigerian and Ghanaian laws which have common law origins.[46] In such meetings, the importance of such harmonization has been highlighted for

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[44] Again, in Europe the European Union treaties, regulations and directives seek to harmonize all European Union 27 member country laws on very many commercial issues. The European Union experience has been particularly successful due to the economic and political benefits inherent to members therein, especially the benefits of economic growth membership of the European Union offers to other countries whose economy are not as strong as Germany, United Kingdom, France, or Sweden.

[45] See Achille Mbog Pibasso, *'LAWYERS STRIVE TO STANDARDIZE OHADA AND COMMON LAW SYSTEMS'* The African Finance Journal, Les Afriques of 22nd of July 2008 available at <*http://www.lesafriques.com/en/africa/lawyers-strive-to-standardise-ohada-and-common-law-systems.html?Itemid=35?articleid=0157*> last visited on the 18th of April 2010; Salvatore Mancuso, Harmonization of Laws and Convergence between Common Law and Civil Law Legal Families: Lessons From the OHADA Experience available at < http://www.tipmoz.com/library/resources/Oldsite1/Harmonization_of_Laws_inSADC_Mancuso.pdf > last visited on the 16th of April 2011; Herbert A Igbanugo and Fred Adiyia, The Harmonization of Business Law in Africa: Possibility or Fantasy? The African Counsel, vol.1 Issue 2 (June 2009) available at < http://www.igbanugolaw.com/news/the-harmonization-of-business-law-in-africa_fact-or-fantasy.html > last visited on the 16th of April 2011.

[46] One of those meetings was organised in Accra on the 24th of February 2008 as a follow up of the earlier meeting organized in Nigeria in May 2004. The Accra meeting had in attendance the Attorney General of Ghana and other legal experts in the field. In the Accra meeting Akin Akinbote, President OHADA Nigeria gave his key note address titled 'Strategies for Adopting OHADA Laws in Anglophone African Countries,' where he emphasized on the importance and benefits that harmonization of the laws will bring to the countries especially in trans-border trade. According to him, "It is pertinent to ask at this stage what are the advantages of harmonization? To mention a few, it encourages free flow of investments, cross-border trade, certainty in business law, legally secured environment,

trans-border trade commerce within the region. Admittedly, the calls for the harmonization of all the OHADA Uniform Acts with that of the Anglophone African countries may face severe challenges, though not insurmountable, due to the contradictions in those laws and the fear of apparent domination of the civil laws over common laws in Africa. However this research's aim of harmonizing only one of the Uniform Acts - secured transactions law in Nigeria and Cameroon using a supposed neutral[47] and efficient model law seem more of a middle road approach and one likely to be acceptable to both the Nigerian common law authorities and Cameroonian civil law authorities.

Besides the above economic and legal reasons for this research, there is an academic view to this work: the secured transactions legal scholarship[48] has so far largely focused on other regions and countries of the world other than Africa. Not much work has been done in terms of making a

political stability, economic growth and regional economic integration. We must therefore seek to understand or have a clear understanding of what harmonization of business law is all about." The key note address is available at <http://www.ohada.com/fichiers/newsletters/332/opening-address-ohada-conference-accra.pdf > last visited on the 18th of April 2011.

[47] Admittedly, Article 9 may not be said to be completely neutral if used in harmonizing a common (Nigeria) and civil law (Cameroon) country's secured credit laws because Article 9 itself comes from a common law country and thus its provisions are tilted in favor of Nigeria's secured credit laws. However the argument for Article 9's neutrality could be based on the fact neither Nigeria nor Cameroon presently copied their secured credit laws from the United States; consequently it may be acceptable to Cameroon to have Article 9 as a compromise. Moreover, whatever apparent fear of domination of common law over civil law that Cameroon would have may fizzle into insignificance if Cameroon considers the potential economic and legal benefits that may accrue to her by reforming its laws with an efficient secured transactions law like Article 9.

[48] Scholars like Clark Daryl E, Revised Article 9 and the PPSA - A Comparison of the American and Canadian Secured Property Legal Regime, The Secured Lender January 1 2003; Roy Goode, *The Changing Nature of Security Rights* in Joseph J. Norton and Mads Andenas (eds.), EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS (Kluwer Law International Ltd., 1998); Phillip Wood, Comparative Law of Security and Guarantee, (Sweet & Maxwell, 1995); Heywood Flesig, Mehnaz Safavian, Nuria de la Pena, Reforming Collateral Laws to Expand Access to Finance, (The World Bank, 2006); Frederique Dahan, John Simpson, Secured Transactions Reform and Access to Credit, (European Bank for Reconstruction and Development, 2008); C.C. Cuming, Symposium: Is The UCC Dead, or Alive and Well? International Perspective: Article 9 North of 49: The Canadian PPS Acts and the Quebec Civil Code, 29 Loyola of Los Angeles Law Review (29 Loy L. A. L. Rev) 97; Iwan Davies, The Reform of Personal Property Security Law: Can Article 9 of the US UCC be a Precedent? International and Comparative Law Quarterly, vol. 37, 1988, July. p. 465; Charles W. Mooney JR., Exporting UCC Article 9 to an International Convention: The Local Law Conundrum 27 CAN. BUS. L. J. 278 (1996); Boodman and Macdonald, How Far is Article 9of the UCC Exportable? A Return to Sources? 27 CAN. BUS. L.J. 249; and Tibor Tajti, Comparative Secured Transactions Law (Akademiai Kiado, 2002).

comparative analysis of secured transactions laws of African countries with any of the developed western secured transactions laws.[49] This research will therefore fill in the vacuum created by dearth of research works on a comparative analysis of secured transaction laws between a developing African economy and a fully developed western economy, thus seen in that perspective this research is an extension of the previous works done by scholars in this field.

2. Roadmap to the Thesis

The research is structured into five chapters; chapter one discusses the evolution of the U.S. secured transactions laws. Most authors that have discussed U.S. secured transactions law started their analysis directly with analysis of the sections of the Article 9. Probably the general assumptions of some of these writers were that the reader already knows all the nuances of the saga of the pre-UCC security devices or that the knowledge of pre-UCC security devices is not needed or necessary any longer.[50] Hence, it is fair to claim that the predominant part of the literature skips the laws that preceded Article 9.[51] The problem is that often without a fair knowledge of the history of U.S. secured financing laws one may not grasp the meaning of the provisions of contemporary Article 9, let alone the policy choices underlying them. For example,

[49]Except for the work of Bahaa Ali El-Dean, Privatization and the Creation of a Market-Based Legal System: The Case of Egypt, supra footnote 2, which may have come close to the comparative analysis, however the work focus mainly on using the EBRD model law on secured transactions in general and Hungarian Secured Transactions law in particular to reform the Egyptian secured transactions laws.

[50] See, for example, Ray D. Henson, Secured Transactions under the Uniform Commercial Code, (West Publishing Co, 2nd ed., 1979); Douglass Boshkoff and Gerald Bepko, Secured Transactions, (Herbert Legal Series, 2nd ed., 1988); William H. Lawrence, William H. Henning, R. Wilson Freyermuth, Understanding Secured Transactions, (LexisNexis, 4th ed., 2007); John F. Dolan, Secured Transactions and Payment Systems (Little, Brown and Company, 1995); Douglas J. Whaley, Secured Transactions (Barbri, 2006); James Brook, Secured Transactions, (Aspen Publishers, 4th ed., 2008); or Richard H. Nowka, Mastering Secured Transactions, (Carolina Academic press, 2009).

[51] Except for the brilliant works of Grant Gilmore, Security Interest in Personal Property (The Lawbook Exchange Ltd, Union New Jersey Reprint 1999) and Douglas J. Whaley, Problems and Materials on Secured Transactions, (Aspen Publishers, 6th ed., 2003) that trace the evolution of secured transactions laws in the United States, discussing all the pre-UCC security devices, most other authors skip the historic part.

one may not appreciate the reason behind provisions of section 9-109 UCC which provides for the unitary and comprehensive nature of security interest if one does not know the chaotic order that existed during the pre-UCC years[52] which Article 9 sought to correct.

Consequently chapter one introduces briefly the types of pre-UCC security devices: possessory pledge, factors lien, field warehousing, trust receipts, chattel mortgage, conditional sales and its derivatives that were in existence before the adoption of the Article 9 by various states.[53] This chapter will also compare the pre-UCC independent security devices with their counterparts in Nigeria and Cameroon; the specialized industries in the United States that live on the provisions of Article 9 and their equivalents in Nigeria and Cameroon (where they exist). The chapter also examines the indigenous micro-credit financing schemes in Nigeria and Cameroon respectively which had similar features not only in both countries but also in some other parts of Africa – 'esusu' and 'njangi' to show that the indigenous forms of credit financing can play complementary roles to the proposed transplantation of the compatible elements of Article 9. The quest to access credit at good terms - i.e., at no interest rate and without collateral - forced the SMEs whose access to credit have been cut off by the formal banking institutions to devise a means of helping one another and the result was the birth of esusu and njangi micro credit schemes in Nigeria and Cameroon respectively. 'Esusu' or 'njangi' is a type of micro-credit scheme run and operated by a close group of people who are mostly micro and small scale

[52]The struggle by the industry practitioners to invent new security devices that will circumvent the registration requirement which was costly and burdensome, by giving new name to the new security and the readiness and alertness of the court to strike down such security devices for lack of registration. This resulted in uncertainty in the pre-UCC security devices. Consequently Article 9 unified all these devices and provided that irrespective of the names given by the parties, so long as the transaction tended to create a security interest in a property or fixtures which secures a loan, Article 9 will govern and which means it requires a filing or other notice giving mechanisms under Article 9. See infra generally chapter 1 on the evolution of secured transactions in the United States.

[53] State is as defined under Article 9. Section 9 – 102 (76) UCC defined State as follows: "States here mean a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.".

entrepreneurs, bound by informal rules and mutual trust. However, the fact that both 'esusu' and 'njangi' micro credit financing are still in high usage until date show the disconnect between the credit financing system and the ordinary people that are suppose to benefit from the banks' services. In Cameroon, for instance, statistics show that 'njangi' micro-credit scheme is more patronized than the formal bank in credit financing services.[54] The chapter therefore analyzes the reasons of the disconnect and examines the possibility of esusu and njangi playing a complementary role to the yet-to-be transplanted elements of Article 9. Finally chapter one introduces the UCC in general, the laws that impact on secured financing in Nigeria and the Cameroon's Uniform Act on Securities and what Nigeria and Cameroon can learn from the evolution of secured transactions in the United States.

Chapters two, three and four are devoted to the comparative analysis of the Article 9 salient features with the Nigeria and Cameroon secured transactions laws based on the 'building blocks' of Article 9 as postulated by Tajti.[55] The reasons for relying on Tajti's building blocks as the basis for the comparison are manifold, though the most important justification lies with the fact that the building blocks are an appropriate method to break the complex law and simplify the understanding of Article 9; and at the same time cover all the seven parts of Article 9.[56] These are in effect those features that made Article 9 efficient and therefore a desirable law to be transplanted in Nigeria and Cameroon. While chapter two will specifically analyze four of the

[54] See infra pp. 111 – 112.

[55] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48. The building blocks will help non-Americans to understand the Article 9 provisions, but the issue is that even Americans and practitioners in this field need a simpler method of breaking down the contents of Article 9 (especially the 1999 revised version) to have a firm grasp of the provisions of the law and this is where Tajti's building blocks of Article 9 becomes needful.

[56]The Article 9 building blocks are the unitary and comprehensive concept of security interest, the filing system; the complex system of priorities; the floating lien; the cumulative enforcement alternatives available to secured creditors and Article 9 close linkages to bankruptcy and consumer protection. See id., pp. 141 and 400.

building blocks i.e., the comprehensive and unitary concept of security interest, filing, the complex priority system including the floating lien concept and its corollary the 'purchase-money security interest', chapter three will be devoted to the enforcement mechanisms of Article 9. Chapter four will then examine the Article 9 close linkages to bankruptcy and consumer protection laws.

Specifically, in cases of comparisons of the four building blocks of Article 9 under chapter two, the chapter will juxtapose the Nigerian and Cameroon equivalents of these building blocks where they exist. For example during the analysis of the United States floating lien concept, the Nigerian floating and fixed charge and OHADA Uniform Act's pledge without dispossession of business will be discussed as the functional equivalents in Nigeria and Cameroon respectively. However the juxtaposition of the Article 9 building blocks with the Nigerian and Cameroon functional equivalents does not suggest that the Nigerian and Cameroon secured transaction laws in those areas do not need reform but rather that they are in urgent need of it.

Because of the importance of efficient enforcement of secured transactions, special focus and an entire chapter – chapter three – is devoted to this topic in the three jurisdictions. Enforceability of secured transactions is by far one of the determining factors for the grant of credit from the lenders point of view. It is one of the key factors that determine whether the lender will enter into the transaction at all; the type of collateral acceptable to the lender and the interest rate chargeable by the lender. Where it is difficult to enforce security interests, lenders would be reluctant to accept non-possessory personal property as collateral from a borrower. In the U.S., credit financing thrives well due to efficient judicial and private enforcement procedures of secured transactions contained both in Article 9 and the civil procedure rules of the states. Most lenders will willingly give credit in the U.S. because there are systemic assurances that where there is a default there are efficient institutional mechanisms for the enforcement of the secured credit transactions. In Nigeria and Cameroon, though there are provisions in the civil procedure rules that could facilitate enforcement of secured credit transactions, there are however weak institutional mechanisms for the implementation of the laws. This has resulted to a less than satisfactory enforcement of secured transactions in both jurisdictions. Chapter three not only x-rays the enforcement mechanisms available in the three jurisdictions, it also identifies the weak points of the Nigerian and Cameroon systems and consequently proffers solutions to them.

Chapter four is devoted to Article 9's close linkages to bankruptcy and consumer protection laws. Default of the obligations of repayment by the debtor is an early sign of the onset of bankruptcy, and the strength of a security interest is tested best in the context of a bankruptcy. Therefore, the chapter examines the interface between secured transactions and bankruptcy laws. In the United States, since one of the reasons why lenders take security interest in the collateral of the debtor is to secure their interest in event of bankruptcy, chapter four will examine the reverence given by bankruptcy law to duly perfected security interests. The chapter will also look at the policy choices behind U.S. bankruptcy law and try to see the link between these policy choices and the unprecedented number of bankruptcy filings – both consumer and business filings. In contradistinction to the large number of bankruptcy filings in the U.S., the chapter will also examine the reasons why there is dearth of bankruptcy filings in both Nigeria and Cameroon – indeed why until date the Nigerian Bankruptcy Act has remained moribund with no known case or why the Act has never been invoked by any person.

Chapter four will also examine the close linkage of Article 9 and consumer credit protection laws. A secured transactions law can only function well where there are laws protecting impecunious borrowers from the hands of lenders who have the economic powers to dictate all the terms of the security agreement or from the professional collectors and repossession agencies hired by them. The consumer protection law prevents the lenders not just from emasculating the debtors by inserting unscrupulous clauses into the security agreement but also from the overreaches of enforcement agencies. The existence of consumer protection laws without effective institutions to enforce the laws will hardly be enough. Effective institutions here include the Federal Trade Commission (FTC) in the U.S., the pro-active Consumer Protection Council (CPC) in Nigeria and the law courts. Cameroon has no laws on consumer protection nor any agency statutorily charged with consumer protection. The impact of this is that consumers are left at the mercy of lenders, accordingly this chapter will make proposal for the creation of a consumer protection agency and the enactment of the laws in this regard. Finally, consumer protection laws – especially consumer credit protection laws – in the U.S. and Nigeria and their effectiveness in putting in check the excesses of the lenders will be analyzed in this chapter.

Having examined and compared the salient features of Article 9 with that of the Nigeria and Cameroon secured transactions laws, chapter five tries to see whether, how and what can be transplanted from Article 9 to both Nigeria and Cameroon secured transactions. The fact is that in Nigeria there are evidences that legal transplantation has been occurring in innocuous forms, though without having been detected or regulated by law.[57] Chapter five analyzes extensively the concept of legal transplantation and the debates articulated by authors about the possibility of legal transplantation, and the reasons proffered by authors for legal transplantation and the benefits Nigeria and Cameroon stand to gain by transplanting the compatible elements of Article 9. It is a fact that Article 9 is a by-product of almost two century's evolution and experimentation of secured transactions in America; including the contributions of specialized industries that lived from secured transactions. Consequently, the central question of this thesis would be: what are the compatible and transplantable elements of Article 9? Further, should transplantation be a gradual or a "one off thing"? In other words, whether to reckon with almost two centuries of experiences and evolutions of Article 9 in proposing the reforms and transplantation to Nigeria and Cameroon?

To answer this question, chapter five will briefly look also at the experiences of those Central and Eastern European countries, as well as that of the Canadian provinces – though in particular that of Ontario – which have also gained valuable experiences in reforming their laws using Article 9 as the model. However, the research does not lose sight of the reality that Article 9 can

[57] One of the reasons is the fierce competition in the Nigerian banking industry. For banks to attract customers, they are becoming innovative with designing "banking packages" which they dangle before customers to attract them. Some of these packages are "copied" from the western countries. A case in point is the coping legal transplantation by some banks in Nigeria of the field warehousing security device – well-known form the pre-UCC period – and the adaptation of the device to suit their purposes. In case of field warehousing, the banks in Nigeria call it - the Tripartite Warehouse Facility. Banks also design other banking packages after other security devices in the United States like - factoring, trust receipts arrangements. The banks back up these packages with elaborate contracts which contain the rights and duties of both parties similar with the rights and duties of creditors and debtors under the devices in the United States.

However, the problem is that there are no laws regulating them and the scale on which they exist are infinitesimal and thus difficult to detect. Upon default, the court will interpret these contractual clauses in so far as they are not manifestly illegal. This is similar to what is obtainable in Germany where apart from the statutory security devices – suretyship, mortgage of real property and pledges of movable properties, new types of security devices have been created over time "by exploiting the principle of freedom of contract and the possibilities provided by contractual clauses." See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 266.

only transplanted to Nigeria and Cameroon with significant adaptations due to the different legal, economic, social, cultural environments. Consequently chapter five identifies the necessary changes that need to be made in Nigeria and Cameroon in order to ensure that properly adapted elements from Article 9 could be successfully transplanted. Finally from all that has been examined above, the research draws its conclusions.

Despite the extensive discussions and analysis in this research, this research believes that there are no easy answers to many of the questions that will be raised in this research. However, what is of primary concern to this research is the reform and harmonization of the Nigeria and Cameroon secured transactions laws using compatible elements of Article 9. The success of this research would be in practical terms, the successful legal transplantation of the properly adapted features of Article 9 to Nigeria and Cameroon and the resultant harmonization of the secured credit transaction laws in Nigeria and Cameroon. This would presumably translate into the thriving of an efficient secured financing in Nigeria and Cameroon as it is in the United States with its attendant growth in the economy of both countries in the nearest future.

3. Challenges of the Research

The first challenge in a research of this nature i.e., comparison of three jurisdictions that belong to two legal families – common and civil law – are the problems caused by the differences in terminology. Whilst some of the terms under the U.S. and Nigerian common law system mean substantially the same, it is not so for many of the terms under the OHADA Uniform Act that is based on civilian law. Whereas this research does not intend to create a separate chapter or sub-chapter for glossary of all the terms that will be used herein with their meanings under the different legal families; the research will endeavor to inform the reader of the meaning of a term used and under which context it will be used, i.e., either Anglo-American common law context or the OHADA civil law context.

Apart from this, a research in the secured transactions laws of Nigeria and Cameroon comes with additional challenges more than a similar research in U.S. or other western countries. The problems range from complete lack of statistical data to the dearth of legal resources on the subject. OHADA Uniform Act on Securities came into force on 1st of January 1998 in all OHADA member countries and irrespective of that, not much has been written on the Act until date probably due to 'recent introduction' of the Act. Although this is not a sufficient reason because in contradistinction to Article 9 that was revised in 1999, the volume of legal resources on the revised Article 9 is overwhelming. Furthermore, it is also a debilitating problem that as at today there is no standard English literature on the OHADA Uniform Act but a few articles of a quite introductory and general nature. Presumably the most comprehensive work remains the work of Claire M. Dickerson published in 2005.[58] Not unexpectedly, the dearth of resources also extends to case laws, which is attributable to the fact that Cameroon and other OHADA member countries being civil law countries have limited use and application of judicial precedents. On the interpretation and analysis of OHADA Law, the research relies heavily on the only not too impressive English translated version of the OHADA Uniform Act.[59] Consequently, the researcher relies more of his own reflections on the law analysis of the OHADA Uniform Acts.

[58] See Claire Dickerson, Harmonizing Business Law in Africa: OHADA Calls the Tune, Columbia Journal of Transnational Law, vol. 44, 17 (2005) available at SSRN: < http://ssrn.com/abstract=1636533 >; last visited on the 11th of April 2011. The work of Dickerson was on the Harmonization of Business Law in Africa and the OHADA initiative.

[59]The main OHADA Uniform Acts in all the commercial areas covered are all written in French. The only available translation is highly suspicious and the translation removed the 'life' out of the law. The coordination in the law was lacking and in some cases the researcher relied on his sixth senses to make out meaning and intendment of the law

Unlike the OHADA Uniform Acts, Nigerian secured transactions laws are written in English, so there is no translation problem in Nigeria. However there are few authoritative legal sources on the subject of secured transactions law and these materials deal only with business financing (i.e., resort to this branch of law by companies and other business forms). To this end, this research will rely on the work of Jelili Omotala[60] which is considered as the leading authority in this field in Nigeria and the works of Fidelis Oditah[61]and Imran Smith.[62] However, many of the materials that would be relied on in this research on Nigerian secured transactions laws are English authors[63] given the fact the laws were copied from England. Other sources that would be relied by the research include the cases and few articles written on the subject matter.

The bulk of the resources in this research will come from the United States, from the reference works of renowned authors[64] to articles in law journals that are too many to be listed here. These

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from the poorly translated version. For example Articles 3 and 4 are irreconcilable while Articles 8, 16, 56, 57, 60 do not make so much sense except one reads in between the lines. For example, Article 3 of the OHADA Uniform Law Organizing Securities provides as follows: "A surety-bond shall be a contract in which the guarantor undertakes, and the creditor accepts, to perform the debtor's obligation if the latter fails to perform it himself. Such undertaking may be contracted without the creditor's authority and even without his knowledge."

While Article 4 of the Act provides "Whatever the nature of the obligation guaranteed, the surety-bond shall not be presumed. Under penalty of being declared void, it shall be expressly agreed upon between the guarantor and the creditor. A surety-bond shall be recorded in a deed bearing the signature of the two parties and an indication in the guarantor's handwriting of the maximum amount guaranteed in words and in figures. Where the two differ, the surety-bond shall be good for the amount in words. A guarantor who does not or is unable to write shall be assisted by two witnesses who shall vouch for his identity and presence in the bond instrument and, furthermore, attest to the fact that the nature and effects of the deed have been explained to him. The presence of attesting witnesses shall dispense the guarantor from fulfilling the formalities referred to in the preceding paragraph." The translated text of OHADA Uniform Act Organising Securities is available at < http://www.jurisint.org/ohada/text/text.04.en.html > last visited on the 20th of April 2011.

[60] See Jelili Omotola, the Law of Secured Credit, (Evans Brothers Nigerian Publishers Ltd, 2006) who was a leading authority in Property law in Nigeria, a seasoned administrator and formerly the Vice Chancellor of University of Lagos Nigeria.

[61] See Fidelis Oditah, Legal Aspects of Receivables Financing (Sweet & Maxwell, London 1991).

[62] See Imran Smith , Nigerian Law of Secured Credit, (Ecowatch Publications Nig. Ltd., 2001).

[63]Prominent among the English sources would be Roy Goode, Commercial Law, supra foot note 13; Roy Goode, Legal Problems of Credit and Security, (Sweet & Maxwell, 3rd ed., 2003); Robert Bradgate, Commercial Law, (Butterworths, 3rd ed., 2000); L.S. Sealy & R.J.A. Hooley Text and Material in Commercial Law, supra footnote 13.

[64] Some of the reference works written by American authors on Article 9 include Grant Gilmore, Security Interest in Personal Property (The Lawbook Exchange Ltd, Union New Jersey Reprint 1999) ; Ray D. Henson, Secured

materials will not only guide and influence my opinions but they would be indispensable parts of this research. The official comment to the 1999 revised version of Article 9 is more than mere comments; it will help the research tremendously to understand the provisions of Article 9. The availability of the case laws on almost every section of Article 9 will be added to the wealth of Article 9 resources which would be relied upon in the course of the research.

Transactions under the Uniform Commercial Code, (West Publishing Co, 2nd ed., 1979); Douglass Boshkoff and Gerald Bepko, Secured Transactions, (Herbert Legal Series, 2nd ed., 1988); William H. Lawrence, William H. Henning, R. Wilson Freyermuth, Understanding Secured Transactions, (LexisNexis, 4th ed., 2007); John F. Dolan, Secured Transactions and Payment Systems (Little, Brown and Company, 1995); Douglas J. Whaley, Secured Transactions (Barbri, 2006); James Brook, Secured Transactions, (Aspen Publishers, 4th ed., 2008); Richard H. Nowka, Mastering Secured Transactions, (Carolina Academic press, 2009).

Chapter 1

The Evolution of the Secured Transactions Law of the United States of America - Lessons for Cameroon and Nigeria

Sub-Chapter A. The Pre-UCC Independent Security Devices and Equivalents under the Nigerian and Cameroonian Secured Transactions Laws

I.1. Introduction

This chapter will examine the evolution of U.S. secured transactions laws[65] in comparison to their equivalents under the Nigerian and Cameroonian secured transactions laws as a preface to discussing in the subsequent chapters the building blocks and main features of UCC Article 9. It is instructive to note from the beginning that in Nigeria and Cameroon there are no separate comprehensive branches of laws that can be called secured transactions laws as in the United States. For example, Nigeria has a compartmentalized system of laws similarly to the United Kingdom; the various branches of law that make up the "secured transactions" law in the United States are scattered in various laws;[66] hence Nigeria and Cameroon do not know Article 9's

[65] It is apposite to give the meaning of 'secured transactions' considering that the term is strictly speaking used only in UCC Article 9. Article 9's title is Uniform Commercial Code – Secured Transactions. Secured transaction is not defined in the text of the Article 9 or Article 1 which is the general provisions. However a combined reading of section 9 – 109 of Article 9 and section 1 – 201(b) (35) unravels the exact meaning of secured transactions under Article 9. Secured transactions mean any transaction which is intended to create a security interest on collateral in personal properties and fixtures. The limiting the scope of secured transactions to personal properties and fixtures is borne out of two reasons. First, the definition of security interest under section 1-201 (b) (35) says "security interests an interest in personal property and fixtures or fixtures which secures payment for an obligation," consequently if the security interests are limited to personal properties and fixtures, it then presupposes that the secured transactions which create the security interest are likewise limited.

Second, in recognition to the first reason, Article 9 which is called Uniform Commercial Code - Secured Transactions is itself limited to personal properties and fixtures. However, from the definition, secured transactions are wide enough to accommodate all the transactions that create security interest in personal properties and fixtures regardless of its forms. See Tibor Tajti, Viehweg's Topics, Article 9 UCC, the 'Kauterlarische Sicherheiten' and the Hungarian Secured Transactions Law Reform, the Vindobona Journal of International Commercial Law and Arbitration, vol. 6, Iss.1 (2002), pp. 93 -131.

[66] In Nigeria, there is a separate law for fixed and floating charges created by the company. This law is contained in the Company and Allied Matters Act C20 Laws of Federation of Nigeria 2004 just as in the UK company's fixed and floating charges are contained in part 25 sections 860 – 877 of the Company Act of 2006. Hire purchase agreements are contained in different legislations called the Hire Purchase Act Cap H4 Laws of Federation of Nigeria 2004. Similarly in the UK, hire purchase agreement is regulated by the Hire Purchase Act of 1965.The

unitary concept of security interests. The chapter will also look at the substantive laws that impact on secured credit financing in Nigeria and Cameroon and will also draw a lesson for Nigeria and Cameroon from the history of the United States secured transactions.

1.2. The United States Pre- UCC Independent Security Devices

The American secured transactions laws have had a long history fraught with skepticism, suspicion, uncertainty and uneasiness on the part of the society, the industry practitioners and the courts. For almost a century or more before the enactment of Article 9, the personal property security devices[67] were a constant 'struggle' and 'battle' between the practitioners in the industry and what Gilmore calls *"the forces of the Establishment, led by the judiciary, black robes flying and pens at the ready, have campaigned against the guerrilla bands of the personal property security people."*[68]The reason for the constant struggle and battle was because every new extension of personal property secured financing by the industry practitioners was viewed with general skepticism and suspicion by the judiciary. The basis for the suspicion and skepticism stemmed from the perception by the judiciary that the new extension of personal property secured financing was a device that sought to validate previously invalid transactions by means of giving the new device a different name to circumvent the requirement of filing imposed by the law for non possessory security. Consequently these new devices were resisted and frustrated by courts for non-compliance with the requirement of registration,[69] although in the case of trust

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Insolvency Act of 1986 contains provisions pertaining to security interest. See infra, pp. 83 – 89 and 128 – 132 for the detailed discussions on the fragmented nature of laws that impact on secured transactions in Nigeria.

[67] See Grant Gilmore, *Security Law, Formalism and Article 9*, NEB. L. R. Vol. 47, No. 4 (1968), p. 660. Gilmore defines devices to connote ingenuity, cleverness, trickery; a legal device is a gimmick for getting around some prohibition imposed by the statutory law.

[68] Id., p. 659.

[69] It should be noted however that as opposed to modern day simple filing, initially a more cumbersome document registration was required. For example registration was initially required for old chattel mortgage Acts. Signatures on the copies of the documents to be registered were to be acknowledged or verified. When the mortgage was filed

receipt the device was successful and recognized by the court without being subjected to the requirement of filing.

Irrespective of the fluidity of the pre-UCC secured transactions law, it is possible to find some commonalities allowing for classification. For example, Tajti identified three main phases of the pre-code history of the United States secured transactions, namely the pre-1929 period; post 1929 to the end of the World War II and post World War II to the adoption of Article 9.[70] The pre-1929 period saw the emergence of security devices that sought to validate invalid transactions by means of giving new names to the hitherto prohibited devices.[71] This period was characterized by a running battle between the practitioners inventing new secured credit financing devices which aimed at circumventing the requirement of registration; in order to validate the previous devices that were invalid for reason of lack of registration[72]and the courts subjecting the new devices emanating from the practitioners to registration. The result was that the personal property security device became very formalistic with the requirements that were complex and costly to keep except for professionals and specialist in the industry.[73] Except for

for record, the mortgage was accompanied by affidavit of consideration or good faith. See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 52.

[70] See Tibor Tajti, Comparative Secured Transactions Law, supra note 48, p. 122.

[71] Industry practitioners devised chattel mortgage after mortgage of real property and pledge of chattels, but chattel mortgage became registrable and costly. Their reaction was to devise a 'conditional sale' which needed no registration as title had not passed to the buyer, the court accepted this but it became regulated by law and also became subject to registration and thus expensive. The industry practitioners then devised leasing, which was not registrable though it could be voided by court if the court found out it was a disguised conditional sale which was not registered. However leasing was recognized by the court and was incorporated into Article 9 UCC.

[72] Tajti called these transactions 'amateurish transactions' in the sense that the transactions were at first amateurish because little was known about the new devices but which each new case, new generation of customers, learning about the experiences of the amateurish transactions became in fact sophisticated so to survive the scrutiny of courts and then to get recognized by the legislature. See Tibor Tajti, Comparative Secured Transactions Law, footnote 48, p. 122.

[73] Even though the famous Benedict v. Ratner voided the non-notification financing against the assignor's trustee in bankruptcy for being fraudulent in law according to then applicable New York law, the consequence of the decision was the emergence of a new technique for complying with the Benedict rule and eventually the professionalization of the industry. Obviously these new rituals became complex and it made non–notification financing formal with the result that mostly only specialists and professionals like factoring houses, could effectively enforce the new

independent security devices which were based on pledge concepts like the field warehousing, filing was required in almost all the independent security devices during this period. With the exception of the initial years following the "invention" of a novel personal property security device, imposition of filing was the rule.[74]

The effect of the formalism during this period had far reaching implications on the use of personal property security devices in the industry especially in long term financing. The *first* effect was that only the professionals or industry specialists who had acquired the experience and expertise could enforce effectively the tricky rituals of field warehousing or comply with the Benedict's ritual or "*cope with the almost incomprehensible metaphysics of trust receipt financing.*"[75] Other people stayed away for fear of making mistakes and this led to quasi monopoly by few large financing enterprises. Only six large companies run the field warehouses in 1960, for instance.[76]

Second, the formalism resulted in extreme consequences especially in the areas of inventory and receivables financing. The inventory and receivable financing was no longer attractive to the institutions and individuals who provided long term financing to business enterprises because of the extra caution in complying to the last details with the requirement of formalism brought about by the Benedict ritual. Any slight deviation from the formalities imposed by the Benedict

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Benedict rituals. See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 260; See Tibor Tajti, Comparative Secured Transactions, supra footnote 48, p. 139.

[74] See Tibor Tajti, Comparative Secured Transactions, supra footnote 48, p. 122.

[75] See Grant Gilmore, *Security Law, Formalism and Article 9* supra note 67, p. 665.

[76]According to Gilmore "In 1960, six large companies, five national and one regional, operated 95 percent of the six thousand field warehouses estimated to be in use; the largest of the six – Lawrence Warehouse Company – was thought to control about half of the market, both in the number of warehouses and in the volume of inventory for which warehouse receipts were issued."See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 147.

rule could lead to avoidance of the security.[77] Consequently, financing based on inventory and receivables was left to professionals who had the expertise to deal with the rituals associated with financing on the strength of inventory and receivable financing while institutions and individuals who provided long term financing concentrated on financing based on fixed assets and equipments of the business enterprise. This is because the individuals and institutions that would have provided the long term capital were ill equipped to cope with the formalities required to make security arrangements in inventory and receivables proof against attack.[78]

The period between post 1929 and the end of World War II was characterized with the need to finance the corporations engaged in war productions, which was one of the reasons behind the relaxation of the earlier rigid rules. Having regard to these considerations, the courts were less inclined to void secured transactions and this in itself sacrificed the certainty and rigidity that had existed before this period. Besides the supportive stance of courts, this period was characterized also by a more encouraging attitude of the federal government – primarily also because of war financing. The support of the government, the less rigidity of the formalities and the perceived profits that accrued to lenders during the war resulted in the re-emergence of the inventory and receivable financing by the small banks and country finance companies. The re-appearance of these small players had its own consequences; it led to the re-appearance of litigation of amateurish transactions unprecedented since the 1920s and 1930s.[79] It was in this set-up that work commenced on Article 9 with the catch-word to simplify the personal property security

[77] See the case of Lee v. State Bank & Trust Co., 38 F.2d 45 (2d Cir. 1930).
[78] See Grant Gilmore, Security Law, Formalism and Article 9, supra note 67, pp. 666 – 667.
[79] According to Gilmore "but the wartime revelation of the possibilities of inventory and receivables as security seems to have stimulated a good deal of post-war financing of this type in situations where neither the lenders nor the borrowers (who were mostly small, and presumably undercapitalized, businesses) nor the lawyers who advised them had more than the vaguest understanding of either the legal formalities or the practical realities". See id., p. 669.

law. The aim in simplifying was not to make the personal property security law the exclusive preserve of the big industries who had the expertise to operate it but rather to make secured transactions a level-playing field for other types of businesses as well – "*small town practitioners, country bankers, even widows and orphans.*"[80]

In a bid to simplify the law, Article 9 draftsmen '*worked, of necessity out of the past'*, i.e., the draftsmen relied mostly on the existing independent security devices, cases and statutes at this period and incorporated all into the new law – Article 9. This fact led Gilmore to believe that Article 9 was a reading of the old cases and the existing statutes in order to reduce the past to a sort of order – hence the description of Article 9 as an "*anthological collection of the most celebrated security law controversies of the preceding forty years*."[81] Gilmore's description of Article 9 was also collaborated by White and Summers who opined that the drafters of Article 9 largely compiled the existing large bodies of separate pre-code personal property security laws.[82] Granted that the drafters of Article 9 relied greatly on the existing pre-UCC personal property security laws, however Gilmore, White and Summer's postulations may not be totally correct, this is because, beyond articulating the existing cases and statutes to a sort of order, the 1952 Article 9 made significant improvement to secured transactions law. An example is the introduction of purchase money security interest which is seen as a means of legal engineering to untie the potential assets of the debtor locked by the principles of after acquired properties of the floating lien concept. Again, their above hypothesis did not take into consideration the expertise

[80]See id., p. 668.
[81] See id., p. 671.
[82] "Although Article 9 was the most innovative of the original Code articles, it did not spring full grown from the forehead of Grant Gilmore, Allison Dunham, or even Karl Llewellyn. The drafters drew heavily on a large body of separate pre-code personal property security law. In pre-code days, the lawyer had to work with a variety of security devices, each governed by its own law. These included the pledge, the chattel mortgage, the conditional sale, the trust receipt, and the factor's lien." See James J. White, Robert S. Summers, Uniform Commercial Code (West, 6th ed., 2010), p. 1148.

and commitment put in by experts[83] including Gilmore's humble self in preparing the Article 9 which spanned over a period of about ten years. More so, with the 1999 revisions of Article 9 which has brought so much innovations and improvements[84] to the law of secured transactions, his view that Article 9 merely read the old cases and the existing statutes in order to reduce the past to a sort of order may have been overtaken by recent events.

Having discussed briefly the history of pre-UCC devices, this work will examine in specificities some of the pre-UCC independent security devices that were in existence. Prior to the adoption of the Article 9 of the UCC by all the States, the United States had known many 'independent security devices,' namely: pledge, chattel mortgage, conditional sale, consignments, floor-plan financing, trust receipt, factor's lien, and field warehousing. These devices were fully developed and most of them had statutes backing them before the adoption of the code. For example, the Chattel Mortgage Act was enacted around 1820 by the legislatures of 'eastern seaboard' states and then to the west coast;[85] the Uniform Warehouse Receipt Act of 1906;[86] Factors' Lien Act was contained in the New York Personal Property Law passed in 1911 which was the first state to pass a Factors' Lien Act and a Uniform Trust Receipt Act was drafted in 1924 and adopted by most states in 1933 after nearly two decades of the existence of the trust receipt device. It is important to briefly examine some of these independent securities devices because knowledge of these security devices will help in the understanding of the key features of Article 9. The discussion of the United States independent security devices will enable this work to do a

[83] See infra, pp. 123 – 124 for the list of names and short biographies of the experts that prepared Article 9 of the UCC.
[84] For the improvements and changes brought by revised Article 9, see infra footnote 402.
[85]See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 26; Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 129.
[86] See Encyclopedia of Credit, Uniform Commercial Code, Michael C. Denis (ed.), available at < http://www.encyclopediaofcredit.com/Uniform-Commercial-Code >; last visited on the 13th of April, 2011.

comparison of their equivalents (if any) in Nigeria and Cameroon, which is crucial given the compartmentalized nature of the laws in Nigeria or the French law inspired Uniform Act on Securities in Cameroon. It will also give allowance to explore whether there are comparable specialized industries in Nigeria and Cameroon that operate the independent security devices equivalents. Accordingly, this will give an insight to what can be transplanted to Nigeria and Cameroon from Article 9.

1.2.1. Pledge[87] in the United States Pre- UCC Era

The history of pledge is as ancient as mankind[88] and universal in all human societies – pledge existed in all jurisdictions. Of all the pre-UCC security devices, pledge might possibly have been the only point of convergence of all the security devices that existed in the three jurisdictions – U.S., Nigeria and Cameroon secured transactions laws. It is the earliest form of security device that is still much relevant to date especially in cases where giving possession of the collateral to the secured party is commercially feasible and will not grind the debtor's enterprise to a halt like certificated securities. It is more widely used in practice in societies with unreformed secured credit systems and underdeveloped economies where creditors are still skeptical of its non-

[87] The meaning and use of the term 'pledge' differs from jurisdiction to jurisdiction, hence a brief comment is necessary in a comparative work like this. Whilst 'pledge' is used in the United States to mean only possessory security, elsewhere it often has a much wider meaning. In Cameroon for instance, pledge can be used as both possessory security and "pledging without dispossession" i.e., non-possessory security. For example, whilst Article 44 of the OHADA Uniform Act Organizing Securities provides for possessory pledge, Article 63 provides for "pledging without dispossession" (non possessory security) of the followings: partnership rights and transferable securities; a business; professional equipment; motor vehicles and stocks of raw materials and merchandise. However, for the purpose of this chapter, pledge shall be used in the American context, i.e., exclusively denoting possessory security unless otherwise stated.

[88] According to Gilmore, "The pledge idea is as old as history." See Grant Gilmore, Security Interest in Personal Property, supra footnote 51, p. 86. See also Wigmore, the Pledge-Idea, 10 Harv. L. Rev. 321, 389 (1897); see also Ulrich Drobnig, Security Rights in Movables, (January 15, 2010), p. 2, available at SSRN < http://ssrn.com/abstract=1537137 >; last visited on the 18th of March 2011

possessory twin-brothers.[89] Skepticism of non-possessory security devices by the public and creditors[90] had also existed in America several decades ago during the evolution of the secured credit laws until the American came to terms with the reality of non-possessory security device.[91] This realization was brought about by the industrial revolution, the growth of the economy which brought to the fore the inadequacies and non-utility value of pledge. This fact may lead to a positive conclusion that with the growth of the economy and the revision of the secured transactions laws, the hostility of creditors towards the non-possessory security devices and indeed by the society may become a thing of the past in underdeveloped economies as well.

Developed at different times in different societies to help people to solve their financial needs, the import of pledge is to put the creditor in possession of the collateral of the debtor and grant him a security interest in the asset held[92] to secure the repayment of the debt. Putting the creditor in possession of the collateral serves two functions: *"it makes it more difficult for the debtor to dispose of the pledged goods to a third person; and the debtor can no longer create the misleading impression in the minds of his other creditors of owning the pledged goods which*

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[89] In Nigeria and Cameroon, possessory security was the major form of secured financing during the evolution of secured credit transactions in both countries from the middle of 19th century up till the middle of 20th century. Even at present, with the other forms of non possessory securities available, lenders prefer possessory security (pledge) in personal properties to non possessory security as a form of collateral.
[90]Skepticism of non possessory security device by the public and creditors here means that the use of non possessory security device where the debtor is allowed to be in possession of the security interest may lead to fraud on unsuspecting potential lenders who may rightly believe that such property apparently belonged to the debtor and had not been encumbered earlier – what is known to be the so-called ostensible ownership or false-wealth problem.
[91] Grant Gilmore vividly captured the mood when he stated as follows: "right thinking people seem always to have felt that there was something vaguely dishonorable, if not outright dishonest, about transactions in which a loan is secured by a debtor's personal property – particularly about transactions in which the debtor is allowed to remain in possession of the property and to enjoy its full use during the loan period. Though exactly what it is that is dishonorable or dishonest about such transactions has never been made clear. Right-thinking people have usually found 'fraud' the most helpful debating term-the transaction in question is constructively, even if it is not actually, fraudulent. And of course once you have characterized anything as constructive fraud the possibility of further rational argument is at end. […]." See Grant Gilmore, Security Law, Formalism and Article 9, supra footnote 67, p. 659.
[92] Though collateral and security interest are used interchangeably by some authors, technically collateral is the asset whereas the security interest is the right created upon it in favour of the secured creditor.

might be available for the satisfaction of their claims."[93] However, with the advent of industrialization, the usefulness of pledge started to wane. Both the lenders and debtors discovered that it would be counter-productive not only to the debtor but also for the creditor to take possession of the equipment or inventories of the debtor used as collateral which otherwise would have been used by the debtor to run its business and repay the loan advanced to the debtor. For example, where inventories and equipment of the debtor used as collateral are in possession of the secured party, the obvious results will be to grind the business of the debtor to a halt and force the debtor into bankruptcy which will not be in the best interest of the creditor. Besides, the attendant cost and burden of keeping and maintaining the collateral would have overwhelmed the creditor and completely wipe out the benefits that may have justified the rationale of taking the possession of the debtor's collateral. It may also increase the transaction cost of securing credit for the debtor as the secured party will definitely transfer the cost of keeping and maintaining the security interest to the debtor. Consequently, the option of pledge as a security device has been reduced to the barest minimum although few secured credit industries like pawnshops and field warehousing still thrive based on possessory security (pledge).[94]However, pledge is still exploited in some areas of secured transactions some of which include: the use of letter-of-credit right, chattel paper and the use of certificated security as collateral for loan.

[93]See Ulrich Drobnig, Security Rights in Movables, (January 15, 2010), supra footnote 88, p. 2.
[94] However it is still much in use in Nigeria and Cameroon societies where people "pledge" their plots of land and other personal properties to the lender who take possession of such security interest in return for the loans advanced to these debtors. For detailed discussions of customary pledge under the Nigerian and Cameroon secured financing laws see infra pp. 38 - 53.

1.2.2. Pledge under the Cameroon's Uniform Act on Securities

As already stated earlier,[95] the term "pledge" under the Uniform Act on Securities shall be used in dual context. It shall be used as possessory security which is called "pledge" and non-possessory security - otherwise called pledge without dispossession by the Uniform Act on Securities. This research shall endeavor to clarify which type of pledge is being discussed under the Uniform Act on Securities. Pledge under the Uniform Act on Securities will be therefore discussed under two headings: possessory pledge and non-possessory pledge – or pledge without dispossession.

1.2.2.1. Possessory Pledge under the Cameroon's Uniform Act on Securities

Possessory pledge under the Uniform Act on Securities is the equivalent of pledge under the United States and Nigeria secured transactions laws. Possessory pledge under the Uniform Act on Securities is a contract where the personal property of the debtor or a property in which the debtor has an interest, is offered to the creditor or a third party[96] agreed upon by the parties as a security for a loan.[97]

Possessory pledge can be constituted for the past, present or future debts[98] using any of the personal property of the debtor.[99] The possessory pledge gives the creditor right to keep in its possession the pledged property until the debtor repays in full: the principal, interest and any related cost of the debt, but subject to the right of the creditor to foreclosure and disposition of

[95] See supra, footnote 87.
[96] The third party here is any person designated by the creditor to receive the collateral on his behalf. It could be the creditor's agent.
[97] See Article 44 of the Uniform Act on Securities.
[98] See id., Article 45.
[99] See id., Article 46.

the collateral where the debtor defaults in repayment. In some instances, the creditor can keep the pledged property as security for additional debt that has arisen between the creditor and the debtor after the pledge contract had been entered into even though the initial pledge contract does not cover this additional debt.[100]

In Cameroon possessory pledge is still one of creditors' preferred means of secured financing. It is more economical than the use of non possessory security, because possessory pledge requires no registration at the registry and the possession of the collateral by the creditor serves as public notice to third parties. Indeed, the high cost of registration and the bureaucratic bottleneck of the registration of security interest under the pledge without dispossession at the registry of Court of First Instance in Cameroon make possessory pledge device the most preferred security interest in Cameroon.[101] Another reason for the preference of possessory pledge is that it ensures also that the debtor does not create another security interest on the collateral that would take priority over the possessory pledgee's initial security interest.[102]

1.2.3. Pledge[103] under the Nigerian Secured Transactions Law

Pledge of personal property still dominates the secured transactions landscape in all parts of Nigeria. In the case of Labode v. Otubu[104] Mohammed Uwais CJN quoting Halsbury's Laws of

[100] See id., Article 54. The keeping of the pledged property by the secured party as collateral for future loan granted to the debtor is analogous to future advance priority under section 9 – 323 (a) UCC.
[101] See infra footnotes 505 and 506 for the discussions of the costs and delays involved in registering security interest created by pledge without dispossession.
[102] See Article 55 of the Uniform Act on Securities; see also Ulrich Drobnig, Security Rights in Movables, supra footnote 88, p. 2.
[103]Though stated earlier, pledge under the Nigerian law denotes only possessory security as it is under the United States law. All the discussions of pledge (both personal and real properties) herein should be seen in that regard.
[104] (2001) 7 Nigerian Weekly Law Report (NWLR) (pt.712), 256 particularly at page 276.

England, 4th edition, volume 36 (1) paragraph 101 at page 72, stated that *"pledge is interchangeable with pawn and both have been defined to mean a bailment of personal security as security for some debt or engagement."* Indeed pledge is one of the creditor's preferred options for creating a security interest in the collateral of the debtor especially in consumer financing. The pledge concept is materially the same in all jurisdictions and consequently repeating what has been said under the United States secured transactions law and Uniform Act on Securities would be unnecessary as the rules are analogous or very similar. Notwithstanding the substantial similarity, pledge does have some idiosyncratic features in many parts of Nigeria. For example, this is so under the indigenous customary practices of one of the ethnic nationalities, the Igbo ethnic group[105] in Nigeria. This pledge system – based on the customary law of the Igbo ethnic group[106] - is a bit different and will give another fresh perspective to pledge. This indigenous customary pledge practice is still in existence even until this date.[107]

It is important to state at the onset that under the customary pledge system of the Igbo people, both personal and real property[108] can be pledged. As stated above, pledge of property under the

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[105]The Igbo tribe is one of the three biggest ethnic groups in Nigeria the other being Yoruba and Hausa tribes. Igbos constitutes eighteen percent of Nigerian total population. The Igbo ethnic group occupies five states in the south eastern part of Nigeria namely Imo, Anambra, Enugu Abia and Ebonyi States. Predominantly Christians there are handful of Muslims and traditional worshippers. See Nigerian People 2010, CIA World Factbook available at < http://www.theodora.com/wfbcurrent/nigeria/nigeria_people.html > last visited on the 18th of October 2010.

[106] The choice of Igbo tribe, though coincides with the tribe of the author of this work, is in a way good because the tribe is one of the most industrious and commerce oriented ethnic groups in Nigeria. Igbos are largely traders and entrepreneurs and are regarded as one of the '*market dominant minorities*' in Nigeria. See Amy Chua, World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability, (Doubleday Publishing, 2002), available at < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=388461 > last visited on the 18th of October 2010.

[107] Consequently the use of present continuous tenses to describe the pledge of real and personal properties is justifiable on this ground.

[108]Legally pledge relates to personal property whilst real property can only be mortgaged. However it is different under the Igbo traditional secured transactions practices. Pledge of real property is indigenous to Igbo tribe and this is another 'terminological' difference between United States secured transactions law and the Igbo traditional secured transactions practices. It is a kind of indigenous mortgage but in this case of pledge of real properties, there is no conveyance of the real property from the pledgor to the pledgee with the implied understanding of re-

customary law of the Igbo tribe – similarly to United States or the Uniform Act on Securities – also presupposes putting the secured party in possession of the property of the debtor which serves a security for the loan until the obligation is discharged. When it is pledge of real property, it is called '*igba ala ibe.*'[109]

At the beginning of the 20th century, when there were very few educated kinsmen to reduce the transaction into writing, both the lender and the borrower would call in many of their kinsmen as witnesses to the transaction as an alternative to reducing the transaction into writing. The importance of many witnesses would be for corroborative evidences in case either party reneged or denied the terms of the transaction. Today, with the presence of more educated people, pledge transactions are now mostly reduced into writing either in English or Igbo language with fewer witnesses to guard against denials and disagreement over the terms of the agreement

Although real property mortgage is not the focus of this work,[110] it is apt to analyze the pledge of real property mortgage because it made up more than 90% of the transactions under the indigenous secured credit transactions of Igbo people in Nigeria. Moreover, it will add to the originality and authenticity of the work for the researcher to explain some interesting things which he witnessed firsthand on the pledge of land as a security interest by his ancestors,

conveyance upon satisfaction of the obligation as it is with the mortgage of real property. What the pledgee gets is the right to be in possession until the obligation is satisfied. This principle of traditional pledge ensured that the pledgor's right to redeem the pledged property is not foreclosed by the pledgee.

[109] The general Igbo language word for the traditional pledge of real property.

[110]This reason for this is that Article 9 of the UCC which shall be used in this work as a benchmark to reform the secured credit laws in Nigeria and Cameroon deals with personal properties. See section 9 – 109 UCC.

although this type of pledge of land is not exclusive to Igbo's alone; it is also practiced in other ethnic groups in Nigeria.[111]

1.2.3.1. Definition and Nature of Pledge of Real Property under the Customary Secured Financing Law of Igbo Ethnic Group in Nigeria

According to Elias, *"[p]ledge is a kind of indigenous mortgage by which the owner-occupier of land, in order to secure an advance of money or money's worth, gives possession and use of the land to the pledge creditor until the debt is fully discharged*."[112] Again in the case of Adjei v. Dankaba & Anor,[113] Mitchelin, J. stated the nature of a pledge as follows: *"it is essential of a native mortgage that possession of the mortgaged premises should be given to the mortgagee at the time when the transaction takes place between the parties. This is made clear from the following passage which appears in Sarbah's Fanti Customary Law at. 261: 'mortgage or rather pledge of land is a transaction in the presence of witnesses, the possession of the land pledged being given to the lender of the money*." In the case of Ahaneku v. Iheaturu[114] Muntaka–Commassie, defined customary pledge as a promise, vow, agreement, undertaking, security, pawn or guarantee.

It should be noted that the indigenous customary pledge of real property is conceptually different from its common-law equivalent. The aspect of the conveyance of the property from the mortgagor to the mortgagee with the agreement to re-convey back the mortgaged property in

[111]For example, it is practiced in Ibibio, Ijaw, Efik, Itsekiri, Ogoni, Esan, Idoma, Igala, Ikwere as well as Eleme ethnic groups.
[112]See Taslim Olawale Elias, Nigerian Land Law and Custom (Routledge & Kegan Paul Limited, 1962), pp.187-188.
[113](1930) 1 West African Court of Appeals (WACA), pp. 66-67.
[114] (1995) 2 Nigerian Weekly Laws Report (NWLR) (pt. 380), p. 770.

event of repayment[115] is lacking in an indigenous customary pledge of real property.[116] Perhaps this explains the redeemability of the pledged property by the pledgor no matter how long it takes the pledgor or his descendants to redeem the pledged property.[117]

There is no prescriptive right to land under the customary pledge system; the effect of this is that the pledgee cannot obtain the absolute ownership of the pledged land no matter how long the loan remains unpaid.[118] Indeed under the customary pledge system, the pledgee takes possession of the land at the *"very inception of the deal and also enjoys the usufruct of the land for as long as it is considered necessary to give him an equivalent credit."*[119] One essential principle of the local indigenous pledge has been its ultimate redeemability; indeed one may say that its

[115]See Robert Megarry, William Wade, The Law of Real Property, (Sweet & Maxwell Limited, 6th ed., 2000), p. 1169; see also the dictum of BucleyL.J. in the case of Swiss Bank Corporation v. Lloyds Bank Ltd (1982) Appeal Cases (A.C.) p. 595.

[116] In the case of Pharmatek Industrial Projects Ltd v. Trade Bank Nigeria Plc, (2009), 13 Nigerian Weekly Law Report (NWLR) (pt.1159), 577 particularly at pages 617-618, Nweze JCA defined mortgage as follows: "a mortgage is a conveyance of legal or equitable interest in property as a security for the payment of debt or the discharge of some other obligations for which it is given. It is subject to the condition that the title shall be re-conveyed if the mortgage debt is liquidated." See also the cases of Intercity Bank Plc. v. Feeds and Foods Farms Nigeria Ltd & Ors. (2001) 17 NWLR (pt. 742) 374; Ahaneku v. Iheaturu (1995)2 NWLR (pt. 380) 758, 770. See also I. O. Smith, Nigerian Law of Secured Credit, supra footnote 62, 35; P. A. Oluyede, Nigerian Law of Conveyancing, (University of Ibadan Press, 1978), 1162.

[117] See S. N. Chinwuba Obi, The Ibo Law of Property (London Butterworth, 1963), pp. 139-140; see also Chubb, L.T., Ibo Land Tenure (1948), p. 70. However, mortgage of real property in Nigeria is same as mortgage of real property under the English Law. Under the Nigerian law, mortgage of real property is essentially a conveyance of the legal or equitable interest in a property from the mortgagor to the mortgagee on the condition that upon repayment of the loan of performance of the obligation which such mortgage secures, the conveyance becomes void or the interest shall be re-conveyed back to the mortgagor. Mortgage of real property law is a state law in Nigeria, each of the 36 states in Nigeria has its own mortgage law. See Taslim Olawale Elias, Nigerian Land Law and Custom, supra footnote 112, p.188; see also See Robert Megarry, William Wade, The Law of Real Property, supra footnote 115, p. 1169. This type of mortgage is the equivalent of title mortgage existing in some states in the United States. See John A. Spanogle Jr, William Wallace Kirkpatrick, Security Interest US Style: A Device for Financing Small Businessmen and Protecting Yourself in Liquidation, Vol. 4, Iss. 2, Bond Law Review (1992), p. 5 available at < http://epublications.bon.edu.au/blr/vol4/iss2/1/ >; last visited on the 4th of December 2010.

[118] This absence of foreclosure on the equity of redemption was somewhat analogous to the English perpetuities rule which restricted the alienability of land by the land owners. According to Megarry and Wade, the ambition of the landowners was to "dictate to posterity how their land is to devolve in the future and so fetter the powers of alienation of those to whom they may give it and it has always been the purpose of courts, as a matter of public policy to confine such settlements within narrow limits and to frustrate them when they attempt to reach too far into the future." To limit the perpetuities rule, there is the Perpetuities and Accumulation Act of 1964. This law ensures that land is freely alienable by making the perpetuity period fixed and not to exceed 80 years. See Robert Megarry, William Wade, The Law of Real Property, supra footnote 115, pp.298-302.

[119]See S. N. Chinwuba Obi, The Ibo Law of Property, supra footnote 117, p. 188.

underlying assumption has been "*once a pledge, always a pledge*."[120] This means that the pledgee of a land would forever remain a pledgee which has only possessory right on the said pledged property and consequently the ownership right of a pledgor over the piece of land pledged cannot be foreclosed; i.e., the right of the pledgor to redeem the land upon repaying the debt and giving the pledgee adequate notice of the pledgor's intention to redeem the land.[121] In

[120] This phrase 'once a pledge always a pledge' may have been borrowed from the old English principles of equity as it related to mortgages which have been abolished under the English Law. This principle of equity was developed to restrict rehypothecation – meaning "a term applied in the securities industry to the arrangement where A delivers assets as collateral to B and B delivers the same assets as collateral to C." Under equity, there was a phrase "once a mortgage, always a mortgage" meaning "where a mortgage or other security interest is given, the mortgagor enjoys an equity of redemption or the right to the return of the mortgaged asset upon discharge of the secured obligation. Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity." See Joanna Benjamin, Interest in Securities – A Proprietary Law Analysis of the International Securities Markets (Oxford University Press, 2000), p.112.

In the case of case Samuel v. Jarrah (1904) A.C. 323, Lord Lindley at p. 329 stated as follows "The doctrine 'once a mortgage always a mortgage' means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and inconsistent with the transaction being a mortgage." Again in the case of Marques of Northampton v. Pollock (1890), 45 Ch. D 190, Bowen LJ at 215 stated as follows: "the principle invoked by the plaintiff is summed up in the epigrammatic formula 'once a mortgage, always a mortgage.' Whenever a transaction is in reality one of mortgage, equity regards the mortgaged property as security only for the money, and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and to rescue what was, and still remains in equity his own." See also the following cases of this principle Noakes v. Rice (1902) A.C. 24; and Fairclough v. Swan Brewery (1912) A.C. 565.

However this rule 'once a mortgage always a mortgage' has been abolished. The abolition came with the legal mortgage where the title in the collateral is conveyed to the mortgagee on the condition that on fulfillment of the obligation the title is reconveyed back to the mortgagor by the mortgagee. According to Benjamin, "(interests in) securities may be transferred outright to the collateral taker, on the basis that the collateral taker assumes an obligation ('the redelivery obligation') to deliver equivalent assets to the collateral giver on the discharge of the collateralized obligation, and on the further basis that the redelivery obligation will be set off against the collateralized obligation in the event of either party's default." See Joanna Benjamin, Interest in Securities – A Proprietary Law Analysis of the International Securities Markets, pp. 119 – 120.

[121] See also Jelili Omotola, The Law of Secured Credit, supra footnote 60, p. 26. According to Omotola, the maxim of *once a pledge always a pledge* import two concepts: First, the pledged land is never lost and can be redeemed at any time no matter how long the pledgee is in possession of the pledged land even where there has been improvements on the pledged land.

In the case of Laregun v. Funlayo (1955-56), Western Region of Nigeria Law Report (WRNLR), 167, it was held that the plaintiff was entitled to redeem the pledged land despite the fact that the defendant has been in possession of the pledged land for over 30 years and had planted economic trees on the land. Second, no matter what is stipulated in the agreement of the parties postponing the date of redemption, the pledgor will be allowed to redeem the pledged land upon giving reasonable notice to the pledge and must not be done mala fide (i.e., not midway the planting season so as to deprive the pledgee the right to plant and reap the fruit of the harvest. Omotola cited a case reported in N. A. Ollennu, Principles of Customary Land Law in Ghana, London (Sweet & Maxwell, 1962), p. 96 where the pledgor pledged to the pledgee a pear tree in consideration of the sum advanced to the pledgor by the pledgee. The reaping of the pear was supposed to have served as interest on the loan. For four years, the pear did not bear fruits and so the pledgee did not reap any fruit as interest. However on the fifth year when the tree had much fruits and the pledgor saw this, the pledgor borrowed from another person to repay the loan in order the case of Onobruchere v. Esegine[122] Oputa JSC stated that: "*In customary law, the pledgor retains the radical title*[123]*. It is not extinguishable by the pledge. The pledgor has the right of redemption, and it does not matter for how long the land had been pledged*." This basic principle of customary pledge has been affirmed in the several other judicial decisions.[124]

Interestingly, the pledge of farm land as a collateral for loan credit has never been registered in any registry to provide public notice to other potential creditors. The natural conclusion might be that the concept of pledge of farm land must have been nothing else but a recipe for chaos among competing pledgees over a piece of farm land due to the absence of registration. Yet the absence of registration in an Igbo customary pledge has never led to competing adverse claims and this can be rationalized on a number of premises. *First*, the lenders and borrowers are usually from the same community where kinsmen know one another. Basically kinsmen know what land is pledged and who the pledgor(s) and pledge(s) of parcels of land are. Consequently, before the formalization of the pledge, the potential pledgee will normally seek advice from his kinsmen who will then clarify to the pledgee on the legitimacy of the transaction.[125] *Second*, and most

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to redeem the pear tree and forestall the pledgee from reaping the interest which he had patiently waited for the last five years. The pledgee resisted the redemption and the court ruled in favor of the pledgee holding the pledgor had redeemed in bad faith without adequate notice to the pledgee.

[122] (1986) 1 Nigerian Weekly Law Report (NWLR) (pt.19) 799 particularly at page 806.

[123]Radical title here means the fee simple interest over the piece of land.

[124] See the cases of Ikeanyi v. Adighogu (1957) 2 Eastern Nigeria Law Report (ENLR), p.38, particularly at page 39; Leragun v. Funlayo (1955-56) Western Region of Nigeria Law Report (WRNLR), 167; Agbo Kofi v. Addo Kofi (1933) 1 West African Court of Appeal (WACA), 284; as well as Orisharinu v. Mefue (1937), 13 Nigerian Law Report (NLR) 181.

See also the case of Onyemaechi v. Nwaohamuo (1992) 9 Nigerian Weekly Law Report (NWLR) (pt. 265), p. 372, particularly at p. 383 where Edozie JCA stated as follows "[…] in a customary law pledge, while the pledgor retains the radical title, the pledgee has the possession of the pledged property. As the appellant's counsel rightly pointed out, once a pledge always a pledge, for the pledgor has the right of redemption, regardless the length of time."

[125] Indeed what happens in practice is that once a pledgor approaches a potential pledgee for a pledge transaction, the pledgee informs few of his kinsmen, in particular the pledgee's uncle who live within the community and who will readily advise the potential pledgee on whether that land had be pledged earlier to avoid adverse claims to a piece of farm land. Such information is of common knowledge amongst the elderly kinsmen living in the community.

importantly, the pledgee is always put in possession of the farm land and is given the power to cultivate the farm land. This gives public notice to all in the community that such land has been encumbered by an earlier pledge. *Third*, registration requirement for customary pledge of land between two rural dwellers would be too complex for them. The services of legal practitioners are not normally engaged in such transactions and it would be way too ambitious to expect the pledgee to register its interest at the land registry. *Fourth*, lands in the villages are not charted and delineated by beacons into plots of land that can be described with certainty at the land registry. Even if a pledgee tries to register its interest at the registry, it would be an uphill task to describe with certainty the plot of land that is the subject of the pledge transaction.[126]

This position of the traditional pledge of land within the Igbo tribe in Nigeria may be analogous to the Sinhala tribe traditions and customs in Sri Lanka. In Sinhala tribe, where there was a debt which was secured with a real property, according to the early Kandyan law "*the time at which the debt should be repaid and the mortgage foreclosed, was not specified because a mortgage could always be redeemed; time was of no consequence.*"[127]Again most sale of land was treated as veiled mortgage which meant that the seller could turn around and return the money and claim back his land unless there was death of either the vendor or purchaser which was considered as a lapse of a generation. The reason for the traditions of the Kandyans in Sinhala tribe of Sri Lanka and Igbo tribe in Nigeria is "*attributed to the inordinate attachment they had to their ancestral land.*" [128]

[126]There is no layout of the land in the rural community. These portions of land have no number to identify them with and consequently will be almost difficult to describe them with precision.
[127] See H.W. Tambiah, Sinhala Laws and Customs, (Lake House Investment Ltd.), p. 316.
[128] Id., p.315.

At times only economic trees[129] are pledged while the pledgor retains his land or both the land and the economic trees are pledged together, though it all depends on the agreements of the parties. Where the pledgee plants permanent economic trees, the pledgee is not entitled to be compensated at the end of the pledge which is normally at the repayment of the loan by the pledgor. Consequently, it is an established rule that the pledgee can only plant seasonal crops or other agricultural seeds, the maturity of which would not exceed two years and may also not plant any economic tree that may be permanent on the land like a palm or a cocoa tree.[130] This ensured that the land will be free, or will after a while, be free any time the pledgor is ready to repay the loan in order to redeem his collateral. Where the pledgee plants some crops or seed that will take 'eternity' to start producing or yielding fruits on the land, such 'agricultural improvements' on the land belong to the pledgor upon the redemption of the land.

Improvement in form of building on the land is totally forbidden as this can have the effect of foreclosing on the equity of redemption by the pledgor. The only interest that the loan credit yields to the pledgee in a traditional Igbo pledge is the cultivation of the pledged land and the attendant harvest on the land. Consequently where the pledgee does not have the time and strength to cultivate the pledged land, it is within the right of the pledgee to do a sublease of the land to another sub-lessee for a fee or percentage of the harvest of the land on the same tenor applicable to the pledgee. However, if at the time when the pledgor is ready to repay the loan and redeem the pledged land, the pledgee has planted a seasonal crops like maize, melon, vegetables or other local yearly crop, the pledgor will nevertheless redeem the land but the redemption will

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[129] Economic trees here mean trees on the land that yield economic fruits. It includes but not limited to palm fruit trees, palm wine tree, oil bean, iroko or cocoa trees.
[130] See S. N. Chinwuba Obi, the Ibo Law of Property supra footnote 117, p. 55.

be subject to the pledgee or the sub-lessee harvesting all the farm crops at the appropriate time when crops of that nature are harvested in other farms.[131]

There have been cases where the grandchildren of the pledgor finally pay back their ancestor's debt and so redeemed it from the pledgee's living descendants.[132] Thus in the case of Akyirefe v. Breman-Esiam[133] it was held that the family land pledged to a member of another family, and redeemed by another member of that other family, is still their family land. This heritability of pledged land has its attendant consequences and this has created more problems than the non-registration of the pledge transaction.

In Nigeria where documents are hardly kept and preserved for a long time, it becomes difficult knowing what was the real intent of the original parties to the pledge contract after two or more

[131] The interesting thing about this pledge which the author witnessed firsthand is that 30% of the author's grandfather's farmland was made of property that had at various earlier times been pledged to him by various debtors. The author was quite young when his grandfather passed away. But sometimes in the early 1990's many of the supposed descendants of the debtors came to the author's father to redeem their land which their grandfathers used as collateral to obtain a loan from the author's grandfather several decades ago. The author's father unaware of such transactions in the distant past contested some of their claims, but the issues were resolved when the author's father found a small note book in his father's box. The notebook contained hand written entries written in the early 20th century which documented all the transactions of the pledge of these farmlands as collateral to the author's grandfather.

The most interesting thing was that each entry stated that a piece of farmland was 'sold' to the author's grandfather. The author being just admitted to read law argued with the father that it was an outright sale of the piece of land instead of the purported pledge being canvassed by the pledgor's descendants, but the author's father pointed out that the writer of those entries meant pledge or mortgage but obviously due to the writer's limited education, the writer cannot distinguish between sale and pledge or mortgage.

Another interesting thing about it was that these transactions were over 100 years old which confirms that there was no foreclosure on the equity of redemption of the mortgagor. It was impossible to repay the loan; indeed no loan was repaid to redeem the land as the money lent at that time was no more a legal tender in Nigeria. It was impossible to do a conversion of those currencies. The loan amount in one case was 'two shekels of silver and 70 Nigerian shillings,' one was at lost how to quantify and convert two shekels of silver and how to convert 70 shillings to Nigerian naira with the gross inflation that has happened over a period of 100 years. Consequently the author's father allowed the pledgor's descendants to redeem their mortgaged land 'free of charge' although the author's family has been farming on those pieces of land for close to 100 years.

[132] See C. W Alexander, Memo on Native Land Tenure in the Colony and Protectorate of Nigeria (1910). Colonial Office Legal Pamphlet, Vol. 1, Folio No. 26, paras. 9, 10, and 24 ; M. M. Green , Land Tenure in an Ibo Village, Chap. IV (para. 1) and Chap. V; J. S. Harris, 'Papers on Economic Aspect of Life among the Ozuitem Ibos', Africa , Vol. XIV, pp. 12-23.

[133] (1951), 13 West African Court of Appeal 311.

generations of the parties to the pledge contract were dead. Worse, still some of the pledge transactions were oral contracts with the parties' kinsmen as witnesses. With the death of two or more generations of the parties and their witnesses, it becomes impracticable to know the actual terms of the pledge agreement. The problem always starts when the descendants of the pledgor approach the descendants of the pledgee to redeem the contract of pledge that their ancestors entered into several decades ago. The descendants of the pledgee having been farming on the said land uninterruptedly for several decades without any prior information from their ancestors as to any adverse ownership of the land would usually contest the authenticity of the claims of the land by the descendants of the pledgor. Most of the times the descendants of the pledgor may lodge a petition to the general meeting of the elders in the community who may be divided in their decision on the rightful owners of the said land. The divided decision of the elders may be borne out of the innocent mistake as to the true owners of the land considering the inordinate lapse of time of the agreement between the original pledgor and pledge. The divided decisions of the elders may be as a result of the loyalties[134] of the elders to the competing claims of the descendants of the pledgor and the pledge. Most times both the descendants of the pledgor and pledgee may not go to court either due to the cost implications and attendant delay of pursuing this option or the fruitlessness of this option bearing in mind that the same elders in the community may be called upon in court as witnesses to the case. At this juncture, the situation is ripe for crisis with the rule of might taking primacy over the rule of law: i.e., the descendant or the family of the descendants that is stronger[135]takes over or retains the disputed land. One way

[134] Unlike in cases before the court in formal judicial system where the judges are supposed to neutral and impartial, here the elders are hardly impartial and neutral. Their non-neutrality may not really be as a result of bribe, but the fact the elders live in the community with the disputants. They naturally may be inclined to support one of the parties due to established long standing relationship with such party.

[135] Being stronger entails being a descendant or their family being financially and economically stronger than the other descendant.

of resolving the dispute about three decades ago was to ask the descendants of the pledgor and pledgee to swear before a deity that the land belonged to their ancestors. The party that swore before a deity would take the disputed land after a year.[136]

In the case of the pledged lands that concerns the researcher's ancestors what helped in resolving the matter amicably was the note of the researcher's grandfather found in the grandfather's box, many other cases do not get resolved peacefully, evidence abound where the transactions ended up in feud between two families and blood bath in extreme cases.[137] This is obviously one of the major limitations of the use of customary pledge of real property as collateral for a credit facility. A simple act of executing a pledge agreement that is duly signed by both the pledgee and pledgor will foreclose these problems. It may amount to expecting so much of the traditional pledge of real property system to advocate for the registration of the pledge document executed at the land registry. This is because the real property used for this type of credit financing is usually land in the rural communities which are neither clearly identifiable nor demarcated. However with

[136] The swearing is done in the public after the Priest of the deity performs some ritual and warns the parties of the dangers of swearing falsely. In Igbo tribe, where a person swears falsely, i.e., that his ancestors truly pledged the disputed land to pledgee when this was not the case or the ancestors had complete ownership of the land when the ancestors was only a pledgee, there is the belief that the deity has the power to know the truth and kill the party that swears falsely within a year. It was not uncommon in the recent past to see some families inviting friends in celebrating one year anniversary of swearing before a deity. Really why a "powerful" deity will wait for a whole year before dispensing justice in a case is a question nobody has given the researcher an answer until date.

This customary method of resolving dispute on the land is akin to old 12th century English common law practice called 'wager *of law.'* Wager of law was a practice by which the defendant could avoid liability of a debt by swearing under oath that he was not indebted to the plaintiff. The defendant oath will also be supported by usually eleven other *'oath –helpers'* who will swore in support of the defendant that the defendant was not indebted to the plaintiff. According to Farnsworth, this method of avoiding liability is "difficult for the modern mind to comprehend." See E. Allan Farnsworth, Contract, (Aspen Law and Business, 3rd ed., 1999), p. 14. Nonetheless there are differences, under the Igbo practice, the pledgor or pledgee's swearing is enough, it does not required collaborative oath-helpers and again under the Igbo practice, the swearing before the deity is potent- both the pledgor and the pledgee believe that swearing falsely can imperil their lives. However, Igbo customary method of swearing before a deity to resolve a pledge dispute has fallen into disuse now because of the infiltration of the Christian religion to the culture and traditions of Igbo ethnic group. Predominant population of the Igbos are Christians and where either the descendants of pledgor or pledgee swore before a deity and their church hears about it, the church will ostracize such a pledgor or pledgee for swearing before the deity as that contradicts the tenets of Christianity.

[137] See S. N. Chinwuba Obi, The Ibo Law of Property, supra footnote 117, p. 189.

increased urbanization, it is expected that all the land within the country (including the land at the rural communities) will be clearly delineated and properly demarcated for ease of reference to any particular piece of land for identification.[138]

As earlier stated, this type of indigenous customary pledge of real property exists side by side with the English style mortgage of real properties until date. Even currently, where the loan transactions involve lenders and borrowers from the same rural community in Igbo tribe, the parties will most probably opt for the customary pledge of land as security for the loan, but where the lender is either a commercial bank or a microfinance bank, then mortgage of real properties will govern the transaction. Enough has been said about pledge of real property.

1.2.3.2. Pledge of Personal Property under Igbo Customary Law

For the pledge of personal property, it is mostly oral agreement and the pledgee was usually put in possession of the collateral which supposedly obviates the need for the pledge contract to be written down.[139] Besides this reason, the illiteracy level of the community may have contributed more to the dearth of a written pledge contract. It has remained, however, the rule that the parties do not set a time frame for the redemption of the collateral even today, the parties' understanding

[138] At present there is no ongoing project to delineate the land at the rural community. Much as author would advocate for the pledge transactions to be written down to avoid crisis during redemption. It appears that the customary pledge suits the life of the people in Igbo rural communities better than mortgage. No male adult (female do not customarily own land under the Igbo culture) will want his land foreclosed by the mortgagee upon default of repayment. Indeed, the psyche of the people is that land must be redeemed at any time the pledgor gets the money to redeem. Thus mortgage will not work; in fact it will create more chaos in the rural communities.

[139]However, there is an exception to the general rule that the secured creditor should be in possession of the personal properties of the debtor as collateral. The exceptions is when the collateral is in the form of farm implements like hoe, cutlass and other implements used in cultivating farm manually. In this case, although the secured creditor may be put in possession of the personal property, the creditor would also allow the debtor to come and collect the farm implements in the early hours of each of the days that the debtor would go to farm and then return the farm implements at the close of the working day. This ensured that the debtor engaged in farming with the prospect that the proceeds of the yields will be used in repaying the loan.

is that the pledgee is expected to be in possession of the collateral until the pledgor repays the loan and redeems the properties. This unwritten rule has far reaching implications on the transactions. *First*, it ensures that not every property is acceptable to the lender as collateral for loan. As in other systems, the value of the assets acceptable as security for loan must be commensurate with the amount of the loan and in most cases the lender demands properties that have higher value than the loan, especially having in mind the quite real possibility of the borrower deciding not to redeem the properties. The difference as to developed systems is that the customary law does not set exact criteria for determining what qualifies as excessive security.[140] *Secondly*, as a corollary, it explains why there is no foreclosure on the borrower's equity of redemption as the borrower can repay the loan and redeem the property at any time the borrower likes. *Lastly*, it ensures that the lender cannot seek to enforce the repayment of the loan from the borrower while still in possession of the collateral although this point is superfluous in pledge of real properties because in all the cases the value of the land is by far higher than the loan and the lender always want to keep the pledged land in perpetuity while the borrower is always desirous to repay the loan and redeem the pledged land.

Personal properties like new clothes, farm implements, high quality local jewelries, and other house hold items are used as securities for loan and the pledgees are usually put in possession. The pledgee can make use of those properties irrespective of the wear and tear that might result

[140]The Igbo customary law leaves the issue of sufficiency of the security to the agreement of parties. It does not determine what may amount to an excessive security. Probably, the reason for this may have been the fact that people do not own much of personal properties except for few valuable house hold items like cloths, radio, television set, and cars. Since the arrays of personal properties available as collateral are quite limited, there was no reason to regulate this area. As opposed to this, some systems have regulations on excessive security. For example in German Law, only the assets of an enterprise can be granted as a security and not the whole of the enterprise and the value of a collateral may not be more than 150% of the obligation it secures. See Strothmann, Chapter on Germany, in WINNIBALD MOOJEN, MATTIEU TRUIDEN (EDS.,), A PRACTICAL GUIDE ON SECURITY DEVICES AVAILABLE TO BANKS IN THIRTY COUNTRIES THROUGHOUT THE WORLD (Kluwer Law International, the Hague, the Netherlands 1999), p. 157.

from its usage and the pledgee is not responsible for the damage resulting from the use of such personal property, if the personal property is used by the pledgee in its normal course and there is no evidence of negligence on the part of pledge in the usage. This is because the usage of such property is reckoned as interest to the loan – hence no additional interest is charged by the lender.[141] However some of the pledgees in some cases never use the pledged properties.[142] Like the pledge of real properties discussed above, the pledgor makes effort to repay the loan and redeem the collateral but where the pledgee has used the collateral to the point of the pledged property losing its value then; there was no point in repaying the loan to redeem an otherwise worthless property.

It should be noted that pledge of personal property above is a type of bailment. According to Sealy and Hooley there are six types of bailment under the English law. One of the six types of the bailment is *"when goods or chattels are delivered to another as a pawn, to be security to him for money borrowed of him by the bailor; and this is called in Latin vadium, and in English a pawn or pledge"*[143] There is neither a bailment law nor pawnshops in Nigeria, however this does not suggest that pledge of personal property as form of security devices are not utilized in Nigeria. The use of non-dematerialized securities as collateral involve depositing of such certificated securities as collateral with their lenders, and the retention of the possession of the

[141]See S. N. Chinwuba Obi, The Ibo Law of Property supra footnote 117, p. 145. The idea that the usage of the collateral reckons as interest is in pari material to the customary pledge of land. Recall that also in the customary pledge of land, no additional interest is charged except for the cultivation of the land and the attendant harvest by the lender. While it is easily understandable that harvest from the land can sufficiently be reckoned as interest, the author is at loss how the usage of clothes, shoe or local jewellery can also be sufficient for interest.

[142] The author remembers vividly some sets of local expensive women wrappers that the author used to see in the author's mother wardrobe which the mother never used for one day. On inquiry the author's mother told the author that they were all pledged properties that belonged to her debtors. Debtors preferred her because other lenders would have used the cloths to the points of the cloths fading away. However this did not make her a bailee as she did this just to help a few of her close folks who needed loan credit and she never charged interest on any of the loan credit.

[143]See the case of Coggs v. Bernard, 2 Ld Raym 909, Court of King Bench (1703), reported in L.S. Sealy, R.J.A. Hooley, Text and Materials in Commercial Law, supra footnote 13, p. 60.

certificated securities by the lenders throughout the tenor of the loan is a good example of the utilization of pledge as a security for loan in Nigeria. With the recent introduction of the dematerialization of securities in Nigeria, the perfection of such dematerialized securities as a form of collateral can only be in the form of perfection by control.[144] Another area where possessory pledge is utilized in Nigeria is in the area of field warehousing, which is another good business example of the continued importance of this device in Nigeria.[145]

1.3. Chattel Mortgage in the Pre- UCC Era

Chattel mortgage came into existence in America as a result of the inadequacies or insufficiencies of possessory pledges to accommodate the growing needs of financing brought about by the upsurge in industrialization at the beginning of nineteenth century. Before this time, the security devices known in the legal system were the mortgage of real property and pledge of personal property. Although the pledge of chattels to the lender solved the problem of 'apparent' or 'ostensible' ownership because the transfer of possession over the collateral from the hands of the debtor to the hands of the creditor was visible to the outside world, however, it was ill-suited to capitalist production as the collateral could not be used to generate income to repay credit. This was the main driving force for the invention of non-possessory security devices. [146]

The collateral which remained in the possession of the borrower during the tenure of the loan was not only unknown but was looked at as being a fraudulent conveyance and invalid against

[144] See infra chapter 2 on the discussion on the use of dematerialized securities as collateral for loan.
[145] See infra pp. 72 – 77 for the analysis of field warehousing in Nigeria.
[146] Writing about the disadvantages of pledge as a form of security device under the English law, Goode observed as follows: "[…] but the typical modern security interest is non-possessory. The debtor needs the asset for immediate use or enjoyment, the creditor lacks the facilities to store it (and with accommodation at a premium, the rental value of space occupied by the asset given in security would be substantial) and possession is also burdensome in that the asset has to be looked after and, as a matter of prudence, insured." See Roy Goode, Commercial Law, supra footnote 13, p. 689.

creditors and purchasers.[147] This was the decision in the old Twyne's case[148] in 1601 and this principle subsisted for a long time apparently due to the exigency of business financing of the time[149] and most especially the negative perception of non-possessory pledge. With time, the demands of secured financing brought about by the industrial revolution made it insufficient for only real property to be used as security. Also, with the appearances of other valuable personal properties like cars, sophisticated equipment, the emphasis put on real property collateral by the lenders began to shift to valuable personal properties. Consequently, other forms of personal properties became available security for secured financing. Commenting on the paradigm shift in the types of debtor's assets being used as security, Gilmore stated as follows: *"As industrialization progressed, personal rather than real property came to be the principal repository of wealth. The mortgage of Blackacre would no longer be enough to support the merchant's insatiable demand for credit and the bankers demand for security […]"*[150]

In time, the array of personal property available as collateral caused a re-think about the Twyne's decision. Not only did it become impracticable to pledge all personal property as security, it also became commercially unviable to pledge inventory and manufacturing equipment as a collateral as the borrower needs all these personal properties to work and earn income to pay off the debt with its interests which to the lender is the sole expectation of engaging in the transaction. Consequently, chattel mortgage transactions allowed the borrower to remain in possession of

[147]See Grant Gilmore, Security Interest in Personal Property, supra footnote 51, p 24.
[148] 3 Co. Rep. 806, 76 Eng. Rep. 809 (Star Chamber, 1601) In this case, Pierce was indebted to Twyne and another creditor who had instituted suit against Pierce. Pierce secretly deeded goods and sheep to Twyne in payment of his debt but remained in possession of the goods and continued to deal with the property transferred to Twyne as if the property still belonged to him. Although the amount of the debt outweighed the goods transferred by Pierce to Twyne, the court nevertheless held that the transaction was fraudulent against Pierce other creditors since Pierce was still in possession of the transferred goods.
[149] As at this period, there was low demand for credit as compared with the onset on industrialization.
[150] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 25.

personal properties which the borrower used as collateral for the debt during the tenor of the loan. Chattel mortgage transaction however was required to be registered in the appropriate register to be effective as against other creditors of the debtors. Chattel mortgage thus became a veritable tool to satisfy the business needs of both the borrower and the lender in the United States.

The chattel mortgage operating in the various states of the United States was statutory. Enacted by the legislatures of the eastern coast states around 1820 the legislation then spread to the western part of the country.[151] These statutes as revised from time to time remained valid until the promulgation of the code. The central feature of the statutes was the requirement of registration of the contract of chattel mortgages[152] to guard against fraud which was the reason for striking non-possessory security (pledge) down two centuries earlier in Twyne's case. The usefulness of this chattel mortgage to secured finance fixated the minds of the judge on the device as every other transaction where the borrower remained in possession was adjudged with chattel mortgage rules in mind. It took quite a while for the courts to come to terms that a non-possessory security transaction could be a conditional sale, bailment – lease, or trust receipt.[153]

Over time the appearance of new collateral types precipitated certain changes with chattel mortgage. Though initially chattel mortgage did not recognize after acquired property, however the "inventiveness of business people experimenting with the doctrines of potential possession,

[151] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p.129.
[152] See Frederick M. Hart, Nathalie Martin, Secured Transactions (Aspen Publishers, 2007), p. 13.
[153] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p.129.

fixtures and accessions have finally triumphed and after acquired property clauses were validated."[154]

Despite the acclaimed success of the invention of chattel mortgage, it proved inadequate to satisfy the business needs for all purposes because of several reasons. The documentary requirement of exact description of chattels to be filed became incongruous and any slight deviation from complying with the requirement could have been fatal as it gave no constructive notice to other creditors. The consequences were that the transaction became burdensome, and a risky device as it could have been easily voided in court. Some collateral for example inventory and receivable financing which by their nature[155] could not fit into the rigidity of the description required in chattel mortgage registration fell outside the realms of chattel mortgage security device. This led to the dichotomy of financing on the security of fixed or long term assets of the borrower (the plant and its equivalent) with financing on the short term or liquid assets (inventory and receivables).[156] With the adoption of Uniform Commercial Code by states, this type of financing became the one of the major ways of secured financing under Article 9 and is subsumed under chattel paper.[157]The equivalent of pre-UCC chattel mortgage in other jurisdictions will be examined below.

[154] Id., p. 130. However, it was not only the chattel mortgage security device that was used to validate after acquired property, other security devices also recognize after acquired property clauses, although the concept of floating lien was unknown as at this time – from 1820 to the end of 19th century.

[155] Inventories and receivables financing are by their nature unfixed. They are types of revolving assets of the debtor. For the inventory, it keeps changing as the debtor sells the present inventories and used the money to buy new inventories and make profits in other to remain in business. Account receivables have the same nature, it involves the debtor realizing the present accounts and then allows purchasers to buy on credit which will then generate more account receivables that constitute receivable financings.

[156]See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p.130.

[157] Chattel paper means "a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods." See section 9 – 102 (a) (11) UCC.

1.3.1. Pledge without Dispossession under Cameroon's Uniform Act on Securities – the Functional Equivalent of Chattel Mortgage

Pledge without dispossession (hypothecation) under the Uniform Act on Securities is another term that presents terminological difference from the United States common law concept of pledge. As already stated, the term pledge without dispossession is a non-possessory security which is peculiar to the Uniform Act on Securities and unknown under the U.S. and Nigerian secured financing. However, pledge without dispossession under the Uniform Act Organizing Securities is simply the all-embracing equivalent of the entire non-possessory security devices known under Article 9 excluding conditional sales, consignments and all other transactions relying on retained titles. In the pre-UCC era, this type of transaction was called chattel mortgage and it was allowed so long as the transaction was filed to provide notice to third parties.

Allowing the debtor to pledge his property as collateral for a loan without surrendering the possession to the creditor under the Uniform Act on Securities, just like in any other secured transaction laws, was borne out of the expediency of dynamic business world. As already stated earlier,[158] it makes no economic sense, neither to the secured creditor, nor to the debtor to deprive the debtor of his economic tools and place the same in the hands of the creditor where such assets may not even be put into any productive use. Indeed it is essential that such equipment be left with the debtor to enable him engage in an economic activity that will facilitate the repayment of the debt by the debtor.[159] Moreover the cost of keeping in safe custody of such tools of the debtor makes it counter-productive and unattractive at least from the economic point of view to dispossess the debtor of those assets.

[158] See supra, footnote 146.

[159] See Jean Alain Penda, *Legal Security: Real Securities Provided the Uniform Act on Security*, University of Buea-Cameroon available at < http://www.ohada.com/infohada_detail.php?article=423 > last visited on the 12th of April 2010.

To deal with the 'apparent' or 'ostensible' ownership problem inherent with non possessory security, the Uniform Act on Security provided for the registration of all pledges without dispossession at the Trade and Personal Property Credit Register and that priority as between competing creditors shall be determined with the first to file his security interest at the Registry. In Cameroon the registration of personal property for pledges without dispossession is done at the Registry of the Court of First Instance.[160] Just like under the French Code Civil,[161] Article 63 of the Uniform Act on Securities provides that the following securities can be pledged without dispossession: partnership rights and transferable securities; a business; professional equipment; motor vehicles; and stock of raw materials and merchandise.

Having given a general overview on pledge without dispossession, these types of non possessory security interests will be examined in more details hereunder. However pledge without dispossession of businesses shall be analyzed in the next chapter in relation to other Article 9's floating lien and Nigeria's fixed and floating charge. Discussing it in this context will make for a better comparison of the three jurisdictions in this area where there are certain commonalities in security devices that are best suited for funding a revolving long term loan.

[160] See infra chapter 2 on registration of personal property security interest in Cameroon, the people's perception of registration and the reasons behind the perceptions.

[161] Under the French Code Civil, the following things could be pledged without dispossessing the debtor: a pledge of motor vehicles (le gage automobile), a pledge of the entire business (le nantissement du fonds de commerce), pledge on specific tools or equipment and pledge of investment securities – shares and bonds. The pledges without dispossession require registration within fifteen days after the creation of the pledge to be valid. Whilst registration of the motor vehicles is done "prefecture" which issued the vehicle's "carte grise", the registration of the pledge of the entire business is done at the commercial court and the registration is valid for 10 years. The registration of the pledge of specific tools or equipment is also done at the commercial court and the registration keeps the pledge valid for 5 years. See Marinka Schillings, Chapter on France in WINNIBALD MOOJEN AND MATTHIEU TRUIDEN (eds.), BANK SECURITY AND OTHER CREDIT ENHANCEMENT METHODS, (Kluwer Law International, 1995), pp. 148 – 149.

1.3.1.1. Pledge without Dispossession of Partnership Rights and Transferable Securities under Cameroon's Uniform Act on Securities

The Uniform Act on Securities provides that partnership rights and transferable securities of commercial companies and the transferable rights of corporate bodies that are subject to registration in the Trade and Personal Property Credit Register (the Registry of Court of First Instance in Cameroon) may be pledged without dispossession by agreement or by the order of the court.[162] Pledge of the above partnership rights and transferable securities in a nutshell mean the pledge of shares, bonds and other securities of a company.[163] Partnership rights and transferable securities are defined in the sister law – the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Group.[164] A combined reading of Articles 37, 38 and 51 of the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Group will reveal that partnership rights are shares issued to partners of a company (owners) in return for their contributions to the capital of the company which each partner pledged to contribute to the company.[165] Transferable securities are like company bonds: they are issued by public limited companies which shall confer rights to the holder and give the holder directly or

[162] See Article 64 of the Uniform Act on Securities.

[163] See Martha Tumnde, Peter Tumnde, and Anoukaha Francois, Commentaries on Uniform Acts on Securities (Guarantees), p. 46 available at < http://www.juriscope.org/infos_ohada/actseng/Uniform%20Act%20on%20securities.pdf >; last visited on the 15th of April, 2011.

[164] This Act is one of the OHADA Uniform Acts which has a direct application and obligation in all the sixteen OHADA member countries. It came into effect at the same time as the OHADA Uniform Act Organizing Securities. This law regulates the formation, operation and winding up of all types of companies within the OHADA member states. Just like one will read other Articles of the UCC to get the full meanings and intentions of Article 9, one needs to read the this OHADA Uniform Act Relating to Commercial Companies and Economic Interest Group to appreciate the full import of the pledge without dispossession of the partnership rights and transferable securities. The law is available at < http://www.jurisint.org/ohada/text/text.03.en.html > last visited on the 13th of April, 2011.

[165] See in particular Article 51 of the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Group 1998 which provides as follows: "A company shall issue shares in return for its partner's contribution. Such shares shall represent the partners' rights and shall be referred to as shares in joint-stock companies, and stocks in the other companies."

indirectly percentage of the capital of the issuing company or give the holder the right to a general claim on the company's property.[166]

Shares and other transferable securities of a company are regarded as good assets which a potential borrower can use as collateral in all the three jurisdictions especially where the company involved is considered 'healthy' or known in the corporate world to be vibrant.[167] The ease of transferability and the marketability of these securities - especially shares of a public limited liability companies - makes it attractive to be used as collateral to the lender. Where a debtor defaults in repayment, the secured party can easily enforce his securities by selling these partnership rights and especially transferable securities at the current market rate where there is a functioning capital market.[168] The sale of such company's securities will almost be devoid of judicial scrutiny of 'commercial reasonability test' as the sale at the capital market will yield the current market value of the shares. A corollary of the ease of marketability of these company's securities is that it may be dangerous for the secured creditor to leave such collateral in the hands of debtor. It is more so critical in view of the fact that under the Uniform Act on Securities there are no private or self help remedies, secured creditors must seek the help of the court to enforce securities. With the slow judicial process, a debtor may dispose of the partnership rights and transferable securities to an unsuspecting third party who may not be aware that such personal

[166] See Article 744 of the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Group 1998.

[167] However it should be noted that an antecedent of 'vibrancy' or 'healthiness' of a company does not guarantee that the shares of the company and invariably the company itself cannot fall. The misfortune that befell some notable big and once very healthy companies is instructive in this regard- ENRON, WORLDCOM, Mannesmann, Lehman Brothers just to mention a few.

[168] However in practice, most partnership agreement requires that partnership rights should be offered to existing partners first. It is only when they partners have exercised their right of first refusal that such partnership rights are sold to the public.

properties have been encumbered even though there is a registration to that effect at the Registry of the Court of First Instance.[169] However, these securities are vulnerable to market uncertainties.

The pledge shall be recorded in a duly registered, notarial or private deed which shall contain the following details: the full names and domicile of the creditor and debtor; the registered office and the registration number in the Trade and Personal Property Credit Register of the corporate body issuing the partnership rights and transferable securities; the registration numbers of the pledged securities; the amount of the debt secured and the condition for claiming the principal and interest.[170] Registration of partnership rights and transferable securities preserves the right of the secured creditor for a five year period in Cameroon commencing from the time of registration. It also lapses if after five years it is not renewed. Besides registration of the pledge, pledging of the partnership rights and transferable securities requires notification of the pledge at the commercial company or corporate body which issued the partnership rights and transferable securities or the documents recording the partnership rights.[171] Pledging of the partnership rights and transferable securities gives the creditor the security interest in the pledged rights and all the attendant rights attached therewith, which he can sell upon default of repayment by the debtor following a court order, it also gives the secured creditor priority under Article 149 of the Uniform Act on Securities.

1.3.1.2. Pledge without Dispossession of Professional Equipment and Motor Vehicles under Cameroon's Uniform Act on Securities

[169] See infra chapter 3 for the problems of enforcement of security interest in general in Cameroon.
[170] See Article 65 of the Uniform Act on Securities.
[171] See Article 67 of the Uniform Act on Securities.

The rationale for putting professional[172]equipment and motor vehicles under pledge without dispossession is obvious. In most cases, professional equipment is an example of personal property that may not be in the possession of the creditor if the creditor is to recover its loan. Professional equipment here refers to the equipment used by the debtor to exercise his profession. Non-possessory security interests can be created on professional equipment or motor vehicles to secure the claims of creditors or third parties who serve as the surety or guarantor to the enterprise.[173] The pledge of professional equipment and motor vehicle is constituted by a duly registered notarial or private deed; the latter must contain the requirement for a notarial deed as in the case of pledge in partnership rights.[174] The pledge shall only take effect upon the registration of the pledge at the Registry of the Court of First Instance in Cameroon which shall preserve the right of the creditor for five years commencing from the date of registration and lapses if not renewed.[175]

The requirement of registration of the agreement alone may not give enough protection for creditors in the case of motor vehicles. Besides registration, there ought to be another form of 'extra' notice to third parties who may readily want to buy the motor vehicle from the debtor or advance loan to the debtor on the strength of the car. This is imperative because the debtor may drive the car out of the jurisdiction where the registration was done and any search conducted at the new jurisdiction will disclose no clue of the former encumbrance. Consequently, Article 96 provides for the endorsement of the fact of the pledge on the originals of the motor vehicle

[172] The choice of the word 'professional' with regards to equipment by the translator is curious, though the meaning of the professional equipment is explained herein, probably the word 'tools' may have been a better word. However since that is the word chosen by the translator, the author can only inform the reader to give the meaning of the word 'professional' as used within the context.
[173] See Article 91 Uniform Act on Securities.
[174] See id, Article 94.
[175] See id., Article 95.

license[176]and other documentations of the motor vehicle. This doubly assures that any third party who engages with the debtor on the purchase of the car or advances loans to the debtor on the collateral of the car is fixed with notice of the former encumbrance.[177]

Whilst being in possession of the pledged property, the debtor is not permitted to sell all or part of the equipment that has been encumbered by the pledge without the approval of the secured creditor or in pursuant to a court order. Where the debtor has defaulted in repayment of the loan, the secured creditor can exercise his right of pursuit and proceed to sell the equipment and motor vehicle after obtaining a court order authorizing him to sell the properties.[178] However where the pledged property is sold by the debtor without the approval of the secured creditor or the court, the debt immediately becomes repayable and the secured creditor can commence a suit to recover the amount of the debt from proceeds of the pledged property or from the debtor's other properties. [179]

1.3.1.3. Pledging without Dispossession of Stocks under the Cameroon's Uniform Act on Securities

Stocks[180] under the Uniform Act on Securities include raw materials, produce from an agricultural or industrial concerns and goods meant for sale (inventory) of the company.[181]

[176] It is also called vehicle license in Nigeria and is the equivalent of motor vehicle certificate of title under the US.
[177] See Uniform Act on Securities (Guarantees) with commentaries from Martha Tumnde, Peter Monteh Tumnde and Anoukaha Francois, supra footnote 163, p. 61.
[178] See Article 98 Uniform Act on Securities.
[179] See id., Article 97.
[180] Stocks have so many meanings under the American literature. One of the meanings is that stocks are 'merchant's goods that are kept for sale or trade.' In this sense it is an inventory under Article 9 and also interchangeable with the word stock in trade which means an 'inventory carried by a retail business for sale in the ordinary course of business.' See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, pp. 1056 and 1059.

Whilst the Uniform Act on Securities lumped together the rules of pledging without dispossession of the above three items, Article 9 has different rules for using the above goods – agricultural goods, inventory and raw materials as security interests.[182] These categories of assets of an enterprise or company may be pledged without dispossession. If it were to be otherwise, the business of the company will surely grind to a halt because all these assets of the company are needed for production or sale to enable the company earn income needed for repayment. Pledge of these assets may be made by a duly notarized or private deed which shall contain all the same information required for the notarial deed in the case of pledge of a partnership rights.[183] The pledge takes effect upon registration at the Registry of the Court of First Instance in Cameroon and the registration shall preserve the rights of the secured creditor for one year from the date of registration unless renewed.

The debtor shall be responsible for taking care of the encumbered stocks under his care: he shall not diminish the quantity or value of the encumbered stocks and shall insure the stocks against risks. The debtor owes the secured creditor the duty to make available statement or records of the pledged stocks as well as accounts of all transactions involving them. The secured creditor or his agent can inquire and inspect the records of the pledged stocks. Where the value of the stocks have been reduced, the debt shall become payable immediately. Where the debtor fails to pay the

[181] Section 100 of the Uniform Act on Securities provides as follows: "Raw materials, produce from an agricultural or industrial concerns and goods meant for sale may be pledged without dispossession through the issue of a pledge document, on condition that a precise package of interchangeable goods is constituted before the issue of the stock."

[182] Under Article 9 farm products are treated differently to protect farmers. However raw materials, industrial concerns and inventories also have separate rules unless the raw materials and industrial concerns form part of the inventories of the business. Article 9 position is preferred in this case as the different rules takes into consideration the unique nature of the goods and the economic potentials e.g., the farm produce which has a special rule to protect the interest of farmers. See sections 9 – 302, 9 – 308, 9 – 310, 9 – 317, 9 – 320 and 9 – 322 of UCC. The equivalent of the pledge of stocks under Cameroon Uniform Act on Securities would be the fixed and floating charge in Nigeria system and this will be discussed alongside US floating lien and Cameroon's pledge of business later in this chapter.

[183]See supra, p. 61 for the content of the information required. See also Article 101 Uniform Act on Securities.

secured creditor upon the reduction of the value of the stocks, or where there is default in repayment after due date although there is no reduction in value of the stocks, the secured creditor may with the order of the court sell the pledged stocks to realize his security.[184]

Interestingly, whilst registration in other types of collateral is for a uniform number of five years, registration can only protect the creditor for only one year in the case of pledging of stocks. The reason for this difference in the number of years that the registration will preserve the right of the secured creditors can be attributed to the nature of security interest - stocks vis-à-vis others. Raw materials can easily be transformed into finished products of the company (inventories). Since there is no provision for security interest to continue in the proceeds of the sale of inventories as at is with the United States floating lien, it means that when raw materials are converted into inventories and sold, the security interest lapses.[185] Again apart from the raw materials changing into inventories, agricultural produce do not last long, their durability depends on preservation which may even be expensive. No matter the level of preservation, agricultural produce may not be as durable as equipment of the company, where the agricultural produce which forms the security interest of a secured party is rotten or the lifespan has elapsed then such security interest has become worthless and serves no value for the secured party. These may explain the shorter period of protection afforded to stocks when registered under the Act. On the other hand, the one year lifespan of the registration of these types of security may work hardship for the secured creditor who may be renewing the registration every one year to avoid the consequences of the lapse of the registration. Yearly renewal will certainly be expensive besides the burden and the administrative bottlenecks of the renewal. The constant renewal may also clog such file and this

[184] See generally Articles 104 – 105 Uniform Act on Securities.
[185] See John Spanogle, The Financing of Small Business: A Functional Analysis of Three Legal Models, supra footnote 38, p. 4.

will make searching difficult. Thus, there is need to increase the period of the validity of the registration of pledge of stocks to a minimum of three years, if five years may be unduly long for the pledge of this type of property.[186] This one year registration for pledge of stocks is in contradistinction with duration of filed financing statements under Article 9 with the exception of public finance or manufactured home transactions, transmitting utility financing statement and a record of mortgage that is effective as a financing statement filed as a fixture filing. Apart from the three instances herein, all other filed financing statement under Article 9 last for five years without any distinction of what types of assets that is the collateral.[187] For the reasons succinctly stated above, the five year duration for all filed financing is preferable; above all this makes for certainty in the filing financing statement.

Granting a security interest in stocks without a corresponding interest in its proceeds does not help secured creditor much. Inventories are by their nature assets of the companies which must be sold to purchasers and - once sold - the security interest of the creditor is cut off against a bona fide purchaser for value. Thus, the only way to protect the interest of the secured creditor is to grant such creditor security interest and priority in the inventory's proceeds. This is the case with Article 9 of the Uniform Commercial Code which has not only granted priority on the proceeds of the inventory, but also on the proceeds of the proceeds of the inventory. Surprisingly, this is lacking in the Uniform Act on Securities and it leads credence to one of this

[186] See the comments of Martha Tumde et al., to Article 102 of the Uniform Act on Securities in Uniform Act on Securities (Guarantees), supra footnote 163, p. 64.
[187] See section 9 – 515UCC. Detailed analysis of the duration of filed financing statements under Article 9 will be discussed in chapter 2 of this work.

research's objectives of reforming the Uniform Act on Securities with the provisions of Article 9 of Uniform Commercial Code.[188]

1.4. The Factor's Lien under the United States Pre-UCC Law

Originally, the word 'factor' meant an agent who took a percentage of the sale's price as commission upon the selling of the goods consigned to him by his principal.[189] But this earlier definition of a factor has undergone some changes, according to Gilmore, the definition of a factor changed at the dawn of the twentieth century and a factor was a person who lends money against the inventory or accounts receivable that the manufacturer put up as collateral but was not involved with the sale of the security.[190] In exchange for the loan, the factor was granted a security interest in the inventory or account receivable although this security interest required filing to be perfected under most states factor's lien statutes. Some of the state statutes also contained a clause that the factor's lien did not extend to after acquired properties since the factor's lien was not a floating lien that attached to the changing objects of the inventory. Where the after acquired property was intended to be part of the collateral, then a new security agreement and a new filing was required for perfection.[191] The first Factor's Lien Act was contained in section 45 of the New York Personal Property Law passed in 1911 and this type of

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[188] Probably this may be to the French law limited concept of "fruits and products' of the original collateral. By this concept, the French recognizes the first disposition of collateral and not further subsequent dispositions. See Heywood Flesig, Mehnaz Safavian, Nuria de la Pena, Reforming Collateral Laws to Expand Access to Finance, supra footnote 18, p. 33.

[189]See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 128; See generally Steffen and Danziger, the Rebirth of the Commercial Factor, 36 Colum. L. Rev. 744 (1936).

[190] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 128.

[191] See Douglas J. Whaley, Problems and Materials on Secured Transactions, (Aspen Publishers, 6th ed., 2003), p.14.

secured financing first arose and was mostly used by the textile industry although its usage was later extended to other areas.[192]

The twentieth century definition of a factor appears to be the most simplified; this is because factoring is somewhat complicated. The factor purchases the account receivables at a discount without recourse[193] against the borrower in case the account debtor defaults in repayment or even becomes insolvent.[194] Thus in form the transaction is an outright sale of the receivables and not a loan coupled with a security transfer.[195] A borrower who has account receivables that will be due in the future but has immediate need for funds may decide to use all or part of the account receivable to raise money. In such a case, a factor buys the account receivables of the borrower at a discount and the factor is saddled with the responsibility of collecting receivables from the account debtors who are notified of the interest of the factor in the accounts.[196]

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[192] It was extended to furniture in the case of In re Cut Rate Furniture Co., 163 F. Supp. 360 (S.D.N.Y. 1958); plumbing and heating equipment in the case of Perkins v. Lakeport National Bank, 139 F. Supp. 898 (D.H.N. 1955); and in electronic equipment in the case of In re Tele-Tone Radio Corp., 133 F. Supp. 739 (D.N.J. 1955). See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 132.

[193]Factoring can be 'with or without recourse' to the borrower in case the account debtor defaults. Without recourse, otherwise also known as non recourse sale of accounts is where the factor does not have any remedy against the borrower even if the account debtors default in payment. With recourse factoring on the other hand is where the borrower guarantees the factor that the account debtor will pay and as such where there is a default by the account debtor, the factor will collect from the borrower the amount in default from the borrower after an agreed time after invoice date which is usually 3 months. See Freedy Salinger, Factoring Law and Practice, (Sweet & Maxwell, 2nd ed., 1995), p.17.

[194] See the agreement in Shapiro Brothers Factors Corp. v. Cherokee Silk Corp., 114N.J.L. 356,176Atl. 893 (1935) as cited in Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p.131.

[195] In the case of Chow Young Hong v. Choong Fah Rubber Manufactory [1962] A.C. 209 at 216, Lord Delvin stated as follows: "there are many ways of raising cash besides borrowing. One is by selling book debts […]" quoted by Freddy Salinger, Factoring Law and Practice, supra footnote 193, p.4.

[196]"Factoring is a form of asset – based finance where credit extended is based on the value of the borrower's accounts receivable – that is, payment owed by the borrower's customers. Unlike the other main forms of asset – based finance, asset – based lending, the receivables are purchased by the factor rather than used as collateral in a loan. That is under factoring title ownership of the receivables shifts from the seller to the factor. Factoring also typically involves more than just financing and generally includes two other services: credit and collections." See Marie H. R. Bakler, Leora F. Klapper, Gregory F. Udell, Financing Small and Medium – Size Enterprises with Factoring : Global Growth and its Potentials in Eastern Europe (May, 2004), p. 5. World Bank Policy Research Working Paper, No. 3342, available at SSRN: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=610386 > last visited on the 8th of December 2010.

Factoring is a financing arrangement and has always been so regarded; both the accounts receivable statutes and Article 9 of the code covers both recourse and non recourse factoring. In substance the factor is a supplier of working capital, not a joint venturer in a business enterprise. In that sense one may properly describe him as a financer, a banker or a lender of money against security. It is apt to differentiate factoring from receivable financing – albeit briefly herein.[197] Whilst factoring involves the purchasing of accounts and consequently the factor is therefore saddled with the responsibility of collecting the account from the account debtors, it is not so in account receivable financing. In receivable financing, the creditor does not buy the accounts but only grants loan to the debtor on the collateral of account receivables. Thus the creditor becomes an assignee on the account receivables: i.e., the account receivables provide security for the loan. The implication of this is that the debtor still collects the receivables from the account debtors.[198] It is only upon default of the repayment that the creditor may have recourse on the collateral of account receivables to realize the securities.

1.4.1. Factoring in Nigeria

Factoring is an emerging area in secured credit financing in Nigeria. There appears to be no literature or law regulating this area of law[199] but it is exploited by banks.[200] There is inventory[201]

[197] Receivable financing will be discussed in details in chapter 2 of this work.

[198] The creditor/assignee notifies the account holders just as it is the case with factoring. The secured creditor in receivable financing also files a financing statement to perfect his security interest under section 9 – 310 UCC.

[199]See J. O. Fabunmi, Contract Registration and Perfection: The Legal Basis for Issuing and Using Warehouse Receipt/Warrant (Negotiable/Non – Negotiable) as Security for Trade Finance-Issues/Options under the Nigeria System, p.2. Being a paper presented at a workshop organized by Securities & Exchange Commission in collaboration with ACE-Audit Control and Expertise S.A. Ltd at Sheraton Hotel Abuja between the 18th – 22nd of March 2002 available at < http://jofsolicitors.com/images/stories/contractregistration.pdf >; last visited on the 22nd of April, 2011.

[200] There appears to be website containing names of six companies doing factoring in Nigeria although there may be more companies not listed on the website. However with the description of the work they do, it appears that the companies are not factoring houses. It appears that they are more into clearing of goods of importers and helping the

and account receivable financing in Nigeria which is done mainly by the banks and not factoring houses. As already stated above, under the law of United States, factoring may imply an outright purchase of the account receivables by the factor and not having recourse to the borrower in case of insolvency of the account debtors. The closest to factoring in this regard was the concessioning of the access gate at the 'Murtala Muhammed International Airport' in Lagos to the financing company '1 Cube West Africa Limited' for a monthly remittance of N40m (about $350,000) by the Federal Airport Authority of Nigeria (FAAN).[202] By paying the agreed monthly remittance to FAAN, 1 Cube West Africa Limited buys FAAN's account receivable for the month. The company (1 Cube West Africa) collects its money from the account debtor i.e., the toll gate collected from the users of the road for the month.

There appears to be no factoring transactions and same is not regulated by any law in Cameroon. The reason for this is not far-fetched, the secured transaction laws in Cameroon and Nigeria are still largely unreformed. The idea of factoring being done by specialized industry or banks is unknown in Cameroon. In Nigeria, though there is factoring, its concept is not fully developed as it is in the United States and the area is dominated by commercial banks in Nigeria. Factoring is an unexplored aspect of secured transactions laws in both jurisdictions and the proposed reforms might trigger the development of it. Consequently, this kind of new paradigms to secured financing is good for the secured financing terrain in Cameroon and Nigeria. Factoring by factoring houses will provide more opportunities for business financing as it will promote

exporters to export their goods than the traditional work of factoring. The list of the supposed factoring houses is available at < http://www.list-of-companies.org/Nigeria/Business_Services/International_Settlement_Services/Factoring/ > last visited on the 6th of April, 2011.

[201] Inventory financing will be discussed in details under field warehousing in Nigeria under the next topic.

[202] See Kenneth Ehiagator, Unanswered Questions about Lagos Airport Toll Gate Concesioning, The Vanguard Newspapers of January 18, 2010 available at < http://www.vanguardngr.com/2010/01/unanswered-questions-about-lagos-airport-tollgate-concessioning/ > last visited on the 6th of December 2010.

competition in the secured financing which is dominated by banks. This will invariably increase the propensity to access credit which will propel growth and development of the economies of Nigeria and Cameroon.

1.5. Field Warehousing in the United States

In the United States, this was a late nineteenth century device intended to facilitate the use of inventory as collateral for getting credit. While the trust receipt and the non-possessory factor's lien were considered as something new,[203] field warehousing was thought to be something old and familiar because it had most of the attributes of a pledge which is as old as humanity.[204]

In field warehousing there are three parties: the borrower, lender and field warehouseman. The lender employs a warehouseman who leases a space on the borrower's premises and sets up a warehouse in that space where the borrower's inventory is stored. Then the warehouseman issues warehouse receipts covering the goods in storage and delivers those documents to the lender. The warehouse receipt will have to be given back to the warehouseman before the warehouseman turns over the goods in the warehouse to anyone; this makes the warehouse receipt a negotiable instrument. In effect the warehouse receipt takes the place of the goods and the receipt is pledged to the lender in return for the loan of money. A lender's security interest is

[203] Trust Receipt and non-possessory factor's lien were thought of something new and as a result could not win general acceptance until both security devices were brought under statutory control and inundated with the requirement of filing. See generally chapter 4 and 5 of Grant Gilmore, Security Interests in Personal Property, supra footnote 51.

[204] The attributes of pledge which bear resemblance to the field warehousing are a security interest may be perfected under the code without filing where the collateral is in the possession of the secured party. Secondly, the secured party have a constructive possession i.e. possession may belong to a third party acting on behalf of the secured party. Where the debtor is in possession or has unrestricted access to the pledged property, the security interest remains unperfected and pledge will not be constituted. See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 134.

perfected by the possession of a warehouse receipt without the need for filing. The field warehouse is the same as the normal warehouse except that the field warehouseman meets the goods instead taking the goods to warehouse; [205]i.e., in almost all the cases and especially where the goods are too bulky and difficult to move easily the field warehouseman goes to where the goods of borrower are stored, leases a store, packs the goods in the store, guards the goods and issues a warehouse receipt for the goods which is pledged to the lender. On repayment of the goods, the warehouse receipt is returned to the borrower who presents the receipt to the field warehouseman. Upon presentation of the receipts, the field warehouseman releases the goods to the borrower and packs up from the store and leaves debtors premises.

One last thing to note is that the field warehouseman in most cases is actually a regular employee of the borrower, though for the tenure of the field warehousing operations he is temporarily employed by the field warehouse company. This most at times results in conflict of interest in the duties and obligations of the field warehouseman to the field warehouse company, the lender and the debtor.[206]

1.5.1. Field Warehousing in Nigeria and Cameroon

In Nigeria, besides the terminal[207] warehouses which are owned and managed by the businessmen solely for the purposes of storing their inventories, there are other warehouses

[205] See Douglas Whaley, Problems and Materials on Secured Transactions, supra footnote 191, p.14.
[206] Id., p.14.
[207] Terminal warehouse is generally called 'parking store' by small and mid scale traders in Nigeria. This is where the traders park away their inventories for lack of available space in the display shops. Many of the traders use the adjoining vacant spaces around their stores as their warehouse to keep their inventories handy for any buyer who may be looking for such goods. It is not uncommon for a buyer to be told that (especially motor spare shops) that the goods that the buyer came for is in the 'parking store' and thus the purchaser should exercise patience until it is brought by an employee from the 'parking store.' However what many of business men and women have failed to realize is that the inventories kept in the 'parking store' are good collateral for secured financing.

called the field warehouses.[208] These field warehouses are operated by specialized companies and they serve dual purposes: besides keeping the inventories safe, the goods stored therein can be utilized as good collateral for secured financing by the businesses that own them. These field warehousing are regulated by the rules and regulations for warehouse operators drafted by the Abuja Securities and Commodity Exchange Plc.[209] A field warehouse company is expected to register with the Abuja Security and Commodity Exchange. Upon the receipt of goods or inventories, a warehouse company is obliged to issue a warehouse receipt as title document of the commodities in its store. The warehouse receipts shall state the name of the commodity in store, location, date of storage monetary value of the item in store, grade, weight and number of bags. The receipt shall also indicate whether or not the commodities have been pledged. Where the warehouse receipt has been endorsed to somebody other than the person named in the receipt, the warehouse register should indicate such endorsement.[210] There are penalties for non-

[208] "Field warehousing is a financial device. It thus differs from its ancestors, terminal warehousing, which is primarily used for storage and distribution. The technique of field warehousing may be sketched in broad outline. An independent warehouse company acts as the custodian of inventory against which a businessman, usually a manufacturer, seeks to secure credit." See The Yale Law Journal, vol. 69, No. 4, (March 1960), p. 663, available at < http://www.jstor.org/stable/794451?seq=1 > last visited on the 8th of April 2011.

[209] The Abuja Securities and Commodities Exchange was originally incorporated as a Stock Exchange on June 17 1998. It commenced electronic trading in securities in May 2001 and was later converted into a commodity exchange on August 18 2001 and brought under the supervision of Federal Ministry of Commerce. Amongst other functions of the Exchange, it regulates the activities of warehouse operators.

There are pre and post registration requirements for field warehouse operators. Some of the pre-registration requirements are as follows: the warehouse operator must show proof of registration with the Securities and Exchange Commission and Federal Produce Board; the warehouse must be insured by reputable insurance companies; all commodities in the warehouse shall all times be insured; every insurance shall provide that proceeds of the policy be payable to holders of delivery certificates backed by warrants or receipts issued for commodities stored in the warehouse; the warehouse must be a body corporate with a minimum share capital of not less than N100million;it must have storage capacity of not less than 500 metric tons and must be managed by people who have track records in warehouse management.

Some of these pre-registration conditions are to ensure that crooks do not get license to operate field warehouse and to make the Abuja Security and Commodity Exchange the true gatekeeper of field warehouse companies. Information about the Abuja Securities and Commodities Exchange can be accessed at < http://www.abujacomex.com/pages/about-us/brief-on-the-exchange.php > last visited on the 18th of November 2010.

[210] See generally the Rules and Regulations for Warehouse Operators made by the Abuja Securities and Commodities Exchange available at < http://www.abujacomex.com/pages/posts/warehouse-rules-and-regulations358.php >last visited on the 18th of November 2010.

compliance with the rules and regulations governing the field warehouse companies in Nigeria.[211]

From the rules above, it is clear that a company can use its inventory stored in a field warehouse as collateral for credit and issue a warehouse receipt which will represent the value of the collateral. There are field warehouse companies in Nigeria.[212] Banks in Nigeria extend credit facilities to their customers on a Tripartite Warehousing Facility. However the operation of the Tripartite Warehousing Facility is slightly different from the normal field warehousing security device in the United States. In a typical Tripartite Warehousing Facility a bank, extends credit facility to a debtor based on the debtor's inventory in the warehouse which serves as the collateral. To secure the interest of the bank, none of the parties can enter the warehouse or remove any goods from the warehouse without the concurrence of the other parties (bank, field warehouse company and debtor). To this end, the lock of the warehouse is secured in such a way that each of the three parties holds a vital key needed to open the warehouse and each party or its representative must be present before the warehouse is opened. This is different from what is obtainable in the United States where the field warehouse company has the responsibility of securing the lock of the warehouse and is solely responsible for the safety of the goods in the warehouse. The second difference is that in the United States, the field warehouse company provides the warehouse receipt which is the title document to the goods in the warehouse. This

[211] For example, "any misrepresentation in the issuance of warrants or receipts by any accredited warehouse is considered to be a grave violation that endangers the integrity of the delivery process. Such violations is subject to a penalty to be imposed by the Clearing House Committee of up to 10% of the value of such warrants or receipts issued, based on current market value of the underlying commodity with the minimum penalty being N200,000 or any amount approved by the board." See id., on the clause on the Misrepresentation on Warrants or Receipts of the Rules and Regulations for Operator made by the Abuja Securities and Commodities Exchange.

[212] List of warehouse companies in Nigeria can be found at < http://www.list-of-companies.org/Nigeria/Business_Services/Logistics_Services/Warehouse_Services/ > last visited 18th of November 2010.

field warehouse receipts gives access to the holder or the endorser of the goods in the warehouse. However in Nigeria, whilst theoretically the warehouse company ought to provide the warehouse receipts to the goods going by the rules and regulations for warehouse operators, in practice the banks provide the warehouse receipts in order to protect their interests. To have access to the goods the debtor pays into its loan account with the bank the amount of the value of goods it wants from the warehouse and the bank issues a warehouse receipt for the commensurate value of the goods and this gives the debtor the access to the quantity of goods as stated on the receipt in the warehouse. The above two variations of field warehousing in Nigeria are to prevent collusion of the field warehouse company and the debtor in fraudulently dissipating the inventories in the warehouse without the approval of the bank as was the situation in the case of Triana Limited v. Universal Trust Bank Plc.[213]

The question becomes how to curb this practice of collusion of the warehouse company with the debtor in dissipating the goods in the warehouse company which provides the security for the

[213]In the case of CA/K/69/2004 Triana Limited v. Universal Trust Bank Plc, Triana Limited is the warehouse company, Universal Trust Bank Plc is the secured creditor and Globus Enterprises Limited is the debtor. The three parties entered into a tripartite warehousing management agreement on the 27th day of April, 1998 wherein the Appellant was supposed to warehouse skins belonging to Globus Enterprises Limited and could only release the warehoused skins upon the permission of the Respondent. The said agreement had an arbitration clause. During stock taking in September, 2000, it was discovered that 16,165 skins valued at N8, 082,500.00 were missing from the custody of the Appellant. The Respondent who financed the business through a credit facility claimed the sum of N8, 082,500.00 from the Appellant as costs and value thereof. The Appellant denied liability and the matter, pursuant to the Arbitration clause, went to arbitration. Chief Bayo Ojo SAN, Mrs Funke Adekoya SAN and Mr. M Bello Adoke were appointed as Arbitrators. Chief Bayo Ojo SAN was the Presiding Arbitrator.

The Arbitral Tribunal after considering the evidence before it as filed by both parties held that Triana Ltd as the warehouse company was obligated to Universal Trust Bank to safe custody keeping of the skin in the warehouse which was the security interest for the loan facility. This being the case the warehouse company was liable for the 16,165 skins missing from the warehouse. Accordingly, the Arbitration Panel awarded the Respondent the sum of N8, 082,500.00 being the value of the missing skins. Dissatisfied with the decision of the panel, the warehouse company – Triana Ltd- filed a suit at the High Court to set aside the award on the ground that Mr. M, Bello Adoke appointed by the warehouse company did not disclosed to the warehouse companies of facts which would have affected his appointment as an arbitrator in the case. Both the High Court and Court of Appeal dismissed the application to set aside the award.

The full report of this case is available at < http://www.courtofappeal.gov.ng/view_judgements.php?v=fa&id=517 >; last visited on the 19th of November 2010.

loan. There is no reason why the field warehousing financing should differ in Nigeria from what is the normal practice of field warehousing in the United State because of the activities of few warehousing companies who collude with the debtors to short change the system. One obvious way of reducing the connivance is holding the warehouse company liable to the secured creditor for any missing good in the warehouse company's possession as was in the case in Triana Limited v. Universal Trust Bank. In addition to holding the warehouse company liable for the loss, the secured creditor can also apply to the Abuja Security and Commodity Exchange to delist the warehouse company from the list of approved warehouse company. This will serve as punitive deterrent to other warehouse companies.

However, there is a dearth of information on the degree of utilization of this type of business financing and is not regulated by law in Nigeria yet. It is also important to note that field warehousing is not looked upon and is not treated as part of secured transactions law but rather something completely different from it; which could be explained by the heavy compartmentalization of the system and the lack of a unitary concept of security interests. Nevertheless, it is pertinent to point out that there are field warehouse companies whose activities can positively impact on business financing in Nigeria. Thus, this is a justification for regulating field warehousing under the proposed transplantation of Article 9 to Nigeria secured transactions law. By bringing fields warehousing under the same heading through the herein proposed secured transactions law reform, the unitary concept of security interests would presumably produce unprecedented benefits for Nigerian businesses and economy.[214]

[214] See infra chapter 2 for the discussion on the meaning and importance of the unitary concept of security interest under Article 9 and the consequence of its proposed transplantation to Nigeria.

In Cameroon, only terminal warehouses of the sort that is also known in Nigeria and used by small and mid scale traders seem to exist at this point in time. Nobody has really thought about using the goods in the warehouse as possible collateral for secured financing. Besides, the absence of industry – field warehouse companies – needed to actualize this will hinder the use of the field warehousing as a form of security for a loan. In essence, herein lies another justification for the reform and the transplantation of elements from UCC Article 9 to Cameroon as well. This way, the hitherto locked dead assets could be rejuvenated and made use of as good collateral for loans.

1.6. Trust Receipts in the United States

The independent security device named 'trust receipt' arose out of the commercial expediency in the nineteenth century without any previous history or genealogy beyond the last quarter of the nineteenth century.[215] It later became statutory in most states after the promulgation of the Uniform Trust Receipt Act in 1933. The Act itself which served as a model for many of the provisions of Article 9 was also the source of the Trust Receipt statutory authority prior to the promulgation of Article 9. Propounded by an article written by Karl T. Frederick,[216] he postulated that trust receipt was basically a chattel mortgage which for commercial expediency escaped the requirement of filing yet the court validated it against the creditors of the importer – buyer – trustee although the exception to filing could not *"be justified beyond the limits of the particular transaction for which the device was created."*[217] Trust receipt is a tripartite transaction involving the seller – entrusting bank – buyer/trustee wherein the title to the trust-

[215] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 86.
[216] See Karl Frederick, The Trust Receipt as Security, 22 Colum. L. Rev. 395, 546 (1922) cited in Grant Gilmore, id., p. 92.
[217] 1d., p. 92.

receipted goods moved from seller to the bank (the bank being the holder of the title during the trust receipt transaction) and from the bank the title is passed directly to the purchaser whilst the bank security interest shifts to the proceeds of sale.

A classical example of a trust receipt transaction according to Frederick will be the financing of importations or domestic purchases.[218] It cannot be used in a transaction where the buyer – trustee had the goods or title before the entrusting bank made its own advance, also the bank must always make its advance to and receive the title directly from a person other than the buyer.[219] If in a trust receipt transaction this rule was violated, then the transaction would be treated as a chattel mortgage in all respects and such transactions would lose the exemption from filing.

The advantages of the trust receipt were immense to the lenders as it removed the burden of filing and its attendant high costs. Again, since duration of trust receipt transaction was for a short time, filing each of these short terms financing which would have been liquidated soon thereafter would have cluttered the files.[220] It would have made the files very untidy and increase the burden of conducting searches in the files. Besides the exemption from filing, in a trust receipt transaction, the automatic shift of the lender's security interest from goods to the proceeds of the sale and also the fact that the trust receipt lender or entruster could entrust the

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[218] See Karl Frederick, The Trust Receipt as Security, supra footnote 216, p. 93.

[219]Omotola sees the Trust Receipt security device as falling under the functional theory of security and used mainly by people engaged in export and import. According to him, "a trust receipt is a document by the pledgee of goods or documents of title thereto, when such are released to him by a bank in order that the goods be sold and the loan repaid or they be warehoused." See Jelili Omotola, the Law of Secured Credit, supra footnote 60, p. 11.

[220] According to Spanogle, "The trust receipt had long been recognized in international transactions as a device for securing a creditor's interest in goods in a warehouse during the short-term possession of the goods by the buyer." See John A. Spanogle, William Wallace Kirkpatrick, Security Interests US Style: A Device for Financing Small Businessmen and Protecting Yourself in Liquidation, supra footnote 117, p. 118.

goods to the borrower with full liberty of sale made the device flexible and very attractive to lenders.[221] The promulgation of Uniform Trust Receipt Act in 1933 formalized this area of law until the coming into being of Article 9. The enactment of Uniform Trust Receipt of 1933 gave the American financiers a 'new style' trust receipt device.[222] Filing was now required for trust receipt devices. The new trust receipt device extended to after-acquired property and could secure future advances to the debtor. It also allowed secured financing of stock in trade and was used to finance the stock of automobiles by dealers: i.e., floor-plan.[223] In floor-plan financing, the title to the automobiles remained with the manufacturers and not the dealers and it passed onto the buyers directly. In event of insolvency of the dealers the creditors of the dealers could not have recourse to the stock of the automobiles in the dealer's warehouse. However as earlier said, the manufacturers would file financing statement to perfect their interests in the said automobiles.

1.6.1. Trust Receipts in Nigeria and Cameroon

There appears to be no trust receipt financing in Nigeria and Cameroon. This may either due to the complexity of this type of financing i.e., the entrusting bank being the holder of title to the goods during the trust receipt transactions but without being liable for warranties. This complexity of the rule may be difficult for the entrusting banks to keep in Nigeria and Cameroon and this obviously will saddle the bank with more obligations both to the seller and to the buyer/trustee. Financing of automobiles in Nigeria by the dealers depends on whether the automobile is a brand new car of a fairly used car (second hand car). Where it is second hand car,

[221] See Grant Gilmore, Security Interests in Personal Property, supra foot note 51, p. 93.
[222] See John Spanogle, William Wallace Kirkpatrick, Security Interests US Style: A Device for Financing Small Businessmen and Protecting Yourself in Liquidation, supra footnote 117, p.118.
[223]Id., p. 118.

dealers import cars from Europe and America, or cross over to neighboring countries like Togo or Cotonou in Benin Republic to buy cars in cash and then sell them to buyers on a cash and carry basis. [224] Whether second hand cars are imported from Europe and America or from the neighboring countries, dealers pay in cash to the sellers and do not get credit to pay the sellers. Where the cars are sold brand new, it is mostly sold by a representative of the manufacturing company in Nigeria. Except for Peugeot that has an assembly plant in Nigeria, no other car is manufactured or assembled in Nigeria, consequently, most of the car manufacturing companies set up their branches in Nigeria. For example, Toyota, Mercedes Benz, Honda, BMW as well as Peugeot, have registered companies in Nigeria which they use in selling their products and offering after sale maintenances to their customers. Since the car retail companies are branches of the parent manufacturing companies, the manufacturers simply display their cars at their branches premises and this would not necessarily connote a floor-plan contract. However, there are other very few independent dealers in brand new cars in Nigeria apart from the branches of these manufacturing companies. It may well be that there are other forms of arrangement between the car manufacturers and the few independent dealers in the form of a floor-plan transaction for the sale of the manufacturers' products. There is no law in Nigeria governing a floor-plan transaction, as stated earlier, parties could enter into such contract and the court will give effect to their agreements if it is not illegal. The dangers in such a floor-plan contract in

[224] Like in Lagos State there is a popular place where second hand cars are sold which is called Berger car sales. There are more than 50 dealers who cross over to the neighboring countries to buy cars or import from some of the European countries like Germany, Austria, Belgium, and Italy and then exhibit the cars for sales at this sales outlet. All the cars therein have been paid for by the dealers. What is popular in Nigeria and within the knowledge of the author is that dealers make arrangement with buyers where a buyer gives trusted dealer (trustworthy here comes in mostly by someone recommending a dealer whom the person had used before) money ahead of time to help him buy a car in Togo or Cotonou Benin Republic.

In this case, the buyer gets it cheaper than it would have been had the buyer come to buy from the ones in the dealers shop. Besides being cheaper, asking the dealer to purchase a car is advantageous because since it is a fairly used car, the dealer will chose the right one that has less faults or potential faults, again and more importantly, the chances are slimmer that the Nigerian Customs Officials will seize the cars at the border since the dealers know how to cross the cars with less risk.

Nigeria is that a dubious dealer can create a subsequent floating or fixed charge or other forms of security device over such cars and the interest of such secured creditor would supersede over that of the manufacturer since the floor-plan contract is not recognized under the Nigerian law. However, where there is the unitary concept of security interest as would be proposed herein, and floor-plan financing would be subsumed as part of secured transactions law. The implication of this is that the priority rules would spell out the priority position of a floating chargee vis-à-vis a manufacturer of car who entered into floor-plan transactions with a dealer, and thus the fraudulent intention of the dealer above would be put on check.

1.7. Conditional Sales and its Derivatives in the United States

Conditional sale transaction was a device which was aimed at escaping the requirement of filing brought about by chattel mortgage by manipulating with the retention of title clauses and as a result the device was not favored by the courts.[225] Though few courts accepted this type of financing as legitimate, majority invalidated the conditional sales for failure to file because the conditional sale created secret lien that failed to give notice of the interest in the property.[226] The term conditional sale is a sort of purchase money security transaction wherein, whilst the buyer have taken the possession of the goods, the title to the goods was retained by the seller or his assignee until the full purchase price of the goods had been paid. The full purchase price is usually paid by installments as agreed between the seller and the buyer. It is a sort of purchase money security transaction because it is only used to finance the purchase price of the goods plus expenses connected with or incidental to, the sale or the financing transaction. In Bucyrus-Erie

[225] See Frederick M. Hart, Nathalie Martin, Secured Transactions, supra footnote 152, p. 13, see also Grant Gilmore, Security Interests in Personal Property, supra foot note 51, p. 131.
[226]See Frederick M. Hart, Nathalie Martin, Secured Transactions, supra footnote, 152, p. 13.

Co. v. Casey,[227] the bankrupt purchased three excavating machines under conditional sales contract which contains the following clause "*Title to the machines shall remain in the vendor until the purchase (including any modifications and extensions, and whether evidenced by notes or otherwise), and all other sums which may be or become due from you to us shall have been fully paid in cash.*" In line with this clause the vendor claimed in vendee bankruptcy in addition to the remaining purchase price in the goods, an item which represented the cost of repairs which the vendor had made to the machines and another item vaguely referred to as an 'open account'. The court in Pennsylvania relying on Section 1 of Pennsylvania Uniform Conditional Sale Act[228] held that the only obligations covered are the purchase price and other transactions incidental to the sale, consequently the court added the cost of repairs to the debt secured but excluded the 'open account' item as not being secured under a conditional sale transaction.

Conditional sale became a statutory law in some states. It had some semblance with chattel mortgage and indeed most of the reported cases were aimed at determining whether a given transaction was a conditional sale or a chattel mortgage. Where the court determined that a particular transaction was a chattel mortgage, it had a fatal consequence as the transaction will be void as against third parties for lack of filing. This resulted in many states enacting a statute that required conditional sale to be filed. Once the legislature passed a statute requiring conditional sale to be filed, other devices emerged which sought to evade the burden of filing by giving a different name to the transactions for example bailment, lease and consignment. In most cases the court will hold that such a transaction is a conditional sale which has a disastrous

[227] 61 F. 2d 473 (3d Cir. 1932).
[228] Section 1 of the Pennsylvania Uniform Conditional Sale Act provides "[…] any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price or upon the performance of any other condition or the happening of any contingency."

consequence to the lender for lack of filing. With the enactment of the Uniform Commercial Code Article 9, the Uniform Conditional Sale Act has been abolished and the conditional sales, just as its derivatives are now subject to Article 9.

1.7.1. Functional Equivalents of Conditional Sales in Nigeria: Hire Purchase Transactions

There is no conditional sale law in Nigeria.[229] However hire purchase and leasing contracts[230] are the functional equivalents of conditional sale in Nigeria. This means that the economic purpose of conditional sale – the sale of goods to the purchaser whilst the seller retains the title in the goods as security for payment is performed by hire purchase transactions and leasing contracts. However whereas conditional sale is brought under the Article 9 and treated as a transaction capable of creating a security interest under Article 9, hire purchase transaction and leasing contracts in Nigeria are regulated under different laws outside the sphere of secured

[229] However, in United Kingdom where Nigeria copies most of her laws, the three forms of title retention financing devices are all in use: the hire purchase, conditional sale and leasing. The author does not know any reason for the omission of conditional sale law in Nigeria. But considering the fact that leasing bill has not been passed as yet in Nigeria but in the final stages of being passed into law by the legislature, it is not out of place to believe that maybe conditional sale law may also be introduced in no distant time.

[230] Leasing contracts are regulated presently by the agreement of the lessor and lessee. As at present there is no Leasing Act, however, the leasing bill would be enacted into law before May 29, 2011 when the tenure of the present government will end. The Equipment Leasing Bill 2011 has been passed by the Nigerian lower house i.e., Federal House of Representatives. The Equipment Leasing Bill 2011 has passed through the first reading in the Nigerian upper house, - Senate - and there are genuine expectations that the Senate would pass the bill and then the bill would be sent to President for his assent to make the Bill a law before the end of the term of the present government on the 29th of May 2011. See Nigerian Tribune Newspapers of 24th of January 2011 with the caption "Leasing Bill sails through first reading in Senate" available at < http://www.tribune.com.ng/index.php/money-market/16507-leasing-bill-sails-through-first-reading-in-senate- >; last visited on the 28th of February 2011.

However, the author has seen the text of the bill that is before the Senate which has been passed by the lower house. The text is not likely going to change and this work will comment on the text of the proposed bill during the discussions on leasing contracts in Nigeria. It will be recalled that Equipment Leasing Bill was passed by both houses of the National Assembly (Senate and House of Representatives) in 2007, but was not assented to by the President before end of the term of that of that government (May 29th 2003- May 28th 2007). This ended that process to enact Equipment Leasing Bill into Law as any bill passed by legislature but not assented to by the President within the tenure of the government elapses, the new legislature in the new government will have to reconsider the bill through its legislative procedures and re-pass the bill again before sending such bill to the president for his assent during the new term of the government. Consequently the Equipment Leasing Bill was re-introduced again by this present government which terms runs from May 29th 2003- May 28th 2011.

transactions law in Nigeria. For example, hire purchase contracts are governed by the Hire Purchase Act, Chapter H4 Laws of the Federation of Nigeria 2004 while leasing contracts would be regulated under proposed Equipment Leasing Bill of 2011 when it would be finally enacted into law.

Hire-purchase[231] is a form of title financing transaction where a sale credit is granted to the hirer (bailee) by the owner (bailor or seller), however there is retention of title clause[232] in the contract which permits the seller to retain the title to the goods until the purchase price is fully paid.[233] Just like the English law, it is not considered in Nigeria as a transaction capable of creating a security interest. The reason for this is that in Nigeria - as in English law - to create a security interest, there has to be a grant of an interest in the collateral by the debtor to the secured party, and hence the law does not reckon that retention of title by the secured party can create a security interest.[234]

It is apt to note that many companies are engaged in leasing contract transactions in Nigeria and numerous economic activities are going on in this area of law more than in hire purchase

[231] Section 20 (1) (b) of the Hire Purchase Act Cap H4 Laws of the Federation of Nigeria 2004 defined the term 'hire-purchase' to mean "the bailment of goods in pursuance of an agreement under which the bailee may buy goods or under which the property in the goods will or may pass to the bailee, and "hire purchase agreement" shall be construed accordingly; and where by virtue of two or more agreements , none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the bailee may buy the goods, or the property therein will or may pass to the bailee, the agreements shall be treated for the purpose of this Act as a single agreement made at the time when the last of the agreements was made."

[232] McCormack defined ROT clause as "a clause in an agreement whereby the party who is transferring property under that agreement seeks to reserve to itself the ownership of that property until certain specified conditions have been met." See Gerard McCormack, Reservation of Title, (Sweet & Maxwell, 2nd ed., 1995), p. 1.

[233] See Nat Ofo, Hire Purchase Legislation in Nigeria: Making a Case for Reform, May 11, 2010 available at SSRN: < http://ssrn.com/abstract=1605484 >; last visited on the 15th of April, 2011; see also K. I. Igweike, Nigerian Commercial Law: Hire Purchase (Malthouse Press Limited, Lagos, 2nd ed. 1999).

[234] See Jelili Omotola, The Law of Secured Credit, supra footnote 60, pp. 13-14; see also E. Sykes & S. Walker, The Law of Securities, (The Law Book Co. Sydney, 5th ed., 1993), p. 14; see Roy Goode, Legal Problems of Credit and Security, supra footnote 63, p. 11.

transactions. One possible reason may be the emergence of new companies that came into being exactly to exploit leasing contracts in Nigeria,[235] though the implied general acceptance of leasing contracts as newcomers by the society has also played a role. Again there are many advantages inherent in leasing transactions.[236] Of not less importance is that hire purchase transaction law in Nigeria is ill-suited to modern business needs as it imposes unjustified limitation on the value of transactions and thus drives away economic activity in this area. The law was originally enacted in 1965 and was copied from the English Hire Purchase Act of 1938. Except for the slight amendment to the law in 1970, the law has remained extant as it was enacted in 1965.[237] This explains why the monetary limit of goods other than motor vehicles that

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[235] There are conservatively over 100 leasing companies in Nigeria with the prominent ones being C&I Leasing Plc, with address at No. 1 Leasing Drive, Off Bisola Durosinmi Etti Drive, Lekki Phase 1 Lagos; website - < http://www.c-ileasing.com >; Abuja Leasing Company Ltd, Address – Tofa House (3rd Floor), Central Business District Abuja, website - < http://www.abuja-leasingcompany.com >; Fleet Derivatives Ltd, Address Suit 61 Dolphin Plaza, Corporation Drive, Dolphin Estate, Ikoyi Lagos, website – < http://www.fleetderivatives.com >. The list of all leasing companies can be found at < http://www.nigeriagalleria.com/Business_Services/Equipment_Leasing_f.html > last visited on the 19th of November 2010.

[236] The advantages of leasing include but are not limited to the following: giving a business the ability to acquire capital intensive equipment with minimal up-front cost and a spread of the remaining costs; provides the small and medium scale businesses the opportunity to easily acquire assets which otherwise, they would have been asked to furnish an acceptable bank collateral were they to have approached the banks for loan for the assets; leasing provides tax advantage for the lessee; because the lessor did not part with the title to the leased equipment, the lessor is protected from lessee creditors and trustee in bankruptcy upon the insolvency of the lessee. See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p.76.

[237] Another example is the current Nigerian Evidence Act which was copied from the English Evidence Act of 1945; it has not been revised since then. This has prevented the admissibility of evidence in such new technological forms as videos, e-mails, phone text-messages because when it was copied these forms of evidence were not in use All the calls from legal practitioners to amend the Evidence Act to accommodate the recent changes in getting admissible evidence have not materialized as yet.

Commenting on the laxity of Nigerian government in not revising its laws copied from British even though such laws have obviously become outdated and have even been revised in the country of origin, Professor Imran Smith stated as follows: "The developed world is attuned to the idea of change and within the context of law as an instrument of social dynamics, reforms are introduced to meet the new perspectives envisioned by the realities of our times. In the area of land tenure in particular, it is interesting to note that the English land tenure system which was received into the Nigerian legal system many decades ago has been transformed in the country of its origin, to meet the challenges posed by continuous changes in land use and management structure since the Norman conquest in 1066. Within the English system of land tenure, orthodox policies, rules and practices have given way to socio-economic realities of our time including the positive impact of globalisation.

Unfortunately in Nigeria, the feudal system of land tenure, though dead in its country of origin, the relics of it still rule us from the grave with many anachronistic western-style laws still being retained, in most cases, to the prejudice of the socio-economic realities and demeaning to the modern concept of land tenure." See Imran Smith, the Act applies to is incongruous. The limit of the value of goods other than motor vehicle to which the Act can apply to cannot be in excess of N2, 000 (about $13).[238] The result is that this and other archaic provisions in the law have severely limited the use of hire purchase agreements both, in consumer and business financing. It is obvious that there is absolutely nothing of value that can be covered by the extant provisions of Hire Purchase Act. This is part of the problems that non-revisions of Nigeria law can cause especially when the revision of such law would have positive impact on the economy of Nigeria.[239]In other words, the Hire Purchase Act has become archaic and has almost lost its relevance in Nigeria.

The gains of revising the provisions of the Hire Purchase Act and most importantly, bringing the hire purchase transactions under the ambit of secured transactions law are numerous. *First* it would make the provisions of the law to accord with the business needs of consumer and commercial financing and this would lead to the much wider utilization of this source of credit financing by the society. *Second*, in Nigeria where there are limited options for secured credit financing, a hire purchase arrangement could be a perfect way of broadening the secured financing horizon if the Act would be brought under the secured transactions law, i.e., a hire purchase transaction would become capable of creating a security interest. This would at the long run popularize the use of personal properties as good collateral thus widening the range of personal properties that can be used as collateral.

Sidelining Orthodoxy in Quest for Reality: Towards an Efficient Legal Regime of Land Tenure in Nigeria, An Inaugural Lecture delivered at the University of Lagos on 18th June 2008.

[238] See section 1 of the Hire Purchase Act 1990. As at 1965, the monetary limit was 1000 pounds which was the currency in use in Nigeria. Sequel to the change of currency of Nigeria from pounds and pence to naira and kobo in 1973 and the conversion rate of pounds and pence to naira and kobo which was 1:2 the 1000pounds in the 1965 Hire Purchase Act was converted to N2000. See Nat Ofo, Hire Purchase Legislation in Nigeria: Making a Case for Reform, May 11, 2010 supra footnote 233, pp. 9-10. See also Central Bank of Nigeria: History of the Currency, available at < http://www.cenbank.org/currency/historycur.asp > last visited on the 25th of October 2010.

[239] See Imran Smith, Sidelining Orthodoxy in Quest for Reality: Towards an Efficient Legal Regime of Land Tenure in Nigeria, supra footnote 237, p.4.

1.7.1.1. Equipment Leasing Contracts in Nigeria

The term 'lease' refers to a contract between a lessor and a lessee which gives the lessee the right to possession and use of a specific asset for a period of time in consideration for the payment of agreed specified rentals. *"Leasing is therefore a form of bailment for financial reward."*[240] In Nigeria as already stated, there is no Leasing Law yet; notwithstanding this fact, there has been unprecedented flurry of economic activities in this area of law in the last ten years. According to Chairman of Equipment Leasing Association of Nigeria[241] Mr. Kehinde Lawanson: *"since 1996, over N1.6 trillion (over $10,5billion) in equipment leasing transactions had been completed, with more than 83% of these, or N1.3 trillion done in the last five years […] The value of leasing into the sectors skyrocketed from N11billion in 2002 to N445billion in 2009, increasing their share of leasing market from less than 25% to more 75% in the seven years."*[242] However, the proposed law is outside the purview of secured transactions law.[243] Keeping this proposed law outside the sphere of secured transactions law shows that finance leasing transactions are not yet recognized as capable of creating security interest in Nigeria. This perhaps might be due to the same reason of keeping hire purchase transactions outside of secured transactions law in Nigeria – the inability to recognize in Nigeria that retention of title transactions can create a security interest in collateral following the approaches inherited from English law.

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[240] See Gunter H. Gottlich, Julius Akene, Leasing Operations in Cameroon and Chad: An Empirical Analysis of the Legal and Institutional Framework, (Deutsche Gesellschaft fur Technische Zusammenabeit (GTZ) GmbH, 2002), p. 14 available at < http://www.gtz.de/en/dokumente/en_leasing_operations_Cameroon_Chad_Goettlich.pdf >; last visited on the 1st of March 2011.

[241] The web page of the Association is available at < http://www.elanigeria.org/index.php >; last visited on the 28th of February 2011.

[242] See Nigerian Tribune Newspapers of 24th of January 2011 with the caption "Leasing Bill sails through first reading in Senate" available at < http://www.tribune.com.ng/index.php/money-market/16507-leasing-bill-sails-through-first-reading-in-senate- >; last visited on the 28th of February 2011.

[243] The suggestion here will be that finance lease should be part of the secured transactions law in while operating or true lease as it called in the United States can under the Equipment Leasing Act. In the United States, this is natural conclusion one gets from reading the definition of a lease under section 2A – 103(1) (p) UCC which provides as follows: "Lease means a transfer of the right to possession and use of goods for a period in return for consideration, but a sale, including a sale on approval or a sale or return, retention or creation of a security interest, or license of information is not a lease."

The risks inherent to leasing have been obviously recognized by the drafters of the proposed act, given that one of the proposed law's goals is to create a gatekeeper by limiting access to this specific business to limited liability companies.[244] The leasing bill, when and if enacted, would establish the Equipment Leasing Regulatory Authority whose duties would include, inter alia, the registration of leasing agreements.[245] A leasing agreement registered by the lessor at the Equipment Leasing Regulatory Authority would provide sufficient notice to third parties. Where such agreement is not registered the agreement is nevertheless valid as between the parties but unenforceable against third parties.[246] During the tenor of the lease, the lessor would retain the legal ownership of the leased equipment and the lessee would be prohibited - during the period in which a lease equipment remains in his possession – from sub-leasing, assigning, or from creating a mortgage, pledge, charge, or create any encumbrance on the object of leasing or act in a way that is inconsistent with the legal ownership of the lessor.[247]

Though there are flurry of activities in the leasing industry in Nigeria going by the number of registered leasing companies and the value of the equipment leasing transactions that had been completed in the last ten years, but how well the proposed leasing law would shape the leasing climate in Nigeria would be a subject of further research in the future. Nonetheless it is heartwarming to know that all efforts are on gear to enact an Equipment Leasing Act and the equipment leasing transaction would diversify the sources of getting credit to acquire a piece of equipment needed to run an enterprise or for consumer purchases.

[244] See section 6 of the Equipment Leasing Bill 2011.
[245] See section 9 of the Equipment Leasing Bill 2011.
[246] See sections 16 and 17 of the Equipment Leasing Bill 2011.
[247] See sections 19 and 20 of the Equipment Leasing Bill 2011.

1.7.2. Leasing as a Functional Equivalent of Conditional Sales in Cameroon

Although leasing – as a novel advanced transaction – is present in Cameroon for more than two decades, it is not particularly popular. According to Gunter and Julius "[a]t present the volume of leasing to the economy stands at about FCFA 10 billion compared with total banking sector credit to the economy which stood at 607 billion as at December 2001, leasing cannot yet be considered as an important source of medium and long term finance to the private sector."[248] The reasons for the unpopularity of leasing contracts are many.[249] First, like Nigeria, there is still no national or supra-national (i.e., OHADA Uniform Act) regulatory framework governing leasing in Cameroon.[250] Two financial institutions dominate the leasing business in Cameroon: SOCCA-SOCABIL, a finance company and *Societe Generale De Banques Au Cameroon*, (SGBC) a commercial bank.[251] The two institutions combine leasing business amongst the other financial services they offer to the public in Cameroon and the interest rate in case of equipment leasing

[248] See supra footnote 240, p. 7.
[249] The reasons includes "the public's general lack of knowledge and information about leasing; absence of an appropriate specific legal, fiscal and institutional framework for leasing; uncertainty about the fiscal treatment of leasing; absence of particular fiscal incentives in favor of leasing activities; high cost of leasing, compared with interest rates for banks credits; cultural practices which favor legal ownership." See id., p. 17.
[250] According to Gottlich and Akene, "In Cameroon there are no regulatory requirements specifically directed at the control of leasing business. No specific leasing laws have been enacted. Leasing activities fall within the range of credit institutions (etablissements de credit) activities as defined by the decree no. 90/1469 of 9th of November 1990 (annex 6)." See Gunter H. Gottlich, Julius Akene, Leasing Operations in Cameroon and Chad: An Empirical Analysis of the Legal and Institutional Framework, supra footnote 240, p. 20. However on the 9th of November 2010, three bills were tabled at the second plenary sitting of the November session of the Cameroon's parliament for consideration. One of the bills was for 'organizing leasing in Cameroon'. It is expected that soon Cameroon may have a Leasing Act. See Emmanuel Kendemeh, Cameroon: Parliament – Three Bills Tabled for Scrutiny, available at all AFRICA.com of the 10th of November 2010 < http://allafrica.com/stories/201011100564.html > last visited on the 7th of December 2010.
[251] The main shareholders of the SOCCA-SOCABAIL are Groupe CFAO, Groupe OPTORG, SOCA, BICEC, SGBC, and HOLDEFI while *Societe Generale De Banques Au Cameroon,* (SGBC) belongs to the international network of SOCIETE GENERALE. See Gunter H. Gottlich, Julius Akene, Leasing Operations in Cameroon and Chad: An Empirical Analysis of the Legal and Institutional Framework, supra footnote 240, p.18. While SOCCA-SOCCABAIL does not have a website, the website for *Societe Generale De Banques Au Cameroon* is available at < http://www.sgbc.cm/ >; last visited on the 1st of March 1, 2011.

ranges between 11% - 22% depending on the client. Both institutions share the leasing market in Cameroon almost equally and compete in all market segments of the leasing business.[252]

Basically only two types of leases are exploited in Cameroon – to wit, finance and operating lease. Finance lease is also called capital lease while the operating lease is the equivalent of the true lease.[253] Finance lease gives the lessee the option of purchasing the equipment at a nominal price at the end of the lease contract which does not exceed the 5% of the initial cost of the asset. This nominal price is usually fixed in the leasing contract.[254] This type of lease at the onset of the agreement transfers to the lessee the risks and benefits attendant with owning of the assets which is the subject of the lease contract. The transfer puts the lessee in an economic position comparable to debtor who had obtained a loan to finance the purchase of the asset. Finance lease contracts generally cover period of three years or 36 months but could be extended for a period up to 60 months where the asset leased is a heavy duty forestry or civil engineering equipment. Usually in a finance lease, there is no advance payment; however the lessor asks for a first installment which is higher than the subsequent other monthly installments.[255]

Operating lease, on the other hand, is akin to true lease and is not the focus of this work. Suffice it to say that in an operating lease, the substantial risk and benefits attendant to owning such an asset which is the subject of the lease contract still remain with the lessor. Consequently, the lessee can walk away at the end of the lease contract without any obligations to buy the asset or

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[252] See Gottlich and Akene, Leasing Operations in Cameroon and Chad: An Empirical Analysis of the Legal and Institutional Framework, footnote supra footnote 240, p. 4. The market segments of lease being the operating lease and finance lease and the small scale and big scale leasing in Cameroon. See also p. 18.

[253]See Gunter H. Gottlich, Julius Akene, Leasing Operations in Cameroon and Chad: An Empirical Analysis of the Legal and Institutional Framework, supra footnote 240, p. 12.

[254] Id., p. 19.

[255] Id., p. 19.

where the lessee decides to purchase the asset, the price shall be the fair market value.[256] This kind of lease is not common in Cameroon; it is being done mainly by SOCCA-SOCABIL.[257] The form of operating offered by this company is called 'full service' wherein there is a maintenance agreement attached to the lease agreement which is also being paid for by the lessee. The maintenance component part of the lease ensures that the lessor repairs the equipment any time there is fault. This is understandable since the lessee is not obligated to purchase the equipment at the expiration of the lease contract.

Although, there is no legal framework for lease contracts in Cameroon, it is obvious that leasing transactions are widely exploited in Cameroon. Consequently this work will propose that Cameroon look towards enacting a lease law that would make finance lease to be a form of security interest and not outside the sphere of secured transactions law.

1.8. Consignments in the United States

Consignment is a transaction wherein the consignor who is the owner of goods delivers them to the consignee for sale. Where the consignee sells the goods, he renders the accounts of the proceeds of the sale to the consignor less his commissions on the sale but where the goods are not sold the consignee returns the unsold goods back to the consignor and is not liable to the consignor for the purchase price of the unsold goods. According to Gilmore this arrangement is

[256] Id., p. 12.
[257] The types of equipment used here for the operating lease are cars, trucks, vans and other heavy equipment. For SOCCA-SOCABIL, it is easy to do an operating lease because its shareholders are major distributors of cars trucks and heavy equipment – Groupe CFAO, Groupe OPTORG, SOCCA, BICEC, SGBC, and HOLDEFI. Accordingly these shareholders can buy off the equipment if the lessee decides not to purchase the equipment at the end of the lease contract.

"*true consignment*."[258] By this arrangement, the title in the goods remains with the consignor and passes to the purchaser upon the sale of the goods by the consignee. The idea of the return of the unsold goods to the consignor presupposes that the risk of any market failure remains with the consignor. This transaction was developed under the pre-UCC era. The fact that the consignee could return the unsold goods back to the consignor made the device not to be attractive for the consignor. The consignment transaction was not subjected to filing statutes as it was generally not thought to be a security devise.[259] However, some statutes required that some signs be posted on the consignee's premises giving the third parties notices of the consignor's interest on the goods and this protected the interest of the consignor in the goods against consignee creditors or bankruptcy trustee on insolvency of the consignee.[260]The need to turn consignment into a security devise made industry practitioners, especially in the seed industry, to draft a clause in the consignment agreement which subjected the consignee to paying for the cosigned goods whether sold or not. In such cases, the courts held that such agreements were not true consignments *"but conditional sales, and therefore, in the usual case, void against the buyer's trustee in bankruptcy because of failure to file."*[261] However, with the enactment of UCC Article 9, consignors were required to file a financing statement to perfect their interest in the consigned goods. Under the pre-1999 Article 9, a consignor was required to file a financing statement

[258] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 73.
[259] See id., p. 74.
[260]Virginia enacted a statute in 1839 which became a model which other states like West Virginia, North Carolina, Mississippi and Arizona copied and called Traders' Act. The effect of this Act is that consigned goods are "subject to the claims of the consignee's creditors unless the consignor complies with an applicable Traders' Act by posting a sign on the premises of the consignee." See Grant Gilmore Security Interests in Personal Property, supra footnote 51, p. 74.
[261] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 75; see also the cases of Liebowitz v. Voiello, 107 F.2d 914 (2d Cir. 1939) and Reliance Shoe Co. v. Fram, 252 Fed. (2d. Cir. 1918).

although most of the rights of the consignee and its creditors were governed under the old UCC Article 2.[262]

The revised 1999 Article 9 defines consignment and incorporated through the definition some of the conditions of consignment contained under the old Article 2.[263] By virtue of the definition of the consignment under Articles 1 and 9 of the UCC, almost all commercial consignments have been moved into Article 9 and consignors are now required to perfect their interest by filing financing statements as required by Article 9.[264]

1.8.1. Consignments in Nigeria and Cameroon

There are no equivalents of United States true consignments in Nigeria and Cameroon. At best, what exists in both countries is sales credit; where merchants take goods from the either distributors or producers on deferment of the payment of the purchase price to a later date. The sale credit is to enable the merchants (traders) sell those goods or even other goods in their inventories to raise money to pay the purchase price to the owner of the goods. The transactions does not create any security interest in the goods in favor of the owner of the goods, indeed as between the merchants and owners (distributors or producers), the transaction is an outright sale

[262] See Article 2 – 326 UCC before the amendment in 2003 which according to White and Robert "subordinated the consignor's interest to rights of the creditors of the consignee in any case in which the consignee did business under a different name than the consignor, unless the consignor could prove that the consignee was generally known to be dealing in goods of another or the consignor complied with a relevant sign law showing its interest or filed a financing statement." See James White and Robert Summers, Uniform Commercial Code, supra footnote 82, p. 116.
[263] Section 9 -102 (a) (20) provides as follows: "Consignment means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and: (A) the merchant: (i) deals in goods of that kind under a name other than the name of the person making delivery; (ii) is not an auctioneer; and (iii) is not generally known by its creditors to be substantially engaged in selling goods of others; (B) with respect to each delivery, the aggregate value of the goods is $1,000 or more at the time of delivery; (C) the goods are not consumer goods immediately before delivery; and (D) the transaction does not create a security interest that secures an obligation." See also section 1 – 201 (b) (35) which defines security interest to include the interest of a consignor.
[264] See James White and Robert Summers, Uniform Commercial Code, supra footnote 82, p. 1166.

and the merchants cannot return those goods even if the goods remain unsold, the producers or distributor can only sue for the purchase price in event of default of payment. As a corollary, the merchant creditors could have recourse on the goods to satisfy their claims against the merchant. This form of sale credit arises as a result of trust built from the good credit history of the merchants with owner of the goods and there are largely no laws in both countries that regulate such transactions. Consequently, having a consignment transaction regulated by secured transactions laws in both countries would protect the interest of the consignor. A consignment transaction would create a security interest in goods in favor of the owners of the goods (consignor) in event of default of the payment and also protect the interest of the consignor against the merchants (consignee) creditors. It would also remove the burden placed on the merchants (consignee) to pay for the goods whether or not the goods are sold.

1.9. Security Interests in Intangible Property in the United States

The history of assignment of intangible was not anything spectacular, though the evolution witnessed a time when intangible property could not be assigned to the present stage where the assignability of intangible has become a foregone conclusion and intangible in whatever form now forms bulk of the security interest in personal property. Gilmore identified three reasons for the perceived non-assignability of intangible property in the early 19th century: *first* it was thought that the "*simple-minded ancestors*" could not fathom the transfer of rights in property which was invisible.[265] The *second* is the Ames-Holdsworth approach which perceived a contract as creating 'personal bond' between two people who were in privity of contract and consequently

[265] See Maitland, The Mystery of Seisin, 2 L.Q. Rev. 481 (1886) cited in Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 200.

"contractual rights could not be assigned to parties who are not privy to the contract."[266] The *third* reason is that the rule on non- assignability of intangibles was just a matter of *"pure public policy based on economic grounds."*[267] The case of the development of the assignability of non-pledgeable intangible took a slightly different detour; it evolved from a complete non-assignability, to assignability in equity and later in law.

The reason for the non-assignability was rooted in the inconvenience and burden where the obligors who had thousands of claims from diverse creditors to deal with; the mere record keeping of the assignments by the obligors (insurance companies dealing with policy holders, banks dealing with bank with holders of bank obligations) will require more expense from the obligors and the obligor may be prone to mistakes and where obligors mistakenly pays to a wrong person, he stills owes the money to the rightful claimant.[268] Consequently obligors prefer to deal with claimants they had privity with. This reasons accords more with Ames- Holdsworth privity of contract theory and Glenn's public policy based on economic grounds.

Security interest in intangible property can be classified basically into two broad sets: those that exist in a tangible format and hence can be pledged by the transfer of possession over the certificate incorporating the bundle of rights to the creditor and those that do not have a 'tangible existence.' The first category is made of negotiable instruments, corporate securities, documents of title and non – negotiable instruments *"represented by what is sometimes called an*

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[266] Ames, The Inalienability of Choses in Action, Lectures on Legal History 210 et seq. (1913); Holdsworth, the Treatment of Choses in Action by the Common Law, 33 Harv. L. Rev. 997 (1920); Holdsworth, A History of English Law 115 (1922); the 'personal bond' theory was put forth earlier in 2 spence, The Equitable Jurisdiction of the Court of Chancery 849 et seq. (1850) cited in Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 201.
[267] See Glenn, the Assignment of Choses in Action: Rights of Bona Fide Purchaser, 20 Va. L. Rev. 621, 635 (1934) cited in Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 201.
[268] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p.214.

indispensable document or writing"[269] The other category of intangible property which cannot be pledged, i.e., "*claims to wealth or property not represented by any writing whose physical delivery (plus any necessary endorsement) is looked on as the one effective or at least the customary method of transfer."*[270] Suffice it to say that the 1999 revised version of Article 9 does not recognize the above two broad categories, but in the place of the above two earlier categories of intangible properties, Article 9 sub divided the intangible properties into negotiable instrument type of intangibles[271] and the pure intangibles.[272] Like other independent securities, assignments of intangible properties are now governed by the provisions of Article 9 for example, factoring and receivable financing.

1.9.1. Security Interests in Intangible Property in Cameroon and Nigeria

Intangible assets of a business enterprise are part of the properties of the business that could be pledged without dispossession under Article 69 (2) of the Uniform Act on Securities.[273] Pledge of intangible property alongside with other assets of the company has been examined above and it does not serve any academic purpose to discuss it again.[274] However, one aspect of pledge of intangible property that needs to be analyzed herein is the requirement of registration of pledge of intangible property. In addition to the registration of the pledge of business without

[269] According to Gilmore writing herein is accompanied by a pledge made by the pledgor which gives the creditor "an interest in the rights represented by it which cannot be defeated by any interest subsequently created by the pledgor." See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, pp. 12 – 13.
[270] Gilmore calls this category contract rights i.e., "rights of payment under an existing contract not yet performed." See Grant Gilmore, Security Interests in Personal Property, supra foot note 51, p. 197.
[271] The negotiable instrument type of intangibles under Article 9 is divided into instruments, documents of title chattel paper and letter-of-credit.
[272] Pure intangibles are divided under Article 9 into accounts, contract rights, deposit account, commercial tort claim, and general intangibles. For the classification of these intangibles, see Jonathan C. Lipson, (ed.), Forms Under Revised Article 9 Uniform Commercial Code Committee, (American Bar Association, 2002), pp. 6-10.
[273] The Article provides as follows: The Article provides as follows that pledge of business "may also extend to other intangible components of the business such as patents, trade and business marks, designs, models and other intellectual property rights, and the equipment."
[274] See supra pp. 57 - 67.

dispossession at the Registry of the Court of First Instance in Cameroon, the pledge of intangible property shall also fulfill the publication conditions laid down by the intellectual property law in each OHADA member state.[275]

Few questions then arise whether intellectual property rights exist in Cameroon; whether a security interest can be created on them and whether intellectual property laws are generally enforced in Cameroon? For the first question, the answer is in the affirmative that intellectual property law exists in Cameroon. The intellectual property law regulates inter-alia *"the protection of intellectual property rights in patents of invention, utility models, trademarks and service marks, industrial/designs, trade names, geographical indications and appellations of origin, literary and artistic property, protection against unfair competition, topographies of integrated circuits and protection of plant varieties."*[276] Cameroon is a member of the African Intellectual Property Organization popularly known by its French acronym (OAPI - Organisation Africaine De La Proprite Intellectuelle).[277] However the enforcement of intellectual property rights in Cameroon is weak and almost non-existent. According to United States Department of Commerce report for Cameroon, *"Although Cameroon technically adheres to the relevant*

[275] Pursuant to Article 77 of the Uniform Act on Securities, it means that when pledge covers intellectual property rights it must comply with any specific intellectual property law requirement applicable to such intellectual property. For example, if patents and trademarks that are registered with the African Intellectual Property Organization (OAPI) are pledged to a secured party, the pledge must be registered also with OAPI to give notice to third parties. See Martha Tumnde, Peter Tumnde, Anoukaha Francois, Commentaries to the Uniform Act on Securities (Guarantees), supra footnote 163, p. 54.

[276] See Feh Henry Baaboh Esq., Intellectual Property Law in Cameroon, HG.org WorldWide Legal Directories Articles of 12th September 2009, available at < http://www.hg.org/article.asp?id=7160 > last visited on the 11th of April, 2011.

[277] The African Intellectual Property Organization was formed at the Bangui Accord of 2nd of March 1977 and amended on the 24th of February 1999. The OAPI is made up of sixteen west and central African countries with the headquarters in Yaoundé Cameroon. The countries are Benin Republic, Burkina Faso, Cameroon, Central African Republic, Congo, Cote d' Ivoire, Equatorial Guinea, Gabon, Guinea Bissau, Guinea Conakry, Mali, Mauritania, Niger, Senegal, Chad and Togo. The aim of the group is to create a regional intellectual property system wherein any IP registered in any one of the member country is protected in all the rest of the 15 countries. The criteria for according IP protection within the region is first to file and not first in use. The web page of OAPI is available at < http://www.oapi.int/index.php/fr > last visited on the 11th of April 2011.

conventions in practice enforcement remains problematic due to corruption within enforcement agencies, the lack of resources dedicated to IPR enforcement and a general lack of awareness of IPRs. A few companies have complained of piracy but have little practical legal recourse to enforce their IPR."[278] Where intellectual property rights' enforcement has become a legal comatose, it becomes difficult to exploit intellectual property right as collateral.

The above facts notwithstanding, for some other reasons, the creation of security interest in intangible property in Cameroon is virtually non-existent. The reason is that generally one of the determinants of the utilization of the intellectual property rights in a country is the level of economic development of such a country.[279] In a country like Cameroon where its economy is still not developed, with few companies which are basically a subsidiary of their European and American parents[280] there are few intellectual property rights that can be used to create a security for loan.

In Nigeria there are also laws governing intellectual property rights. Nigeria has Copyright, Patent, as well as Designs and Trademarks laws.[281] There is no specific provision either in any of these laws or in the Companies and Allied Matters Act that provides for the creation of security interest in intangible properties of the company as it is with the Uniform Act Organizing

[278] See United States Department of Commerce, International Trade Administration, Office of Textile and Apparel report on Cameroon, available at < http://web.ita.doc.gov/tacgi/overseasnew.nsf/alldata/Cameroon#IPR >; last visited on the 1st of March, 2011.

[279] See Barthelemy Nyasse, Research & Development and Intellectual Property Rights in Cameroon: A Case Study, University of Yaoundé 1- Cameroon, p. 1, available at < http://www.wipo.int/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103991.pdf > last visited on the 11th of April 2011.

[280] Id., p, 2.

[281] See Copyright Act Cap. C28 Laws of the Federation of Nigeria (LFN) 2004; Patent and Design Act Cap. P2 LFN 2004 and Trademarks Act Cap. T13, LFN 2004.

Securities. However, section 178 (1) CAMA 2004[282] dealing with the creation of a floating charge contains a wide provision which can be construed to mean that security interest can also be created on intangible assets of a company. Evidently, if a floating charge can be created on the whole company's assets and undertakings, then a floating charge can be created also on the company's intangible property. In line with the provisions of Article 9 and Uniform Act on Securities dealing clearly with the creation of security interest in intangible properties, this work recommends transplanting rules from Article 9 that would make the use of intangibles as collateral possible and easy in Nigeria to widen the classes of assets that would be available for this purpose.

Having discussed briefly the pre-UCC security devices and their equivalents in Nigeria and Cameroon where they exist, this work will discuss below some indigenous forms of consumer and business financing that is peculiar to the Nigeria and Cameroon societies.

1.10. Indigenous forms of Consumer and Business Financing in Nigeria and Cameroon

This work will discuss in the following pages a type of credit financing indigenous to Nigeria and Cameroon. This type of credit financing is generally known as '*esusu*'[283] in Nigeria and '*njangi*' in Cameroon. The discussion is to show that there has been other inventive ways peculiar to some African countries to secure both consumer and business finance. The analysis will explore the concepts of esusu and njangi generally and their strengths and weaknesses. It

[282] "A floating charge means an equitable charge over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and the future, but so that the charge shall not preclude the company from dealing with such assets […]"

[283] Though it is known with different names to different tribes in Nigeria, it is even known in more countries in Africa.

will explore whether these indigenous credit financing method are compatible with the proposed transplantation of Article 9 to both jurisdictions and whether the indigenous forms of credit financing could complement the Article 9 secured transactions when transplanted.

1.10.1. The 'Esusu' Micro-Credit Scheme in Nigeria

Though nobody knows for sure the actual time of its invention, the first sign of its existence was noticed around the middle of the 20th century in Nigeria. There are two major reasons for the emergence of 'esusu' micro credit scheme. The first is the increased need for both consumer and business financing and the second is the perceived 'inadequacies' of the pledge of real and personal properties. The reader would recall that in Igbo customary pledge, the borrower puts the lender in possession of property as collateral for the loan and where it is land; the debtor is deprived of the use of the land for as long as the loan remains unpaid. During those periods of time when most people depended on subsistent farming for living, the borrower had given out almost the only means of survival. Consequently the people set out to invent a credit financing system where all the perceived lapses of pledge will be eliminated. This led to the invention of 'esusu' micro credit scheme. 'Esusu' micro credit scheme is communal in nature as it is a concept where the members of a group help one another out with the money jointly contributed by the members. This scheme ensures that the borrower does not need to furnish any collateral or pay any interest to obtain a loan credit. It is probably the only credit financing scheme that is practiced not only in Igbo tribe but in all other tribes in Nigeria.

In Nigeria it is known with different names to different ethnic groups. It is called *utu* or *isusu* in Igbo, Yoruba call it esusu or *ajo,* the Hausa call it *adashi,* Edo call it *osusu,* the Nupe call it *dashi*, Ibibio call it *etibe* while Kalahari call it *oku*,[284] but the generally accepted name is '*esusu.*'[285] As already stated, the informal communal micro credit scheme was invented to help people source relatively larger finances without having either to pay interest or pledge their real or personal property as collateral. It consists of group of individuals who agree to make a regular contribution and pool such regular contributions together and give the amount contributed together to a member or certain members of the group on a rotating basis until all the members have benefited from the pool. Most of the 'esusu' groups operate with written by-laws which binds the members of the group while others operate with unwritten by-laws which are reinforced by an oath of allegiance to all the members of the group.[286]

The above communal financing is a common feature of the evolution of credit financing of most African societies and this is most probably due to their communal nature. This feature of the African credit financing had similar characteristics in all the societies that practiced it although it was known with different names in different societies. As earlier stated, in Nigerian and other West African Countries, it is called 'esusu/susu/osusu'; in Cameroon it is called 'njangi'; in Zambia it is called 'upato'; it is called 'chilimba' in South Africa and 'gitata' in Kenya.[287] The commonality between these groups is that it is a 'rotating savings and credit association.'[288]

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[284] Generally Yoruba, Nupe, Hausa, Edo, Ibibio and Kalahari are names of the some of the ethnic tribes in Nigeria.
[285] See A. H. Ekpo, U. J. Umoh, The Informal Sector available at <http://www.onlinenigeria.com/economics/?blurb=495 >; last visited on the 7th of April, 2011.
[286] Oath here does not necessarily connote rituals but affirmation by members to be bound by the unwritten rules of the group will suffice. The most important rule usually being to make regular contributions to the pool most especially when the member has received his/her own contributions.
[287] See Rose Marie – Rita Endeley and Rosetta Bola Thompson, Management of Credit Schemes For Women Entrepreneurs in Africa: A Training Manual, (Commonwealth Secretariat and SFI Publishing, 2004), p. 316 available at <http://books.google.com/books?id=UO2nD6jJFDEC&pg=PA317&lpg=PA317&dq=cameroon+njangi+credit+scheme&source=bl&ots=iIEPTBvhii&sig=fSMt_y3TBOcirOPFbuf9IK7W2yM&hl=en&ei=4ZK_S_TxCcH8nAeswcXtAg&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAYQ6AEwAA#v=onepage&q=cameroon%20njangi%20credit%20scheme&f=false > last visited 9th April, 2011.
[288] Id., p. 316.

Certain factors that make this group appealing to the poor are as follows: "*ability to offer smaller amount of loans which the bank cannot not offer; ability to assess these funds without the necessity of providing collateral for the loans; are less bureaucratic and have flexible repayment schedules; encourage and promote social activity as coming together to make the regular contributions afford opportunity for the members to interact socially; the groups have flexible hours of meetings; being in a group generate a feeling of belonging and easy access to needed funds; low interest rates or none at all and serve as a quick source of fund in an emergency situation.*"[289] Members of a group can belong to more micro-credit scheme groups so long as the member has enough resources to meet its financial obligations to all the groups. Indeed belonging to more groups translates into accessing more credit from the groups one belongs to. Besides the oath of allegiance and mutual trust, there is an unspoken norm that no member of the group will default in contributing periodically to the group fund especially after the member has collected his/her own share of the fund. This unspoken norm is reinforced by the fact that each group is mostly made up of people from the same community who have known one another for some time and can vouch for the integrity of one another. The fear of communal reaction to such behavior which may in some extreme cases include ostracizing the person checkmates possible deviants.

However where any member absconds and refuses to contribute to the group after such member has received his/her turn of the contribution, such act may be treated as a crime under the Criminal Code – Obtaining Credit by False Pretences or Other Fraud - and such acts are

[289] Id., p. 317.

punishable under the section 419A (1)[290] of the Nigeria Criminal Code Chapter (Cap) 77 of 1990.[291]

These esusu associations have largely escaped regulation because of their informal nature. The esusu association is not registered with the Corporate Affairs Commission although on a wider interpretation of some sections of the Companies and Allied Matters Act, the association which is formed by members in furtherance of esusu objectives could be registered as incorporated trustees under Part C of Companies and Allied Matters Act 2004. This is because the association can be said to promote social cohesion and development among members.[292] The non-registration of the meeting or association has its disadvantages to the meeting or association. The implication is that in Nigeria the meeting or association has inter-alia no legal personality recognized in law and cannot sue or be sued, cannot acquire a property in its name, cannot open a bank account and cannot seek for funding. Where there is any fraud however members can

[290] The section provides "A person who by any false pretence or by means of any other fraud obtains credit for himself or any other person: (a) in incurring any debt or liability; or (b) by means of an entry in a debtor and creditor account between the person and the person receiving credit, is guilty of a felony and is liable to imprisonment for three years."

[291] However the first reaction to abscondment or willful refusal to continue to make regular contributions will be for members of the group to talk to such person. Where this fails, members may report such persons to his/her relations, church members or any other social group the deviant member belongs to. Where all entreaties from the other members fail, then only will the members report the conduct of such person to police. This last sort to police is always rare as the matter is always settled amicably and hardly ever gets to the police. Whilst in Nigeria there are not reported cases as yet of a member of the group who after collecting his/her turn absconds from the community and refuses to pay back, it is not so in Cameroon. However, for a discussion of instances where a member of the group absconded after receiving his/her turn of the contribution, see infra pp. 106 – 107.

[292] Section 673 (1) and (2) of Companies and Allied Matters Act 2004 provides, " (1) where one or more trustees are appointed by any community of persons bound together by customs, religion, kingship or nationality or by anybody or association of persons established for any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose, he or they may, if so authorized by the community, body or association (hereinafter in this decree referred to as "association"), apply to the Commission in the manner hereafter provided for registration under this decree as a corporate body. (2) upon being so registered by the Commission, the trustee or trustees shall become a corporate body in accordance with the provisions of section 679 of this Part of this decree."

collectively sue in their names against the fraudster but the meeting or the association cannot maintain an action in its ‘corporate’ entity.[293]

1.10.2. ‘Njangi’ Micro-Credit Scheme in Cameroon

Cameroon’s ‘njangi’ micro-credit scheme (or known as ‘tontines’ in the French speaking Cameroon)[294] is structured in many respects similarly to Nigeria’s ‘esusu’ micro-credit financing. In njangi micro-credit scheme, members form an association and periodically gather to contribute together into a pool and give the contributions to their members on a rotating basis until all the members have benefited from the contributions.[295] According to Endeley and Thompson, ‘njangi’ “*is a self – help voluntary association aimed at improving the socio-economic situation of members. Relationships and operations are based on trust, therefore membership is usually of friends, people belonging to the same ethnic community family or having other important bonds which binds them together*.”[296]

[293] See section 679(1) Companies and Allied Matters Act 2004 provides, “From the date of registration, the trustee shall become a body corporate by the name described in the certificate and shall have perpetual succession and a common seal, and power to sue and be sued in its corporate name as such trustee or trustees and subject to section 685 of this part of this Act to hold and acquire, and transfer, assign or otherwise dispose of any property, or interest therein belonging to, or held for the benefit of such association, in such manner and subject to such restrictions and provisions as the trustees might without incorporation, hold or acquire, transfer, assign or otherwise dispose of the same for the purposes of such community or body or association of persons.”
[294] See Michael Rowlands, *Looking at Financial Landscapes: A Contextual Analysis of ROSCAs in Cameroon*, in SHIRLEY ARDENER AND SANDRA BURMAN, (eds.), MONEY-GO-ROUNDS: THE IMPORTANCE OF ROTATING SAVINGS AND CREDIT ASSOCIATIONS, (Berg, 1995) p. 111at p.112 available at < http://books.google.com/books?id=dFie4OG3nzoC&pg=PA49&lpg=PA49&dq=Money+go+rounds:+the+importance+of+Rotating+savings+and+credit+Association+for+women&source=bl&ots=fYZKxUx-PE&sig=V9czcgk5ghptkwqfMJuB7IVcEq8&hl=en&ei=dzqeTKapEc-6OIbc5aAM&sa=X&oi=book_result&ct=result&resnum=10&ved=0CDcQ6AEwCQ#v=onepage&q=Money%20go%20rounds%3A%20the%20importance%20of%20Rotating%20savings%20and%20credit%20Association%20for%20women&f=false >; last visited on the 20th of April, 2011.
[295] All that been said about esusu micro-credit scheme in Nigeria apply mutatis mutandis to njangi.
[296] Id., supra footnote 287, p. 317.

‘Njangi’ in Cameroon is not regulated by law. Just like in Nigeria, the association formed by the people in furtherance of the njangi objectives is not registered with any government agency because of their informal nature. This has its obvious disadvantages.[297] Being unregulated by any law and also unregistered with any governmental agency, the major pre-occupation of the njangi groups is how to enforce discipline within the group by compelling repayment or better still continued contribution by members especially after such a member has received his/her contribution. Enforcing continuous contribution amongst the group’s members is essential because the acid test for the existence of njangi group in their quest in helping one another in getting unsecured loan at no interest is the ability of members to perform their obligatory periodic contribution to the pool.

Towards this end, the njangi association has devised several ways to ensure that members continually contribute to the pool so that all the members receive their money. One of such ways is to put a fine as penalty for defaulting. The fine is graded depending whether the defaulter has received his/her turn of contribution or not: a defaulter who has received his/her turn of contribution pays heavier fine for than someone who has not. Another method is to request a recipient member to have a guarantor from amongst other members who is yet to receive his/her contribution, this is to enable the meeting to hold onto the guarantor’s quota at the guarantor’s turn should the member who has collected default in further contribution to the pool. Another option by which some njangi groups forestall defaults among their members is “*to place*

[297] See supra pp. 103 – 104.

members whose reliability is doubted toward the end of the rotation."[298] This ensures that such members would have contributed for others before receiving theirs.

Although the above mechanisms have been effective in check mating the propensity to default, instances abound where members who have received their contributions have absconded without continuing with the scheme. Where a member has repeatedly failed to make the required periodic contribution the association will treat such successive failure as a case of abscondment and tries to use all peaceful means to ensure that such a member resumes payment until all other members have received their contribution. Such peaceful entreaties may entail reporting such member to his/her friends or even church or other religious groups that the deviant belongs to, in order to intervene in the matter and compel the defaulter to continue the contribution. However where such entreaties fail to produce the desired result, the member may be reported to the police who would arraign and prosecute such member under section 318 (b) of the Cameroon Criminal (Penal) Code. Cases abound of convictions by the courts of first instance in Cameroon of people who received their contributions of the njangi but refused to make further contribution to the association. In the case of Tabah Thomas v. Tachi George[299] the Respondent/Debtor (Tachi George) belonged to an njangi group in Bambalang village made up of about fifteen members. The njangi group meets bi-monthly to make contributions to a pool which is given to each member of the group as a loan credit in rotation until all the members of the group have all received from the contributions. One of the conditions of receiving the contribution is that before any member could benefit from the njangi contribution, such member would get a surety from

[298]See Margaret Niger-Thomas, Women's Access to and the Control of Credit in Cameroon: The Manfe Case in SHIRLEY ARDENER AND SANDRA BURMAN (eds.), MONEY-GO-ROUNDS THE IMPORTANCE OF ROTATING SAVINGS AND CREDIT ASSOCIATIONS FOR WOMEN, supra footnote 294, pp.103-105.
[299] In Suit NDM/PS/S.P/06007 decided by the Court of First Instance in Ndop on the 15th of June 2007.

another member and herein the Applicant was the surety to the Respondent/Debtor. Tachi George was the third person to receive the contribution which was the sum of 1,300,000 francs. After repaying the twelfth time, Tachi ceased making further contributions into the njangi pool and when all entreaties to settle the matter peacefully failed, the surety sued him for the outstanding amount due from him to the njangi meeting. The court entered judgment for the Applicant-creditor and held that the defendant is obliged to continue making the bi-monthly repayment until the last member takes his turn from the njangi contribution pool. The court awarded general damages to the Applicant/Creditor in this case. Njangi in Cameroon is classified into three types, namely: ordinary, commercial and labour 'njangi.'[300]

1.10.2.1. Ordinary 'Njangi'

This is similar to Nigerian 'esusu.' It is the rotational savings scheme where members agree to individually contribute a certain sum of money into a pool on each meeting day.[301] The sum

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[300] See Rose Marie – Rita Endeley and Rosetta Bola Thompson, Management of Credit Schemes for Women Entrepreneurs in Africa: A Training Manual, supra footnote 287, pp. 317-318. However there are some other classifications by some other writers on the issue which can be subsumed into the above three categories. According to Margaret Niger-Thomas, njangi could be classified into 'personal' and 'impersonal' njangi; 'kitchen' and 'equipment' njangi. Whilst 'kitchen' and 'equipment' njangi are a variant t of labour njangi, 'personal' and 'impersonal' njangi is a type of ordinary njangi. See Margaret Niger-Thomas, Women's Access to and the Control of Credit in Cameroon: The Manfe Case in SHIRLEY ARDENER AND SANDRA BURMAN, (eds.), MONEY-GO-ROUNDS THE IMPORTANCE OF ROTATING SAVINGS AND CREDIT ASSOCIATIONS FOR WOMEN, supra footnote 294, p.100.

[301] A captivating account is given of the management and running of women's association for the purpose of contributing ordinary (personal) njangi in Cameroon as follows: "The following is a general description of the functioning of a personal njangi. Membership varies from five to fifty. Besides ethnicity, two main criteria stand out: status and occupation. Each group has its officials, notably president, secretary, treasurer, discipline and social officer. These form the executive, which determines the tone and direction of the njangi. Usually the president is the person who has initiated the idea and has organized the njangi into a cohesive group. Leadership positions are renewed yearly in some groups. The role of the secretary is to record the order of the rotation and contribution. The treasurer collects the contributions at each sitting and hands the fund to the recipient. At times the president appoints one member to hand over the amount collected. The treasurer also collects fines from defaulters.

There are always some kind of refreshments at the end of each njangi sitting, offered by the person whose turn it is to receive the fund. In one njangi the recipient may provide a crate (20 bottles) of beer from the contribution she receives. In some groups members contribute for refreshments sums between 300 1,000 FRS cfa (worth 60p-2pounds in 1991); the currency (cfa francs) used in Cameroon is backed by the French government. This contributed is then counted and handed over to a member in rotation until all members have benefitted from this contribution and the process starts all over again. The order of turns is usually done by balloting at the beginning of the contribution period. Interest is usually not charged to this type of 'njangi' and this makes it more attractive than all other methods of financing. Membership of such groups is always limited to trusted few and usually used by the micro and small scale entrepreneurs in the society. The size of the contributions depends on the capacity of the members to contribute and the numerical strength of the group. A member who has received contribution is not permitted to pull out of the group until all other members have received their contributions also, however a member can decide to pull out when the circle of the receipt of contribution by members is completed i.e., all members have received their contributions and the process of contribution is starting afresh.

1.10.2.2. Commercial 'Njangi'

This form of 'njangi' is used by the small and mid-scale entrepreneurs. It differs from the ordinary 'njangi' in the sense that contributions are not handed over to the members in rotation, rather members who need loans apply to the meeting for loan facilities. Interest is charged on loans taken on the funds contributed by members. In this type, regular savings are being made by members at agreed intervals. From the funds contributed by members, loans are given to members who requested according to the rules and regulations of the group at an agreed interest rate. At the end of each operating year, the accrued interest is shared by members in form of

depends on the level of contributions of the group. The total amount collected is handed over to the next recipient for the purchase of food and drink. In some groups the current recipient is given the entertainment money collected to subsidize her expenditure. The role of the social officer is to supervise and organize the refreshments at each sitting. The discipline officer maintains order during the meetings." See Margaret Niger-Thomas, *Women's Access to and Control of Credit in Cameroon The Mamfe Case* in SHIRLEY ARDENER AND SANDRA BURMAN, (eds.), MONEY-GO-ROUNDS:THE IMPORTANCE OF ROTATING SAVINGS AND CREDIT ASSOCIATIONS supra footnote 294, pp.101-12.

dividends.[302] Besides this, members receive back their annual savings in bulk to start afresh the savings next year.

Perhaps the most important feature of the commercial 'njangi' loan scheme is the high rate of repayment record of between 95% - 100% especially among women groups.[303] This achievement is due to the efficiency of the loan recovery device employed to recover loans by this group[304] and the fact that the whole essence of 'njangi' is built on mutual trust. The recovery device used is mostly group pressure and members' guarantee.[305] But the underlying success of recovery is probably due to the fact that the membership of commercial 'njangi' group is limited to reliable few people, who live in the same community and probably belong to same ethnic and religious group. With the screening done before membership is granted to any individual, the group is able to screen out miscreants and opportunists in the society whose aim is to take advantage of such loans without the probability of repayment.

1.10.2.3. Labor 'Njangi'

This type of 'njangi' is non-financial. Instead of the group rendering financial assistance to members, the group renders such assistance in kind and in properties which are purchased with the contributions made by the group. This type of 'njangi' is beyond the scope of this research

[302] See Rose Marie – Rita Endeley and Rosetta Bola Thompson, Management of Credit Schemes for Women Entrepreneurs in Africa: A Training Manual, supra footnote 287, p.318.
[303] Id. p.318; see also See Jean – Marc Sika, Balz Strasse, Ben Nakomo, The Entrepreneur Newspaper, December 27, 2006 *Five Million Cameroonians Rely on Tontines and Njangi to Fight Poverty*, available at < http://www.entrepreneurnewsonline.com/2006/12/five_million_ca.html > last visited on 10th April 2011.
[304] For the inventive ways the meeting devised, to ensure repayment by members who have collected their own contribution, see supra pp. 105 - 106 of this work.
[305] See Rose Marie – Rita Endeley and Rosetta Bola Thompson, Management of Credit Schemes for Women Entrepreneurs in Africa: A Training Manual, supra footnote 287, p. 318.

since it is not directly financial contributions to members i.e., credit,[306] but suffice it to state that, in this case of ‘njangi’ the group’s ‘communal’ help is rendered in kind or money’s worth. A typical example of this variant of ‘njangi’ is the women’s kitchen ‘njangi,’ whereby the members contributions are used to purchase needed items for each members kitchen in turn. The benefit of this to members are immense as this gesture may raise the standard of living of the members and give the members the opportunity to enjoy the basic needs which hitherto have been elusive to such members family as a result of lack of financial resources. What can be bought for members of the group may be varied ranging from food items to economic equipment or implements. Again the members may decide to render services in the form working at the farm land of their member.

1.10.3. Assessment of Njangi and Esusu Micro-Credit Schemes

As can be seen above, Cameroon’s ‘njangi’ micro credit scheme is wider than the Nigerian ‘esusu’ scheme in many respects. There are more variants of the ‘njangi’ schemes in Cameroon than there are in ‘esusu’ scheme in Nigeria. There is no form of labor ‘njangi’ in Nigeria and even the commercial ‘njangi’ is not practiced with the commercial aim of making gains for members of the group to share in Nigeria.

From the foregoing, the following deductions can be made as some of the major characteristics of ‘njangi’ (a) the scheme is built on mutual trust and membership is purely voluntary. (b) members have common bond such as family, religion, tribe, which help to foster trust, social

[306] However one can equally argue that since it is the members contribution that is used for the purchase of properties that are given to the members; which properties otherwise such member may have bought by credit, then labor ‘njangi’ is equally a form micro-credit scheme and falls squarely on the scope of this work.

cohesion, control and solidarity among members. (c) the groups rely entirely on members' contributions which are made at agreed intervals. This is truism because it is from the pool of funds that each member receives his/her contribution which is the whole essence of the existence of the group. (d) the groups have a management structure like the chairperson, secretary and other officers and a laid down rules and regulations to guide them and ensure cohesion during meetings. These officers are elected by members at periodic intervals as prescribed in the members' rules; and (e) confidentiality is maintained and enforced by the group; it is the hallmark of their existence. [307]'Njangi' communal financing is still very much in existence until date in Cameroon.

In a 2006 report of The Entrepreneur,[308] about five million out of the Cameroonian population of about fifteen million depend on 'njangi' to raise capital needed for commercial or personal purposes. According to the report, as at 2006 only about 700,000 bank accounts exist in Cameroon with 250, 000 business accounts and 450,000 private accounts. This shows that 'njangi' communal financing is flourishing (just like the 'esusu' micro credit scheme in Nigeria) in Cameroon especially amongst the micro, small and medium scale enterprises even in the modern times where banks and other financial institutions are holding sway in secured credit financing in other developed economies. The preference of the society for 'njangi' financing over banks shows that there are problems in the relations between the people and the formal financial institutions. Obviously, the problems are not only related to the connected legal framework, however it should also be noted that there is a room for improvement here; which

[307] See Rose Marie – Rita Endeley and Rosetta Bola Thompson, Management of Credit Schemes for Women Entrepreneurs in Africa: A Training Manual, supra foot note 287, p. 319.
[308] See Jean – Marc Sika, Balz Strasse, Ben Nakomo, The Entrepreneur Newspaper, December 27, 2006 *Five Million Cameroonians Rely on Tontines and Njangi to Fight Poverty,* supra footnote 303.

makes the theme of this thesis propose the transplantation of elements from developed secured transactions laws realistic. Needless to say that the challenges abound in the following areas: the laws on secured transactions or the compartmentalized laws that in isolation or conjunction make up for secured transactions law, the general terms of the credit facility, and the society's pre-determined mindset in accessing funds from financial institutions which is driving people away from the formal institutions of financing.[309] Consequently there is need to look at the laws of secured transactions in Cameroon and Nigeria in order to identify and rectify the problem driving people away from formal financial institutions.

1.10.4. Challenges of the Esusu and Njangi Micro-Credit Scheme as forms of Credit Financing

First, it should be noted that notwithstanding how good and noble the 'njangi' and 'esusu' micro credit scheme concepts are, they are obviously inadequate to provide the funds needed for the development and growth of the economy of either Cameroon or Nigeria. Whilst njangi and esusu may be an alternative source of credit financing for micro and perhaps small scale entrepreneurs, same cannot be said of medium or large scale entrepreneurs. For example "njangi" and esusu micro credit scheme among other numerous challenges cannot provide the much needed finance for a small to mid-scale enterprise to transform into a large scale enterprise. The finance needed for this sort of transformation and growth can only be provided by formal financial institutions like banks who can give such huge loans. The situation is even more worrisome in Cameroon because as of date there is no capital market or stock exchange in Cameroon;[310] this means that

[309] The reasons of the disconnect and the probable solutions are discussed in details infra in chapter 5 of this research.

[310] See Gunter, Julius, Leasing Operations in Cameroon and Chad: An Empirical Analysis of the Legal and Institutional Framework, supra footnote 240, p. 18.

the companies do not have a market where they could sell their shares to the public to raise the needed capital, with the exception of private placement though with all the risks and prohibitive costs.

Another challenge is that there is short or not enough moratorium for repayment of the loans in esusu or njangi micro-credit schemes. A member who receives his/her own contribution from the pool contributed by other members is expected to start paying back on the next periodic contribution date which could be weekly, fortnightly or monthly as the members agree. In most cases, the contribution is done weekly or fortnightly and this does not give a member enough moratorium to invest the money meaningfully and reap the fruits thereof. The reason for short moratorium is because, esusu and njangi depend solely on members contribution and where any member defaults, the money in the pool will be incomplete and the member whose turn it is to collect will have to receive less. Therefore regular contribution is the number one rule which all members must abide with, and any member who defaults in contributing on any periodic contribution date pays a fine which is either kept in the purse of the group or given to member who collected the incomplete amount to assuage the anger of such member. Consequently there is short time or no time for a member to invest his contribution, reap some profit before being saddled with the responsibility of the repayment of the loan. This short or no low moratorium may account for the default or inability to repay the loan.[311] This leaves the alternative of bank loan the preferred choice where one wants to access credit that he/she intends to invest and needs a longer moratorium for repayment.

[311] See the case of Tabah Thomas v. Tachi George supra pp. 106 – 107.

The third challenge is that though it appears that the percentage of repayment or continued contribution by members of a group has been quite remarkable, nevertheless uncertainty of repayment is real in njangi and esusu groups. This challenge is implicit in several 'ingenious' mechanisms devised by the meeting to ensure repayment of the loans given to members.

It is evident that these mechanisms are not fool proof to guarantee repayment and it might be a matter of time for a major scandal to erupt or even the occurrence of a ponzi scheme.[312] In event of the death of any member who has taken his/her turn of the contribution, the njangi or esusu meeting is severely handicapped. Where for instance three out of twenty members who have collected their contributions die during the njani or esusu circle, this will clearly affect other members' entitlements. There is obviously no form of insurance that may help in such circumstance. Consequently any refusal by members of the njangi or esusu group to continue further contribution will spell doom for the group.

All these reasons underscore the need for government and the bank to do more to earn the confidence of the people in the formal financial institutions. This could be done by re-assessing the secured transactions laws which has impeded people from accessing loans from the bank and also government revisiting their monetary policy so as to reduce the interest rates charged by the banks on loans.

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[312] One wonders what may happen where the president and other principal officers of the meeting decide to misappropriate the funds so contributed by the members. Also, if a group people who were lucky to have received their own turn of the contributions collectively refuse to make further contributions to the pool. It does appear that the meeting may not have any effective recourse to these frauds and the other unfortunate members may have to lick their wounds and bemoan their fates.

In conclusion notwithstanding the above drawbacks, njangi and esusu communal micro-credit financing are still greatly in use until this day and they have helped micro, small and mid-scale farmers, artisans, traders and entrepreneurs to set up businesses or expand the existing businesses. The data given on Cameroon above on the patronage of this mode of communal financing attest to the wide acceptability of this communal oriented effort at sourcing credit with no-strings attached.

1.10.5. Compatibility of Esusu and Njangi to the Proposed Transplantation of Article 9 to Nigeria and Cameroon

Undoubtedly, it is settled by now that among other challenges of njangi and esusu micro-credit scheme, neither has answers to commercial financing needed for growth and development of any economy – thus necessitating the need for creating a legal environment that would not just transplant elements from Article 9 but would also create incentives to banks and non-bank financial institution to exploit the possibilities offered by the would-be new secured financing laws in Nigeria and Cameroon.

Perhaps, what is left now is to explore at this stage whether the esusu and njangi micro-credit financing methods can exist side by side with Article 9 secured transactions. This question becomes apposite considering the fact that esusu and njangi operate without two of the corollary institutions of Article 9 secured financing – interest and collateral. Suffice it to state that though njangi and esusu operate without interest and collateral, yet they can operate side by side with Article 9 secured financing and are even compatible with Article 9. This is because esusu and njangi's general theme – making credit available to people, fit into the general policy choice of

Article 9.[313] Besides, it is generally known that the banks in Nigeria and Cameroon mostly extend credits to big businesses that can furnish the required collateral demanded by the bank and largely ignore the small time artisans, farmers, traders and sole proprietor businesses who cannot meet their conditions for loans. This is the major justification for setting up of micro credit finance banks in Nigeria so that these groups of individuals can access consumer or commercial financing. Considering that esusu and njangi micro-credit schemes are structured mainly for same group of persons, it presupposes that esusu and njangi close ranks with other institutions set up by government to provide funds for those excluded by the traditional banking system in the society. Seen from this perspective, esusu and njangi are not only compatible, but they complement the relevance of Article 9 styled bank and non-bank financial institutions secured financing and thus, can operate side by side with the transplanted Article 9 to Nigeria and Cameroon. Though admittedly the testing of the correctness of these statements await some future time.

1.11. Comparisons of the Evolution of Secured Transactions Laws in the United States, Nigeria and Cameroon

A good starting point will be to note that the evolution of the secured credit transactions laws in Nigeria and Cameroon are similar in several ways.[314] Thus it is safe for this research to place the evolution of secured credit transactions of Nigeria and Cameroon on one side and that of the United States on the other side. This will bring out the sharp contrast between the evolutions of

[313] This general policy directive can be gleaned from the provisions of the revised 1999 version of Article 9 which created many more types of secured transactions and personal properties that can be used as collateral. See the Official Comment to section 9 – 101 UCC.

[314] For example, the 'esusu' scheme in Nigeria was the same in content and form with the 'njangi' scheme in Cameroon.

secured credit transactions in African societies (especially Nigerian and Cameroon societies) with that of the American society.

Consequently a comparison of the evolution of the pre-statutory-era secured credit transactions in Nigeria and Cameroon on one side with the evolution of secured credit transactions in the United States on the other side will reveal startling differences both in forms, contents and level of evolution and development which are obvious and need not be dabbled into in this research. But suffice it to say that these huge differences might be explained by the level of economic development, literacy/illiteracy level, technological knowhow, traditions, customs and societal underpinnings of the two different societies. For example the industrial revolution in the 19th century led to the unprecedented economic development in America at that time and this resulted in the increase in the demand for credit to finance the emergence of new industries. The need for credit resulted in several inventive ways to source for credit by the Americans – thus the invention of pre-UCC independent security devices to finance businesses.

Again, by the 1920's the United States already had a large corporate sector. Two hundred large corporations controlled about 38 per cent of the business wealth and 22 per cent of the national wealth of the United States[315] obviously as a result of the industrial revolution. This large

[315]Writing about 200 biggest corporation in the United States in the 1920's, Berle and Means posited: "when we seek to compare the wealth of the big companies with that of all industry we get into difficulty since there appears to be no adequate basis for estimating the total business wealth in the country. A very rough estimate, however, indicates that at least 78 per cent and probably a larger proportion of the American business wealth is corporate wealth. Since the two hundred largest corporations controlled approximately 49 per cent of all corporate wealth, the rough calculation would indicate that they controlled 38 per cent or more of the business wealth. When we come to national wealth, we are necessarily dealing with estimates which can at best be only most appropriate. The National Industrial Conference Board has estimated that the national wealth at the end of 1928 amounted to $360,062,000,000. If we assume an increase equal to the average of the previous six years we should have $367,000,000,000 as the national wealth in 1929. Since the total assets of the two hundred big companies in that year amounted to $81,077,000,000, they controlled roughly 22 per cent of the total wealth of the country." See

corporate sector helped to stabilize the United States economy after the depression of the 1930's. This presence of large corporate sector in America increased the demand for credit and contributed to the growth of the economy. On the other hand and on a sad and regrettable note, both Nigeria and Cameroon have not until date experienced industrial revolution, the few companies that were established in Nigeria in the early 1990's are barely managing to survive due to harsh government policies and lack of infrastructural amenities for their sustenance. For example, Nigeria has a small corporate sector constituting about 4% of the business enterprises in Nigeria.[316] It is doubtful whether Cameroon even until date has a corporate sector; the Doula Stock Exchange has had since its opening in April 2003 only one bottled water company called 'Tangui' registered in it as at January 2008.[317] With 12 banks in operation and one registered company at Doula Stock Exchange, this is obviously a far cry of what a corporate sector looks like in a developed economy.[318] If in 2008, the corporate sector only constitute a mere 4% of businesses in Nigeria and zero or at best inconsequential percentage of business in Cameroon, it then means that it did not exist during the evolution of the secured credit transactions in Nigeria and Cameroon. Consequently both countries lacked one of the necessary catalysts that would have helped to propel the demand for credit and the shaping of the secured credit history in both societies.

Adolf Berle, Gardiner Means, the Modern Corporation & Private Property, (Transaction Publishers, Reprint 1991), pp. 32 -33.

[316]According to market report and industry estimates, small enterprises constitute about 87% of businesses in Nigeria, while the medium and large enterprises constitute about 9% and 4% respectively of the businesses in Nigeria. See US Commercial Service, Doing Business in Nigeria: 2008 Country Commercial Guide for US Companies, p. 8 available at < http://www.buyusainfo.net/docs/x_2601303.pdf> last visited on the 13th of April 2011.

[317] See U.S Commercial Service, Doing Business in Cameroon: A Country Commercial Guide for U.S. Companies, prepared by The International Copyright, U.S. & Foreign Commercial Service and U.S. Department of State, 2007, p, 39 available at <http://www.buyusainfo.net/docs/x_2078986.pdf > last visited on 13th of April 2011.

[318] Id.

However, despite these huge differences there were points of convergence in the evolution of secured credit transactions in these societies. The first point of convergence was the need for credit in these societies and the realization that if the economy was to grow, people should be able to access credit to help them set up economic activities or expand existing businesses, although the level of the demand for credit was lower in Nigeria and Cameroon due to the reasons stated above. Again, pledge of personal property and mortgage of real properties being the oldest forms of secured credit transactions were practiced in these societies though there were some variations especially in pledge of real property in Nigeria where there was perpetual redemption of the pledge of real property.

In conclusion, the evolution reveals a basic fact that the history of secured credit transactions in Nigeria and Cameroon has been gradual and commensurate with the level of economic development in both societies. The evolution of secured credit in Nigeria and Cameroon is quite unlike the process of the evolution in the United States where the industrial revolution necessitated exponential demand for credit. However, besides the startling world of differences between Nigeria and Cameroonian societies with that of the United States, there are some though minimal point of convergence in the history of secured credit transactions.

1.12. Lessons of the Evolution of United States Personal Property Security Laws to Nigeria and Cameroon

There are invaluable lessons to learn from the history of secured transactions law in the United States. The evolution of the development of the phases of security devices in America over a period of about two centuries, from 1820’s to the enactment of Article 9 of the Uniform

Commercial Code in the twentieth century is instructive. It shows that things did not happen overnight, it was a gradual process. The long period of the evolution not only prepared the minds of the American society for each successive phase but also ensured that the society embraced the phases of evolution. Tajti had identified fourteen phases of the evolution.[319] In a nutshell, the evolution had started with the pledge which is the oldest form of security devices. From the traditional pledge of personal property and mortgage of real property to the invention of chattel mortgage, and then to the invention of other independent security devices, to the use of intangible property as security, to account receivable financing and finally to the enactment of Article 9 provisions.

The study of the gradual evolution of secured credit laws in the United States is instructive essentially in the suggestions and recommendations that this work will make on the Nigeria and Cameroon secured transactions laws. The study of some of the diverse independent secured credit financing namely: factors lien, field warehousing, trust receipt, chattel mortgage, leasing and conditional sale that existed before the enactment of Article 9 which are now regulated under Article 9 is also quite enlightening. The study has shown that secured financing are carried out by not only banks but also by financial institutions designated in the U.S. as non-banks. The types of secured financing provided by non-banks are in fact viable alternatives increasing access to credit as opposed to sheer monopoly enjoyed by the banks in Nigeria and Cameroon. The availability of these alternative secured financing will bring about competition amongst lenders in secured financing and this will invariably reduce the unfavorable terms which banks exact from their debtors.

[319] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, pp. 124-128.

The study also revealed that the more valuable and more often exploited asset type as collateral in the pre-UCC independent securities was not real property. Personal property was used as collateral in factoring, field warehousing, trust receipt, leasing contract, chattel mortgage, and conditional sale. Accordingly, with any of the above transactions getting foothold in Nigeria and Cameroon, credit would become more accessible especially to small business enterprises. For example, they could use the goods placed in a terminal warehouse as collateral in borrowing from a bank; which is a realistic possibility even in Cameroon. Thus, SME's whose access to credit is cut off for inability to furnish acceptable collateral to banks – now almost exclusively: real properties – could make use of these other methods of secured financing that de-emphasize the use of real property collateral.

Nonetheless, in other to achieve this, there is a need to have in place the normative framework for instituting these types of secured transactions and the industries that operate them both in Nigeria and Cameroon. Here lies the essence of legal transplantation of elements of Article 9 being advocated by this work. Besides the availability of the secured transactions devices, there is a need to educate the business people and indeed the society in Nigeria and Cameroon on these other types of secured financing that can provide them with viable alternatives from borrowing from formal banking institutions although how to do would be a big question considering that there is no tested known method. Knowledge of these specialized industries could be spread by awareness raising or through seminar and conferences on the subject. The benefits inherent to the economies of both countries in having these types of secured financing are immense. Not only would credit be more accessible to the generality of the society, the presence of the specialized industries will create more jobs for the society and this will contribute to the growth and development of the economy.

Sub-Chapter B. The Secured Transactions Laws in the three Jurisdictions

1.13. Introduction

Having discussed the pre-UCC security devices compared to their equivalents in Nigeria and Cameroon; the indigenous forms of consumer and business financing in Nigeria and Cameroon; and the lessons that Nigeria and Cameroon could learn from the evolution of secured transactions laws in the United States, the stage is ripe for discussions of the extant laws on secured transactions in the three jurisdictions. For Nigeria that has fragmented and compartmentalized laws, this sub-chapter will present the opportunity to briefly introduce all the laws that impact on secured financing. The subchapter will appraise the Uniform Act on Securities and also examine the Article 9 specialized industries and their equivalents in Nigeria and Cameroon. This discussion will be a forerunner to the discussions in chapter 2 which will do a comparative analysis of the building blocks of Article 9 in relation to what is available from the secured transaction laws in Nigeria and Cameroon.

1.13.1. The United States' Uniform Commercial Code

A brief introduction of the UCC will be apposite as a prelude to the discussion on Article 9 of the Code. This will not only help in the understanding of Article 9 and its interrelatedness with all other Articles in the Uniform Commercial Code but will explain the reasons behind the popularity of Article 9, and indeed the entire code to all the States in America that have adopted the articles of the Code as their States' law.

The Uniform Commercial Code has undergone series of revisions since its enactment by states in the U.S., the last being the revision of Article 2 on sale of goods in 2007.[320] The Uniform Commercial Code was a long - term joint project of the National Conference of Commissioners on Uniform State Laws (hereinafter called NCCUSL) and the American Law Institute (hereinafter called ALI) which started in 1942 and ended in 1952. The Code was drafted by some of the top legal scholars in the United States among whom were Herbert Goodrich who was Chairman of the editorial board, Karl Llewellyn[321] who was the Chief Reporter of the Code,

[320] Some of the revisions are as follows: Between 1967- 1972 Article 9 was revised; between 1975- 1977 Article 8 (Investment Securities) was amended; New Article 2A (Leases) was introduced in 1987; In 1989 Article 4A (Funds Transfer) was introduced; Between 1988- 1990 Article 3 (Negotiable Instrument which was formerly Commercial paper)was revised; between 1988 - 1990 Article 4 (Bank Deposits and Collections) was revised; between 1988-1989 old Article 6 (Bulk Transfer) was repealed and Article 6 (bulk Sales) was revised; 1990Articles 9, 2 and 2A were revised; between 1991-1995 Article 5 (Letters of Credit) was revised; between 1992-1994 Article 8 (Investment Securities) was revised; between 1993-1999 Article 9 was revised with subsequent amendment in 2000 and 2001, between 1996- 2001 Article 1 (General Provisions) was revised; between 2000 – 2003 Article 7 (Documents of Title) was amended; Article 2 (Sales) and Article 2A (Leases) were amended in 2003 and 2005 respectively. See Uniform Commercial Code (2008 Edition) Official Text and Comments, (Thompson Rueters/West, 2008) p. iii; See also Harry G. Kyriakodis, Past and Present ALI Projects (as of February 2007) (The American Law Institute) available at http://www.ali.org/doc/past_present_ALIprojects.pdf last visited on the 21st of April 2011.

[321] Karl Nickerson Llewellyn (1893-1962) Known for his theories on legal realism - "a philosophy that is critical of the theory that the law operates only as a system of objective rules," Llewellyn was born in Seattle; he spent much of his youth in Brooklyn. Unchallenged by the academic life in High School in the United States, he spent three years in Germany as a young man and enrolled in Real-gymnasium in Mecklenburg Germany. Llewellyn became fluent in German and developed interest in mathematics and science. He attended University of Lausanne in Switzerland briefly and returned in September 1911 and continued his education at Yale. He was still a student when the First World War broke out in 1914; he fought on the side of Germany and fought with the 78 Prussian Infantry in Germany earning the Iron Cross for his service although he never officially enlisted in the German Army. Llewellyn returned to the United States in 1915, he went back to Yale Law School. He studied under William Summer (the author of Folkways 1906). "The ideas and theories found in Summer's work significantly affected the development of Llewellyn's view of law as a social institution that is greatly influenced by the surrounding culture." Llewellyn was the editor in chief of Yale Law Journal for three years, was a part time lecturer in Yale Law School, worked with the legal department of National City Bank in New York City and later returned to a full time teacher at Yale Law School. He later moved to Columbia Law School. Some of his works include: The Bramble Bush: On Our Law and Its Study (1931), Cases and Materials on the Law of Sales (1931) and The Cheyenne Way (1941). Llewellyn also taught at Chicago Law School and from there Llewellyn and his third wife Soia Mentschikoff accepted appointment to work on the Uniform Commercial Code where he served as the Chief Reporter of Article 9.

Grant Gilmore[322] Associate Chief Reporter, Soia Mentschikoff the Associate Chief Reporter, William A. Schnader, Allison Dunham, and others.[323] The work was initiated by some private organizations; it is in fact a model law, which got the status of a statute by being adopted by the legislatures of the States. Once adopted, the code became the law of the state that enacted it, and hence the code including Article 9 remains a state law. All the Articles in the code which have been several revised have been substantially adopted by all the 50 states in America.[324] The drafting of the code by law experts - law professors, accomplished attorneys and judges - in the field gives the experts opportunity to consider the provisions of the code dispassionately and thoroughly and this is evident in the adoption of the code by all the states shortly after its drafting. According to British Columbia Law Reform Commission, "*The code (The UCC) is a codification of almost the entire body of commercial law […] the preparation of Article 9 involved many years of careful and painstaking work on the part of leading scholars and*

See the biography of Karl Llewellyn available at < http://law.jrank.org/pages/8336/Llewellyn-Karl-Nickerson.html > last visited on the 22nd of April, 2011.

[322] Grant Gilmore (1910-1982) obtained his AB from Yale College in 1931, Ph.D. in French Literature in 1936 from Yale College and LL.B in 1942 from Yale law School. He lectured at Yale Law School and Chicago Law School. Amongst other several articles which he published in law journals, Gilmore wrote many standard text books in law which have won many prizes and awards. Some of his works include: Security Interest in Personal Property (1965) which won Ames prize in 1966 given by the Harvard Law School faculty and Coif award in 1967 awarded then triennially by the American Association of Law Schools for the best book of legal scholarship; The Death of Contract (1974), The Ages of American Law (1977) and The Law of Admiralty which he co-authored with Charles Lund Black in 1957. Grant Gilmore served as an Associate Reporter for the drafting of Article 9 of the Uniform Commercial Code. A short biography of Grant Gilmore is available at < http://www.law.yale.edu/cbl/3085.htm > last visited on the 22nd of April, 2011.

[323] Besides these people there were many other law experts (Judges, practicing attorneys and law professors) who acted as advisers and draftsmen to the 1952 edition of the code. Some of the judges were John Loughran, Thomas Swan, John Wickhem,; some of the practicing attorneys were Dana Backus, Howard Barkdull, Lawrence Bennett, Harold Birnbaum, Williams Eagleton, Vernon Eney, Fairfax Leary Jr., while some of the law professors were Ralph Baker, William Briton, Charles Bunn, Arthur Corbin, Albert Harno, Friedrich Kessler, Maurice Merrill. Besides the editorial board of the 1952 draft, many other editorial boards have been constituted at various times for the review of the code with many experts appointed to those boards at different times. For a comprehensive list of all past and present members of the Permanent Editorial Board for the Uniform Commercial Code see – Uniform Commercial Code (2008 edition) Official Text and Comments (Thompson Reuters/West, 2008) pp. vii-xxi; Uniform Commercial Code (2005 Edition) Official Text and Comments available at http://www.ali.org/ali_old/com_ucc.htm last visited on the 22nd April, 2011; Braford Stone & Kristen Adams, Uniform Commercial Code In a Nutshell (Thomson West, 7th ed., 2008), p.XII.

[324] Even civil law state like Louisiana has enacted most provisions of the UCC except Article 2 on sale of goods and Article 6 on bulk transfer. Louisiana prefers to maintain its civil tradition governing sale of goods. See Braford Stone & Kristen Adams, Uniform Commercial Code In a Nutshell, supra footnote 323, p. XIII

practitioners in the field in the United States. For anyone concerned with reform of this branch of law, it is an effort of paramount importance."[325]

The Code contains many aspects of commercial transactions which are not only complementary to one another but are also interwoven and this may account for the grouping of all these interrelated subjects of commerce together in a single Code. For example a transaction for the sale of goods (article 2) *"may involve the giving of a check or draft for the purchase, […] the check or draft may be negotiated and pass through one or more banks for collection (article 3). […]. If the goods are shipped, the subject matter of the sale may be covered by document of title - bill of lading or warehouse receipts (article7), […] the purchase price for the sale may not all be paid for immediately and consequently may involve the acceptance of some form of security for the balance which is the subject of Article 9. […]. It may well be that the sale may be made pursuant to a letter of credit either domestic or foreign (article 5).*"[326]Every stage of the transaction highlighted above is only a part of the sale and payment transaction and it does make sense to have a code that deals with all the facets of the commerce. However, the analysis above does not mean that the code is a complete treatise on commercial transactions; it was only on issues that the drafters reached an agreement that was included in the code. Some fields that rightly belonged to the domain of commercial transactions that an agreement could not be reached were left out. For example the law of agency was left out of the code because of this reason. Again some of the areas covered by the code already had some uniformity during the pre-UCC era, for example there were some uniformity throughout most states in the United

[325] See Report on Debtor –Creditor Relationship to the Attorney-General of British Columbia (Project No.2), part 5 Personal Property Security Law, p. 14, cited by Iwan Davies, The Reform of Personal Property Security Law: Can Article 9 of the US Uniform Commercial Code Be a Precedent? The International and Comparative Law Quarterly, Vol. 37, No.3 (July 1988), pp. 475-476.
[326]See Braford Stone & Kristen Adams, Uniform Commercial Code In a Nutshell, supra footnote 323, pp xiv- xv.

States on the Chattel Mortgage Act, Uniform Warehouse Receipt Act, Uniform Trust Receipt Act, Uniform Conditional Sale Act and Factors Lien Act and these uniformities ensured that the principles of Article 9 was acceptable and agreeable to the drafters. In a way the Code unified many of the states laws on commercial transactions that existed prior to the introduction of the code.[327]

As stated earlier, Article 9 of the UCC is only a part of the Uniform Commercial Code.[328] In a way UCC is somewhat analogous to OHADA Uniform Acts. The point of similarity being that both UCC and OHADA Uniform Acts deal with several commercial issues and both laws ensure uniformity of laws on those issues covered within the jurisdictions that both laws govern.[329] However one of the numerous differences between the two laws is that whereas the UCC provisions apply only to one country, the provisions of OHADA Uniform Acts apply to 16 OHADA member countries.[330]

As already stated above, the UCC covers related laws on issues which are interwoven and overlap one another.[331] On the other hand, the commercial issues covered by the OHADA Uniform Acts are not that manifestly interwoven and the issues covered by OHADA Uniform

[327] The official comments to the Code prepared by the NCCUSL and ALI is very helpful in interpretation of the code. It assists in determining the underlying purposes and policies of the Code and also in ensuring uniformity in the interpretation and construction of the Code among the various States that adopted the Code. See Id. p. xvi.

[328] Other Articles of the code are as follows: Article 1 - general provision – definitions, rules of interpretations, Article 2 - sale of goods Article 2A - leases of goods Article 3 - negotiable instruments-banknotes, drafts (commercial paper), Article 4 - bank deposit-banks, banking, check collection process, Article 4A - funds transfer - transfer of money between banks, Article 5 - letters of credit, Article 6 - bulk transfer and bulk sales-auctions and liquidation of assets, Article 7 - warehouse receipt, bill of lading and documents of title – storage and bailment of goods, and Article 8 - investment securities – securities and financial assets.

[329] Although the UCC Article 9 varies slightly from one state to another but the provisions are substantially the same.

[330] See supra footnote 25 for the names of the OHADA member countries.

[331] For an example, the subject matter of Articles 2A, 3, 4, 5, 7, and 8 of the UCC can be used as a form of collateral to create a security interest under Article 9, again a sale transaction under article 2 could involve the subject matters and provisions of articles 3, 4, 5, 7 and 9.

Acts are much wider, e.g., secured transactions law, arbitration law, accounting law and law regulating contracts for the carriage of goods by road. The common denominator under the OHADA Uniform Acts is that the Act governs general commercial laws in member states.

There is no equivalent of the United States' Article 9 UCC or the Cameroon's Uniform Act on Securities in Nigeria. Lack of equivalence as used here means that there is no one piece of legislation in Nigeria where one can find a comprehensive secured transactions law in personal properties and fixtures as in Article 9 or secured credit law in personal and real properties as in the Uniform Act on Securities. However, just as in United Kingdom, there are pieces of laws scattered in different statutes which when assembled together may form personal property secured transactions law in Nigeria. The fragmented nature of secured transactions law makes the statutes not easily accessible and understandable to the public.[332] Even the legal practitioners and other industry practitioners find it difficult to locate the exact legislation that applies to each transaction. Again the absence of having in one statute book secured transactions law have far reaching implications and is taking its tolls on both the consumer and business financing in Nigeria. One can only imagine the trauma of the potential consumer or business borrower in trying to find which of the laws govern a particular transaction that he/she is entering into. This reinforces this research's convictions to have the unitary concept of security interest in Nigeria.

[332] According to Diamond Report in the UK, "[t]he English law of security is divided into rigid compartments, making the law fragmented and incoherent. Transactions essentially similar in nature are treated in very different ways. This has the effect of complicating the legal issues quite unnecessarily […] the compartmentalization of the law just referred to inevitably gives rise to a law that is complex and uncertain." See Diamond Report, paras. 8.2.4. and 8.2.7, quoted by Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 234.

1.13.2. A Brief Overview of Nigerian Secured Transactions Statutes: The Nigerian Fragmented Secured Transactions Laws

A brief synopsis of Nigeria's secured transactions statutes will give a snapshot of all the laws that impact on consumer and commercial financing even if such laws are outside the purview of secured transactions law in Nigeria. The essence of the overview of such laws will be to know which laws would be suggested to be brought under the ambit of secured transactions law in order to achieve the unitary concept of security interest as it is under the Article 9.

The following laws in Nigeria could be said to contain the most important provisions on consumer and business financing:

(a) The Hire Purchase Act Chapter H4 Laws of the Federation of Nigeria 2004[333]

(b) The Company and Allied Matters Act (CAMA) Chapter C20 Laws of the Federation of Nigeria 2004

(c) Banks and other Financial Institutions Act Chapter B3 Laws of the Federation of Nigeria 2004, and

(d) The Bankruptcy Act Chapter B2 Laws of the Federation of Nigeria 2004.

1.13.2.1. The Companies and Allied Matters Act 2004

CAMA will be analyzed in details when this work will deal with fixed and floating charges and registration of company's charges in chapter 2. However a brief overview of the provisions of the CAMA that impacts on secured transactions of a company is provided herein. It suffices herein to state that the Act governs every aspect of the life of a company, incorporated trustees

[333] Hire Purchase Act and Equipment leasing Bill have been discussed earlier in the context of Nigerian equivalents of the United States conditional sale and its derivatives and the discussions on both laws need not be revisited here.

and partnerships registered at the Corporate Affairs Commission (CAC).[334] For the company, the Act governs from the registration of the company to the winding up of the company. However, the two important aspect of the life of a company that is relevant to this research is the company's use of its assets and undertakings to raise capital for its operations[335] and the winding up of the company on grounds of insolvency - its inability to pay its debts.[336]

The Companies and Allied Matters Act provides that a company can borrow money for the purpose of running its business and may charge or mortgage its undertaking, property, and uncalled capital as collateral for the loan. The company may issue debentures, debenture stock and other securities as security for the loan.[337] In furtherance to this, CAMA provides for the fixed and floating charges over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and future as security for any of the company's borrowings.[338] CAMA also provides for the registration of these fixed and floating charges to create public notice for other potential creditors of the company.[339] Suffice it to say that the Companies and Allied Matters Act is the only law in Nigeria that regulates company's secured transaction in personal properties.

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[334] CAC is a body corporate with perpetual succession and a common seal. It is the place where all forms of business enterprises in Nigeria are registered particularly companies, partnership and incorporated trustees. Companies and other forms of business organizations file their company charges and other statutory returns there. It is also where searches are conducted to find out about company's charges. For other functions of CAC, see section 7 of the CAMA 2004 and its web page is < http://www.cac.gov.ng/ > last visited on the 11th of April, 2011.

[335] See generally sections 166 – 210 CAMA 2004 and the discussions in chapter 2 infra.

[336] See generally sections 401 – 540 CAMA 2004 and also the discussions in chapter 4 infra. Insolvency and winding of company are terms Nigerian company laws adopted from copying the English Company Act of 1985. The equivalents of insolvency and winding up of company under the United States law are bankruptcy and dissolution respectively.

[337] See section 166 CAMA 2004.

[338] See generally sections 178 and 179 of the Companies and Allied Matters Act 2004. The concept of fixed and floating charges will be analyzed in relation to the United States floating lien under chapter 2of this work.

[339] Id. See section 197 CAMA. See infra chapter 2 for the discussion on the registration of the fixed and floating charges in comparison to the simple notice filing system under Article 9.

As already stated, CAMA also regulates the winding up of a company.[340] The only ground of the winding up of the company that is relevant to this research is the one on the basis of the inability of the company to pay its debts to its creditors. CAMA regulates the rights of a secured creditor over its perfected security interest vis-à-vis the powers of the liquidator in a company's winding up proceeding. CAMA also provides the necessary safeguards to secure the rights of a secured creditor in the assets of the company which the creditor holds a perfected security interest.[341]

1.13.2.2. Banks and other Financial Institutions Act Chapter B3 Laws of the Federation of Nigeria 2004 and Bankruptcy Act Chapter B2 Laws of the Federation of Nigeria 2004

Another law that impacts on secured transactions in Nigeria is the Banks and Other Financial Institutions Act 2004. The only point of interest which warrants mentioning of this law is that the banks are also guided by this law in granting loan credits to their customers.[342] Basically this

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[340] According to section 408 CAMA, a company may be wound up by the court if: "(a) the company has by special resolution resolved that the company be wound up by the court; (b) default is made in delivering the statutory report to the commission or in holding the statutory meeting; (c) the number of members is reduced below two; (d) the company is unable to pay its debts; (e) the court is of the opinion that it is just and equitable that the company should be wound up." Winding up of company under the Nigerian company laws is the equivalent of dissolution of company under the U.S. laws.

[341] See infra chapter 4 for a detailed analyses of the interface between the rights of a secured creditor and that of the liquidator of an insolvent company.

[342] For example, section 18 (1) and (2) prohibit the manager or any other officer of the Bank to (a) have either directly or indirectly any personal interest in any advance, loan or credit facility which the bank grants to its customers and to declare such interest to the board of directors of the bank where it exist; unless the officer of the bank is only a shareholder of such customer who holds less than 5% of the shares of the customer or the Central Bank of Nigeria regarded such interest as being immaterial (b) to grant advance, loans or credit facility except in accordance with the rules and regulations of the bank and where adequate security is required by the rules and regulations before the grant of the credit facility such security shall be obtained before the grant of the advance, loans or credit facility; (c) to benefit as a result of the grant of any advance, loans or credit facility to the customers of the bank.

The Act provided for the punishment of the violation of any of the provisions of these sections to include a fine of ₦100, 000 (one hundred thousand naira) or an imprisonment for a term of three years and forfeiture of the gains that accrued to such manager or officer of the bank to the government upon conviction. Also Section 20 (1) (a) of the Banks and Other Financial Institutions Act prohibits commercial bank to grant loans and credits above a certain limits to customers except with the approval of the Central Bank of Nigeria, the Act prohibits the bank to grant 'to any person any advance, loan or credit facility or give any financial guarantee or incur any other liability on behalf of any person so that the total value of the advance, loan credit facility, financial guarantee or any other law contains the prudential guidelines from the Nigerian regulatory bank (Central Bank of Nigeria) to all commercial banks in Nigeria. The rules provide the dos' and don'ts in the banking industry with sanctions (ranging from fines to imprisonment) for violations of the rules.[343]

The last Act that impacts on secured transaction in Nigeria is the Bankruptcy Act 2004 This moribund Act relates to the bankruptcy proceedings of individuals and partnerships only, how properties of the bankrupt are utilized by the bankruptcy trustees to settle the bankrupt's debts to its creditors. The point of relevance to secured credit laws here is, like in the case with sections 401 – 540 of Companies and Allied Matters Act which deals with the insolvency of companies, this Act governs the right of the secured creditor in a bankruptcy proceeding of the debtor especially upon the making of automatic stay order by the court. It determines the rights of the secured creditor vis-à-vis the avoidance powers of the bankruptcy trustees. Since this law might curtail albeit momentarily the security interest of the secured party over the collateral given to secured party by the debtor, it thus make sense to examine the law in details. It is for this reason that chapter 4 has been devoted to the interface between the powers of the bankruptcy trustee or

liability in respect of the person is at any time more than twenty per cent of the shareholders fund unimpaired by losses or in the case of a merchant bank not more than fifty per cent of its shareholders fund unimpaired by losses; and for the purpose of this paragraph all advances, loans or credit facilities extended to any person shall be aggregated and shall include all advances, loans or credit facilities extended to any subsidiaries or associates of a body corporate.'

343 On October 8th 2010, a former Managing Director of Oceanic Bank International Plc, Mrs. Cecilia Ibru was convicted for contravening the provisions of Section 20(1) (a) of the Banks and Other Financial Institutions Act after pleading guilty on one of the three charges of giving out loan over and above the credit approval of Oceanic Bank Plc without the approval of the Central Bank of Nigeria and was sentenced to 18 months imprisonment. The charge was read thus: "That you, Cecilia Ibru while being the Managing Director/Chief Executive Officer of Oceanic Bank International Plc on about 2nd August, 2007, within the jurisdiction of this honorable court, approved a credit facility in the sum of US$20,000,000.00 by the bank to WAVES Project Nigeria Limited, which sum was above your credit approval limit as laid down by the regulations of Oceanic Bank International Plc and you thereby committed an offence contrary to section 15 (1)(b) of the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Act Cap F2 Laws of the Federation of Nigeria, 2004 and punishable under section 16(1) (a) of the same Act." However it should be noted that Cecilia entered into a plea bargain with the state prosecutors and asset worth N191 billion (about $1. 1billion) recovered from her.

liquidator and the rights of a secured creditor; hence it would amount to unnecessary repetition to go into details of the law herein.

1.13.2.3. Proposed Law on Security Interest in Movable Property for Nigeria

Notwithstanding the above laws, it is pertinent to say a word or two about the initiative of the Center for the Economic Analysis of Law (CEAL) Washington D.C. in drafting a proposed law on Security Interest in Movable Property for Nigeria.[344] This initiative spearheaded by Nuria de la Pena, Heywood Flesig and Peter Winship aims at giving Nigeria a law on security interest in movable property which would combine both consumer and commercial financing. The proposed draft would supersede the provisions of sections 166 – 182 CAMA 2004 which deal with companies financing. This draft law is fashioned after the Article 9. The draft law has seven parts: namely part I regulates the general provisions; part II deals with the creation of security interest; part III governs publicity and priority; part IV talks of internet notice-filing archive of security interest in personal property; part V provides for the enforcement of security interest; part VI deals with the international transactions and part VII regulates the final and transitory provisions.

The initiative that has resulted in the draft law is quite commendable and partly in line with aim of this research – the reform of the Nigeria secured transactions law to make it responsive to the current emerging paradigms in secured financing. The provisions of the proposal draft are in line also with current trends in consumer and business financing. However, this proposed draft

[344]See Nuria de la Pena, Heywood Fleisg, Peter Winship, Nigeria: First Draft Law on Security Interest in Movable Property, Center for the Economic Analysis of Law available at < http://nigeria.ceal.org/docs/ > last visited on the 9th of April, 2011.

remains an initiative though the drafters have had series of meetings with selected law firms in some cities in Nigeria to discuss the proposed draft law. The draft law has not yet been sent to the Nigerian National Assembly as a bill, consequently this research can only treat this proposed draft as Nuria de la Pena et al opinion as what a law on security interest in movable property should be in Nigeria. Thus, references to it in this work will carry only an academic weight.

1.13.3. The Cameroonian Secured Transactions Law - The OHADA Uniform Act on Securities

As stated earlier, Organization for the Harmonization of Business Law in Africa (OHADA) was established by a treaty signed initially by the 14 member African countries on the 19th of October 1993 in Port Louis Mauritius; the membership of the organization at present is 16 member countries. One of the guiding principles for the formation OHADA is among other things to harmonize the business laws within the contracting states "*by the elaboration and adoption of single modern common rules adapted to their economies.*"[345] In order to achieve the member countries' objectives; to ultimately facilitate investment within the member states and also to attract foreign investment,[346] the member states have harmonized business laws in eight different areas.[347]

Pursuant to the above objectives, the Uniform Act on Securities was one of the three OHADA Uniform Acts[348] adopted by the Council of Ministers of OHADA member countries on the 17th

[345] See the preamble and Article 1 of the Treaty on the Harmonization of Business Law in Africa available at < http://www.jurisint.org/ohada/text/text.01.en.html#PREAMB > last visited 11th April 2011.
[346] See Claire M. Dickerson, Harmonizing Business Laws in Africa: OHADA Calls the Tune, supra footnote 58, p.4.
[347] See supra footnote 28.
[348] The other two Uniform Acts being the: Uniform Acts relating to General Commercial Law and Uniform Act relating to Commercial Companies and Economic Interest Group.

of April 1997.[349] However the Uniform Act on Securities came into force on January 1, 1998. The provisions of Uniform Act on Securities like all the other seven OHADA Uniform Acts have direct application in the member states legal system just like the provisions of the European Union treaties and regulations on the EU member states. With the coming into effect of the Uniform Act on Securities in OHADA member countries, the Act made amendments and revisions to what were hitherto the existing laws of member states on secured transactions which the member states copied from the French Civil Code of 1804. Undoubtedly, the laws of member states on secured credit transactions that copied the French law of 1804 had become outdated and could not meet the contemporary financing needs of the member states as at 1998. Although the law had become outdated, most of the African countries in their usual characteristics of not revising the statutes they inherited from their colonial masters, notwithstanding, that the provisions of those laws had become spent and outdated, allowed the law to remain in their statute book without revising the laws.[350] Except for Senegal, no other member state had revised its secured credit laws which were copied from the French Civil Code of 1804.[351]Consequently not only that the Uniform Act on Securities brought some uniformity to this area of law in the OHADA member countries, it also updated the OHADA member states (Cameroon) statute book in this important area that holds the key to growth and development of a country.

[349] See Juris International, The Overview of the OHADA Uniform Acts written by the Secretariat of the Organisation for the Harmonization of Business Law in Africa available at <http://www.jurisint.org/ohada/pres/pres.00.en.html > last visited on the 11th of April 2011.

[350]See the case of Evidence Act and Hire Purchase Act in Nigeria, See also Professor Imran Smith supra footnote 237 for the lackadaisical attitude of Nigeria authorities to revise and update laws copied from the English law even when the laws have become outdated and have been revised in country of origin.

[351] See OHADA Uniform Act Organizing Securities, notes prepared by the Secretariat of the Organization for the Harmonization of Business Law in Africa with the collaboration of Professor Joseph Issah Sayegh of the Faculty of Law Abidjan, p. 2 available at < http://www.juriscope.org/infos_ohada/droit-sure/pdf-gb/presentation-surgb.pdf > last visited on the 13th of April, 2011.

The Uniform Act has 151 Articles and is divided into five parts. While Part I[352] deals with personal securities[353] - like surety bonds: terms, effects and extinction of surety bonds, and letter of guarantees and counter-guarantees (i.e., their formation and effects), Part II[354] is about transferable guarantees like possessory liens – pledges (constitution, effects and extinction of pledges). It also provides for non possessory lien - pledging without dispossession, namely pledging of partnership rights and transferable securities, pledging of a business and preferential right of the vendor of a business, pledging of professional equipment and motor vehicles, pledging of stocks. Part III[355] then provides for mortgages and the types of mortgages recognized under the law- contractual and forcible mortgages and the effects of mortgages and Part IV[356] with the distribution and classification of security. Part V [357]deals with the final provisions. This research shall therefore only examine the features of the Uniform Act on Securities as it relates to collateral securities on personal properties and fixtures.

This work will refrain from discussing part I of the Uniform Act on Securities for the obvious reasons. This part deals with personal securities like the surety bond and letter of guarantee. These types of personal securities are largely left out in our discussions in other jurisdictions (the United States and Nigeria) since the focus of this research is on use of personal properties and fixtures as collateral. As personal security devices are not covered by Article 9 and as one of the aims of this work is to transplant Article 9 to Nigeria and Cameroon; it thus makes sense to

[352] See Articles 1 – 38 of the Uniform Act on Securities.
[353] One of such terminological differences is the inclusion of surety bonds, letter of guarantee as collateral securities by the Uniform Act on Securities although these types of securities are strictly speaking personal securities. Whilst these types of securities are treated under the United States as personal securities not qualifying as 'collateral' securities and thus not governed by the provisions of Article 9, the Uniform Act has classified collateral securities to include surety bonds and letter of guarantee.
[354] See Articles 39 – 116 of the Uniform Act on Securities 1998.
[355] See id., Articles 117 – 146.
[356] See id., Articles 147 – 149.
[357] See id., Articles 150 – 151.

restrict the research to the precincts of Article 9. Also for the same reasons given above, real property mortgages covered under part III of the Uniform Act on Securities will not be discussed even though they are likewise a type of proprietary security. Meanwhile, the provisions of part II of the Uniform Act on Securities have been examined earlier on this chapter. Whilst pledge was discussed in the context pledge under the United States and Nigeria, pledge without dispossession under Uniform Act on Securities was analyzed in comparison to the United States chattel mortgage. It makes no further academic contribution to belabor the issues here again. This work will therefore discuss briefly possessory lien under the Uniform Act on Securities.

1.13.3.1. Possessory Lien of the Cameroon's Uniform Act on Securities

Possessory lien is provided for under Article 41 of the OHADA Uniform Act Organizing Securities 1998. Interestingly, possessory lien under the Uniform Act on Securities is akin to mechanic's liens[358] as known in the U.S. Article 41 of the Uniform Act provides *"Any creditor legitimately holding a debtor's asset may hold same pending full payment of his due, regardless of any other security."*[359] Article 42 of the Uniform Act on Securities provides the conditions under which the right of possessory lien could be exercised. For the possessory lien to be held legitimately it must be exercised prior to any distraint; it must be exercised before any other person who has a lawful claim to the property takes possession of the property or seizes the property under the Uniform Act on Simplified Recovery Procedures and Measures of Execution.

[358] Mechanic' lien means "A statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real or personal property, such as a building, an automobile, or the like. Also termed as artisan's lien; chattel lien (for personal property); construction lien (for labor); garageman's lien (for repaired vehicles); laborer's lien (for labor) and materialman's lien (for materials)." See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 943.

[359] According Martha Tumnde et al, the provisions of possessory lien are derived from Senegalese Law on Securities. See Joseph Issa-sayegh, Le droit de retention en droit senegalais, Melanges Charles Freyria, p.69 et seq; penant, no.810, octobre-decembre 1992, p. 261et seq. See Martha Tumnde, Peter Tumnde and Anoukaha Francois , Commentaries to Uniform Act Organizing Securities (Guarantees), supra foot note 163, p. 30.

It must be exercised where the debt is unquestionable, liquid and due. For a debt to be unquestionable liquid and due, it means that the debtor does not have any form of counter claim against the creditor and the debt has become payable.[360] Again, it must be exercised where there is a link between the origin of the debt and the asset held.[361] The link is established where the asset held and the debt resulted from business dealings between the creditor and debtor – thus the asset held does not necessarily need to emanate from the same business transaction that gave rise to the debt. It suffices if the asset held emanated from other business dealings between the same creditor and debtor. Where however, the debtor furnishes another equivalent security, then the creditor shall give up the possessory lien over the property. [362]

A closer reading of Article 41 of the Uniform Act on Securities shows that where the lienee legitimately obtains possession of the asset of the debtor pursuant to this possessory lien, the lienee's interest in the property takes priority over all other security interest created in the property under the Uniform Act on Securities. Thus possessory lien prevails over pledge without dispossession, but will not prevail over a possessory pledge because the creditor will at all material times be in possession of the collateral. Possessory pledge differs from possessory lien under the Uniform Act on Securities in many ways. Whilst possessory pledge can only come into being by the consensual agreement of both the creditor and the debtor, possessory lien arises only by operation of the law. Closely connected to this is that whereas in case of the former the creditor is put in possession of the asset of debtor as security for the grant of credit from the

[360] See the case of Societe Maregel (Conseil: SCP DIOUF et FALL, Avocats a la Cour) c/ Serigne Mustapha MBACKE (Conseil: Maitre Chiekh Amadou DIOP, Avocats a le Cour), Arret No. 016/2002 of 27 June 2002 in the Common Court of Justice and Arbitration Abidjan, cited in Uniform Act on Securities (Guarantees) with Commentaries from Martha Tumnde, Peter Monteh Tumnde and Anoukaha Francois, supra footnote 163, p. 32.
[361] See Article 42 of the OHADA Uniform Act on Securities.
[362] See Uniform Act on Securities (Guarantees) with Commentaries from Martha Tumnde, Peter Monteh Tumnde and Anoukaha Francois, supra footnote 163, p. 32.

inception, in the case of the latter the property is not initially given to the lienee as a security; rather the proprietary right gets constituted only subsequently because of the inability of the debtor to meet his financial obligations to the lienee.[363]

Article 43 even allows a creditor - who has a possessory lien over a property - to exercise his right of pursuit and preferential rights upon notification to the debtor and the proprietor of the asset if the creditor receives neither his payment nor another equivalent security. Pursuant to this, the Uniform Act on Securities has created a number of liens which it calls special liens under Articles 109 – 116 of the Act.[364] Consequently, the combined effect of Articles 41 and 42 of the Uniform Act on Securities accord with the United States notion of mechanic's liens, like the agricultural liens, or hotelkeeper's liens.[365]

1.13.3.2. General Appraisal of the Cameroon's Uniform Act on Securities

Though Cameroon and other OHADA member countries have Uniform Act on Securities which regulate the use of personal and real properties as collateral for credit, still the law is inadequate to deal with the new frontiers of modern day credit financing. For example, while the pledge of

[363] For example in a garageman's lien, the motor vehicle of the debtor was taken to the garage initially for the purpose of effecting repairs on the motor vehicle, the garageman's lien will only arise because of the inability of the owner of the motor vehicle who has now become a debtor to pay for the services rendered by the lienee. See Martha Tumnde, Peter Tumnde and Anoukaha Francois, Commentaries on Uniform Act Organizing Securities (Guarantees), supra footnote 163, p. 30.

[364] Some of the examples of such liens are a vendor's lien over a sold property to guarantee payment if the property is still in the hand of the debtor (Article 110); a lessor of a building lien over the furniture of the rented premises to guarantee unpaid rent (Article 111); a haulage company's lien over the transported property to guarantee the unpaid cost of transporting the property (Article 112); an employee's lien over the sums owed to the company for work done as guarantee for the debts owed the employees in connection of the work done (Article 113); a commission agent's lien over the merchandise he holds on behalf of the principal to guarantee his claims arising from the commission contract (Article 115).

[365] It is a type of lien that allows an innkeeper to hold as security for payment any of the personal property that the guest brought into the hotel. See also Bryan Garner, (ed.), Black Law Dictionary, supra footnote 3, pp. 942-943.

business under the Uniform Act[366] – in French called the '*nantissement de fonds de commerce'* – could be said to be the functional equivalent of the U.S. floating lien and the English style fixed and floating charges,[367] some of its features robs it the efficiency.[368] Writing on the limitations of the *nantissement de fonds de commerce*, Spanogle stated as follows: "*However there are several limitations on the creditor's rights. His rights are subordinate to perfected equipment liens, if the holder of the equipment hereon notified the mortgage creditor, and to wage and tax claims. It may also be subordinate to a seller's claims arising out of retention of title clause, and no notice of such clauses is required. Further, the debtor may sell the equipment assets of the business, and a good faith purchaser will not be subject to the mortgage. Finally enforcement may only be through a sale of the assets by judicial auction. The creditor may not take over the business or its assets, or attempt to sell them through normal commercial channels*"[369]

Besides this, the Uniform Act on Securities falls short of providing for other forms of secured credit financing devices that could accommodate the use of a wider range of personal properties. There is no provision on any contract form that would exploit retention of title (ROT) clauses as a means of secured financing, like that is the case with hire-purchase or leasing in the neighboring Nigeria or conditional sales in North-America.[370] The Uniform Act on Securities is also deficient because it in effect discourages extension of credits, for example, because of its failure to provide for appropriate priority rules that would reckon with the possibility of using the

[366] See Articles 69 – 72 of the Uniform Act on Securities 1998.
[367] See John A. Spanogle, the Financing of Small Businesses: A Functional Analysis of Three Legal Modules, supra footnote 38, p. 4.
[368] For a full comparison between pledge of business under the Uniform Act, the United States floating lien and the English style fixed and floating charge, and the latent shortcomings of the pledge of the business under the OHADA Uniform Act, see infra chapter 2, pp.222 – 226.
[369] See John A. Spanogle, the Financing of Small Businesses: A Functional Analysis of Three Legal Modules, supra footnote 38, p. 3.
[370]Even until date there is no law regulating hire purchase or leasing contract in Cameroon.

same, or portions of a property (in case of global security) or asset as collateral more than once. For example where a company pledges its business to secure credit, the opportunity of raising further credit from other potential creditors by the use of the company's asset appears to be shut as most creditors would not want to have a subordinated security interest. Most times, the initial secured creditor may not want to increase the loan based on the strength of the old collateral especially where the company's fortunes are dwindling and such additional credit might just be critical to the company coming out of its financial doldrums. Such scenario should have necessitated the draftsmen of the Uniform Act on Securities to consider other probable ways for the company to raise money like the Article 9 Uniform Commercial Code's rules on purchase money security interests.

Again, the mechanisms for the enforcement of security interests under Uniform Act on Securities leave much to be desired. The enforcement of secured transactions is not as diverse as it is under the Article 9 or even as it is in Nigerian. Essentially, in Cameroon – and in most of African systems that have modeled themselves after French law – there are no private mechanisms for the enforcement of the security interest like the appointment of receiver/manager, let alone self – help repossession and the other connected rules.[371] It does appear from the reading of the law that for the secured creditor to realize his securities upon the default of the repayment of the loan by the debtor or the reduction in value of the pledged property, the creditor must file a suit in a court. The prerequisite of filing a suit for the enforcement of all secured transactions in Cameroon does not accord with current business trends. This may reduce the willingness of the

[371] These rules on public and private enforcement of security interest, especially the absence of self help rules and its implications on the secured credit transactions on Cameroon will be discussed in details in chapter 3 of this work. However suffice it to say that the lack of provision of self help rules stem from the fact of the civil law nature of Uniform Act on Securities.

financial institutions to give out credit or the banks may give out credit on stringent measures that most micro, small and mid scale entrepreneurs may not afford to access those loans. This may have contributed to the thriving of 'njangi' financing at the expense of the formal secured credit transactions in Cameroon until date.

Consequently some of the above limitations and challenges inherent in the Uniform Act on Securities will be analyzed in subsequent chapters of this research and solutions proffered on chapter 5 of this work on the legal transplantation of the provisions of Article 9 to Cameroon and Nigeria.

1.14. Article 9-Based Specialized Industries and their Equivalents in Nigeria and Cameroon

Article 9 is a product of over two hundred years evolution of secured transactions laws in the United States.[372] In essence Article 9 evolved out of the practices and norms of specialized businesses – initially each exploiting typically only one particular form of – what came to be known – independent security devices. The same applies also today and, indeed, it is fair to claim that the hallmark of the efficiency of U.S. secured transactions law is the presence of specialized industries that live on the provisions of Article 9. Considering that it may be difficult to identify comprehensively all the industries in the United States that operate under Article 9 this research will therefore limit the discussion only to the most important ones. On the other hand, the secured transaction laws in Nigeria and Cameroon are not fully developed. The fact of

[372] See Grant Gilmore describes Article 9 as the "anthological collection of the most celebrated security law controversies of the preceding forty years […]." See Grant Gilmore, Security Law, Formalism and Article 9 in COMMERCIAL LAW Ross Cranston (ed.), supra foot note 67, p. 397. See also James White, Robert S. Summers supra footnote 82, p. 1148.

non-development ipso facto presupposes that the industries that could live from this branch of law are likewise undeveloped. Consequently, albeit exact statistical data are lacking, one could safely presume that in the two targeted countries secured transactions are still mainly isolated one-shot type transactions rather than a business professionally run by an organized industry. Hence, one should talk primarily of 'fledgling industries' in Nigeria and Cameroon. In other words, most of the consumer and commercial financing are being provided only by banking institutions – or their captive subsidiaries – in these African countries.

As opposed to the African realities, in the United States – besides the traditional commercial banks that provide consumer and business financing – crucial role has been played by the non-banking financial institutions. These institutions basically play two roles in secured transactions law in the United States. They complement the role of commercial banks by providing consumer and business finances in those areas that banks may do inefficiently.[373] They also compete with banks thus breaking the monopoly banks would have had on the secured financing. Competition by non bank financial institutions makes banks more efficient and more responsive to the needs of borrowers.[374] The most important non-banks – that may appear also in Nigeria and Cameroon – are the factoring houses,[375] field warehouse companies,[376] leasing companies, automobile manufacturing companies that engage in floor plan financing, and other manufacturing

[373] See Jeffrey Carmichael, Michael Pomerleano, the Development and Regulation of Non-Bank Financial Institutions, (World Bank, 2002), p. 207.
[374] Id., p. 207.
[375] Rosenthal & Rosenthal is one of numerous factoring companies in the United States with its head office in New York and offices in Los Angeles and Shanghai China. It has been in existence since 1938 doing factoring business among its many other businesses. The website of the company is available at < http://www.rosenthalinc.com/main/getpage.php?pgid=117 > last visited on the 8th of April 2011.
[376] According to Gilmore, in 1960 about six large companies operated about 95% of the total number of over six thousand field warehouses in the United States. The Lawrence Field Warehouse was the largest and prominent one amongst the six and the company controlled about "half the market both in the number of warehouses and in the volume of inventory for which warehouse receipts were issued." See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 147. Presently there are several thousand of field ware house companies in the United States providing services to businesses who want to use their inventories as collateral for loan.

companies that engage in consignments (consignors). There are also the availability of other industries that do not provides finance nevertheless they provide other services that help in smooth operation of the provisions of Article 9 – repossession companies, legal practitioners, or insurance companies.

As said earlier, many of the Article 9 specialized industries are not in existence in Nigeria and Cameroon yet. Indeed, most of the credit financing are done by banks, except for leasing and hire purchase transactions in Nigeria. In Nigeria, there are different types of banks that provide financing to diverse categories of consumers and business entities. The most important types of banks include: the commercial banks;[377] mortgage banks;[378] micro-credit finance banks (MFB);[379] and the Nigerian Export-Import Bank (NEXIM).[380] The Export-Import bank was

[377] There are about 24 commercial banks in Nigeria that give out loans both to consumers and business entities. The activities of these banks are regulated by the Central Bank of Nigeria and the major law guiding the activities of these banks is the Banks and Other Financial Institutions Act 2004. The average lending rates of these banks are between 18% - 23% as at 30th of August 2010. This information is obtained from Central Bank web site at < http://www.cenbank.org/documents/bsdpublications.asp >. The directory of the banks with all their head offices can be found at < http://www.nigeriagalleria.com/Banking_and_Finance/Banks.html > last visited on the 2nd of April, 2011.

[378] In Nigeria, there is the Federal Mortgage Bank of Nigeria (FMBN) with its headquarters in Abuja and branches in almost all the states of the federation, while there are 101 Primary Mortgage Institutions (PMI) in Nigeria. FMGN started operations in 1956 as Nigerian Building Society but became the FMBN in 1977. Both FMBN and PMI's primary aim of granting mortgage facilities are to facilitate affordable home ownership to contributors of the Nigerian Housing Trust Fund. To qualify for a loan, one needs to have joined and contribute to the Nigerian Housing Trust Fund for a minimum of 6 months through a recognized Primary Mortgage Institutions (PMI). Upon contribution up to 6 months, the contributor will apply through the PMI for a loan which must not be over N5m (about $35,000); the FMBN will give the loan to a PMI at 4% per annum who will now disburse to the contributor at 6% per annum. The repayment could be spread for over 30 years. Again the FMBN can give an estate developer a loan to help in construction of the estate for sale to the contributors of Nigerian Housing Trust Fund loan. The loan is given at an interest of 10% per annum and the loan is repayable in 24 months. The web page of the FMBN is < http://www.fmbnigeria.org/new/home.html > while the directory of PMIs in Nigeria can be found at < http://www.nigeriagalleria.com/Banking_and_Finance/Mortgage_Institutions.html > or < http://www.cenbank.org/Supervision/Inst-PMI.asp > last visited on the 2nd of April 2011.

[379]At present there are about 903 Micro-Finance Banks listed on the web page of Central Bank of Nigeria. For the list of the 903 microfinance banks in Nigeria see the Central Bank of Nigeria web page available at < http://www.cenbank.org/Supervision/Inst-MF.asp > last visited on the 2nd of April 2011.

[380] The Nigerian Export-Import Bank (NEXIM) was established by Act 38 of 1991 as an Export Credit Agency (ECA) with a share capital of N50, 000,000,000 (Fifty Billion Naira) held equally by the Federal Government of Nigeria and the Central Bank of Nigeria. The Bank replaced the Nigerian Export Credit Guarantee & Insurance

established by the federal government to among other things to *"maintain a foreign exchange revolving fund for lending to exporters who need to import foreign inputs to facilitate export production; provide credit in local currency to its clients in support of exports.*" The bank also provides short and medium term loans to Nigerian exporters. Apart from the banks, there are other industry practitioners like the field warehouse companies,[381] leasing companies,[382] and legal practitioners. In Cameroon, the commercial banks provide most of the consumer and business financing needs. However besides banks, there are non-bank industries like the leasing companies in Cameroon that provide consumer and commercial financing.[383]

1.14.1. Microfinance Banks in Nigeria

The important role, the peculiar nature of work, the popularity and eventually the impact of microfinance banks on the yet-to-be-transplanted elements of Article 9 to Nigeria require commenting also by this work. Microfinance banks are regulated by the Nigerian Central Bank's Microfinance Policy, Regulatory and Supervisory Framework made by in December 2005. Microfinance banks are privately owned banks which make financial services accessible to a large segment of potentially productive individual entrepreneurs and micro and small enterprises that otherwise would have little or no access to credits or financial services.[384] It is generally known in Nigeria that commercial banks extend credit facilities mostly to medium and large scale enterprises which have the required real property collateral but avoid lending to the micro

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Corporation earlier set up under Act 15 of 1988. The web page of the bank is available at < http://www.neximbank.com.ng/index.php > last visited on the 6th of April 2011.

381 See supra footnote 212 on field warehouse companies in Nigeria.

382 See supra footnote 235 on leasing companies in Nigeria.

383 For example, SOCCA-SOCABIL, see supra footnote 251.

384 See section 4.1 (i) of the Microfinance Policy, Regulatory and Supervisory Framework of December 2005 available at < http://www.cenbank.org/out/Publications/guidelines/dfd/2006/microfinance%20policy.pdf > last visited on the 2nd of April 2011.

and small scale entrepreneurs due to associated cost and risks which are considered high.[385] *"In Nigeria, the formal financial system provides services to about 35% of the economically active population while the remaining 65% are excluded from access to financial services."*[386] This is the reason for the emergence of microfinance banks as the bank exists to provide loans to the micro and small scale entrepreneurs located in the remote rural communities. The justification for the emergence of microfinance banks in Nigeria also resonates in India where microfinance banks have also been introduced to provide loans for the segment of the society which were left out by the formal financial institutions basically because they are poor and do not have the requisite collateral required by the formal financial institutions.[387]

Three main features distinguish microfinance banks from other formal financial institutions. They are: the small size of the loans – in Nigeria as well as India, micro-finance banks give considerably small loans to its customers. Whist in Nigeria the loan size varies between N8, 000 - N50, 000 ($60 - $350), in India the loan size ranges from ($50 - $200). Another feature is the absence of asset-based collateral and the simplicity of their operations which also characterize

[385] See C. M. Anyanwu , Microfinance Institutions in Nigeria: Policy, Practice and Potentials, paper presented at the G24 Workshop on Constraints to Growth in Sub Saharan Africa in Pretoria, South Africa (November 29-30, 2004) available at < http://www.g24.org/anyanwu.pdf > last visited on the 2nd of April 2011.

[386] See supra footnote 384 on the introduction of the Microfinance Policy, Regulatory and Supervisory Framework of December 2005, p.5.

[387] According to Piyush Tiwari, S. M. Fahad, "The lack of access to credit for the poor is attributable to practical difficulties arising from the discrepancy between the mode of operation followed by financial institutions and the economic characteristics and financing needs of low-income households. For example, commercial lending institutions require that borrowers have a stable source of income out of which principal and interest can be paid back according to the agreed terms. However, the income of many self employed households is not stable, regardless of its size. A large number of small loans are needed to serve the poor, but lenders prefer dealing with large loans in small numbers to minimize administration costs. They also look for collateral with a clear title - which many low-income households do not have. In addition bankers tend to consider low income households a bad risk imposing exceedingly high information monitoring costs on operation." See Piyush Tiwari, S.M. Fahad. Microfinance Institutions in India, available at < http://www.gdrc.org/icm/conceptpaper-india.html > last visited on the 2nd of April, 2011.

micro-finance lending both in Nigeria and India.[388] In Nigeria, the practice of microfinance banks is culturally rooted in the Rotating Savings and Credit Associations like the 'esusu' micro-credit scheme and other savings collectors and co-operative societies and operate side by side with them.[389] Microfinance banks are registered by the Central Bank of Nigeria and are given license to operate as a bank upon the fulfillment of the requirement of registration by the promoters of the microfinance banks. The activities of microfinance are limited to savings, credit and insurance facilities.[390] People from the rural communities save their money in these banks and access loans with interest lower than what is charged by commercial banks without the requirement of real property collateral. The savings constitute one of the ways which the microfinance banks raise the money which they give as loans. Other ways of raising money include aids and grants from development agency like the United Nation Development Program, the Ford Foundation, the African Development Foundation, Community Development Foundation, Development and Peace of Canada, and the Catholic Agency for International Development of the Netherlands.[391]

How well has the over nine hundred microfinance banks scattered all over the country performed since its existence four years ago leaves much to be desired. Allegations of underperformance culminated in the withdrawal of license of about 224 microfinance banks by the Central Bank of Nigeria in September 2010.[392] With the license of a huge number of microfinance banks in the

[388]Id., p. 5.
[389] See Microfinance Policy, Regulatory and Supervisory Framework, supra footnote 384, p. 5.
[390] Id., p. 5.
[391] Id., p. 6.
[392] The reasons for the withdrawal of the operating licenses were insolvency, poor operations management, high levels of non-performing loans, undercapitalization, poor board governance and corrupt management officials. According to Central Bank, microfinance banks in Nigeria are busy competing for relatively high-income customer of commercial banks thus leaving the poor rural populations without financial access. See Wall Street Journal

last five years, it does appear that the category of microfinance bank has become an all-comer affair, at the expense of competence, integrity and professionalism required in the banking industry. One only hopes that the regulation and supervision of the microfinance banks by the Central Bank of Nigeria is effective and some of them are not set up with the sole motive of swindling the depositors of their money. However, the crucial point to be noted for the purposes of this thesis is that the microfinance bank-system does not exclude the materialization of ideas on the transplantation of elements from UCC Article 9.

1.14.2. Micro Finance Institutions in Cameroon

Most of the characteristic features of microfinance banks in Nigeria apply also to Cameroon and so it will be unduly repetitive and serve no academic purpose to enumerate them again. Nonetheless, few facts peculiar to microfinance institutions (hereinafter known as MFIs) in Cameroon would be highlighted herein. MFIs are seen as an offshoot of njangi or tontines which have been in existence for over a century.[393]However, their presence became more pronounced in the early 1990s with the crisis in the banking industry in Cameroon which led to the distress of many banks. The vacuum created by the collapse of these banks resulted in the proliferation of many MFIs.[394] MFIs in Cameroon serve a segment of the society who are mostly rural dwellers and do not have the requisite collateral demanded by banks to obtain credit. Their services

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"Central Bank of Nigeria Revokes Licenses of 224 Microfinance Banks" by Obafemi Oredein, September 28, 2010 available at < http://online.wsj.com/article/BT-CO-20100928-716321.html > last visited on the 2nd of April, 2011.

[393]See Tamfu Hanson, Cameroon Boom Time for Microfinance, Inter Press Service News Agency of 26th November 2008 and available at < http://www.ipsnews.net/news.asp?idnews=44874 > last visited 17th of May, 2011.

[394]For example, Daniel Kalbassou worked for BIAO-Meridian Bank as Director of Marketing and Field Operations until the bank closed in 1990s. He started off MFI with the name Credit Du Sahel in 1990s with just $40,000, but today Credit Du Sahel has as at 2009 total assets of $ 25.5m; gross loan portfolio of $17.9m and number of active borrowers as 38,693 persons. For more detailed company profile of Credit Du Sahel, see Mix Microfinance Information Exchange profile of Credit Du Sahel available at < http://www.mixmarket.org/mfi/cds > last visited on the 17th of May, 2011.

include savings and loans, rapid money transfer, insurance and payment of salaries.[395] *"According to a 2006 CEMAC study, there are 714 MFIs[396] in Cameroon, with over 475,000 clients making up 2.9 percent of the total population. The total loans outstanding were reported at USD111 million, with the average loan size reported as USD233. […] Another study, the results of which were summarized on Microfinance Gateway, concluded that microfinance in Cameroon makes up over 44 percent of the financial sector and covers over 287 localities as opposed to 15 by commercial banks."*[397] MFIs in Cameroon are regulated by a supra national law of the CEMAC[398] governing the establishment of MFIs in all the CEMAC member countries.[399]

Similar to what is obtainable in Nigeria, funds for the MFIs are generated by customer's deposit and grants from international development agencies like the United Nation Development Program, the Ford Foundation, the African Development Foundation, African Development Bank and Community Development Foundation. Also similar to what happened in Nigeria;

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[395] See Tamfu Hanson, Cameroon Boom Time for Microfinance, reported in Inter Press Service News Agency of 26th November 2008 and available at < http://www.ipsnews.net/news.asp?idnews=44874 > last visited 17th of May, 2011.

[396] Cameroon Credit Union League (CAMCCUL) is about the MFI with the largest network with 177 affiliates and 300,000 memberships. See id.

[397] See Lori Curtis, Cameroon's Microfinance Industry in Need of Regulation if it is to Meet Poverty Eradication Expectations, reported in MicroCapital Monitor of December 10, 2008 available at < http://www.microcapital.org/microcapital-story-cameroons-microfinance-industry-in-need-of-regulation-if-it-is-to-meet-poverty-eradication-expectations/ > last visited on the 17th of May, 2011.

[398] CEMAC is an acronym for Communaute Economique et Monetaire de l' Afrique Centrale which means in English Monetary and Economic Community of Central Africa. CEMAC is made of six central African countries including Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea and Gabon. Amongst other things, this body is charged with the monetary and fiscal policy of the member countries. The webpage of CEMAC is available at < http://www.cemac.cf > last visited on the 17th of May 2011.

[399] See CEMAC Region Financial Sector Assessment Program, Technical Note, Access to Finance, March 2006, available at < http://www.cgap.org/gm/document-1.9.6001/CEMAC%20Access%20to%20Finance%20FSAP%20technical%20note%202006.pdf > last visited on the 17th of May, 2011.

about 250 MFIs in Cameroon were closed down in 2006 for non compliance with the laws regulating MFIs, illiquidity and fraudulent practices.[400]

With the above introduction of the subsisting laws in the three jurisdictions briefly described above, the work will proceed to examine in specific details the building blocks of Article 9 in the next chapter.

[400]According to Hanson, "With the proliferation of MFIs, conmen and quacks have also infiltrated the sector. Reports are frequent in newspapers of dubious MFIs disappearing with the meagre savings of poor earners. Such impostors have pushed the general public to be wary of any newcomer into the sector. […] some of them have acute liquidity problems; sometimes unable to satisfy even five percent of their customers. According to Guy Roger Zo'o Olouman, sub-director in charge of MFIs at Cameroon 's Ministry of Finance, […] they indulge in operations that do not fall within their competence, creating confusion and rendering control difficult for the administration." See Tamfu Hanson, Cameroon Boom Time for Microfinance, supra footnote 395.

Chapter 2

Comparing the Building Blocks of UCC Article 9 with their Equivalents under Nigerian and Cameroonian Secured Transactions Laws

2.1. Introduction

Article 9 of the Uniform Commercial Code was last revised in 1999. This revised edition of Article 9 has been adopted by all the States in America as States' secured transactions laws.[401] The 1999 revised Article 9 introduced several changes to the 1972 version of Article 9[402]and the result of the changes is that the revised Article 9 is now bulkier and a bit more complicated[403] to

[401] In fact the adoption was fast and a testimony of the acceptability of the 1999 revised version. Upon the approval of the 1999 Revised Article 9 UCC by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), six states – Arizona, Maryland, Montana, Nebraska, Nevada, and Texas - adopted the 1999 revised version of Article 9 UCC in 1999 even though the NCCUSL had recommended that the coming into effect of would be on July 1, 2001. See Secured Lender, States Begin to Adopt Revised UCC Article 9, September/October 1999 available at < http://findarticles.com/p/articles/mi_qa5352/is_199909/ai_n21443802/ >; last visited on the 10th of November, 2010. Again as of May 2001, 37 states had adopted the 1999 revised Article 9, while three states – Alabama, Florida and Mississippi - out of the 37 states chose the commencement date to be January 1, 2002, the other 34 states decided to abide by the July 1 2001 commencement date given by the NCCUSL. See again The Secured Lender, Revised Article 9 Adoption Update, July 1 2001 available at < http://www.allbusiness.com/finance/1108939-1.html > last visited on the10th of November 2010.

[402] Some of the changes brought by the 1999 revised Article 9 are as follows: many new definitions were introduced, the hitherto 14 definitions under the old law was expanded to 80 new definitions under section 9 – 102; Revised Article 9 accommodates technological developments such as software and electronic commerce, expanded the definition of deposit accounts, and broadened definition of good faith to include commercially reasonable standards of fair dealing; simplifies the filing system by promulgating a national form of financing statement and designates the debtor's location as the place to file against tangible property as well as intangible; expands the scope of Article 9 to cover more types of collateral like deposit accounts and more transactions like asset securitizations, sales of payment intangibles, health care insurance receivables, agricultural liens, consignments of all types, assignments of commercial tort claims, security interest granted by state and local government unless covered by another statute; adds new numbering of the sections, however the parts retain the same general order and structure; broadens the definition of proceeds; adoption of the concept of "control" from the UCC Article 8 as a mode of perfection for some types of collateral; making easier the methods of perfection by allowing filing to perfect a security interest in instruments, not requiring the debtor's signature on UCC-1 financing statements, and permitting "all asset" collateral descriptions in UCC-1 financing statements; lowers the centralization of filing offices by providing for more certainty as to the correct location for filing financing statements and their amendments. Indeed the new filing systems permits and accepts electronic filings; adds a number of specific and more extensive rules for consumer transactions; adds significant new language relevant to agricultural financing which among other things, bring statutory agricultural liens within the scope of revised Article 9 for purposes of perfection, priority and enforcement; provides more detailed rules on non-judicial enforcement of security interests, including safe-harbor as well as additional requirements; clarifies and elaborates on prior law to fill in gaps, eliminate ambiguities, and resolve conflicts in judicial interpretation. See UCC Revised Article 9 Deskbook (Washington State Bar Association, 2003), pp. 1- 4 and 2 - 3.

[403]According to White and Summers, "The 1999 Article is both more certain and more complex than its predecessors. At the insistence of lawyers who were careful to a fault, it bristles with phrases familiar to tax lawyers: 'except as otherwise provided in section x* * *.' The cost of resolving the many uncertainties of the 1972 Code is length and complexity. While the new Code makes the sophisticated lawyer's job easier, it makes the student's comprehension more difficult." See James White and Robert Summers, supra footnote 82, p. 1149. In the same vein, Duggan and Gedye stated: "Compounding the difficulty of the basic subject-matter is the opaqueness of the Article 9 model and the unfamiliarity of its key concepts. Unlike the ordinary run of statutes, it is not possible to read

understand and apply its provisions. The effect of the changes is that the provisions of Article 9 are understood and utilized by the law professors, legal practitioners with specialization in secured transactions law and industry practitioners who are professionals and specialists in the field of secured transactions.

On the contrary, the secured transactions laws in Nigeria and Cameroon are not fully developed and this has the following implications: *First*, the laws are more easily comprehensible by law professors, legal and industry practitioners than the United States Article 9. *Second*, Nigeria and Cameroon do not have a unitary and comprehensive secured transactions law system that would cover all transactions the function of which is to provide security. Even the narrower areas that are covered by the secured transactions law of both jurisdictions would still have to be reformed to catch up with the dynamics in this area of law. The reader can see based already on these systemic features of the laws that because they are radically different in nature, structure and even terminology (i.e., the bulky nature and diverse new issues covered by Article 9 and the simple yet compartmentalized laws of Nigeria and Cameroon) their comparative analysis is difficult; especially in the lack of tested patterns for doing that.[404]Faced with these challenges, the best option for this work is to rely on Tajti's system of building blocks of Article 9 to see which of them exists and which does not in the compartmentalized secured transactions laws of

Article 9 [….] from cover to cover and come away with a working knowledge of what it is about. Article 9 has its own logic which requires mastery before the secrets of the statute can be unlocked." See Anthony Duggan and Michael Gedye, Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change, supra footnote 27, p. 661.

[404]Numbers might sometimes be telling notwithstanding the structural and other differences that might distort the picture. For example, whereas the Cameroon Uniform Act Organizing Securities has only 151 Articles on the whole and some of the provisions deal with mortgages of real properties which are not covered under the Article 9; and the portions of the Nigerian Companies and Allied Matters Act 1990 that deal with secured transactions is about 16 sections with sub-sections (i.e., from sections 166 – 182 CAMA), Article 9 has a far bigger number of provisions ranging from section 9 – 101 to 9 - 709. In addition to that, there is also a huge difference in the drafting style as the level of detail in Article 9 is unprecedented – at least compared to the other two systems' laws. It is to be noted as well that the provisions contain many sections dealing with types of transactions and wide arrays of personal property security interest that are not contemplated by the Nigerian and Cameroon Laws.

Nigeria and Cameroon. The building blocks will thus serve as the basis for the comparison of Article 9 with Nigerian and Cameroon secured transactions laws. Where the Article 9 salient features or their functional equivalents are lacking, this work will endeavor to make suggestions of how to tackle those problems, including suggestions for inclusion of transplants into the Nigerian and Cameroon secured transactions laws. These salient features will be a point of convergence of the secured transaction laws in Nigeria and Cameroon and a starting point for the harmonization of both laws. The other advantage of using Article 9's 'building blocks' as the basis of the comparison with the secured credit laws of Nigeria and Cameroon is that Article 9 'building blocks' sufficiently cover what Article 9 is all about, from the creation, attachment, perfection, priority and enforcement of the security interest through the relationship of this branch of law with bankruptcy and consumer protection. Because of these advantages, the building blocks will be relied on for the comparative analysis on Article 9, the Nigerian and Cameroon secured credit laws

The building blocks of Article 9 are as follows: the unitary and comprehensive concept of security interest and all novelties brought about by this mind shift; the peculiar perfection system – having notice filing as the main perfection method; the complex system of priorities; the floating lien coupled with the purchase-money security concept; the cumulative enforcement mechanism alternatives available to secured creditors and Article 9's close linkages to bankruptcy and consumer protection laws.[405] What Tajti calls the '*building blocks*' are in a nutshell those essential features of Article 9 which have made Article 9 work efficiently in the

[405]Tajti believes that the building blocks will help non- Americans understand not just the provisions of Article 9 but also the role other branches of law and other non-legal factors play in making the United States' system work efficiently. Yet the issue is that even Americans and practitioners in this field need a simpler method of breaking down the contents of Article 9 (especially the 1999 revised version) to have a firm grasp of the provisions of the law.

United States. However it should be noted that the success of Article 9 in the United States cannot be solely attributed to the provisions of Article 9 alone but to some other institutional mechanisms which help complement the provisions of Article 9. For example, the Article 9 enforcement mechanism is effective because there are other efficient non-Article 9 enforcement mechanisms in the United States that complement Article 9 enforcement mechanisms, like the provisional and preliminary measures contained in the United States civil procedure rules.[406] Whether one decides to enforce his securities either by Article 9 self-help measures or by going to court and invoking the provisional and preliminary measures contained in a Civil Procedure Rules in any of the state in America,[407] as a prelude to the eventual litigation and enforcement of the court orders by the bailiff, the process will invariably lead to the same efficient enforcement mechanism. This is one of the hallmarks of the effectiveness of Article 9 and this has made Article 9 model desirable and a reference point for other countries that seek to reform their secured credit laws to make them efficient and in tandem with the modern business needs.[408]

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[406] However some of these Article 9 and other non-Article 9 efficient enforcement mechanisms are lacking in other jurisdictions example self – help rules and interim protective measures are lacking in the enforcement of secured transactions in many other countries including Nigeria and Cameroon.

[407] See for example sections 4-52-1 and 4-52-2, Part IV of the State of New Jersey Civil Procedure Rules. Section 4-52-1 provides for Temporary Restraint and Interlocutory Injunction – Application on filing complaint. "(A) Order to Show Cause with Temporary Restraints. On filing of a complaint seeking injunctive reliefs, the plaintiff may apply for an order requiring the defendant to show cause why an interlocutory injunction should not be granted pending the disposition of the case […] The order to show cause shall not, however, include any temporary restraint or other interim relief unless the defendant has either been given notice of the application or consents thereto or it appears from specific facts shown by affidavit or verified complaint that immediate and irreparable damages will probably result to the plaintiff before notice can be served or informally given and a hearing had thereon […] The order may further provide for the continuation of the restraint until the further order of the court and shall be returnable within such time after its entry as the court fixes but not exceeding 35 days after the date of its issuance, unless within such time the court on good cause shown extends the time for a like period or unless the defendant consents to an extension for a longer period." The State of New Jersey Civil Procedure Rules is available at < http://www.judiciary.state.nj.us/rules/part4toc.htm >; last visited on the 9th of March 9, 2011.

[408] For example the 1967 Ontario Personal Property Security Act was based on Article 9 UCC. After Ontario, all other Common law provinces in Canada have followed suit in passing PPSA that are based on Article 9. Even Quebec that operates civil law has a civil code in 1996 that is parallel to the PPSA and modelled after Article 9 UCC. See Karen Redman, International Trade – Service Providers International UCC Equivalents, published in The Metropolitan Corporate Counsel of October 4, 2010 available at < http://www.metrocorpcounsel.com/current.php?artType=view&EntryNo=11508 > last visited on the 10th of November 2010. Article 9 also influenced the draft of UNIDROIT secured transactions model law. See R.C.C.

It is apt to note that the above building blocks only look at Article 9 from the legal point of view. However, there are other non-legal factors which have made Article 9 work efficiently in the United States. These factors are the social, economic, political, cultural and technological factors[409] which evolved alongside with the history of the United State secured credit transactions for over a period of two centuries. These non-legal factors are not quite in existence in Nigeria and Cameroon secured credit environment as yet. Hence, it is apposite to sound a note caution that the transplantation of the legal factors to Nigeria and Cameroon without reckoning with non-legal factors may be an exercise in futility.

Whilst the unitary and comprehensive concept of security interest, the intricate rules and rational behind filing, priorities and the floating lien concept will be discussed in chapter 2 herein, enforcement – due to its heightened role – will be discussed in detail in the next chapter, and Article 9 close linkages to bankruptcy and consumer protection will be analyzed in chapter 4.

2.2. The Building Blocks of Article 9: the Unitary and Comprehensive Concept of 'Security Interests'

There are two characteristics of Article 9 security interest postulated herein by this building block - the unitary and the comprehensive nature of the concept of security interest. The unitary nature is encapsulated in section 9 – 109 (1), which provides as follows: *"Except as otherwise provided in subsections (c) and (d), this article applies to: a transaction, regardless of its form,*

Cuming, UNIDROIT: Restricted Working Group Responsible for Determining the Desirability and Feasibility of the Preparation by UNIDROIT of a Model Law in the General Field of Secured Transactions, (Rome, October 1994) available at <http://www.unidroit.org/english/documents/1994/study72a/s-72a-01-e.pdf > last visited on the 4th of April, 2011.

[409] See infra chapter 5 for a detailed discussions on the non legal factors in the United States and their near absence in Nigeria and Cameroon and also the required non legal changes needed to be made in Nigeria and Cameroon for the transplantation of Article 9 Building Blocks to Nigeria and Cameroon.

that creates a security interest in personal property or fixtures by contract."[410] This means that the form of transaction does not matter, once the transactions fulfills or purports to have a security function in personal property or fixtures the transaction is subject to Article 9.[411] Cindy J. Chernuchin captured this succinctly as follows: "*The form of the transaction or the label that the parties put on the transaction is irrelevant for purposes of determining whether Article 9 applies. Rather, the determination as to whether Article 9 applies is based on the economic reality of the transaction. For example, a transaction may be characterized by the parties as a sale or a lease of goods, but if in economic reality a security interest is being created, Article 9 will nevertheless apply […] it is also not required that the parties refer in their documents to a 'security interest' being created under a 'security agreement.' Even if the parties use other terms, such as 'assignment,' 'hypothecation,' 'conditional sale,' 'trust deed,' or the like, Article 9 still applies whenever a security interest in personal property is being created […] similarly, it is generally irrelevant, for purposes of Article 9, whether title to the collateral is in the name of the debtor or the secured party.*"[412]

The significance of this section would be better appreciated if one relates back to the state of affairs of the security devices during the pre-code era. During that time, the practitioners were devising new forms of secured transactions to evade the burdens placed upon the existing

[410] See Section 9 – 109 (1) UCC.
[411] See Richard H. Nokwa, Mastering Secured Transactions UCC Article 9 (Carolina Academic Press, 2009), p. 4. In the case of In re Vigil Bros. Construction, Inc, (BAP 9th Cir 1996) 193 BR 513, the court held that an assignment of an account receivable that acted to fulfil a promissory note created a security interest, not an absolute conveyance under the Arizona UCC. Consequently the intention of the parties to create an absolute conveyance was irrelevant because any assignment of an account is governed by Article 9.
[412] See Cindy J. Chemuchin (ed.), Forms Under Revised Article 9 Uniform Commercial Code Committee, Task Force on Forms Under Revised Article 9, (American Bar Association, 2nd ed., 2009), p. 4.

devices. [413] In most cases, the courts held that the new devices were substantially not different from the old ones and as a result imposed the same registration formalities which hitherto had existed on the old devices. Thus conditional sale which was invented to evade the burden of filing imposed on chattel mortgage by ‘manipulating’ with the title of the property through the process of retention of title, also became formalized and consequently required filing.[414] The process of devising a means to evade filing was that the legal practitioners or the industry practitioners came up with some devices slightly different in form but all serving the same purpose: the use of personal property or fixtures as collateral in obtaining credits.

It was with this mindset and the need to solve the chaotic order that had existed with the pre-code security devices[415] that the draftsmen of the code inserted section 9 – 109 (1) UCC which provides for the unitary concept of security interest. This section led to rest the argument of a secured transaction being treated differently from one another solely on the basis of the name the parties chose to call their transactions. Indeed, parties are free to give their transactions any name they wish, but notwithstanding the names given to the transaction, if it is intended to create a security function in personal property or fixtures, then Article 9 will govern their relationship.

[413] The burdens on the devices were mainly the requirement of registration which was burdensome and makes the transactions expensive.

[414] This trend of inventing some devices to evade the requirement of filing for example the invention of conditional sale to evade the obligation of filing the contract of chattel mortgage obviously goes to show that the invention of these devices were fraudulent to circumvent the statutory regulations. But beyond this, the positive side to the new devices was the realization that the same economic result could be achieved by different agreement i.e. both conditional sale and chattel mortgage produce same economic result. Achieving same economic ends using different types of consensual agreements means that there were viable options open to both the secured creditor and the debtor and this makes for efficiency.

[415]The struggle by the industry practitioners to invent new security devices that will circumvent the registration requirement which was costly and burdensome, by giving new name to the new security and the readiness and alertness of the court to strike down such security devices for lack of registration. This resulted in uncertainty in the pre-UCC security devices.

Suffice it to say that though the unitary nature of security interest under Article 9 does not make any distinction based on the ‘formal’ lines of the security interest, nonetheless, there are differences along the ‘functional’ lines. In other words, Article 9 contains tailor-made provisions applicable solely to specific types of transactions. For example, the name of two transactions may be the same – i.e., ‘security agreement’ – the content of one may in fact be a ‘sale of receivables’ and the other one ‘a letter-of-credit rights.’ While the basic rules would be equal to the two, due to their nature, the perfection, priority or enforcement rules applicable would be different. This means that the unitary nature of security interest does not preclude the normal different ways of perfecting security interest due to their nature under Article 9.[416] To state the obvious: while there could be ‘repossession’ in case of consigned goods, there can be only ‘collection’ in case of receivables.

Implicit in section 9 - 109 (a) (1) UCC is the underlying assumption that the section is comprehensive, since it encompasses all types of security interest created in personal properties and fixtures. It will not be incongruous to conclude that the comprehensiveness of security interests is the same or at best a necessary concomitant of the unitary nature of security interests under Article 9. Indeed contextually both the comprehensiveness and unitary nature of security interests under Article 9 may be construed as meaning the same thing. By being comprehensive, Article 9 encompasses all the independent security devices in personal property and fixtures that existed during the pre-code era. While the pre-code laws dealt with each security device

[416] Article 9 has treated differently the method of perfection depending on the collateral involved. Whilst security interest in payment intangibles, (s. 9 – 309 (3) UCC) promissory notes, (s. 9 – 309 (4) UCC) the assignment of a health-care-insurance receivable, (s. 9 – 309 (5) UCC) purchase-money security in consumer goods (s. 9 – 309 (1) UCC) are perfected upon attachment, security interest in chattel paper, negotiable documents, instruments, or investment property (s. 9 – 312 (a) UCC) may be perfected by either by filing or taking possession and security interest in money, deposit account, electronic chattel paper, letter-of-credit-right (s. 9 – 314(a) UCC) may be perfected by control.

separately, Article 9 combined all the laws together under the same heading.[417] Hence the use of the 'neutral' terminology of 'security interest'[418] to describe all the hitherto security devices that preceded the code. The neutrality of the terminology stems from the fact that the definition is wide enough to accommodate any transactions between parties which have the elements of using any personal property or fixtures to secure the performance of the obligation of the debtor.

The comprehensive and unitary concept of security interest is the expression also of the fact that Article 9 is not something completely new but rather a simplification of pre-code personal property security laws.[419] Article 9 synthesized the pre-code secured transaction laws with the industry practices and the needs of modern business financing. The greatest achievement of Article 9 vis-à-vis the pre-code laws is that it has *"brought order into this field and increased legal predictability to a great extent and ensured greater consistency of court decisions and lessened the legal risks involved in granting credit"*[420] This may have accounted for the ease and convenience with which most states adopted the Uniform Commercial Code in general and in particular the provisions of Article 9 as their State law.

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[417]Gilmore had earlier proposed the reorganization of personal property security law along these lines in an article before being involved in the drafting of Article 9. His views were shared by the then Chief Reporter of the code Professor Karl Llewellyn and Associate Reporter for Article 9 Professor Allison Dunham. This convergence of views made the Chief Reporter to invite Gilmore to be an Associate Reporter for the secured credit transactions aspect of the code. See generally Grant Gilmore & Allan Axelrod, *Chattel Security,* 57 Yale L.J. 517, 761 (1948), see also Grant Gilmore, Security Interests in Personal Property, supra note 51, p. 290.

[418] Security interest is defined in Section 1 – 201(b) (35) UCC as follows: "Security interest means an interest in personal property or fixtures which secures payment or performance of an obligation. Security interest includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. Security interest does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under section 2 – 401, but a buyer may also acquire a security interest by complying with Article 9. Except as otherwise provided in section 2- 505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a security interest, but a seller or lessor may also acquire a security interest by complying with Article 9. The retention or reservation of title by a seller of good notwithstanding shipment or delivery to the buyer under section 2 – 401 is limited in effect to a reservation of a security interest. Whether a transaction in the form of a lease creates a security interest is determined pursuant to section 1 – 203."

[419] However Article 9 introduces some new innovations to old personal properties security devices.

[420]See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 143.

2.2.1. Is there a Unitary Concept of Security Interest in Nigeria?

There is no unitary concept of security interest in Nigeria. As already noted in the earlier chapter, there are several laws that regulate various aspects of what would be secured transactions law in the United States; for example, the Hire Purchase Act Chapter H4 Laws of Federation of Nigeria 2004 and the Equipment Leasing Bill which is before the Nigerian legislature presently. The main function of the hire purchase agreement is also to provide a security for the seller, who retains the title in the goods which is the subject matter of the hire purchase agreement as security for extending sales credit to the buyer/hirer. However, - similarly to the United Kingdom,[421] the hire purchase agreement is not treated as a transaction capable of creating a security interest. Rather, it is looked upon as being something conceptually different from mortgages or floating charges[422] and as a result it is regulated separately under the Nigerian Hire Purchase Act. Again, leasing contract – especially finance lease – serves the same purpose as hire purchase, the lessor retaining the title in the leased property as security for the performance of the lessee obligations of paying the lease rent in installments. Yet, finance leasing contracts are also looked upon as not having anything common with mortgages or floating charges, and therefore are to be regulated in the proposed but yet not enacted Equipment Leasing Act 2011. Consequently keeping the hire purchase transactions and finance leasing contracts outside the purview of security interest, and consequently outside the secured transactions law even though both transactions perform the same security functions show that Nigeria does not have unitary concept of security interest.

[421] See the United Kingdom Hire Purchase Act of 1965.

[422] See supra p. 84 for the reasons why hire purchase agreements and finance leasing contract are not treated as transactions capable of creating security interest in Nigeria.

The benefits of bringing all hire purchase and finance lease transactions under secured transactions law, thus creating a unitary and comprehensive concept of security interest in Nigeria – proposed by this thesis – cannot be overemphasized. It would ensure not just that the transactions are streamlined and regulated by one secured transactions law as it is in Article 9 irrespective of whatever names parties choose to call their transactions, but it would make the laws governing secured transactions easily accessible even to non-lawyers. It would create many good alternatives for consumer and business financing and thus reduce the over-dependency on commercial banks for credits.[423] Above all treating hire purchase transactions and finance leasing contracts as capable of creating security interest would widen the arrays of personal properties that are used as collateral and the era of cutting off access to credit for micro and small scale entrepreneurs on account of inability to furnish acceptable real property collateral will be over.[424]

[423] To buy a car now in Nigeria many people may approach banks for credit to finance the purchase of cars and then repay by installments with interest to the banks. However, with the hire purchase or finance leasing of a car one does not need to approach a bank for credit. The hirer/lessee approaches the seller/lessor, concludes the hire purchase or leasing contracts and then pays the agreed installment repayments. This way there will not be too much dependency on the banks again when there other viable options of getting credit.

[424] Since the collateral in all the cases of hire purchase or leasing contracts would be the subject of those contracts, it means that the hirer/lessor (consumer, micro or small scale enterprise) can acquire those properties without being saddled with the responsibilities of providing additional 'adequate' collateral which have cut off access to credit for consumer and micro and small scale enterprises. For example, where a micro or small scale entrepreneur desires to acquire a machine that will be used in production of goods, the micro or small enterprise goes to the bank for a loan of say $10,000 to buy the machine. The bank may demand for collateral that is worth more than $10,000 which may be real property if the enterprise does not have other valuable machines in the company that is worth over $10,000. Where the real property cannot be provided, the bank may not provide credit and access to credit is cut off for lack of collateral. However where the same micro or small enterprise approaches a leasing company for the finance leasing of that same machine, the collateral will be the machine with the leasing company retaining title over the machine. In this case both the hire purchase and leasing agreement have helped to provide wide arrays of personal properties that can be used as collateral, thus ending the era of cutting off access to credit as a result of lack of collateral.

2.2.2. Is the Unitary Concept of Security Interest of any relevance to Uniform Act on Securities?

As already noted, Uniform Act on Securities regulates both personal and real property secured credit transactions. However, being a law fashioned after French civil law, nothing similar to the unitary concept of security interest seems to exist under the Act. The Uniform Act on Securities does not cover leasing and hire purchase transactions. As already seen in chapter 1, though there are at present no laws governing leasing, leasing transactions are going on in Cameroon. Failure of the Uniform Act on Securities to cover leasing contracts is an indication of lack of unitary concept of security interest. Thus this has necessitated the question of whether the unitary concept of security interest is relevant to the Uniform Act on Securities and what would be the potential benefits if the concept is transplanted to the Act? Granted that the reason for the introduction of the unitary concept of security interest in the United States was the need to bring together under one secured transactions law (Article 9) the wide arrays of security devices available in the United States, which are conspicuously absent in the Cameroon and Nigeria, nevertheless, there is the need to have a unitary concept of security interest in both jurisdictions. As already stated, in the context of Nigeria (which reasons are adopted herein), having a unitary concept of security interest for all transactions (irrespective of whichever names the parties call them) which seeks to creates a security function in the personal properties and fixtures for the performance of the debtor obligation would be most appropriate both for the debtors and the economy of the countries. It would also ensure that wider arrays of personal property are acceptable as collateral, which would provide viable alternatives to indigenous means of securing credit – to wit, njangi and esusu - which have been shown to be inadequate source of financing for the growth of an economy.

2.3. The Filing System and other Public Notice Mechanisms of Article 9

One of the main objectives of Article 9 is creating a legal environment in which all, or most, personal property types could be easily utilized as collateral. This policy choice is not stated explicitly in Article 9 yet it could be readily extrapolated from it. The net effect of the materialization of this policy choice is that one could hardly locate a particular type of tangible or intangible personal property that could not be exploited as collateral. Indeed, Article 9 makes the biggest pool of asset-types for utilization as collateral in the world; especially having the additional asset-categories created by the revised 1999 version of Article 9.[425]

Although this richness of collateral-types is per se a positive development, it could also be a recipe for chaos both for the secured transactions system and the economy on the whole, if the process is not well managed in terms of giving public notice of encumbrances on the properties especially in view of increased use of non-possessory personal property security device in modern times.[426] Here lies the usefulness and the advantages of filing (registration) and other public notice mechanisms of Article 9.[427]

[425] Some of the new personal properties created by 1999 version of Article 9 are as follows: deposit account; sales of payment intangibles and promissory notes; health-care-insurance receivables; non-possessory statutory agricultural lien; supporting obligations and property securing rights to payment; commercial tort claims; transfers by States and governments units of States; non-assignable general intangible. See the Official Comments to s. 9 – 101 UCC.

[426] Chaos here means that if there is no filing or other public notice mechanisms in Article 9, people will not know which personal property collateral had been previously encumbered and would lend credit on the strength of already encumbered collateral. In this scenario, the prospects of realizing the securities become slim more so where the value of such collateral is inadequate to cover the amount of the loan granted.

[427]On the other hand, Germany which equally has a developed legal system and economy is less bothered about filing of security interest except where the security interest is in immovable where they have real property mortgage (Hypothek). In personal properties, the German Civil Code (BGB) only recognizes pledge as a security device in movable with the implication that there must be the transfer of possession from the pledgor to the pledgee which in itself creates notice to third parties without the need for filing. The possessory pledge for movables was obviously inadequate for the financing needs of businesses in Germany. This rigid stands of the BGB coupled with the clausus numerus of the German system forced the business community and industry practitioners to invent the non statutory security devices to circumvent the clausus numerus system. This they do by "by exploiting the principle of freedom of contract and the possibilities provided by the contractual clauses." According to Tajti, "while German security law is a perfect example of clausus numerus – and anti-registration system, Article 9's central building blocks are ,

Filing is one of the recognized perfection methods under Article 9.[428] Indeed, filing is the main method of perfection[429] and a veritable tool to prevent 'ostensible' or 'apparent' ownership problem in non-possessory security interest transactions.[430] Under the pre-code era, the wide acceptance of the non-possessory security interest and its increased use as a form of security device made filing to become the exclusive method of perfection.[431]This exacerbated the proliferation of filing systems under the pre-code era.[432] As each new device formalized and became statutory, it had its own independent filing system *"kept in a different set of books in a different place by a different public official according to different principles from any of the previously established filing system."*[433] However, the proliferation of filing systems had its attendant consequences of making filing burdensome and expensive and unable to serve its purpose of affording creditors the means of checking on borrowers previous financial records and also providing means to lenders for perfecting their security interest.[434]

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indeed, its non-clausus numerus character and filing – a simplified form of registration – as the central 'anti-false wealth ' defense mechanisms." See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, pp. 272 – 273.

[428] See s. 9 – 312 (a) UCC. The other methods of perfection being possession, control and automatic perfection as in the case of purchase money security interest in consumer goods. Filling was required for most of the pre-code devices like chattel mortgage and factors lien. Filing was also required for conditional sale in some states where it became statutory and formalistic. Although initially what was obtainable during the pre-code era was registration of the document.

[429] Perfection is the process whereby a secured party brings the notice of his security interest to the public and thus justifies maximizing his rights in the collateral against third parties. Perfection under Article 9 can be effected by any of the four methods; 'by filing a financing statement; taking possession of the collateral; obtaining control of the collateral and by obtaining automatic perfection.' See Willa Gibson, A Comprehensive Review of Revised Article 9, (Carolina Academic Press, 2007), p. 49; see also James White and Robert Summers, Uniform Commercial Code, supra foot note 82, p. 1195.

[430] See Iwan Davies, The Reform of Personal Property Security Law: Can Article 9 of the US Uniform Commercial Code Be a Precedent? The International and Comparative Law Quarterly, Vol. 37, No.3 (July 1988), pp. 465 – 504 at 466.

[431] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 463.

[432]According to Gilmore, the "gradually changing attitudes toward filing as an effective method of giving a debtor's creditors notice of encumbrance on his property may well explain the unfortunate fact that the filing systems tended to proliferate, just as the security devices themselves did." See id., p. 463.

[433]Id., p. 463.

[434] The pre-code era saw the emergence of separate filing systems for chattel mortgage, conditional sales, trusts receipts, factors lien and for assignments of accounts receivables. This diverse filings systems coupled with the fact that the different filings are obscure and tricky increased the difficulty and expense of making a thorough credit check and the possibility that a counsel who was familiar with filing on one of the devices could inadvertently make

This situation informed the draftsmen of Article 9 not only to unify the laws on the pre-code diverse security devices but also to unify the – up to that point in time – separate filing systems. Article 9 introduced a unified filing system for all the security interest created under it. Though Article 9 filing system is not absolutely comprehensive,[435] all the same, the filing system has become more efficient, simpler and effective in serving the real purpose of filing a security interest- to provide notice of encumbrance on personal properties and solve the problem of ostensible or apparent ownership.

2.3.1. What to File under the United States UCC Article 9

In filing, the question that was decided by the Article 9 draftsmen was whether to adopt the transaction or the notice filing system. Transaction filing means the filing of the whole or substantially all the material information contained in the security agreement which puts subsequent creditor on notice of all the material facts of the previous encumbrance on the property. According to Gilmore, transaction filing involved filing a copy of the of the security agreement.[436] Notice filing, on the other hand, means filing a limited amount of information

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a mistake in an another devise and this could lead to non- perfection of the security interest. See generally Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 463, see also Tibor Tajti, Comparative Secured Transactions Law, supra foot note 48, p. 145.

[435] Besides the central one under Article 9, other filing systems are also in existence in the United States: to wit, the certificate of title notation system, filing (or registration) system under some federal statutes like the trade mark and patents laws, or fixture filings in real property registries.

[436] A distinction is sometimes made between 'filing statutes' and 'recording statutes.' Under many nineteenth century statutes a clerk copied out, word for word, at so much a word, the contents of the mortgage or other security agreement which was being placed on record; these were known as recording statutes. All modern statutes relating to security interest in personal property call merely for the deposit of a copy of the security agreement or other document required to be placed on record, with the appropriate public official; these are known as filing statutes. In the personal property field almost all the old recording statutes were, even before the enactment of Article 9 of the code, amended to permit the simple filing of a copy." For example, section 230 New York Lien Law stated as follows: "every mortgage, or conveyance intended to operate as a mortgage, under which possession of the goods mortgaged is not immediately taken by the mortgagee, shall be void unless the mortgage, or a true copy thereof is filed as hereinafter provided […]" see Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 462. In Nigeria also, a copy of the agreement creating the charge is required to be filed. See sections 190 and 197 of CAMA 2004.

from the security agreement, which puts the creditor on threshold of inquiry[437] to find out from the secured party named in the notice filing of the information needed.[438]

Many of the pre-code security devices initially applied transaction filing, which required that the security agreement itself be filed.[439] Besides this the law required that the mortgagee file a self-serving affidavit stating that the "*mortgage was given for a fair consideration and that the mortgagee was acting in good faith and with no intention to hinder, defraud or delay the creditors of the mortgagor.*"[440] This was a manifestation of the distrust and cynicism that pervaded the nineteenth century that a mortgage of personal property was 'a species of fraudulent conveyance.'

The formalities and the precision of transaction filing were in conflict with the concept of inventory financing and created a burden for it. This meant that the mortgage was not effective on the inventory until a supplemental mortgage containing a proper description was filed and this

[437] According to El-Dean, "Notice filing has been described as a publicly filed notice that tells a reader where to haunt for more information." See Bahaa El-Dean, Privatization and the Creation of a Market –Based Legal System: The Case of Egypt, supra footnote 2, p. 109.

[438] In the case of re AA Appliance & TV Center, Inc, 170 F. Supp. 103 (E.D. Wis. 1959), aff'd, 271 F.2d 800 (7th Cir. 1959), holding the description 'appliances' in a filed notice sufficient to cover refrigerators, ranges , washers, a dryer and a freezer. The case arose under UTRA. The District Judge commented, 'in respect of notice therefore, we can only conclude that the framers of the act contemplated providing only for the first step of a two step process to be undertaken by a prospective creditor in order to discover the exact status of the goods he is concerned with. Put another way, it expressly appears that the burden in the first instance is put upon the entruster and the trustee to supply prescribed basic information about the parties, the kind of goods covered, and the form of financing. Once this is done in such a way that a ready and reliable course of inquiry is laid out, the burden implicitly shifts to the creditor to take the further step of contacting the entruster for detailed information […] the intent of the act in respect of notice is met if the descriptive words used would inform an experienced and sophisticated creditor that goods in possession of the trustee could not be relied on and that he should investigate further' 170 F. Supp. at pp. 106, 107. See also the case of In Re: Grabowski; (SDIII 2002) 277 BR 388 where the court held 'the financing statement did not need to specify the property encumbered to secure its interest, it only needed to notify subsequent lenders that a lien might exist and that further investigation was required to determine the exact status of the debtor's property.' See Secured Transactions Guide Transfer Binder Developments-Decisions (1996-2003) New CCH Editorial Staff Publication, p. 73 and 551.

[439] Chattel Mortgage and Conditional Sales Acts required that the mortgage or the conditional sale contract be filed.

[440] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 466.

rendered void the mortgages of inventory finance in some states. Although the solution to this was the introduction of notice filing in inventory finance, the first enactment to introduce notice filing was the Uniform Trust Receipt Act and then - following the UTRA lead - the Factors Lien Act and the accounts receivable statutes.

Article 9 adopted notice filing.[441] From the contents of the provision on filing, it is obvious that the requirements for the financing statement are minimal and in tandem with the very idea underlying the concept of notice filing: the information contained is just a starting point for a third party to further inquire about the transaction between the debtor and the secured party.[442] The third party (prospective creditor or purchaser) may through a record authenticated by the debtor request for the status of the transaction from the secured party to enable him get all the information needed to take a decision either to enter into the transaction with the debtor or not.[443] Normally, it will be in the interest of the debtor to liaise with the third party to get the requested information from secured party to establish his credit rating and which of his assets are not encumbered. The secured party is obligated to grant this request with 14 days subject to some exceptions.[444] Notice filing has made both filing and search easier and less burdensome, more so with the right given to the debtor to request that the secured party makes a disclosure concerning the transaction.

[441] Section 9 – 502 (a) UCC provides as follows: "Subject to subsection (b), a financing statement is sufficient only if it: (1) provides the name of the debtor, (2) provides the names of the secured party or a representative of the secured party; and (3) indicates the collateral by the financing statement."
[442] See the cases of re AA Appliance & TV Center, Inc, 170 F. Supp. 103 (E.D. Wis. 1959), aff'd, 271 F.2d 800 (7th Cir. 1959) and In Re: Grabowski; (SDIII 2002) 277 BR 388, already discussed in supra footnote 438.
[443] See s. 9 – 210 (a) (2) where it is a request for an accounting; s. 9 – 210 (a) (3) where it is a request regarding a list of collateral and s. 9 – 210 (a) (4) where it is a request for a statement of account.
[444] See sections. 9 – 210 (b), (c), (d) and (e).

2.3.1.1. Where to File under Article 9: General Choice of Law Rules

The provisions of revised Article 9 have simplified the rules relating to filing from what used to be the position under the old Article 9.[445] From the provisions of Article 9, the law of the debtor's location governs the perfection of most security interests that are perfected by filing; it also determines the place of filing. This is the import of sections 9 – 301 and 9 – 305 of Article 9.[446] Once the issue of which state law governs the transaction has been determined, the place of filing becomes certain.[447] Section 9 – 301 (1) applies the law of the state in which the debtor is located to the followings: the perfection, effect of perfection or non-perfection, and priority of collateral unless there is anything provided to the contrary in section 9 – 301 or sections 9 – 303 through 9 – 306. The exceptions to this rule are for agricultural liens and collateral related to real estate. In cases of agricultural liens,[448] collateral related to real estate which includes fixtures,[449] a timber to be cut[450] and as extracted collateral,[451] the choice of law rule provides that their perfection, non-perfection are governed by the laws of the state in which the collateral is located or extracted. Consequently, the secured party should file the financing statement in relation to the collateral in the state where the collateral is located.[452]

[445]Under the old 1972 law, filing was done at the place of the collateral, the problem inherent in this was where the collateral used in one particular transactions are located in different places, then the secured creditor would have to file at all those places otherwise the secured creditor's interest was not perfected at the place where filing was not done concerning that collateral. This lead to the proliferations of multiple filings for a particular transaction. See Darl E. Clark, Revised Article 9and the PPSA – A Comparison of the American and Canadian Secured Property Regime, the Secured Lender (January 2003).
[446]See Russell A. Hakes, The ABC's of the UCC (Revised) Article 9 Secured Transactions (American Bar Association 2000), p.48.
[447]Section 9 – 501 (a) (2) specifies the central filing office where virtually all financing statements are to be filed which is usually the secretary of state's office.
[448] See s. 9 – 302 UCC.
[449] See s. 9 – 301(3) (a) UCC.
[450] See s. 9 – 301 (3) (b) UCC.
[451] See s. 9 – 301 (4) UCC.
[452] See Willa E. Gibson, A Comprehensive Review of Revised Article 9, supra footnote 429, p. 57.

Where the collateral is negotiable documents, goods, instruments, money or tangible chattel paper, Article 9 offers a slightly different divergence approach. In such cases Article 9 requires the secured party to file its financing statement where the debtor is located whilst the issues of relating to the effect of perfection, non-perfection or priority are governed by the law of the jurisdiction where the collateral is located.[453] This is to satisfy the expectations of the parties that the law of the jurisdiction where such collateral are should govern the perfection and priority issues of such collateral.[454]

The location of the debtor is based on the nature of the debtor. Section 9 – 307 (b) provides that a place of business is a place where the debtor conducts its affairs and a debtor who is an individual is located at the individual‘s principal residence whilst a debtor who is an organization is located at its place of business. Where an organization has more than one place of business, then the relevant place of business becomes at its chief executive office. The United States is located in the District of Columbia;[455]Article 9 also contains special rules to determine the location of foreign entities and registered organizations that are organized under federal law.[456] Registered organization that is organized under the laws of the United States defers to the laws of the United States in determining the debtor's location. If a law in the United States designates a particular state as the debtor's location, then for the purposes of Article 9 that designation becomes the debtor's location. Likewise, where a United State's law authorizes the registered

[453] See s. 9 – 301 (3) UCC.
[454] See Willa E. Gibson, A Comprehensive Review of Revised Article 9, supra footnote 429, p. 54.
[455]See s. 9 – 307 (h) UCC.
[456] See s. 9 – 307 (f) provides that unless provided in subsection (1), a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a State are located (1) in the state that the law of the United States designates, if the law designates a state of location; (2) in the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its State of location; or (3) in the District of Columbia, if neither paragraph (1) nor paragraph (2) applies.

organization to designate a state as its location, the state so chosen by the organization as its location, stands for the purpose of Article 9 choice of law rules.[457]

The law of the location of the debtor or the collateral as postulated by the Article determines where to file a financing statement. Where a secured party inadvertently fails to file the financing statement at the place statutorily required to file such financing statement for the purposes of perfection, then that filing does not constitute perfection of the security interest as against the third parties who do not have actual notice of such financing statement. This may be so even if the mistake of not filing at the proper place may be attributable to an error on the part of the debtor.[458] Also where a debtor moves from one state to another, the creditor must file another financing statement with the secretary of the state for the new state within four months; otherwise the creditor's security interest will become unperfected.[459]

2.3.2. Registration under Nigerian Secured Transactions Law

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[457] See the Official Comment to section 9 – 307 (f) UCC.

[458] See the case of In Re: Perry Hollow Management Company (DNH 2001) 260 BR 58. In this case the debtor purchased 72 golf carts from the creditor before the bankruptcy of the debtor. The creditor filed the UCC financing statement in the county where the creditor believed the business of the debtor was and this belief of the creditor was as a result of the address furnished by the debtor in the sales agreement. When the debtor defaulted in payment the creditor sought replevin. Although the debtor settled the replevin action, the debtor later filed for bankruptcy protection. The bankruptcy trustee sought to void the creditor's security interest in the golf carts since the creditor did not file the UCC financing statement at the right county, the court held that despite the fact that the creditor filed the UCC financing statement based on the address provided by the debtor, the language of the statute strictly required that the UCC financing statement be filed in the county where the transaction occurred or where the debtor's business resided; and since the UCC financing statement was not filed in either county, the creditor did not have a properly perfected security interest in those carts and so the trustee can void the creditor's security interest in the carts.

[459] Douglas J. Whaley, Secured Transactions (Barbri, 11th ed., 2002), p. 80. The choice of law rules under Article 9 is important as we will soon under Nigeria and Cameroon. In Nigeria, the place of filing is not clear to say the least and this has generated a lot of confusion for people who are conducting searches for previous encumbrances on companies' collateral. This Article 9 choice of law rules will shape the recommendations to be made in this regard.

Filing as understood under Article 9 does not exist in Nigeria. However, what exists both for personal and real properties is registration. Registration of personal and real properties were not on the front burner during the pre-statutory era, the reason was not far-fetched: *first* there was no registry in existence during the period where one could register charges on either real or personal properties. *Second*, the only personal property security device was pledge[460] in case of which possession was and is still considered as a good means of giving public notice. Even when land was 'pledged' as collateral, the pledgee was put in possession of the piece of land and exercised control over the piece of land by cultivating the land.

At present, with the wide acceptability and usage of non-possessory security device the law has recognized the need to register any encumbrance/charge of properties (both real and personal properties) used as collateral to provide notice to third parties and to avoid the problems of ostensible ownership.[461] Failure by the creditor to register charges created on a company's property will render the security interest void as against subsequent creditors and liquidators of the company.

2.3.2.1. Where and What to Register in Nigeria

In Nigeria, similar to United Kingdom, there are separate registers for the registration of company charges. Where the company[462] charges are on personal properties of the company, the

[460] Pledge under the Nigeria secured transaction law is a possessory security.
[461] Whilst in the case of hire purchase transaction, the law does not require registration by the seller or hirer of the goods, registration would be a prerequisite for the lessor in the yet to be enacted Equipment Leasing Bill 2011. See section 13 of the Equipment Leasing Bill 2011.
[462] Companies herein include both public and private limited liability companies.

charges are registered at two separate registers[463] but where the charges involve real properties of the company; then in addition to the two registers, the charges will also be registered in the State's land registry of the State[464] where the property is situated.[465] Presently there is no personal property registry for consumer debtors in Nigeria. The major reason is that there is no law on personal property security interest for consumers and again most collateral acceptable to the banks and other finance institutions in Nigeria are real properties. Where personal properties are used by consumers as collateral like shares certificates and bonds, they are perfected by possession or control; which in this case are deposited with the banks and hence do not require registration. The proposal made as part of the recently launched reform project of the Washington D.C. - based 'Economic Analysis of Law Center' recommends a registry for filing of security interests in movable property in Nigeria.[466]

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[463] The two separate registers are at Corporate Affairs Commission (CAC) and at the registered office of the company.

[464]In every State in Nigeria, lands are divided into State or Local government land according to the proximity of the land to the State capital. Document of title to the State Land is called the statutory right of occupancy while document of title to the local government land is called customary right of occupancy. The Place of registration of mortgages or sale of real properties is determined by whether the land is covered by a statutory right of Occupancy or Local government customary right of occupancy. In cases of land covered by statutory right of occupancy, the registration is done at the State's Land Registry which is centrally located in every State capital whereas for lands governed by local government's customary right of occupancy, the registration is done at the Local Government Headquarters in a State. It should be noted that any mortgage or sale of land whether covered by statutory right of occupancy or customary right of occupancy requires the consent of the Governor of the State because the ownership of all lands in a State is vested in the Governor of the State and individuals were only given leasehold interest vide the right of occupancy. Real property mortgages or sales in Abuja which is the Federal Capital Territory is centrally registered in Abuja Geographical Information System. See sections 2, 21-22 of Nigeria Land Use Act 1978. See also Adeoye Adefulu, Nnamdi Esionye, Nigeria: An Overview of Nigeria's Land Use Amendment Bill, June 29 2009, available at < http://www.mondaq.com/article.asp?articleid=81844>; last visited on the 15th of December, 2010.

[465] It may be debatable whether a registration of company charges on real properties at the land registry of the state where the real property is situated is important to perfect a company charge on real properties. This is due to section 197 (8) CAMA 2004 which provides as follows: 'the holding of debentures which entitles the debenture holder to a charge on land shall not, for the purpose of this section, be deemed to be an interest in land.' It is only interest in land that is registrable at the land register. However no matter the argument against the registration at the state land registry, it is always better to err on the side of caution by registering at the land register. If it is not a requirement, the secured party looses nothing but where it is and the charge was not registered then the secured party's interest may lose priority to a subsequent interest.

[466] Indeed the draft law provides in section 24 (1) and (3) of the Draft Security Interest in Movable Property that security interest and other liens on property governed by the Act are perfected by a filing the said security interest in the Notice-Filing Archive of Security Interest in Movable Property. The process of filing fixes all other subsequent creditors with notice of the earlier encumbrance. See Nuria de la Pena, Heywood Fleisig, Peter Winship, Nigeria:

The Companies and Allied Matters Act – similar to the United Kingdom Companies Act of 1985 where it was copied from – has provided for transactions (charges) of a company which must be registered with the CAC within ninety days[467] of the creation of such charges to create a valid security interest in those properties. In order to register a company's charge, a company who has created a debenture[468] is required to deposit a copy of the instrument creating the debenture in addition to providing prescribed particulars of the charge to register the debenture at the CAC.[469] In effect two documents are needed to register a company's charge: a copy of the agreement/instrument itself and the prescribe particulars of the charge – a form from CAC where the information contained in the company's charge is recorded.[470] Upon the registration of the company charges at CAC, the CAC issues a certificate of registration to the company and such

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First Draft Law on Security Interest in Movable Property, Center for the Economic Analysis of Law, supra footnote 345.

[467] But under the United Kingdom Companies Act of 1985, the time within which to register a company charges was twenty one days. See section 395 (1) of U. K. Companies Act 1985. This research cannot fathom any reason why the registration time was increased from 21 days under the U.K. Companies Act to ninety days.

[468] Debenture is defined under Section 650 CAMA 2004 to mean, "a written acknowledgement of indebtedness by the company, setting out the terms and conditions of the indebtedness, and includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not." However, in US, a debenture is generally known as "a bond that is backed only by the general credit and financial reputation of the corporate issuer, not by a lien on corporate assets." See Bryan Garner, (ed.), Black Law Dictionary, supra footnote 3, p. 430.

[469] See section 197 of the CAMA 1990 which provides as follows: "Subject to the provisions of this Part of this Act, every charge created by a company, being a charge to which this section applies, shall so far as any security on the company's property or undertaking is conferred be void against the liquidator and creditor of the company, unless the prescribed particulars of the charge together with the instrument, if any by which the charge is created or evidenced, have been or are delivered to or received by the Commission for registration in the manner by this Act or by any enactment repealed by this Act within ninety days after the date of its creation but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section, the money thereby secured shall immediately become payable.(2) The provisions of this section shall apply to the following charges, that is – (a) a charge for the purpose of securing any issue of debentures; (b) a charge on uncalled share capital of the company; (c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;(d) a charge on land, wherever situate, or any interest therein, but not including a charge for rent or other periodical sum issuing out of land;(e) a charge on book debts of the company;(f) a floating charge on the undertaking or property of the company; (g) a charge on calls made but not paid; (h) a charge on a ship or aircraft or any share in a ship; and (i) a charge on goodwill, on a patent or a licence under a patent, on trademark or on a copyright or a licence under a copyright." See also section 396(1) United Kingdom of the Companies Act of 1985.

[470] This is a hybrid of the recordation statutes and filing statutes discussed by Gilmore and this makes the registration cumbersome. See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 462.

certificate is a prima facie evidence[471] of compliance with the registration requirements.[472] Apart from the registration of the charges of the companies' property at the CAC by the secured creditor to serve as public notice to third parties, the law further mandates every limited liability company to keep at its registered office a copy of the instrument (either debenture, fixed or floating charge agreement) creating the charge and also a register of charges and enter therein all charges specifically affecting the properties of the company.[473] The companies' register of charges gives in each case a short description of the property charged, the amount secured by the charge and - except in case of bearer securities - the names of the creditors.[474] The law even prescribes punishment of a fine to any officer of the company who willfully and knowingly authorizes or permits the omission of any entry required to be made in this regard.[475] The essence of the above provisions is to further provide notice to prospective creditors and third parties of the encumbrances of the companies' properties in addition to the notices already provided at the CAC.

[471] However as against section 401(2) of the U. K. Companies Act 1985 which provided that certificate of registration is conclusive proof of compliance, Nigerian CAMA 2004 only states that it is prima facie proof of compliance. The difference is that while evidence can be adduced to rebut the presumption of compliance under the Nigerian law, evidence cannot be given to rebut compliance under the English Act. Writing about the conclusive nature of this certificate of registration Goode stated as follows: "The issue of a certificate of registration is conclusive evidence that the registration requirements of the Act have been satisfied, even if it is later found that the filed particulars omitted a class of asset covered by the security, misstated the date of creation of the charge or the amount secured or contained some other inaccuracy and even if the charge should never have been accepted for the registration in the first place." See Roy Goode, Commercial Law, supra footnote 13, p. 714.

[472] See section 198 (2) CAMA 2004 provides that "Where a charge is registered under this part of this Act, the commission shall issue a registration certificate setting out the parties to the charge, the amount thereby secured, with such other particulars as the commission may consider necessary; and the certificate shall be prima facie evidence of due compliance with the requirements as to registration under this part of this Act."

[473] See sections 190 and 191 (1) of the Companies and Allied Matters Act 2004.

[474] The information contained in the company's register of charges is insufficient, however considering that a copy of the charge itself will also be attached; the copy of charge furnishes any missing information on the company charges. For example the name of the debtor.

[475] See section 191 (2) CAMA 2004.

The law further mandates the company to keep open the copies of instruments creating any charge that require registration during the business hours of the company for inspection by any creditor or member of the company without the payment of a fee whilst the inspection of such register by other person will attract a minimal fee. Where inspection of the copies of the instrument creating charges is refused, the law also prescribes punishment of fine for officer of the company who declines to grant access to third parties to inspect the instrument. In some circumstances, the court may by order compel an immediate inspection of the copies of instruments or the register.[476] Where a debtor company duly complies with this requirement of keeping the register of its charges at its registered office, 'counterpart'[477] registration will ensure that additional notice of the companies' charges is given to the public, especially potential creditors.

Ordinarily in other jurisdictions like the United States and Cameroon, the law places the obligations to give notice of the security interest to third party on the secured creditor,[478] but interestingly, in Nigeria, the obligation to give notice of the encumbrances on companies properties to third parties appears to be placed both on the debtor (herein the company)[479] and the creditor. One reason may be the fact that registration of the company charges and searches of encumbrance on company files is manually done only in Abuja where the main office of the CAC is located.[480] Registration of companies' charges and the corresponding searches on

[476] See section 192 CAMA 2004.
[477] The word counterpart is not used in its legalistic sense. However the word is used here because, this is the second registration of the company charges, but in this case, the register is kept at the registered office of the company.
[478] See section 9 – 310 UCC; and Articles 64, 65, 67 (1), 70, 72, 73, 79, 83, 94, 95, 99, 101, 102, 129, and 133 of the OHADA Uniform Organizing Securities.
[479] See sections 190, 191 and 199 of CAMA 2004.
[480] There are 36 states in Nigeria. CAC also has a small branch office at each of the 36 states of the federation where business names are registered. However registrations of companies are done only at the Abuja main office. Consequently, this work proposes the maintaining of companies register of charges at each of the 36 states of

company file at only one place in the whole of the federation of Nigeria is grossly inadequate. It will be difficult for prospective creditors of companies that have their offices in other States of the federation of Nigeria to come to Abuja to conduct searches for previous encumbrances of the companies' assets otherwise the cost of credit will be exorbitant. Therefore the law requires the companies to keep a 'counterpart' register of charges at their registered office, probably to obviate the need for a prospective creditor of the company to come to Abuja to conduct searches on the company. [481] Another explanation for this may be attributed to the fact that companies tend to and have interest in hiding corporate information that may be detrimental to their reputation, their relations with suppliers and on the value of their shares. Consequently many companies will want to suppress such information, hence the need for the law to equally impose the duty on the company to ensure that such information are disseminated to the deserved recipients. This reason is further buttressed by the fact that there are penalties for non-

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federation where the CAC has offices. That way it would be easier for the creditor to conduct search on the companies' register of charges or confirms what is contained in the register of charges already kept at the registered offices of the companies, easily without much cost. This proposal may be difficult for now because the register of companies' charges is still manual and not electronic.

When a prospective creditor wants to conduct search of a company, upon the payment of the prescribed fees, the legal practitioner engaged by the company for the purpose of conducting search is given the company's file which is in hard copies which the legal practitioner painstakingly goes through. Every new registration of company's charges is filed in this file opened for the company. Hence it may be difficult to reproduce the files into 36 other copies and send to each office of the CAC in all the 36 states of the federation and to update the files in all the states for any new registration. Consequently, it is only when such charges are registered electronically that it will be easy to have them in all the offices of CAC in the 36 states in Nigeria. Thus the urgent proposal for electronic registration of all companies' charges like the way filing is electronically done in the United States, Canada and Hungary.

Hungary has a centralized electronic system maintained by Hungarian Chamber of Public Notaries for the registration of security interests. However in Nigeria, this work will recommend the continued maintenance of the would-be centralized electronic filing system by CAC and not public notaries. Public notaries are not accorded much importance as they are accorded in Hungary and there is no Chamber of Public notary. Notary Public status are given to lawyers of post seven years call, however their importance in notarizing documents are on the decrease, such works of notarizing documents are increasingly given to commissioner of oaths in Nigeria. It does not make sense to give the management of centralized electronic register of security interest to a group of persons that are not organized and whose importance is dwindling in the society.

[481] It can also be argued that this may not be a strong reason for asking the company to keep register of charges at its registered office. This is because, CAC Abuja is the place solely designated for company to register its charges. The idea of asking prospective creditors to seek such vital information from the debtor itself may be subject to abuse as the debtor may be tempted to hide facts that will not be favorable to it.

compliance by every officer of the company who refuses or neglects to comply with the requirement of keeping at its registered office the companies' register of charges.[482]

2.3.2.2. Dilemmas Confronting Registration of Security Interests in Personal and Real Properties in Nigeria: Any Lessons from Article 9?

Following the analysis of registration of company charges above, some basic questions need to be formulated. *First*, whether registration of company charges works in Nigeria? The *second* is - given that secured creditors must registers their charges at CAC can the non registration of the very same charges in the company register maintained at its registered seat affect the priority of the secured creditor? The *third* is whether secured creditors always conduct searches at the companies charge register especially at CAC to see whether there are prior ranking encumbrances before granting loans? *Fourth,* is it possible and whether it would make sense for Nigeria to embrace the United States notice filing system with respect to registration of security interests in personal property? *Fifth*, can there be a computerized registration system in Nigeria, and if yes, would that benefit secured transactions in Nigeria and the economy?

On question one, registration of companies charges at the CAC works primarily because it is in the interest of the secured creditor that its security interest is perfected by registering it at the appropriate office. The law mandates the secured creditor to register the charges on the companies' property. As the secured creditors of companies are professionals - mostly commercial banks – they know well how to secure their interests and the unpleasant consequences of non-registration of such charges. Notwithstanding the argument proffered here,

[482] See section 191 (2) CAMA 2004.

the rate of filing of company charges is generally low.[483] There have been cases where banks have negligently failed to register the charges created on company assets at CAC.[484] The result is that where the debtor creates any subsequent security interest over the same assets of the company, such interest takes priority over the earlier unregistered interest.

It is commonly known that the 'counterpart' registration of the company charges at the registered office of the company which the law requires from the debtor company should be treated with circumspection. It could be safely presumed that many companies hardly keep – let alone properly maintain – the register of company charges at their registered offices; irrespective of the lack of precise data on that in Nigeria. A good case in point is the case of Folio Communications Ltd which the researcher's law firm was directly involved in. Folio Communications Ltd did not keep the register of the deed of debenture of seven hundred and fifty million naira (about $5m) which it borrowed from defunct Hallmark Bank Plc at its registered office. The situation in this case was made worst due to the fact that Hallmark Bank Plc also omitted to register the charge at the CAC. What saved the day for the bank was that the company did not create any subsequent security interest on its assets; otherwise the banks security interest would have been subordinated

[483]According to Fleisig et al., "Visits to the registry and interviews of lenders revealed little use of the CAC registry for corporate charges (there are only 1800 filings, compared to almost 1 million for far smaller Romania). This lack of use may reflect several factors including: the evasion of taxes and filing fees, the result of negligence or ignorance on the part of companies, seeming complex filing procedures, administrative bottlenecks at the registry leading to frustration when trying to file charges by companies, and inadequate supervision and periodic checks by the registry, or, a combination of these factors. Moreover, given that there is presently no comprehensive security interests' law; Nigerian law does not require that financial leases register for priority." See Heywood Flesig, Nuria de la Pena and Corey Loney, Nigeria Registry Assessment for Filing Security Interests in Movable Property, March 2010, p. 6, Center for the Economic Analysis of Law, available at < http://www.ceal.org/welcome.asp >; last visited on the 2nd of April 2011.

[484] One of such unfortunate instances is the case of Folio Communications Ltd which borrowed the sum of seven hundred and fifty million naira (about $5m) from defunct Hallmark Bank Plc and used the companies' assets and undertakings as collateral. The bank did not register this charge at the CAC within the mandatory ninety days given in the statute. Upon default of repayment, the Bank made the researcher's law firm the receiver/manager of Folio Communications Plc to recover the sum. When it was discovered that the debenture was not registered, the researcher's law firm took steps to register the debenture first of all before taking over the management of Folio Communications Ltd as receiver/manager in order to recover the debt.

to the new interest created. Though mortgages are not the thrust of this research, but it is apt to posit that secured creditors who advance loans on the strength of real property security also register their interest at the appropriate land registry office where the property falls.

On question two, it is the registration at CAC done by the secured party that gives priority to the interest held by the secured party on the company charges.[485] Where the company charges have been registered at CAC, non registration of the company charges at the company's registered office will not affect the secured creditor's priority in relation to subsequent interest. This is because the duty to register the charges at company' registered office is imposed on the debtor - company with penalty to officers of the company for non-compliance.[486] It will thus be inequitable to the secured creditor if its priority is affected by the actions of the debtor when the secured creditor has done all that is expected from it to perfect its interest.

In answering the third question – to wit, whether secured creditors do in fact conduct research – the picture would not be full without making a difference between the realm of securities on personal property and real property mortgage registration. In the sphere of personal property registration which is done at the CAC, the answer is in the affirmative.[487]As already stated,

[485] See section 197 (1) CAMA 2004.
[486] See section 191 (2) CAMA 2004.
[487] Indeed, registration of companies and conducting of searches of companies at CAC is the most common job of a 'new wig' that is practicing law in Abuja. It is a common knowledge within the legal circle in Abuja that most 'new wigs' prefer to be accredited with the CAC and get jobs for company's registration from clients and searches from banks than learn the rigors of litigation. Registration of companies for clients and conducting of searches on behalf of a bank fetch easy money for new wigs. On a normal day one will see a cache of new wigs in CAC registering and conducting searches. Checklist for conducting searches are as follows: whether the company is registered; what is the registration number of the company, who are the directors of the company; the object of the company; the borrowing power of the company and whether there is a limitation on the amount of borrowing contained in the memorandum and articles of association of the company; whether there is any previous borrowing by the company and if so what assets of the company was used as collateral for the previous loan; the share capital of the company, the subscribed capital and the paid – up capital of the company; any other information on the memorandum and

companies' creditors are mostly commercial banks, and being professionals, they protect their interest by ensuring that their prospective debtors had not encumbered their assets previously by charges securing big loans which would make it improbable for the company (debtor) to repay them. In view of this, and also coupled with the existing asymmetry in access to information on credit in Nigeria – lack of private and public credit reporting system in Nigeria – banks as a rule do conduct searches on companies at CAC before granting credit.

On whether searches on real property at the land registry are conducted by prospective secured creditors before advancing loan on the strength of such real property, the answer is a definite yes. To a very large extent, conducting of searches on real properties at the appropriate land registry has been embraced by Nigerian potential secured creditors and purchasers for two major reasons. *First*, it is because of the general reason to check for any prior encumbrance on the property sought to be sold or used as collateral. The *second* and most important reason is due to the presence of fraudsters in Nigeria, who attempt to obtain money from individuals and companies by falsely selling non-existent or existing real properties belonging to other people. This has made everybody - though in particular secured creditors and purchasers - to be cautious of every transaction that involves either taking security interest in real property of the debtor or outright purchase of property. No commercial bank or any other person interested in advancing loans and taking a security interests in any real property of the borrower or an outright purchase of any real property can conclude such transactions without engaging the services of the legal practitioner to conduct searches on the property at the requisite registry. When searches are conducted on real properties, the aim is to find out three important information: (a) whether such a property exists;

articles of association of the company or the file of the company that may influence the bank negatively or positively in granting loan credit to the company.

(2) if the property exists, whether debtor or seller is the actual owner or have an interest it claimed to have in the property, and (3) where the above two questions are answered in the affirmative, whether the property has any prior adverse encumbrance?[488] This is the essence of the Torrens system of title registration in Nigeria.[489] The information contained in the file reveal

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[488] Indeed, the author - while practising as a lawyer in a law firm in Nigeria - has conducted several searches at Abuja Geographical Information System Registry (hereinafter called "AGIS" where searches for all lands situated in the Federal Capital Territory are conducted upon a payment of the prescribed fees) for clients who either wanted to purchase real property or to take a security interest in the real property. The first requirement of whether a property exists may be taken for granted in other jurisdictions but in Nigeria experience has shown otherwise. The first search conducted by the author was over a supposed undeveloped piece of land in Abuja, which opened the eyes of the author. The author was given a certificate of occupancy of a FCT land to conduct a search on the land for a client who was a prospective buyer. On getting to the registry and payment of the required fees, it turned out that such a supposed land with the plot number does not exist in the layout of the area where the land was alleged to exist. Yet the fake certificate of occupancy was given to the author's client by a respectable person in the society. When the report of the findings was handed over to the client, the client was astonished because he had already been taken to that area and an empty plot of land was shown to him by the seller as being the land corresponding to what was contained on the certificate of occupancy. In fact the client was showed a freshly built beacon which had the numbers corresponding with the numbers on the certificate of occupancy as the beacon demarcating the supposed land from other lands around the area.

The sad thing is that this is not an isolated case, other colleagues in the law firm where the author practised law have discovered at other times upon conducting search that some of other certificates of occupancy documents that were given to them to conduct searches on were fake and such lands did not exist in reality. Another specie of fraud that is most prevalent in the most metropolises in Nigeria, especially Lagos State, is the sale of other person's property. Most of the times, a fraudster will clone a certificate of occupancy of a building apparently with the connivance of the staff of land registry and sell such building without the owner's knowledge and then disappear with the money. The owner may get to know about the fraud only when the purchaser comes to take physical control of the building.

Fraud is so rampant that most of the buildings in many parts of the cities in Nigeria bear these words boldly written on all sides of the building "THIS HOUSE IS NOT FOR SALE, BEWARE OF FRAUDSTERS OR THIS HOUSE IS NOT FOR SALE, BEWARE OF 419." The "419" is usually a reference to fraudsters in Nigeria, section 419 of the Nigerian Criminal Code is the section that criminalizes obtaining property by false pretences under the Nigeria Criminal Code. Consequently due to the prevalence of fraud in real properties in Nigeria, it is uncommon, for the transaction of a sale or taking of a security interest in a real property in Nigeria to be undertaken without conducting a proper search at the appropriate register. Indeed, the author knows of many clients that engage as a rule the services of two law firms to conduct searches of the same real property to make assurance doubly sure that the entries concerning a piece of property are genuine, especially where the cost of the property is high.

[489] The main idea of Torrens is articulated by the Government of South Australia Department for Transport, Energy and Infrastructure as follows: "[…] the main object of the system is to make the register conclusive (in most cases) without a transferee or purchaser having to look behind the register as was the case in the "old system title" system inherited from age-old English legal practice and procedure. Once your name is registered or recorded on the title register under Torrens title you become the owner of the property to the exclusion of all others, by the very fact of registration. You therefore obtain "title by registration", which is the pivotal concept of Torrens Title…Under this system no document such as a transfer or a mortgage is effective to pass the title or give rise to an interest in a property unless and until it is recorded at the centralized registry." See Government of South Australia Department for Transport, Energy and Infrastructure, What is the Torrens Title System, available at < http://www.landservices.sa.gov.au/1public/Education_-_Careers/_Documentary_Movies/4What_is_the_Torrens_Title_System.asp >; last visited on the 4th of March, 2011, see also AussieLegal.com.au, Torrens Title, available at < http://www.femail.com.au/torrenstitle.htm >; last visited on 12th of October 2010

all the information needed to advise the prospective purchaser of the property or secured party of the status of the property without seeking to get confirmation or more details from the secured party on record (if there is any).

This takes us to the fourth question whether it is possible and also whether it makes more sense for Nigeria to embrace the United States simple notice filing for security interests on personal property? It is the firm position of this thesis that it would be possible and highly desirable to embrace the notice filing for charges in personal properties in Nigeria. Embracing the simple notice filing in place of transaction registration will be good because the privacy of the parties' transaction is protected[490] with the minimum information contained in the financing statement without sacrificing the main purpose of filing. It also accords with the changing business trends.[491] The only challenges it may pose will be how to properly manage the notice filing without opening the system to fraud, and whether there are industry practitioners (including detectives) who will know what to do - conduct more enquiry from the facts got from the company's register to ascertain the true status of the property. A notice on company charges which is filed by the secured creditor at the CAC should have the full names of the secured creditor and all the address with data necessary for proper and easy identification of the asset used as collateral.[492] With this contact, the secured creditor on record is contacted who now gives

[490] There may be trade secrets that the parties therein want to protect that would be incompatible with transaction filing. According to Tajti, "The debtor might not want his competitors to know the rate of interest he is paying or the burdensome nature of affirmative or negative covenants, which his secured creditor may have demanded. Similarly the secured party might prefer to keep for himself whatever favorable terms he may have granted to the debtor. " See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 148; see also Coogan, Public Notice Under the UCC and Other Recent Chattel Security Laws, Including 'Notice Filing,' 47 IOWA L. Rev. 322 (1962).

[491] Before the introduction of simple notice filing into United States law, transaction filing was practiced. Moving from transaction filing to simple notice filing shows the changing business trends in the United States.

[492] The above information accords with what is obtainable from notice filing system in the United States under section 9 – 502 (a) UCC.

the full details. Since the record is kept by a government agency there may be little that the debtor may do to alter the contact details of the true secured creditor on record.

On the issue whether the secured creditor or its agent (who would most probably be a legal practitioner), will know that under simple notice filing, the information received is not the 'complete story' that more detective work is required; this will be a function of educating the lenders – banks, and lawyers on the new system. It would require spreading the essence of the new simple notice filing to all potential secured creditors through seminars and conferences. Another ingenious way to ensure that prospective secured creditor or its agents embrace the idea of doing more detective work of searching for the parties[493] on record in order to discover the whole status of the former encumbrance will be the law to require all filed financing statement to have a bold inscription on a conspicuous part of the paper words - conveying that the information received is not the 'complete story' of the transaction.[494]

Though there are obvious advantages of the notice filing, the practical difficulty of introducing Article 9 simple notice filing in Nigeria is not lost on this research. When and how to introduce notice filing is a tough question not only for Nigeria but for other countries that have carried out reforms of their secured transactions. For example none of the Eastern European reform

[493] By virtue of section 9 – 502 UCC, a financing statement should contain, the name of the debtor, the name of the secured party and the indication of the collateral covered by the financing statement. However, to discover the status of former encumbrance, the lawyer should contact the secured party to confirm what the debtor says. The debtor has interest to reduce the size of the loan or falsify the repayments made so far on the earlier encumbrance, but this is not so with the secured party on record. The secured party statement should be more relied as the accurate information on the state of the former encumbrance than the debtor. A lawyer should be circumspect with the information received only from the debtor.

[494] Sentences like this may suffice: TAKE NOTICE THAT THE INFORMATION STATED HEREIN IS ONLY MEANT TO PUT ONE ON INQUIRY, CONSEQUENTLY THE PROSPECTIVE SECURED CREDITOR OR ITS AGENT SHOULD CONTACT THE PARTIES ESPECIALLY THE SECURED CREDITOR ON RECORD FOR THE DETAILS OF THE TRANSACTIONS BETWEEN THE SECURED CREDITOR ON RECORD AND THE DEBTOR.

countries has introduced the Article 9 notice filing, most systems filings provide much more than a minimum reduced notice to the public. Hungary with her adoption of computerized filing that is maintained by the Hungarian Chamber of Public Notaries is still not a notice filing system because *"the number of data registered is much broader than the United States notice-filing regime, what normally does not require further inquiry from searchers and the certificate issued by the office is deemed to be authentic proof on some of the contained data."* [495]

On the fifth question about having a centralized and computerized registration system, yes there can be a computerized registration system especially for company charges. Indeed, Nigeria is overdue for computerized registration system and the benefits are numerous. The reason why there is only one company register serving the whole federation is due to lack of computerized filing. As already stated, there are 36 states in Nigeria and CAC maintains branch offices in each of these states where other functions of the Corporate Affairs Commission are being carried out, e. g., the registration of business names. However registration of companies, registration of company charges and conducting of searches on company charges are done only at the Abuja main office. The inability to conduct searches at all the 36 states of the federation is largely due to the fact there is no computerized registration. When a company is formed a hard copy or paper file is opened for such company at CAC. In like manner, when a company registers any charge on its assets, it is done by sending in a hard copy which is filed in the corresponding file of the company. It is this hard file that legal practitioners acting for secured creditor painstakingly go through to conduct search of company charges at the CAC Abuja office. To have this hard copy file of hundreds of thousands of companies at all CAC's branch offices throughout the federation

[495] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 313.

is almost impossible. That would entail that the hard copies of files of the ‘multitude’ of companies must be reproduced at least a minimum number of 36 times with constant updating of the company files, each time a company registers new charge, or a termination statement of the company charges is filed. However, all the trouble of reproducing and sending the hard copy files to all the branches of CAC will be a thing of past with the introduction of electronic registration of company charges, electronic filing of termination statement and indeed all filings required by law from the company. Computerized filing will make it easy for accredited lawyers with CAC with login name and password to conduct searches online from the convenience of one’s office upon payment online of the prescribed fees. This will drastically reduce the cost of transaction. Time wasted at waiting on queue to get out a company file and the cost of travelling to CAC in Abuja for legal practitioners residing in other parts of the country will be completely avoided. Computerized registration will remove the necessity of requiring a ‘counterpart’ registration of the company charges to be kept by the company at its registered office with all its attendant transaction costs. Since, registered legal and industry practitioners could access information from the convenience of their office upon payment of a fee, there will no need for companies to keep register of charges at their registered offices. By this, the manipulation of the register of company charges by the companies will be eliminated. Without a doubt, to say that computerized registration will bring about numerous benefits to the secured transaction is quite an understatement. It will change the secured transactions landscape in Nigeria. Hence, this research urgently proposes for computerized registration of all company charges like the way it is done under Article 9.

The research believes that the whole discussion on centralized computerized filing above is one of the instances where Nigeria can do a quantum leap and catch up with the secured transactions laws in the United States because of the availability of the resources and industry practitioners who can manage the newly transplanted processes from Article 9.[496]

2.3.3. Registration System under the Cameroon's Uniform Act on Securities

Just like Nigeria, United States-styled notice filing is foreign to the OHADA Uniform Act Organizing Securities, which – following French traditions – is based on a much onerous yet more-data-providing registration system. The Uniform Act on Securities is replete with provisions making securities interests valid against third parties only upon registration at the Trade and Personal Property Registry.[497] As already stated in chapter 1, although there is no separate Trade and Personal Property Registry in Cameroon, registration of personal property security interests is done at the Registry of the Court of First Instance.[498] This registry performs several functions namely: providing administrative support to the court – i.e., receipt and filing of court processes for the Court of First Instance; registration of companies; registration of the personal property security interests in cases of pledges without dispossession; as well as keeping of files of the companies for searches upon the payment of prescribed fees. Accordingly it is at the registry of the Court of First Instance where pledges without dispossession of preferential rights and transferable securities, business, professional equipment, motor vehicles and stocks of raw materials and merchandise are registered.

[496] Processes here include, filing in place of registration, computerized filing system in place of manual filing.
[497] See Articles 64, 65, 67 (1), 70, 72, 73, 79, 83, 94, 95, 99, 101, 102, 129, and 133 of the OHADA Uniform Organizing Securities.
[498] Court of First Instance is second court in order of hierarchy of courts in Cameroon. It is located in all the judicial sub-divisions in Cameroon. The Court of First Instance has civil jurisdiction to hear any cases where the claim does not exceed 500, 000 CFA. The court also has limited criminal jurisdiction.

The Uniform Act on Securities is based on transaction registration. For the five types of pledge without dispossessing the debtor discussed above which require registration, there are almost identical information required from the creditor for registration at the Registry of Court of First Instance in Cameroon. The information is more detailed than a simple notice filing which Article 9 adopted, but is less than what is obtainable under the Nigerian Companies and Allied Matters Act, where a copy of the instrument creating the debenture or charge is required to be filed alongside with the prescribed particulars of charge.[499] The Uniform Act on Securities provides that the pledge shall be constituted by 'a duly registered notarial[500] or private deed.' Though the notarial deed ensures some measures of authenticity on the document, however, the requirement of notarial deed is an additional formality which is likely to be burdensome, expensive and complicated to comply with. Where the requirement of notarial deed is not complied with, it may be a threshold for the courts to void securities since the language of the Article has tied the validity of a pledge to be dependent upon being constituted by a duly registered notarial or private deed.[501] Since the purpose of registration is to give notice to third parties of an earlier

[499] For example see the provision of which information is needed for the pledging of stock by Article 101 of the Uniform Act on Securities. This section requires the entry of the following data: the full name, domiciles and professions of the parties and, where necessary, the registration number in the Trade and Personal Property Credit Register of the debtor who constitutes the pledge; a precise description of the asset pledged which permits its identification by its nature, quality, value and location; the name of the insurer who shall insure the secured stock and the building in which such assets will be stored against fire and destruction; the amount of the secured debt; the conditions for claiming the principal and interest on the debt; and finally the name of the banker in whose establishment the pledge document is kept. See also Articles 65, 70, 94 of the Uniform Act on securities for similar requirement for other types of pledges without dispossessing the debtor.

[500] Notaries or notary public as they are called in some jurisdictions are lawyers or persons with legal training who are licensed by the state to perform acts in legal issues. Their roles include witnessing the appendage of signatures on documents and this ensures some authenticity to such documents. The roles of notaries vary from jurisdiction to jurisdiction. In Nigeria, notaries public have diminished roles presently; the roles of notaries are being taken over by commissioner for oaths, who under the Oaths Act 2004 are assigned the roles of witnessing the signing of official documents. In Cameroon notaries have increased roles, from the buying of land, constitution of pledge securities to the incorporation of companies, notaries have roles to play. It is thus not surprising that the Uniform Act on Securities have a rigid requirement that before a pledge without dispossession is registered, the pledge must be duly notarized.

[501] See for example Article 101 of Uniform Act Organizing Securities which provided as follows: "pledging of stock shall be constituted by a notarial deed or private deed […]." This sentence is in pari-materia with the provisions of

encumbrance on an asset, registration of the non-possessory pledge without it being constituted by a notarial deed would still give notice of the earlier encumbrance to the third parties. What really matters is that a potential creditor is informed of an earlier encumbrance on a debtor's property. It makes business and efficiency sense to relax the rigid rules on notarial or private deed more so if simple notice filing is going to be adopted in Cameroon. Notarial or private deed is not required in the United States and Nigeria in order to prepare a financing statement or company charges.

In practice, the patronage of the registry of the Court of First Instance for the registration of security interests for all the five types of pledges without dispossession under the Uniform Act is low, only few creditors register their security interests at the registry of Court of First Instance. The reason is not implausible; creditors mostly prefer possessory security which does not require registration. Also many creditors are yet to come to terms with the idea of non possessory security devices despite the several provisions on it under the OHADA Uniform Act Organizing Security. Creditors believe that their security interest will not be properly protected by a pledge without dispossession irrespective of the fact of registration since the collateral will remain in the hands of the debtor. This fact is reinforced by the fact that enforcement of such security interest upon default can only be by recourse to the court and distress sales by the court. The slow and uncertain judicial system of enforcement of security in Cameroon does not instill confidence in the creditors either. The collateral may have been dissipated by the debtor before the order of court is made.[502]

Articles 65, 70, 94 which talk about the pledge of other non-possessory security interest of partnership rights, businesses, professional equipment or motor vehicles.

[502] See generally chapter 3 for the problems of court assisted enforcement under Cameroon Civil Procedure Rules.

Another reason for the low usage of the registry of the Court of First Instance is the cost implication of registration (even though the cost of registration is eventually transferred to the debtor). As stated above the law requires that all pledges without dispossession shall be constituted by a duly registered notarial or private deed. The cost of complying with this requirement, just as the registration itself, is expensive.[503] The transaction costs are further increased because of delays in registration occasioned by the inflexible bureaucratic processes involved.[504]

2.4. Termination Statements under Article 9

Whether it is notice or transaction filing, the essence of it is to alert third parties to beware that the debtor's properties have been encumbered by a previous transaction wherein the debtor has used such properties as collateral in favor of a secured creditor and the obligations and rights created in the previous transaction are still subsisting. Accordingly where the debtor has repaid the loans or performed the obligations which the collateral secured, there should be a means of informing the public that the obligations of the debtor to the creditor have been performed. Consequently, the earlier encumbrance having been discharged, the third party is free to deal with the assets of the debtor as agreed upon by the debtor and such third party. This becomes important since the financing statement contains very limited information which does not state

[503] For example the cost of notarizing the security agreement that will be registered which is a requirement of the law is exorbitant. Decree 95/038 of 28/02/95 fixes the fees for the notarizing of agreement as follows: for the debt between 1million-3 million francs (CFA) 4.5%; 3-10 million CFA 3%; 10-25 million CFA 1.5%; 25-50 million CFA .75%; 50 million CFA and above .50%. This percentage excludes the cost of stamp duties and the actual cost payable to the registry of the court of first instance for the registration of the security interest. See Registering Property in Cameroon Details - Doing Business –The World Bank Group available at < http://www.doingbusiness.org/exploretopics/registeringproperty/Details.aspx?economyid=34 > last visited on the 15th of December, 2010.

[504] See Uniform Act on Securities (Guarantees), with comments from Martha Tumnde, Peter Monteh Tumnde and Anoukaha Francois, supra footnote 163, p.47, especially comments on Article 65.

when the encumbrance on the property will cease. Allowing the public to conjecture when a security interest is discharged or terminated may work against the interest of both parties, especially the debtor.[505]

Accessority principle is an implied feature of most secured credit law especially the continental systems; common sense dictates that when a debt, which is secured with a collateral is repaid in full, unless there is another obligation which the collateral secures, the collateral ought to be released to the debtor. Though not expressly mentioned under the Article 9, this principle however can be inferred from the provisions of Article 9[506] and other secured credit laws.[507] Section 9 – 513 (a) (1) of the UCC,[508]like the Nigerian Law provides for the filing of the termination statement when the financing statement secures no more obligations, and the secured party has no commitment to make an advance, incur an obligation or give value to the debtor. Where the financing statement is filed in respect of a consumer good, the secured party has a duty to file a termination statement within one month after the expiration of obligation; or if earlier, within 20 days after receiving an authenticated demand from the debtor to do so.[509] Where the financing statement is not filed in respect of consumer goods, then the secured party on record has no duty to file a termination statement, the secured party has a choice to send to the

[505] The debtor may suffer damages to his credit worthiness as prospective lenders may be unwilling to lend to the debtor if the registry still records the financing statement without a corresponding termination statement.
[506] It is a principle that states that the lifetime of a security interest corresponds with that of the underlying obligations but see s. 9 – 513 (a) which is in essence the effect of accessority principle.
[507] In some jurisdictions the accessority principle becomes a central principle of its secured credit law. For example under Hungarian law, there is no termination statement because according to accessority principle the lifetime of a security interest expires at the discharge of the obligations which the security interest secures. Accordingly the Hungarian law does not see the need to file additional termination statement. See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p.149.
[508] The section provides as follows: 'a secured party shall cause the secured party of record for a financing of statement to file a termination statement for the financing statement if the financing statement covers consumer goods and: (1) there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value.'
[509] See s. 9 – 513 (b) (1) & (2) UCC; see the case of Hans ford v. Burns (GaCtApp 1999).

debtor the termination statement or file the termination statement within 20 days after receiving the authenticated demand from the debtor.[510]

2.4.1. Termination Statement under Nigeria and Cameroon Laws

In Nigeria, section 204 of the CAMA 2004 provides for filing and issuing of a memorandum of satisfaction whenever the debtor discharges the whole or part of the obligations to the secured party.[511] In Nigeria where transaction registration is still practiced, it is explicable why the Nigeria law would specifically provide for a termination statement (memorandum of satisfaction) to be issued to the debtor (herein the company) whenever the debtor has repaid the whole or part of the obligations to the creditor. A copy of the memorandum of satisfaction duly issued by the CAC is prima-facie evidence to the creditors and third parties generally that the charges on the company's assets have ceased. If it were otherwise, the creditor may have to search through volumes of documents to find out a simple fact that the encumbrances on the company's assets have been discharged. This may be burdensome and may make financing of companies less attractive for creditors. Again considering that the company is required by law to keep 'counterpart' registration of charges at its registered office, a company needs the memorandum of satisfaction issued by CAC to file in its own register to show that the charge on the corresponding company register has been discharged.

[510] See s. 9 – 513 (c) UCC.

[511] Section 204 CAMA 1990 provides as follows: "If the Commission is satisfied with respect to any registered charge that – (a) the debt for which the charge was given has been paid or satisfied in whole or in part; or (b) part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, it may enter on the register a memorandum of satisfaction to the extent necessary to give effect thereto and, where it enters a memorandum of satisfaction it shall, if required, furnish the company with a copy of the entry, and any such entry shall have effect, subject to the requirement of any other enactment as to registration."

Termination statement is not provided under the Uniform Act on Securities. Yet, just like other continental civil codes, the principle of accessority is contained in the Uniform Act on Securities.[512]One would have expected that the Uniform Act would also have stated the ways for the termination of the pledge, especially in pledge without dispossession by providing for the filing of termination statement by the secured creditor when the obligation secured by the security interest is executed. One of the many possible reasons why the Uniform Act on Securities overlooked the issue of filing termination statement may probably be due to the reason that the lifetime of a security interest expires at the discharge of the obligations which the security interest secures.[513] No matter the justification for the non-provision of the termination statement, it will be clearer if the Uniform Act on Securities provides for the termination statement in cases where the obligation for which the registration was made has been discharged as it is the case in the United States and Nigeria.

Suffice it to say that, in general the main effect of filing a termination statement is to inform third parties that the financing statement has ceased to be effective and consequently the public is free to transact with the debtor on those properties hitherto covered by the previous financing statement.[514]

[512]Article 61 of the Uniform Act on Securities in relation to pledge provides in general as follows: “The pledge shall terminate when the obligation it secures is finally extinguished.”
[513] Probably, Uniform Act on Securities like other continental civil code does not pay much attention to tiny details like the UCC. Consequently, Uniform Act on Securities presumes that it is enough to state the accessority principle without really providing for termination statement.
[514] See s. 9 – 513 (d) UCC.

2.5. Cut-off Periods and the Self – Clearing Rule under Article 9

The cut-off period entails the statutory period when a filed financing statement lapses and if not re-filed within the appropriate time, hence the security interest becomes unperfected. The great difference in this case here as against the filing of termination statement is that in this case the obligation of the debtor to the creditor is still not discharged, yet the secured party loses priority in payment to an intervening interest within the period of the lapse of the financing statement.[515] Article 9 provides - albeit with some exceptions - that a filed financing statement is effective for a period of five years after the date of filing.[516] The exceptions provided to this rule are: financing statements in respect of public-finance[517] or manufactured-home transactions[518] which the effective date is 30 years;[519] or where the continuation statement is filed six months prior to the lapse of the initial financing statement[520] or if the debtor is a transmitting utility.[521] In the

[515] See the case of Pepperell Trust Company v. Mountain Heir Financial Corp. Supreme Judicial Court of Maine, March 5, 1998, 708 A2d 651. In this case a creditor that had failed to file a continuation statement lost its superior security interest in restaurant equipment to a competing lending company that perfected its own security interest in the same equipment after the creditor had filed its original financing statement but before that creditor's filing of a continuation statement when the original filing lapsed. The court consequently held that under the section 9 – 403 (2) of the Maine UCC, the creditor's security interest in the restaurant equipment had lapsed because the creditor had not filed a continuation statement at all within the specified period, and, therefore, the competing lending company's security interest in the same equipment prevailed. The contention of the creditor that it should have retained a superior security interest because the competing lending company had actual notice of its interest was rejected by the court on the ground that the Maine's UCC takes actual notice into account when a party files documentation in an improper place or in fewer than all places required to be filed but not when a party fails to file at all. Also see the case of In re Bailey (Bankr DKan 1998) 228 BR 267.

[516] See s. 9 – 515 (a) UCC.

[517] 'A public-finance transaction is defined to mean a secured transaction in connection with which: debt securities are issued; all or a portion of the securities issued have an initial stated maturity of at least 20 years; and the debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a state or a government unit of a state' see s. 9 – 102 (67) UCC.

[518] Manufactured-home transaction is defined under the definition section [s. 9 – 102 (54) to mean a 'secured transaction: that creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or in which a manufactured home, other than a manufactured home held as inventory is the primary collateral.'

[519] See s. 9 – 515 (b) UCC.

[520] See s. 9 – 515 (d) UCC.

[521] See s. 9 – 515 (f) a transmitting utility is defined under the definition section [s. 9 – 102 (80)] to mean a person primarily engaged in the business of (a) operating a railroad, subway, street railway, or trolley bus; (b) transmitting communications electrically, electromagnetically, or by right; (c) transmitting goods by pipeline or sewer; (d) transmitting or producing and transmitting electricity, steam, gas, or water.

case of a transmitting utility where the fact is stated on the financing statement, the financing statement does not expire, it must be explicitly terminated.[522] There is no limit to which the financing statement can be renewed with the filing of a continuation statement in so far as the continuation statement is filed within the statutory time. The justification of this cut off rule may be the rebuttable presumption that, *ceteris paribus*, a debt is presumed to have been repaid after a certain period of time.

Article 9 mandates the filing office to keep the record of the information of any filed financing statement for one year after the expiration of the five year cut-off rule before discarding the information contained therein unless the financing statement comes under the exceptions contained in s. 9 – 515 (b)-(g).[523] Thereafter, the filing office may automatically discard the information and this is the principle of self-clearing rule of the Article 9.[524] It is important to state that the keeping of the record for additional one year period is strictly for information purposes and does not perfect a security interest which has become unperfected at the expiration of the cut-off rule of five years unless the secured party filed the continuation statement to the financing statement six months prior to its expiry. The information kept by the filing office is retrievable using the name of the debtor and the file number assigned to the initial financing statement to which the record relates. The use of the debtor's name is instructive, it enables any intending creditor to do a quick search and get the information needed on the debtor or his personal properties.

[522] See Russell Hakes, The ABC's of the UCC (Revised) Article 9 Secured Transactions supra footnote 446, p.48.
[523] See s. 9 – 522 (a) UCC.
[524] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 151.

2.5.1. The Cut-off Rule under Nigeria and Cameroon Laws

The Cameroon Uniform Act Organizing Securities provides for the cut-off period but not the self – clearing rule. For three out of the five types of pledge without dispossessing the debtor which requires registration to be valid, registration preserves the security interest of the creditor for five years from the date of the registration and shall cease to have effect if it is not renewed after the expiry of the period in question. The three types of pledge with dispossession covered are as follows: pledge of partnership rights and transferable securities;[525] pledge of business and the vendor's preferential right [526]and the pledge of professional equipment and motor vehicles.[527] On the other hand, the registration of the pledge of stocks shall preserve the rights of the secured creditor for only one year from the date of the registration and shall cease to have effect if not renewed before the end of first year.

The provision of the cut-off rule is important in the Uniform Act on Securities system since there is no express provision of termination statements in the law. A registered security interest, in other words, would remain in the registry of Court of First Instance in Cameroon in perpetuity except for the cut-off rule. In a way the cut-off rule serves the purpose of termination statement unless the secured party renews the registration. However, this analysis does not in any way suggest that having a termination statement obviates the need for cut-off rule or vice versa. Having both termination statements and a cut-off rule help the registry get rid of expired or discharged security interests from the registration files. Indeed the uses of termination statements and the cut off rule are different which necessitate that a reformed secured credit transaction law should have both features.

[525] See Article 67 of the Uniform Act on Securities.
[526] Id., Article 83.
[527] Id., Article 95.

Where the debtor repays the whole monetary obligations secured by the security interest in the first year of the life of the security agreement while the cut off rule for that type of security interest is five years and the laws does not provide for the termination statement, it then means that registration will still be effective until after the cut off period even after repayment. This can cause a whole lot of inconvenience to the debtor, especially where the debtor wants to use such property as a security interest in a subsequent loan. It will be embarrassing and may cause hardship for the debtor to keep informing subsequent potential creditors that the obligation secured by such property has been repaid. Most creditors would want to get confirmation from the named secured party in the former registration and the time and resources wasted by the potential creditors to clarify this point could have been avoided by simply providing for the filing of a termination statement upon the discharge of the obligation secured in the security interest by the debtor. The United States is a good example of a country that has both features in their secured credit law. Again, under the Cameroonian Uniform Act on Securities, the secured party is required to renew the registration before the expiry of the initial registration; this gives some flexibility to the creditor to renew at any time before the expiry of earlier registration instead of the six months specified in Article 9.

The Nigerian laws provided neither for the cut-off periods nor for the self-clearing rule. It does appear that once a secured creditor registers the security interest at the CAC, the secured party is protected from intervening creditors and enjoys priority until the debt is repaid and the CAC issues the debtor the memorandum of satisfaction. It is therefore submitted that the provisions of the cut-off periods and self clearing rule as they exist under Article 9 should be introduced under the Nigerian secured transactions law whilst the provisions of termination statement and self clearing rule should be introduced under the Uniform Act on Securities because of the benefits articulated above.

2.6. Exemptions from Filing: Automatic Perfection upon Attachment under Article 9

Filing is the main method of perfection and the provision of public notice under Article 9. Apart from filing, other methods of perfection are by possession or control.[528] Exemptions from filing here means that the security interest is not filed, yet, the law deems that such security interest is valid against the public. It also means that the security interest is not perfected by other means of perfection like possession or control as the public notice is also given when collateral are taken into possession by the secured party or the secured party exercises control over the property.

Article 9 has provided the instances of exemptions for some collateral which have automatic perfection without the need for the secured party to file a financing statement, to take possession of the collateral or to acquire control. One of the instances is the case of a purchase-money security interest in consumer goods, which is automatically perfected upon attachment unless the goods are subject to a statute or treaty that preempts the Article 9 requirements.[529] However there are few states in the United States which limit the amount financed in each transaction that can be automatically perfected in the purchase money security interest in consumer goods. A

[528] See section 9 - 312 UCC.

[529] See s. 9 – 309 (1) UCC. It also should be noted that a complete reliance by the secured party on the purchase money security interest may not be all effective to the secured party as a consumer who purchases the goods from a consumer debtor without knowledge of the security interest may take the goods free of earlier security interest and therefore takes priority over the purchase money security interest of the secured party. See Willa E. Gibson, A Comprehensive Review of Revised Article 9, supra footnote 429, p.59; see also s. 9 – 320 (b) UCC.

purchase-money security interest is defined under Article 9 to mean an interest which the secured party has in respect of goods if the secured party had advanced some funds to the debtor which was used in purchasing the property or the vendor of the goods retains a security interest in the property sold to secure the payment of the purchase price.[530]

Sections 9 – 309 (2) – (13) UCC listed twelve other security interests which are perfected upon attachment.[531] These exemptions may seem to contradict the policy choices behind the adoption of the filing system, however the need to dispense with the filing of these security interests nonetheless does not derogate from the policy choice. On the contrary, the need for the exemptions accords more with business exigencies of using these personal properties as collateral. Some of these transactions have low value and thus requiring filing for each of them would make the cost of transaction for them too expensive; which is instructive to Nigeria and Cameroon as well.[532] For example in the case of purchase money security in consumer goods filing is dispensed because a creditor of low credit consumer may not be bothered so much if the properties of the consumer has been encumbered but is more worried whether the debtor has a

[530] See s. 9 – 103 (a), (b) and (c) UCC. See also James White, Robert Summers, supra footnote 82, p. 1197. See infra pp. 236 - 240 for a detailed discussion on purchase money security interest.

[531]The security interest includes : 'an assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles; a sale of payment intangibles; a sale of a promissory note; a security interest created by the assignment of a health care insurance receivable to the provider of the health-care goods or services; a security interest arising under section 2 – 401, 2 – 505, 2 – 711(3) or 2A – 508 (5) until the debtor obtains possession of the collateral; a security interest of a collecting bank arising under section 4 – 210; a security interest of an issuer or a nominated person arising under section 5 – 118; a security interest arising in the delivery of a financial asset under section 9 – 206 (c); a security interest in investment property created by a broker or securities intermediary; a security interest in commodity contract or a commodity account created by a commodity intermediary; an assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder; a security interest created by an assignment of a beneficial interest in a decedent's estate'. See sections 9 – 309 (2)-(13) UCC.

[532] Exemptions from filing for transactions that have low value will keep the transaction cost low.

regular job and a reputation of paying his bills.[533] Again if every consumer credit transaction was to be filed, then "*the filing offices would be bulging at the seams.*"[534]

2.6.1. Is there any use for Automatic Perfection under the Nigerian and Cameroonian Laws?

Nigerian and Cameroon secured transactions laws do not provide for instances of perfection of security interests upon attachment.[535] The instances provided by the two jurisdictions are the cases of registration of the security interests (filing), possession or control of the security interest by the secured party or his agents. Perfection (registration, possession and control) is required for all the personal properties that can be used as collateral both under the Nigerian and Cameroonian laws. For example in Nigeria, fixed and floating charges are registered while all the five types of non-possessory pledges under the Uniform Act on Securities require registration at the Cameroon Court of First Instance. Even in the proposed Equipment Leasing Act 2011, any leasing contract must be registered irrespective of the value of the property in the agreement.[536] However it does appear that some of classes of security that exempted from perfection under Article 9 are mostly unknown and indeed do not exist in Nigeria and Cameroon.[537] The sophisticated and complex nature of the application of the security interests under section 9 –

[533] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 157.
[534] See James White, Robert Summers, Uniform Commercial Code, supra footnote 82, p. 1197.
[535]This is partially because the transactions (retention of title) that would have required instances of perfection of security interest upon attachment are outside the sphere of secured transactions laws e.g., hire purchase transactions whilst in the United States; such transactions are within the framework of Article 9.
[536] See section 13 of the proposed Equipment Leasing Act which provides as follows: "An equipment lease agreement made pursuant to this Act shall irrespective of the value of the leased agreement be registered with the Registration Authority not later than 14 day after the commencement of such lease agreement, or within three months for a lease agreement made before the commencement of this Act."
[537] For example, a sale of payment intangible; a sale of promissory note; a security interest created by the assignment of a health-care-insurance receivable to the provider of the health-care goods or services; security interest in a commodity contract or a commodity account created by a commodity intermediary; an assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder; a security interest created by an assignment of a beneficial interest in a decedent's estate and a sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance. See section 9 – 309 UCC.

309 UCC is best practiced in a society that has a long history of evolution of secured transactions law and also is well advanced in economy, literacy level and technology.

The question then is - in view of the provisions of section 13 of the proposed Equipment leasing Act that requires that every agreement must be registered irrespective of the value of the agreement - is there any need for automatic perfection for agreement which has low value? Again, in view of the fact that this work will propose the transplantation to Nigeria and Cameroon of these diverse collateral which the security interest created from them have automatic perfection under Article 9, would there be any need to advocate for automatic perfection for the security interest created from these collateral or will it require registration as others do in Nigeria and Cameroon? No doubt automatic perfection for security interests created on collateral[538] will be beneficial to Nigeria and Cameroon for all the advantages highlighted above. Again, the insistence that every lease agreement must be registered irrespective of the value will unnecessarily increase the transaction cost where the value of the lease agreement is too low like television, pressing iron, compact discs player and other small house hold equipment. Borrowing from the automatic perfection provision of Article 9, security interest in such collateral could be perfected automatically for the obvious advantages inherent in it.

2.7. Perfection by Possession under Article 9

Perfection by possession is another general exception to perfection by filing as provided under Article 9.[539] Apart from perfection by possession, some of other exceptions to this general rule

[538] See s. 9 – 309 UCC.

[539] Section 9 – 310 (a) is instructive on this issue and it provides as follows: It provides as follows: except as otherwise provided in subsection (b) and section 9 – 312 (b), a financing statement must be filed to perfect all

are automatic perfections, perfection by control or under other federal laws which preempt the requirements of Article 9.[540]

Article 9 provides that filing of a financing statement is not necessary to perfect a security interest created in certain types of collateral.[541] They include security interests created in the following assets: tangible negotiable documents,[542] goods,[543] instruments,[544] money,[545] or tangible chattel paper.[546] Also a security interest in certificated securities may be perfected by taking delivery of the certificated securities under section 8 – 301 of the UCC. In simply terms, in all these security interests listed above, Article 9 has equated possession of the collateral by the secured party with filing of a financing statement which gives public notice of the encumbered security interest.[547]

The question one may ask is whether possession in practice equally gives public notice of the existence of security interests in these collateral as filing does to other collateral? No doubt the answer to this question will be in the affirmative; some real legal conservatives may even argue

security interests and agricultural liens. See also James Brook, Secured Transactions Examples and Explanations (Aspen Publishers, 3rd ed., 2005), p. 143.

540 See section 9 – 310 (b) (1) – (10) UCC.

541 See the combined reading of sections 9 – 310 (b) (6) and 9 – 313 UCC.

542 A security interest in tangible negotiable document may be perfected by the secured party taking possession of the tangible negotiable document in addition to filing. See sections 9 – 312(a) and 9 – 313(a).

543 A security interest in goods may be perfected by the secured party taking possession or by filing. See sections 9 – 310(a), 9 – 312(a) and 9 – 313(a).

544 Under sections 9 – 312 (a), 9 – 313(a), a secured party's security interest in instruments may be perfected by either filing or possession.

545 Under section 9 – 312 (b) (3), a secured party's security interest in money must be perfected by possession by the secured party.

546 Under sections 9 – 312 (a) and 9 – 313 (a), a security interest in tangible chattel paper may be perfected by filing or the secured party taking possession of the tangible chattel paper.

547 In re Omega Environmental Inc; Omega Environmental Inc. v. Valley Bank NA (9th Cir 2000) 219 F3d 984, it was held that a bank that was assigned a certificate of deposit as collateral for a promissory note held a perfected security interest in the certificate of deposit under the Virginia UCC by maintaining possession of it as the certificate of deposit was deemed to be an 'instrument' and not a 'general intangible' under the Virginia UCC, the bank was only required to possess the certificate of deposit to perfect its security interest; the bank was not required to file any UCC financing statement.

that possession gives a better public notice than filing and totally avoids the propensity of the debtor defrauding third parties with the already encumbered goods. Consequently, conservatives may prefer possession to filing as a way of giving public notice of the encumbrance on the security interest.

Apart from the time consuming process, and additional expense incurred in filing which do not exist in perfection by possession, possession has the added advantage of avoiding some 'potential confusion' inherent in the Article 9 filing requirement. For example the decision of where to file a financing statement of motor vehicles may be determined based on whether the motor vehicle is part of the inventory goods of a dealer or whether the motor vehicle is used by the dealer in the course of his business. If the car is an inventory good of the dealer then, filing will be done pursuant to Article 9 whilst if was used by the dealer in the course of the dealer's business then filing will have to be done in accordance with State certificate-of-title statutes covering motor vehicles.[548] It may not be easy in this case to determine the status of the car and any wrong determination of the status of the motor vehicle may mean that the filing is ineffective. In this scenario, the best option may be to file both under the UCC and under the State certificate –of – title statute which will be more expensive and thus increase the transaction cost. This confusion would never have arisen under perfection by possession.

Perfection by possession has its root in the age long notion that if a property shall be used as security interests then the secured party should at all material time during the tenor of the loan be in possession of the security interest. This old doctrine formed the basis of the court's decision in the Twyne's case of 1601. Notwithstanding that this case has been overruled and the principle

[548] See Article 9 – 311 (2) and (3) UCC.

abandoned with the invention of non-possessory security devices, Article 9 still recognizes possessory pledge and provides that some security interests can only be perfected by possession.

2.7.1. Perfection by Possession under Nigeria and Cameroon's Secured Transactions Law

This is another point of convergence in the three jurisdictions being analyzed. Perfection by possession being an offshoot of pledge still dominates the secured credit landscape of Nigeria and Cameroon. The Uniform Act on Securities provides as follows: *"a pledge shall be a contract in which personal property is offered to the creditor or a third party agreed upon by the parties as security for a debt."*[549] Except for the five instances of pledges without dispossessing the debtor of the security interest which require registration at the Registry of Cameroon Court of First Instance for perfection, all other types of personal properties used as security interests are perfected by possession. This is because the means of creating a security interests in all these other personal properties is by possessory pledge which requires the creditor to be put in possession of the security interest until the debt is repaid – hence its perfection is by possession.

In Nigeria, because of the dominance of pledge in secured transactions, it may not be incorrect to say that perfection by possession is the main method of perfection whilst registration is an exception. Most of the secured transactions between consumer creditors and debtors are on the basis of pledge where the debtor surrenders the possession of the collateral to the creditor. Possession here also entails being in possession of the document of title of the collateral. Many of the banks' loans are premised on surrendering of the document of title like share certificates, or the physical possession of assets like gold and other things of value acceptable as collateral to

[549] See Article 44 of the Uniform Act on Securities.

the bank. The significance of perfection by possession dates back to the history of secured transactions in Nigeria where the secured creditor was put in possession of the collateral until the debtor repaid in full the obligation secured by the collateral. The mentality that pledge is the best form of protection for the secured party in case of default of the debtor in repayment or any other adverse claims of the third party still permeates the Nigerian and Cameroonian secured transactions landscapes until date.

2.8. Perfection by Control under Article 9

Article 9 has designated that security interest created from certain collateral may be perfected by control due to their nature. The collateral are investment property, deposit accounts, electronic chattel paper, electronic documents, and letter-of-credit rights and the collateral will be discussed hereunder. Under Article 9, investment property can be perfected either of two ways: by filing[550] or by control.[551] There are three types of investment property that can be perfected by control namely: certificated security,[552] uncertificated security[553]and security entitlement.[554] Control of investment property here and the meaning of control under Article 8 are the same and in the case of certificated securities control implies the delivery and endorsement of certificated security to the secured party. [555] In the case of uncertificated security control is achieved by *"an agreement by the issuer of uncertificated securities that the issuer will honor instructions from the secured party without further consent of the debtor, and an agreement by a bank, broker, or other*

[550] See section 312 (a) UCC.
[551] See section 314 (a) UCC.
[552] Certificated security means a security that is represented by a certificate. See section. 8 – 102 (a) (4) UCC.
[553] By virtue of section 8 – 102 (a) (18) UCC, an uncertificated security means a security that is not represented by a certificate.
[554] Security entitlement means the right and property interest on an entitlement holder with respect to a financial asset specified in section 8 – 501(b) (2) or (3) UCC. See section 8 – 102 (a) (17) UCC.
[555] See sections 8 -106 and section 9 -106 UCC.

securities intermediary holding a securities account or by a commodity intermediary that it will honor instructions from the secured party without further consent of the debtor."[556] Control of security entitlement is effected where the securities intermediary has agreed that it will comply with entitlement orders that come from the secured party without further consent by the entitlement holder. Control extends to the secured party registering the securities, or the securities amount in his name.

For deposit account, its perfection can only be by taking control of the deposit account under Article 9.[557] The ways to take control of the deposit account include the followings: where the secured party is the depositary bank; or where the secured party becomes the bank's customer with respect to the deposit account; or where the depositary bank enters into an agreement with the secured party that the depositary bank will comply with instructions from the secured party as to the funds in the deposit account without further consent from the debtor.[558] In the case of electronic chattel paper, its perfection can by two methods under Article 9. It can be perfected either by filing or by taking control.[559] Control in electronic chattel paper is done by having one single authoritative and identifiable copy of the electronic record of the chattel paper, which identifies the secured party as the assignee of the record, the copy is communicated to and maintained by the secured party or its designated custodian, any revisions that add or change an identified assignee can be made only with the participation of the secured party and any revisions of the authorized copy will be readily identifiable as an authorized or unauthorized revision.[560] In

[556] See Cindy J. Chernuchin, (ed.), Forms Under Article 9 of the UCC, Uniform Commercial Code Committee, (American Bar Association Publication, 2nd ed., 2009), p. 15; see also sections 8-106 (c) (2) and 9 – 106 UCC.
[557] See sections 9 – 312 (b) (1) and 9 – 314 (a) UCC.
[558] See section 9 – 104 (a) UCC.
[559] See sections 312(a) and 9 – 314(a) UCC.
[560] See section 9 – 105 UCC.

essence, what is means basically is that only the secured party has access to the electronic chattel paper, he can identify any changes and also only the secured party can authorize any changes or give approval to any changes in the electronic chattel paper.

Under Article 9, electronic documents are perfected by two ways namely by filing if the electronic document is negotiable[561] or by taking control.[562] Control of electronic chattel paper is possible if the system employed for evidencing transfer of interest in the electronic document establishes that person as the person to which the electronic document was issued or transferred.[563] The process is established like in the case of electronic chattel paper by having one single authoritative and identifiable copy of the electronic document, which identifies the secured party as the assignee of the electronic document, the copy is communicated to and maintained by the secured party or its designated custodian, any revisions that add or change an identified assignee can be made only with the participation of the secured party and any revisions of the authorized copy will be readily identifiable as an authorized or unauthorized revision.

The last category of security interest that can be perfected by control under Article 9 is the letter-of-credit rights. Security interest in a letter-of-credit right is perfected only by control.[564] Control of a letter-of-credit right is exercised to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under section 5 – 114 (c) UCC or other applicable law.[565]

[561] See section 9 – 312 (a) UCC.
[562] See section 9 – 314 (a) UCC.
[563] See the combined effect of sections 9 – 102 (b) and 7 – 106 (a) UCC.
[564] See sections 312 (b) (2), UCC and 9 - 314 (a) UCC.
[565] See section 9 – 107 UCC.

The security interests created from the above collateral that are perfected by control are a bit technical and complex. As it will be seen from the next subtopic, only certificated and uncertificated securities are exploited as collateral in Nigeria. Letters-of-credit transactions exist in Nigeria but nobody has thought about utilizing it to create security interest. According to Fleisig et al., *"[…] nearly 99 percent of movable property that could serve as collateral for a loan in the United States would likely be unacceptable to a lender in Nigeria."*[566] In Cameroon as we will see, most of the assets are not in existence and are not exploited as collateral. This gives credence for the call for a reform of the secured transactions laws in both countries with a view to widening the personal property collateral available for credit. The research will now consider the use of the above collateral in Nigeria and Cameroon.

2.8.1. Perfection by Control in Nigeria and Cameroon – Any Hope Soon?

Perfection by control may be a new emerging area in Nigeria. This is due to the introduction of dematerialized securities to ease the sale of shares or the use of the dematerialized securities as collateral for credit. When shares are dematerialized, they are kept electronically with the Central Securities Clearing System Limited[567] for trading, safe keeping purposes or as collateral for

[566]See Heywood Fleisig, Mehnaz Safavian and Nuria de la Pena, Reforming Collateral Laws to Expand Access to Finance, supra footnote 18, p. 7. The authors based their data from the analysis given by Ronald Cuming and Yair Baranes, A Modern Secured Financing System Involving Personal Property Collateral for the Federal Republic of Nigeria being a report prepared for the World Bank, Africa Region, Private Sector Development Department, Washington, D.C., 2004. While this research agrees that there is severe limited use of movable property as collateral in Nigeria, this research doubts the percentage given Fleisig et al in relation to the use of movable property as collateral in the United States.

[567] The Central Securities Clearing System Ltd (hereinafter called CSCS Ltd), was incorporated as a subsidiary of the Nigerian Stock Exchange on 29th of July 1992 and later commissioned in April 1997 and it commenced operations on the 14th of April 1997.it was licensed by the Securities and Exchange Commission as an Agent for Central Depository, Clearing and Settlement of transactions in the stock market. It operates a computerized depository clearing settlement and delivery system for transactions in shares listed on The Nigerian Stock Exchange. More of their functions can be found on its website at < http://www.cscsnigerialtd.com/web/guest/overview >; last visited on the 9th of November 2010.

loan.[568] Admittedly, any security interest perfected on those shares can only be by way of control. However dematerialized securities being new in Nigeria,[569] perfection by control was not provided for in the secured transactions provisions contained in the Company and Allied Matters Act of 2004. In Nigeria, the only form of perfection in personal property as already explained above is the registration of company charges at CAC and the 'counterpart' registration at the company's office. Before the introduction of the dematerialized securities, share certificates were issued to share holders in hard copies and shareholders gave possession of it to secured creditors as collateral for loans. Even with the introduction of dematerialized securities most shareholders who are only interested in getting dividends but not interested in selling or trading with their shares are still keeping the share certificates. While the Nigerian Stock Exchange is educating the shareholders of the benefit of dematerialized securities, the issue of perfection by control remains a mirage until shareholders comply with the directive. Nigeria has

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[568] According to Peter Adebayo Egunbiyi, the General Manager (operations) of CSCS Ltd, the followings are the steps to be taken in order to use the dematerialized shares with the CSCS Ltd as collateral for loan. *First*, the lender will ask from the borrower the current statement of stock position issued to the borrower by the CSCS Ltd and an authorization letter from the borrower enabling the lender to make inquiries of the borrower's stock account with CSCS Ltd. Upon receipt of both, the current statement of stock position and the authority letter, the lender pays a fee to CSCS Ltd to verify the authenticity of the current statement of the borrower's stock account with the CSCS Ltd. The next step is for the lender, borrower and the borrowers stock broker to execute an agreement mandating CSCS Ltd to place lien on certain number of stock or all the stock belonging to the borrower in the CSCS Ltd, this agreement will be sworn to by the commissioner for oath or be registered at the stamp duties office. Again, the borrower signs an undated letter authorizing the CSCS Ltd to sell such stocks placed on lien and give the proceeds to the lender in event of default of the obligations of repayment at the due date by the borrower. The agreement will state the duration of the lien.

When the above agreement is received by the CSCS Ltd, CSCS Ltd moves the borrower's shareholding to a CSCS reserved account with the lien of the lender noted on the shares and this will be communicated to all the parties. It is only the lender that can mandate the CSCS LTD to remove the lien on the shares after the borrower repays the loan to the borrower. However where the borrower defaults in repayment, the lender writes to CSCS Ltd and copies the borrower and instructs CSCS Ltd to sell the shares placed on lien. On receipt on such instructions, CSCS Ltd puts a date to the letter written to CSCS Ltd by the borrower and uses it as a justification for the sale of the shares of the borrower placed on lien to satisfy the indebtedness of the borrower to the lender. See Using Shares in CSCS Depository as Collateral for Loan , BUSINESSDAY Newspapers of July 1, 2010 available at < http://www.businessdayonline.com/NG/index.php?option=com_content&view=article&id=12280:using-shares-in-cscs-depository-as-collateral-for-loan&catid=58:investor&Itemid=520 > last visited on the 19th of November 2010.

[569] It was only in January 2008 that Nigerian Stock Exchange gave ultimatum given until the 31st of December 2008 for all holders of certificated shares to take them to their stock brokers so that it could be dematerialized. See Stockwatch, Nigerian Stock Market and Investment Portal available at < http://www.stockswatchonline.com/post/2010/09/26/A-close-look-at-dematerialisation-of-share-certificates.aspx > last visited on the 9th of November 2010.

a developed stock market[570] and is already using both certificated and dematerialized securities as collateral. These are some of the areas that the transplantation of Article 9 will help in reforming the Nigeria secured transactions law especially in the other assets where security interest created on them can be perfected by control.

For Cameroon, the situation is quite different; there is no functional stock exchange in the country, the Doula Stock Exchange opened in 2005 has only one water company registered in it. Shares, whether in certificated or dematerialized forms are largely unknown, although some few influential Cameroonians[571]own insignificant shares in some companies in Cameroon. Most banks and other companies are owned by their parent companies[572] and the Cameroonians are not given opportunity to buy some shares of these companies. Indirect holding of securities is still unknown. Consequently security interests that can be perfected by control are to a large extent unknown in Cameroon. It is hoped that their stock exchange would become functional in no distant time like the case in Nigeria and accordingly Cameroonians will begin to acquire shares. This would be the basis for advocating the legal transplantation of the perfection by control to Cameroon secured transactions law.

[570] Nigerian Stock Exchange was established in 1960. As at March 9 2007, it had 283 listed companies with a total market capitalization of about N15 trillion (about $125b). Nigeria Stock Exchange web page can be found at < http://www.nigerianstockexchange.com/index.jsp >; last visited on the 8th of March 2011.

[571] Current president Paul Biya has insignificant percent in the biggest brewery - Les SocietesAnnonymes du Cameroun and in few of the commercial banks in Cameroon.

[572] For example Nigerian banks own Ecobank, United Bank for Africa, Oceanic Bank and Union Bank of Cameroon. Citibank Cameroon is owned by the Citigroup in United States; Standard Chartered Bank Cameroon is owned by Standard Chartered Bank United Kingdom, Societe Generale des Banques au Cameroon is owned Societe Genarale in Paris France; SCB Credit Agricole and SCB Credit Lyonnais are owned by their parent companies in France; Atlantic Bank Cameroon is owned by Atlantic Bank Cote d'Ivoire. The biggest brewery in Cameroon – Les Societes Anonymes des Brasseries du Cameroun is owned by Les Glaceries d' Indochine (BGI) and Heineken.

2.8.2. Other Perfection Forms under Article 9, Uniform Act on Securities and CAMA 2004

Apart from perfection by filing, possession and control, there are other forms of perfection provided by federal and state laws and recognized under Article 9. The perfection under the federal and state laws pre-empt Article 9. These include perfection of security interests in aircraft, vessels, and motor vehicles (that are not inventory goods of a dealer). Once the secured party perfects its security interest in accordance with those federal and specific state laws, the perfection becomes effective and creates public notice of the interest so perfected and its effects is equivalent to the perfection by filing under Article 9.[573] However where one perfects a security interest under Article 9 which perfection ought to have be done under the federal and state laws, such perfection is not good perfection and cannot protect the secured party against adverse intervening interest of the third party[574] if such adverse interest was obtained during the period of the faulty or irregular perfection of such security interest under Article 9.[575]

For Cameroon, there are other forms of perfection of security interest apart from the registration at the Cameroon Court of First Instance for non-possessory pledges and possessory pledge.[576] Security interest created on maritime and aircraft are registered under international instruments

[573] See section 9 – 311 (d) UCC.

[574] See the case of Reagan v. Citizens Bank (MissSCt 1996) 675 So2d 1239 where it was held that lien creditors who failed to perfect their security interest in motor vehicles according to the Mississippi Motor Vehicles Title law had an invalid security interest and consequently lost all rights in the vehicles. The creditors attempt to perfect by filing at the Mississippi UCC for non-titled personal property did not avail the creditor and protect its security interest.

[575] See the official comment to section 9 – 311(a), (b) UCC.

[576] Article 1 of the Uniform Act on Securities which provides: "Securities shall be the means offered a creditor by the law of each Contracting State or agreement between the parties to guarantee the execution of obligations, whatever their legal nature may be. Securities in the domain of fluvial, maritime and airspace law shall be regulated by specific legislation."

and conventions.[577]Apart from the sphere of maritime and airspace, as already discussed, security interest created in intellectual property is registered with OAPI.[578] For Nigeria, as stated earlier, the laws allow a company to use all or some of its assets and undertaking to create a fixed or floating charge. Where some of the assets involve intellectual property rights, motor cars or even aircraft, the only requirement is to file company charge at CAC and at the registered office of the company. All the intellectual property laws in Nigeria[579] are silent on the use of such IP rights as collateral or where to perfect security interests created on such collateral. This leaves the provision of CAMA 2004 which requires registration with CAC as the place to register.[580] In conclusion, whether the perfection is by filing, control or by possession the essence is to give notice of the encumbrance of the security interest to the public; to preserve the priority of the earlier creditor in the security interest and to prevent the debtor from defrauding unsuspecting third parties.

2.9. The Concept of Floating Lien in the United States

[577] "According to Article 1 (2) in the area of fluvial, maritime and airspace law, the laws on securities are regulated by specific codes, decrees and regulations and international conventions. (For example, seethe CEMAC Maritime Code, Reglement no. 03/01-UEAC-088-CM-56 portant adoption du Code, Communautaire revise de la Marine Marchande adopted on August 3, 2001at Bangui Central African Republic). In Cameroon, see Order No.00726/MINT of 18 June, 2005 establishing the conditions for the use of civilian aircrafts in general aviation and aerial works. Also, Order No. oo732/MINT of 18 June 2005 relating to the logbook for the registration of civilian aircrafts." See Uniform Act Organizing Securities with commentaries of Martha Tumnde, Peter MontehTumnde and Anoukaha Francois, p. 3 supra footnote 163.

[578] See supra pp. 96 – 99 for discussions on the registration of intellectual property rights in Cameroon.

[579] See Copyright Act Cap C28 LFN 2004; Patent and Design Act Cap P2 LFN 2004 and Trademark Act Cap T13 LFN 2004.

[580]This research believes that the political reasons that prevented the inclusion of security interest created on automobiles and other goods covered by certificate of titles into Article 9 will not be an issue in Nigeria and Cameroon. There appears to be organization or body like the National Conference of Motor Vehicle Commissioners that may oppose the inclusion of automobiles. More so presently both in the Uniform Act on Securities and CAMA 2004, creation of security interest in automobiles are covered and their registration is at Cameroon Court of First Instance and CAC respectively.

Floating lien is a concept under Article 9. This means it is borne out of a series of Article 9 provisions instead of being an identifiable stand alone security device – which is the case with Nigerian fixed or floating charges.[581] Quite unlike the position under the Nigerian law, there is no definition of the concept either under the Article 9 or under Article 1 of the UCC. There are however series of Article 9 provisions from which the concept of floating lien can be deduced. These provisions are the ones on the extension of the security interest on after acquired property; on proceeds and future advances; the overruling of the main principle in the case of Benedict v. Ratner[582] as well as the rules on simple filing notices.[583] It should be noted that the Nigerian floating[584] and fixed[585] charges and the pledge without dispossession of a business under the Uniform Act on Securities are the conditional equivalents of the U.S. floating lien.

As already stated above, one of the provisions of Article 9 where the concept of floating lien can be deciphered is the use of after acquired property. Section 9 – 204 provides for the possibility of creating a security interest in after acquired property. It also provides for the creation of security

[581] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p.178.
[582] See 268 U.S. 353, 360, 45 S.Ct.566, 69 L.Ed.991, 997 (1925).
[583] See Tibor Tajti, Comparative Secured Transactions Law, supra foot note 48, p. 178.
[584] See section 178 (1) , (2) of the Companies and Allied Matters Act 1990 which provides as follow: Section 178 (1) "A floating charge means an equitable charge over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until- (a) the security becomes enforceable and the holder thereof, pursuant to a power in that behalf in the debenture or the deed securing the the same , appoints a receiver or manager or enters into possession of such assets; or (b) the courts appoints a receiver or manager of such assets on the application of the holder ; or (c) the company goes into liquidation;
(2) On the happening of any of the events mentioned in subsection (1) of this section, the charge shall be deemed to crystallize and to become fixed equitable charge on such of the company's assets as are subject to the charge, and if a receiver or manager is withdrawn with the consent of the chargee, or the chargee withdraws from possession, before the charge has been fully discharged, the charge shall thereupon be deemed to cease to be a fixed charge and again to become a floating charge."
[585] See section 179 of the Companies and Allied Matters Act 1990 which provides as follows: "A fixed charge on any property shall have priority over a floating charge affecting that property, unless the terms on which the floating charge was granted prohibited the company from granting any alter charge having priority over the floating and the person in whose favor such later charge was granted had actual notice of that prohibition at the time when the charge was granted to him."

interest in after acquired property in consumer goods other than accession when given as additional security, if the debtor acquires rights in the property within 10 days after the secured party gives value. In inventory financing a floating lien security interest device is best suited because of the rapid turnover of collateral.[586] This is so because floating lien gives the secured party the latitude to have a security interest in after acquired property since the debtor who uses his inventory as collateral in a floating lien security interest will most probably sell the present inventory and replenish the stocks in other to remain in business to repay the loan. The attraction of this after acquired interest is that provided the secured party has perfected the initial security interest by filing a financing statement, the party does not need to re-file a financing statement each time the debtor acquires a new property. The after acquired property clause and the general description[587] under Article 9 ensure that the burden of re-filing a financing statement each time a new inventory or property is acquired is eliminated. Consequently floating lien[588] is most efficient for long term financing of inventory and where there is a revolving line of credit.

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[586] See Donald B. King, Calvin A. Kuenzel, Bradford Stone and W.H. Knight Jr., Commercial Transactions Under the Uniform Commercial Code and Other Laws, (Matthew Bender, 5th ed., 1997), p. 1006.

[587] See s. 9 – 108 (a) and (b) UCC.

[588] A good model of a floating lien clause is as follows; "The debtor hereby grants and pledges to the secured party, to secure the payment and performance in full of all of the obligations, a security interest in all personal and fixture property whether governed by Article 9 of the UCC or other law, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and product thereof (collectively the "Collateral"), including without limitation: (i) accounts (including health-care insurance receivables); (ii) chattel paper (whether tangible or electronic); (iii) Commercial Tort Claims [include specific description of commercial tort claims existing at execution of this Agreement]; (iv) deposit accounts; (v) document ; (vi) goods (including inventory, equipment, and any accessions thereto); (vii) instruments (including promissory notes); (viii) investment property; (ix) letter of credit rights (whether the letter of credit is evidenced by writing); (x) money; (xi) oil and gas and other minerals before extraction; (xii) general intangibles (including payment intangibles) and registered copyright; (xiii) insurance and insurance claims; and (xiv) supporting obligations and proceeds. Notwithstanding the foregoing, in no event shall collateral include excluded collateral, provided however, that all proceeds of excluded collateral shall be collateral to the extent that the proceeds are not themselves excluded collateral." See Cindy J. Chernuchin, (ed.), Forms Under Revised Article 9 Uniform Commercial Code Committee, Task Force on Forms Under Revised Article 9, supra footnote 556, p. 45- 46.

Another feature of the floating lien is that it affords liberty to the debtor to deal with the property that is subject to the floating lien in the ordinary course of business until there is a default of the payment or other obligations. This unfettered dominion given to the debtor overrules the rule in Benedict v. Ratner[589]which required the secured party to police its security interest. However, Article 9 assumes that receivable financing is now done by professionals who can adequately protect themselves even with the unfettered power of the debtor over the collateral, without the need to impose additional rules of the Benedict sort. Consequently, a lender can create a valid security interest even if the lender leaves the unfettered dominion over the collateral to the debtor. This could not have been possible under pre-UCC as the decision in Benedict v. Ratner would have voided the transaction.

Another feature of the United States floating lien is the coverage of future advances (i.e., new credits extended by the same creditor on the strength of old collateral). Floating lien as earlier

[589] Concise facts of this case are as follows: in May 1921, Hub Carpet Company was in need of additional working capital. Aaron Ratner agreed to lend the company the sum of $30,000 drawn in two installments. To secure the loan, the company assigned to Ratner all its present and future accounts receivables. In furtherance of the agreement, a list of all the accounts then outstanding was delivered to Ratner on the 23rd of May and similar list of outstanding accounts was delivered to him on the 23rd of each succeeding month. The list of outstanding accounts from May through August showed outstanding accounts which aggregated between $100, 000 - $120, 000. In September the total account reduced to $90,000, however in line with the agreement the company had with Ratner , the company continued to collect the account and to use the proceeds of the accounts as it deemed fit. The company did not render accounts to Ratner and the account debtors were never notified of the assignment. On September 17, Ratner became worried of the pressure from the creditors and decided to exercise his rights under the agreement he had with the company to wit: to collect subsequent remittances. During this time the company was insolvent, between September 17th and 26th, the company turned over to Ratner checks, trade acceptances and notes which totaled the sum of $11,581.78. On 26th of September, a petition in bankruptcy was filled against the company and the company was adjudged bankrupt. Benedict was appointed the receiver of the company and Ratner filed a petition in the bankruptcy proceedings to require Benedict to pay over to him from the proceeds of the assigned receivables the balance of the loan. Benedict cross petitioned that Ratner returned to estate of the company the receivables which the company had remitted to him between the 17th through the 26th of September and also any other proceeds that he might have collected from the company. Both the district and second circuit court decided and affirmed the petition in favor of Ratner. On further appeal to the Supreme Court, the Supreme Court reversed their decision. Having noted that there was no finding of fraud in fact, the court however held as follows: " Under the law of New York a transfer of property which reserves to the transferor the right to dispose of the same, or to apply the proceeds thereof, for his own uses is, as to the creditors, fraudulent in law and void." See 268 U.S. 353, 360, 45 S.Ct.566, 69 L.Ed.991, 997 (1925).

stated is most efficient for a revolving line of credit; accordingly, the secured party would want to secure both his present and future loans and would not want an intervening creditor's interest to supersede the future advance made. Not only did Article 9 provide for the use of present collateral to secure future advances, but it also gives priority to future advances against intervening creditors based on the fulfillment of certain conditions by the initial secured creditor.[590] The provision of future advance under the Article 9 ensures that the floating lien security interest takes priority over an intervening creditor although the holder of purchase money security interest in the specific inventory or good will take free of the floating lien security interest.

The last prerequisite for easy utilization of floating liens is the simplified notice filing system; in particular the possibility of filing only a single financing statement covering all the floating-lien-linked future changes in lieu of a series of registrations for each future advance, after acquired property or any other development affecting the floating lien. Naturally, one should not forget that this is the requirement for the perfection of a floating lien. Filing ensures that notice of the floating lien is given to the public and this serve as the justification for giving priority to a floating lien security over other conflicting security interest in the property (except purchase-money security interests). A properly filed floating lien secures the lienee's interest in the after-acquired property and proceeds as well as for any future advances made by the secured creditor. Despite the liberality of section 9 – 108 UCC provision, care should be taken to be as precise as possible in the description of the collateral and also at the same time not to sacrifice the principles of generalizing after acquired properties allowed under Article 9.

[590] The conditions are that both the initial advance and future advance are secured by the same security interest and a financing statement was filed to perfect the first or initial advance.

2.9.1. Nigerian Floating and Fixed Charges

The above features of the US floating lien are to a great extent similar to the features applicable to the two most venerable Nigerian security devices, the floating and fixed charges; though there are some important differences which shall be highlighted shortly in the subsequent paragraphs. Fixed and floating charges are creatures of the English Company Act of 1985[591] from where Nigeria copied her Company and Allied Matters Act of 2004. The essence of creating a floating charge under the English Act was that the common law did not recognize the creation of security interest in after acquired property and hence to ease the burden under the common law of the insistence that "*real rights could only be created by present transfer, not by a purported assignment of future property, a lender who wished to extend his security to cover new equipment brought on the premises in substitution for that given as security would under the common law rule, be obliged to take a fresh instrument of transfer or to rely on some new dispositive act by the debtor, after acquisition of the property, pursuant to the original security agreement.*"[592]

Still, the recognition in equity of the creation of the security interest in after acquired property started with the old English case of Holroyd v. Marshall.[593] Nonetheless, the definition of floating charge and fixed charge was formulated in the case of Re Yorkshire Woolcombers Association Ltd. where Romer LJ stated as follows: "*I certainly do not intend to attempt to give an exact definition of the term 'floating charge' nor am I prepared to say that there will not be a floating charge within the meaning of the Act which does not contain all the three characteristics*

[591]The others are mortgages, pledges and liens. See Gerard McCormack, *Pressured by the Paradigm, The Law Commission and Company Security Interests* in John de Lacy ed., THE REFORM OF UK PERSONAL PROPERTY SECURITY LAW COMPARATIVE PERSPECTIVES (Routledge –Cavendish, 2010), p. 85.
[592] See Roy Goode, Commercial Law, supra footnote 13, p. 730.
[593] 10 HL Cas 191 (1862).

that I am about to mention, but I think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) If that class is one that which, in the ordinary course of the business of the company would be changing from time to time; and (3) If you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."[594]

The above English decisions on the floating and fixed charges are relevant and persuasive in Nigerian courts. Where a company issues a debenture, it can create either a floating or a fixed charge over the whole or part of its assets and undertakings or both a floating charge over some parts of its assets and undertakings and a fixed charge over the other parts of its assets and undertakings.[595] Though it makes sense to create a fixed charge on company's fixed assets and a floating charge on a revolving assets of the company,[596] however under section 173 (2) CAMA 2004, there is no such demarcation for the fixed and floating charge security devices.

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[594] 2 Ch. 284, at 295 (1903). This definition was corroborated by Lord Macnaghten in the case of Illingworth v. Houldsworth (1904), AC 355, at p. 358 as follows: "I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." See also the cases of Official Assignee of Madras v. Mercantile Bank of India Ltd., (1935) A.C. 53; Buckley L.J.in Evans v. Rival Granite Quarries Ltd., (1910) 2 K.B. 979 at p. 999. See Roy Goode supra footnote 13, p. 732; see also Roy Goode, Legal Problems of Credit and Security, supra footnote 63, p. 114.

[595] See section 173 (2) CAMA 1990.

[596] See Roy Goode, Legal Problems of Credit and Security, supra footnote 63, pp. 121-122. However, in the case of Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd. (1979) 2 Lloyd's Report 142 cited by Goode in his book, it was held that what the major elements in a fixed and floating charge was not whether the charged assets were either on fixed or current but whether the debtor company was given the right to deal with the charged assets of the company in the ordinary course of business free from the security interest created thereon. Whilst this freedom is inconsistent with a fixed charge, it is in tandem with a floating charge security interest. It would appear that the Nigeria CAMA 2004 followed the reasoning of this case.

Creation of a floating charge over the assets of company includes its extension onto the after acquired property of the company. The Companies and Allied Matters Act 2004 provides for the after acquired property of the company in a floating charge security device.[597] Once the secured party had registered the initial floating charge security agreement[598] at the CAC within three months of the creation of the charge, the secured party does not need to re-file when the company acquires a 'future' or after acquired property. Like the floating lien in America, the floating charge gives the debtor the unfettered dominion to manage the properties that is the subject of floating charge security interest in the normal course of business until crystallization.[599] Proceeds and future advances are necessary concomitants of a floating charge and in fact they form part of the floating charge security device in Nigeria as well. Floating charge is normally used in Nigeria when the credit transaction is a revolving line of credit between the secured creditor and the company and the proceed rules as well as the tracing principle ensure that at crystallization the secured party follows not only the assets of the company but the proceeds of the assets of the company.

A fixed charge may be created by a company on some or all of the properties of the company. It can also be created alongside the floating charge by creating a fixed charge on some certain properties and then a floating charge on the rest of the properties.[600] The parties to a security agreement are at liberty to determine the creation and constitution of the properties for either

[597] See section 178 (1) CAMA 2004 reproduced supra in footnote 584.
[598] Filing is a requirement of perfection of company's charges under the Nigerian Law and it is provided under S. 197 of the Companies and Allied Matters Act 2004.
[599] According to Gough, "Crystallization is the process of conversion of the security from being floating in character into being specific or fixed. […] the essence of crystallization is that a floating charge fixes upon certain specific property and that the contractual right of the charger company as against the charge to dispose of the charged property comes to an end." See W.J. Gough, Company Charges, (Butterworths, 2nd ed., 1996), p. 135. Under section 208 CAMA, certain acts of the company could trigger the process of crystallization namely: where the company fails to pay its debts as the fall due; the company ceases to carry on business or the company is being wound up.
[600] See section 173 (2) CAMA 2004.

fixed or floating charge. Fixed charge takes priority from the point of perfection and also takes priority over floating charges except the floating charge comes under the exception under section 179 CAMA 2004.

2.9.2. Pledging without Dispossession of Businesses under the Cameroon's Uniform Act on Securities

A business[601] is recognized under the Uniform Act on Securities as capable of being used as collateral in a non-possessory security – pledge without dispossession. Pledging of a business which is French styled *Nantissement de fonds de commerce* involves pledging all the assets of the business both tangible and intangible including the business customers,[602] the sign, business name, right to business lease and business licenses, equipment, patents, trade and business marks, models and other intellectual property rights.[603] The pledge can extend to a business and all its branches. The array of business assets and undertakings used here as collateral is wide and comparable to the assets and undertakings of a company that can be utilized in creating a security interest in a fixed and floating charge.

The assets of the enterprise used as a non possessory pledge are to be registered with the Registry of the Court of First Instance in Cameroon. Where the assets used for the pledge include the enterprise's intellectual properties (i.e., patents, service and trademarks, designs and models) then the business additionally has to satisfy the registration requirements imposed by the relevant

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[601] The Uniform Act on Securities used the term 'business'. The term business as used by the Act is synonymous to corporation in the United States and companies (both private and public limited liability companies).

[602] Though Article 69 (1) of the Uniform Act on Securities provides: "pledging of business shall extend to the customers, the sign, business name, right to business lease and business licenses," it is doubtful whether business customers could be pledged and in what sense? At most, what could be pledged may be list of customers and even no customer would be bound by such pledge.

[603] See Article 69 (1) and (2) of the Uniform Act on Securities 1998. Generally speaking, pledging of business is akin to United States floating lien.

intellectual property laws.[604] Pledge without dispossession of a business is to be contained in a notarial or private deed specifying all the requirements as in the pledge of a partnership rights.[605] Registration of business preserves the security interest of the creditor for five years commencing from the date of registration and it shall lapse if the registration is not renewed before the expiry of this term. Like the case of pledge of partnership rights, a secured creditor who has registered his security interest in the enterprise can realize his security interest in the event of debtor's default by applying to court for an order of writ of execution with which the secured creditor can lawfully conduct a sale to realize his securities.[606]

The ability to use all the assets of the business both tangible and intangible as collateral in a pledge of business security device is advantageous both to the secured creditor and the debtor. *First*, it allows the debtor to utilize assets of the business used as collateral in running the business during the tenor of the loan. *Second*, the collateral can be described in a general term without describing each piece of equipment. *Third*, pledge of business covers after acquired property and future advances automatically.[607]

Notwithstanding the above advantages, there are limitations on the use of the pledge of business as collateral to raise loan by the business enterprise. The first limitation is the limited use of inventories and accounts as collateral. Under the French law where Uniform Act on Securities was copied from, inventories are available to sellers who give out sales credit and not to lenders

[604] See Articles 69 (2) and 77 Uniform Act on Securities 1998.
[605]See Article 70 Uniform Act on Securities 1998.
[606] See Article 89 Uniform Act on Securities 1998.
[607]See John A. Spanogle, the Financing of Small Businesses: A Functional Analysis of Three Legal Modules, supra footnote 38, p. 4.

who give out loan credit.[608] Even where inventories cover a creditor's interest, inventories by their nature are supposed to be sold and restocked and the creditor's interest is generally cut off upon the sale of the inventory and worst still, the creditor has no priority interest in the proceeds of the sale.[609] For the accounts receivables, the limitation to it comes from the fact that accounts are required to be stated precisely and any new account created after the security agreement is not covered automatically, this means that a new security agreement will have to be entered into and new registration done. This will potentially raise the cost of credit for this type of collateral.[610] Another limitation with pledge of business which is general to all security interests created under the Uniform Act on Securities is the enforcement of security interest in the event of default by the debtor. Collateral including the assets of the business can only be sold through a judicial process or 'judicial auction.' This is because there is no private or out of court enforcement of security interests and judicially or court administered sales are distress sales which usually yield less than the normal commercial value of the collateral.[611]All these inherent disadvantages under the Uniform Act on Securities lend credence to the postulations by some law and economics scholars that French civil law legal system generally, in comparison to common law legal system, is the least business friendly.[612]

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[608]Id., p. 4.

[609]Getting Credit in Cameroon details – The World Bank Group- available at < http://www.doingbusiness.org/ExploreTopics/GettingCredit/Details.aspx?economyid=34 > last visited on the 15th of October 2010.

[610] See John A. Spanogle, the Financing of Small Businesses: A Functional Analysis of Three Legal Modules, supra footnote 38, p.4.

[611] Id., p. 4; see also Article 56 (1) of the Uniform Act on Securities 1998. The detailed analysis of enforcement of security interest under the Uniform Act on Securities is discussed in Chapter 3 of this work on enforcement of security interests.

[612] See Rafael La Porta, Florencio Lopez-de Silanes, Adrei Shleifer & Robert W. Vishny, Legal Determinants of External Finance, 52 J. Finance, p. 1131 (1997); Rafael La Porta et al., Law and Finance (1998) 106 J. Pol. Econ. 1113; Simon Johnson et al., Tunneling (2000) 90:2 Am. Econ. Rev. 22; Paul G. Mahoney, the Common Law and Economic Growth: Hayek Might Be Right (2001) 30 J. Legal Stud. 503; Simeon Djankov et al., the Regulation of Entry (2002) 117 Q. J. Econ. 1; Edward L. Glaeser & Andrei Shleifer, Legal Origins (2002) 117 Q.J.Econ. 1193; and Catherine Valcke, Introduction to University of Toronto Law Journal, Vol.59, No. 2, (Spring 2009), pp.179-183

2.9.3. Differences and Similarities between the United States Floating Lien, the Nigerian Fixed and Floating Charges and the Pledge without Dispossession of Businesses under the Cameroon's Uniform Act on Securities

Generally speaking, the Cameroonian pledge without dispossession of business is akin to the English and Nigerian floating charge and the United States floating lien.[613]Their major common denominator is the ability of a company to create a security interest in all or most of its assets and undertakings in favor of a secured creditor and yet, be able to employ those assets and undertakings in the normal course of running its businesses. Besides this, the assets and undertakings used as collateral in the above three security devices can be described in general terms without describing each piece of asset in detail; the three security devices cover after acquired property and also future advances and this make the three security devices a good financing choice for a revolving loan transaction.[614]

On the other hand, the main point of divergence between the United States floating lien and the Nigerian floating charge are their priority positions. Until crystallization - when the floating charge becomes fixed charge, [615]and despite the perfection of the floating charge - the debtor can create another security interest (a fixed charge) in the property which will rank in priority above the floating charge. However this may not be possible where there is a negative pledge covenant

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available at < http://muse.jhu.edu/journals/university_of_toronto_law_journal/v059/59.2.valcke.pdf > last visited on the 5th of December 2010.

[613] See Uniform Act on Securities (Guarantees) with commentaries from Martha Tumnde, Peter Monteh Tumnde and Anoukaha Francois, supra footnote 163, p. 45; see also Boris Martor et al., Business Law in Africa; OHADA and the Harmonization Process (Kogan Page, London, 2002), p. 203. Since Nigeria floating charge and English floating charge are substantially the same, Tumnde et al, reference to English floating charge could be substituted for Nigeria in the context of this research comparative analysis.

[614] See John A. Spanogle, the Financing of Small Businesses: A Functional Analysis of Three Legal Modules, supra footnote 38, p. 4.

[615] See section 178 (2) CAMA 2004.

between the secured party and the debtor.[616] Even with this clause, a debtor who creates such a security interest in breach of the covenant may be personally liable to the secured party. The breach may not affect the priority of the later security interest unless it is shown that the new creditor was aware of the negative covenant as at the time of entering into the security interest agreement with the debtor.[617] Whereas in case of an Article 9 floating lien the perfection of the floating lien by filing financing statement gives the secured creditor priority immediately, and except for a purchase money security interest under the special priority rules, it may not be possible for the debtor to create another security interest that will take priority over the floating lien.[618] This is the only point of similarity between the United State's floating lien and the Nigerian fixed charge, perfection of a fixed charge gives the chargee priority immediately in the security interest.

Furthermore, the priority position of a secured creditor in pledge without dispossession of business is analogous to the floating lien. Upon registration of the pledge without dispossession at the requisite office, the secured creditor gets priority immediately and its security interest is determined according to the priority rules contained under the OHADA Uniform Act Organizing Securities.

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[616] Negative pledge is usually contained in a floating charge agreement by which the debtor company undertakes not to grant subsequent security ranking in priority or pari passu with floating charge without the prior consent of the of the floating charge. A text of the negative pledge covenant is as follows: "The borrower will not create or permit to exist any security on its assets of those of its subsidiaries." See Phillip Wood, International Loans, Bonds and Securities Regulation, (Sweet and Maxwell, London, 1995), p.34; see also Roy Goode, Legal Problems of Credit and Security, supra footnote 63, p. 50.

[617] See section 179 of CAMA 2004.

[618] However, the floating lienee can sign a subordination agreement with another secured creditor where the security interest of the subsequent secured party will take priority over that of the floating lienee. See Roy Goode, Legal Problems of Credit and Security, supra footnote 63, p. 55.

Another point of divergence is that while a default by the debtor must formally lead to '*crystallization'* for the secured party to take control of the security interest under the floating charge, default is enough to cause the secured party to take control of the security interest under the floating lien. This means that there is no requirement of crystallization under Article 9. This thin line of division becomes clearer bearing in mind that the crystallizing events must be spelt out in the debenture deed as not every default of an obligation may lead to crystallization. In Intercontractors v. UAC[619] Karibi-Whyte JSC stated as follows: *"A floating charge, as the assets in this debenture is ambulatory and floats over the property until the event indicated in debenture deed happens which causes it to settle, remain fixed and crystallize into a fixed charge."* Where the debenture deed confers power to the secured creditor, the secured party may upon crystallization of the floating charge appoint a receiver or manager or may enter into possession of such assets of the company; the secured creditor may alternatively apply to court to appoint a receiver or manager for the assets of the company.[620] Where the secured party decides to apply to court to appoint a receiver or manager of the assets of the company, the interval of the application to the court and the appointment of a receiver or manager may be critical to the secured party as the debtor may dispose or dissipate the assets especially where the security interest is not real property.

Crystallization is part of British relics in Nigeria's secured credit law. Its efficiency on the secured credit industry has not been analyzed to ascertain its usefulness. Nonetheless one

[619] (1988) 2 Nigerian Weekly Law Report (NWLR) (pt.76), 303 particularly at p. 323. See also the English case of Government Stock Co. v. Manilo Ry (1897) A.C. 81, 86.
[620] See sections 178 (1) (a) & (b) CAMA 2004. In the case Intercontractors v. UAC supra, Karibi-Whyte at page 323 stated: "When the floating charge crystallizes, the debenture-holder is entitled and empowered under the debenture deed to appoint a receiver/manager who would then enforce the security and recover his money by taking over the assets in the debenture. The appointment of receiver is an event which causes the floating charge to crystallize." See also the case of Re Crompton & Co. Ltd. (1914) 1 Ch. 954.

perceived obvious use is that it protects the debtor - it does not leave the debtor at the mercy of the secured party. Except for crystallizing factors as specified in the agreement,[621] the secured party cannot take control of the assets and undertakings of the debtor's company that is subject to the floating charge security device. This seeming usefulness is superficial because the same protection can be given to the debtor in the security agreement of the parties without importing the principles of crystallization. For example under Article 9 a debtor is equally protected because a secured party in the United States cannot take over the assets and undertakings of the debtor's company that is subject to floating lien unless the debtor has defaulted on the obligations contained in the agreement: i.e., the default clause must specify the events that constitute default.

Like the United States floating lien, one of the advantages of a floating charge is that it affords the liberty to the debtor to deal with the assets and undertakings that is the subject to the floating lien and floating charge in the ordinary course of business until there is a default of the obligation. This ensures that the debtor runs its business unfettered, generates income from which it can repay the credit and is the "highest-value" security in each of the systems discussed above allowing the extension of the biggest credits possible.

2.9.4. Is the Marriage of the United States Floating Lien and the Nigerian Floating Charge Possible?

As already pointed out above, both security devices offer great opportunity for a debtor company to utilize the company's assets and undertakings – used as collateral – productively in the

[621] However if the security agreement contains acceleration clause, then the secured party accelerate repayment and take control of the collateral if he in good faith deems itself insecure. In this case it might just be that none of the events specified in crystallization clause has happened.

ordinary cause of business. Still, the question what to do with the Nigerian floating charge in case Article 9 would gain foothold on Nigerian soil is crucial because of the major difference between the two above security devices which is their priority position. Whilst the floating lien gets immediate priority position upon filing, the floating chargee's priority is delayed until crystallization and this can be detrimental to the interest of secured creditor. Consequently without sacrificing the great feature of floating charge of allowing the debtor to utilize the collateral in the ordinary course of business, the dilemma is how give the secured creditor the deserved priority, i.e., give the floating chargee the priority position from the time of registering the charge at the CAC in line with the United States' floating lien.

A cursory look at other jurisdictions that have passed through this quandary may give one an insight. Canadian experience is a good example in this regard. Canada adopted the British styled floating charge in the 19th century almost when floating charge was also introduced in England.[622] However challenges arose on how to integrate the floating charge into the US transplanted UCC Article 9 system in revising the Canadian provincial PPSAs starting from the 1960s on considering that some features of the floating charge were irreconcilable with the Article 9 floating lien.[623] The first step was to grant the Canadian floating charge a priority position upon filing. This issue which dominated the discourse in shaping the Ontario Personal Property Security Act was resolved by the provisions of section 22 of the 1967 Ontario PPSA. The section (section 22 of the Ontario Act) extended the priority position of other security devices upon perfection to a floating charge security interest. Consequently, under section 35 (1) (a) of the Ontario Act priority as between competing perfected security interest was determined

[622] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 222.
[623] The floating nature of the floating charge is irreconcilable with the giving the holder of floating charge priority even filing, unless the charge crystallizes.

by priority rules in the Act: i.e., *"where no special position rule is applicable, by the residual first to file rule in section 35 (1) (a) where both securities have been perfected by filing.*"[624]

After the grant of the priority position to a floating chargee, another characteristic feature of a floating charge – the concept of crystallization was removed from the floating charge. The removal of the concept of crystallization became necessary because, before crystallization the secured party's interest was inchoate, hence it was just floating on the shifting assets of the debtor and *"Article 9 concept of security interest does not recognize inchoate or floating security interest or anything that has a quasi-immediate existence.*"[625] With the removal of the concept of crystallization, the Canadian floating charge became a fixed charge but with the implied understanding between the secured creditor and the debtor that the debtor is at liberty to use the collateral in the normal course of business until there was a default. Thus, in Canada the floating charge became a fixed charge of a sort.[626]

Drawing inferences from the Ontario PPSA experiences which is highly instructive on this issue, this research will propose giving immediate priority to the floating chargee upon filing of the security interest and thus allowing the priority position of the floating chargee as against other competing perfected secured interest to be determined by the priority rules of first to file if there are no other special priority rules that may dislodge the floating chargee's priority position. This way the lenders will be more willing to lend on the strength of floating charge security device.

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624 See Jacob Ziegel, *Recent and Prospective Development in Personal Property Security Area and the Recommendations of the Ontario Advisory Committee*, in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 1, pp. 11 – 17 (1985).

625 See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 223, see also Jacob Ziegel, Benjamin Geva, Ronald C. C. Cuming Commercial and Consumer Transactions – Cases, Text and Materials , (Edmond Montgomery Publishers, 3rd ed.,1995), p. 388.

626 See Jacob Ziegel, Benjamin Geva, Ronald C. C. Cuming Commercial and Consumer Transactions – Cases, Text and Materials , p. 387.

Also, this research sees nothing bad in removing the concept of crystallization from the floating charge so long as the debtor has the liberty to use the collateral in the normal course of business until there is a default. This will make the Nigerian floating charge to be transformed into a fixed charge as it is in the 1989 Ontario PPSA.

2.10. Priorities under Article 9

One of the consequences of the use of the same asset as collateral by the debtor in different loan transactions to more than one secured party is that at some point there will be conflicting and competing legitimate claims from different secured (or other) parties on the same collateral.[627] Where the proceeds of the security interest can satisfy all the competing claims, the matter becomes of no 'serious' consequence although there may be the issue of which interest is discharged first. On the other hand, as in most cases, the proceeds of the collateral and indeed other properties of the debtor are hardly enough to satisfy the conflicting and competing claims of the creditors then the question whose claims should take precedent becomes inevitable and contestable. The task of answering these and other connected questions is the function of priority systems; especially as far as the rights of competing secured creditors are concerned.

[627] The conflicting interest here might come from statutory or judicial lien holders, good faith purchasers, and other secured creditors who have competing security or other types of interests in the assets of the debtor.

In bankruptcy proceedings,[628] the bankruptcy trustee [629] takes control of estate of the bankrupt company and distributes it amongst the creditors according to the priority rules. Modern bankruptcy rules first allow for the payment of all secured creditors, in priority to unsecured creditors (debt-holders) and equity holders. Normally, the proceeds from the sale of the estate are insufficient to satisfy all the debts owed especially to unsecured creditors. Accordingly, it is not out of place to state that priority is a central issue both for the secured and unsecured creditors in realizing their credits from the debtor.

Though filing and other public notice mechanisms were devised to give priority to earlier creditors in order to deal with this problem, nevertheless, there are some financing transactions which by the dictates of their nature, business exigency or statutory recognition, take precedent over an earlier perfected security interest.[630]Therefore the law devised a means to prioritize in order of preferences, all the secured financing transactions a debtor collateralizes with the same asset. This is to maintain some form of order in an otherwise chaotic area of financing so that the policy choice of using wider range of personal properties as collateral to secure credit can be achieved. The answer to this problem lies in the principle of priorities which is another essential feature of Article 9 UCC. Article 9 has not only made use of its priority systems to encourage the taking of several credits in one collateral but has also resolved which of the competing security interests in a collateral takes precedent over the other.

[628] The intersection of bankruptcy proceedings with the rights of the both secured and unsecured creditors of the debtor will be analyzed in the chapter 4 on close linkage of Article 9 and bankruptcy laws.

[629] A bankruptcy trustee is someone appointed by the court, other administrative bodies or by the creditors to gather in the estate of a bankrupt in order to distribute the proceeds equitably to the bankrupt's creditors in line with the extant bankruptcy laws. See Bryan Garner, (ed.,), Black's Law Dictionary, supra footnote 3, p. 950. Note however that in case of chapter 11 reorganization, where there is no trustee appointed, as a rule, the debtor's management stays in place as debtor in possession whilst the re-organization and restructuring of the company and its debt are effected.

[630]For example purchase money security interest, buyer in the ordinary course of business and subordination agreement.

Priority rules under Article 9 form a system that encompasses several priority rules which are beyond the first in time, first in rights rule.[631] The simple first in time filing will not only be grossly inadequate to accommodate the divergent characteristics of all the several security interests and transactions under Article 9, but the rule will not also serve the commercial needs of secured financing and the interest of both the debtors and creditors. Consequently, Article 9 has introduced several numbers of priority rules with the result that in any case involving priorities, care should be taken to examine the complex priority rules to find out which rule governs the transaction. This is to ensure that the precise governing rule apply to the particular facts. Some of these priority rules shall be examined in details below.

2.10.1. Unperfected Creditors under Article 9

The law expects a creditor to perfect a security interest in collateral so as to give notice to the public. From this principle follows the general basic law of priorities that the first to file or perfect takes priority. Nevertheless where there are two conflicting attached security interests in the same collateral and both conflicting security interests are unperfected then priority is given to the order of attachment.[632] It also follows that since the law requires perfection of every security interest created, a perfected security interest takes precedence over unperfected security interest

[631] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 164. This is especially valid if the United States priority system is compared with the civilian system- where the rule of first in time is still sufficient and reformers had problems grasping why there was need for more specific priority rules.
[632] See s. 9 – 322 (a) (3) UCC and the official comments to the section. The section provides as follows: "The first security interest or agricultural lien to attach or become effective has priority if conflicting security interest and agricultural liens are unperfected."

notwithstanding the fact that the unperfected security interest may have been created first before the creation and perfection of the later security interest.[633]

2.10.1.1. First to File or Perfect Priority Rule

The first to file or perfect priority rule[634] is obviously the most straightforward priority rule under Article 9, the *"rules may be regarded as adaptations of the idea, deeply rooted at common law, of a race of diligence among creditors […] based on precedence in the time as of which the competing secured parties either filed their financing statements or obtained perfected security interest."*[635] It postulates that when there is more than one perfected security interest in a property, the first to perfect has priority over a subsequent creditor who perfects later. Perfection here presupposes that it can be done either by filing of a financing statement or by other methods (i.e., transfer of possession, acquisition of control or by automatic perfection). But where any other method of perfection is used then the first to perfect under those rules will be the first to acquire a perfected security interest i.e. *"one that has attached and as to which any required perfection step has been taken."*[636] In perfection by possession, it is pretty clear that where there is already a possession by a secured party, it becomes a non issue that the interest of the secured creditor in possession takes precedence over other perfected interest.[637] Article 9 also equates the

[633] See s. 9 – 322 (a) (2) UCC is instructive on this and provides as follows: "A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien."
[634] First in time of filing or perfection rule is provided in section 9 – 322 (a) (1) as follows: 'except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules: (1) Conflicting perfected security interest and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.'
[635] See the official comment to section 9 – 322(a) UCC.
[636] Id.
[637] The question may be asked how a subsequent creditor can perfect a security interest in an asset already in possession of an earlier secured party. The answer is simple by filing; a subsequent secured party can perfect by means of filing a financing statement of his security interest in a property which is in the possession of an earlier

time of filing or perfection in respect of the security interest in collateral as the time of filing or perfection as to the security interest in proceeds.[638]

This first to file or perfect priority rule under Article 9 exist in Cameroon[639] as well. One of the reasons for requiring the registration of non-possessory pledges at the Cameroon Court of First Instance is to determine who gets priority. This is determined by who registers first at the Court of First Instance since the first person to register gets priority.

2.10.1.2. Buyer in the Ordinary Course of Business Priority Rule

Section 9 – 320 (a) provides that a 'buyer in the ordinary course of business' takes free of a security interest created by his seller's even though the security interest is perfected and even though the buyer knows of its existence. This section gives priority (and displaces the first in time rule) to a buyer who buys in ordinary course of business and purchases from the inventory of a dealer over the initial perfected security interest of a creditor whose interest was created by the dealer. But for a buyer to benefit from this section, the buyer must be a buyer in ordinary course of business. Section 1 – 201 (b) (9) UCC defines a buyer in the ordinary course of business to *"mean a person that buys in good faith, without knowledge that the sale to him is in violation of the rights of a third party in the goods, buys in ordinary course and from a person*

secured party and the subsequent interest of the second secured party takes effect upon the discharge of the interest of the earlier secured party. Another way might be where the possession of the goods is in the hands of a third party who is holding it on behalf of the 1st secured party, and the third party acknowledges that it holds that goods for the interest of the 1st secured party and then in discharge of the interest of the 1st secured party, then it holds the goods for the interest of the 2nd secured party. The bottom line of this type of priority rule is that the first secured party to perfect takes priority over other subsequent perfections by any other secured party in the security interest.

[638] See section 9 – 322 (b) UCC.

[639] The situation different in Nigeria and will be explained in details at the later part of this discussion.

other than a pawnbroker in the business of selling goods of that kind."[640] The third requirement which states that a buyer must buy from a person other than a pawnbroker, that is in the business of selling goods of that kind effectively limits the choices of the buyer to buying from an inventory of a merchant.[641]

Article 9 gives priority to the buyer in the ordinary course of business over a prior perfected security interest even though the buyer was aware of the prior perfected security interest.[642] There is a difference between a buyer in the ordinary course of business who buys with the knowledge that there is a perfected security interest in the goods bought on one hand and the buyer who buys with the knowledge that the sale violates the rights of another person in those goods. While the former is protected and can take free from the perfected security interest in those goods, the latter is not protected; the latter ceases to be a buyer in the ordinary course of

[640] The decisions of the US court on the normal course of business have been inconsistent: In the case of Hempstead Bank v. Andy's Car Rental System Inc. 35 A.D.2d 35, 312 N.Y.S.2d 317, 7U.C.C. Rep. Serv. 932 (Sup. Ct. 1980), a car rental agency was generally in the business of leasing automobiles but periodically sold an automobile in its inventory in order to keep its fleet modern, the court held that the sale was incidental to the leasing business and consequently the sale was not made by a person engaged in the normal business of selling cars. However in the case of Tanbro Fabrics Corporation v. Deering Milliken Inc. 39 N. Y. 2d 632, 685 N. Y.S.2d 260, 350 N.E.2d 590, 19 UCC Rep. Serv. 385 (1976), the court held that the purchase was made in the ordinary course of business even though the transaction differed from the seller's most common business. The facts of this case are as follows: Deering sold unfinished fabric to Mills Fabrics which finished the fabric and resold it in the course of its business. Mills Fabrics lacked storage facilities and consequently Deering retained possession of fabric paid for by Mills Fabric until it was needed by Mill Fabrics. Deering also retained a security interest in the fabric for obligations owed it by Mills Fabrics under an open account. On occasion, Mill Fabric sold the unfinished fabric to other fabric converters and ordered Deering to make delivery to the buyer. The buyer in this case was Tanbro. When Deering refused to make delivery, Tanbro sued for conversion, arguing that it was a buyer in ordinary course of business and accordingly took free from Deering's security interest which was perfected by possession, the court held in favour of Tanbro despite the fact that selling unfinished fabric to other fabric converters is not the major business of Mills Fabric. See other cases of Sindone v. Farber, 105 Misc, 2d 634, 432 N.Y.S.2d 778, 31 U.C.C. Rep. Serv. 329 (Sup. Ct. 1980); Taft v. Jake Kaplan, Ltd., 28 U.C.C. Rep. Serv. 253 (Bankr. D.R.I. 1980).

[641] See William H. Lawrence, William H. Henning and R. Wilson Freyermuth, Understanding Secured Transactions, supra footnote 50, p. 262. However a buyer of farm products from a farmer can qualify as a buyer in the ordinary course of business, though the rights of such buyers are determined by preemptive federal law hence such buyers rights do not come within the purview and benefits of Article 9 priority rules.

[642] See section 9 – 320 (a) UCC.

business. This is because the knowledge of the fact that the sale violates another person's right in the good robes him of the cloak of the buyer in the ordinary course of business.

The rationale behind given priority to buyer in ordinary course of business can be traced back to the floating lien concept where the debtor is allowed to deal with the goods subject to the floating lien in the usual course of business. A secured party who takes security interest in inventory of the goods of a seller knows that the goods must be sold and re-stocked for the seller to make turnover and profit in order to repay the loan. This explains the reason while a buyer in the ordinary course of business with knowledge of a perfected security interest in the goods takes free of the security interest.[643] Again, the rule only protects buyers in ordinary course of business and for only security interest created by the seller's secured creditors. This policy can be justified on the ground that if buyers were allowed to buy subject to the initial claims of every third party, no buyer would want to buy goods as every purchase would amount to potentially buying a law suit and the sellers will not be able to sell inventories, make profit to satisfy the claims of the secured party and this will grind commerce to a halt.[644]

But this cannot be said of a supposed buyer in the ordinary course of business who is aware that the sale violates a third person's right, here there is no implicit assumption between the seller and the third party that the goods which the buyer has bought will be sold, this may account why the sale of the goods violates the third party's right in the goods. The problem is the difficulty in

[643]See Bradford Stone & Kristen David Adams, Uniform Commercial Code (Thomson West, 7th ed., 2008), p. 155.
[644]See Louis F. Del Duca, Egon Guttman, Frederick H. Miller, Peter Winship, William H. Henning,. Secured Transactions Under the Uniform Commercial Code and International Commerce (Anderson Publishing Co. Cincinnati Ohio, 2002), pp. 174-175.

proving the mental state of the buyer – i.e., the buyer in the ordinary course of business bought with the knowledge that the sale is in violation of the rights of a third party.

It should be noted that unlike the buyer who purchases in the ordinary course of business, a buyer of farm products from a farmer does not take free of existing perfected security interest in the farm product held by the farm creditors. This section of the Article 9 has been preempted by the Federal Food Security Act of 1985.[645]There are also the future advances vs. intervening buyers, intervening lien creditor and lessee of goods priorities which are summarized in a footnote because its limited use under the Nigerian and Cameron proposed priority rules.[646]

2.10.1.3. Future Advance Priority

Future advance priority[647] is a necessary concomitant of the United States floating lien which enables a secured party to secure his security interest and have same priority both to the initial

[645] Under section 1324 of the Food Security Act of 1985 [7 U. S. C. s. 163] farmers are obligated to give their creditors a list of buyers of their products. Following the receipt of the list, the secured party dispatch a notice to the buyers on the payment modalities and only buyers who comply with these instructions takes free of the perfected security interest. 'The act also encourages the state to set up a central filing system for registry of all the restrictions imposed on selling farmers by their creditors, so that compliance with the central registry restrictions would also protect the buyers of the farm products. Farmers who fail to inform their creditors of the identities of the potential buyers of the farm products are subject to a fine of at least $5,000' [see 9 C.F.R. 10795- U.S.D.A. regulations on point see also Douglas J. Whaley, Secured Transactions, supra foot note 50, p. 120.

[646]Where there is an intervening good faith purchaser who have an interest in the collateral that is subject to future advance and the intervening buyer's interest arises after the first advance but before the second advance, the future advance takes precedence over the buyer's interest if the secured party made the future advance without the knowledge of the purchase and the future advance was made within 45 days of the purchase by the intervening buyer. (see 9 – 323 (d) UCC) However where the secured party made the future advance with the knowledge of the intervening purchase, then the buyer of goods take free of the security interest in the collateral arising from future advance even if the future advance was made within 45 days of the purchase by the intervening buyer. See Willa Gibson, A Comprehensive Review of Revised Article 9, supra footnote 429, p. 101, see also section 9 – 323 (d) & (e) UCC Similarly, a secured party's future advance takes primacy over an intervening lien creditor where the secured party made the future advance within 45 days of the interest of the intervening lien creditor or the secured party made the future advance without the knowledge of the interest of the intervening lien creditor or the secured party entered into a commitment without the knowledge of the intervening lien creditor. See Willa Gibson, A Comprehensive Review of Revised Article 9, supra footnote 429, p. 102; see also s. 9 – 323 (b) UCC this principle also applies to the lessee of goods mutatis mutandis. See s. 9 – 323 (f) UCC.

[647] See s. 9 – 323 (a) UCC.

advance and any subsequent advances that may be given to the debtor. Article 9 has protected future advances given by the secured party to a debtor and has also given the future advance the same status and priority with the previous advance provided that both the initial advance and future advance are secured by the same security interest and a financing statement was filed to perfect the first or initial advance.[648] Consequently where an intervening secured party gives a loan to the debtor whose security interest is subject to the future advance clause - which normally will be found in the floating lien contract - the intervening secured party's loan is subordinate both to the initial advance and to the future advance.

2.10.1.4. Purchase Money Priority in General

For some intellectuals[649] who disagree with Grant Gilmore's postulation that Article 9 was only an "*anthological collection of the most celebrated security law controversies of the preceding forty years…almost nothing new was added*"[650] their point of disagreement stem from the fact that despite the fact that Article 9 was partially a reading of the old cases and the existing statutes in order to reduce the past to a sort of order, Article 9 also brought new security devices under the system that were never seen during the pre-UCC era. One of such new ingenious security devices is the purchase money security interest.

The category of purchase money security interest is a product of legal engineering to reconcile and accommodate all types of security interests that existed on the eve of the drafting of Article 9. One of the quandaries was the existence of the floating lien. Though floating lien is a good mechanism for long term financing which allows the debtor the freedom to utilize its properties

[648] See Willa Gibson, A Comprehensive Review of Revised Article 9, supra footnote 429, p.101.
[649] Tibor Tajti, an ardent follower of Gilmore, however, disagrees with Grant Gilmore on this issue.
[650] See Grant Gilmore, Security Law, Formalism and Article 9 in COMMERCIAL LAW Ross Cranston (ed.,) supra footnote 67, p. 397.

used as collateral whilst the loan is outstanding, it also has its downturns especially to the debtor and the unsecured creditor. The disadvantages of floating lien to these two groups created two dilemmas for the drafters of the Article 9 which were as follows. *First*, since the floating lien perfects security interest in debtors present and future after acquired properties, the existence of floating lien ensured that nothing is left to satisfy the claims of the unsecured creditors and this *"[…] will tend to dry up the sources of credit. Second, the drafters were also of the opinion that the law should protect a necessitous borrower against him by refusing him to encumber all the property he may ever own to secure a present loan."*[651] To answer the above two quandaries the drafters of Article 9 introduced three measures to contain the apparent hardship that the effects of floating lien caused to the debtors and the unsecured party. One of the measures was the introduction of the category of purchase money security interests and granting super-priority[652] to them. These became the solutions for the reconciliation of long and short term financing.[653]

[651] See Grant Gilmore, Security Interest in Personal Property, supra footnote 51, pp. 360-361; see also Tibor Tajti, Comparative Secured Transactions Law, supra foot note 48, p. 180.

[652] See the case of General Electric Capital Commercial Automotive Finance Inc. v. Spartan Motors, Ltd , et al (NY AppDiv 1998) 246 AD2d 241, 675 NYS2d 626. In this case the issue was which of the two competing security interest by two automobile finance companies will take priority. The first automobile finance company maintained a floating lien 'dragnet lien' covering a car dealership's automobile inventory which arose out of a security agreement that was duly perfected. Subsequently a second automobile finance company entered into a security agreement – purchase money security interest with the same car dealership company and filed its loan documentations to perfect its security interest and sent a letter to the first automobile finance company as notification of its purchase money security interest in the same car dealership companies' automobile inventory. The second automobile finance company reimbursed the car dealership after the acquisition of the two Mercedes Benz cars in issue. The court found that such 'after advanced funds fell within the purchase money security status under section 9 – 107 (b) of the New York UCC. Accordingly despite the fact that the second automobile company filed its security interest after the first company, its security interest nevertheless prevailed over the first automobile finance company and was thus entitled to the $194,500 in proceeds resulting from the sale of the two Mercedes Benz cars. See also the case of In the Matter of Galbreath Clearing and Grading, Inc. (Bankr SDGa 2000) 258 BR 859.

[653] The other two measures are the provision of section 9 – 315 (d) UCC which talks about the cut-off rule of 20 days in perfection of the proceeds of the security interest and the limitation of the after acquired property interest to the real intentions of the parties and not every pre-existing claims (antecedent claims) of the debtor which was not contemplated by the parties at the time of entering the floating lien contract. See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 180.

Purchase money security interest can arise in three main ways: where a seller sells his goods on credit and retains a security interest in the goods to ensure that the purchase price will be paid, where a lender lends money for the purchase of goods and the money is used to purchase the goods, and the goods is used as a collateral to ensure the repayment of the loan, and a consignor obtains a security interest in a consigned goods.[654] With the advent of floating lien's long term tenure and its automatic perfection of after acquired properties, borrowing became difficult to the debtor whose properties were subject to the floating lien concept of Article 9. The reason was that new creditors were reluctant to lend on the strength of collateral which has been encumbered by a previous floating lien and the existing creditor may not be willing to extend more credit based on the old collateral which the existing creditor already has. This problem affected both the debtor and even the creditor because it is to the creditor's advantage that the debtor injects new capital to his business to boost the economic value of the debtor's assets. An answer to this quagmire came from the institution of purchase money security interest which allowed the debtor create a new security interest that takes precedence over the automatic perfection of the after acquired property concept of floating lien on the debtors property.

The justifications for allowing the purchase money security interest to supersede the existing security interests are manifold. *Firs*t, the new creditor provides funds for the purchase of the new property which increase the assets of the debtor. This contribution to the assets of the debtor is also beneficial to the secured creditor's interest in the after acquired property because the value of the credit the purchase money security interest secures is as a rule less than the value of the

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[654] See Russell A. Hakes, The ABC's of the UCC (Revised) Article 9 Secured Transactions, supra footnote 446, p. 91; see also s. 9 – 103 (a), (b) & (d) UCC.

collateral under a floating lien.[655] *Second,* debtor may have no other way to finance new purchases if the debtor cannot assure the intervening creditor of priority in the property purchased as "*the existence of purchase money super-priority prevents debtors from being captives of their existing creditors.*"[656] Article 9 has many special rules regarding the purchase money security interest which shall be further summarized herein.

2.10.1.5. Purchase Money Security Interest in Inventory

In cases of inventory, the rule is modified slightly. To get a purchase money security interest in inventory that will take primacy over other creditors, the PMSI must be perfected at the time the debtor receives possession of the collateral[657] and the purchase money secured party must give an authenticated notification to any other security interest holder who has previously filed a financing statement covering inventory of the same type of goods as those that will be covered in the purchase money security interest. Such notice must be given prior to the date on which the debtor takes possession of the collateral.[658] The notice shall state that the person filing has or expects to acquire a purchase money security interest in the debtor's inventory and it must describe the inventory[659] and the holder of the conflicting security interest receives the notification within twenty days before the debtor receives possession of the inventory.[660] The rationale for notification stem from the nature of the transaction in inventory financing. The

[655] According to Kripke, "[…] secured credit that makes possible the purchase of additional assets takes nothing from (un)secured creditors, and may benefit all parties." See Homer Kripke, Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum, 133 University of Pennsylvania Law Review, p. 971.
[656] See Douglas J. Whaley, Secured Transactions, supra footnote 50, p. 95.
[657]See s. 9 – 324 (b) (1) UCC.
[658] See s. 9 – 324 (b) (2) UCC.
[659] See s. 9 – 324 (b) (4) UCC.
[660]See s. 9 – 324 (b) (3) the notice will preserve the priority of the purchase money creditor for all later similar transactions. The notice which last for five years can be renewable if the purchase money financing is continuing by sending a new notice to the conflicting interest holders. See Douglas Whaley, Secured Transactions, supra footnote 50, p. 96.

transaction between the inventory secured party and the debtor presupposes that the secured party makes periodic advances against incoming inventory or periodic releases of old inventory as new inventory comes in. A fraudulent debtor may ask for an advance from the inventory secured party despite the fact that he has given purchase money security interest in the inventory to another secured party. Consequently Article 9 requires the purchase money secured party to notify any other conflicting security interest who has filed financing statement against the same item or type of inventory before the purchase money secured party filed or its security interest became perfected temporarily.[661] The essence of the notification is to protect the other inventory secured party, where he gets the notification from the purchase money secured party; he will not presumably make the advance to the debtor knowing full well that the security interests of the purchase money secured party will supersede over his security interests.[662] Apart from purchase money security in inventory there are other purchase money priority that would be summarized in the footnote because of the perceived lesser important of these priorities in Nigeria and Cameroon namely purchase money priority interest in non inventory and non livestock[663] and purchase money priority interest in livestock.[664]

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[661] See section 9 – 312 (e) & (f) UCC.

[662] See the official comment 4 to section 9 – 324 UCC. However, Kripke thinks that the reason behind the notice given to inventory secured party may not have reflected the commercial practice in inventory finance. According to Kripke, "[…] the earlier secured party must be given direct notice of the purchase money financing to be given priority. The notice enables the secured party to avoid making a fresh advance against new inventory, as its financing arrangement may contemplate. The notice is good for five years. Why the requirements of actual notice when the collateral is inventory but not when the collateral is something other than inventory? Because the drafters believed that the likelihood of the earlier secured party making advances in the case of inventory newly acquired by the debtor is greater than in other cases. Perhaps this could be empirically verified, but the vast diversity of situations covered suggests not. In any event, its advantages could not be rigorously proven in retrospect because the statute itself may have altered commercial behavior and precluded further inquiry." See Homer Kripke, Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum, supra footnote 655, p. 957.

[663] As earlier stated, a creditor who loans money to a debtor for the purchase of goods has purchase money security interest in such goods if the goods are used as collateral for the loan. Consequently, such a creditor has priority over other creditors of the debtor and should be accorded more protection than other creditors over the collateral. Section 9 - 324 (a) provides the additional advantage by stating that a perfected purchase money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods and its identifiable proceeds if the purchase money security interest is perfected when the debtor receives possession of the

2.10.1.6. Priority of Security Interests that are perfected by Control

For all the security interests that can be perfected by control, where the creditor has control of such security interest, then such security interest takes priority over other conflicting security interest that the competing secured creditor do not have control over. Article 9 provides that a security interest held by a secured party having control of the deposit account takes precedence over a conflicting security interest held by a secured party who does not have control.[665] Similarly for security interest held in respect of investment property,[666] letter of credit[667] and chattel paper[668] a security interest held by a secured party having control has priority over a conflicting security interest held by a secured party who does not have control.

In conclusion, there are other numerous priority rules that abound under Article 9 which are of minor importance to the research and so would only be mentioned in this work.[669] It is certain

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collateral or within 20 days afterwards except where the other conflicting security interest in the same goods is perfected by control under section 9 – 327. Where a lender lends money for the purchase of goods and the money is used to purchase the goods, and the goods are used as collateral to ensure the repayment of the loan.

[664] Similar to the purchase money security interest in inventory, the purchase money security interest in livestock grants priority to a purchase money secured party if the purchase money secured party perfects its security in the livestock by the time the debtor receives possession of the livestock, (See s. 9 – 324 (d) (1) UCC) and sends notification to the holders of conflicting interest in the livestock before filing its financing statement. (See s. 9 – 324 (d) (2) UCC) The content of the notification will state that the purchase money secured party has or expects to acquire a purchase money security interest in livestock of the debtor and properly describes the livestock. (See s. 9 – 324 (d) (4) UCC) The only difference here is that the holder of the conflicting security interest receives the notification within six months before the debtor receives possession of the livestock as against five years in the case of inventory. (See s. 9 – 324 (d) (3) UCC) It is important to mention that apart from the above purchase money security interest discussed above; there are other purchase money security super-priority interests that will not be discussed here. But suffice it to mention that these purchase money interest have varied conditions attached to them, where the holder fulfils all the conditions or obligations attached to the purchase money security interest, the result is to put the holder of such purchase money security interest in an advantage position or in priority over the holder of a conflicting security interest. These purchase money security interests are purchase money security interest in software (See s. 9 – 324 (f) UCC) and competing purchase money security interest. (See s. 9 – 324 (g) UCC).

[665] See section 9 – 327 UCC.

[666] See s. 9 – 328 UCC.

[667] See s. 9 – 329 UCC.

[668] See s. 9 – 330 UCC.

[669] They are as follows: licensee in the ordinary course priority rules (s. 9 – 321 (a), (b) UCC); consumer to consumer buyer priority rules (s. 9 – 320 (b) UCC); dual debtor priority rules (s. 9 – 325 UCC); new debtor priority rules (s. 9 – 326 UCC); certificate of title goods buyer priority rules (s. 9 – 337 UCC); fixtures and crops priority

that this work cannot discuss all the special priorities rules scattered in Article 9 and the rights of competing and conflicting secured creditors to the same collateral. These priority rules are to say the least confusing even to the legal practitioner as the practitioner needs to search through the numerous sections to find out which priority rule governs the transaction under consideration. There is a need to revise and streamline Article 9 priority system so that it will be more comprehensible and easily understandable both to the parties themselves and their legal practitioners. This will make it easy for the creditors to understand their position vis-à-vis other competing secured creditors of the debtors and also help them to decide whether it is worthwhile to enter into such secured credit financing with the debtor.

2.10.2. Are Purchase Money Security Interests of any Relevance to Nigeria and Cameroon?

There are no rules on purchase money security interests in both the Nigeria laws and in the Uniform Act on Securities. As earlier stated, one of the main reasons for the creation of purchase money security interest in the United States was the economic justification for its introduction. The economic justification for the introduction of purchase money security interest in the United States secured transaction law was the effect of the floating lien on the debtor's property and his powers to do business with that property. The floating lien extends onto both present and after acquired property of the debtor, thus leaving no property of the debtor unencumbered to raise further loans whilst the present creditor may not be interested in providing further loans to the debtor based on the strength of the existing collateral. This was particularly so because of the

rules (s. 9 – 334 UCC); instruments priority rules (s. 9 – 330 (d), s. 9 – 331 UCC); lessee in the ordinary course priority rules (s. 9 – 321 (c) UCC); consignment priority rules (s. 9 – 319 UCC); investment property priority rules (s. 9 – 328 UCC); letter of credit right priority rules (s. 9 – 329 UCC); chattel paper priority rules (s. 9 – 330 UCC); deposit account priority rules (s. 9 – 327 UCC). See generally Willa Gibson, A Comprehensive Review of the Revised Article 9, supra footnote 429, pp. 101-112.

treatment of retention of title based transactions like leases, conditional sales or consignments as creating security interest under Article 9 due to the unitary concept of security interest. The treatment deprived the debtor the alternative of using any of these means to get property as any asset acquired by any of these means will be caught immediately by the after-acquired property clause of the floating lienee.

The question therefore for Nigeria is whether the same problem arises when agreeing on a combination of a fixed and a floating charge extending to all, or substantially all, property of the debtor? Or, more precisely, whether it is possible to acquire new assets based on hire-purchase or leasing without the obligation to ask for the consent of the floating charge or infringing on the after-acquired property interest of a floating chargee? The answer to this question is in affirmative. In Nigeria and Cameroon, where a debtor executes a floating charge or pledge without dispossession of business which encumber both present and after acquired properties of the debtor, thus making it difficult for the debtor to use the same collateral to create a security interest in any subsequent loan applications, a debtor can still use the hire purchase or leasing contract to acquire new assets without impinging on the after-acquired property rights of an earlier floating lienee. This is because as already stated; both leasing and hire purchase contracts are not considered as transactions capable of creating security interest even though transactions serve as security function. The reason for this is that in Nigeria - as in English law - to create a security interest, there has to be a grant of an interest in the collateral by the debtor to the secured party, and hence the law does not reckon that retention of title by the secured party can create a security interest.[670] Since such retention of title-based transactions in Nigeria and Cameroon are not treated as creating security interests, they have their own existence completely separate from all forms of security interests; the debtor can use them to acquire new property without the consent of the floating lien or infringing on the after-acquired property interest of the floating chargee. In essence the economic imperative which necessitated the introduction of purchase money security interest in the United States is not evident in Nigeria and Cameroon – hence no need to transplant the category of purchase money security interests to Nigeria and Cameroon. However, with the proposal already made by this research to transplant the Article 9 unitary concept of security interest which would translate to bringing leasing and hire purchase transactions under the umbrella of secured transactions laws in both countries, then there would be the economic need to transplant the purchase money security interest. But until then purchase money security interest has no real relevance under Nigeria and Cameroon.

2.10.3. Priority Rules under Nigerian Secured Transactions Law and the Cameroon's Uniform Act Organizing Securities

Unlike the priority system of Article 9, Nigerian secured transactions laws and the Cameroon Uniform Act on Securities have much simpler priority rules. The reason for the simpler priority system is not farfetched: there are not so many types of secured transactions and fewer classes of assets are known to the system and utilized by practitioners. Indeed, most of the types of collateral and transactions available in the United States are conspicuously absent in Nigeria and Cameroon. Also in Nigeria, hire purchase and leasing contracts are regulated by distinct laws and hence there is no need for special priority rules for these types of transactions.

[670] See Jelili Omotola, The Law of Secured Credit, supra footnote 60, pp. 13-14; see also E. Sykes & S. Walker, The Law of Securities, (The Law Book Co. Sydney, 5th ed., 1993), p. 14; see Roy Goode, Legal Problems of Credit and Security, supra foot note 63, p. 11.

Whilst in Cameroon the rule is first to register or perfect which can be deduced from the provisions of the Uniform Act on Securities it is not so in Nigeria; it is first to create a security interest. Under the Uniform Act on Securities, priority for the five security interests that require registration is first to register.[671] This provision which is in pari materia to the provision governing the distribution from the sale of real property[672] provides that the rank of the creditors at the Trade and Personal Property Credit Register – in Cameroon, Registry of the Court of First Instance – which is determined by the date of the registration of the security interest by the secured creditor at the registry is the determinant factor in deciding the issue of priority. This means that the claims of the creditor who registered his security interest first at the registry of the Court of First Instance will be settled first before the claims of the other secured creditors who registered later. It is also instructive to note that secured creditors who registered their security interest at the registry have priority over creditors with a special lien,[673] creditors with a general lien[674] and unsecured creditors.

[671] See Article 149 of the OHADA Uniform Organizing Act which provides as follows: the proceeds from the sale of chattels shall be shared in the following order: (1) to creditors owed legal costs incurred in the process leading to the sale of the property and in the actual distribution of the proceeds; (2) to creditors who assumed the cost of conserving the debtors property in the interest of the creditors with the older debts; (3) to creditors of highly preferred wages; (4) to creditors guaranteed by a pledge according to the date of establishment of the pledge; (5) to creditors guaranteed by a pledge or preferential right subject to publication , each according to his rank in the Trade and Personal Property Credit Register; (6) to creditors with a special lien, each according to the property to which the lien attaches, in case of creditors with a special lien having conflicting claims over the same property, preference shall be given to the first to bring action for distraint; (7) to creditors with a general lien not subject to publication according to the order prescribed by Article 107 above; (8) to unsecured creditors in possession of an enforceable title following a distraint order or an objection to the distribution procedure. In case the funds to pay off the creditors mentioned in (1), (2), (3), (6), (7) and (8) of this article are inadequate and the said creditors occupy equal rank, the funds shall be distributed proportionately to their total debts. However this priority positions is in bankruptcy.

[672] See Article 148 of the OHADA Uniform Act.

[673] Special liens are holders of liens that are contained in Articles 109 – 116 of the Uniform Act on Securities. They include unpaid vendor's lien, lessor's lien over furniture of the lessee, carrier's lien over the transported property in respect of what is owed to carrier. See Martha Tumnde et al, Commentaries to Uniform Act on Securities, supra footnote 163, p. 70.

[674]General liens are "secured creditors who have a general privilege for example, tax authority, custom authority, social security, salaries of wage earners which are not the last twelve months but before the last twelve months. In this category, there is no requirement for registration and publication. The ranking would be the same as that

In Nigeria, - like the priority rule of the English Companies Act of 1985 – priority rules for company's fixed and floating charges are governed by CAMA 2004. The rule is that priority is accorded to the first interest to be created so long as the secured creditor registered his security interest within the time given under the law for registration. Consequently registration of security interest is a perfection requirement and does not constitute a priority point.[675] Under CAMA, a company who has created either a floating or fixed charge over its assets or undertaking has ninety days after the creation to register the charge with the CAC otherwise the charge will be void against any subsequent creditor or liquidator of the company.[676] In other words within the ninety days of creation of the floating charge, the floating chargee enjoys priority over a subsequent floating charge security created on the same assets or undertaking of the company even without registering the charge at CAC.[677]This applies to a fixed charge as well; within 90 days of creating a fixed charge, the fixed chargee enjoys priority over the subsequent creation of another fixed charge by the company. Within this ninety day period, the rule is first to create. However, after ninety days a subsequent charge that is created by the company and which

established under Article 107 as follows: funeral cost and medical cost before death; living expenses; salaries before the last twelve months; the debt owed to artist, writers or authors of intellectual property; tax authority, custom authority and social security." See Martha Tumnde et al, Commentaries to Uniform Act on Securities, supra footnote 163, p. 95.

[675] See Roy Goode, Commercial Law, supra footnote 13, p. 715.

[676]See section 197 (1) CAMA 2004.

[677]Writing on the effect of registration under the English Companies Act of 1985 – which Nigeria copied her CAMA 2004, Goode postulated as follows: "Registration of the security is merely a perfection requirement. It does not validate an ineffective security, nor does it constitute a priority point. Provided that the interest is registered within twenty-one days, it has priority according to the date of its creation, and thus prevails over a later interest registered first, despite the fact that the grantee of the latter interest has no means of discovering from the register the existence of the previous charge." See Roy Goode, Commercial Law, supra footnote 13, p. 715. For example, on the 1st of January 2011, Nigerian Breweries Plc created a floating charge on all the assets and undertakings of the company in favor of A and there is no negative pledge covenant contained in the agreement. On the 20th of January 2011, the same company created another floating charge using all the assets and undertakings of the company to B. On the 30th day of January2011 B registered his interest at CAC and on the 10th of February 2011, A registered his interest. By virtue of the provisions of section 197(1) CAMA, A enjoys priority for being the first floating charge to be created and he registered his security interest within the ninety days grace even though B's interest which was created latter in time was registered first.

registers its security interest before the earlier charge will take priority. i.e., after the ninety days, it becomes first to register. It should be noted that this priority rule above does not detract from the rule that a holder of fixed charge takes priority over the floating chargee. For example, if after the creation of floating charge, one week later the company decides to create a fixed charge over the same assets, the fixed charge would take precedence over the floating charge so long as the fixed charge is registered within 90 days of the creation. However, this priority of the fixed charge over the floating charge can be displaced if there is a negative covenant in the security agreement between the company and the floating chargee and the fixed chargee is aware of this negative covenant as at the time the subsequent fixed charge is granted to him.[678]

In the case of individuals in Nigeria, technically speaking there is no priority rule. The reason is that there is no personal property security law that governs security transactions by individual in Nigeria.[679] Consequently, there are no classes of secured transactions that would necessitate providing for their priority rules. However during bankruptcy proceedings, the Nigerian Bankruptcy Act Cap B2 Laws of the Federation of Nigeria 2004 provides for the distribution of the proceeds of the estate of the bankrupt. It would be noted that secured creditors are omitted in the distribution of the proceeds of the estate of the bankrupt; one of the possible explanations for the omission of the secured creditors could be that the bankruptcy Act automatic stay does not affect the secured creditor's right to deal with his collateral.[680] Consequently, the secured creditor's securities (i.e., collateral which the security interest of the secured party is created on) are excluded from the distributable estate of the bankrupt, thus necessitating excluding the

[678] See again section 179 CAMA 2004.
[679] Unlike the provisions of floating and fixed charge by the CAMA 2004 for a company to raise credit, there is no equivalent law (personal property secured transactions law) for individuals in Nigeria. Recall that Hire Purchase Act is not considered as a secured transaction law.
[680] See section 10 (2) Bankruptcy Act Cap B2 LFN 2004.

secured creditor from the distribution of the proceeds of the estate. However, where the secured creditor's security interest is successfully challenged by the bankruptcy trustee, the secured creditor becomes unsecured and shares in pari passu with other unsecured creditors.[681]

Section 35 and 36 of the Bankruptcy Act provide the distribution of the proceeds of the estate of a bankrupt by the trustee in bankruptcy. Section 35 provides the deductions that will be made from the estate of the bankrupt towards the expenses incurred in realizing the estate of the bankrupt.[682] Where the expenses are deducted from the estate of the bankrupt and there are some proceeds left, then section 36 of the Bankruptcy Act list the debts that should be paid out of the estate of the bankrupt in the order of their priority.[683] In all, unsecured creditors are at the last to be paid and in most bankruptcy cases, there are hardly enough proceeds of the estate of the bankrupt remaining to trickle down to the unsecured creditors. Payment of the debts of the unsecured creditors pari passu here means that all the debts of the unsecured creditors provable in bankruptcy proceedings shall be paid ratably irrespective of which debt was created earlier or which debt attached earlier.

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[681] See infra chapter 4 on the rights of the secured creditors during bankruptcy proceedings in Nigeria.

[682] Section 35 provides for the following deductions in the order of their priorities: "(a) the actual expenses incurred by the Official Receiver in protecting the property or assets of the debtor or any part thereof and any expenses or outlay incurred by him or by his authority in carrying out the business of the debtor; (b) the fees, percentage and charges payable to, or costs, charges and expenses incurred or authorized by, the Official Receiver, whether acting as Official receiver or trustee; (c) the remuneration of the special manager where his services are used; (d) the taxed costs of the petitioner, so far as the same may not have been disallowed by the court."

[683] Section 36 provides as follows: "(a) all debts due from the bankrupt to the state at the date of the receiving order, or became due and payable within twelve months before the date that the receiving order was made; (b) all wages and salaries due to the employee of the bankrupt at the date of the receiving order or four months prior to the date of the receiving order provided it does not exceed the sum of three hundred naira; (c) where the landlord or any other person has distrained on any property of the bankrupt within three months before the date of the receiving order and the debt is given priority in this section, then such debt shall have a first charge on such properties distrained or on the proceeds from the sale of such property; (d) then if there remain any money from the estate then all debts proved in bankruptcy (unsecured creditors) shall be paid in pari passu."

2.10.4. Lessons from the Diverse Priority System of Article 9 to Nigeria and Cameroon

The obvious dilemma from the study of the complex priority systems of Article 9 is whether to advocate for the transplantation of this priority system to Nigeria and Cameroon jurisdictions or to leave the simple priority rules that have existed in both jurisdictions. The answer to this dilemma will be dependent on whether both jurisdictions would transplant the new frontiers of secured transactions and wide arrays of personal properties as collateral for loan. Where both jurisdictions do, as it has been advocated in this work, then it will be a foregone conclusion that the Article 9 priority system has to be transplanted as well. It is obvious that the present simple priority rules in existence in Nigeria and Cameroon cannot accommodate complex diverse secured transactions and the wide arrays of collateral under Article 9 if they are transplanted. Consequently, despite the complexity of the United States Article 9 priority systems, it is imperative that it should be transplanted both to Nigeria and Cameroon with the transplantation of the new paradigms of collateral and secured transactions. Where this is not done, there will be chaos if the priorities rules governing these transactions and collateral are not properly delineated, prioritized and enforced.

With the wealth of the literature on Article 9 including the official comment, the complexities of priority systems of Article 9 ought not to be a hindrance to its transplantation. The literature on Article 9 will assist in understanding the priority systems especially by the judges who will be deciding as between adverse competing security interest, which interest gets priority on the collateral or proceeds therein.

Chapter 3

Article 9 Enforcement Mechanisms as a Model for Nigeria and Cameroon

3.1. Introduction

Generally speaking, in every jurisdiction, enforcement of laws is one of the most important aspects of the legal system. It might be argued that enforcement is more important than substantive law because law lacks meaning if it cannot be enforced. [684]Enforcement of law is one of the key factors that determines many other variables in the legal system among which are peoples' perception of the law; peoples' willingness to obey the law, the maintenance or breakdown of law and order in the society, the rule of law observance,[685] attraction of foreign investment in a country[686] and eventually economic growth.

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[684] See Kenneth W. Dam, the Law-Growth Nexus the Rule of Law and Economic Development (The Brookings Institution, 2006), pp. 93-94.

[685] However whilst enforcement is key to the people's perception of the law, the willingness to obey the law and the maintenance or breakdown of law, the rule of law observance is strengthened also by the four elements identified by Krygier which are scope of the law, the character of the law, the integrity of legal institutions and the social embeddedness of the law. See Martin Krygier, Transitional Questions About the Rule of Law: Why, What, and How? In JULIA SZALAI (ed.,) EAST CENTRAL EUROPE /L'EUROPE DU CENTRE EST: EINE WISSENSCHAFTLICHE ZEITSCHRIFT vol. 28, part1 2001, p. 9.

[686] Besides enforceability of laws, there are other several factors that attract foreign direct investment in a country and some of them are as follows: cost factors which include labor cost, low cost of raw materials, return on investment; political and legal factors – political stability, tax reduction in host country, laws against expropriation or taking, ease of repatriation of profits back, good legislation for the protection of FDI; market factors – large size of the host market, demands in host market, level of competition in the host market, economic stability; infrastructure and technological factors – high industrial concentration (clustering), availability of well qualified work force, availability of infrastructural amenities. See Hans Van Houtte, the Law of International Trade, (Sweet & Maxwell, 1995) , pp. 225 – 229; see also Fawaz Binsaeed, Factors Affecting Foreign Direct Investment Location in the Petrochemicals Industry, the case of Saudi Arabia, Doctoral Symposium 23rd & 24th March 2009 available at < http://www.brunel.ac.uk/329/BBS%20documents/PHD%20Doctoral%20Symposium%2009/FawazBinsaeed0531820.pdf >; last visited on the 20th of March, 2011.

In the area of secured transactions prompt enforcement is one of the key to the survival of the secured credit financing industry which is undoubtedly central to the growth of the economy.[687] Where there is effective and prompt enforcement system, lenders will advance secured loan easily on more favorable terms to the debtor namely – lower interest, higher amount, longer tenure, without insistence on higher collateral value (real properties). This is because the secured party knows that in the unlikely event that the debtor defaults in his obligation to repay the loan, the secured party can count and rely on effective and efficient mechanisms of enforcing the security agreement. With an efficient enforcement system in place, the rate of defaults will fall (save in case of a severe financial crisis like the one cause by the Credit Crunch in 2007). A debtor will not default on his obligations on the security agreement on flimsy excuses. Any default will be rooted in circumstances beyond the financial control of the debtor as most debtors will certainly not risk the double jeopardy of having the secured party realize the loan promptly through the instrumentality of effective enforcement mechanisms and at the same time also being blacklisted from accessing loan facilities in the future by the creditor putting such default on the credit report.[688] 'Opportunistic'[689] debtors will have to re-consider accessing loans from lenders since they know that where they fail to repay the loans, there will be institutional effective means of recovering the loans from them.

[687] Harmathy succinctly captured the importance of enforcement in the area of secured transactions when he stated thus: "it has been pointed out by economic historians that an important factor in the growth of an economy is the effectiveness of the enforcement of agreements. This factor is particularly important from the point of view of secured transactions, too." See Attila Harmathy, The EBRD Model Law and the Hungarian Law in JOSEPH NORTON AND MADS ANDENAS (eds.), EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS, (Kluwer Law International, 1998), p. 197.

[688] See Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions - The Consumer Credit and Sales Legal Practice Series, (National Consumer Law Center, 6th ed., 2005) paragraph 6.2.1, p.183.

[689] Opportunistic debtors here mean debtors who take loan without the intention of repaying the loan and rely on the porous enforcement system that hinders recovery. In Nigeria, there are few people who borrow money they know quite well that they cannot pay back but are nonetheless unconcerned because the system of recovery of loans is in itself frustrating and most lenders may not recover if the amount borrowed is not very substantial.

On the other hand, where there are ineffective enforcement systems, the law becomes a *toothless bulldog* notwithstanding how good the text of the law is. This situation has dire consequences for the secured party, the debtor and generally for the society as a whole. *First*, the lender will not be willing to advance credit facility to the debtor. The notion of 'secured party' becomes academic and meaningless as the rights exercised by the secured party in event of default of the debtor will be mere rhetoric. However where the secured party advances loan to the debtor, the lender's exposure to risk will be high and in order to cut down the risk, the terms will not be favorable to the debtor. *Second*, the tenure will be short as the secured party will want to realize the loan and get away from the transaction as fast as possible before some uncertainties set it to make the debtor to default. *Third*, the amount may be smaller than what the debtor needs, the higher the amount the higher the exposure and the uncertainty of recovery in event of default, consequently the secured party will want to keep the amount low. *Fourth*, the interest on loan will be high, the cost of the loan will be high for the secured party due to the uncertainties, the secured party may want to recover as much as possible through the interest 'upfront' in event the debtor decides to default and there may not be many willing secured lenders which may push the interest down through competition.[690] This will invariably lead to a high percentage of interest on the loan.

The above not only affects the secured lender and the debtor, it also affects the economy and the society in general. Strictly speaking, the economy suffers the most in the above scenario, because the above situation will translate to poor credit facility, poor access to credit facilities and high cost of obtaining credit especially for micro, small and medium scale enterprises (SME's).[691]

[690] See Heywood Fleisig, Mehnaz Safavian and Nuria de la Pena, Reforming Collateral Laws to Expand Access to Finance, supra foot note 18, p. 43.

[691] It is difficult to define uniformly in global context what micro, small and medium scale enterprises are. However in Nigeria, micro enterprise is defined as an industry with a labour size of not more than 10 workers or a total cost of

There is a direct correlation between cost of obtaining credit and price of goods and services in the society. High cost of obtaining credit increases the prices of goods and services that require these credits and low level of growth in the economy, stagnation or even economic recession. Consequently it is in the interest of the economy and the society in general that enforcement mechanisms of secured transactions and indeed all laws be reformed to make it efficient. Suffice it to note that where a borrower repays its debt as at when due, there may not be any need for enforcement, however where a borrower is for any reason unable to meet its obligations contained in the security agreement, a 'default' has occurred and enforcement becomes needful to enable the lender realize his securities. It is therefore this 'default' that activates enforcement that this work shall examine in the next topic.

3.2. Default under Article 9

The legitimate expectation of the secured party in entering into a security agreement with the debtor is that at due date, the debtor will repay the loan with the attendant interest therein. This is the whole essence of information and checks on credit reports that the secured party carries out

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not more than N1.5million naira including working capital but excluding cost of land. Small scale enterprises are defined as an industry that has a labour force of between 11-100 workers or a total cost of not more than N50 million including working capital but excluding cost of land. Medium scale enterprises make an industry that has a labour force between 101-300 workers or a total cost of over N50 million but not more than N200 million including working capital but excluding cost of land. Large scale enterprises belong to an industry with a work force of over 300 workers or a total cost of over N200 million including working capital but excluding cost of land. See F. N. Udechukwu, *Survey of Small and Medium Scale Industries and Their Potentials in Nigeria* in CENTRAL BANK OF NIGERIA: SEMINAR ON SMALL AND MEDIUM INDUSTRIES EQUITY INVESTMENT SCHEME (SMIEIS), (Central Bank of Nigeria Training Centre, Lagos 2003) Number 4, p. 8; available at < http://www.cenbank.org/out/Publications/guidelines/dfd/2004/smieis.pdf > last visited on the 10th of April, 2011.

Again, the World Bank has defined micro enterprise as an enterprise that has up to 10 employees and total assets of up to $10,000 and total annual sales of up to$100,000. Small enterprise is defined as an enterprise that has up to 50 employees and total assets of up to $3 million; while medium enterprise is an enterprise that has up to 300 employees and total assets and total sales of up to $15 million. See Meghana Ayyagari, Thorsten Beck, Asli Demirgúc-Kunt, Small and Medium Enterprise Across the Globe, March 2005 available at < http://center.uvt.nl/staff/beck/publications/obstacles/globe.pdf > last visited on the 10th of April, 2011. Nigerian criteria fit into the World Bank's criteria of micro, small and medium scale enterprises.

on the debtor to determine whether the debtor has a good credit. Almost all 'good faith'[692] secured lenders will not give credit to any debtor if they know, or have reason to know, that the loan will be a bad loan: i.e., the debtor will not repay it. However, apart from the sub-prime loans[693] which culminated into the recent mortgage crisis, most secured lenders only give credit where the probability of the debtors to repair is reasonably high.[694] However, regardless of the meticulousness of the secured party in choosing his credit risks, there are cases in which the debtor is unable to meet the repayment obligations set by the parties in the security agreement making the expectations of the secured party a utopian state. As a result, lenders prefer and most times insist on the debtors providing collateral for the loans, which secure their position and

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[692] Good faith here means that the secured lender has good faith towards the debtor on the credit given as opposed to some unscrupulous secured lenders who know that the debtor may not able to pay but go ahead to extend the credit on the strength of the security interest offered by the debtor. The ultimate aim of the secured lender in such case is to take control of such security interest in the event of the expected default, and then to sell or foreclose such security interest in an inappropriate manner at the detriment of the debtor.

It has been posited that one of the causes of the mortgage and financial crisis in the United States was the lending to two classes of borrowers by the financial institutions. The lenders knew the inherent dangers of extending loans to these the borrowers but nevertheless went ahead and granted credit to them. The first set of borrowing was the sub-prime mortgages granted by banks and housing mortgage institutions to poor borrowers who really need the houses but have high propensity to default in repayment due to their unstable jobs. The second class of lending was to prime borrowers but who were speculators - they used the money to invest into their second or real estate with the hope that the prices of real estate will keep going up so as to make huge profits out of their investment- thus there was bubble when the price of real estate crashed.

This is one of the reasons for the general apathy of the United States public to the bailout money given to these banks and mortgage institutions by the United States government to cushion the effect of the financial crisis. In his first address to the joint session of the US congress on the financial crisis and credit crunch plaguing the US on the 24th of February 2009, President Obama captured the mood of the nation when he stated "[…] people bought homes they knew they couldn't afford from banks and lenders who pushed those bad loans anyway […] I understand that when the last administration asked this Congress to provide assistance for struggling banks, Democrats and Republicans alike were infuriated by the mismanagement and results that followed. So were the American taxpayers. So was I. So I know how unpopular it is to be seen as helping banks right now, especially when everyone is suffering in part from their bad decisions. I promise you – I get it. […]" this speech is available at < http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress/ > last visited on 12th of February 2011.

[693] The sub-prime loans were granted by the banking industry following a shift in government credit policies which instigated banks to give credits to both sub-prime borrowers and wealthy borrowers who are merely speculators.

[694] To determine the probability of the repayment by the debtor, the lender checks through the past credit history of the debtor to see whether the debtor has a delinquent bad record. The lender also looks at the income of the borrower to ascertain whether the debtor earns or makes enough income to repay the loan. Where the loan facility is to be invested in business, some lenders ask for business plans for the investment of the money and conducts independent feasibility study into the proposed business of the of the borrower for which the borrower shall be investing the loan facility to check whether the business can yield returns to repay the loan. However most lenders ask for adequate collateral for the credit facility to guarantee repayment of the loan and are unconcerned about the profitability of the proposed business for which the borrower is requesting for credit.

ensure that the secured party recovers most or all of their credit in event of the debtor's default in repayment.

In both secured and unsecured transactions, default in repayment of the loan triggers off the enforcement procedure.[695] A debtor's default of his obligations contained in the security agreement is a prerequisite for the enforcement of the security interest by the secured party to recover his money. However in some instances the parties may agree that the debtor may not be in default for the secured party to enforce its interest by collecting against certain peculiar types of collateral, for example where the security interest is created on sale of accounts,[696] chattel paper, payment intangibles or promissory notes. In the above cases, the debtor does not need to be in default for the secured party to collect against these types of collateral. This is because the transaction is a sale of the asset to the secured party/buyer and such transaction gives the secured party right to collect against such collateral whether or not there is a default by the debtor.[697]

Article 9 neither defines 'default' nor states what acts or omissions of the debtor amount to it but leave the question of the constituents and definition of the term to the agreement of the parties.[698]

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[695] See James White, Robert Summers, Uniform Commercial Code, supra footnote 82, p. 1325. However whilst the secured creditor uses will make use of any of the Article 9 enforcement procedures, the unsecured creditor sues the debtor, proves his case, get judgment and levy execution on the property of the debtor.

[696] Sale of accounts was brought under Article 9 because it is difficult to differentiate in practice between the 'sale' of an account and use of an account as collateral only in receivable financing. To obviate this problem, Article 9 included the sale of an account as a transaction that creates security interest. See the official comment to section 9 101 UCC - the pre- revised 1999 UCC.

[697] See Linda J. Rusch, Stephen L. Sepinuck, Problems and Material on Secured Transactions (Thomson West, 2006), p. 127.

[698] See official comment 3 to the Article 9-601 which provides as follows: "This Article leaves to the agreement of the parties the circumstances giving rise to default." Also compare sections 9 – 601(a), 9 – 607(a), and 9 – 609(a). In all these sections cited herein, the code assumes that the parties have agreed on what constitutes default and so only provides remedies that the creditor has after default. See id. p. 128, see the case of Chesapeake Investment Services, Inc. v. Olive Group Corp., 2003 WL 369682 Super. Ct. Jan.30, 2003; see also Douglas J. Whaley, Secured Transactions, supra footnote 50, p. 146; See James White, Robert Summers, Uniform Commercial Code, supra footnote 82, p. 1326.

Gilmore approached the constituent element of default from two perspectives. First, he looked at the mandatory component of 'default' irrespective of whether the parties stipulated it as such or not which is the failure of the debtor to make timely payments of principal or interest. The second constituent being what the parties say it is. According to him *"[t]he principal, basic, classical event of default is the debtor's failure to make timely payments of principal or interest. Since paying on time is of the essence of the debtor's obligation, his failure to do so leaves him in default whether the security agreement spells the matter out or not. Beyond that point default is, within reason, a matter of contract and can be best defined as being whatever the security agreement says it is."*[699] This Gilmore's approach was summarized in White and Summers's views on default when they posited as follows: *"security agreements often include default clauses as long as the creditor's arm and as wide as the counsel's imagination. A provision which stipulates that debtor's non-payment constitutes default is only the starting point for a well-drawn default clause."*[700]

In the same vein, Warren and Walt[701] opine that due to the wide variety of commercial and consumer transactions covered by Article 9, parties should provide for what constitutes as default in their security agreement as it is next to impossible to make 'a one size fit all' formula on default.[702] The authors listed as events amounting to default to include: failure to meet required payments; death, dissolution, insolvency or bankruptcy of the debtor; as well as debtor's breach or failure to perform any of the agreements, covenants, representations, or warranties contained

[699] See Grant Gilmore, Security Interests in Personal Property, supra note 51, p. 1193.
[700] See James White, Robert Summers, Uniform Commercial Code, supra footnote 82, p. 1326.
[701] See William D. Warren, Steven D. Walt, Secured Transactions in Personal Property (Foundation Press, 7th ed., 2007), p. 248.
[702] According to Donald B. King, et al, "Freedom of contract is the prevailing rule and the contracting parties may specify what events constitute default." See Donald B. King, Calvin A. Kuenzel, Bradford Stone and W. H. Knight Jr., Commercial Transactions Under the Uniform Commercial Code and Other Laws, supra footnote 586, p. 1047.

in the agreement. These default-constituting events are in line with a list of Linda J. Rusch and Stephen L. Sepinuck which include: where the debtor has created another security interest in the collateral that takes priority over the security interest of existing creditor like the PMSI; the debtor has allowed the collateral value to be so depreciated that if the secured party decides to dispose the collateral in event the debtor fails to pay, the value of the collateral will not be sufficient to satisfy the loan amount; the debtor which is a company fails to satisfy a judgment debt after a certain period of time, or change of the management of the company that may affect the ability of the company to pay its existing obligation.[703]

Generally, from the views of the authors above, the summation of the elements that can constitute 'default' is that, the 'default' that can lead to enforcement of the security interest by the secured party is the inability of the debtor to meet with the material contractual terms contained in the security agreement[704] and this is much wider than the failure of the debtor to repay the financial obligations under the agreement.

One of the natural consequences of the inability of Article 9 to define and delimit 'default' in its provisions is that Article 9 leaves a vacuum for the secured party to include all things that may subsequently go awry in the transaction to constitute default. However, notwithstanding every conceivable circumstance that may constitute 'default' that the secured party may include in the default clause, there may still arise a situation which was not contemplated by the parties. In such a case, the secure party may put in a clause which gives him a right to declare a default whenever

[703] See Linda J. Rusch, Stephen L. Sepinuck , Problems and Material on Secured Transactions, supra footnote 697, p. 128

[704] See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 480 defined default as 'the omission or failure to perform a legal or contractual duty; especially the failure to pay a debt when due.'

in good faith it deems itself insecure.[705] This right of the secured party to include any term as an element of default is circumscribed by the need to protect consumers from unfair practices of the secured party. Generally, creditors are not permitted by the mandatory laws of the state to include flimsy, unfair, arbitrary and unconscionable terms which can amount to default entitling the secured creditor to enforce his security interest especially in consumer transactions.[706]For example, the Uniform Consumer Credit Code 1974 defines default as follows: "*An agreement of the parties to a consumer credit transaction with respect to default on the part of the consumer is enforceable only to the extent that: (1) the consumer fails to make a payment as required by agreement; or (2) the prospect of payment, performance, or realization of collateral is significantly impaired; the burden of establishing the prospect of significant impairment is on the creditor"*[707] Also the fact of the unequal bargaining power of the parties will prohibit a court from enforcing unconscious, flimsy and immaterial conditions that the creditor may insert into the security agreement as constituting default and this is against the mandatory laws of some States.[708] Secured parties can even be liable, and damages may be recoverable against them where consumer protection laws are violated.[709]

[705] See section 1-309 Uniform Commercial Code on the option for the secured creditor to accelerate payment and also power of the secured party in good faith to deem itself insecure. Also an example of the provisions which gives the secured party the right to declare a default where it deems itself insecure. Section 9.4 of Accounts Receivable/Inventory Loan Agreement contained in appendix 1to William D. Warren, Steven D. Walt, Secured Transactions in Personal Property supra footnote 701, p. 624 which provides as follows: '9.4 Additional Remedies. Notwithstanding any other provisions of this agreement, upon the occurrence of any event, action, or inaction by borrower, or if any action or inaction is threatened which CNB (City National Bank) reasonably believes will materially affect the value of the collateral, CNB may take such legal actions as it deems necessary to protect the collateral, including but not limited to, seeking injunctive relief and the appointment of a receiver, whether an event of default or potential default has occurred under this agreement".

[706] Article 9 close linkages to consumer protection will be discussed in details in chapter 4 of this work.

[707] See section 5 – 109 Uniform Consumer Credit Code 1974; see also William D. Warren, Steven D. Walt, Secured Transactions in Personal Property supra footnote 701, p. 249.

[708] An example of the mandatory law of a state that protects the consumer debtor is the Massachusetts law which provides as follows: "in any consumer credit transaction involving a loan that is secured by a non-possessory security interest in consumer goods a provision relating to default is enforceable only to the extent that the default is material and consist of the debtor's failure to make one or more payments as required by the agreement, or the occurrence of an event which substantially impairs the value of the collateral" see Massachusetts General Laws ch.

Suffice it to say that despite the fact that Article 9 did not provides what actions or inactions of the debtor constitute 'default,' it however provides remedies for the secured party in event the 'default' as stipulated by the parties in the security agreement occurs, although parties are free to provide other additional remedies if they so wish. Having considered the meaning of default, this work will discuss the normal consequences arising from it.

3.3. After Default What Follows? - Article 9 Enforcement Mechanisms

Once 'default' - as stipulated in the security agreement by the parties - has occurred, the secured party has four basic remedies under Article 9 to recover his money from the debtor. These remedies are: (a) retention of the collateral,[710] (b) right to take possession of the collateral, or without removal, the right to render equipment unusable and to dispose the collateral on the debtor's premises,[711] (c) sale or other disposition of the collateral,[712] and (d) an action for the debt.[713] One novelty of the Article 9 is the declaration that the remedies available to the secured creditor are cumulative and a secured party can pursue all its options simultaneously.[714] In the case of Phillips v. Ball and Hunt Enterprises, Inc.[715] the court held that *"the creditor was not barred from asserting its rights under the security agreement because the claim was reduced to judgment. UCC section 9 – 501 (1) makes clear that the secured party is not barred by any*

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225 section 131 (a), See Linda J. Rusch, Stephen L. Sepinuck, Problems and Material on Secured Transactions supra footnote 697, p. 128

[709] See the case of Johnson County Auto Credit Inc. v. Green, 83 P. 3d 152 (kan. 2004) where creditor was held liable for failure to comply with Kansas consumer protection statute when enforcing its security interest in debtor's motor vehicle. Consumer protection laws will be discussed in details in chapter 4 of this work.

[710] See ss. 9 – 620 UCC.

[711] See s. 9 – 609 UCC.

[712] See s. 9 – 610 UCC.

[713] See s. 9 – 601 (a) UCC.

[714] See s. 9 – 601 (c) UCC. However in actual practice, the secured party is most likely to start with self-help repossession where the collateral is with the debtor and may resort to court where occasion demands.

[715] (WDVa 1996) 933 FSupp. 1290.

doctrine from asserting his rights under the security agreement after a judgment has been obtained because the creditor's rights and remedies are cumulative." This means that until the secured party is made whole, the pursuit of one remedy does not estop the secured party from pursuing other remedies though the secured party cannot make profit from the debtor from compounding the remedies.[716] In using the remedies cumulatively, it is instructive to note that the use of cumulative remedies may not override the non-UCC state laws like the law of tort and statutes regulating collection of debts under which simultaneous exercise of remedies in the same case may constitute abusive behavior and harassment which may give rise to liabilities against the secured party.[717]

The Article 9 enforcement mechanisms are efficient not only because of the remedial provisions they afford the creditor, but also its efficient institutions and rule of law processes[718] (both public and private mechanisms) that work together in helping the secured party enforce its security interest in the case of default. Tajti[719]has identified four enforcement avenues which he calls the 'four–pronged system' of the enforcement of security interest. They are as follows: efficient bailiff system, readily exploitable prompt preliminary and interim measures, efficient self help system as well as civil procedure system. In other words, enforcement of security interests is efficient in the United States because of the existence of equally efficient, 'creditor supportive'

[716] See the case of Olsen v. Valley National Bank, 234 N.E. 2d 547 (111. 1968).
[717] See official comment 5 to section 9 – 601 UCC which provides as follows: "Moreover, permitting the simultaneous exercise of remedies under subsection (c) does not override any non-UCC law, including the law of tort and statutes regulating collection of debts, under which the simultaneous exercise of remedies in a particular case constitutes abusive behavior or harassment giving rise to liability."
[718] Rule of law here means having regard to due process of law in the enforcement of securities by the secured creditor. Such due process include without the breach of the peace clause in repossession, the sale of the collateral that must be commercially reasonable and the rule 60 per cent rule in consumer goods. On the other hand, it also involves the civil and criminal liabilities imposed on the debtor for willful damage or theft of the collateral after default. These issues will be discussed in this chapter.
[719] See Tibor Tajti, Comparative Secured Transactions Law, supra note 48, p. 182.

institutions (both public and private) and the arrays of competent choices which a creditor has in the enforcement of security interest. This not only gives confidence in the system and makes credit more available, but it ensures that credit is given at more favorable terms which as already pointed out, are sine qua non for the growth of the economy. The recent credit crunch which resulted in global financial crisis and economic recession especially in the United States is still fresh in memory and instructive on the dependency of the growth of the economy on the availability and flow of credit in the economy.[720] The four institutions will be discussed below in relation to the remedies and rights available to the secured party vis-à-vis the rights of the debtor in cases of default under Article 9. This will be a prelude to making a comparative analysis of the United States four institutions with what exist in Nigeria and Cameroon to see whether urgent changes should be made to improve the enforcement mechanisms in both countries and possibly bring it at par with what is obtainable in the United States.

3.3.1. Secured Transactions Enforcement Mechanisms in Nigeria and Cameroon

In Nigeria, enforcement of secured credit laws is partly governed by the procedure stated in the various States' High Court Civil Procedure Rules,[721] Federal High Court Civil Procedure Rules, Companies Winding-Up Rules and the Bankruptcy Act. However, the remedies open to a secured party upon default by the debtor are largely determined by the type of the transaction and the concomitant position of the secured party, i.e., whether the secured party is a fixed or

[720] See supra footnote 5, for once again President Obama's first address to the joint session of the US congress on the financial crisis and credit crunch plaguing the US on the 24th of February 2009, where he succinctly summarized the importance of credit in an economy and the urgent need for credit to begin to flow again in the United States.
[721] Each of the 36 states plus the Federal Capital Territory Abuja has its own High Court Civil Procedure Rules, each of the state high court rules provisions are substantially similar to the others. The rules are made by the Chief Judge of each state. The rules amongst other things govern the procedures in instituting, prosecuting and defending a suit at the high court of the state.

floating chargee, a legal mortgagee, someone in possession or control of the collateral or rather is only an equitable mortgagee.[722] It is also determined by the terms agreed upon by the parties and expressly stated in the security agreement, though as a rule of thumb, the terms determined by the parties to a large extent merely replicate the statutory terms in Nigeria.

A legal mortgagee has more rights and options over the debtor's mortgaged property than the equitable mortgagee. A legal mortgagee can exercise the power of sale of the mortgage properties without recourse to court while an equitable mortgagee has no such power, an equitable mortgagee can only sell the mortgaged property upon an order of court.[723] Generally speaking, a secured party has three options to enforce a security interest in the event of a default by the debtor. They are as follows: the appointment of a receiver or receiver and manager to run the collateral (if it is a business entity) in order to recover the debt;[724] disposition or sale of the collateral to satisfy the debt and institution of court proceedings to recover the debt. Theoretically these options should work well to ensure that a secured party realizes its security in the event of default by the debtor, however in practice these options have become counter-productive and each option has been bogged down by protracted court litigation. There have also been inordinate delays in court assisted options due to the slow process of the judicial

[722] Just like under the English Law, the distinctions between legal and equitable mortgage still exist under the Nigerian law. See Richard Bethell-Jones, *Chapter on England* in WINNIBALD MOOJEN AND MATTHIEU TRUIDEN (eds.), BANK SECURITY AND OTHER CREDIT ENHANCEMENT METHODS (Kluwer Law International, 1995), p. 133; see also Jelili Omotola, the Law of Secured Credit, supra footnote 60, p. 23.

[723] The method of creating legal and equitable mortgages differs. The English principles on the creation of legal and equitable mortgages are analogous to that of Nigeria. Whilst the creation of a legal mortgage is by way of executing a deed of legal mortgage between the mortgagor and mortgagee, an equitable mortgage can be created by several other ways. Roy Goode identified six ways of creating an equitable mortgage: (a) where the property used for the mortgage relates to future property (b) where there is no transfer or agreement for transfer at all, but merely a charge (c) where there is no present transfer, merely an agreement for transfer or a declaration of trust by the debtor, (d) where the transfer is not made in accordance with the formal requirements for the transfer of legal title, (e) where the transfer is made not to the creditor but to a third party as trustee for the creditor and (f) where the transferor's title to the asset is equitable and not legal. See Roy Goode, Legal Problems of Credit and Security, supra footnote 63, p. 8; see also Jelili Omotola, the Law of Secured Credit, supra footnote 60, p. 23.

[724] See sections 389 and 390 (1) CAMA.

process in Nigeria. The above options will be analyzed side by side in comparison to Article 9 remedies.

In Cameroon, the bi-jural nature of the country foisted on the country two methods of recovery procedure; i.e., enforcement of secured transactions in the Anglophone and the Francophone parts of Cameroon. They were the 'injunction to pay'[725] for French-speaking Cameroon, and the 'summary judgment'[726]for English-speaking Cameroon until the 1989 consolidation reforms. Needless to say, these two methods were inherited from French civil and English common law and were by virtue of the provisions of sections 46, 43 and 68 of the 1961, 1972 and 1996 constitutions of Cameroon respectively made applicable locally as long as they were not repealed or modified by any national law.[727]

In 1989, Cameroon unified the recovery procedure in the Francophone and Anglophone parts of Cameroon by virtue of law No. 89/021 of December 29 1989 which introduced a simplified procedure for recovery of commercial and civil debts; later to be modified by law No. 96/10 of August 1996.[728] This simple recovery procedure was then replaced by the OHADA Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution (hereinafter known as

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[725] Injunction to pay was made applicable to Francophone Cameroon by virtue of decree of 18th of April 1954, which was adopted into Cameroon by "the French decree of 25th August 1937 on the Simplified Recovery Procedure of Small Commercial Debts of Less than FCFA 250,000."
[726] The English Summary Judgment was adopted from Order 14 of the Nigerian Supreme Court Civil Procedures Rules of 1948. The Anglophone part of Nigeria was governed as part of Nigeria until 1961 when this part joined the French part of Cameroon. Consequently the summary judgment is part of the English Law the Anglophone Cameroon inherited due to its association with Nigeria. Since summary judgment procedure was adopted from the Nigerian Supreme Court Rules of 1948, summary procedure will be discussed in details during the analysis of Nigerian civil procedure rules that aid speedy enforcement of secured transactions.
[727] Fonkwe Joseph Fongang, Lucy Asuagbor, Francois Anoukaha, Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution with Commentaries available at < http://www.juriscope.org/infos_ohada/actseng/recovery%20peocedures.pdf > last visited on the 20th of January 2011.
[728] The unification was achieved by the court "applying the new law with either a civil law or common law bias depending on their location in Francophone or Anglophone Cameroon." See id. p. 3.

the Uniform Act on Recovery and Execution) which was adopted by the OHADA member states in Libreville Gabon on 10th April 1998.[729] Currently when there is a default by the debtor, the secured party employs the provisions of the Uniform Act on Recovery and Execution to recover. Interestingly, under the new Uniform Act on Recovery and Execution, the method of enforcing secured transactions or other debt owed to the creditor from the debtor upon default is by means of injunction to pay. Hence it is this procedure that will be analyzed later in this chapter in the section devoted to the issue of judicial enforcement of secured transactions in Cameroon.

3.4. Secured Creditor's Rights under Article 9: Self–help Repossession

Article 9 grants to the secured party the right to take the possession of the collateral upon default by the debtor.[730] Repossession can be of two ways: it can be by voluntary surrender of the collateral by the debtor or by its repossession by the creditor or usually by his agents (repossession companies).

3.4.1. Voluntary Surrender

Although Article 9 does not use the term 'voluntary surrender,' the statutory basis of the concept of voluntary surrendering can be deduced from the provisions of s. 9 – 609 (c) UCC. The term voluntary surrender is used to describe when a debtor willingly turns over the collateral to the

[729] While Article 9 of the OHADA Treaty on the Harmonization of Business Law in Africa provides that the Uniform Acts enter into force in member states 90 days after their adoption, Article 10 of the Treaty provides that the Uniform Acts being a supra national law is directly applicable and supersedes any contrary provisions of national legislations in the member states notwithstanding any conflict the Uniform Acts may cause in respect of previous or subsequent enactment of national laws.
[730] See s. 9 – 609 (a) UCC.

secured party upon default.[731] That is, however, permitted by Article 9 only where the agreement of the parties so provides.[732] Obviously, where the debtor refuses to surrender the security interest voluntarily, the other option left to the secured party is to repossess the security interest or pursue other Article 9 judicial means of enforcement of the security interest.

Debtors can voluntarily surrender the collateral to the secured creditor when they are in default of their obligations of repayment instead of waiting for the creditors to repossess the security interest. Voluntary surrender by the debtor has advantages both for the secured creditor and the debtor. For the secured creditor, voluntary surrendering saves the time and reduces the hassles of repossession. Again, it bars the debtor from claiming that the repossession was wrongful with the attendant consequences of damages which may be awarded to the debtor for wrongful repossession of the security interest by the secured party or its agents. For the debtors, the advantages of voluntary surrender are many. *First*, the debtor may save the cost of repossession which includes attorney's fee and the fee to the repossession agencies which the secured party will defray from the proceeds of the repossessed property. *Second*, the voluntary surrender forestalls the probability of the creditor or his agent repossessing additional properties of the debtor while repossessing the security interest; for example, the debtor's tools left in the trunk of the car or jewelries or cash left in the glove compartment of the car. *Third*, it ensures that the collateral may not be damaged in the process of repossession which enhances the price for which

[731] See section 9 – 609 (c) UCC which provides as follows: "if so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties." See also Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions - The Consumer Credit and Sales Legal Practice Series, supra footnote 688, paragraph 6.2.1 pp.183 – 185.

[732] See Michael Downey Rice, *Equipment Loan Agreements* in STARR L. TOMCZAK (ed.), CORPORATE AND COMMERCIAL FINANCE AGREEMENTS (Shepard's/Mcgraw-Hill, 1984), p. 3-53.

it could be sold. *Fourth*, when the collateral is surrendered on time, it forestalls depreciation and increases the price for which it could be sold. The selling price of the collateral is of more importance to the debtor as it may eliminate or reduce the deficiency claims against the debtor. *Fifth*, the ugly sight, the psychological trauma and inconvenience the repossession of collateral gives to the debtor would be avoided. *Sixth,* in return, and as a sign of good will to the voluntary surrendering, the creditor may decide to waive its deficiency claim against the debtor[733] or even to refrain from including the default in the credit report on the debtor.[734] Where the secured creditor agrees to accept the surrendered collateral and waives his right to demand for deficiency claim (where it exists), this development is called a contract of accord and satisfaction and the secured creditor will be estopped from asserting the contrary of these representations.[735] In the case of Cobb v. General Motors Acceptance Corp,[736] the court held that the return of the collateral is a new consideration as the security agreement did not stipulate that the debtor should return and surrender the collateral and as such it can be a basis of finding that there is a contract

[733] However, waiving of the deficiency judgment by the creditor following a voluntary surrender of the collateral by the debtor may be of no real incentive to the debtors where such debtors live in those States of the United States where the laws forbid deficiency claims in consumer transactions involving repossession of the collateral. Such laws are called election-of-remedy or anti-deficiency statutes. The statutes give the creditor a choice of either to sue the consumer for the full amount of the loan or repossess the collateral in full and final discharge of the loan. Accordingly, where the creditor chooses to repossess the collateral, the creditor has foreclosed the option of suing for the deficiency judgment and where the creditor decides to sue the consumer debtor, the creditor cannot repossess the collateral. See Ala. Code s. 5-19-13; Ariz. Rev. Stat. Ann. S. 44-5501; Cal. Civ. Code ss. 1812.2 to 1812.9 (West); Cal. Civ. Code s. 2983.8 (West) (Automobiles Sales Finance Act); Cal. Health & Safety Code s. 18038.7 (West) (mobile and manufactured homes, floating homes as well as truck campers); Colo. Rev. Stat. S. 5-5-103; Conn. Gen. Stat. S. 36a-785 (f); D.C. Code s. 28-3812(e); Fla. Stat. S. 516.31(3); Idaho Code Ann. S. 28-45-103; 815 III Comp. Stat. S. 405/26; Ind. Code s. 24-4.5-5-103; Kan. Stat. Ann. S. 16a-5-103. See Carter, Sheldon, Rao, Repossessions, supra note 688, p. 400.

[734] See Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions - The Consumer Credit and Sales Legal Practice Series, supra footnote 688, paragraph 6.2.1, p.183.

[735] Under the common law rule of accord and satisfaction, where a debtor returns or surrenders a property to a secured creditor with the understanding, expressly or implied that the surrendering of the property is in satisfaction of the creditors claim against the debtor and the creditor accepts such property and retains same, this will result in accord and satisfaction and the creditor may be estopped from seeking for deficiency judgment. Thus in the case of Farmers & Merchants Bank v. Hancock 506 So. 2d. 305 (Ala. 1987), the Court upheld the jury finding of accord and satisfaction when the bank told the debtor that the bank will not sue him if he signed the documents allowing repossession sale. See id. paragraph 12.5.8.3 p. 411.

[736] 589 So. 2d 728, 16 U.C.C. Rep. Serv. 2d 1253 (Ala. Civ. App. 1991).

of accord and satisfaction between the parties which bars the creditor for asking for deficiency judgment.[737]

Voluntary surrendering of the security can lead to the *'reinstatement agreement,'* where the creditor may agree not to sell the collateral and may return it back to the debtor if the debtor makes certain number of payments. This right to reinstate as provided in many state laws[738] is different from the right to redeem as provided under the Article 9 UCC in two ways. *First* while the right to reinstate only obligates the debtor to pay the amount that were in default prior to acceleration including the repossession cost, the right to redeem requires the debtor to pay the full accelerated amount including the cost of repossession. *Secondly,* the right to reinstate is limited to specific time like 15 days after repossession and this right at times elapses before the goods are disposed of either in private or public sale. As opposed to that, the UCC right of redemption has no time limitation and so may be exercised at any time before the disposition of the repossessed collateral. Besides, this right is not available where the debtor has acted in bad faith like threatening or attempting to destroy the goods.[739] The right to reinstate may be used in some states to cure non pecuniary default like failure of the consumer to properly insure the vehicle.[740]

[737] See also the case of Jackson v. Slidell Nissan, 693 So. 2d 1257 (La. Ct. App. 1997) here the court held that that the buyer's voluntary surrendering of the vehicle is part of the agreement where the creditor waived its right to seek a deficiency claim against her.

[738] See Cal. Civ. Code S. 1812.2 (West) (Retail Instalment Sales Act), though some statutes uses the term redeem, the statute allows reinstatement of contract by paying unaccelerated amount, Conn. Gen. Stat. S. 36a-785; 625 III. Comp. Stat. S. 5/3-114 (f-7); 815 III. Comp. Stat. Section 405/26 (RISA); La. Rev. Stat. Ann. Section 9:5363.1; Miss. Code Ann. Section 75-9-614; Ohio Rev. Code Ann. Section 1317.12 (West); See Carolyn L. Carter, John Rao, Jonathan Sheldon, Repossessions – The Consumer Credit and Sales Legal Practice Series, supra footnote 688, p.287.

[739] See Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions - The Consumer Credit and Sales Legal Practice Series, supra footnote 688, paragraph 9.2.1 pp. 287-288.

[740] See Wis. Stat. Section 425.208 (Consumer Act); Black v. Peoples Bank & Trust Co., 437 So. 2d 26, 37 U.C.C. Rep. Serv. 641 (Miss. 1983) (debtor may cure default and acceleration caused by the creditor's insecurity by offering reasonable assurance to the creditor to alleviate the insecurity).

Interestingly, voluntary surrendering of the collateral does not foreclose the right of the debtor to challenge the disposition of the collateral by the creditor as being commercially unreasonable. Irrespective of the manner of repossession, a debtor has the unfettered right to challenge the disposition of the collateral if it is not done in a commercially reasonable manner.[741]

It should be noted that voluntary surrender of collateral by the defaulting debtor does not dispense with the other cost associated with repossession like storage or sales-costs. Hence where State legislations permits, the creditor will debit the debtor account with the aforementioned costs and will proceed to recover the balance as a deficiency claim unless there is a negotiation between the parties which has resulted in the creditor granting concessions and waiving those expenses or deficiency claim for the debtor. No doubt that voluntary surrender can induce the creditor to make a lot of concessions to the debtor, but it is advisable to put the concessions and agreements in writing otherwise the secured creditor might decide to insist on its full rights after he takes control or possession of the collateral.[742]

3.4.1.1. Self-help Repossession by the Creditor

The process of taking possession can be with the aid of judicial process or without the aid of the judicial process.[743] Repossession with the aid of judicial process will be discussed under enforcement through judicial means. The other type of repossession is the one carried out without the aid of judicial process. Known as self-help, although it is fraught with risks and

[741] See section 9 – 610 UCC.
[742]See Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions - The Consumer Credit and Sales Legal Practice Series, supra footnote 688, p, 184.
[743] See s. 9 – 609 (b) UCC.

casualties especially for the repo men practicing it,[744] it is a veritable tool of enforcement of security interest in the American legal history. Self-help repossession[745] can only be resorted to under Article 9 if it can be done without the breach of peace.[746] It is carried out usually by professionals who know and understand the precarious position of repossessing collateral without breaching the public peace although repossession has different effects on consumer and business debtors.[747]

The standard 'without breach of the peace' is not defined under the code and has become a constant issue in litigation that has arisen in connection to repossession. In several cases the

[744] See Warren and Walt, Secured Transactions in Personal Property, supra note 701, p.269 quoting the news reported in New York Times, March 8, 1994 where in 1994, a Texas debtor killed a repo man who came to repossess his truck. The Texas debtor shot and killed the repo man as he was hooking the truck to the debtor's vehicle in the night. Police refused to arrest the Texas debtor because of a frontier-era law which gives considerable leeway in dealing with nighttime thieves and intruders. The New York Times Article also reported that one or two repo men are killed yearly whilst repossessing, whereas the number of death in 1990 was 4 repo men.

[745] A good repossession clause is usually contained in the remedies clause as follows: "After an Event of Default has occurred and is continuing, the Secured Party shall, without any other notice to or demand upon the debtor, thereafter have in any jurisdiction in which enforcement hereof is sought, in addition to all other rights and remedies, the rights and remedies of a secured party under the Uniform Commercial Code of the State or any other relevant jurisdiction and any additional rights and remedies as may be provided by applicable law, including the right to take possession of the collateral, and for that purpose the Secured Party may, so far as the Debtor can give authority therefore, enter upon any premises on which the Collateral may be situated and remove the same therefrom.

The Secured Party may in its discretion require the Debtor to assemble all or any part of the Collateral at such location or locations within the jurisdiction(s) of the Debtor's principal office(s) or at such other location or locations as the Secured Party may reasonably designate. Unless the Collateral is perishable or threatens to decline speedily in value or is a type customarily sold on a recognised market, the Secured Party shall give to the Debtor at least ten days prior written notice of the time and place of any public sale of Collateral or of the time after which any private sale or any other intended disposition is to be made. The Debtor hereby acknowledges that ten Business days prior written notice of such sale or sales shall be reasonable notice.

In addition, the Debtor waives any and all rights that it may have to a judicial hearing in advance of the enforcement of any of the Secured Party's rights and remedies hereunder, including, without limitation, the Secured Party's right after an Event of default has occurred and is continuing to take immediate possession of the Collateral and to exercise its rights and remedies with respect thereto." See Cindy J. Chernuchin, (ed.), Forms Under Article 9 Of the UCC, supra footnote 556, p. 63.

[746] See the combined reading of sections 9 – 609 (a) (1) & (b) (2) UCC which provides as follows: 9 – 609 (a) (1) After default, a secured party: (1) may take possession of the collateral, (b) a secured party may proceed under subsection (a): (2) without judicial process, if it proceeds without breach of the peace.

[747] According to Gilmore, "In the financing of business debtors repossession causes little trouble or dispute. In the underworld of consumer finance, however, repossession is a knockdown, drag-out battle waged on both sides with cunning guile and a complete disregard for the rules of fair play." See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 1212.

debtor whose property has been repossessed by the agent of the secured party would file a suit to claim damages from the secured party on the basis that the repossession breached the public peace. Case laws have established that a secured party will violate breach of the peace provisions if the secured party or its agent enters an enclosed area without consent, a house, apartment, garage or office; whereas no breach of the peace violation may be established where the repossession is carried out on unattended cars parked on the street or driveways.[748] Generally speaking, any repossession made against protest by the debtor, or by anyone else present even though not the debtor, may constitute a breach of the peace notwithstanding that no violence or major disturbance occurred.[749] Thus it was held in the case of Morris v. First National Bank[750] that a repossession of lawnmower from the front yard amidst protest of debtor's son constituted breach of the peace and trespass. In the case of Mckee v. State,[751] it was held that "*to constitute a breach of peace it is not necessary that the peace be actually broken, and if what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required, nor is actual personal violence an essential element of the offence.*"[752] The court also held in the case of Dixon v. Ford Motor Credit Co.,[753] that "*when a creditor repossesses in disregard of the debtor's unequivocal oral protest, the repossession may be found to be in*

[748] See Warren and Walt, Secured Transactions in Personal Property, supra foot note 701, p. 271.
[749] See Douglas J. Whaley, Secured Transactions, supra foot note 50, pp. 150 - 151.
[750] 254N.E.2d 683 (Ohio 1970).
[751] 75 Okl. Cr. 390, 132 P.2d 173.
[752] See also the cases of Stone Machinery Company v. Kessler 1 Wash. App.750, 463 P.2d 651, 7 U.C.C. Rep. Serv. 135 (1970), and also the case of Beneficial Finance Co. of Tulsa v. Wiener, 405 P.2d 691 (Okl 1965), Hollibush v. Ford Motor Credit Co. , 508 N.W.2d 449 (Wis.App.1993), Ford Motor Credit Co. v. Herring, 27 U.C.C.Rep. 1448 267 Ark. 201, 589 S.W.2d 584, 586 (1979).
[753] 391 N.E.2d 493, 497 (111.App. 1979), see also J. White & R. Summers, Uniform Commercial Code (1st ed. 1972) s. 26-6 p. 972. But in the case of Clarin v. Minnesota Repossessors, Inc, (8th Cir 1999) 198 F3d 661, where there were oral protest to the self help repossession and in response to the oral protest to the repossession of the debtor's car, the repossession company phoned the police, allowed the debtors to phone the secured creditor, allowed the removal of debtor's personal belongings, and furnished a copy of the repossession order. The court in analyzing section 336. 9 – 503 of the Minnesota UCC held that despite the fact that the debtors initially protested to the repossession, there was no breach of the peace.

breach of the peace." However in the case of Williams v. Ford Motor Credit Co. [754]where the repo men came to repossess the car of Cathy Williams around 4.30 am for the default in payment obligations by the ex-husband, wherein Williams even admitted that the men were civil to her and even gave her back some personal items that was in the car before taking the car away. The appeal court held that the repossession was lawful, there was no breach of peace and therefore quashed the decision of the jury which awarded her $5,000.00 in damages against the secured creditor.[755]

The question to be asked especially in the light of the court decision in the cases of Morris v. First National Bank, Mckee v. State and others - that were decided in like manners - is whether it is possible not to expect resistance from the debtor if his personal property is being taken away by the secured party or his agents? Also whether there is a fine line of division between resistance which may not amount to breach of peace and protest that may constitute the breach of peace. These questions become more important because almost every debtor who has defaulted in repayment will not want his property repossessed and sold off as this will mean an end to economic activity which he does with such collateral. Realizing this natural inclination of human beings to resist anything that will cause inconvenience or discomfort, courts and jury ought to be wary and construe acts that constitute breach of peace liberally and with the benefit of doubt going to the secured party. This argument is reinforced by the fact that the reason of repossession in the first place is the breach of the secured transactions contract (default of payment) by the debtor. Consequently, the court should only come to the conclusion of breach of the peace when there is a real breach: like violence, break down of law and order, imminent dangers to the

[754] 674 F.2d 717 United States court of Appeals, Eight Circuit, (1982).
[755] See also the similar case of Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171 (III. App. 1996) where the court held that there was breach of peace in the creditor's repossession.

persons present as opposed to mere protest from the debtor or persons present or altercations by the parties. Where resistance did not come from the debtor but from other persons present, the court ought not to find that there was a breach of the peace.[756] In such cases where resistance came from other parties present other than the debtor (no matter the relationship between the debtor and such third party), the court should hold such third parties liable for breach of peace as such third parties are meddlesome interlopers, not being privy to the security agreement between the secured creditor and the debtor.

Since most resistance of the debtor during repossession may likely lead to the interpretation of the violation of the principle of without the breach of peace by the court, and all a debtor need do is to protest vehemently to set in motion the acts that will result in the breach of peace, and capitalizes on it to get damages, a reasonable and wise secured party or its agent[757] will repossess when the debtor is not around the property or in the middle of the night.[758] Where the debtor is present and resists repossession, the secured party can withdraw, re-strategize and come back to repossess when the debtor is absent from his property since nothing stops the secured creditor from coming several times thereafter to repossess the property.[759]

[756] See the case of Morris v. First National Bank (supra).

[757] Agents of the secured party in this case could be companies who are formed for the purpose of enabling a secured party to repossess the properties of the defaulting debtor among other purposes of the company. These agents are called repossessors. Examples of repossessor companies are Repossessor Inc. with its headquarters at Minnesota, United Repossessors Inc. with its headquarters in Kansas, First National Repossession based in Minnesota, H.A.R. Inc, West Valley Wrecker Sales in California etc. In the US, repossession laws are State laws for all the 50 States in America. The companies that are engaged in repossession businesses are registered and regulated.

[758] See Ralph Thomas, The Auto Repossession Business available at < http://www.pimall.com/nais/n.repo.html > last visited on the 9th of April, 2011. In cases of auto repossession which is most famous it is illegal to enter into the closed garage of the debtor to repossess, so the repossessor waits till the car is driven out to work or parked in a grocery store. Also in case of car repossession, repossession is not completed until the car is driven off the debtor's property.

[759] See the case of Ford Motor Credit v. Cole 503 S. W. 2d 853 (Tex.1974).

When a breach of peace has occurred, the repossession would not be in accordance with Section 9 – 609 (b) (2) and the implication will be that the secured party would lose the authorization and protection to repossess under Article 9. In such a case the secured party is liable to pay damages to the debtor in the event of a law suit from the debtor. The debtor may be awarded punitive damages if the jury finds out that the means used to repossess the collateral by the secured party is unconscionable.[760] The loss of the authorization and protection to repossess collateral may not be a ground for the court to reverse the repossession and return the collateral to the debtor where the security agreement between the parties provide for repossession of collateral even though the repossession was done in violation of the principle of breach of the peace or not consistent with the provisions of Article 9. It should be noted that whether the repossession is with the aid of the judicial process or by self help, the essence of repossession is to dispose of the collateral in a commercially reasonable manner and use the proceeds of the sale to satisfy the debt.

3.4.1.2. Civil and Criminal Liabilities of the Debtor for Misconduct during Repossession in the United States

Despite the fact that repossession of collateral is skewed in favor of the debtor by the inclusion of the without breach of the peace provisions, many acts of the debtor may bring upon him both civil proceedings and criminal prosecution if the debtor acts in a way that is unreasonable from the time of the default to the period of repossession. A debtor is limited to verbal and passive resistance to repossession and where the debtor resorts to violence he may be criminally liable.

[760] See 35 A. L. R. 3d 1016, see the case of Williamson v. Fowler Toyota Inc, (Okla.SCt 1998) 1998 OKla 14, 956 P2d 858 where it was held that a secured party was liable in punitive damages for the act of the repossession agency (independent contractor acting on secured party's behalf) who in a bid to repossess the debtor's vehicle trespassed into the premises of the automobile repair business that was in an enclosed lot after dark, without the owner's permission, and cut the chain of a padlocked gate with bolt cutters, pushed the car out of the lot, towed the car and then notified local police of the repossession.

The controversial civil liability of debtors was found to exist in the case of Texas National Bank v. Sandia Mortgage Corp.,[761] where the Court of Appeal held that "*a debtor who grants a security interest makes an implied promise not to interfere with repossession of the collateral. Interfering with repossession was therefore a breach of contract. Consequently, the court upheld the award of attorneys' fee to the creditor under a state law that made a party who breached a contract liable for the other's attorney fees.*"[762] In some states in America[763] it may not be in the interest of the debtor to resist repossession, because the debtor may be liable in damages to the creditor if after default and a demand in writing to turn over the collateral, the debtor has wrongfully failed to deliver the collateral to the creditor or the debtor has abused, misused or damaged the collateral.[764]Other instances of civil liability include cases where the debtor may be liable for malicious damage to the collateral[765] or other conduct grossly inconsistent with the realization of the collateral by the creditor.[766]

Apart from the civil liability, a debtor can also face criminal liability for conducts that are aimed at defrauding the secured creditor or obstructing the realization of the security interest. First the debtor cannot interfere with repossession when it is carried out by the sheriff of the court;

[761] 872 F. 2d 692 (5th Cir. 1989).
[762] Id., p. 188.
[763]The states are Arizona, Idaho, Indiana, Colorado as well as Minnesota.
[764]See the model Uniform Consumer Credit Code section 5.103 (6) (1974) which provides as follows: "The consumer may be held liable in damages to the creditor if the consumer has wrongfully damaged the collateral or if, after default and demand, the consumer has wrongfully failed to make the collateral available to the creditor."; Arizona Revised Statute Annotated Section 44-5501; Colorado Revised Statute 5-5-103(5) provides as follows "The consumer may be liable in damages to the creditor if the consumer has misused, abused, or wrongfully damaged the collateral or if, after default and demand in writing, the consumer has wrongfully failed to make the collateral available to the creditor." District of Columbia Official Code Section 28-3812 (e) (6); Idaho Code Annotated Section 28-45-103; Indiana Code Section 24-4.5-5-103(5) Minnesota Revised Statute Section 325 G.22 (2).
[765] See the case of State v. Batchelor 2001 WL1089768 (Tenn. Ct. App. Sept.18, 2001) where the conviction of the debtor was upheld for deliberately scratching the paint of the car that is being repossessed.
[766]See Worth v. State, 346 S.E.2d 82 (Ga.Ct.App. 1986), where the debtor transferred the property to a relative and gave the creditor several inconsistent explanations about the property when the creditor came to repossess the property.

interference with the sheriff execution of the order of replevin may make the debtor liable to contempt of the court or criminal sanctions. Also there are states' criminal statutes that prohibit the debtor from removing, destroying, transferring, encumbering, or concealing security interest with the intention either to defraud or prevent the enforcement of the security interest, [767]although the consumers are hardly prosecuted under these laws and even conviction will require cogent evidence of fraudulent intention.[768] The debtor himself may be liable if he threatens or breaches the peace when the creditor comes to repossess upon default. [769] The above civil and criminal liabilities of the debtor show that, besides the responsibility of civility in the repossession of the collateral placed on the secured creditor or its repossession agents, the law also expects some decorum from the debtor from the time of his default of the obligations contained in the security agreement to the point of repossession of the collateral from him. Notwithstanding the usefulness of repossession, there are some transactions that are either exempted from repossession or restricted and these transactions will be analyzed hereunder.

3.4.1.3. Bars to Repossession in the United States

In spite of the advantages and usefulness of self help repossession, some states prohibit it in their statutes. This prohibition is different from the election of remedy or anti-deficiency statutes

[767] See 18 U.S.C. section 658; Alabama Code section 13A-9-46; Alaska Statute Section 11.46.730; Arizona Revised Statute Annotated Section 13-2204; Arkansas Code Annotated Section 5-37-203; California Penal Code Section 154 (West) Colorado Revised Statute Sections 18-5-206, 18-5-504; Delaware Code Annotated Title 11, section 891.

[768] In the case of case of United States v. Porter 842 F.2d 1021(8th Cir. 1988) fraudulent intention was found when the defendant who was the debtor was found of stealing the mortgaged tractor with intent to defraud. Also, in the case of United States v. Sanders 843 F. 2d 717 (8th Cir. 1987) although the debtor claimed that he thought that the sale was permitted by the court order , nevertheless his conviction for selling cattle subject to security interest with intent to defraud was upheld by the appeal court. See also the cases of United States v. Dobbs 63 F. 3d 391 (5th Cir. 1995); United States v. Gilbert 1995 U.S. App. Lexis 35482 (6th Cir. Nov. 2, 1995).

[769]In unpublished case of People v. Butler, 2002 WL 31058 309 (Cal.Ct. App. Aug. 23, 2002), the California Court of Appeal upheld the criminal conviction of a consumer for armed assault and threat for pointing a gun at repossessors, in the case it became irrelevant to the criminal charge whether the repossession was wrongful. See Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions - The Consumer Credit and Sales Legal Practice Series, supra footnote 688, paragraph 6.2.4, p, 185.

discussed earlier.[770] Here, some states statutes bar the use of self-help repossession for certain types of goods or for certain types of debtors. While in some states in America self help repossession is prohibited unless with the consent of the debtor, it is restricted in other states and it can only be embarked upon by certain lenders and for certain collateral only.

Wisconsin is an example where self help repossession is prohibited except with the consent of the debtor. The Wisconsin Consumer Act restricts the creditor to judicial action in order to recover the security interest except where the debtor voluntarily surrenders or the creditor has lawful possession of the collateral by virtue of a restraining order of the court. [771] Even when the creditor has judgment, it is still not a guarantee that it can repossess using the repo agencies, the creditor can only do so if there will be no breach of the peace otherwise the creditor will still make use of the court sheriff to take the property where there is potential danger for the violation of the breach of the peace principle.[772]The limitations also apply to motor vehicle consumer leases, provided the total amount due on the lease is less than $25,000.[773] A Maryland statute also forbids repossession unless the debtor has consented to the repossession. The statute indeed criminalizes the act of repossession except with the prior consent of the debtor. This consent of the debtor is satisfied where a repossession clause is contained in the security agreement which was signed by the debtor.[774] The Act applies to all repossessions within Maryland.[775] Also, State of New York allows repossession only when there is a *"substantially contemporaneous writing*

[770] See supra footnote 733.
[771] See Wis. Stat. Section 425.206
[772] See the case of Hollibush v. Ford Motor Credit Co. 179 Wis. 2d799, 508 N.W.2d 449 (Ct. App. 1993).
[773] See the case of Rameda v. Bank of Am., 668 N. W.2d 563 (Wis. Ct. App. 2003).
[774] See Md. Code Ann. Crim. Law Sections 7-104, 7-110(a0 (West); see also Borgen v. State. 468 A.2d 390 (Md. Ct. Spec. App. 1983).
[775] See 65 Op. Md. Att'y Gen. 163, 1980 WL 118090 (Jan. 29, 1980).

signed by the buyer indicating the buyer's agreement to the repossession."[776] District of Columbia allows repossession subject to consent from the debtor who is in possession of the collateral and the secured party repossesses without the use of force, intimidation, undue influence, fraud and breach of peace.

On the hand, State of Louisiana restricts the use of self-help repossession. Prior to January 1 2005, Louisiana[777] prohibited self-help repossession except the debtor agreed to surrender the property upon default or imminent default.[778] However in 2004, Louisiana revised its law which came into on January 1 2005. The revised law allows for the repossession of motor vehicle whether subject to a lease[779] or secured transactions[780] by creditors who are either financial institution chartered under the laws of Louisiana or other states. Persons licensed and regulated as lenders licensed under state consumer credit law or persons licensed and regulated as lenders under the Motor Credit Sales Finance Act are also allowed to repossess motor vehicle.[781] The repossessors or agencies must have a state license.[782] Prior to repossession, the secured creditor is mandated to inform the debtor in writing of its right to repossess the collateral upon default without further notice given by the creditor to the defaulting debtor[783] and the secured creditor shall file a notice of repossession with the required local authorities within three days of the

[776] See N. Y. Personal Property Law Section 413 (12) (c) (McKinney).
[777] The choice of states of Louisiana, Maryland, New York and District of Columbia were chosen randomly to illustrate the state that restrict, forbids and allows self help repossession. However the choice of Louisiana is instructive because of its quasi-French civil law legal system. Consequently, it would be basis for this work to advocate for the transplantation of self- help repossession in Cameroon since Louisiana legal system is somewhat similar to Cameroon civil law system.
[778] See Louisiana Revised Statute Annotated Section 10:9-609.
[779] Lease here is defined as "a contract or agreement of lease of any movable property, whether for a fixed term or for an indefinite period." See section 9:3306(15) of the Louisiana Revised Statute Annotated.
[780] See Louisiana Revised Statute Annotated. Sections 6:966, 6:965 (c).
[781] Id., Section 6:966 (c) (1), (2) and (3).
[782] Id., Section 6:966(d).
[783] Id., Section 6:966(a) (2).

repossession and pay a filing fee of $325.[784] Default that can warrant the secured creditor to repossess is further defined in the Act and not left to the agreement of the parties, here default means nonpayment of two consecutive payments on their due dates or nonpayment of the debt for up to sixty days.[785]

Apart from the states that prohibit or restrict self help repossession, there are some specific transactions or particular collateral types that cannot be repossessed vide self help repossession in many States. One of such collateral is mobile homes. The dilemma has been whether to treat a mobile home as a personal property, fixture or real property. Where a mobile home is treated as a personal property then it can be bought and sold or used to create a security interest and subject to Article 9 provisions wherein the secured creditor can retake the home either by replevin or self help repossession upon default of the debtor. However, if it is treated as a real property then the state real property laws govern and upon the debtor default different foreclosure rules and procedure applies: i.e., the state's mortgage foreclosure laws.[786] Again, the Servicemembers

[784]Id., Section 6:966.1.

[785] Id., Section 6:965 (c) (3). See also Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions - The Consumer Credit and Sales Legal Practice Series, supra footnote 688, paragraph 6.3.2, p. 189.

[786] Foreclosure of real property differ from state to state, but generally the procedure will involve informing the debtor of the default and giving him the opportunity to cure the default; where the debtor fails to cure the default, the creditor files a law suit to obtain a court a court order to sell the property, conducting a sale in a commercially reasonable manner. See Foreclosure State laws for all the States in America by Realty Trac available at < http://www.realtytrac.com/foreclosure-laws/ >; last visited on the 19th of March, 2011.

See Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions - The Consumer Credit and Sales Legal Practice Series, supra footnote 688, paragraph 5.2.1 p, 155. Generally most states treat mobile homes as a personal property; accordingly the mobile homes are subject to replevin or self-help repossession although it may cease to be a personal property when it is annexed to real property. In re Onyan 163 B.R. 21 (Bankr. N.D.N.Y. 1993) mobile homes were treated as personal property forming part of consumer goods for the purpose of Article 9. Notwithstanding the status accorded to mobile home, the secured party secured cannot rely on eviction law to take over possession because the buyer is occupying the mobile home by virtue of the sale agreement and not by a lease agreement.

Minnesota prohibits secured creditors from repossessing a mobile home, the law provides that in a case where a mobile home is the security interest, then 30 days notice to the debtor shall be given after which there will be a judicial proceeding to recover possession. (See Minn. Stat. S. 327.64, see also the case of First National Bank v. Edison Homes Inc., 415 N.W.2d 442 (Minn. Ct. App. 1987). Colorado allows repossession of a mobile home only if the debtor consents or if the debtor has vacated the mobile home while Vermont allows for repossession of mobile

Civil Relief Act grants the service men who are involved in 'military service' many concessions in their commercial transactions.[787] The Act specifically exempts the properties of military personnel and their family members[788] who are debtors from being taken by the secured creditor through the means of self-help repossession; if the debtor has paid at least one installment or a deposit before entering the military service, such property can only be taken by an order of the court. This concession extends not only to Article 9 transactions but also to lease and bailment of properties.[789]To be qualified for all the concessions the person must be in active service[790]as defined by the statute.

From the statutes of various states considered and also the plethora of cases considered in self help repossession, it can be concluded that the rights and liabilities of both secured creditor and the debtor are fairly balanced and this is one of the reasons why this remedy has worked efficiently in the United States. The bars to repossessions on transactions, collateral and persons ensure that there is justice and equity in the use of self help repossession remedy.

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homes only with the aid of the court. (see Colo. Rev. Stat. S. 4-9-609; Vt. Stat. Ann. tit 9, s. 2603). The justification in prohibiting self-help repossession of a mobile home are many: first the use self help repossession for a mobile home that is occupied will involve taking the debtors unsecured furniture, clothing and other house hold properties located in the house which are exempt properties; second, it is not possible to seize the mobile home without the repossessors entering into the home of the debtor which is a classical breach of peace provisions that may open the creditor to damages for trespass; third, self-help repossession of a mobile home may cause a lot of damages to the personal properties of the debtor: properties like glassware, lamps and other breakable items may be at danger

[787] See 50 U.S.C. sections 501-596, see also Roger M. Baron, the Staying Power of the Soldiers' and Sailors' Civil Relief Act, 32 Santa Clara L. Review 137 (1992), James P. Pottorff, Contemporary Applications of the Soldiers' Sailors' Civil Relief Act, 132 Mil. L. Rev. 115 (1991).

[788] Family members here include only the spouse and their children.

[789] See section 50 U.S.C. app. Section 532(a) (2) which provides as follows: 'After a service member enters military service, a contract by the service member for (a) the purchase of real or personal property (including a motor vehicle); or (b) the lease or bailment of such property, may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person's military service, nor may such property be repossessed for such breach without a court order. (2) This section applies only to a contract for which a deposit or instalment has been paid by the service member before the servicemember enters military service.' See the cases of In Re Burrell, 230 B.R. 309 (Bankr. E.D. Tex. 1999); Charles H. Jenkins &Co. v. Lewis, 259 N.C. 86, 130 S.E.2d 49 (1963). See Carolyn L. Carter, Jonathan Sheldon, John Rao, Repossessions -The Consumer Credit and Sales Legal Practice Series supra footnote 688, paragraph 6.3.5.1, p, 191.

[790] See 50 U.S.C. App. section 511(2) (i) which defines active service to include serving members of Army, Navy, Air Force, Marine Corps or Coast Guard.

3.4.2. Is Self-help part of Nigerian Law?

In general terms, self-help repossession as understood and practiced under the United States Article 9 is not part of Nigerian law. In many judgments of the Supreme Court of Nigeria, the practice of resorting to self-help repossession has been deprecated. In the case of Ellochim (Nig) Ltd &ors v. Mbadiwe[791] Aniagolu JSC stated inter alia as follows: "*the laws of civilized nations have always frowned at self-help. If for no other reason than that they engender breaches of peace.*" In other words, repossession can only be done with the help of courts in Nigeria. In the case of Civil Design Construction Nigeria Limited v. SCOA Nigeria Limited,[792] decided by the Supreme Court of Nigeria on the 23rd of February 2007 in suit SC216/2001, the Supreme Court per Walter Onnoghen JSC stated: *"Even under the common, if it were to apply to the facts of this case, which I do not concede, the respondent cannot seize or repossess the rig without recourse to the courts."* In a concurring judgment, Ikechi Ogbuagu (JSC) in further denouncement of self help repossession stated as follows: *"Of course, self-help in any guise and by any person - high or low, Government or its functionaries/agents, have been deprecated by this Court in many decided authorities."* In cases where the secured party repossesses the property of the debtor without an order of the court and keeps the same, an action in tort can lie against such secured party in detinue.[793] Despite the denunciation of self-help repossession by the Supreme Court

[791] (1986) 1 NWLR (Pt.l4) 47at 65; (1986) 1 S.C. 99 at 130; (1986) 1 All NLR (Pt 1) at 11. See also the case of Ojukwu vs. Military Governor of Lagos State (1985) 2 NWLR (Pt. 110) 806.

[792] The text of the decision is available electronically at < http://www.nigeria-law.org/Civil%20Design%20Construction%20Nigeria%20Ltd%20v%20SCOA%20Nigeria%20Limited.htm >; last visited on the 9th of February2010.

[793] In the case of Chief Paul Ordia v. Piedmount (Nig.) Ltd. (1995) 2 NWLR (Pt. 379) 516; (1995) 2 SCNJ. 175 at 181 - per Belgore, JSC, (as he then was) stated that Detinue is based on the defendant's wrongful detention of plaintiff s chattel after the defendant's refusal to deliver up the chattel on demand by the plaintiff. "Detinue is an action only in tort for failure to deliver up the plaintiffs' chattel and it entails claim for the return of the chattel or its value and damages for its detention." The United States equivalent of detinue is conversion and it is defined as "any

justices, there are however other types of self help which are available to secured creditors to enforce their securities upon default of repayment and these forms of self- help will be examined below.

3.4.2.1. Self – help Variants under Nigerian Law: Appointment of a Receiver Manager and the Legal Mortgagee's Power of Sale

Notwithstanding the above decisions of the Supreme Court, self-help repossession under Article 9 has functional equivalents recognized under the Nigerian law. Since the essence of United States self help repossession is for the secured party to take possession of the collateral in the hands of the debtor in order to sell it off and satisfy the debt without the assistance of the court; then self help repossession could be likened under the Nigerian Companies and Allied Matters Act 2004 to the out of court appointment of receiver manager[794] by the secured creditor. This is because the receiver takes the properties and undertakings of the debtor used as collateral with a view to selling them in order to liquidate the debtor's indebtedness to the secured creditor party. Another functional equivalent of self help repossession under Nigerian law is the power of sale

act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." See the judgement of Edmonds J. In the case of Zaslow v. Kronert 29 Cal.2d 541, 176 P.2d 1 (1946) reported in Page Keeton et al, Tort and Accidental Law Cases and Materials, (West Publishing Co., 2nd ed., 1989), p. 100. Also conversion is defined as "The wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of wilful interference without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property." See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 356.

[794] It is worth mentioning that court appointed receivership existed in United States as a mode of restructuring financially troubled company until the 1930's when its practice was codified into chapter 11 of the Bankruptcy Law. Even presently, distressed businesses are considering using state law receivership as an alternative to filing for bankruptcy under chapter 11. According to Skeel, "Receiverships are the grandfather of current chapter 11. The process, which begins with a request that the court appoint a receiver to take control of the company's asset until it is sold or restructured was perfected by JP Morgan and a handful of other wall street banks in the 19th century, and used to restructure nearly every major American railroad, as well as many other corporations. After the early 1930's, when congress finally added large scale corporate reorganization provisions to the federal bankruptcy law – essentially codifying receivership practice – the receivership came to an end." See David Skeel, The New (and Very Old) State Law Technique for Restructuring Troubled Companies, American Bankruptcy Institute, available at < http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=41348&TEMPLATE=/CM/ContentDisplay.cfm >; last visited on the 20th of March, 2011.

given to the legal mortgagee under deed[795] to sell the debtor's collateral to satisfy the debtor's indebtedness without recourse to court.[796]

Just like the appointment of administrative receiver under the English Law,[797] the out of court appointment of receiver/manager by the secured party to recover the debt owed to the secured party by the debtor is likened to the self help repossession under Article 9. This is because the powers or the job of the receiver here is to take the possession of the collateral given by the debtor to secure the loan and sell same to recover the security of the creditor. A receiver/manager[798] can be appointed by the secured party out of court by the power contained in the security agreement between the parties[799] or can be appointed by the court pursuant to an application made by the secured party.[800] Such a person duly appointed as a receiver/manager shall exercise the following powers over the part or whole assets and undertakings of the debtor.

[795] See Gaius Ezejiofor, The Consent Requirement of the Nigerian Land Use Act, Journal of the African Law, vol. 42 No. 1 (Cambridge University Press, 1998), pp. 101-109 available at http://www.jstor.org/stable/745700?seq=5 , last visited on the 10th of April, 2011; see also section 123 of the Property and Conveyancing Law, Cap 100 Laws of Western Nigeria 1959; s. 19 English Conveyancing Act 1881.

[796] Although, this power is exercised in connection to mortgage of real properties which is outside the scope of this research, in United States, this power of sale given to a legal mortgagee could be instructive in the case of the use of mobile home as collateral, hence the justification of the brief discussions that will be made on it in this research.

[797] The Administrative receiver is the equivalent of receiver/manager under the Nigerian CAMA 2004. Administrative receiver is defined under Section 29(2) of English Insolvency Act 1986 to mean "(a) a receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debenture secured by a charge which as created was a floating charge, or by such a charge and one or more other securities ; or (b) a person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property." See Roy Goode, Commercial Law, supra footnote 13, p. 862; W. J. Gough, Company Charges, supra footnote 599, p. 129.

[798] Receiver/managers in Nigeria are mostly legal practitioners, accountant or business administrators who are appointed to the business of the debtor in order to realize the securities of the creditor. The appointee must understand his responsibilities both to the appointing creditor, other creditors of the company and the court. There is no association for receiver/managers in Nigeria. However there is an association of insolvency practitioners in Nigeria called Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN). Membership of BRIPAN is mostly open to legal practitioners, accountants and bankers. BRIPAN is a member association of INSOL International. One of the main objectives of BRIPAN is to "impact legislative reform by evaluating and focusing attention on the development of the Nigerian law in the areas of bankruptcy, receivership and liquidation, business restricting and turnaround management." Information about BRIPAN can be found at its website at < http://bripan.org/ >; last visited on the 1st of February 2011.

[799] See section 390 (1) CAMA 2004.

[800] See section 388 CAMA 2004.

The receiver/manager of any property of a company shall - subject to the rights of prior encumbrances - take possession of and protect the property, receive the rents and profits and discharge all out-goings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed.[801] Unless appointed also as a manager he has no power to carry on any business or undertaking.[802] Any person appointed as a manager of the whole or any part of the undertaking of a company manages the same with a view to the beneficial realization of the security of those on whose behalf he is appointed.[803]

From the above two provisions of the law, it is apparent that the powers of the receiver/manager appointed by the secured party under Nigerian law, are wider than the powers of a self-help repossessor. A self-help repossessor can only repossess the security interest created by the defaulting debtor but has no power to enter into and take control of the business of a defaulting debtor nor does the self-help repossessor have the powers to receive rents, discharge outgoings, or manage the business or undertaking of the of the defaulting debtor. Again there is no without breach of the peace provision under CAMA 2004 and consequently the receiver/manager is not bound by the principle during the take-over of the assets of the debtor company by the receiver manager, indeed experiences have shown that at times the take-over of the assets and undertakings of the debtor company could go awry.[804]However, the receiver is expected to

[801] See the case of Union Bank (Nigeria) Ltd. V. Tropic Foods Ltd. (1992), 3 NWLR (pt. 228), 231.
[802] See section 393 (1) CAMA 2004.
[803] See section 393 (2) CAMA 2004.
[804]The author recalls with a sober reflection the sad experience he encountered working in a law firm in Nigeria whose principal partner was appointed the receiver /manager of Folio Communications Ltd which sad experience fired his curiosity to study the secured credit transactions laws in Nigeria. Sometimes ago, the Bureau for Public Enterprises advertised to sell the government shares in The Daily Times of Nigeria Plc as part of government privatization program. Folio Communications Ltd became the preferred bidder and bought the shares of the government in The Daily Times of Nigeria Plc. Folio Communications Ltd approached Hallmark Bank Nigeria Plc and obtained a loan N750million (about $6million then) and another sum of N500m (about $3.5 million then) from a private financier with which it acquired the government shares of the publishing company which gave Folio

exercise restraint and maintain peace during the takeover. The law anticipates that the debtor company would naturally want to resist the take-over of its business by the debtor company and thus grants the receiver/manager assistance to maintain peace by providing him with law enforcement agents who would help to maintain the peace during the process of the taking over the assets and undertakings of the debtor company. Although there are some peaceful takeover of businesses of the debtor by the receiver/manager, but many of the recorded cases of fierce resistance, protest and violent takeover of the businesses or assets and undertakings of the debtor cannot pass the test of without breach of peace principle under Article 9.

Notwithstanding that the process of taking over the properties of the debtor by the receiver/manager may not be as efficient as self-help repossession under Article 9, the effectiveness of the concept lies in the fact that the appointment of a receiver/manager could be

Communications Ltd a controlling shares in the publishing company. To obtain the loan Folio Communications Ltd executed a debenture deed of all company assets and undertaking as security interest for the loan with the power given to Hallmark Bank of Nigeria Plc to appoint a receiver/manager of not only Folio Communications Ltd but also of The Daily Times of Nigeria Plc in event of default of repaying the loan.

Folio Communications Ltd not only defaulted several in the repayment of the loan but started to strip The Daily Times of Nigeria Plc of its assets by selling off the equipment and other real properties of The Daily Times of Nigeria Plc. Following this, Hallmark Bank of Nigeria Plc appointed Chief Anthony Idigbe (Senior Advocate of Nigeria) author's Chambers Principal Partner the receiver/manager of Folio Communications Ltd with the mandate to run the company in order to realize Hallmark Bank's loan to Folio Communications Ltd. The appointment was made out of court but pursuant to the powers conferred on the bank by the debenture deed. In a bid to take over the properties, assets and business of Folio Communications Ltd in Abuja , the author got himself 'equipped' with 13 anti –riot police officers armed and ready to dislodge any resistance from the debtor.

Being the lead counsel in the Abuja Chambers, but inexperienced in the act of taking over a business as a receiver /manager (as the author had never before engaged in such act), the author led the 13 policemen to take over the business of Folio Communications Ltd. Not only that the author encountered tremendous life treating opposition from the owner of Folio Communications Ltd even with the presence of the 13 policemen, the 13 armed police were subdued by the perceived worth of the Managing Director of Folio Communications Ltd in the society and his contacts which he made whilst the author and the police men were in the premises. The result was that the policemen could neither help the author to take over the property nor protect the author when the Managing Director of Folio and his kinsmen were pursuing the author with dangerous weapons to kill the author.

It was indeed one of the closet shave the author has had with death in his life time. The receivership sparked off an avalanche of court cases, at a time there were about 16 cases pending in court in relation to the receivership, finally the matter was settled when our client became distressed and the statutory liquidator of our client National Deposit Insurance Corporation settled with the management of Folio Communications Plc. This case brought to the fore among other things the inadequate enforcement procedures of the secured credit laws, the general disregard of rule of law and attendant breakdown of law and order in Nigeria and the need to revisit and revise both the secured credit laws and enforcement mechanisms of secured credit laws in Nigeria.

done by the secured party without resort to court. However, where the security agreement stipulates that only the court can appoint a receiver/manager, the order of court to appoint a receiver/manager to take control of the assets and undertakings of the debtor is usually obtained by motion ex parte.[805] This makes the appointment of the receiver/manager and the taking over the assets and undertakings of the debtors business prompt without giving the debtor the opportunity to dissipate, sell or hide his properties which he gave as collateral for the loan.

As already stated, the other variant of United State's self help in Nigeria is the power given to a legal mortgagee under a deed. A legal mortgagee whose mortgage is under deed has the power of sale[806] of the mortgaged properties upon default by the debtor. Despite the fact the power of sale is inherent in the rights of a legal mortgagee under deed; most security agreement also restates and provides this obvious power of the legal mortgagee in the agreement. The power of sale entitles the legal mortgagee to repossess the mortgaged property and put it up for public or private sale without resort to court. The legal mortgagee's power of sale is only circumscribed by the fact that the sale must be conducted in a commercially reasonable manner. Thus the legal mortgagee will be liable to the debtor if sale is not commercially reasonable.[807] The power of the legal mortgage to sell obviates the need to initiates court proceedings before getting the order of the court to sell. In a country like Nigeria where the judicial process is slow, such out of court

[805] See sections 388 and 390 (1) CAMA 2004.

[806] This is equivalent of the power-of-sale foreclosure under the United States. Power-of-sale foreclosure is a procedure "by which, according to the mortgage instrument and a state statute, the mortgaged property is sold at a non judicial public sale by a public official, the mortgagee or a trustee, without the stringent notice requirements, procedural burdens, or delays of a judicial foreclosure." See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p.674.

[807] The legal mortgagee cannot sell the property to a lower bidder or exclude some certain people who may outbid his favored bidder. Where he wants to buy the property then the sale must be an open public sale. The sale is scrutinized more by the court to check whether it was in tandem with a commercially reasonable sale where the legal mortgagee buys the property. See Andrew P. Bell, Modern Law of Personal Property in England and Ireland, (Butterworths, 1989), p. 147; Crossley Vaines, Personal Property, (Butterworths, 5th ed., 1973), p. 461.

powers will help the secured creditor (the legal mortgagee) to realize his securities promptly without incurring further expenditure in attorney fees and filing of court processes. However, this power is utilized in secured transactions involving real property which is not within the scope of this research.

3.4.3. Is Self-help available under the Cameroon's Uniform Act on Securities?

Neither Article 9-type of self-help repossession nor the Nigerian variants of self-help is available in Cameroon: concretely, under the Uniform Act on Securities and the Uniform Act on Recovery and Execution. The latter primarily governs the processes of seizure of collateral by court bailiffs.[808] The process of seizure of the collateral of the debtor upon default of repayment can only be made upon an order of a writ of execution issued by a court where the debtor refuses to voluntarily give up the possession of the collateral.[809] Articles 28 – 334 of the Uniform Act on Recovery and Execution provide comprehensive and lengthy procedures for the seizure and sale of the collateral. The bottom line of the provisions is that both seizure and sale are to be made

[808] Cameroon decree number 78/448 of November 5, 1979 as modified by decree number 85/238 of February 22 1985 defined who a bailiff is in Cameroon. According to the decree, "a bailiff is a court official who executes court judgments, write down court injunctions, and carry out auction sales." See Brenda Yufeh, *Bailiffs are not Omnipresent*, published in AllAfrica.com of 17th of November 2004 and available at < http://allafrica.com/stories/200411170284.html >; last visited on the 11th of March 2011. Bailiffs in Cameroon are organized and they have an Association. The name of the association is called Chambre Nationale des Huissiers de Justice et Agents d'Execution du Cameroun and the association's web page is available at < http://huissiers-cameroun.com/web/ >; last visited on the 11th of March 2011.

[809] Article 56 (1) of the Uniform Act on Securities provides as follows: "where payment is not made by the due date, the secured creditor armed with the writ of execution may proceed with the liquidation sale of the pledged asset eight days after notice to the debtor and, where necessary, to the third party setlor of the pledge under the conditions provided for by the rules of measures of execution. The competent court may authorize the assignment of the pledge to the secured creditor up to the amount of the debt and following an estimate at the quoted prices or as determined by an expert. Any clause in the contract which authorizes the sale or assignment of the pledge without complying with the foregoing formalities shall be deemed to be unwritten."

upon order of the court with right given to the debtor to contest any part of the court procedures that infringes on its rights or interest.[810]

The above mean that there is no provision in the law - either express or implicit - that permits a secured creditor to recover its security without recourse to the court. The Uniform Act on Securities prohibits any contract in a security agreement which authorizes the secured creditor to realize his securities without going to court to obtain writ of execution upon default of repayment by the debtor.[811] Lack of provisions for self-help and coupled with the slow judicial process in Cameroon put the secured creditor in a disadvantaged position in terms of recovery of his security. This certainly has a correlative effect on the availability of credit and the unfriendly terms of loans in Cameroon: i.e., the interest rate, loan size and tenor of the loan and the types of assets acceptable to the secured creditor as collateral for a loan. Spanogle identified the mandatory recourse to court to enforce a security interest as one of the setbacks of the French enforcement mechanisms of the security interest[812] which is the model where the Uniform Act on Securities was copied from. According to him, judicial recourse will open a floodgate of endless litigation of contentions issues of: whether there was adequate notice, whether the security interest was properly registered, whether the security interest is even enforceable and all these

[810] See Articles 19, 28, 29 and 31 of the Uniform Act on Recovery and Execution.
[811] See again Article 56 of the Uniform Act on Securities.
[812] Apart from the enforcement there are other aspects of French civil law perceptibility on security that has made Wood to describe French system as unsympathetic to security. Some of them are: the French registered business charge over specified assets like industrial equipment does not extend to inventories or receivables; the excessive degree of formalities in the grant of securities like notarizing the security agreement that hinder the creation of security interest; levying unrealistic documentary taxes; excluding security for future advance or revolving credit thus insisting that the maximum amount secured must be state; , down – grading the security below priority creditors (taxes, bankruptcy costs, employees) so that one never knows what it is worth; the presence of bankruptcy freeze on enforcement of security as contained in the French *redressement judiciare* of 1985 as well as the allowance of moratorium loans to rank ahead of security interest in an insolvency rehabilitation. See See Phillip Wood, *World –Wide Security –Classification of Legal Jurisdictions* in Joseph Norton and Mads Andenas eds., EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS, (Kluwer Law International, 1988), pp. 39 – 47.

increase the cost of enforcement of security. Also, sale of the pledged property is conducted by court officials and sale by court officials are generally distressed sales which brings in distressed prices as court officials may not be expert in conducting such sales in a commercially reasonable manner. Consequently, such distress sales are generally speaking less than the commercial value of the pledged property.[813]

Suffice it to say that the disadvantages of the court assisted enforcement posited above do not seek to advocate for the abolition of this method of enforcing securities. On the other hand, court aided enforcement remains a veritable mechanism employed by all jurisdictions - among other benefits – to ensure that there is rule of law and justice to both parties in the process of the recovery of the securities.[814] Nonetheless, court assisted enforcement works best where there are efficient institutions and procedures that guarantee speedy utilization of the judicial processes in the recovery of the securities and the availability of other private (non-court assisted) enforcement mechanisms which complement and provide viable alternatives of enforcement to the secured party. Sadly, both factors are almost non-existent in Cameroon. Whilst this research will propose for the transplantation of the Article 9 self-help or at the minimum the Nigerian variant of self-help mechanisms: i.e., appointment of a receiver/manager,[815] the issue of reforming the court assisted enforcement mechanisms to make it efficient will be examined in the later part of this chapter.

[813] See John Spanogle, The Financing of Small Businesses: A Functional Analysis of Three Legal Modules, supra footnote 38, p. 5.

[814] However this does not mean that out of court enforcement of securities imports less rule of law as can be seen by the United States example. The civil and criminal liabilities of both the secured creditor and the debtor during self help repossession ensures the 'balancing' of the rule of law in the out of court enforcement.

[815] For the pledge without dispossession of business, where there is a default, an out of court appointment of a receiver/manager could be made by the secured party. There could entry barriers on a would-be receiver manager through registration and also regulation by an agency created by government. A code of conduct should be enacted for receiver/managers with fines and other forms of punishment for its breach by receiver managers.

3.5. Creditors Rights – Strict Foreclosure under Article 9

Whilst the remedy of self help repossession is usually used in non possessory security, enforcement of security by means of strict foreclosure[816] could be exploited both in possessory and non possessory securities. As a preliminary, a secured party can accept collateral in full or partial satisfaction (except in consumer goods)[817] of the obligations secured by the collateral subject to authenticated acceptance after default by the debtor[818]and non receipt of objection from other creditors or other persons that have recognized vested interests in the collateral.[819] Strict foreclosure could be by way of legal proceedings ordered by the court in a suit instituted by the secured creditor. It could also be by the agreement of the parties provided for in the contractual agreement upon the occurrence of specified events which is usually a default by the debtor of his material obligations in the agreement. The essence of strict foreclosure of the collateral is for the secured party to acquire the title of the collateral. Retention of the collateral in full satisfaction of the debt is advantageous on the ground that it obviates the burdensome procedures placed on the secured party by the Article 9 and extra expense incurred in disposing of the collateral.[820] The procedure leading to strict foreclosure is simplified[821] where the secured

[816]Foreclosure is a legal proceeding to terminate a mortgagor's interest in property instituted by the lender either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property. Where a proceeding is instituted to gain title to the mortgaged property –without first conducting a sale- after a defaulting mortgagor fails to pay the mortgage debt within a court-specified period, then such proceeding is called strict foreclosure. This procedure is limited to special situation except in those few states that permits this remedy. On the other hand, judicial foreclosure is a procedure by which the mortgaged property is sold through a court proceeding requiring many standard legal steps such as the filing of complaint, service of process, notice and a hearing. Available in all jurisdictions and is the common procedure of foreclosure in most of the states in the United States. See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 674.

[817] See section 9 – 620 (g) UCC.

[818] See section 9 – 620 (c) (1) & (2) UCC.

[819] See section 9 – 620, other people with recognised vested interest in the collateral are persons to which the secured party was required to send a proposal under section 9- 621 or other persons holding interest in the collateral that are subordinate to the security interest of the secured party. See generally section 9 – 620 (a) and (b) UCC.

[820] According to White and Summers, "Taking the collateral in full or partial satisfaction enables the creditor to avoid any challenge to its notice or conduct of sale. It also enables the creditor to avoid the cost of a formal notice and sale. Moreover, the strict foreclosing creditor may thereafter sell the goods wherever and however it wishes."

party wishes to accept the collateral in full satisfaction of the debt. Where the secured party sends the proposal to debtor of his proposal to accept the proposal in full satisfaction and debtor accepts in response or keep silence for twenty days, the proposal is deemed to be accepted but where the debtor objects within the twenty days, the proposal is annulled. However where the debtor wishes to take the collateral in partial satisfaction, the secured party must obtain the debtor's acceptance 'in a record authenticated after default.' The essence of insistence of debtor's consent is to protect the debtor from secured creditor's undue overreaching. For example in a debt of $1,000 the secured party may decide to appropriate collateral of market value of $500 for $100 and sue for the remaining amount.[822]

Besides receipt of the debtor's acceptance the proposal of the secured party to keep the collateral either in full or partial satisfaction of the debt, the secured party also needs to send the proposal to any person to whom the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral, and there is no objection from such person within twenty days from the day the proposal was sent.[823]

see James White, Robert Summers, Uniform Commercial Code, supra footnote 82, p. 1338; see also section 9 – 615 UCC.

[821] "Although these provisions derive from former section 9 – 505, they have been entirely reorganized and substantially rewritten. The more straightforward approach taken in this Article eliminates the fiction that the secured party always will present a proposal for the retention of collateral and the debtor will have a fixed period to respond. By eliminating the need (but preserving the possibility) for proceeding in that fashion, this section eliminates much of the awkwardness of former section 9 – 505. It reflects the belief that strict foreclosures should be encouraged and often will produce better results than a disposition for all concerned." See comment 2 of the Official Comment to section 9 – 620 UCC.

[822] See James White, Robert Summers, Principles of Secured Transactions, (Thomson West, 2007), p.224.

[823] See section 9 – 621 (a) (1) UCC.

Where the transactions involve a consumer goods transaction and the debtor has paid 60% of the cash price in the case of a purchase-money security interest,[824] or 60% of the principal amount of the obligation in the case of a non-purchase-money security interest,[825] the creditor may not use strict foreclosure but is mandated to dispose of the collateral.[826] The secured party is not only under obligation to dispose of the collateral in a commercially reasonable manner, but is also obligated to dispose of the collateral within 90 days after taking possession of the collateral[827] or any time longer which the debtor and or all secondary obligors have agreed to in an authenticated record after the default.[828] The principle of mandatory disposition of collateral in cases where the debtor has paid 60% of the purchase price is to forestall against undue advantage and the resultant hardship that may result if the secured party is allowed to keep the collateral after having received 60% or more of the purchase price. Upon payment of 60% or more of the purchase price, the equity of the debtor would have accrued on the collateral. It would most certainly be unfair to the debtor for the secured party to keep the collateral; upon the sale of the collateral, the debtor's equity which has inured on the collateral will certainly result to a surplus for the debtor which ought to be protected. The secured party may not accept partial collateral in partial satisfaction of the obligation it secures in consumer transaction.[829]

Where the collateral is accounts, chattel paper, payment intangibles or promissory notes, the acceptance of the collateral in partial or full satisfaction of the obligation they secure would constitute a sale of these collateral to the secured party and this in effect would constitute strict

[824] See section 9 – 620 (e) (1) UCC.
[825] See section 9 – 620 (e) (2) UCC.
[826] See James White, Robert Summers, Principles of Secured Transactions, supra footnote 822, p. 224.
[827] See section 9 – 620 (f) (1) UCC.
[828] See section 9 – 620 (f) (2) UCC.
[829] See section 9 – 620 (g) UCC.

foreclosure.[830] Where the secured party forecloses the collateral of the debtor either in full or partial satisfaction of the obligations secured by the collateral, the title and all other debtors' rights in the collateral will be transferred to the secured party. The foreclosure discharges the obligations to the extent consented to by the debtor; discharges the security interest or agricultural lien and any subordinate security interest or subordinate lien and terminates any other subordinate interest in the collateral.[831]

In conclusion, strict foreclosure is not widely exploited in the United States.[832]There are no equivalents of strict foreclosure in Nigeria and Cameroon, what may have been close to strict foreclosure in Nigeria is foreclosure by the court and seizure for sale under the Cameroon's legal system. Although, strict foreclosure is good for the secured creditor as it obviates the burden placed on the secured creditor to give adequate notices of the disposition of the collateral to the debtor and also to dispose the collateral in commercially reasonable manner, its usage in Nigeria and Cameroon may be abused. This is because there is weak enforcement of consumer protection laws in both countries and consequently this research would be cautious in advocating its transplantation.

3.5.1. Disposition under Article 9

The essence of taking possession of the collateral by the secured party either through foreclosure or repossession upon debtor's default is to dispose the property and utilize the proceeds in

[830] See comment 10 of the official comment of section 9 – 620 UCC.
[831] See section 9 – 622 (a) UCC.
[832] Gilmore reports that in 1943, it was only practiced in Connecticut, Vermont and Illinois. See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 1183. See also Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 674 which posit that the use of "strict foreclosure is limited to special situations except in those few states that permit this remedy generally."

satisfaction of the debt due to the secured creditor. It thus presupposes that unless the collateral was retained in full satisfaction of the debtor's indebtedness to the secured party, the secured creditor is entitled to sue for deficiency judgment where the where the proceeds is inadequate to satisfy the debt. Conversely, where there is surplus arising from the sale of the collateral, the secured creditor is obligated to return the excess back to the debtor.[833] However, some states grant the creditor the right to sue for deficiency judgment only when the creditor exercises all reasonableness in disposing the collateral of the debtor. The criteria for reasonableness normally entail compliance with the requirements of disposition of the debtor's property as contained in the provisions of Article 9. Some of the requirements include giving statutory notices to the debtor before, during and after the disposition, and disposing the collateral in commercially reasonable manner. This is to forestall the debtor from suffering from the predicament of 'double jeopardy', i.e., the debtor losing money on the collateral due to the recklessness of the secured creditor or connivance of the secured creditor with the buyer at the auction sale which may turn out to be the secured party's crony; and at the same time being asked to pay deficient judgment, which would not have been necessary had the sale been conducted in a commercially reasonable manner.

Disposition of foreclosed collateral is to be conducted in a commercially reasonable manner either in a public or private sale[834] and the determination of commercial reasonability of a sale is a question of fact which the court will consider case by case. Suffice it to state that the secured party must have followed the procedure laid down in the code and the eventual amount the secured party sold the collateral may not of itself alone determine the commercial reasonability

[833] See section 9 – 615 (d) UCC.
[834] See section 9 – 610 (b) UCC.

of the sale. In the case of General Electric Capital Corporation v. Stelmach Construction Company[835] the court held that the sale was commercially reasonable because the secured party complied with S. 84-9-504 Kansas Stat. Ann. UCC despite the fact that the secured party sold the collateral below what the debtor's expert valuer stated as the current market price of the property.[836] The code requires the secured party to send notifications of the disposition to all who are entitled to receive the notifications within a reasonable time.[837] There are two major consequences for the failure of the secured party to dispose of the collateral in a commercially reasonable manner: [838] the first is that the secured party may be liable in damages to the debtor which is the difference in the disposition price had the collateral been properly disposed in a commercially reasonable manner.[839] Indeed punitive damages may lie against the secured party in extreme cases of improper disposition of the collateral.[840] The second consequence is that the secured party may even be barred from recovering any deficiency judgment against the debtor.[841]

[835] 45 UCC Rep. Serv.2d 675 (D. Kan.2001).

[836] See also the case of PACCAR Financial Corporation v. Mackey (8th Cir 1997) 122 F3d 1134; In the Matter of the Estate of Greg Sagmiller; Ford Motor Credit Company v. Jeanette Sagmiller (NDSCt 2000) 2000 ND 151.

[837] The persons expected to receive an authenticated notifications of dispositions are the debtor, any secondary obligor, and where the collateral is other than consumer goods, any other person from which the secured party has received, before the notification date, a notification of a claim of an interest in the collateral, any other secured party or lien holder who held a security interest within 10 days before the notification date, or other lien on the collateral which has been perfected by filing of a financing statement. See section 9 – 611 (c) UCC.

[838] Disposition is deemed to be done in a commercially reasonable manner if it is made in the usual or any recognised market; at the current price in any recognised market at the time of the disposition; or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. The courts have interpreted recognised markets to mean auction markets such as grain market or stock exchanges where the goods are fungible, see the case of Norton v. National Bank of Commerce, 398 S.W. 2d 538 (Ark.1966). A disposition could also be commercially reasonable if the disposition has been approved by the court, bona fide creditors' committee, by a representative of the creditors or by an assignee for the benefit of creditors. See section 9 – 627 (b) and (c) UCC.

[839] See section 9 – 625 (b) UCC.

[840] See the cases of Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp. (325 F. 2d 2 [3d Cr. 1963]), Skeels v. Universal C.I.T. Credit Corp., (335 F. 2d 846 [3d Cr., 1964]).

[841] See the case of Liberty National Bank & Trust Co. v. Acme Tool Division of Rucker Co., 540 F.2d 1375 (10th Cir.1976) and compare with the case of GECC v. Stelmach Construction Company (supra). In the case of Liberty Bank v. Thomas (NYAppDiv 1995) 635 NYS2d 912 it was held that "a secured creditor for an automobile loan was not entitled to deficiency judgment after the sale of a reposed automobile because the creditor violated the New York UCC in failing to give the debtor proper notice of the sale and in failing to conduct the sale in a commercially reasonable manner. The creditor was not entitled to a deficiency judgment even though the debtor was in default at the time the creditor repossessed the automobile and at the commencement of the action for deficiency judgment."

For example in Missouri State laws, the secured party is entitled to deficiency judgment only if the collateral is disposed off in public sale and the secured party strictly complies with the statutory requirement of the UCC - given adequate notice of the sale to the debtor.[842]

3.5.2. Foreclosure and Disposition under the Nigerian Law

Foreclosure under the Nigerian law has the same meaning as under the English law and thus its definition by Goode is apposite here.[843] Foreclosure[844] is one of the ways of by which a debenture[845] holder secured by fixed or floating charges of the assets of a company can realize his security in Nigeria if company defaults in meeting its obligations to the debenture holder. [846] Some of ways by which a company can default on its obligations to the debenture holder are as follows: *First,* if any creditor of the company issues a process of execution against any of its

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See Secured Transactions Guide Transfer Binder New Developments-Decisions (1996-2003) p. 71,719. See also the case of S & S Diversified Services, L.L.C. v. Arguello (DWyo 1995) 911 F. Supp. 498.

[842] See sections 9 – 613 and 9 614 of the Missouri Stat. Ann. (Supp.2002), see also the case of case of In re Downing 286 B.R. 900 (Bankr. WD Mo. 2002) where the court denied the secured party deficiency judgment for given the debtor inadequate notice. .

[843]According to Goode, “Foreclosure is the termination by court of the right to redeem. Its effect is to vest the mortgaged property in the mortgagee absolutely free from the equity of redemption. Foreclosure extinguishes the residue of the debt, for by obtaining foreclosure the mortgagee is deemed to have elected to take the property in satisfaction.” See Roy Goode, Commercial Law, supra footnote 13, p. 692. This definition of foreclosure by Goode is the English Law equivalent of United States strict foreclosure. Ironically whilst foreclosures under the English and by extension Nigerian laws are the functional equivalent of strict foreclosure, foreclosure under the US means something slightly different. Under the US is “a legal proceeding to terminate a mortgagor’s interest in property, instituted by the lender (the mortgagee) either to gain title (strict foreclosure) or to force a sale in order to satisfy the unpaid debt secured by the property.” See Bryan Garner (ed.), Black Law Dictionary, supra footnote 3, p. 674. In a loose sense, foreclosure under the US law is an enforcement mechanism.

[844]Apart from the provisions of the CAMA 2004, foreclosure rules in mortgages are also governed by partly by the English Conveyancing Act 1881, the Property and Conveyancing Laws of Western Nigeria 1959 and the contractual terms of the parties as contained in the agreement. However since this law relates to real property which is outside the scope of this work, this research will not go into details with foreclosure under the two laws: i.e., English Conveyancing Act 1881 and Property and Conveyancing Laws of Western Nigeria 1959.

[845] Debenture is defined in section 650 of CAMA 2004 as follows: “debenture means a written acknowledgment of indebtedness by a company, setting out the terms and conditions of the indebtedness, and includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not.”

[846] Section 209 (2) CAMA 2004 provides thus: “subject to any conditions imposed in the debenture or debenture trust deed, a debenture holder or a trustee, in the case of a trust deed, may – (a) bring an action in a representative capacity against the company for payment and enforcement of the security; (b) realize his security by (i) bringing a foreclosure action, or (ii) commencing a winding-up proceeding.”

assets; *second, "the company fails to pay any installment of interest or the whole or part of the principal or any premium, owing under the debenture or the debenture trust deed covering the debenture within one month after it becomes due;" third,* the company fails to fulfill any obligations imposed by the debenture; *fourth,* the company is wound up; *fifth*; *"any circumstances occur which entitles a debenture holder who ranks for payment of principal or interest in priority to the debentures secured by general floating charges to realize his security."*[847] Upon the foreclosure order of the court, a debenture may appoint a receiver who would among other things take possession of the assets subject to charge or and sell those assets or otherwise manage and deal with such assets with a view to realizing the security of the debenture holder[848] if the debenture deed provides for the appointment of a receiver in event of default.

Where the right to appoint a receiver is not contained in the agreement of the debenture holder and the company, then the sale of the foreclosed collateral would be done by the Sherriff of the court[849] through a public auction or bid.[850] Where the sale is conducted by the Sheriff of the court

[847] See section 208 CAMA 2004.
[848] Section 209 (3) CAMA provides "A receiver appointed under this section shall, subject to any order made by the court , have power to take possession of the assets subject to mortgage, charge or security and to sell those assets and , if the mortgage, charge or security extends to such assets, to collect debts owed to the company, to enforce claims vested in the company, to compromise, settle and enter into arrangements in respect of with a view to selling it on the most favorable terms , to grant, or accept leases of land and licenses in respect of patents, designs, copyright or trademarks, and to recover any installment unpaid on the company issued shares."
[849] Sheriffs are highest ranking administrative officers of the court, although sheriffs can sometimes perform some judicial functions. One sheriff is appointed in a state, and many deputy sheriffs can be appointed as many as there are need for them. The sheriff appoints the bailiffs of the court who help the sheriff in the discharge of the duties of the sheriff. Both the sheriff and bailiff are public officers of the court and they are paid by government i.e., by public funds. Where a sale is done pursuant to the orders of the court, it will be done by a sheriff or deputy sheriff. The sale cannot take place in less than 5 clear days from the seizure of the goods unless the goods are perishable goods or the debtor in writing so request. Before the goods are sold the sheriff will publicize the auctioning of the goods on the court's notice board three clear days before the date of the sale. In some deserving circumstances the sale may be published in one or some of the national daily newspapers if the court so orders. See sections 3 – 15, 19 – 31 of the Sheriffs and Civil Process Act Cap. S6, Laws of Federation of Nigeria 2004. The text of the law is available at < http://www.nigeria-law.org/SheriffsAndCivilProcessAct-Tables.htm >; last visited on the 15th of March 2011.
[850] See sections 29, 30 and 31 of the Sherriff and Civil Process Act Cap S6 Laws of the Federation of Nigeria 2004.

in pursuance of the order of the court and in compliance with the Sheriff and Civil Process Act Cap S6 Laws of Federation of Nigeria 2004, the debtor may not have any recourse to the secured party for damages for wrongful disposition of the collateral and the secured party is allowed to buy the auction properties if the secured creditor so wish.

3.5.3. Seizure and Disposition under Cameroon's Uniform Act on Securities and Uniform Act on Execution

Seizure and disposition under Cameroonian law is governed partly by the Uniform Act on Securities and partly by the Uniform Act on Recovery and Execution. Article 56 (1)[851] of the Uniform Act on Securities is categorical on the options open to a secured creditor in event of default of the debtor where the secured creditor is in possession of the collateral. The provision stipulates mandatorily that in event of default the secured party must employ the assistance of the court – armed with a writ of execution[852] - in recovering the pledged asset and in disposition of the pledged asset in accordance with the procedures set out in the Uniform Act on Recovery and Execution. The sale can be conducted solely after due notice to the debtor and third party settlor

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[851] The pertaining section reads as follows: "Where payment is not made by the due date, the secured creditor armed with the writ of execution may proceed with the liquidation sale of the pledged asset eight days after notice to the debtor and, where necessary, to the third party settlor of the pledge under the conditions provided for by the rules of measures of execution. The competent court may authorize the assignment of the pledge to the secured creditor up to the amount of the debt and following an estimate at quoted prices or as determined by an expert. Any clause in the contract which authorizes the sale or assignment of the pledge without complying with the foregoing formalities shall be deemed to be unwritten."

[852] Article 31 of Uniform Act on Recovery provides that the writ of execution can only be available to the creditor who can show an unquestionable claim due for immediate payment. Hence in the unreported case of CAMTEL v. PASTEL suit no. CASWP/48/2002 where a garnishee proceedings was carried out on the basis of unliquidated damages emanating from an "astreinte" (daily penalty in delay in paying debt). The Court of Appeal South Province Buea Cameroon held that an "astreinte" cannot be the basis to levy execution as it is no more than a threat against a defendant in acse of non-compliance with the court's orders, pecuniary damages would be awarded in favor of the plaintiff. Consequently, the court held that "astreinte" is not an award per se. It can be likened to unliquidated damages; it is only when the actual amount of "astreinte" is determined by the competent court that the creditor can proceed to execute the judgment liquidating the "astreinte." See Fonkwe Fongang et al., Commentaries to the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution, comments to Article 31, p. 43.

[853]where necessary. Any contrary agreement by the parties circumventing these requirements is null and void.[854] The Article also provides what may be referred to as strict foreclosure under the United States law. The Article provides: *"The competent court may authorize the assignment of the pledge to the secured creditor up to the amount of the debt and following an estimate at quoted prices or as determined by an expert."*[855] This means that a court of law may make an order for 'strict foreclosure' of the pledged property to the amount of the debt being owned. Like the French *Lex Commissoria* contained under the French Code Civil,[856] the determination of the value of the pledged property to the debt owned is to be determined either by the quoted price or an expert valuer.

Whilst the Uniform Act on Securities provides in general what a secured party needs to do in event of default of the repayment by the debtor – proceed with the liquidation sale of the pledged asset of the debtor – the judicial procedure for achieving that is governed by the Uniform Act on Execution. The Uniform Act on Execution has made provision for the creditor to seize and sell the tangible property of the debtor in order to realize his security.[857] According to Fonkwe Fongang et al, *"The creditor must possess a writ of execution. Like the procedure of attachment*

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[853]Third party setlor here means the third party who has guaranteed the pledge. See Martha Tumnde, Peter Tumnde and Francois Anoukaha, Commentaries to the Uniform Act Organizing Securities (Guarantees), supra footnote 163, comments to Article 56 (1), p. 41.
[854] See Article 56 (1) Uniform Act on Securities.
[855] See Article 56 (1) Uniform Act on Securities.
[856] See Article 2348 of French Code Civil of 2006. Lex Commissoria is a contractual forfeiture clause under which upon debtor's default, the title to the pledged goods would pass to the creditor. According to Drobnig, "Formerly it was broadly agreed that a contractual forfeiture clause under which upon the debtor's default title to the pledged goods would automatically pass to the creditor is void (lex commissoria). However, the new French law of 2006 offers a more realistic modern solution: the parties can agree to the creditor becoming the owner of the pledged asset; however, an expert must determine the market value at the time of appropriation, unless there is a recognized market value." See Ulrich Drobnig, Security Rights in Movables, supra footnote 88, p. 3.
[857] Article 91 of the Uniform Act on Execution provides as follows: "Any creditor in possession of a writ of execution showing a claim due for immediate payment may, after notification of a summons proceed to seizure and sale of the tangible property belonging to his debtor, whether the said property is held by the debtor or not, in order to be paid from the sale price."

under the common law, any movable property belonging to the judgment debtor whether or not in his possession may be attached […] this debt must be liquid and due. Although not clearly indicated, it must also be certain."[858]Eight days prior to the seizure, a summons to pay would be served on the debtor. The contents of the summons to pay will include the principal sum, interest and costs claimed, and the writ of execution for the impending seizure if payment is not effected after eight days.[859] Service of the summons to pay on the debtor may cause him to hide or dissipate his properties unless it is real properties.[860]

If after the expiration of the eight days, the debtor is unable to pay the debt, the bailiff of the court would then enter into the house of the debtor and seize the properties of the debtor. The bailiff will take inventory of the seized properties.[861] The sale of the seized property can be by private sale conducted by the debtor or by public auction conducted by the bailiff. Unlike the sale in the United States, the secured party is not involved in the sale of the seized property.[862] Whether the sale is by private sale or by public auction, there are safeguards in the law to ensure that the sale is conducted in a commercially reasonable manner like the safe harbor rules under Article 9. [863]The detailed provisions of the Uniform Act on Execution shall be examined below.

[858] See Fonkwe Fongang, Lucy Asuagbor, Francois Anoukaha, Commentaries to the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution, comments to Article 91, supra footnote 727, p. 89.
[859] See Article 92 Uniform Act on Execution.
[860] According to Fonkwe et al, "the disadvantage of summons to pay is that unscrupulous debtors may upon notification organize their bankruptcy or insolvency." See Fonkwe Fongang, Lucy Asuagbor, Francois Anoukaha, Commentaries to the Uniform Act on Execution, comments to Article 92, supra footnote 727, p. 90.
[861] See Article 100 of the Uniform Act on Execution.
[862] See Article 115 of the Uniform Act on Execution.
[863] See section 9 – 627 (b) of the UCC. Under Article 9 dispositions are done in a commercially reasonable manner if it is made "in the usual manner or in a recognized market; at a price current in any recognized market at the time of the disposition; or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." See also James White, Roberts Summers, Principles of Secured Transactions, supra footnote 822, pp. 228 – 235.

The debtor conducts the private sale of the seized property within one month of the seizure.[864] The debtor informs the bailiff in writing of the offers received in respect of the seized properties and the name and address of the offerees. The bailiff forwards the offers and the names of the offerees to the secured party who has fifteen days to decide whether to accept the private sale, refuse it or to propose himself as purchasers with a better offer on the seized property. Where after fifteen days, the bailiff receives no response from the secured party; it is deemed that the he has accepted the offer. Where the secured party opposes the private sale on grounds that the offer is inadequate or where within one month, the debtor is not able to conduct private sale, then the seized property would be sold by public auction by the bailiff.[865]The scrutiny of the price and the opposition from the creditor over the price is to forestall the debtor from arranging the sale to his crony to buy the property at a low price that will jeopardize the interest of the secured creditor.[866] This is in line with the safe harbor rules of Article 9 which determines the commercial reasonability of a sale.[867] The sale price will be deposited with the bailiff for the payment of the secured creditor's debt. [868]

On the other hand a public sale is conducted by the bailiff either at the place of the seized property, in a hall or an open "*market whose geographical location is most appropriate to attract competitive bidding at little cost.*"[869] Any disagreement on the place of sale between the secured creditor and debtor will be determined by the court who will rule on the best place for conducting the sale given the nature of the property to be sold. Advertisement for the sale will be

[864] See Article 116 of the Uniform Act on Execution.
[865] Id., Article 117.
[866] See Fonkwe Fongang, Lucy Asuagbor, Francois Anoukaha, Commentaries to the Uniform Act on Execution, comments to Article 117, supra foot note 727, p. 105.
[867] See James White and Robert Summers, Principles of Secured Transactions, supra footnote 822, pp. 228 – 229.
[868] Id., Article 118.
[869] Id., Article 120.

by posters or announcement in the media indicating the date, time and place of the sale and this will be done by the bailiff.[870] The debtor will be informed of the sale by the bailiff not less than 10 days before the sale.[871] The sale shall be made to the highest bidder after three calls and the price is payable in cash.[872] All the safeguards on public auction are to ensure that the sale is commercially reasonable and thus yields good price. This is particularly so since according to Spanogle, "*sales by court officials are distress sales that bring distress price*."[873] Besides the distress prices, private sale is preferable to the debtor than public auction. According to Fonkwe et al, "*A private sale will be advantageous to the debtor in that he will avoid the cost due to the bailiff in the event of an auction sale. The proceeds of sale may be higher since the debtor knows better the value of the goods. Above all a private sale saves the judgment debtor from public embarrassment.*"[874]

3.6. Debtor's Right of Redemption under Article 9

The default of the obligations contained in the security agreements do not ipso facto mean that the debtor has unconditionally lost the title of the collateral to the secured party.[875] The debtor can redeem his collateral from the secured party even after repossession upon default but the redemption must be made timely. The debtor can redeem the collateral at any time before the secured party has disposed of the collateral or entered into a contract for its disposition or before

[870] Id., Article 121.
[871] Id., Article 123.
[872] Id., Article 125.
[873] See John A. Spanogle, the Financing of Small Businesses: A Functional Analysis of Three Legal Modules, supra footnote 38, p. 5.
[874] See Fonkwe Fongang, Lucy Asuagbor, Francois Anoukaha, Commentaries to the Uniform Act on Execution, supra footnote 727, p. 103.
[875] According to Whaley, "The Fact that the debtor has defaulted does not irreversibly set in motion the provisions for the disposition and retention of the collateral by the secured party under the code." See Douglas Whaley, Secured Transactions, supra footnote 50, p. 167.

there is a strict foreclosure of the collateral by the secured party either in full or partial satisfaction of the obligations it secures.[876] To redeem the collateral, the debtor has to make good not only the debts that have fallen in arrears but also the whole of the debt secured by the collateral. In other words the whole debt will be accelerated upon default and becomes due and payable. Acceleration of the debt by the secured party can be effected on two grounds. The first, is where there is a default of the debtor of the payment obligations or other obligations contained in the security agreement. In this case, a default of one installment payment may be enough and the requirement of good faith may not be shown by the secured creditor[877] although some case laws still insist that good faith is still applicable even where the debtor has defaulted or breached a fundamental term of the contract.[878] The *second* basis for accelerating is where the secured party in good faith and on reasonable grounds deems himself insecure even though there may not have been any default of the obligations by the debtor.[879] The only difference is that the acceleration of repayment in this case must be done by the secured party in good faith, in reasonableness and in fairness otherwise the secured party can be liable in damages where

[876] See section 9 – 623(c) UCC.

[877] See the case of Kham & Nate's Shoes No.2, Inc. v. First Bank, 908 F.2d 1351 (7th Cir. 1990), James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.) 908 F.2d at 1357

[878] See the case of Alaska Statebank v. Fairco, 674 P.2d 288 (Alaska 1983) where a toy shop was in default of its repayment obligations to the bank, there was a workout negotiations between the parties. After negotiations the bank without notice seized its collateral-the inventory of the store and refused to honor the checks of the debtor. The debtor was only allowed to reopen its business upon conceding to the terms which it had previously rejected. The debtor sued alleging that the Bank had breached its duty of good faith in closing the store in a bid to coerce the debtor in bringing forth additional collateral, the debtor therefore sued for wrongful repossession and dishonor of checks. Notwithstanding that the debtor was in default when the bank acted, the trial court decided for the debtor on the ground that the existence of negotiations between the parties had modified the written agreement so as to require the bank to give notice to the debtor before closing its business and dishonoring its checks. Punitive damages were also awarded to the debtor. On appeal the Supreme Court of Alaska affirmed the decision. See also the case of Duffield v. First Interstate Bank, 13 F.3d 1403 (10th Cir. 1993).

[879] Section 1-309 UCC provides as follows: "OPTION TO ACCELERATE AT WILL. A term providing that one party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure" or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised".

acceleration is not done in good faith.[880] It is also apt to point out that for the whole debt to be accelerated by the secured party, the security agreement between the parties should provide for an acceleration clause.[881]

Another thorny issue in the redemption of the collateral is that the debtor shall also pay the reasonable expenses incurred by the secured party in repossessing the collateral. The expense payable by the debtor extends to keeping, caring, preparing for disposition and processing of the collateral to the extent provided by the agreement and not unconscionable as to be prohibited by law. In addition, the debtor is expected to pay reasonable attorney's fees and other legal expenses incurred by the secured party.[882] The burden imposed by this section on the debtor has made redemption impracticable, first a debtor who has defaulted in paying arrears of a debt is most unlikely to clear the backlog of arrears and also pay for the whole obligations secured by the collateral. Moreover, the other financial burdens imposed upon the debtor by Article 9[883] as stated above are well over what the debtor may possibly bear in discharging the financial obligations associated with security agreement. This has prompted the thoughts whether the right of redemption is not merely rhetoric under the code or at best a strategy to delay or hinder the mortgagee from legitimately assuming the title of the black acre and to keep the ownership of the

[880] See section 1-309 UCC and also the cases of K.M.C. Co. v. Irving Trust Company 757 F.2d 752 (1985) (US Court of Appeals, Sixth Circuit), Brown v. AVEMCO Investment Corp., 603 F.2d 1367, 1375-80 (9th Cir. 1979), Blaine v. G.M.A.C., 82 Misc.2d 653, 655, 370 N.Y.S2d 323, 327 (1975).

[881] See the case of General Electric Credit Corp. v. Bankers Commercial Corp., 429 S. W.2d 60 (Ark. 1968).
An example of an acceleration clause is contained in section 9.3 of Accounts Receivable/ Inventory Loan Agreement in Appendix 1 to William D. Warren, Steven D. Walt, Secured Transactions in Personal Property supra foot note 687, p. 624 which provides as follows: "CNB (City National Bank) Remedies. Upon the occurrence of an event of default, at the sole and exclusive option of CNB, and upon written notice to Borrower, CNB may (a) declare the principal of and accrued interest on the loans immediately due and payable in full, whereupon the same will immediately become due and payable; (b) terminate this agreement as to any future liability or obligation of CNB, but without affecting CNB's rights and security interest in the collateral and without affecting the obligations owing by the Borrower to CNB; and/or (c) exercise its rights and remedies under the loan documents and all rights and remedies of a secured party under the code and other applicable laws with respect to the collateral".

[882] See section 9 – 623 (b) UCC.

[883] See sections 9 – 623 (b) and 9 – 615 (a) (1) UCC.

land with the mortgagor and his family.[884] Nevertheless it is good to point out that a debtor is entitled to redeem his collateral after default if he fulfills the requirement as laid down under Article 9.[885]

3.6.1. Redemption under Nigeria and Cameroon's Secured Transactions Laws

There appears to be no provisions dealing with right of redemption as it relates to the company's fixed and floating charges. However, it appears that where a floating charge created by a company has crystallized and has becomes fixed following default, and the secured party has appointed a receiver/manger over the assets of the a company, upon the resumed fulfillment of the obligations, the receiver could be withdrawn and the crystallized charges would become floating again to enable the company operate its normal business.[886] Besides it is elementary that the reason for the appointment of a receiver/manager is to realize the security of the secured party upon the default of repayment by the debtor. Upon default, the entire amount of money owed by the company to the secured party becomes accelerated, however where the company repays the accelerated amount secured by the floating charge, the crystallization ceases and receiver appointed has no option than to leave the assets of the company. Like all forms of redemption, the company need to act timely otherwise where the receiver has sold any of the properties to a third party, the redemption will not affect the rights of such third parties whose interest has inured on the property.

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[884] See Grant Gilmore, Security Interests in Personal Property, supra footnote 51, p. 1216, see also Tibor Tajti, Comparative Secured Transactions Law, supra note 48, p. 192.
[885] The requirements are stated in section 9 – 623 (b) and (c) UCC.
[886]This is the effect of section 178 (2) CAMA 2004 which provides as follows:"On the happening of any of the events mentioned in subsection (1) of this section, the charge shall be deemed to crystallize and become a fixed equitable charge on such of the company's assets as are subject to the charge, and if a receiver or manager is withdrawn with the consent of the chargee, or the chargee withdraws from possession, before the charge has been fully discharged, the charge shall thereupon be deemed to cease to be a fixed charge and again become a floating charge."

Unlike the case in the United States where the secured creditor can accelerate the amount if he reasonably deems himself insecure or the debtor defaults in paying installments, acceleration can only be done by the court in Nigeria. There is no right given to the creditor to unilaterally deem itself insecure and accelerate the repayment at will even if there are reasonable grounds to believe so. It is only in the case of floating charge, where there are reasonable grounds for a creditor to deem itself insecure that the creditor will first apply to court to get an order enabling him to accelerate the payment.[887] Though the reason behind the provision of court's intervention before accelerating a debt is to guard against abuse of acceleration clause by the creditors as acceleration has the propensity to put pressure on the debtor to pay all accrued and accruable debts immediately, requiring the creditor to get a court order may be counter-productive. This is due to the obvious reasons of slow judicial proceedings in Nigeria. In good faith, acceleration of the debt is contemplated or done by the secured creditor in extreme urgent circumstance, i.e., when it is clear that there is an imminent danger to the secured creditor's rights to be repaid and the security interest is also fast disappearing. At this stage what the secured creditor needs to recover all or most of its securities is prompt and fast action, hence burdening the secured creditor with the burden of getting court order under the Nigerian law is to say the least preposterous. In the case of floating charges a debtor who knows that the creditor is getting an imminent acceleration order from the court which will lead to the appointment of a receiver or manager over its assets may dissipate his properties before the acceleration order is made. Consequently, the American method of accelerating debt which requires no prior court order is

[887] See section 180 (2) CAMA 1990 which provides as follows: "In the case of a floating charge, the court may, notwithstanding that the charge has not become enforceable, appoint a receiver or manager if satisfied that the security of the debenture holder is in jeopardy; and the security of the debenture holder shall be deemed to be in jeopardy if the court is satisfied that events have occurred or are about to occur which render it unreasonable in the interests of the debenture holder that the company should retain power to dispose of its assets."

preferable as it is most efficient in dealing with cases of grave danger to the security of the creditor. The award of damages in cases of abuse of acceleration clauses will put the excesses of the secured creditor in control.

Right of redemption is more evident in the mortgage of real property under the Property and Conveyancing Law of 1959. Though real property is out of the scope of this work, suffice it to say a few brief comments on the right of redemption under the mortgage. Generally foreclosure by the mortgagee has the effect of extinguishing the mortgagor's equity of redemption and accordingly transfers the title to the mortgagee under the common law.[888] However, equity will aid the mortgagor in redeeming his property subject to certain conditions. The maxim is there is no clog on the equity of redemption unless the interest of third parties or subsequent purchasers of the property have accrued in the property. Where the interest of subsequent purchasers has inured in the property the equity of redemption cannot avail the debtor any longer. Just like the Article 9 provisions, where the debtor wants to redeem his property which has been foreclosed, the debtor is obligated to satisfy all outstanding debts and the cost associated with the foreclosure. It should be noted that any sale conducted in contravention of the rules of disposition – not given the mandatory public notices or not selling the collateral in a commercially reasonable manner – may be a ground for the court to declare the sale void and the secured party may also be liable in damages to the debtor.

There is no provision either under the Uniform Act Organizing Securities or under the Uniform Act on Recovery and Execution that specifically provide for redemption of the collateral seized

[888]See Gaius Ezejiofor, The Consent Requirement of the Nigerian Land Use Act, Journal of the African Law, supra footnote 795, p. 105.

by the secured party upon default of repayment by the debtor. However redemption of the seized collateral is possible and may be inferred by the combined reading of the provisions of Articles 59 and 60 of the Uniform Act Organizing Securities. Both Articles provide that where the debtor has repaid the debt owed to the secured creditor then the debtor is entitled to receive back the collateral given for the loan. By extension, where the debtor has repaid the loan and other associated cost of the seizure of the collateral before the sale of the collateral or before third party's interest has accrued on the collateral, the debtor has successfully redeemed its collateral. The collateral in the five types of pledges without dispossession which are registrable at the Registry of Cameroon Court of First Instance, are redeemable by the debtors upon the fulfillment of the obligations secured therein. The secured creditor's interest in the collateral that would have legitimately entitled him to sell and transfer title in the collateral to a third party has ceased, consequently the title to the collateral reverts back to the debtor. Like in the United States and Nigerian, the debtor must act fast to redeem its collateral before the rights of a third party legitimately accrue in the collateral.

3.7. Enforcement through Judicial Means: Introduction

Beyond the methods of enforcing securities to satisfy the secured party's claims already discussed above, there is yet another means of enforcing the secured party's claims upon the debtor's default, albeit with the help of the court. Because of the inherent risk of paying damages in event of non compliance with the laws and procedures of self-help repossession, strict foreclosures and disposition, a secured party may decide to enforce his security interest with the aid of court upon default by the debtor. Prompt judicial enforcement of the secured transaction presupposes the efficient performances of the officials necessary for the judicial administration -

court officials who include sheriff, bailiffs[889] and clerks, judges and the legal practitioners – and also the efficient utilization of the court processes like preliminary/interim measures and fast-track civil procedure rules. Consequently, discussions on the judicial enforcement in the United States, Nigeria and Cameroon will center on these officials and processes. The discussions will also afford opportunity to proffer ways of reforming the Nigeria and Cameroon judicial administration by drawing from the experiences and best practices from the United States.

3.7.1. Judicial Enforcement under Article 9

Where there is a default and the secured creditor decides to enforce its security interest with the aid of the court, the secured party may institute an action against the debtor in replevin to recover the collateral wrongfully taken or detained by the debtor. Alternatively, the secured party may completely ignore the fact that he holds collateral and institute a suit based on the debt[890] and if successful, the secured party will take out a writ of fieri facia to attach and seize the properties of the debtor by the bailiff of the court and have the properties sold by the sheriff for the satisfaction of his claims.

Though not a perfect solution because of the delay that may be associated with the process especially in an unreformed system where the judicial process takes almost eternity,[891]

[889] In Nigeria sheriffs are different from bailiffs under the Sheriffs and Civil Process Act 2004. See supra footnote 837 for the distinction between sheriffs and bailiffs.
[890] See section 9 - 601 (1) UCC and Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 194.
[891] In Argentina and other countries which have unreformed secured credit transaction laws, the judicial process of enforcing a security interest and the process of appeal that may result therefrom takes a very long time which makes the value of the collateral or other assets of the debtor (with the exception of real property) to depreciate drastically or even become worthless that any judgment based on it will be fruitless and not worth the while. See Heywood Fleisig, Mehnaz Safavian, Nuria de la Pena, Reforming Collateral Laws to Expand Access to Finance, supra footnote 18, p. 91.

nonetheless judicial enforcement remains a sure safeguard against opportunistic litigation by the debtor against the secured party on a whimsical reason of non compliance with the statutory procedures especially in a high litigation prone society like the United States. Even in the United States, the problems of the delay in the process of judicial enforcement and the attendant consequences of the dissipation of the debtor's collateral or other personal properties pose a real challenge to any secured party who wishes to pursue the option of judicial enforcement. Hence, the provision of preliminary and interim measures in the civil procedure system to protect the properties of the debtor from being dissipated and removed out of the jurisdiction of the court. Accordingly, the writs of attachment[892] and garnishee orders were employed to ensure that a secured party who decides to use court enforcement does not lose out on the collateral due to the protracted nature of litigation. Whilst attachment is used for other personal properties, garnishee orders are used for the debtor's monies with the third party, especially with a bank. The essence of attachment and garnishment is to enable a bailiff of the court to seize the property of the debtor upon an interlocutory application of the plaintiff. The seized property would be what the plaintiff (secured party) will rely on to satisfy the debt, in event the plaintiff secures judgment on

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This is also true for Nigeria especially when one considers the length of time it takes for cases to go through the appellate courts. It may between 5 – 10 years or even more for a case to be finally decided by the Supreme Court and by this time the personal properties of the debtor would have been completely worthless.

[892] See Rule 4:60-5 of State of New Jersey Court Rules which provides for the writ of attachment as follows: Rule 4:60-5 (a) "Issuance of Writ on Notice. A writ of attachment shall issue only in cases where the defendant is subject to the exercise of jurisdiction by the State consistent with due process of law. The writ shall issue upon court order on the plaintiff's motion. Except as otherwise provided by paragraph (b) of this rule, the motion shall be heard on no less than three days' notice to the defendant, who shall file and serve any opposing affidavits or cross-motions at least one day prior to the hearing. The motion shall be granted only upon the court's finding, based on the moving papers, any opposing affidavits which may have been filed, and any testimony taken pursuant to R. 1:6-6, that (1) there is a probability that final judgment will be rendered in favor of the plaintiff; (2) there are statutory grounds for issuance of the writ; and (3) there is real or personal property of the defendant at a specific location within this State which is subject to attachment."

Rule 4:60-5 (b) "Issuance of Writ Ex Parte. An order for issuance of writ of attachment without notice to the defendant may be entered by the court only if the defendant is about to abscond or if the court finds from specific facts shown by affidavit or verified complaint that the giving of such notice is likely to defeat the execution of the writ."Rule 4:60-5 (c) "Contents of Order. Upon satisfactory proof of plaintiff's right to the writ, the court by order shall direct the issuance of the writ fixing the amount or value of property to be attached, and providing the manner in which notice of the attachment shall be given to the defendant, and such terms and conditions as the court deems appropriate."

his claims against the defendant (debtor). Besides other conditions,[893] the attachment and garnishee orders which subsist for a short duration, are normally made by the judge[894] or clerk[895] of the court ex-parte on examining the claims of the plaintiff[896] upon some conditions which usually include the secured party executing a bond indemnifying the defendant in case the case turns out to be frivolous.

Suffice it to say that the effective freezing of the asset of the debtor with the aid of the judicial process postulates the proficiency of the judicial system in general. Specifically it presupposes that the bailiff system is efficient, otherwise the orders of the court would not be carried out judiciously, thereby denying the secured party the fruit of his litigation. It also envisages the availability of court preliminary or interim orders, the willingness of the court to grant preliminary orders in deserving circumstances and the dexterity of the American Judges to discharge these cases speedily. The volume of cases filed each day in courts in the litigious American society is enormous,[897] and yet, there are no absurd numbers of backlogs of cases

[893] Some of the conditions are as follows: attachment and garnishee orders are available to the plaintiff (secured party) only when the plaintiff is seeking a money judgment; also the attachment and garnishee order gives the plaintiff a kind of lien which is dependent on the outcome of the suit, if the plaintiff succeeds on his main claim, then the contingent lien becomes a judgment lien otherwise the court will vacate the attachment or garnishee orders already made with cost against the plaintiff; again the effect of the order is technically to prevent the defendant from dissipating his personal properties by selling or removing the properties out of the jurisdiction of the court, using the properties, or further encumbering his properties. In a way, the order preserves the status quo ante whilst the matter is sub judice. See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 196.

[894] Mitchell v. W.T. Grant Co, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d.406 (1974).

[895] Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d. 556, cert. denied; 409 U.S. 902, 93 S .Ct. 177, 34 L.Ed. 2d 165 (1972).

[896] The normal procedure is to make an interim order for attachment or garnishee ex-parte, until the defendant is heard on the issue, when the defendant is heard and the court believes from the argument of both parties that the order should subsists till the determination of the suit, then the court makes an interlocutory order extending the life of the initial interim order pending the hearing and determination of the suit. However if at the hearing of both parties the courts believes that there is no justifiable basis for the making of the order in the first place the court will vacate the order at cost to the plaintiff.

[897] It is estimated that about 15 million law suits are filed each year in America. See Legal Reform Now, Reduce the Number of Law Suits, available at < http://www.legalreform-now.org/menu3_3.htm >; last visited on the 18th of March 2011.

pending in court[898] – at least compared to many emerging systems of the world – is an unambiguous testimony of the adroitness of the judges and the attorneys in the United States in hearing and determining cases speedily.[899]

However, in the United States, the pre-trial grant of attachment and garnishee orders have sparked off the question of the constitutionality of the orders in view of the constitutional protection of due process enshrined in the 14th Amendment. The United States Supreme Court, in the case of Fuentes v. Shevin[900] struck down the Florida and Pennsylvania prejudgment replevin provisions for being unconstitutional because the procedure of not giving the debtor the opportunity of being heard before depriving him of his property offends the due process enshrined in the 14th Amendment.[901] However, in the case of Mitchell v. W. T. Grant Co.,[902]the United States Supreme Court upheld the constitutionality of the Louisiana sequestration[903] summary procedure because the law provided that the attachment be made by the judge (i.e., not a clerk) and also for immediate hearing of the case after the attachment with possibility of vacating the order if the facts provides otherwise.

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[898] However a greater percentage of the law suits are settled out of court. According to Legal Reform Now Blog, about 97% of all the cases filed in the United States are settled out of court. See Legal Reform Now, Reduce the Pressure towards Lawsuit Settlement, available at < http://www.legalreform-now.org/menu3_4.htm >; last visited on the 18th of March 2011. Some of the reasons for the out of court settlement are high legal fees, court cost, and awards. According to Gorge Priest, "the availability of unlimited punitive damages affects 95per cent to 98 per cent of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damage claims increases the magnitude of the ultimate settlement and increases the likelihood of litigation." See Victor E. Schwartz and George Priest, Punitive Damages Reform: The Case of Alabama, 56 LA. L. REV. 825, 830 (1996).

[899] Although there are extreme willingness of Americans to settle the cases before or during the trial of the cases and this also contribute in decongesting the court cases.

[900] See supra footnote 896.

[901] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 198.

[902]See supra footnote 894.

[903] Sequestration is the process by which property is removed from the possessor pending the outcome of a dispute in which two or more parties contend for the property. It could be voluntarily done by parties i.e., the parties willingly deposit the property at issue in a lawsuit (conventional sequestration) or court ordered sequestration (judicial sequestration). See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 1397.

From the foregoing, it is axiomatic to state that for judicial enforcement to be effective, the following must be present: the civil procedure must provide for a judicial process that is not bogged down with many unnecessary formalities, the preliminary measures of the court should give relief to the secured party in preserving the collateral or other properties of the debtor which form the basis for the satisfaction of the debtor's indebtedness to the secured party; the Judges, lawyers and other court officials (bailiffs, sheriffs or clerks) should be diligent in the trial of the case, and enforcement of the orders of the court timely. American judicial process and its enforcement mechanisms are model system in this regard, blazing the trail in speedy enforcement of secured credit transactions both in judicially assisted enforcement and in private enforcement through self-help remedies. Indeed, this is one of the hallmarks of the efficiency of the American secured credit enforcement: the fact that within the American legal system there are efficient Article 9 and non-Article 9, private and public options of enforcement of secured transaction which the secured creditor can chose from to realize his security.[904] This partly explain the willingness, readiness and confidence of individuals, sellers, banks and other credit institutions to extend credit facilities to borrowers and purchasers in the society and the positive effect it has on the US economy.[905] The lenders in the United States have trust in the arrays of

[904] Example the provisions of garnishee order proceedings and other interim measures are not contained in Article 9, they are contained in various States civil procedure codes and for the enforcement debt or liquidated money demand which may not arise out of secured credit transactions, yet they are effective for the enforcement of secured credit transactions. See generally Tibor Tajti, Comparative Secured Transactions Law, supra foot note 48, p.195

[905] Whilst the author was in the United States for his research, he went to Best Buy Stores at 330 NE Northgate Way, Seattle to buy a laptop to change the one he was using that was giving him problems. The laptop and its accessories became more expensive than the author bargained for, while pondering whether to purchase the laptop and its accessories immediately or purchase it in batches; the author decided to remove the accessories and told the sales representatives of his decision. Immediately the sales representatives informed the author of three credit purchase options available to the author where the payment of the purchase price for the laptop and accessories could have spread out for the next 12 months without interest and the credit purchase would have been concluded in less than ten minutes. However, Best Buy Stores would take purchase money security interest in the laptop and its accessories. This offer did not materialize because the author had only three months for his research in the US. Again, most of the properties in the house where the author lived in the Seattle during his research, which was a nice couple's home, were all purchased on credit especially electronic items. The different sellers have purchase money security interest on those household properties. Even the house was bought on a mortgage.

institutional mechanisms available to promptly enforce and realize their security upon default by the debtor and not necessarily on the integrity of people to respect and honor agreements on secured transactions.[906]

3.7.2. Judicial Enforcement of Secured Transactions under Nigerian Law

Judicial enforcement remains the main option of enforcement open to the secured party to realize his securities upon default of the debtor in Nigeria. This is largely because the notion of self-help repossession as practiced in the United States is unknown in Nigerian law and other methods open to the secured party are fraught with so many uncertainties that an average secured creditor may not find the other options attractive as a means of the enforcement of the secured credit transactions. Quite unlike in the United States where there are other effective options which avails the secured party of the opportunity of realizing his securities in event of default, the situation in Nigeria is pro-debtor[907]and is impacting negatively on the availability and accessibility of credit in Nigeria with its dire consequences on the economy. The challenge therefore is how to create other efficient enforcement mechanisms using the Article 9 enforcement model in order to enable the secured party to realize his securities.

Where cases take ages to conclude at the court of first instance and also take inordinate time to go through the several appellate processes, the personal properties of the debtor may either have been disposed off, deteriorated or the value have become worthless that the sale of it at the end

[906] Though this trust and confidence was shaken greatly with the recent mortgage and financial crisis in the United States in 2008 which spilled over to other countries of the world and resulted to a recession in the US. Nevertheless the American economy is coming out in recession and confidence is being restored now, banks and other financial institutions are lending again.
[907] Examples of pro-debtor laws are the absence of self-help, the requirement of a court order to foreclose a debtor's collateral by a mortgagee or chargee, and the absence of strict foreclosure.

of protracted litigation may not be sufficient to satisfy the judgment debt. This could constitute a clog on the wheels of financing with sad consequences to the debtor and the economy: credit may stop flowing or the terms of credit may be unfavorable; the interest may be high; the maturity date may be too short, or the lenders may demand properties with higher value as collateral or even probably real properties as collateral. This may exclude some deserving SME's from accessing credit with dire consequences to the economy.[908]

Besides being the main option, judicial enforcement is also the 'default' option for the enforcement of a security interest by the secured party. 'Default' option here means that where the security agreement does not contain other options for the secured party to enforce his security interest – like appointment of receiver/manager or power of sale - the secured party will be left with the only option of judicial enforcement in 'default' of the provision of any other option in the security agreement. This re-emphasizes the importance of judicial enforcement and the need to reform the procedures and the mechanisms needed for its efficiency.

Irrespective that in Nigeria the judicial process is clogged with so many unnecessary technicalities and formalities, nonetheless, in a number of cases, the courts have shown preferences for substantial justice over technicalities; thereby not sacrificing justice on the altar of technicalities and formalities.[909] Apart from the slow and formality-laden judicial processes,

[908] See Heywood Feisig, Mehnaz Safavian & Nuria de la Pena, Reforming Collateral Laws to Expand Access to Finance, supra footnote 18, p. 51. Once again see the address of President Obama to the joint session of the Congress on the 24th of February 2009. But basically when the interest rates on loans go up, there is a corresponding increase in goods and services in a society, this could result in inflation on the economy and everybody in the society will feel the impact.

[909] In the case of Ogundele v. Agiri (2009) 12 SC (pt. 1) 135 where the Nigerian Supreme Court held that the filing of a brief of argument of a party in the suit in the name of the law firm (unless duly registered as such) that prepared the brief instead of the name of the legal practitioner that prepared the brief is not only an irregularity but a fundamental error since the name of the law firm is not a legal practitioner recognized by law or a person entitled to

there are other issues that hinder the prompt dispensation of justice in Nigeria including the judicial enforcement of secured transactions. Some of the issues are as follows: backlog of cases in court; the civil procedure rules which gives room for manipulations of lawyers to either buy time or cause unnecessary delays in a case; the act of some lawyers who are not always prepared to prosecute or defend the case of their client with dispatch; inefficient court officers like the bailiffs, sheriffs and court clerks; lethargic and compromised court officials including judges and magistrates; the list is endless. This litany of woes that bedeviled the Nigerian judicial process contradict the very essence of prompt enforcement of secured transactions especially movable securities which by their nature are susceptible to dissipation and deterioration.

The importance of quick enforcement of security interests – especially in case of personal property – cannot be overemphasized. This is because, the problems of dissipation or deterioration of movable securities when their enforcement is protracted is real and challenging. Cases abound in Nigeria, where a secured lender obtains a judgment against the properties of the debtor, secures a writ of *fieri facias*[910] and only to discover that the properties have either been dissipated or have deteriorated so badly that it does not make good business sense expending energy, time and resources in levying execution on them. In order to alleviate the hardship and inconvenience caused by the dissipation and deterioration of the debtor's properties as a result of long and protracted litigation, the various civil procedure rules of the court have provisions of

practice as a barrister and solicitor in line with sections 2 (1) and 24 of the Legal Practitioners Act, Cap 207 Laws of the Federation 1990. However after citing other authorities in support of the decision, the Supreme Court went ahead to consider the merit of the case as the court held as follows: "However, in the interest of the litigants, I will go on for the last time with the merits of the Appeal." See also the cases of UBA v. Nwora (1978) 11-12 SC1, Nishizawa v. Jethwani (1984) 12 SC 234, Nneji v. Chukwu (1988) 3 NWLR (pt 81) 184, UTC v. Pamotei (1989) 2 NWLR (pt 103) 244.

[910] A writ of execution that directs a sheriff to seize and sell a defendant's property to satisfy a money judgment. See Bryan Garner, (ed.), Black's Law Dictionary, supra foot note 3, p. 659.

interim, preservative and protective measures. The aim is to preserve the res[911] of the proceedings in order not to render nugatory the judgment of the court or deprive the successful party the fruits of his judgment. The provision of interim, preservative and protective measures is not an end to the justice of a case in itself but serves as a means to the ends of justice by preserving the res of a case. The ultimate end to justice is the timely and efficient determination of the competing rights of the parties in a suit: i.e., impartially determining the rights and obligations of the parties to the suit without fear or favor. Herein lies the bedrock of the people's confidence in the judicial process and the willingness of parties to submit their disputes to court for adjudication.

Although, it is not within the purview of this work to review and assess whether the Nigerian courts have been dispensing justice, but it is sufficient for the purpose of this work to state here that whatever seeming 'successes' Nigerian courts may have recorded in dispensing justice, have been marred by slow judicial process which is an antithesis of prompt judicial enforcement of security interest. This work will therefore analyze the factors listed above that have contributed to the slow judicial process in Nigeria, and at the same time analyze and give commendations to the provisions contained in the civil procedure rules that should enhance quick judicial enforcement of secured credit transactions.

3.7.2.1. High Courts Civil Procedure Rules in Nigeria

Notwithstanding the slow processes of litigation in Nigeria, Nigerian civil procedure rules contain quite interesting provisions that should enhance the quick dispensation of justice. As

[911] The object, interest, subject matter or status of the case before the court. See id., p. 1332.

already pointed out, conscious of the need for speedy enforcement of the security interest, and the apparent lack-luster performance of the courts in this area, the various States High Court Civil Procedure Rules[912]and Federal High Court Civil Procedure Rule have provisions for interim preservative measures and prompt dispensation of justice. For example the High Court of Lagos State Civil Procedure Rules 2004[913] has many provisions both on fast dispensation of justice and interim preservative measures that is aimed at fast tracking the judicial processes and preserving res of case. Also the Federal High Court[914]Civil Procedure Rules have similar provisions.[915]There are other provisions in Nigerian High Courts (both Federal and States High Court) civil procedure rules that tend to fast track the judicial processes and ensure that a secured creditor enforces his security interest promptly. These rules will be discussed below.

3.7.2.2. Fast-track Procedure: Frontloading

[912]Each of the 36 States in Nigeria has its own Civil Procedure Rule with which the business of the court is being conducted although the civil procedure rules of various states are substantially similar. There have been calls to harmonize and have one uniform civil procedure rule for all the 36 states to ease the burden of lawyers who are legally entitled to practice in any state in knowing what various civil procedure rules of different states in Nigeria provide.

[913] The High Court of Lagos State Civil Procedure Rules 2004 is available at http://www.nigeria-law.org/LagosStateJudiciaryHighCourtRules2004.htm last visited on 17.02.2010. See also the High Court of Federal Capital Territory, Abuja (Civil Procedure) Rules 2006 available at http://www.nigeria-law.org/High%20Court%20of%20the%20Federal%20Capital%20Territory,%20Abuja%20(Civil%20Procedure)%20Rules.htm last visited on the 17th April, .2011.

[914] In contrast to the State High Courts, the Federal High Court in Nigeria is one with one jurisdiction (over all states in Nigeria) but have different judicial divisions. See section 251 of the Constitution of the Federal Republic of Nigeria 1999.

[915] The title of the Order 28 of the Federal High Court Civil Procedure Rules 2009 is Interlocutory Injunctions and Interim Preservation of Property. Order 28 Rule 2 (1) provides "On the application of any party to an action, the court may make an order for the detention, custody or preservation of any property which is the subject matter of the action or as to which any question may arise therein or for the inspection of any such property in the possession of a party to the action." The procedure for frontloading which is pari-materia with the provisions of the High Court of Lagos State Civil Procedure Rules 2004 is provided in Order 3 Rule 3 of the Federal high Court Civil Procedure Rules 2009.

The process of frontloading[916]that fast-tracks judicial process will be better appreciated when one compares the old civil procedure rules[917] which did not provide for it and the new civil procedure rules that provided for the front loading mechanisms in filing court processes. The comparison will reveal that under the old civil procedure rules that had no front loading requirement, there were many stages and formalities that a plaintiff had to pass through before his suit was ripe for hearing in a court of law. These stages required service of notices to the other party and waiting for the responses of the defendant to the court processes filed by the plaintiff. The procedures involved in the service of court processes and the receipt of responses from the parties to the suit (plaintiffs and defendants) consumed unnecessary time. In most cases, the attorney for the defendant insisted on having its statutory allowed time to file a response to the court process from the plaintiff's attorney.[918] Yet the time limit given by the rules were not sacrosanct and defendant attorneys in most cases entered appearances or filed the defendant's statement of defense months after they were served the plaintiff's writ of summons and statement of claim by filing a motion for the extension of time for leave of the court to enter appearance and file the statement of defense out of time. The attorneys always fabricated stories in their affidavits to

[916]This is a mechanism where the plaintiff in a matter files all the documents at the commencement of the suit to enable the case to be decided speedily. Order 3 Rule 2 (1) of the High Court of Lagos State Civil Procedure Rules 2004 provides as follows: "(1) All civil proceedings commenced by writ of summons shall be accompanied by: (a) statement of claim, (b) list of witnesses to be called at the trial, (c) written statements on oath of the witnesses and (d) copies of every document to be relied on at the trial. (2) Where a claimant fails to comply with the Rules (1) above, his originating process shall not be accepted for filling by the Registry, see also Order 3 Rule 3 of the Federal High Court (Civil Procedure) Rules 2009 which has a substantially similar provision."

[917] Examples of the old civil procedure rules are the Federal High Court (Civil Procedure) Rules 2000, High Court of Lagos State (Civil Procedure) Rules 1994. These old civil procedure rules have been changed by the Federal High Court (Civil Procedure) Rules 2009 and High Court of Lagos State (Civil Procedure) Rules 2004which now have provisions for the front loading of court processes which have shortened the period of filing and hearing cases.

[918]For example, under the old civil procedure rules where a plaintiff filed and served a writ of summons on the defendant, the writ required the defendant to enter an appearance within eight days. (See Order 14 Rule of the Federal High Court Civil Procedure Rules 2000 and form 1 in Appendix 6 to the Rules) Also where a plaintiff filed and served on the defendant his statement of claim, the rule gave 30 days to the defendant to file and serve his statement of defense to the plaintiff's statement of claim. Where the issue was the ownership of a piece of land, the rule provided more time and gave the defendant up to sixty days to file and serve his statement of defense on the plaintiff.

justify the delay in filing the court processes within the time prescribed by the rules and the courts in almost all the cases would grant the motion with or without cost. [919] Even where cost was granted, it was marginal to the plaintiff and would not assuage the delay in dispensing justice occasioned by their acts. This is the major cause of the slow judicial process known even to the unlearned[920] in Nigeria. It is under this mindset that one appreciates the fast track procedure of frontloading all court processes provided for in the new rules[921] which seek to abridge time and remove the unnecessary stages or phases in commencing litigation. In frontloading the plaintiff's attorney files simultaneously at the commencement of the suit all the documents needed to commence the case and the same are sent to the defendant for his response after which the case is set down for hearing.[922] This new procedure of frontloading coupled with the process of pre-trial conferences and scheduling[923] ensure that cases are decided promptly as

[919] Interestingly, in the case of UBA v. Nwora (1978) 11-12 SC 1, the Supreme Court held that the court ought not to shut out a defendant from entering his defense even if it is out of time. Shutting the defendant from entering appearance of filing his defense out of time is tantamount to depriving the defendant from his constitutional right of fair hearing- i.e., the right to be heard before any decision involving the defendant is given by the courts.

[920] This is a shorthand way of saying everybody (lawyers and non-lawyers alike) in Nigeria. In Nigeria refer to legal practitioner as a learned gentleman and the corollary is that others are 'unlearned'.

[921] Again the new rules are: the Federal High Court (Civil Procedure) Rules 2009 and High Court of Lagos State (Civil Procedure) Rules 2004.

[922] See Order 3 Rule 2 of High Court of Lagos State Civil Procedure Rules 2004, Order 3 Rule 3 Federal High Court Civil Procedure Rules 2009 which is substantially similar to the High Court of Lagos State Civil Procedure Rules provide as follows: 'Order 2 Rule 3 (1) All civil proceedings commenced by writ of summons shall be accompanied by (a) statement of claim, (b) copies of every document to be relied on at the trial, provided that dispute survey plans need not be filled at the commencement of the suit, but shall be filled within such time as may be ordered by the court upon any application made under sub-rule 3 of this rule. (c) list of non-documentary exhibits, (d) list of witnesses to be called at the trial, and (e) written statements on oath of witnesses; provided that (i) the statements on oath of witnesses requiring subpoena from the court need not be filed at the commencement of the suit, (ii) the witnesses who require subpoena or summons shall at the instance of the party calling them be served with Civil Form 1 (a) before the filing of the statements of such witnesses. (2) Where a plaintiff fails to comply with sub-rule 1 of this rule, and rules 3 and 9 of this order his originating process shall not be accepted for filing by the Registry.'

[923] Pre-trial conferences and scheduling are provided under the civil procedure rules. It is a mechanism wherein some preliminary issues are dealt with dispatch before the actual trial begins after the close of pleadings and this narrows the issues for contention by the parties. Some of the issues that the judge can decide at this stage among others are as follows: the disposal of matters which must or can be dealt with on interlocutory application; giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal; promoting amicable settlement of the case or adoption of alternative dispute resolution; formulation and settlement of issues; amendments and further and better particulars; control and scheduling of discovery, inspection and production of documents; narrowing the field of dispute between expert witnesses, by their participation at pre-trial conferences or in any other manner, and generally such other matters that can facilitate

so many interlocutory issues are decided between the parties speedily before the commencement of the actual trial. This greatly narrows the remaining issues to be adjudicated between the parties and hence help to ensure that cases are determined expeditiously if all the parties and their attorneys cooperate; thus, drastically reducing the many frustrating stages of the slow judicial processes.[924] Although this procedure of frontloading applies to court proceedings generally, its positive impact in the area of enforcement of secured transactions especially in personal properties in Nigeria in invaluable. It is obvious that a creditor would have been almost frustrated litigating under the old order to enforce its securities especially on personal property collateral. This reason being that the worth of the assets may have deteriorated so significantly within the course of the protracted litigation that the secured creditor would hardly had recovered its credit from the decreased value of the collateral. The sad consequence of this would work against extending credit facilities to people or corporations who cannot afford real property security interest.

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the just and speedy disposal of the action. See generally Order 25 of High Court of Lagos State Civil Procedure Rules 2004.

[924] The author remembers vividly the case he handled for Bureau of Public Enterprises in Kaduna while working as an Associate in the Law Firm of Punuka Attorneys and Solicitors. The case is Suit FHC/KD/CS/66/2001 Maggi Johnson & 71 Ors. v. Attorney general Of the Federation & 3 Others, though the matter was no on the enforcement of secured credit transaction, it was a matter where the Bureau of Public Enterprise (An agency of the government charged with privatization and commercialization of government companies in Nigeria) sought to re-privatize the Durbar Hotel (a four-star hotel) to core investors after former late president of Nigeria General Sani Abacha sold the Hotel to his crony who later transferred same back to him.

When Bureau for Public Enterprise wrote to the surrogate owner and intimated him of the plans to re-privatize the hotel, the family of the late president sued the Bureau, the Federal Government of Nigeria and the Attorney General seeking to stop the re-privatization of the hotel. This brought the operation of the hotel to a halt while the legal battle raged on. The case which was filed on the 19th of December 2001 took four years at the first court (Federal High Court in Kaduna) and during this time, the hotel properties and fixtures got so badly deteriorated and vandalized that the hotel became a ghost of itself. On one of the trip the author paid to Hotel sometimes in 2004, the author was shocked to see how vandalized and deteriorated, Durbar Hotel Plc, one time tourist destination in northern part of Nigeria had become.

The situation was so bad that that the author began to question the rationale and economic sense in continuing to defend a worthless cause. The case is currently on appeal as the federal government through the Bureau appealed against the decision of the Federal High Court in Kaduna and this has worsened the condition of any remaining asset of the Hotel. It certainly will not be possible for the federal government to realize anything tangible from the sale of the hotel, should government win at the end of the day. Maybe the government may only sell the carcass of the real property and the land where it is built, this is the dangers of a protracted litigation in Nigeria which is as result of the loopholes in the civil procedure rules which give inordinate time for counsel to file and respond to processes in court.

3.7.2.3. The Undefended List Procedure

The undefended list procedure is contained in most states' High Court Civil Procedure Rules.[925] It is used in respect of a recovery of debt or liquidated money demand where the sum owed is not in dispute, the facts are not in dispute and the defendants have no real defense to the claim of the plaintiff. In the case of Nwankwo & Anor v. Ecumenical Development Co-operative Society (EDCS) U. A.,[926] Ogbuagu JSC stated: "*it need be stressed and this is also settled, that the object of Rules under the undefended list, is to ensure quick dispatch of certain types of cases such as involving debts or liquidated money claims. In other words, the object is to enable a plaintiff whose claim is unarguable in law and where the facts are undisputed and it is inexpedient to allow a defendant to defend for the mere purpose of delay (as in the instant case leading to this appeal), to enter judgment in respect of the amount claimed.*" In this procedure, where the plaintiff issues a writ of summons on a claim to recover debt or liquidated money demand, and the summons is supported by an affidavit setting forth the grounds of the claims and stating that in the deponent's belief the defendant does not have any defense to the claim. If the court peruses through the application and is satisfied that there are good grounds of believing that that there may not be any defense to the plaintiff's claim, the Court will mark the writ of summons as undefended and set a date for the hearing of the case.[927]

[925] For example see generally Order 12 of the Federal High Court (Civil Procedure) Rules 2009. A similar is provided for in the High Court of Lagos State Civil Procedure Rules 2004 in Order 11Rules (1) - (7). It is called summary judgment procedure and it is in pari-materia with the provisions of the Federal High Court Civil Procedure Rules 2009. It is aimed at enforcement of debt or liquidated money demand speedily without going through the whole process of trial when the defendant does not have defense on the claims of the plaintiff.

[926] (2007) 5 NWLR (pt. 1027), 377, 414; see also the cases of Ataguba & Co. v. Gura Nig. Ltd. (2005)8NWLR (pt. 927), 429; Hinterland Resources Ltd & Anor. v. Fixity Investment Ltd. (2007) 5 NWLR (pt. 1027), 326; Winlyn Ltd. V. NACB Construction & Finance Co. Ltd. (2000) 8 NWLR (pt. 670) , 594; Bank of the North v. Intra Bank S.A, (1969) 1 All Nigerian Law Report (NLR) 91; Macaulay v. NAL Merchant Bank Ltd. (1990) 4 NWLR (pt.144) 283.

[927] See Order 12 Rule 1 of the Federal High Court Civil Procedure Rules 2009. Marking a writ as undefended means that the defendant has no real defense to the claim of the plaintiff, thus in this scenario, the case is set down for the plaintiff to still prove its claim.

The plaintiff's writ together with the affidavit will be served to the defendant and the defendant will be given some time to file a notice stating that he intends to defend the suit and also file an affidavit disclosing a defense on the merit on the case. Where the defendant files an affidavit disclosing defense on the merit within the time, the court may grant him leave to defend the suit and accordingly transfer the suit to 'general cause list' and set the suit down for trial.[928] However, where the defendant fails to file an affidavit disclosing defense on the merit, or files an affidavit which does not disclose defense on the merit, the suit shall be heard as an undefended suit and judgment given therein without going through the whole formality of trial procedure-without the plaintiff being asked to summon witness in court to prove his claim.[929]

This procedure is yet another method to hear a matter expeditiously, abridging the hearing processes by not calling witnesses. The relevance of this procedure to the expeditious judicial enforcement of secured transactions is that where the procedure is properly used without manipulations of defense lawyers, cases can be heard and determined within one to three months and the assets of the debtor which is the subject of a security interest would not deteriorate within this period.

3.7.2.4. Summary Judgment Procedure

The summary judgment procedure is in all fours similar to the undefended list procedure. This procedure is provided in the High Court of Lagos State (Civil Procedure) Rules 2004 and in

[928] See Order 12 Rule 3 (1) (2) of the Federal High Court Civil Procedure Rules 2009. See also the cases of Hinterland Ltd. V. Fixity Ltd. (supra); Federal Military Government of Nigeria v. Sani (1990) 4 NWLR (pt. 147) 688.

[929] See Order 12 Rule 4 of the Federal High Court Civil Procedure Rules 2009. See the cases of Ebong v. Ikpe (2002) 17 NWLR (pt. 797) 504; Franchal (Nig.) Ltd. V. N.A.B. Ltd. (1995) 8 NWLR (pt. 412) 176; U.T.C. (Nig.) Ltd. V. Pamotei (1989) 2 NWLR (pt. 103) 244.

many other states' civil procedure rules.[930] The Summary Judgment procedure provides ample opportunity to claimant to hear his case expeditiously where the claimant believes that there is no defense to his claim. In such a case, the claimant has to file alongside with other court processes an application for summary judgment which is to contain an affidavit stating the grounds of his belief that there is no defense by the defendant to his case. Upon filing of such court processes, the processes will be served on the defendant who will in turn file a statement of defense and other processes to establish his defense to the claims. Where it appears to the judge that the defendant has a good defense, the defendant will be allowed to defend. As opposed to that, where the judge upon reading through all the processes filed by the claimant comes to the conclusion that the defendant has no defense to the claims of the claimant, the court will enter judgment without allowing the parties to go through the whole long process of trial. In the case of Agbabiaka v. First Bank of Nigeria Plc.,[931] Garba JCA stated that: *"[t]he provisions of Order 10 rules 1and 2 (now Order 11 rules 1and 2) of the High Court of Lagos State (Civil Procedure) Rules, (summary judgment procedure) were meant to enable the court to expeditiously decide actions in which from the affidavit evidence before it, no legally tenable defense on the merit was disclosed. The discretion given to court in the rules is used in such cases to save precious time and resource on the part of the court and the parties. The procedure therefore avoids delays and often frustration associated with full trials of such clear cut cases."* It therefore will not be wrong to conclude that these procedures above – front loading system, undefended list and summary judgment procedures – are best suited for prompt judicial enforcement of secured

[930] See Order 11 Rules 1, 2, 3, 4, and 5 of the High Court of Lagos State (Civil Procedure) Rules 2004, Order 11 Rules 1, 2, 3,4, 5 and 6 of High Court of Ogun State (Civil Procedure) Rules 2008.
[931] (2007) 6 NWLR (pt 1029), 25, 54; see also the cases of Adebisi Macgregor Ass. Ltd. V. N.M.B. Ltd. (1996) 2 NWLR (pt. 431), 378; Eastern Plastics v. Synco (W.A.) Ltd. (1999) 1 NWLR (pt. 587) 456; Aubergine Col. Ltd. v. Habib Bank (2002) 4 NWLR (pt. 757) 338; University of Benin v.Kraus Thompson Organization & Anor., (2007) 14 NWLR (pt 1055) 441.

transactions where the facts are not contentious. These procedures are utilized by plaintiffs in litigation and they have to a limited extent[932] reduced the unending delays associated with litigations especially in the area of enforcement of securities.

3.7.2.5. Interim and Interlocutory Preservative Orders: the Mareva Injunction and Interim Attachment of Property

The Mareva injunction and the Anton Pillar orders are part of the relics of English common law rules that form part of Nigerian laws till date. Mareva injunction was developed in England in the case of Mareva Compania Naviera S.A. vs. International Bulkcarriers S. A,[933] it was an injunction given to stop a defendant from removing his assets from the jurisdiction. It is a form of interim preservative measure with the main purpose not to render nugatory the judgment of the court by ensuring that there are defendant asset(s) (including money) to satisfy the judgment of the court that may be given against the defendant. In England, Mareva injunction is an action instituted in England against a foreign defendant freezing sums of money of the defendant in an English bank derived from the same activity which constituted the basis of the plaintiff's claim on the defendant.[934]The provision of Mareva injunction has been codified in our civil procedure rules though not with the title Mareva injunction but with the title '*interim attachment of property*.' Suffice it to say that the import of the combined provisions of the Federal High Court Civil Procedure Rules 2009[935] has the same effect as a Mareva injunction. The aim of the

[932]See infra pp. 334 – 339 for the reasons why the procedural rules have only produced limited results.
[933][1975] 2 Lloyd's Report 509.
[934] See Tibor Tajti, Comparative Secured Transactions Law, supra foot note 48, p. 251
[935] The provisions are Order 30 Rules 1(a) and (c), 3 (1) and Order 45 of the Federal High Court (Civil Procedure) Rules 2009. The detailed provisions of this order is reproduced as follows to show that a defendant who is absconding from Nigeria and at the same time removing his properties from Nigeria and has refused to send security for his appearance may in fact risk be taken into custody of the court: Order 30 Rule 1 (a) provides as follows: "the defendant in any suit with intent to obstruct or delay the execution of any decree that may be passed against him, is

combined provisions of the Federal High Court Civil Procedure Rules is to stop a defendant from removing his properties out of the jurisdiction of the court so that the plaintiff can satisfy his judgment out of such properties in event the plaintiff secures judgment against the defendant - ensuring that the plaintiff reaps the benefit of his judgment. In the case of International Finance Corporation v. DSNL Offshore Ltd,[936] Rhodes-Vivour JCA held: "*A Mareva injunction would be*

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about to dispose of his property, or any part thereof, or to remove any such property from the jurisdiction" while sub-rule (c) says: "then in either such case, the plaintiff may apply to the court either at the institution of the suit or at any time thereafter until final judgment, to call upon the defendant to furnish sufficient security to fulfill any decree that may be made against him in the suit, and on his failing to give security, or pending the giving of such security, to direct that any property movable or immovable belonging to the defendant shall be attached until the further order of the court.'

Rule 3 (1) provides as follows : if the court after making such investigation as it may consider necessary, is satisfied that the defendant is about to dispose of or remove his property with intent to obstruct or delay the execution of the decree, it shall be lawful for the court to order the defendant, within a time to be fixed by the court, either to furnish security in such sum as may be specified in the order or produce and place at the disposal of the court when required, the said property, or the value of the same or such portions thereof as may be sufficient to fulfill the decree or to appear and show cause why he should not furnish security.'

Order 45 Rule 1 provides: *(1)* If in any suit the defendant is about to leave the jurisdiction of the Court, or has disposed of or removed from the country, his property, or any part thereof, or is about to do so, the plaintiff or applicant may, make an application to the Court that security be taken for the appearance of the defendant to answer and satisfy any judgment that may be passed against him in the suit. Rule (2) (1) If the Judge, after making such investigation as it may consider necessary, is of the opinion that there is probable cause for believing that the defendant is about to leave Nigeria, or that he has disposed of or removed his property, or any part thereof out of the country while the suit is pending and that by reason thereof the execution of any judgment which may be made against him is likely to be obstructed or delayed, the judge shall issue a warrant to bring the defendant before him, that he may show cause why he should not give good and sufficient recognizance for his appearance. Rule 2 (2) the defendant shall be brought to Court within two days of the execution of the warrant. (3) If the defendant fails to show such cause, the Judge shall order him to give recognizance for his appearance at any time when called upon while the suit is pending, until execution or satisfaction of any judgment that may be passed against him in the suit, or to give recognizance for the satisfaction of such judgment, and the surety or sureties shall undertake in default of such appearance or satisfaction to pay any sum of money that may be adjudged against the defendant in the suit, with costs. Rule (4) (1) Where a defendant offers to deposit a sum of money in lieu of recognizance for his appearance sufficient to answer the claim against him, with costs of the suit, the Judge may accept the deposit, and direct that the deposit be paid into an interest yielding account in a bank. Rule 4 (2) where a defendant offers security other than money in lieu of bail for his appearance, sufficient to answer the claim against him, the Judge may accept such security and make such order as he may deem fit in the circumstance. Rule (5) (1) In the event of the defendant fails to furnish security or offer a sufficient deposit, the judge may commit him into custody until the decision of the suit, or if judgment be given against the defendant, until the execution of the judgment. Rule 5 (2) Committal to custody under this rule shall not exceed a period of six months at a time. Rule 5 (3) The Judge may at any time upon reasonable cause being shown and upon such terms as to the security or otherwise as may seem just, release the defendant."

[936] (2008) 7 NWLR (pt. 1087) 592, 601-602. In this case the Court of Appeal went enunciated the principles guiding the grant of Mareva injunction: there must be a justifiable cause of action against the defendant; there must a real and imminent risk of the defendant removing his assets from jurisdiction and thereby rendering nugatory any judgment which the plaintiff may obtain; the applicant must make a full disclosure of all material facts relevant to the application; the applicant must give full particulars of the assets within jurisdiction; the balance of convenience must be on the side of the applicant ; and the applicant must be prepared to give an undertaking as to damages. See

granted where it is likely that the plaintiff would obtain judgment against the defendant for a certain sum and there is a reason on the part of the plaintiff to believe that the defendant has assets within the jurisdiction to meet the judgment wholly or in part, and that the defendant may likely dispose of or dissipate the assets such that when judgment is delivered against him there will be no assets to satisfy the judgment." The provisions of Order 45 of the Federal High Court Civil Procedure Rules 2009 even go beyond the properties of the defendant, the provisions compel the defendant not to abscond from the jurisdiction of the court (Nigeria) or remove his property from the jurisdiction of the court pending the determination of the case unless the defendant has furnished recognizance for appearance in assets – money or property, from which the plaintiff can satisfy the judgment sum. Where the defendant is trying to abscond from Nigeria, has removed his property from Nigeria, failed to enter recognizance for appearance, and failed to get a surety or sureties who will pay the judgment debt where he fails to pay - in a bid to obstruct or delay the execution of the judgment sum against him, then the defendant may be taken into custody until after the judgment in the suit or the execution of the judgment of the court. This is a far reaching provision of the Federal High Court Civil Procedure Rules which aims at ensuring that judgments of the courts - especially debt or liquidated money judgments - are satisfied. Indeed it is a veritable tool in judicial enforcement of secured transactions. At the risk of repetition, this provision of the Federal High Court civil procedure rules ensures that the plaintiff reaps the benefits of his judgment and it is for this that the detailed provisions of this rule has been reproduced verbatim in the footnotes and which is therefore a novel institution of Nigerian that is extremely useful to secured creditors.

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the cases of Durojaiye v. Continental Feeders (Nig.) Ltd. (2001)10 NWLR (pt. 722) 659; Efe Finance Holdings Ltd. V. Osagie (2000) 5 NWLR (pt.658) 536; Sotuminu v. Ocean Steamship Nig. Ltd. (1992) 5 NWLR (pt. 239) 1; A.I.C. Ltd. V. NNPC (2005) 1 NWLR (pt. 937) 563.

3.7.2.6. Anton Pillar Orders, Interlocutory Injunctions and Interim Preservation of Property

Anton Pillar orders are granted by the court to enable the applicant and officials of the court to enter into the premises of the defendant to search, inspect and seize some documents or materials infringing on the proprietary rights of the applicant, which is the subject of the litigation pending in court. Developed in the case of Anton Pillar KG v. Manufacturing Process Ltd,[937] it is a reaction to the unabated increase in infringement of Intellectual Property Rights (IPR) especially infringement in copyright by violators who engage in pirating sounds and video recordings. Nigeria has a law on copyright law[938] and the procedure for enforcing the laws by entering into a defendant premises in order to search and seize infringing materials vide the Anton Pillar orders is provided for in the civil procedure rules in Nigeria.[939] It is apt to say that the Anton Pillar order is not strictly a secured credit enforcement mechanisms but the connection to secured credit enforcement interestingly is its quick and surprise element of the order which is the hallmark of a good mechanism for the judicial enforcement of a secured credit transaction. These characteristics no doubt will prevent the dissipation and deterioration of security interest and can be used by the secured creditor in realizing his security interest timely.

3.7.2.7. Impediments to the Enforcement of Secured Transactions in Nigeria

[937] [1976] Ch 55.

[938] Copyright Act Cap. C28 Laws of the Federation of Nigeria 2004.

[939] Order 28 Rule 3 (10 provide as follows: "where it considers it necessary or expedient for the purpose of obtaining full information or evidence in any action, the court may, on the application of a party and on such terms, as it thinks just, by order authorize or require any sample to be taken of any property which is the subject matter of the action or as to which any question may arise therein, any observation to be made on the property or any experiment to be tried on with the property." Sub-rule 2 provides as follows: "for the purpose of enabling any order under sub-rule (1) to be carried out, the court may by order authorize any person to enter any land or building in the possession of any party."

Despite the above laudable provisions (frontloading provisions, undefended list procedure, summary judgment procedure, Mareva injunction/interim attachment of property, Anton Pillar orders/interlocutory injunction and interim preservation of property) contained in the various civil procedure rules in Nigeria that should have facilitated effective and prompt enforcement of security interest in the event of default, what have confronted secured lenders in their quest to enforce the security interest through the court has left much to be desired. This shows that the persistent problem of judicial enforcement of secured credit transactions may be unrelated to provision of good civil procedure rules. Indeed, this indicates that a society needs more than a good civil procedure rules or good substantive laws in order to maximize the dividends of enforcement of law. Specifically, in order to have an effective enforcement, the 'operators' of the judicial processes should be committed, just and efficient in the performance of their duties; and there should be willingness by the people to obey and abide by rule of law. These two factors are part of what Krygier encapsulated in his four elements of the rule of law which he calls the *"the integrity of legal institutions; and […] the social embeddeddness and significance of the law."*[940] Regrettably, these two elements are nearly absent in both Nigerian and Cameroonian societies and this is the crux of the issue that perpetuate lack of enforcement of law generally and secured transactions in particular in both jurisdictions. This situation has created general apathy by the lenders in giving out credit and the resultant cutting of access to credit to the deserving people. Consequently, the persons hitherto identified earlier, whose duties impact on the judicial enforcement of law will be examined herein in order to find out the source(s) of slow process of judicial proceedings and enforcement of law generally.

[940]The other two elements according to him are the scope of laws and the character of the laws. See Martin Krygier, Transitional Questions About the Rule of Law: Why, What, and How? In JULIA SZALAI (ed.,) EAST CENTRAL EUROPE /L'EUROPE DU CENTRE EST: EINE WISSENSCHAFTLICHE ZEITSCHRIFT vol. 28, part1 2001, p. 9.

3.7.2.8. Court Officials

Sheriffs, bailiffs, and clerks (hereinafter referred to as court officials) play an important role in the administration of justice in any jurisdiction. They are charged with several administrative and enforcement functions including but not limited to the followings: service of court processes, attaching and levying execution on the properties of the defendant to execute the judgment of the court through the writ of fifa; coordinating the sale of the properties of the defendant through auctions or public sale.[941] Their roles in the administration of justice in Nigeria are critical to the quick judicial enforcement of secured credit transactions. The orders of the courts on enforcement of secured credit transactions would be meaningless if not promptly enforced by court bailiffs and sheriffs. This underscores the need for the court sheriffs and bailiffs to be diligent in the discharge of their functions. Though court officials can be given a pass mark in their functions in Nigeria, there have been cases of collusion of the bailiffs and sheriffs with the defendant to enable the defendant hide or remove his movable assets before purporting to levy execution. This sort of arrangement hatched by court officials and defendants is obvious - to present a case of fait accompli on the plaintiff and accordingly deny the plaintiff the fruits of his litigation, i.e., the judgment of the court. There are also instances where some bailiffs and sheriffs charge unofficial exorbitant sums of money from the judgment creditor as ‘logistics’ before levying judgment of the properties of the defendant.[942] This no doubt increases the cost of

[941] See sections 8 – 13 and 15 of the Sheriff and Civil Process Act Cap 407 Laws of the Federation of Nigeria 1990 for the powers, duties of the Sheriff, Deputy Sheriff, Court Bailiffs and Police Officers. For the purposes of this work, only the court bailiffs and sheriffs will be focused on.

[942] Generally in Nigeria the judgment creditor provides the funds to levy execution on the judgment debtor’s properties. Normally, this fund should be part of the cost of levying execution which ought to be deducted first by the sheriff while distributing the proceeds of the properties of a judgment debtor. Although, the judgment creditor provides funds for levying the execution, such funds are not returned to him at the end of the day. Again, in most cases, the sheriff or bailiff charge amount in excess of what is needed to levy the execution from the judgment creditor.

In one of the author’s cases before the Magistrate Court in Karu Abuja, the author got a judgment for the eviction of a Tenant who has not paid rent to the Landlord (author’s client) in the last one year and also for the litigation in Nigeria and worst still, the period when there is ongoing negotiation on the amount that the successful litigant will pay to the sheriffs and bailiffs to have his judgment enforced can be critical to the enforcement of secured transactions in Nigeria.

3.7.2.9. Judges and Attorneys

It is not by mere coincidence that judges and lawyers are grouped together in the analysis of legal institutions whose performance impact on the prompt and efficient judicial enforcement of the secured transactions. Indeed in the administration of justice in Nigeria, they ought to be so grouped. The assemblage of these two institutions is borne out of the fact that the two professions receive the same training and need each others' cooperation to achieve a prompt enforcement of secured transactions. More so, by the professional callings and trainings of both institutions, they ought to be more concerned with the dispensation of justice – being ministers in the temple of justice and putting the interest of justice first than any other parochial interest.

Though lawyers' services are retained by their respective clients, however, lawyers, as ministers in the temple of justice, owe their allegiance first to the course of justice, and to practice their professions within the ambit of the law – helping the judge in arriving at a just decision of the

seizure of the Tenant's personal properties in satisfaction of the areas of rent owed to the Landlord. Upon the grant of the order and the sealing of the order (docketing of the order) the author approached the senior court registrar to assign the sheriff who will go to evict the Tenant and execute the writ of fifa on the properties of the Tenant. To the author greatest surprise the registrar demanded that a certain big amount of money must be paid by the successful plaintiff for 'logistics' before the assigned sheriff will carry out the order of the court.

On enquiry of what 'logistics' meant, the registrar told the author that it is the transportation of the sheriff and other officials of the court. The author reminded the registrar of her instructions to the plaintiff to provide a car to convey the sheriffs to the house and also to carry any seized property to the court. The registrar still insisted on the payment of the amount. The author then reported the matter to the Magistrate whose intervention in the matter, to the chagrin of the author, was to reduce the amount that the registrar charged. The author advised the plaintiff to pay the non-receipt amount and after two days, the court bailiff and other officials went and evicted the Tenant and seized the personal properties of the Tenant. The 'logistics' amount never entered into the coffers of the government and was shared between the registrar, sheriff and other officials of the court.

matter, then to their conscience and thereafter to their clients.[943] Ideally, both lawyers and judges ordinarily should work towards dispensing justice speedily without fear or favor. However, contrary to the rules, lawyers in Nigeria have been known to do the bidding of their clients even when those acts are not within the letters and spirit of the Rules of Professional Conduct in the Legal Profession. Specifically, cases abound where legal practitioners file frivolous objections and motions just to delay the proceedings and buy time even where the facts are clear and their clients have absolutely no defense against such claims. In some cases the legal practitioners' services are retained by clients only to cause delay and deprive the plaintiff the speedy enforcement on his rights. The notion of justice from the legal practitioners' point of view changes and is highly subjective. At times the notion of justice has been largely determined from the side of the case that he is representing – justice from the parochial interest of the plaintiff or defendant depending on who the legal practitioner is representing. In such circumstances, the notion of speedy judicial enforcement of secured transactions becomes a mere rhetoric.

On the other hand, casting aspersions only on legal practitioners also ignores a vital fact that some judges are lazy and this in most cases account for the backlog of cases piling in court. When old cases pile up and are not adjudicated, it becomes very difficult to hear and adjudicate new cases that may still be assigned to the same judges – albeit in a prompt manner. Again, it is a bitter truth that the integrity of some judges is sometimes compromised by illicit rewards or expectation of illicit rewards from some litigants and in such cases justice is sacrificed.[944]

[943] See Rules 1 (d), 14 and 24 of Rules of Professional Conduct in the Legal Profession (Legal Practitioners Act) Cap 407 Laws of the Federation of Nigeria 1990. This Rule is available at < http://www.nigeria-law.org/Rules%20of%20Professional%20Conduct%20in%20the%20Legal%20Profession.htm >; last visited on the 11th of May 2011.

[944] The current scandal rocking the top echelon of the Nigeria judiciary is a case in point. In Nigeria, there are three levels of competent court of record, the High Court, the Court of Appeal which is higher and then the Supreme Court which is the highest court is the country. Whilst election petition in the case of presidential election gets to the

Consequently, the plaintiff may have to go through the painful, exorbitant and lengthy process of an appeal to reverse the decisions of the lower court which has been tainted with corruption. Here again, speedy judicial enforcement of secured credit transactions suffers setback.

There is no doubt that judges and the lawyers are the primary institutions to effect a speedy and efficient judicial enforcement of secured transaction. Accordingly, they need to be alive to their duties and responsibilities to ensure quick dispensation of justice. This no doubt would reverse the ugly trend of slow or near non-existence of judicial enforcement of secured transactions in Nigeria.

Supreme Court of Nigeria as the final arbiter (see section 233 of the Constitution of Federal Republic of Nigeria 1999), petitions in other elective post like the governorship, senatorial and house of representative elections end at the Court of Appeal (see section 246 of the Constitution of the Federal Republic of Nigeria 1999). The panel of the supreme court justices that hear the petition for the presidential election is constituted by the Chief Justice of Nigeria (who is the highest judicial officer in Nigeria) while the President of the Court of Appeal who is the head of Court of Appeal constitutes the panel of the Court of Appeal justices that hears other election petition cases.

The current President of the Court of Appeal Justice Salami and the current Chief Justice of Nigeria Justice Kastina-Alu have been involved in imbroglio for some months over the constitution of the court of appeal panel that determines election petitions. Underneath the impasse is the desire of the Chief Justice of Nigeria to be involved in constituting the Court of Appeal panels that hear election petitions which the President of Court of Appeal has vehemently resisted, although, constitutionally the right belongs to the President Court of Appeal. The impasse crystallized in the Chief Justice of Nigeria attempting to remove the President of Court of Appeal by purporting to elevate him to the Supreme Court. This resulted in the president of Court of Appeal openly accusing the Chief Justice of Nigeria through the filing of an affidavit in court wherein he deposed that the Chief Justice of Nigeria asked him to compromise an election petition involving the Sokoto State governorship election.

According to the President Court of Appeal, the Chief Justice asked him to instruct the panel to decide the petition in favor of the incumbent Governor of Sokoto State and where the panel refused, to disband the panel and constitute other panel that will give a verdict that favors the incumbent governor. Meanwhile the president of Court of Appeal has been accused of constituting two Court of Appeal panels that gave compromised decisions in the case of Osun and Ekiti States governorship election petitions for illicit rewards that run into hundreds of thousands of dollars. The accusers are the parties that lost in the governorship election petition in Osun and Ekiti states.

The Nigerian Judicial Council, who is the body that discipline corrupt justices are currently investigating the matter of corruption against the Chief Justice of Nigeria and President Court of Appeal, to this end both parties have been suspended from Nigerian Judicial Council pending investigation of the series of allegations involving them. Whatever may be the outcome of the investigations, the Nigerian judiciary has been brought to disrepute by this unprecedented scandal. Above all, the trusts of the people have been eroded with this outrage over the integrity of the two most important judicial officers in the administration of justice in Nigeria.

3.7.3. Judicial Enforcement of Secured Transactions under Cameroon's Uniform Act on Recovery and Execution

There are many commonalities of judicial enforcement of secured transactions in both Nigerian and the English speaking part of Cameroon before the adoption of the Uniform Act on Recovery and Execution on the 10th of April 1998. As stated earlier, the English speaking part of Cameroon adopted the Nigerian Supreme Court Civil Procedure Rules of 1948 and this made for some uniformity in the methods of enforcement of laws especially secured transactions law whilst the French speaking part of Cameroon had a different mechanism for the enforcement of secured transactions law.[945] It was with the adoption of Uniform Act on Recovery and Execution that harmonized the judicial enforcement of secured credit transactions laws in the English and French speaking part of Cameroon. Nevertheless, some commonalities with Nigerian law are still apparent in the area of impediments to the efficient enforcement of secured transactions law and these similarities will be pointed out in the course of the discussions herein.

As already pointed out, judicial enforcement is the only option permitted under the Uniform Act Organizing Securities for the enforcement of secured transactions since the Act does not recognize any form of private enforcement of secured transactions.[946] The restriction of the mechanisms of enforcement of secured transactions to judicial procedures has many implications. The first is that being the sole option, every secured creditor employs this method of enforcement upon default of repayment by the debtor and this fact, puts much pressure on the judicial enforcement mechanisms not only in Cameroon but in other OHADA member countries. Consequently, Cameroon can ill afford not to have an efficient enforcement system otherwise the

[945] See supra, pp. 264 – 265.
[946] See again Article 56 (1) of the Uniform Act on Securities.

consequences will be grave – secured creditors will hardly give out loans to debtors because they have no means of enforcing their securities in event of default by debtors. It is against this backdrop that, judicial enforcement under the Uniform Act on Recovery and Execution will be analyzed in details herein.

3.7.3.1. Mechanisms of Judicial Enforcement: Injunction to Pay or to Deliver

The simplified procedure under the Uniform Act on Recovery and Execution for the enforcement of secured transactions upon default of repayment by the debtor is by means of injunction to pay,[947] or injunction to deliver or restitute.[948] Like the undefended list or summary judgment procedure, injunction to pay or deliver is a prompt enforcement procedure that intends to circumvent the whole process of normal trial of cases. According to Fonkwe Joseph Fongang et al., "*injunction to pay or to deliver should be understood in English as an order given by the judge at the behest of a party, for a debt of liquidated money demand to be paid or for a specific tangible personal property to be delivered or restituted (see French decree No. 51/500 of 12/05/1981 repealing that of 28/08/1972 on simplified recovery of debts). This type of procedure exists in England under the summary judgment and is known in Germany as Mahnverfahren.*"[949]

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[947] Articles 1 and 2 of the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution provides as follows: "The Collection of an unquestionable claim due for immediate payment may be secured through the injunction to pay procedure." Article 2 states "The injunction to pay procedure may be initiated where (1) The claim arises from a contract; (2) The commitment arises from the issuance or acceptance of any negotiable instrument, or any cheque for which cover was found to be inexistent or insufficient."

[948] See Article 19 of the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution provides as follows: "Any person who claims to be the creditor of an obligation to deliver or return specific, tangible, personal property may petition the president of the competent court to order such delivery or restitution."

[949] See Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution, with commentaries from Fonkwe Joseph Fongang, Lucy Asuagbor, Francois Anoukaha, supra footnote 727, p. 7.

Whilst injunction to pay is used where the plaintiff wants to recover money from a defendant (debtor), injunction to deliver or restitute is used where a plaintiff wants to recover properties from the debtor. Specifically injunction to deliver or restitute is used where the secured creditor wants to repossess collateral which is in debtor's custody. Injunction to pay is brought by way of petition by the creditor filed by the petitioner or his attorney. The petition, on one hand, has to indicate the exact amount claimed, the components of the claim and the cause of the claim, and on the other hand, the originals or certified true copies of the documents in proof of the claim have to be attached to the petition.[950] Upon the perusal of these filed documents, the judge may - where it seems to him that the claim is founded either in whole or in part - shall make an order for injunction to pay. However where the judge thinks otherwise, he may dismiss the matter and then the petitioner would have to bring his matter through the procedures of general law.[951] The injunction to pay will then be personally served on the defendant[952] (debtor) which will order the defendant to either pay to the creditor the amount fixed by the judge or within 15 days from the service of the document file a defense in the competent court[953] to the claims of the creditor.

Where the defendant does not file any opposition within the allowable time, or the defendant withdraws his opposition to the injunction to pay, the creditor applies for an executory formula

[950] See Articles 3 and 4 of the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution.

[951] See Article 5 of the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution.

[952] See the unreported case at the Yaoundé Court of First Instance case of T. Boniface v. Nzitouo Thomas where the bailiff served the injunction to pay on a waiter at the bar belonging to the debtor. The case is reported in the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution with commentaries from Fonkwe Joseph Fongang et al supra footnote 727, p. 22.

[953] In the unreported case of Bouake Civ 1er No. 13/2001 delivered on the 24th of January 2001, the court held that the competent court that the defendant must bring his objection is the court that issues the injunction to pay. See also the case of CASWP/21m/2000 of 28/06/2000 Hon. Tamfu Ikunde Peter Rex Lyonga (unreported). See Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution, with commentaries from Fonkwe Joseph Fongang et al; supra footnote 727, p. 20.

which will make the injunction to pay which is an *order nisi*[954] to become a final order of the court binding on the defendant to pay without any right of appeal given to the defendant over the final order of the court.[955] However where the defendant files a defense to the injunction to pay, the judge before whom the defense is filed shall first attempt to convene a conciliatory meeting between the parties. Where the conciliatory meeting is successful, the terms of the meeting shall be the judgment of the court but where the conciliatory meeting does not fully settle the issues in contention between the parties then hearing will commence on the matter.[956]

Injunction to pay operates mutatis mutandis with injunction to deliver or restitute. It has all the same formalities with injunction to pay: mode of filing; the order to the defendant; the period within which the defendant is to file opposition; the effects or failure to file opposition by the defendant; the effect of successful filing of opposition by the defendant; the duty imposed on the Judge under whose court the opposition is filed.

Injunction to pay or to deliver is akin to the undefended list or summary procedure in Nigeria because where the defendant fails to file a defense or purports to file a defense which does not disclose a real defense, the creditor gets judgment without going through the whole process of calling witnesses to prove his case. Thus the process of litigation is abridged and the secured creditor enforces its securities promptly. Though the injunction to pay or deliver is not specific to

[954]Also called decree nisi, it is a court order that will become absolute except that the party adversely affected by the order shows the court enough reasons to set aside the order with the time specified by the order. See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 441.
[955] See Article 16 of the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution.
[956] See the unreported case of HCF/004/SP/03-04, Presprint Ltd v. Cameroon Tea Estate S.A. see also Article 12 of the Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution.

only secured creditors, yet it is a veritable tool to realize the creditor's security especially in cases of non-possessory security – pledge without dispossession.

But despite the provisions of injunction to pay or deliver, judicial processes in Cameroon are slow, long and unending. Dispensation of justice in Cameroon is fraught with the same problems that exist in Nigeria amongst which are: backlog of cases in court; the civil procedure rules which gives room for manipulations of lawyers; the act of some lawyers who are not always prepared to prosecute or defend the case of their client with dispatch; inefficient court officers like the bailiffs, sheriffs and court clerks; lethargic and compromised court officials including judges and magistrates. These judicial malaises have been analyzed in detail under the Nigerian context and they apply also to Cameroon. Hence, the analyses made of these problems are apposite herein and it will make this work unnecessary repetitive to discuss it again.

Having identified some of the major issues that hinder courts in Nigeria and Cameroon from dispensing justice, it behooves on the authorities of both jurisdictions to look inwards in order to remedy these problems. These are the reasons why discussions on enforcement of secured transactions are crucial to this work. As already pointed out, in the United States, the courts are functioning efficiently in helping the secured creditor to promptly realize its securities in event of default of repayment by the debtor. It is these efficient enforcement mechanisms that give confidence to the secured creditor to willingly give out loans to deserving debtors on liberal terms since there is an institutional mechanism that will come to its aid in event the debtor defaults in repayment. A corollary to this assurance – lack of judicial enforcement will cause the secured creditor to withdraw credits to deserving debtors or give credit on stringent conditions -

will portend danger to the economies of both countries. It is for this reason that the United States private and public enforcement are discussed in juxtaposition to that of Nigeria and Cameroon. This is to enable both countries transplant the best practices from the United States enforcement model. For Cameroon, it is urgent and imperative that the judicial enforcement be reformed since there is no private enforcement of security interest as yet.[957] This reformation will be precursor to the introduction of Article 9 private enforcement mechanisms in Cameroon.

[957] Since Cameroon has never had any form of self help prior to date, the introduction should be gradual. In this situation, it may not be appropriate to introduce the Article 9 self help repossession. What could be introduced at the initial stage may be the appointment of receiver manger as a form of self help. There could entry barriers on a would-be receiver manager through registration and also regulation by an agency created by government. A code of conduct should be enacted for receiver managers with fines and other forms of punishment for its breach by receiver managers to guard against abuse. Depending on how successful this form of self help is, then the Article 9 self help repossession would be introduced with stricter regulations and oversights than the case of receiver manager.

Chapter 4

Article 9's Close Linkages with Bankruptcy and Consumer Protection Laws: Lessons for Nigeria and Cameroon

4.1. Introduction

The popularity attained by Article 9 is not completely attributable to its provisions alone but to other laws in the United States which have positive impact on Article 9's secured creditor and debtor. Some of these laws are so closely linked with Article 9 that an exhaustive discussion on Article 9 would not be complete until such laws are examined. For a research, which has as one of its objectives to transplant compatible elements of Article 9 to Nigeria and Cameroon, it may be an effort in futility to overlook such closely linked laws to Article 9 as successful reforms in secured transactions would also require looking at the 'surrounding' areas of the law in both countries, too.[958] This is because these related laws have contributed immensely in making Article 9 work efficiently[959] in America that it has become a model law in the area of secured transactions and thus the reason for transplantation. The two most closely interrelated branches of laws to Article 9 that will be examined herein are bankruptcy and consumer protection law. Armed with this knowledge, the chapter will evaluate whether such laws exist in Nigeria and Cameroon, and if they do, what are the nature of their relationship to secured transactions law? Whether the linkages are appropriate in the sense of finding the proper balance between protecting the competing interests? Where such laws do not exist in Nigeria or Cameroon, the work will proffer suggestions on what need to be done in this regard.

[958] According to Tajti, "It is important to stress that secured transactions law relies much more on other broader or narrower areas of law than what would follow from the normal relationship of various fields of law. [...] Even though the extent of such complementarity varies depending on the features of each jurisdiction, no reform could disregard the importance of the surrounding areas." See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 200.

[959] Efficiency as used here does not only mean proficiency but also connotes the wide acceptability of the Article 9 and the reason why secured transactions have been embraced in the US. This proposition becomes clearer when this work will discuss the absence of consumer credit protection laws in Nigeria and Cameroon and the negative effect it has on consumer borrowings in both jurisdictions towards the end of this chapter. It suffices to say that the consumers in US do not have fear in borrowing from the banks because their interest are adequately protected by statutes and this may probably be one of the reasons to explain why there is more consumer credit demand in US than in Nigeria and Cameroon. However, in Nigeria and Cameroon where the consumer debtors are not protected from the hands of secured lenders, there is consumer apathy to borrowing from the formal secured lenders.

4.2. Article 9 and Bankruptcy Law

In the US, the land of 'second opportunities,' with the philosophy of fresh start and the globally increasingly popular 'reorganization' proceedings, eventually resulting in the biggest number of bankruptcy cases instituted annually in the world, obviously one of the crucial things is to ensure that the security the creditor was given will survive. Hence, it is virtually a commonplace to claim that *"[t]he acid test of security is, of course, its status and effectiveness in the event of the debtor's insolvency. […]. The essence of all real or 'genuine' security rights is that the creditor can look to the subject matter of the security to realize the debt and no more. […]."*[960] In other countries of the world the frequency of bankruptcy filings is significantly lower; consequently the importance of the strength of security interests in the context of bankruptcy is less important and therefore less visible.

Yet, no market economy can exist without a proper bankruptcy system and therefore what happens to liens and in particular security interests – as consensual securities – is of importance to secured and unsecured creditors, the debtor as well as the bankruptcy trustees.[961] One of the fundamental differences among the three systems focused upon in this work and the crucial point to be noted is that while in the United States the position of the secured creditor vis-à-vis the unsecured creditors are clearly spelt out in great detail in any of the bankruptcy proceedings;[962]

[960] See Ulrich Drobing, *Basic issues of European Rules on Security in Movables* in JOHN DE LACY (ed.,) THE REFORM OF UK PERSONAL PROPERTY SECURITY LAW COMPARATIVE PERSPECTIVES (Routledge-Cavendish, 2010), p. 449.

[961] It is apt to state that it is not in every bankruptcy proceedings that a trustee in bankruptcy is appointed to gather in the property of the bankrupt into his estate for sale and distribution of the proceeds to the creditors. In chapters 11 and 13 bankruptcy proceedings, the debtor may still be in control of its assets as debtor in possession and then proposes plan of how to pay the creditors.

[962] Whether in chapters 7, 9, 11, 12 or 13 bankruptcy proceedings.

the same may not be said with certainty in Nigeria and Cameroon.[963] The result of this is that in the latter two systems the position of the secured creditor is very unpredictable in the context of bankruptcy. However, in the three jurisdictions, the impact of bankruptcy proceedings could affect contractual obligations, be daunting on the economy[964] and could also alter the course of the enforcement of security interests if the secured creditor failed to take all the steps required to make his security interest unassailable by the bankruptcy trustee. Hence no legal practitioner - particularly in the United States or other jurisdictions in which bankruptcies are frequent - can adeptly render services or advise a client on the creation, perfection or enforcement of his secured credit transactions without being knowledgeable on bankruptcy law especially, as it affects the rights of the secured creditor.[965] The rationale for this proposition is that the main reason for taking a security interest in the debtor's property in the United States is, indeed, to guarantee the repayment of the credit in event of default or bankruptcy of the debtor. It will thus be counter-productive and undermining the efficacy of security interest if duly filed and perfected security interests are not honored in bankruptcy proceedings.[966] White and Summers concurred when they opined as follows: *"[i]n general a perfected secured creditor is entitled to his collateral or the value of his collateral in a debtor's bankruptcy. Unsecured creditors on the other hand generally share pro rata in the assets that are not subject to perfected security*

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[963] This is especially on the making of receiving order by the court in company winding up proceedings under Nigerian Law and also in Cameroon during the preventive settlement proceedings. See infra pp. 362 – 366 for detailed discussions on these issues.

[964] According to Wood, "[…] bankruptcy has a profound effect on normal legal relationships. Bankrupts and their directors are disqualified from working and their basic freedom and liberty compromised and controlled. Property is seized and sequestrated, including that of creditors. Assets are expropriated without compensation. Contracts are shattered and their terms interfered with or negated. Security interests are frozen or avoided or debased below priority creditors. People lose their jobs. The economy of the state itself may be sapped. Bankruptcy is a destroyer and spoliator." See Phillip R. Wood, Principles of International Insolvency, (Sweet & Maxwell, 1995), p. 1.

[965] Raymond Nimmer, Ingrid Hillinger, Michael Hillinger, Commercial Transactions: Secured Financing Cases, Materials, Problems, (Matthew Bender, 2nd ed., 1999), pp. 12 – 13.

[966] See Steven L. Harris, Charles W. Mooney Jr., Revised Article 9 Meets The Bankruptcy Code: Policy and Impact, 9 American Bankruptcy Institute Law Review, 85 (Spring 2001).

interests. That is not to say that the secured creditor is happy to see his debtor go into bankruptcy."[967]

There has been an academic debate that the provisions of Article 9 give too high priority to holders of properly perfected security interests at the expense of the unsecured creditors, for the protection of whose interest the bankruptcy trustee is eventually appointed.[968] While some go as far as to claim that Article 9 is an anti-bankruptcy law,[969] the general consensus amongst scholars is that there is no real conflict between the rights of secured creditor under Article 9 and the provisions of the bankruptcy law even though the policy choices behind the two laws are not necessarily identical.[970] However, this research would like to avoid this academic debate since it adds no real value to the pragmatic issues raised in this thesis: i.e., what needs to be done to ensure that the elements transplanted from Article 9 work efficiently in Nigeria and Cameroon. It

[967] See James White, Robert Summers, Uniform Commercial Code, supra footnote 82, p. 1248.

[968] See Lucian A. Bebchuk & Jesse M.Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy* in BARRY E. ADLER (ed.) FOUNDATIONS OF BANKRUPTCY LAW (Foundation Press , 2005), pp. 40-41.

[969] See G. Ray Warner, Is the Revised UCC Article 9 an Anti-Bankruptcy Act? Yes, 28 Okla. City U. L. Rev. 537 (2003); G. Ray Warner, The Anti-Bankruptcy Act: Revised Article 9 and Bankruptcy, 9 American Bankruptcy Institute Law Review 3, (Spring 2001), see also Lynn M. LoPucki, The Unsecured Creditor's Bargain, 80 Virginia Law Review 1888-89 (1994).

[970]For example Kripke opines as follows: "Finally, much long-term financing has as its purpose the acquisition of new facilities by the debtor. The security taken may not fall within the definition of a purchase money security interest or the definition of a refinancing mortgage. As financing intended to facilitate the acquisition of new assets by the debtor, however, such a loan deserves to be treated like the purchase money security interest for our purpose of our inquiry into the legitimacy of secured credit. Surprisingly, neither Schwartz nor Jackson & Kronman seem to realize that these priorities represent a recognition that one who contributes new assets to the debtor is entitled to be paid for them and should not be required to give up a hold on the assets until paid. Instead, much of the discussion in these two articles proceeds on the assumption that what the secured creditor gets is taken away from unsecured creditors and, therefore does not increase either the debtor's or the creditor's welfare. Seemingly, these authors view secured credit as a zero-sum game. None of the authors explicitly recognizes that in purchase money situations the secured party has added to the assets of the debtor, and that since the purchase money priority requires the secured creditor's funds to be traced into new assets, the secured creditor and the debtor have taken nothing away from the unsecured creditor." See Homer Kripke, Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum, 133 University of Pennsylvania Law Review, p. 936; see Steven L. Harris, Charles W. Mooney Jr., A Property-Based Theory of Security Interest: Taking Debtors' Choices Seriously, 80 Virginia Law Review 2021, 2067-71 (1994); see Robert E. Scott, The Truth About Secured Financing, 82 Cornell Law review 1436 (1997), see Douglas G. Baird, Bankruptcy Uncontested Axioms, 108 Yale Law Journal 573 (1998); see Alvin C. Harrell, The Relationship Between Revised Uniform Commercial Code Article 9 and The Bankruptcy Code: Points of Intersection and Conflict, 28 Oklahoma City University Law Review (Summer-Fall 2003).

should be borne in mind that it is not only bankruptcy law that has different policy choices with Article 9, other fields of law also do and thus compete with Article 9's secured creditor.[971]

In reflecting on the relationship of bankruptcy and secured transactions law in this chapter, the focus will be on two main issues. The *first* will be to analyze the rationale of the United States fresh start policy and the reasons why this policy has not been embraced, or may not likely be implemented in Nigeria and Cameroon in the near future. On this issue, the research will examine whether this philosophy could be introduced and what would be its consequences on the Article 9 elements to be transplanted? Apart from individual bankruptcies, the research will also examine business insolvencies, arrangement and compromise[972] and preventive settlements[973] in both jurisdictions. Taking inspiration from the elaborate Chapter 11 reorganization in the United States, this work will advance ways whereby businesses in Nigeria and Cameroon could

[971]According to Nimmer et al., "Article 9 and its order exist within a larger, chaotic world that does not necessarily share Article 9's underlying assumptions or goals. The larger world involves many other policies, goals, societal interest and concern, often in competition with each other as well as Article 9. […] the subtitles of an article vividly, if morbidly, describe some lurking dangers. An Article 9 creditor can be 'Hanged by Consignee 's Creditors and Debtor's Lessors;' 'Handcuffed by Reclamation;' 'Bombarded by Bulk Transfers;' and 'Overpowered by Higher Priorities.' Being 'Ambushed by State law' also includes being 'Dismembered by Landlord's Lien;' 'Poisoned by State Environmental Liens;' 'Locked out by a Warehouseman's Lien.' Worse still, the Article 9 security interest can be 'Swallowed by Federal Law;' 'Beheaded by a Federal Tax Lien;' 'Suffocated by a Federal Environmental Lien;' 'Blindsided by a RICO Forfeiture;' ' Bludgeoned by an ERISA Lien; [....] 'Bloodied by the Bankruptcy Code […] The world is a dangerous place, even for secured creditors." See Raymond Nimmer, Ingrid Hillinger, Michael Hillinger, Commercial Transactions: Secured Financing Cases, Materials, Problems, supra footnote 965, pp. 52 – 53; see also Mark Gittelman, Earl Stamm, The Dangers of Being a Secured Lender: Where Filing a Financing Statement May Not Be Enough, 94 Com. L.J. 377 (1991).

[972] Section 537 CAMA defines arrangement as follows: "In this part of the Act, the expression "arrangement" means any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Act or by the unanimous agreement of all parties affected thereby." Arrangement and compromise is the equivalent of chapter 11reorganization in the United States.

[973] Preventive settlement is the Cameroon's equivalent of United States Chapter 11 reorganization. Article 2 (1) of the Uniform Act on Debt defines preventive settlement as follows: "preventive settlement shall be proceedings aimed at avoiding the cessation of payments or the cessation of activity by a company or at making it possible to wipe off its debts through a preventive composition agreement. Preventive settlement shall apply to any natural person or corporate body that is a trader and to any non-trading private corporate body, to any public corporation in the form of a private corporate body which no matter the nature of its debts, is facing a difficult but not irremediable economic and financial situation."

maximally exploit the advantages of reorganizations when they are in financial difficulties rather than being wound-up as it is largely the case presently.

The *second* issue will be to examine the close linkages and complementarities between Article 9 and bankruptcy law which have undoubtedly made Article 9 to function better and thus increase its popularity in the US. This analysis is with a view to seeing whether such connections and complementarities exist in the Nigeria and Cameroon secured transactions and bankruptcy laws. Where they do not exist, then proposals will be made in that regard. In order to examine the above two issues, the work will introduce – albeit briefly, the bankruptcy laws of the three jurisdictions.

4.3. The Bankruptcy Law of the United States

In the United States, bankruptcy is governed by the Bankruptcy Reform Act of 1978, 11 U.S.C. (as amended by Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) 2005) which replaced the Bankruptcy Act of 1938 (otherwise known as the Chandler Act). The Chandler Act was the first major amendment to the Bankruptcy Act of 1898. The U.S. bankruptcy law in a nutshell is essentially a procedural law containing rules regulating how the proceeds of the non-exempt properties of the bankrupt are distributed among the competing interests of both the secured and unsecured creditors. Property rights – including liens and security interests as consensual liens – in the assets of a bankrupt's estate in bankruptcy proceedings are governed by state laws (notwithstanding that bankruptcy is a federal law).[974]

[974]This is called the Butner Principle developed by the United Supreme Court in the case of Butner v. United States, 440 U.S. 48, 55 (1979) where the Supreme Court stated as follows: "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. Property interests are created and defined by state

Under the old Bankruptcy Acts of 1830, 1841 and 1867, bankruptcy was pro-creditor as it was used as a creditor remedy to recover most of the debt being owed to the creditor by the debtor. But reprieve came to the debtors in the 1898 Bankruptcy Act, in fact the first modern bankruptcy act in United States. Changes in the 1898 Act showed that although bankruptcy law still to a large extent protected creditors' interests, bankruptcy laws were becoming more debtor friendly.[975]

As already stated above, the 1898 Bankruptcy Act was revised by the 1978 Bankruptcy Reform Act which made major changes to the bankruptcy law (e.g., introduction of the trustee system).[976] Some of the changes brought by the 1978 Act continued to confirm the pro-debtor[977] stand of the United States bankruptcy law in comparison to some other jurisdictions.[978] Suffice it

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law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." See also William D. Warren, Steven D. Walt, Secured Transactions in Personal Property, supra footnote 701, p. 461 See also Alvin C. Harrell, The Relationship Between Revised Uniform Commercial Code Article 9 and The Bankruptcy Code: Points of Intersection and Conflict, 28 Oklahoma City University Law Review (Summer-Fall 2003).

975 It was the 1898 Bankruptcy Act that introduced the discharge of individual bankrupts. White posits that "the discharge was an integral part of the 1898 Bankruptcy Act, and both Congress and the judiciary have consistently read the Act as including the 'fresh start' as one of its primary goals." See James J. White, Bankruptcy and Creditors' Rights Cases and Materials, (West Publishing Co, 1985), p. 29; see also Lewis R. Townsend, "Fresh Cash"- Another Element of a Bankrupt's "Fresh Start"?, 31 U. Miami L. Rev. 275, 281 (1976-1977).

976 According to White, "the code substantially expanded the rights of the consumer debtor, made chapter 13 a more desirable alternative for those in debt, and expanded the number and variety of assets exempt from the creditor's reach. In business area, the code collapsed the old chapters X, XI and XII into a chapter 11 proceeding. It significantly altered the avoidance provisions and, most important of all, it expanded the power of the trustee in bankruptcy to use and inhibit the creditor's control of property that was subject to a perfected security interest. History may tell us that the Code subtly but significantly sifted power from secured creditors to others in bankruptcy proceedings." See James J. White, Bankruptcy and Creditors' Rights Cases and Materials, supra footnote 976, p. 30.

977 See David A. Skeel Jr., Debt's Dominion: A History of Bankruptcy Law in America, (Princeton University Press, 2001), p.38; see Michelle J. White, Personal Bankruptcy Law: Abuse Prevention versus Debtor Protection, October 2006, p. 3 available at < http://econ.ucsd.edu/~miwhite/white-bapcpa.pdf >; last visited on the 24th of March, 2011; see also Nicola Gennaoli and Stefano Rossi, Judicial Discretion in Corporate Bankruptcy, available at < http://www.eco.uc3m.es/temp/agenda/discretion-march-28.pdf >;last visited 24th of March, 2011.

978 For example in Nigeria, the Bankruptcy Act stigmatizes a bankrupt and bans such person from holding responsible political and corporate positions. There principle of fresh start is unknown in Nigerian bankruptcy law. In Germany, bankruptcy is also an offence .Section 283 of the German Criminal Code as amended on the 4th of July 2009 has created series of bankruptcy offences. Some of the bankruptcy offences are as follows: section 283 (1) German Criminal Code provides "Whosoever due to his liabilities exceeding his assets or current or impending inability to pay debts: (1) disposes of or hides, or in a manner contrary to regular business standards, destroys,

to say that all post-1898 Bankruptcy laws were enacted to achieve three objectives which can rightly be termed the policy choices behind the Acts.[979] One of the objectives is to give an individual debtor a fresh start from the burden of dischargeable debts upon the debtor giving his non-exempt assets to the creditors. The other reasons are to provide equitable rules for the distribution of the estate of the debtor to its creditors and thirdly to provide a *"mechanism for the rehabilitation of a business debtor who has the capacity to stay in business and to pay most or all of its debt."*[980]

There are at present 91 judicial districts each with a Bankruptcy Court with one of more bankruptcy judges in the United States. There are also United States Trustees[981] assigned to one or more judicial districts. These salaried Trustees are appointed by the Attorney–General whose duty, as stated in section 586 28 U.S.C., is to supervise the administration of bankruptcy cases.[982]

damages or renders unusable parts of his assets, which in the case of institution of insolvency proceedings would belong to the available assets; (2) in a manner contrary to regular business standards enters into losing or speculative ventures or futures trading in goods or securities or consumers excessive sums or becomes indebted through uneconomical expenditures, gambling or wagering; (3) procures goods or securities on credit and sells or otherwise distributes them or things produced from these goods substantially under their value in a manner contrary to regular business standards; […]. Shall be liable to imprisonment of not more than five years or a fine." The conclusion one can reach from bankruptcy laws in Nigeria and Germany is that there is policy of fresh start giving to bankrupt individuals as it is in the United States. This point will be discussed in more details in this chapter.

[979] According the White, "The various provisions of modern American bankruptcy law have served three fundamental purposes." See James J. White, Bankruptcy and Creditors' Rights Cases and Materials, supra footnote 975, p.29.

[980] Id., pp. 29-30. These three purposes (policy choices) will be explored later in this chapter. Also Adler et al share the view that the United States bankruptcy code serves three purposes. According to them, "In short, the Bankruptcy Code serves three purposes: (1) saving the creditors the cost of a destructive race to the debtor's assets, (2) helping individuals overburdened with debt, and (3) reorganizing the capital structure of firms in financial distress." See, Barry Adler, Douglas Baird, Thomas Jackson, Bankruptcy – Cases, Problems, and Materials, (Foundation Press, 4th ed., 2007), p. 29.

[981] The US trustees is public body that appoints and supervises the work of other private trustees: i.e., chapters 7, 11 and 13 trustees. US trustees also appoints creditor's committees and examiners. The US trustees ensures that the requirements of the bankruptcy code is observed by all the parties, this they do by conducting investigations into the bankruptcy proceedings. See James White, Bankruptcy and Creditors' Rights Cases and Materials, supra footnote 975, p. 51.

[982] See William D. Warren, Steven D. Walt, Secured Transactions in Personal Property, supra foot note 701, p. 462.

The Bankruptcy Reform Act of 1978 is divided into many chapters.[983] Chapters 7, 11, 12, 13 and the new chapter 15 added by the amendment contained in BAPCPA 2005 will be briefly discussed herein in furtherance of the background information to the main focus of this chapter.

4.3.1. Chapters 7 and 13 Bankruptcy Proceedings

It is apt to discuss these two chapters together because both chapters are used mainly by individuals although businesses can also use chapter 7. However, chapter 13 can only be used by individuals that have regular incomes. Chapter 7 – known also as 'liquidation' – provides for the sale of all the non-exempt properties of the debtor and the distribution of the proceeds at the date of the bankruptcy. Upon the filing of chapter 7 liquidation, a trustee is appointed by the United States trustees whose job is to bring into the bankruptcy estate all the properties of the bankrupt to be administered by him except for the exempt properties which are retained by the debtor.[984] What assets qualify as exempt is largely determined by the state law where the debtor is domiciled although federal laws also provide for exempt properties.[985] The non-exempt

[983] Chapters 1, 3, and 5 of the code dealt with general definitional provisions, creditors, debtors' estate amongst other things, the next five other chapters provide for the different types of relief a debtor may seek. See Clarkson, Miller, Jentz, Cross, Business Law Text and Cases: Legal, Ethical, Global, and E-Commerce Environment, (South-Western Cengage Learning, 11th ed., 2009), p.611.

[984] See section 541 BC.

[985] There are also federal laws that provide general exemption statute under 11 U.S.C. section 522 or in other federal statutes like the federal tax lien under 26 U.S.C. section 6334; social security benefits under 42 U.S.C. section 407; veterans' benefits under 38 U.S.C. section 3101 and savings deposit for servicemen under 10 U.S.C. section 1035 (d) (1982). However, there are exemptions granted by the state laws where the debtor is domiciled. States use the 'opt out' provisions contained in 11 U.S.C. section 522 (b) (1) to require the exclusive use of the state law exemptions like the New York Debtor & Creditor Law section 284 (McKinney Supp. 1988); California Civil Procedure Code section 703.103 (West 1987) and Indiana Code Section 34-2-28 (1986). Exemptions under the state law differ from state to state and the exemption laws are dissimilar. In re Bray, 8 F. Supp. 761 (D.N.H 1934), the judge remarked, "while I have spent considerable time searching for precedence, I am satisfied that it was more or less time wasted, as the exemption laws in the different states are so dissimilar." (Reported in King and Cook, p. 469). However exemptions statutes can be grouped into three broad categories, according to King and Cook "exemption statutes are of several general types. They may exempt specific property with no limit as to value, such as the immunity for all social security benefits. They may exempt property to the extent 'needed for support' or as 'necessary' raising though definitional questions with regard to items such as alimony, trust income, and life insurance. Other classes of property are limited to the total sum certain, such as $20,000 for a homestead, or a total

properties of the debtor are then sold and the resulting proceeds are distributed to the creditors of the debtor. Where the debtor is an individual, the person will be discharged of all personal liability on all or most pre-bankruptcy debts. Where the individual gets discharged of the remaining debt, he will get a fresh start, however some debts are not dischargeable under chapter 7 liquidation.[986] This fresh start is limited to individuals,[987] corporations and partnerships do not get a fresh start or get discharged of their debts in this sense; however, they can resort to Chapter 11 reorganization within which debts can also be written off. Alternatively, they are dissolved and liquidated under chapter 7 proceedings. In response to the abuse of chapter 7 by individuals, the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 restricted access to it by providing that individuals whose income prior to bankruptcy exceeded applicable state median family income are subject to a 'means test' to determine whether such individual would rather obtain relief in chapter 11 or 13 instead of chapter 7.[988]

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amount allowable per item, such as home furnishings or jewelry." See generally Lawrence King and Michael Cook, Creditors' Rights, Debtors' Protection and Bankruptcy, (Matthew Bender, 3rd ed., 1997), pp. 469 – 471.

[986] Section 523 BC identified many types of debts that are not dischargeable and some of them are as follows: taxes specified under section 507 are exempted from discharge. Such taxes include withholding taxes, custom duties, or property taxes due within the year prior to bankruptcy and income taxes arising within three years before bankruptcy, where a fraudulent tax return or a late tax return is filed by the debtor two years before the before the bankruptcy, such tax liability is not dischargeable; fines and debt incurred as a result of an intentional tort (willful and malicious injury) are not dischargeable; consumer debts incurred through fraud by false representations or false pretenses other than a statement about the debtor's financial condition are not dischargeable; alimony, maintenance or support that the debtor owes to the spouse or child is not dischargeable; educational loans are not dischargeable under the debt first became due more than seven years prior to bankruptcy or the debtor can show that the repayment of such debt would impose undue hardship to him or his dependants; debt which was not listed on the scheduled under section 521(1) and debt arising from death or personal injury caused by the debtor's driving if such driving was unlawful or the debtor was intoxicated by drug, alcohol or any other substance. See James White, Bankruptcy and Creditors' Rights Cases and Materials, supra footnote 975, pp. 362 – 363.

[987] See section 727 (2) 1 BC.

[988] See Roxane Delaurell, Robert Rouse, *The Bankruptcy Reform Act of 2005: A New Landscape,* The CPA Journal – A publication of the New York State Society of CPAs, November 2006 Issue available at <http://www.nysscpa.org/cpajournal/2006/1106/essentials/p36.htm >; last visited on 27th of February 2011. See also William D. Warren, Steven D. Walt, Secured Transactions in Personal Property, supra foot note 701, p. 463.

As already stated, chapter 13 is another proceeding that is designed for individuals. Unlike the proceedings under Chapter 7 liquidation where the individual gets discharge after the sale of the individuals non-exempt properties to satisfy the creditors, in chapter 13 the individual keeps all his nonexempt properties but gives up his future income to pay his creditors. Indeed the relief afforded to the individual under chapter 13 can also be achieved by the debtor outside of bankruptcy through the instrumentality of debt renegotiation. Yet, the beauty of chapter 13 is that it gives the opportunity to individual to reach the same outcome even though some debtors are intractable upon the confirmation of the plan by the bankruptcy judge.[989] The Individuals who can benefit from chapter 13 are those who have regular income and their debts exceed threshold of $336,900 and $1,010,650 for unsecured and secured amount respectively.[990] In other words, Chapter 13 is suitable for debtors who are workers or couple who have 'limited financial affairs' for example proprietors of small enterprises.[991]The good point of chapter 13 bankruptcy is that the debtor can be discharged of pre-bankruptcy debt without losing the nonexempt property in which case the debtor is expected to formulate a plan wherein the debtor proposes to pay in part or whole, some or all of the pre-bankruptcy debt over a period of time usually three years from his income. However, the period may be extended to five years by the court in order to satisfy the domestic support obligations in deserving cases.[992] This plan,[993] which need not be confirmed

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[989] See Barry Adler, Douglas Baird and Thomas Jackson, Bankruptcy: Cases, Problems, and Materials, supra footnote 980, p.621.

[990] Id., p. 621. However section 109 (e) BC states "only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $250,000 and noncontingent , liquidated, secured debt of less than $750,000or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broke, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000 may be a debtor under chapter 13 of this title." It should be noted that dollar caps in this section 109 (e) are adjusted every three years to reflect inflation pursuant to section 104 BC.

[991] See Barry Adler, Douglas Baird and Thomas Jackson, Bankruptcy: Cases, Problems, and Materials, supra footnote 980, p. 621.

[992] See Section 101(14) (a) BC. However higher income debtor may even propose a five-year plan.

[993] Under section 1322 BC the plan must satisfy two conditions: it must provide the full satisfaction in deferred cash payment of all allowed claims entitled to priority under section 507 of the Bankruptcy Code unless the holder of

by the creditors provided it is confirmed by the bankruptcy Judge,[994] forms the basis of the payment to the creditors from post-bankruptcy earnings. However the court may not confirm the plan if there is an objection by a creditor unless the plan provide payment in full of unsecured claims or in the alternative provide for all of the debtors 'projected disposable income' for the period of the plan.[995] The confirmation of the plan is not the end of the chapter 13 bankruptcy proceedings, the proceedings remains open and the debtor's creditors are however estopped from enforcing their securities in deference to the automatic stay provision.[996] With the full payment of the debt stated in the plan, the debtor will be discharged of all the debts provided in the plan.[997] However, in some cases the debtor can still be discharged of the debts provided in the plan even though the payment under the plan have not been completed, where the failure to complete the payment is not due to the debtor's fault.[998]

4.3.1.1. Chapter 11 Reorganization Proceedings

Chapter 11 reorganization or rehabilitation proceeding gives the financially distressed company the opportunity to reorganize with a view to avoiding liquidation. In the case of NLRB v.

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such claims agrees otherwise to a lesser sum in satisfaction of such claim.; the plan should also provide for the satisfaction of provable unsecured claims with property whose value as at the commencement date of the plan is equal to the amount that the creditors would have received under chapter 7 on that date. This is to forestall the unsecured creditors receiving less than what they would have received had the debtor's bankruptcy proceedings preceded under chapter 7 liquidation. See section 1325 (a) (4); see also Barry Adler, Douglas Baird and Thomas Jackson, Bankruptcy: Cases, Problems, and Materials, supra footnote 980, p. 622.

[994] See section 1327 (a) BC.

[995] See section 1325 (b) (1) BC. The BC defines disposable income to mean the total income of debtor less the amount reasonably needed by the debtor for his maintenance and that of his dependants. In this case it varies from person to person and is a matter of fact that can be proven before the Bankruptcy Court. See section 1325 (b) (2) BC.

[996] See section 362 BC, see also Barry Adler, Douglas Baird and Thomas Jackson, Bankruptcy: Cases, Problems, and Materials, supra footnote 980, p. 623.

[997] See section 1327 (c) BC.

[998] See section 1328 (b) BC.

Bildisco & Bildisco[999] the United States Supreme Court held that "*the fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.*"[1000] Chapter 11's great value is that it can be used by both individuals[1001] (except stockbrokers and commodity brokers), uninsured state member bank, corporations organized under section 25A of the Federal Reserve Act, large corporations – railroad, although by its nature it is statutorily better suited for corporations.[1002] In case of reorganization, the debtor – the same old management is allowed to remain in place and to retain the assets of the organization and to continue operating the business as a debtor in possession.[1003] The debtor in possession - old management - will continue to exercise the powers of a trustee i.e., right to sell, use or lease the property and right to borrow money to run the business. Beyond

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[999] 465 U.S. 513, 528, 104 S.Ct. 1188, 1197, 79 L.Ed. 2d482 (1984); see also Scarberry, Klee, Newton and Nickles, Business Reorganization in Bankruptcy Cases and Materials, (Thomson West, 4th ed., 2006), p. 1.

[1000] The legislative history to the Bankruptcy Code explained the purpose of the a business organization to mean as follows: "the purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and provide a return for its stock-holders. The premise of business reorganization is that assets that are used for the production in the industry for which they were designed are more valuable than those same assets sold for scrap." See H.R. REP. No. 595, 95th Congress, 1st Session 220 (1977) as reported in Charles J. Tabb and Ralph E. Brubaker, Bankruptcy Law: Principles, Policies and Practice (Anderson Publishing, 3rd ed., 2010), p. 595.

[1001] See the case of Toibb v. Radloff 111S.Ct. 2197, 24C.B.C. 2d 1179 (1991) where the Supreme Court held that chapter 11 reorganization is not placed beyond the reach of a non-business individual debtor.

[1002] Section 109 (d) BC provides the classes of natural and artificial persons that can make use of chapter 11 as follows: "only a railroad, a person that may be a debtor under chapter 7of this title (except a stockbroker or a commodity broker),and an uninsured state member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title." Writing on the companies that could utilize the provisions of chapter 11, Epstein et al, stated as follows: "sketchy as they are, the data on success and failure of the chapter 11and of its operation suggest that one should divide the chapter 11 universe into two. Small and medium size companies populate one part of that universe, companies that are typically closely held and range in size from several millions of dollars in assets down to hundreds of thousands. These would encompass not only the small retail stores or real estate developments, but also the small manufacturing or service organizations. Large, publicly held companies populate the other part of the universe. Recent examples of this later group are the LTV [in re Chateaugay Corp., 838F.2d59 (2d Cir. 1988), 80 B.R. 279 (S.D.N.Y. 1987)]; Johns-Manviville [in re Johns-Manville Corp., 824 F. 2d 176 (2d Cir. 1987, 45 B.R. 833 (S.D.N.Y. 1984)]; White Motor [in re White Motor Credit, 761 F.2d 270 (6th Cir. 1985), 37 B.R. 631 (E.D.Ohio 1984)]; and Revere Copper [in re Revere Cooper and Brass Inc.,78 B.R. 17(S.D.N.Y.1987)]." See David Epstein, Steve Nickles and James White, Bankruptcy Practitioner Treatise Series, Vol. 3 (West Publishing Co., 1992), pp. 4 – 5.

[1003] See section 1104 BC, but where there is fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor by the old management then at the request of a creditor or the United States trustee, the court will order for the appointment of the trustee.

the managerial powers the debtor in possession enjoys the strong-arm powers like the trustee and can also resist the plans to lift the automatic stay order.[1004] Whilst a trustee will not be appointed in cases where there is debtor in possession, an examiner may be appointed whose duty would be to oversee the reorganization[1005] process although the debtor in possession exercises control of the management of the debtor's business. In return, the debtor in possession proposes a plan of reorganization wherein the creditors will be paid over a period of time from the assets of the organization of post confirmation incomes.

Within 120 days of the of order of relief following the commencement of the case, the debtor in possession has the exclusive right to file a plan of reorganization and another 60 days to solicit for the support and acceptance of the plan from creditors without any competing plan from creditors. These periods could be extended up to 18 months by the court, however where a plan is not filed within these periods, any interested party like the creditor or examiner where appointed could propose a plan.[1006]The plan categorizes the claims of the creditors and the interest of shareholders into various classes, but creditors with dissimilar claims or shareholders with dissimilar interest are not allowed to be placed into same class.[1007]

[1004] See sections 363, 364 and 1106 BC. See Barry Adler, Douglas Baird and Thomas Jackson, Bankruptcy: Cases, Problems, and Materials, supra footnote 980, p. 674.

[1005] See section 1106 BC and the case of Official Committee of Equity Security Holders v. Mabey, 832 F.2d 299 (1987); see also the case of in re Lenihan $ Br 209 (Bankr. D.R.I. 1980); see also Epstein, Nickles and White, Bankruptcy Practitioner Treatise Series, vol. 3, supra foot note 1001, p.20.

[1006] See section 1121 BC.

[1007] See sections 1122 and 1123 BC, the essence of this is that when one third of same class with same interest or claims approves the plan, the court may cram down the dissenting members of the class and it will not thus not be fair in the circumstance to allow a dissimilar interest or claim to be in the same class.

Contrary to chapter 13, confirmation of the plan in chapter 11 is made only after the plan has been assented to by the various classes of the creditors and stockholder interests of the debtor.[1008] A class of creditors requires some specific majority to assent on behalf of that class even though there may be some dissenting views of that class of creditors. Upon the preparing of the plan, the debtor in possession sends the plan to each class of creditors; the class studies the plan and votes on the plan. Approval of the plan is given by votes of members of the class who hold two-third amount of claims in the class.[1009] Where the classes of claims are unimpaired, the debtor may not have problems in the plan being approved by the classes,[1010] however where one class of claims is impaired[1011] then the class with the impaired claim must vote to approve the plan.[1012] Where one class with impaired claims accepts the plan, then the debtor can apply to have confirmation of the plan over other classes that have objected to the plan by having the court cram down the plan. In order to do this, "*the plan must not discriminate unfairly against the dissenting class and must treat the dissenting class in a way that is fair and equitable*."[1013] Where an individual creditor dissents instead of a class on the plan, the court will cram down the plan if the individual dissenter will receive under the plan the distribution at least equal in value to what the individual would have received had the debtor been liquidated under the chapter 7.[1014] When the debtors plan of reorganization is confirmed, the debtor is given a discharge of all pre-confirmation debts and the creditors and stockholders on the other hand are entitled to rights which the plan confer on them. Apart from the chapters discussed above, there are other chapters in the Bankruptcy

[1008] See William D. Warren, Steven D. Walt, Secured Transactions in Personal Property, supra footnote 701, p. 464.
[1009] See section 1126 BC.
[1010] See section 1126 (f) BC; see also Epstein, Nickles and White, Bankruptcy Practitioner Treatise Series, vol. 3 supra footnote 1001, pp. 43- 44.
[1011] Section 1124 (1) BC defines impaired claims as claims that leaves altered the legal, equitable, and contractual rights to which such claims or interest entitles the holder of such claim or interest.
[1012] See section 1129(a) (10) BC.
[1013] See Barry Adler, Douglas Baird and Thomas Jackson, Bankruptcy: Cases, Problems, and Materials, supra footnote 980, p. 681; see also section 1129 (b) BC.
[1014] See section 1129 (a) (7) BC.

Code where other classes of individuals and government institutions could file for bankruptcy proceedings.[1015]

4.3.2. Bankruptcy Laws in Nigeria

Nigeria has different laws and different judicial procedures for declaring a person bankrupt and a corporation insolvent.[1016] Whilst the Bankruptcy Act Cap B2 Laws of Federation of Nigeria

1015 For example, Chapter 12 provides for the rehabilitation of 'family farmers.' Section 109 (f) provides that only a family farmer or family fisherman with regular income may be a debtor under chapter 12 of this title. Section 101 BC defines a farmer as a person who receives more than 50 percent of their gross income from farming operations, such as tilling the soil, dairy farming, ranching, or the production or raising crops, poultry or livestock. Chapter 12 is a mix of chapter 11 and chapter 13 as it incorporates the elements of both chapters; however it has more attributes of chapter 13. Chapter 12 is modeled for family farmers who are at risk with the loss of their farms to restructure their debts in bankruptcy while the business of their farm is ongoing. According to Epstein et al, "chapter 12's enactment was only one of Congress' attempts in the mid-1980s to assist farmers who were facing hard times, when a decline in the value of agricultural commodities early in the 1980s was followed by a dramatic drop in farmland prices. These changes left many highly leveraged farmers unable to meet their debt obligations." See David Epstein, Steeve Nickles and James White, Bankruptcy Practitioners Treatise Series, vol. 2, (West Publishing Co. 1992), pp. 684 – 685.

According to Esptein et al, chapter 12 was to last until October 1, 1993 its lifetime was further extended by the Congress ad infinitum. Upon the filing of bankruptcy petition under chapter 12, an automatic stay order is made to stay the hand of the creditors from the properties of the bankrupt farmer. A standing trustee is appointed whose duty would be to supervise the debtor in the formulation and execution of the plan, ensuring that a substantial percentage of the future income of the farmer is used in paying the creditors. The farmer keeps both his exempt and nonexempt property as it is under chapter 13 but within 90 day files a plan, however the time for the filing of plan may be extended if the court sees the need to extend such time. (See section 1221 BC).

The content of the plan should provide for the submission of the substantial portion of the future earnings of the debtor to the supervision and control of the trustee for the execution of the plan. Also the plan provides for full payment for all those entitled to priority under section 507 BC. (See sections 1222 (a) (1) and (2) BC). However, the plan could provide for the payment of less than full payment to creditors where the plan provides for the utilization of the debtor's disposable income for five year period in making payment under the plan. (See section 1222 (a) (4) BC). The plan will be confirmed if it is proposed in good faith and the plan does not breach any provision of the law. (See section 1225 (3) BC). Upon the confirmation of the plan and payment by the debtor of all the obligations, the debtor is granted discharge. However the debtor may also be granted discharge even without full payment if the reason for non completion of payment is due to circumstances for which the debtor should not be justly held accountable. (See section 1228 (b) (1) BC).

Chapter 9 deals with the insolvency of municipality. It provides for the adjustment of a municipality debts. For the municipality to file for bankruptcy under chapter 9, it must be authorized in its capacity as a municipality or by name to be a debtor under such chapter by state law, or by a governmental officer or organization empowered by state law to authorize such entity to be a debtor under such chapter.

There is a new chapter 15 to the United States Bankruptcy Code. Known as the Ancillary and Other Cross-Border Cases, chapter 15 was added by the amendment contained in BAPCPA 2005. Chapter 15 repealed section 304 of the Bankruptcy Code, and the new chapter was codified at 11 U.S.C. Sections 1501- 1532. The aim of the addition of the chapter 15 is to further enhance the principle of 'comity' among nations i.e., promote synergy and cooperation between United States and other countries in dealing with matters of transnational insolvencies. According to Glosband et al., chapter 15 aim "include cooperation with foreign proceedings, greater legal certainty for trade and investment, fair and efficient administration of cross-border insolvencies that protects all parties, protection and maximization of the value of the debtor's assets, and facilitation of the rescue financially troubled businesses." See Daniel M. Glosband et al, American Bankruptcy Institute Guide to Cross-Border Insolvency in the United States, (American Bankruptcy Institute, 2008), p. 27.

2004[1017] applies in declaring a person bankrupt,[1018] insolvency of companies is contained is some of the sections of the of the Companies and Allied Matters Act C20 Laws of Federation of Nigeria 2004. Specifically insolvency of a company[1019] is provided for in sections 401 - 540 of the Companies and Allied Matters Act and the Companies Winding – up Rules 2001.[1020]Both the Bankruptcy Act and the insolvency of company sections in the Companies and Allied Matters Act provide the powers of the trustees in bankruptcy and the liquidators during bankruptcy proceedings or winding-up proceedings vis-à-vis the rights of the secured creditors over the collateral given to them by the debtors.[1021]

As already stated, this Nigerian Bankruptcy Act applies to the bankruptcy proceedings of individuals as opposed to companies. Specifically section 108 of the Bankruptcy Act limits the

[1016] Whilst in Nigeria, there are different terminologies applying to individual and companies, it is not so in the United States. When an individual's debt is greater than his assets at a fair valuation, then the individual is said to be bankrupt and if a company, then the company is said to be insolvent. However, in the United States, section 101 (32) of the Bankruptcy Code 11 U.S.C. defines insolvent to mean with respect to both, individual or corporation, that the 'sum of such entity's debts is greater than all of such entity's property at a fair valuation." In other words insolvency applies both to individuals and corporations in the United States. See also Lawrence P. King, Michael L. Cook, Creditors Rights, Debtors' Protection and Bankruptcy, supra footnote 985, p. 4.

[1017] Nigerian Bankruptcy Act is available at < http://www.nigeria-law.org/BankruptcyAct.htm >; last visited on the 24th of March, 2011.

[1018] Bankruptcy Act may technically speaking the equivalent of chapter 7 under the Bankruptcy Act in the United States. Both share some similar concepts in common like the automatic stay, avoidance powers of the trustee and both apply to bankruptcy proceedings of mainly individuals. This will be discussed more in the later part of this chapter. However, beyond this, there is no more basis for the comparison of both systems.

[1019] Insolvency of companies may loosely be said to be the equivalent of companies liquidation under chapter 7, although sections 537 – 540 CAMA which provide for arrangement and compromise of a company could be likened to chapter 11 business reorganization of the United States Bankruptcy Code.

[1020] Winding-up of a company is the process of bringing the life of the company to an end. Under section 409 CAMA, there are several grounds of winding up a company. However, this chapter will focus on winding up of a company for the inability of the company to pay its debts (insolvency). Winding-up of a company is akin to dissolution of a company which means the termination of a corporation legal existence under the United States law. In the United States, dissolution of a company could be on several grounds: namely by the expiration of its charter, by legislative act or by bankruptcy of the corporation. This research will also focus on the dissolution of a corporation in the United States on the grounds of bankruptcy. See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 506.

[1021]This research will discuss these powers in relation to the rights of the secured creditors during bankruptcy proceedings or winding up proceedings later in this chapter.

applicability of the Bankruptcy Act to persons[1022] and partnerships.[1023] The Bankruptcy Act has remained largely moribund throughout the years since its enactment in Nigeria 1990. According to Oluwale Akanle "*the Nigerian enactment (on bankruptcy) has not been operated at all despite the fact that it has existed in the statute books for over a decade.*"[1024] This is in contradistinction to its counterpart – Sections 401- 540 of the Companies and Allied Matters Act 2004 and the Companies winding – up Rules 2001 which have received relative 'patronage' from legal practitioners in Nigeria in filing for the winding – up petition for insolvent companies registered in Nigeria.[1025] A creditor whose debt has not been paid by an insolvent company can petition for the winding up of the company based solely on the debt owed to the creditor. This makes the winding up procedure easier to use and more attractive as a means of recovering debt from a recalcitrant company than the Bankruptcy Act.

4.3.3. Cameroon's Bankruptcy Law

Cameroon's bankruptcy law is the Uniform Act Organizing Collective Proceedings for Wiping Off Debts[1026] (hereinafter called Uniform Act on Debt) which is operational in all the OHADA member states. The Act, similarly to United States bankruptcy law, governs both insolvencies of

[1022] Section 108 Bankruptcy Act as amended provides as follows; "A receiving order shall not be made against any corporation or against any association or company registered under the Companies and Allied Matters Act." See also Iyiola Olatunde Oyedepo, The Imperatives of Vibrant Insolvency Practice in Nigeria, (February, 2008), available at SSRN: < http://ssrn.com/abstract=1089345 >; last visited on the 29th of March, 2011.
[1023] See section 5 of the Bankruptcy Act.
[1024] See Olisa Agbakoba, Tunde Fagbohunlu, Bankruptcy and Winding – up Proceedings: Potential Mechanisms for Speedier Debt Recoveries, available electronically at < http://agbakoba-associates.com/admin/uploads/pubs/BANKRUPTCY%20AND%20WINDING%20UP.pdf >; last visited on the 7th of March, 2010.
[1025]See Osaro Eghobamien, Bankruptcy Law: A need for urgent Reform, published in BusinessDay Newspapers of 20th November, 2008 and available at < http://www.perchstoneandgraeys.com/article/BANKRUPTCY%20LAW%20-%20A%20NEED%20FOR%20URGENT%20REFORM.pdf >; last visited on the 29th of March 2011.
[1026] This law is available at < http://www.jurisint.org/ohada/text/text.06.en.html >; last visited on the 24th of March, 2011.

individuals and that of companies.[1027]The Act came into force in all member states on the 1st of January 1999.[1028] The Act consists of seven parts, [1029]and has the following three objectives: preventive settlement, legal redress and liquidation of the assets of the debtor to wipe off debts. Consequently the first aim of the Act is to encourage a preventive settlement; it is only when the preventive settlement agreement cannot be not reached between the debtor and the creditors that the other options of legal redress and liquidation of the assets of a debtor will be undertaken to wipe off the debts of the bankrupt. Preventive settlement entails the court encouraging the creditors to reach an agreeable composition with the debtor. This preventive settlement is aimed at the debtor (whether individual or business entity) making continuous payment in furtherance to wiping off the debt. Where the debtor is a business entity, the Act ensures that such business continues as a going concern. It is comparable to judicial liquidation which was in practice in Cameroon prior to the adoption of the Uniform Act on Debt in 1999. It is also the functional

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[1027] This is in contradistinction to the Nigerian bankruptcy laws where different legislative acts govern individual bankruptcies and the insolvencies of companies.

[1028] Prior to the adoption of the Uniform Act on Debts, Cameroon had two rules of court in cases of the insolvency of a company. The rules were bankruptcy (faillite) and judicial liquidation (liquidation judiciare). In judicial liquidation, the debtor company's management continued to remain in control of the affairs of the company (debtor in possession) whilst the company tried to secure a composition with its creditors. In the case f bankruptcy, the pronouncement of bankruptcy was punitive as it automatically ended the life of the company. The order of bankruptcy was made by the court at the behest of the creditors, and the order was requested where the company failed to make the application for judicial liquidation within 15 days of the insolvency or failed to get composition with its creditors. No court could force the creditors to enter into compromise with the debtor so survival of an insolvent company depended on of its creditors. Where there was composition, it took the form of any of these arrangements: "third party acquisition of debtor's assets, a scale-down of debts, a moratorium on repayment or a combination of these." Any of the form of composition of the debtor with its creditors required court approval to be effective. Where no composition was agreed, or where the debtor failed to honor its obligations under the compromise, the assets of the debtors were liquidated and distributed to its creditors. See Weissberg, Gaetjens & Ziegenfeuter, A Guide for Business in Cameroon, advisory paper presented by the International Law Firm of SCP Weissberg – Gaetjens – Ziegenfeuter, 1996-1998, available at < http://www.wgzavocats.com/articles/guide-cameroun7.html >; last visited on the 24th of March, 2011; see also eStandards ForumFinancial Standard Foundation, Cameroon: Effective Insolvency and Creditor Rights Systems, available at < http://www.estandardsforum.org/cameroon/standards/effective-insolvency-and-creditor-rights-systems >; last visited on the 24th of March, 2011.

[1029] Part I deals with the preliminary part; part II provides for legal redress and liquidation i.e., organs responsible for legal redress and liquidation of property, effects of the decision to initiate proceedings on the debtor or creditor, discharge of legal redress and liquidation of property; part III deals with personal bankruptcy and discharge of bankrupt; part IV provides for the legal remedy in matters of redress and liquidation of property; part V deals with bankruptcy offences; part VI provides for the international collective proceedings while part VII is on final provisions.

equivalent of chapter 11 in the United States Bankruptcy Code, since preventive settlement is negotiated whilst the bankruptcy proceedings is pending in court.[1030] However this preventive settlement can only be encouraged by the Act where debtor is facing "a *difficult but not irremediable economic and financial situation*"[1031] irrespective of the nature and size of the debt.

Legal redress is a court proceeding that tends to protect a debtor company while wiping off its debts through composition with its creditors. Liquidation of property is resorted to as a final measure where preventive settlement fails. The aim of the liquidation of the assets of the debtor is to use the proceeds of the sale of the assets of the debtor to pay its creditors in accordance with the priority rules stated under Articles 166 and 167 of the Uniform Act on Debts and also pursuant to the provisions of Uniform Act Organizing Securities.

4.3.4. Is the Frequency of Bankruptcy Cases in United States of any Relevance to Nigeria and Cameroon?

As stated above, one of the three objectives of bankruptcy laws in the United States is to give an individual debtor a fresh start from the burden of dischargeable debts. Fresh start was encapsulated in the United States Bankruptcy Act of 1898 and given judicial recognition in the case of Wetmore v. Markoe,[1032] decided in 1904 when the United States Supreme Court held as follows: "*systems of bankruptcy are designed to relieve the honest debtor from the weight of*

[1030] See Articles 2, 3, 4, and 5 and 6 of the Uniform Act on Debts. However Articles 3 are instructive on the issue that preventive settlement is done when the case is in court. Article 3 provides: "preventive settlement, legal redress and liquidation of property shall fall within the jurisdiction of the competent court in charge of commercial matters. […]." Whilst Article 5 provides: " […] no petition for preventive settlement shall be lodged by the debtor before the expiration of the period of five years following a previous petition that resulted in a decision granting preventive settlement."
[1031] See the proviso to Article 2 (1) of the Uniform Act Organizing Collective Proceedings for Wiping of Debts.
[1032]196 U.S. 68, 77, 25 S.Ct. 172,176, 49 L.Ed. 390 (1904). See also Townsend, Fresh Cash – Another Element of a Bankrupt's Fresh Start? 31 U. Miami L. Rev. 275, 281.

indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business fortunes." It is thus not surprising why the bankruptcy law in the United States is pro-debtor. Indeed, the ease with which debtors file for voluntary bankruptcy and get relief when beset by the creditors in the United States attest to the fact that bankruptcy proceedings are pro-debtor. However, the recent Bankruptcy Abuse Prevention and Consumer Protection Act 2005 has restricted access to chapter 7 by ensuring that people who could pay their debts over time do not discharge their debts by filing a chapter 7 bankruptcy petition – thus making the United States individual bankruptcy less pro-debtor.[1033] Nevertheless, the large number of bankruptcy cases filed in a year in the United States can attest to the fact that bankruptcy proceedings in the United States in comparison to other jurisdiction is debtor friendly and aimed at giving an honest but unlucky bankrupt another opportunity to start over again. In a 12 month period ending 31st March 2010 alone, there were over 1.5 million bankruptcy petitions filed for both business and non-business debts,[1034] in comparison to Nigeria's nil number of cases filed in individual bankruptcy since the enactment of Nigerian Bankruptcy Act in 1990. The curious question to be

[1033] According to White, "The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) which went into effect in October 2005, changed United States personal bankruptcy law from very pro-debtor to much more pro-creditor. BAPCPA was passed in response to a large increase in personal bankruptcy filings in the United States, from 287,000 per year in 1980, to 718,000 in 1990, to around 1,500,000 per year in each of the years 2002 – 2004. […] An important question is whether opportunistic behavior explains the rapid increase in the number of filings: did consumers learn that bankruptcy law was very pro-debtor and respond by borrowing more and filing for bankruptcy even when they could afford to repay? Creditor's groups used the opportunism argument to convince Congressional leaders that reform was needed because bankruptcy was being abused and, since BAPCPA went into effect, personal bankruptcy filings have in fact dropped sharply." See Michelle J. White, Personal Bankruptcy Law: Abuse Prevention versus Debtor Protection, October 2006, p. 3 available at < http://econ.ucsd.edu/~miwhite/white-bapcpa.pdf >; last visited on the 24th of March, 2011.

[1034] Although the greater majority of the bankruptcy filings were for non business debts. See infra footnote 1049 for the breakdown of the analysis of the statistics of the bankruptcy filings in the United States. See statistics of Bankruptcy filings in the United States Courts for 12 month period ending March 31, 2010, available at United States Courts Bankruptcy Statistics available at < http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx >; last visited on the 25th of March, 2011; See also the 2009 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, p. 5, available at < http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2009/2009BAPCPA.pdf > last visited on the 4th of February 2011.

asked is why has Nigeria not embraced this means of removing the burden of the *weight of indebtedness …which has become oppressive* in order to give a bankrupt a fresh start, a situation that has been recognized in America since 1898? One of the main reasons why bankruptcy proceedings (most especially individual bankruptcies) have not thrived well in Nigeria is that the Bankruptcy Act and other laws that impact on bankruptcy are not debtor friendly. Indeed, to say that the laws are not debtor friendly is a gross understatement; the laws stigmatize bankrupts.

As opposed to United States, the level of social stigmatization of bankrupts in Nigeria and also in United Kingdom from where Nigeria copied her bankruptcy laws is quite high.[1035] The stigmatization of bankrupts makes no distinction between those who are honest but unlucky or undercapitalized and the reckless or fraudulent. Expectedly, the same fate has also befallen honest but unlucky business people in Nigeria who happened to be bankrupt, for the obvious reasons that Nigeria copied most of her laws including the Bankruptcy Act from the United Kingdom. However, while the United Kingdom is making efforts to change some of her laws in response to the dynamics of the times, the reverse is the case in Nigeria. Sadly, Nigeria does nothing about reviewing and reversing some of her own laws copied blindly from United Kingdom in line with the current trends despite the establishment of the Nigerian Law Reform

[1035] Writing about social stigmatization of bankrupts in the United Kingdom, Stephen Byers posited as follows: "One of the reasons why people in the UK tend to be risk averse is because they see the financial and social costs of failure as outweighing the benefits of success. Bankruptcy law currently makes no distinction (and therefore third parties cannot tell the difference) between those who are honest but unlucky or undercapitalized and the reckless or fraudulent. All lose their personal wealth (with some limited exceptions), are automatically disqualified from being a director of a limited company and suffer a number of other restrictions for a period of up to three years. We believe that a distinction can and should be made between the two groups so that the vast majority of honest bankrupts do not continue to be stigmatized through association with the dishonest." See Stephen Byers, Bankruptcy: A Fresh Start - A Foreword, Secretary of State for Trade and Industry to the Insolvency Service Publications in March 2000; available at < http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/freshstart/foreword.htm >; last visited on the 26th of February, 2010.

Commission in 1979.[1036] She is probably satisfied that whatever law that is copied from United Kingdom must forever stand the test of times.[1037]

Indeed, in Nigeria, bankrupts suffer the worst fate. Notwithstanding the social stigmatization and the barring of the bankrupts from holding some political or corporate positions in Nigeria,[1038] the law even criminalizes the act of a bankrupt person holding the position of a director in a

[1036] The Nigerian Law Reform Commission's office is located at the Federal Secretariat Complex Abuja. Section 5 (1) of the Nigerian Law Reform Commission Act Chapter N118 LFN 2004 provides the functions of the Commission as follows: "It shall be the duty of the Commission generally to take and keep under review all Federal laws with a view to their systematic and progressive development and reform in consonance with the prevailing norms of the Nigerian society including, in particular, the codification of such laws, the elimination of anomalies, the repeal of obsolete, spent and unnecessary enactments, the reduction in number of separate enactments, the reform of procedural laws in consonance with changes in the machinery of the administration of justice and generally, the simplification and modernization of the law." The website of the Nigerian Law Reform Commission is available at < http://www.nlrc.gov.ng/index.php > last visited on the 4th of February.

[1037] Example of this attitude is that while Nigeria was satisfied copying the English Company law of 1985, the English Company law was amended in 2006 in response the commercial exigencies of times, meanwhile Nigeria has no plan amending or copying the current law regulating companies in England which is the 2006 revised version of the English Company Law. This is not limited to company laws only, indeed it has become the general norm of all laws copied from British in Nigeria, in reference to outdated land law statutes in Nigeria, Professor Imran Smith stated "The developed world is attuned to the idea of change and within the context of law as an instrument of social dynamics, reforms are introduced to meet the new perspectives envisioned by the realities of our times. In the area of land tenure in particular, it is interesting to note that the English land tenure system which was received into the Nigerian legal system many decades ago has been transformed in the country of its origin, to meet the challenges posed by continuous changes in land use and management structure since the Norman conquest in 1066. Within the English system of land tenure, orthodox policies, rules and practices have given way to socio-economic realities of our time including the positive impact of globalisation. Unfortunately in Nigeria, the feudal system of land tenure, though dead in its country of origin, the relics of it still rule us from the grave with many anachronistic western-style laws still being retained, in most cases, to the prejudice of the socio-economic realities and demeaning to the modern concept of land tenure." See Imran Smith, Sidelining Orthodoxy in Quest for Reality: Towards an Efficient Legal Regime of Land Tenure in Nigeria, An Inaugural Lecture delivered at the University of Lagos on 18th June 2008.

[1038] See section 126 (1) of the Bankruptcy Act cap B2 Laws of the Federation of Nigeria 2004 as amended which provides as follows: "126 (1*)* where a person is adjudged bankrupt under this Act, he shall, subject to the other provisions of this Act, be disqualified for- (a) being elected to the office of President or Vice-President, Governor or Deputy –Governor; (b) being elected to, or sitting or voting in, either House of the National Assembly or in a State Assembly; (c) being elected to, or sitting or voting in, any local government council in any State in the Federation or the Federal Capital Territory Abuja; (d) being appointed to, or sitting or voting in, any governing board (howsoever known or described) of any statutory corporation or any other statutory body (whether corporate or unicorporate) or, as provided by section 253 of the Companies and Allied Matters Act, of any company as defined in that section; (e) being appointed or acting as a justice of the peace; (f) being appointed or acting as a trustee of a trust estate; (g) being admitted to practice any profession for the time being regulated by law on his own or in partnership or in any other form of association (other than as an employee) with any other person. Subsection 2 (c) made a volte – face by providing as follows: (2) The disqualification to which a bankrupt is subject under this section shall, shall unless otherwise provided by any other enactment, be removed and cease if and when- (a) the adjudication of bankruptcy against him is annulled or; (b) he is automatically discharged pursuant to the Act: or; (c) he obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his own part."

company.[1039] The long title to the Bankruptcy Act in Nigeria lends credence to the social stigmatization suffered by the bankrupts. The long title to the Act provides as follows: "*An Act to make provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as an employee).*" The combined effect of the long title and other provisions of the Bankruptcy Act and CAMA[1040] cast the debtor as someone who cannot manage both his private and financial life. These provisions do not give a debtor a fresh start and has negatively affected the willingness of the debtor to seek for credit to embark on a productive venture that could have helped in developing the economy for fear of stigmatization and deprivation of the lucrative and responsible positions in the political and corporate world. The effects of these laws have hindered people from filing for voluntary bankruptcy under the Act.[1041] The consequences of being declared bankrupt under the legislations in Nigeria can force any potential bankrupt to go to any length to source for funds to repay his creditors instead of being forced into involuntary bankruptcy by his creditors. The author does not know until date of any case of filing either for voluntary or involuntary bankruptcy under the Bankruptcy Act.[1042]

[1039] See sections 127 -128 of the Bankruptcy Act cap B2 LFN 2004, see also section 253 (1) of the Companies and Allied Matters Act 1990 which provides as follows: "If any person, being an insolvent person acts as director of or directly or indirectly takes part in or is concerned in the management of any company, he shall be guilty of an offence and liable on conviction to a fine of N500, or to imprisonment for a term not less than 6 months or more than two years or both." See also section 258 (1) which provides as follows: "The office of director shall be vacated if the director- (b) becomes bankrupt or makes any arrangement or composition with his creditor generally."

[1040] See sections 126-128 of the Bankruptcy Act and section 253 (1) Companies and Allied Matters Act 2004.

[1041]Under the indigenous system, the society had empathy on someone who was unable to pay his debt especially when the inability was circumstances beyond the debtors control like loss of crop yield, death or prolonged sickness that affected the debtor's trade or profession. There was no law to discriminate, ostracize or punish such a person and the creditor was ready to grant more moratoriums to enable the person recover from the situation and resume payment again. But it is not so with the Bankruptcy Act. Casting such debtor as someone who cannot manage his financial life engenders societal stigmatization on the bankrupt.

[1042] The author is not alone on this view, the Managing Partner of Punuka Attorneys & Solicitors, Chief Anthony Idigbe SAN (Senior Advocate of Nigeria is an equivalent of the British Q.C.) who has more twenty five years of active litigation practice in Nigeria also believes that the Bankruptcy Act has not been used to file either for voluntary or involuntary bankruptcy despite its existence in the Nigerian statute book for about twenty years due to the consequences attached to a bankrupt in Nigeria.

There is therefore urgent need to reform the bankruptcy law in Nigeria and amend other related laws;[1043] the laws of the United States offer many lessons in this regard. These laws have not only stigmatized bankrupts but have made it an offence for a bankrupt to hold any responsible position notwithstanding whether the person became bankrupt as a result of unforeseeable economic downturn or a conscious, deliberate and reckless effort of the debtor to live above one's means. Where bankrupts are stigmatized and prevented from holding any responsible position then there will be the tendency not to borrow for the fear of the repercussions of failing since there is ever present risk of sliding into bankruptcy for any person or entity who borrows money for commercial purposes. This will invariably affect the economy. Legal transplantation of one of the United States bankruptcy law policy choices of giving a debtor a fresh start in Nigeria – by eliminating the anti-debtor provisions; specifically the provisions that stigmatize and criminalize bankrupts in the Nigerian Bankruptcy Act[1044] – is what is needed herein to reward genuine entrepreneurs who are willing to take risk in order to contribute to the growth of the economy.

Apart from the stigmatization and criminalization of the bankrupts, another plausible reason for the avoidance of the Bankruptcy Act in Nigeria was the procedural flaws in filing bankruptcy proceedings under the old bankruptcy law. Although this reason can no longer be tenable since the amendment of the law in 1992, but it suffices to mention briefly for historical purposes that the pre-1992 procedural process hindered the initiation of individual bankruptcy cases. Under the old bankruptcy law, a creditor could only commence a bankruptcy case on two grounds. The *first*

[1043] Companies and Allied Matters Act 2004.
[1044] See sections 126 -128 of the Bankruptcy Act and sections 253 and 258 of CAMA 2004.

ground was where the creditor obtained a final judgment against a debtor in a previous judicial proceedings and the debtor had failed within fourteen days of the service of the notice, to satisfy the debt or set up a counter claim, set off or cross demand which equaled or exceeded the amount of the judgment. The *second* ground was where an execution against a debtor pursuant to a proceeding in court which had been levied by the seizure of his goods and the goods had been sold or held by the bailiff for twenty – one days.[1045] This meant that bankruptcy petition then was an ancillary or secondary proceeding. Bankruptcy was not the main proceeding that a secured creditor would have embarked upon on default of repayment obligations by a debtor unless the debtor himself voluntarily filed for bankruptcy on the grounds of his inability to pay his debt which was very unlikely. In a country where the judicial process is slow, a secured creditor could ill afford the 'luxury' of initiating two court cases in order to commence bankruptcy proceedings against the debtor to recover debts and this provision made a travesty of the prompt enforcement of secured credit transaction in Nigeria while it lasted. This was the position until the amendment of the bankruptcy law in 1992 added more grounds which entitles the creditor to initiate a bankruptcy proceeding against the debtor. Even with the addition of these other grounds,[1046] the Bankruptcy Act is still hardly ever used to commence a bankruptcy proceeding against individuals.[1047]

[1045] See section 1 of the Bankruptcy Act 1990 which provides as follows: "A debtor commits an act of bankruptcy in each of the following cases: (a) if a creditor (i) has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed , has a bankruptcy notice served on him and (ii)does not within fourteen days after the service of the notice, comply with the requirement of the notice or satisfy the court that he has a counter –claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or the proceedings in which the order was obtained. (b) if the execution against him has been levied by seizure of his goods under the process in an action or proceedings in the court, and the goods have either been sold or held by the bailiff for twenty – one days. (c) if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself."

[1046] See section 1 of the Bankruptcy Act 1990 and the additional grounds contained in section 2 of the the Bankruptcy Amendment Act 1992.

[1047] See Iyiola Olatunde Oyedepo, The Imperatives of a Vibrant Insolvency Practice in Nigeria, supra footnote 1022.

Cameroon's Uniform Act on Debt presents a slightly better scenario than its Nigerian counterpart although there is no difference in the outcome: i.e., the number of people or the frequency with which people file for bankruptcy petition (wiping off debts) is very low. Where a debtor is unable to pay his debts, the debtor shall file a petition for preventive settlement. Upon filing of this action, a receiver will be appointed by the court to gather his estate in order to use the proceeds thereof to settle his creditors.[1048] Where the properties are inadequate to settle the creditors; the judge shall nevertheless close the liquidation process on liquidating his property and technically discharge the debtor. However the creditors are individually given the right to maintain action against the debtor.[1049] Thus there is neither complete discharge, nor a fresh start as it is under the United States bankruptcy laws.

Nonetheless, the debtor is not stigmatized and his actions are not criminalized – contrary to the Nigerian Bankruptcy Act – unless the debtor has engaged in some misfeasance and is pronounced personally bankrupt. Under the Uniform Act on Debt, a person who is pronounced personally bankrupt by the competent court is banned from the following activities: "*to trade and particularly to direct, manage, administer or control an individual business concern or any corporate body with any economic activity; to hold an elective public office or to be an elector for the said public office; to hold any administrative, legal or professional representation office.*" This ban shall not be less than 3 years and more than 10 years.[1050] However, the good thing is that the acts of the debtor that may result in declaring such a person bankrupt are

[1048] See Article 8 of the Uniform Act on Debt.
[1049] This is the effect of the combined reading of Articles 170 – 174 Uniform Act Organizing Collective Proceedings for Wiping Off Debts.
[1050] See Article 203 of the Uniform Act Organizing Collective Proceedings for Wiping Off Debts.

potentially fraudulent acts[1051] and not the mere act of borrowing money for an honest business venture which later went awry.

The question is why the proceeding for wiping off debts not utilized also in Cameroon even when the provisions of the law are not as anti-debtor as it is in Nigeria. One probable reason may be that the supra-national law is still 'new' having come into effect in 1999; accordingly, it may be possible that many people are not aware of the existence of the law.[1052] Another reason may be the absence of complete discharge that the law grants to a debtor who files for petition for preventive settlement. Where a debtor does not get a complete discharge after all his property has been liquidated, it thus makes no difference to file a petition for preventive settlement in the first place as there is no incentive to file a petition for preventive settlement. This underscores the usefulness of the legal transplantation of one of the policy choices of the United States Bankruptcy Acts to Cameroon which will grant complete discharge to debtor and give the debtor an opportunity to have a fresh start. It will provide the incentive to debtors to file for petition for preventive settlement – thus utilizing the almost moribund Cameroon Uniform Act on Debts.

[1051] Article 196 of the Uniform Act Organizing Collective Proceedings for Wiping Off Debts is instructive in this regards and provides as follows: "The Competent court shall, at any time during the collective proceedings pronounce the personal bankruptcy of persons who have: (a)abstracted the accounts of their company, embezzled or hidden part of its assets or recognized fraudulently debts which did not exist; (b) carried out a commercial activity in their personal interest either through an intermediary or under cover of a corporate body concealing their dealings; (c) disposed of the credit or property of a corporate body as their own; (d) by fraudulent misrepresentation, obtained for themselves or for their company, a composition agreement which is later annulled; (e) committed acts in bad faith or inexcusable misfeasance or serious offences against trade rules and practices such as defined in Article 197."

[1052] There are no special mechanisms to publicize the Uniform Acts in the 16 member states contained in the OHADA Treaty itself or in any other OHADA Uniform Act, rather the member states rely on the each member state to disseminate the information on the Uniform Acts as it does to other national laws. For example in Cameroon, information on Uniform Act on Securities, Uniform Act on Debt and Uniform Act of Recovery are disseminated like other laws on a need to know basis. It is most probable when a business wants to borrow money that it will be seized of the Uniform Acts on Securities. However the legal practitioners and other industry practitioners like banks, leasing companies who practice in these areas presumably are aware of the existence of these laws.

4.3.5. Business Re-organization in Nigeria from the Perspectives of Chapter 11 of the United States Bankruptcy Code

The third policy choice of bankruptcy laws in the United States is to provide mechanisms to reorganize a business entity with the aim of making it to continue as a going concern and to pay its debts where that is feasible. This is the whole essence of Chapter 11 reorganization. It involves restructuring both the debt and the business. Restructuring of the debt may take the shape of extending the time within which the company will repay the debt, or reducing the total amount accruable from the debtor company to the creditor or may include both.[1053] Restructuring of a business can take place in different dimensions including but not limited to the followings; sale of a business as a going concern, asset sale, pre-packaged bankruptcies, change of ownership of a part or whole sections of the business, selling off divisions or manufacturing lines, closure or substantially reducing money-losing divisions, trim excess staff, refocus product lines, reduce the number of company cars. The essence of the restructuring is to "*produce a smaller, leaner company with a reduced debt (and interest) burden, once again able to concentrate on the type of business that it does well.*"[1054]According to Tajti, 10% - 27% of businesses that filed for chapter 11 reorganization were successful.[1055] The percentage may have

[1053] See Lynn M. LoPucki, Elizabeth Warren, Secured Credit A Systems Approach, (Aspen Publishers, 6th ed., 2009), p. 95; see also Elizabeth Warren, Jay Lawrence Westbrook, The Law of Debtors and Creditors Text, Cases and Problems, (Aspen Publishers, 6th ed., 2009), p. 387.

[1054]See Elizabeth Warren, Jay Lawrence Westbrook, The Law of Debtors and Creditors Text, Cases and Problems, supra foot note 1053, p. 388.

[1055] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 203. However, Baird believes in the reorganization of small business, both the benefits and cost involved have been modest. According to Baird, "Serial entrepreneurship is the most persistent and most telling characteristic of small business bankruptcies. The benefits of chapter 11 in these cases may seem modest, but the cost may be modest as well. Within a few months, bankruptcy judges sort out the debtors who will reorganize successfully and those who will not. Empirical evidence suggests that more than half the debtors who cannot reorganize successfully are identified and dismissed within three months of the filing of the petition; more than three-quarters are dismissed or converted within five months. Thus, under able judges, owners of small businesses in hopeless condition cannot use chapter 11 to drag out the inevitable for very long." See Douglas Baird, Elements of Bankruptcy, (Foundation Press, 5th ed., 2010), p. 209.

changed in recent years due to financial and mortgage crisis and other economic downturns both in the US and globally.[1056]

One remarkable feature of chapter 11 proceedings is that upon filing, the first aim of the debtor company and the creditors would be how to reorganize the business to get it back on its feet in order to become profitable again and repay its debts. It is only when this cannot be achieved that the alternative option of using the assets of the business to repay loan vide the process of liquidation will be considered. In Nigeria, as already stated, arrangement and compromise are the equivalents of the US chapter 11 reorganization. The Company and Allied Matters Act makes provisions for arrangements and compromises a company can make with its creditors or class of creditors which is aimed at restructuring both the debts of the company and the company itself with a view to keeping the company running. [1057] The provisions of arrangements and

[1056] CIT Group in the US, a company that lends to SMEs and was affected by the recent sub-prime mortgage crisis filed for Chapter 11reorganization in November 2009 and was cleared by the Court for the reorganization in December 2009. See Boston.com, Court Clears CIT Reorganization Plan, available at < http://www.boston.com/business/articles/2009/12/09/court_clears_cit_reorganization_plan/ > last visited on the 13th of May, 2011.

[1057] See sections 537 - 540 CAMA 1990. Section 539 is instructive in this regard and it provides as follows: „(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, the court may, on the application, in a summary way, of the company or any of its creditors or members or, in the case of a company being wound up, of he liquidator, order a meeting of the creditors or class of creditors, or of the members of the company, or class of members, as the case may be, to be summoned in such a manner as the court directs. (2) If a majority representing not less than three-quarters in value of the shares of members or class of members, or of the interest of creditors or class of creditors, as the case may be, being present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement may be referred by the court to the Securities and Exchange Commission which shall appoint one or more inspectors to investigate the fairness of the said compromise or arrangement and to make a written report thereon to the court within a time specified by the court. (3) If the court is satisfied as to the fairness of the compromise or arrangement, it shall sanction the same and the compromise or arrangement shall be binding on all the creditors or the class of creditors or on the member or the class of members as the case of a company in the course of being wound up, on the liquidator and contributories of the company. (4) An order made under subsection (3) of this section shall have no effect until a certified true copy of the order has been delivered by the company to the Commission for registration and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order been made. (5) If a company makes default in complying with subsection (4) of this section, the company and every officer of the company who is in default shall be liable to a fine of 5 for each copy in respect compromises give the company allowance to pay its debt to creditors later instead of liquidating the assets of the company. These saving provisions – even though provided in the law – are almost dead letters, and the provisions on compromise and arrangements are hardly ever resorted to in restructuring ailing companies in Nigeria. Ordinarily the provisions on compromise and arrangement ought to have been the first option to be explored to see the possibility of giving the distressed company an opportunity to restructure its debts with its creditors and continue in business than be liquidated. However this is hardly the case, creditors are either unwilling to enter into an arrangement and compromise with an ailing company, or are too eager to end their 'relationship' with such company and consequently opt for the full winding up proceedings against the company instead of helping to revive such companies. The impact of this is that companies which hitherto would have been resuscitated or saved from been wound up by restructuring, are left to die an 'untimely death' with its dire consequences on the Nigerian unemployment rate and ultimately on the economy.[1058] In Nigeria where there are other extraneous factors[1059] - than the usual business risk - that could adversely affect the continued

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of which default is made. (6) In this section and section 450 of this Decree, "company" means any company liable to be wound up under this Decree.

[1058] See Iyiola Olatunde Oyedepo, The Imperatives of a Vibrant Insolvency Practice in Nigeria, supra footnote 1022, p. 9.

[1059] In Nigeria for instance the risk to slide into bankruptcy is even high for lack of infrastructural amenities. Poor infrastructural developments are indices of underdevelopment or a neglect of the society by the government. It is one of the diseases plaguing African countries and a threat to development and possible industrialization of African countries. An articulate entrepreneur who does a feasibility study on the success or otherwise of a business venture today will come to the stark realities and painful conclusion that the cost of doing business in Nigeria is too high and the chances of business survival and growth in Nigeria is low. For example the debilitating disease of power outages in Nigeria which other countries take for granted, has crippled many businesses and greatly frustrated the micro, small and mid scale entrepreneurs. In a country where power (electricity) is supplied for about ten hours in a week in some parts of the country, cannot be a business friendly environment. Consequently many Nigerian business enterprises have relocated their businesses to neighboring countries because of this problem. For example, Dele Mamoudu, the publisher of Ovation Newspapers a celebrity magazine relocated his publishing company because of lack of infrastructural amenities especially lack of power supply.

Most multinational companies do not rely on national electricity grid for power supply to their productions or operations, the multinational companies buy big generating plants which they rely on in operating their businesses. Regrettably, the cost of generating power on one's own is too expensive and this cost is passed on to the consumers in products and services. The micro, small and mid-scale entrepreneurs do not have resources to generate existence of businesses, the need for creditors to explore ways of reorganizing distressed businesses instead of seeking to wind them up is more evident. This stand of creditors in Nigeria is the opposite of the situation in the United States where one of the priorities of the creditors is to reorganize a financially distressed business instead of liquidating its assets.[1060]

In the case of Ado Ibrahim & Co. Ltd v. Benue Cement Company Ltd[1061] the Nigerian Supreme Court per Tanko Muhammad JSC listed instances that can warrant the winding up of a company to include among others where the company is unable to pay its debt.[1062] Inability of a company to pay its debts consist of any of the three scenario: *first*, where a company has defaulted to pay a debt of N2,000[*1063*] and above for three weeks after the demand to pay the said sum had been served on the company's registered or head office. *Second*, where an execution of a judgment or order of any court in favor of the creditor of the company has not been paid either in part or

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power for their operations by themselves, and accordingly they go out business. An assiduous micro, small and mid-scale entrepreneur who has done this calculation would not want to borrow money from the bank for fear of being bankrupt. The real sad story about the debilitating power situation in Nigeria is that the past governments has paid lip service to the power sector in Nigeria but yet an unprecedented huge sum of money had gone down the drain in a bid to improve the power supply in Nigeria. Late President Alhaji Musa Yara'duwa, while receiving Dr Oby Ezekwesili, the World Bank Executive Vice President for Africa in his office lamented that the previous government of President Olusengun Obasanjo spent a whopping sum of $16b from 1999-2007 for power generation in Nigeria without improving the power situation in Nigeria.

However there appears to be flicker of hope for the resuscitation of the power sector with the present government headed by Dr. Goodluck Jonathan. The magnitude of the problem in the power sector has caused the present government to declare a state of emergency in the power sector. One only hopes that the efforts of the present government will bring a turnaround to the power sector in Nigeria i.e., the government will be able to generate more power supply that will bring more stable power supply to Nigerians and not like the empty promises of the previous government. Other absence of infrastructural amenities are lack of provisions of good roads for transportation of raw materials and finished product, good and functioning railway lines for alternative and cheaper means of conveying products.

1060 It is therefore not surprising to see that about 13, 553 businesses filed for chapter 11 re-organization in a 12 month period ending 31st March, 2010. See statistics of Bankruptcy filings in the United States courts for 12 month period ending March 31, 2010, available at United States Courts Bankruptcy Statistics at < http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx >; last visited on the25th of March, 2011.

1061 (2007) 15 NWLR (pt 1058) 538, 564.

1062 See section 408 CAMA 1990

1063 At the exchange rate of Nigerian currency (naira) to dollar currently, the amount is about $14, obviously as at the time of the enactment of the CAMA in 1990, the amount of N2, 000 was higher in value, but with the devaluation of Nigerian currency and market fluctuations the threshold amount has become puerile yet the amendment of such laws are not contemplated by the Nigerian Law Reform Commission despite the fact that this insolvency proceedings are used intermittently to wind up a company.

whole, and *third*, the court is satisfied that the company is not able to pay its debts after taking into account either the contingent or prospective liability. [1064] From the provisions of section 409 CAMA above, some facts are worrisome. The first is the small amount of money being the threshold of company's insolvency and the second is the short moratorium of three weeks given to a company to pay its debts.[1065] These facts show that winding up of company is rather encouraged by the provisions of the law. It thus does not come as surprise that there is no reported case of a successful reorganization of an ailing company pursuant to sections 539 CAMA since its enactment in 1990, yet there are instances of winding of a company on grounds of the inability of the company to pay its debts. Where a company knows that, it would be wound up without giving it an opportunity to explore arrangement and compromises with its creditors, there will not be any incentive to commence voluntary insolvency proceedings. This may also be one of the reasons of the low rate of insolvency proceedings in Nigeria in comparison to the United States.

In conclusion, both the Nigerian bankruptcy and insolvency laws and the Cameroonian bankruptcy law need to transplant one of the policy choices governing the United States bankruptcy laws to wit: *"to provide a mechanism for the reorganization of a business debtor who has the capacity to stay in business and to pay most or all its debts."* [1066] This way the business debtors in both jurisdictions will see the need to utilize their bankruptcy and insolvency laws which will give them the opportunity to reorganize businesses in financial difficulty instead of allowing the companies to prematurely wind up. Where however the company cannot be

[1064] See section 409 CAMA 2004.
[1065] See Abel Ezeoha and Chioma Anyigor, Bankruptcy Practice in the Absence of Long-term Corporate Financing: the Nigerian Case, published by Palgrave Macmillan, Journal of Banking Regulation, available at < http://www.palgrave-journals.com/jbr/journal/v10/n3/full/jbr200824a.html >; last visited on the 31st of March, 2011.
[1066] See James White, Bankruptcy and Creditors Rights supra footnote 975, p. 30.

'revived,' then the bankruptcy laws will ensure the equitable distribution of the proceeds of the properties of the debtor to its creditors.

4.4. The Linkages between Article 9 and Bankruptcy Code

Where bankruptcy proceeding is commenced in the United States under any of the chapters discussed above, there are linkages and intersections between the bankruptcy proceeding and Article 9. Bankruptcy and secured transaction in the United States are so interconnected that most authors that write on secured transactions invariably discuss bankruptcy laws and vice versa.[1067] To further underscore the interrelatedness of the bankruptcy laws and secured transactions laws in America, one of the policy choices behind the enactment of bankruptcy law is to provide for the equitable distribution of properties of the bankrupt amongst the classes of secured creditors.[1068] In the United States, where the bankruptcy and secured transactions laws are fully developed, with over 1, 531,997 million business and non-business bankruptcy filings in all the chapters of the Bankruptcy Code in a year,[1069] the conclusion one can draw is that the

[1067] Some of the American text books are as follows: Grant Gilmore, Security Interest in Personal Property (The LawBook Exchange Ltd, Reprint 1999); Lawrence P. King, Michael L. Cook, Creditors' Rights, Debtor' Protection and Bankruptcy, (Matthew Bender, 3rd ed.,1997); Elizabeth Warren, Jay Lawrence Westbrook, The Law of Debtors and Creditors Text, Cases and Problems, (Aspen Publishers, 6th ed., 2009); David Epstein, Steve Nickles, James White, Bankruptcy: Practitioner Treatise Series, (West Publishing Co. 1992) Vols.1 , 2 and 3; James J. White, Bankruptcy and Creditors' Rights Cases and Materials, (West Publishing Co, 1985); Douglas J. Whaley, Problems and Materials on Secured Transactions, (Aspen Publishers, 6th ed., 2003); Louis F. Del Duca et al, Secured Transactions Under the Uniform Commercial Code and International Commerce (Anderson Publishing Co., 2002); Linda J. Rusch, Stephen L. Sepinuck, Problems and Materials on Secured Transactions (Thomson West, 2006); Lynn M. LoPucki, Elizabeth Warren, Secured Credit A Systems Approach (Aspen Publishers, 6th ed., 2009) .

[1068] According to James White, "The second purpose of the bankruptcy law is to provide a set of equitable rules for the division of the debtor's property among various creditors. These rules determine the treatment of a perfected secured creditor and a creditor who is secured but unperfected, as well as regulating the rights of various parties who have received payments or other transfers of the debtor's assets in the days preceding the bankruptcy." See James White, Bankruptcy and Creditors Rights Cases and Materials, supra footnote 975, pp. 29 – 30.

[1069]The breakdown of the bankruptcy filings statistics in the United States Courts for the period of 12 month period ending March 31, 2010 show as follows, total of chapter 7 bankruptcy filings is 1,100, 032 with business filings of 42, 346 and non business filings of 1,057,686; chapter total filings stood at 15, 251 with business filings of 13, 553 and non business filings of 1, 698; the total of chapter 12 business filings is 605, and there is no non business bankruptcy filings under chapter 12 while the total filings for chapter 13 is 415, 966 which is made up of 4, 503 system wants to reward risk taking. Consequently one of the sure ways for a creditor to protect itself from the uncertainties of the debtor's bankruptcy is by entering into a secured transaction agreement with a debtor wherein the secured creditor creates a security interest on the collateral given to him by the debtor. This guarantees the creditor that the secured creditor's rights are duly protected since the rights of a duly perfected security interest holder survives bankruptcy proceedings in the United States. Indeed in order for the system to reconcile risk taking and still give incentives to creditors to give credit, bankruptcy law gives maximum recognition to secured creditors – thus this is the reason for close linkages between bankruptcy law and secured transaction law. In other words, in countries in which the number of bankruptcies is much less, the utility of secured transactions may be less visible. However it should be noted that security interest can also be enforced outside of bankruptcy proceedings.

Consequent upon all the above analysis, a closer examination of the complementarities of the bankruptcy laws and secured transactions law of the three jurisdictions will be made herein. Specifically, the right of a person who holds a duly perfected security interest in the estate of a bankrupt will be x-rayed during bankruptcy proceedings with a view to understanding the complementarities of United State's Bankruptcy Act and Article 9 and the equivalent laws in the other two jurisdictions. The essence of is to see whether such complementarities exist in Nigerian and Cameroon in their bankruptcy and secured transactions laws, and where they do not exist, what need to be done in that regard to enhance the efficiency of secured transactions laws in both jurisdictions.

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bankruptcy business filings and 411, 463 non business bankruptcy filings. The statistics is for the 12 month period ending 31st March, 2011 and is available at United States Courts Bankruptcy Statistics at < http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx >; last visited on the25th of March, 2011.

First, it is necessary to state that the United States Bankruptcy Code recognizes and honors Article 9 liens[1070] created and perfected in favor of the secured creditor. While section 506(a) of the Bankruptcy Code recognizes and allows a claim of the creditor secured by a lien on the property in which the estate of the bankrupt has an interest, section 101 (37) BC defines a lien as "*charge against or interest in property to secure payment of a debt or performance of an obligation.*" From the definition, it is incontestable that the category of 'lien' includes Article 9 security interests as well.[1071] Besides, many other sections of the Bankruptcy Code recognize state property and lien laws including Article 9 and defer to these laws.[1072] Cases have shown too that the Bankruptcy Code defers to the state laws to determine property rights and lien, and also the distinctions and priority rules between secured and unsecured creditors.[1073]

Perhaps, the best example of the linkage between bankruptcy law and Article 9 is the secured creditor's right to get paid in full to the limit of the value of the collateral securing their claims before unsecured creditors are paid anything in bankruptcy.[1074] This is achieved by so many ways: the collateral could be sold by trustee in bankruptcy and the proceeds would be used in

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[1070] Bankruptcy Code recognizes not only the Article 9 liens, but indeed all liens. Each lien creates apriority position that is respected in bankruptcy.

[1071] See Alvin C. Harrell, the Relationship between Revised Uniform Commercial Code Article 9 and the Bankruptcy Code: Points of Intersection and Conflict, 28 Oklahoma City University Law Review (Summer-Fall 2003).

[1072] Section 362(b)(3) of the Bankruptcy Code recognize Article 9 grace periods for purposes of the Section 362(a) automatic stay; sections 363 and 364 BC protect state law liens though in the context of the liquidity and credit needs of bankruptcy debtors; section 506 (d) recognize liens validly executed though with few exceptions; Section 546(b) BC recognize state law lien rights and priorities for purposes of Bankruptcy Code Sections 544, 545 and 549; Section 547(e)(1)(A) and (B) BC define "transfer" and "perfection" by references to state law; Section 552 BC recognize subject to limits the state law right of setoff; see Harrell id.

[1073] Butner v. United States, 440 U.S. 48 (1979); Long v. Bullard, 117 U.S. 617 (1886); BFP v. Resolution Trust Corporation, 512 U.S. 1247, (1994).

[1074] According to Tabb and Brubaker, "[…] secured creditors are entitled to be paid in full, up to value of the collateral securing their claims, section 506(a), before unsecured claims are paid at all. […] The principle that secured creditors have an enforceable entitlement to certain of the debtor's property (their "collateral") in preference to unsecured creditors is one of the most fundamental in law." See Charles J. Tabb and Ralph Brubaker, Bankruptcy Law – Principles, Policies, and Practice, supra footnote 1000, p. 243.

paying the secured creditor's claim first before any unsecured creditor.[1075]Another means is that the trustee may hand over the collateral to the secured creditor in cases where the equity of the debtor has not inured on the collateral and the collateral is not necessary for the administration of the estate of the bankrupt.[1076]This priority accorded to secured creditors over unsecured is not limited to the US jurisdiction alone, but exist also in Nigeria and Cameroon at least to a limited extent.[1077] These instances lend credence to the claim of this work that there is close linkages between bankruptcy law and Article 9. Apart from the two situations above, there are other ways by which the interest of secured creditor is protected under bankruptcy proceeding to wit: the import of ipso facto clauses on the interests of the secured creditor in a collateral; the secured creditors right to get back the collateral upon the discharge of automatic stay order or after the bankruptcy proceedings and the rights of secured creditor vis-à-vis the avoidance powers of a trustee. These will be examined below.

4.4.1. Ipso Facto Clauses

Another evidence of interrelatedness of bankruptcy law and secured transactions law is the fact that notwithstanding the "anti" ipso facto[1078] provisions contained in the Bankruptcy Code, [1079]

[1075] See section 363 BC.
[1076] See sections 725, 1129(b) (2) (A) (iii), 1225(a) (5) (c) and 1325(a) (5) (c) BC.
[1077]See Articles 148 and 149 of the Uniform Act on Securities.
[1078]See Barry Adler, Douglas Baird and Thomas Jackson, Bankruptcy Cases, Problems, and Materials, supra footnote 980, p. 213.
[1079] Ipso facto clauses are contract clauses that specify the consequences of the party's bankruptcy. See Bryan Garner, (ed.), Black Law Dictionary, supra footnote 3, p. 847. Section 541 (c) (1) BC provide as follows: "[…] an interest of the debtor in property becomes property of the estate […] notwithstanding any provision in the agreement, transfer instrument , or applicable non bankruptcy law - (a) that restricts or conditions transfer of such interest by the debtor; or (b) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title, or custodian before such commencement, and that affects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property." There is no equivalent of "anti" ipso facto provision under the Nigerian and Cameroonian bankruptcy laws; nonetheless, the bankruptcy laws in both jurisdictions will not honor ipso facto clauses in agreements upon the bankruptcy of the debtor.

secured transactions contracts are enforced in and out of bankruptcy. The effect of "anti ipso facto" clause is to ensure that "*a contractual or applicable non bankruptcy law restriction on transfer cannot prevent a transfer from the debtor to the debtor's bankruptcy estate*" [1080] in cases of bankruptcy. This means that despite the ipso facto clauses contained in parties agreement, upon bankruptcy, the property of the debtor would go into the bankruptcy estate of the debtor which will be sold and the proceeds used in satisfying the claims of creditors.[1081] However in cases of secured transactions, there are no restrictions placed on the transfer of the collateral – which ordinarily would have been part of the estate - to the secured party, although the making of the automatic stay order stays the hand of the secured party from realizing his security over the collateral until the order is lifted or the bankruptcy proceedings comes to an end. This shows that the interests of the secured creditor are respected in bankruptcy i.e., "*the general principle that bankruptcy law [should] not upset substantive non-bankruptcy rights.*"[1082]It is noteworthy that the secured creditor seeks for protection under the section 362 (d) BC while the automatic order lasts. Notwithstanding the above, this research will examine below the interplay of rights of the secured creditor and the bankruptcy trustee especially on the effect of an automatic stay

[1080]According to Adler et al., "Congress drafted section 541 (c) (1) (B) BC effectively to disallow any modification of a debtor's interest in property if such modification applies not generally, but only when bankruptcy or another process for the distribution of a debtor's assets occur or seem imminent. An ipso facto modification of a debtor's interest is invalid regardless of whether applicable non-bankruptcy law merely enforces a clause in the contract or operates independently." See Adler, Baird and Jackson, Bankruptcy Cases, Problems and Materials, supra footnote 980, p. 214.

[1081] The reason for the anti ipso facto clauses is explained in the case of Summit Investment and Development Corp. v. Leroux 69 F.3d 608, 610 (1st Cir. 1995), where the court held as follows: "Generally speaking, until the enactment of the Bankruptcy Reform Act of 1978, unambiguous contractual ipso facto provisions such as section 7.5E were enforceable against chapter 11 debtors, debtors in possession, and their estates. Congress reversed course in 1978, however, with its enactment of various code provisions, see Bankruptcy Code Sections 365 (e), 365 (f) and 541 (c) which invalidate contractual ipso facto provisions for the reason that automatic termination of a debtor's contractual rights frequently hampers rehabilitation efforts by depriving the chapter 11 estate of valuable property interest at the very time the debtor and the estate need them most. S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5845."

[1082] Id., p. 216.

order and the avoidance powers of the trustee to further see the linkages and complementarities between the two fields of law.

4.4.1.1. Automatic Stay under the United States' Bankruptcy Code

The filing of bankruptcy petition, yet, presents another good intersection of bankruptcy law and Article 9. A bankruptcy proceeding can be initiated by the filing of a voluntary or involuntary[1083] petition in bankruptcy in the appropriate court alongside other processes of the court like the statements and schedules[1084] of information.[1085] The filing of petition in bankruptcy operates as a stay against acts taken by both secured and unsecured creditor either to perfect their security interest or to recover the debt whether from the debtor or against his properties which by now have become part of the bankruptcy estate.[1086] The Bankruptcy Code defines the properties of the bankruptcy estate to include "*all legal or equitable interests of the debtor in property as of the commencement of the case,*"[1087] and also authorizes the turnover of such properties to the bankruptcy estate.[1088] Specifically, the acts of the creditors that are stayed upon the filing of the bankruptcy petition includes: filing or continuing with a judicial proceedings already pending in court wherein a creditor seeks to recover in a pre-bankruptcy case; taking possession, levying

[1083] Voluntary bankruptcy is filed by the debtor while involuntary bankruptcy is filed by one or more creditors of the debtor to force the debtor into bankruptcy.
[1084] In voluntary petition in bankruptcy, schedule must contain the followings: "(1) a list of both secured and unsecured creditors, their addresses, and the amount of debt owed to each. (2) A statement of the financial affairs of the debtor. (3) A list of all property owned by the debtor, including property that the debtor claims is exempt. (4) A list of current income and expenses. (5) A certificate of credit counseling. (6) Proof of payments received from employers within sixty days prior to the filing of the petition. (7) A statement of the amount of monthly income, itemized to show how the amount is calculated. (8) A copy of the debtor's federal income tax return for the most recent year ending immediately before the filing of the petition" see Clarkson, Miller, Jentz, Cross, Business Law Text and Cases: Legal, Ethical, Global, and E-Commerce Environment, supra footnote 983, p. 613.
[1085] See section 301 BC.
[1086] See section 362 (a) BC, see the case of In re Godfrey, 102 B.R. 769, 771 (Bankr. 9th Cir. 1989) where the court held that the filing of bankruptcy petition create automatic stay as soon the petition is placed in clerk's possession and not when the petition is time stamped.
[1087] See section 541(a) (1) BC.
[1088] See section 542 (a) BC.

execution or the enforcement of any pre-bankruptcy judgment against the debtor or the property of the estate;[1089] any act to create, perfect or enforce a lien or charge on the property of the debtor which has become part of the bankruptcy estate. The stay also extends to the informal acts of making telephone calls or writing a demand letter in a bid to recover pre-bankruptcy debts from the debtor.[1090] There are three possible scenarios that could be encountered by the secured party in the realization of his security in connection with making the automatic stay order. The *first* is where the secured party has repossessed the collateral and sold same to a third party buyer before the making of the automatic order. The *second* is where the secured party has repossessed the collateral but has not sold the collateral while the *third* is where the secured party has not repossessed the collateral before the making of the order. Whilst the answer of the third is pretty much settled with the discussions above, the answer to the first and second situations are not. Under the first setting, the debtor can neither file for a voidable preference action against the secured party nor recover from the third party buyer. Accordingly since the buyer is a bona fide purchaser for value, there is no right of redemption of the property vested in the debtor, the trustee cannot recover the property from the buyer.[1091] In the second scenario, there is no bona fide purchaser for value, however the question becomes what kind of right is still left with the debtor upon repossession of the collateral by the creditor? The non-bankruptcy rule is that for the debtor to redeem, he will tender the whole amount owed to the secured party. Strictly speaking what the debtor has over the repossessed collateral is the right of redemption which is what a

[1089]Indeed section 362 (a) (5) BC bars any act of the pre-petition secured creditor to enforce its security interest in property of the bankruptcy estate or of the debtor.

[1090] See section 352 (a) (6) BC; see Warren and Walt, Secured Transaction in Personal Property, supra foot note 701, pp. 464-465; Epstein et al, succinctly summarized it as follows: "In short, after the petition is filed the debtor's creditors may continue to breathe, eat and sleep and are free to dream about the debtor, but they may do little else having anything to do with the debtor." See David Epstein, Steve Nickles, James White, Bankruptcy: Practitioner Treatise Series, (West Publishing Co. 1992) Vol.1, p. 79.

[1091]Baird succinctly summarized it as follows "Debtor is simply out of luck." See Douglas Baird, Elements of Bankruptcy, supra footnote 1055, p.203.

trustee can exercise in this circumstance.[1092] However, in the case of United States v. Whiting Pools Inc.[1093] the Supreme Court of the United States held that the repossessed collateral of the debtor that has not been sold by the creditor forms part of the estate of the bankrupt. Consequently, the creditor should turn the collateral over to the trustee for use, sale or lease[1094] and the trustee may keep the collateral if it is essential for the reorganization or the equity of the debtor has accrued on the collateral.[1095]

Suffice it to say that the whole essence of the automatic stay is to prevent a situation where the creditors *"would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all (general, unsecured) creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that."*[1096] This means that even the rights of a properly perfected security holder are stayed until the automatic stay order is discharged by the court[1097] or is automatically

[1092] See section 542 BC, see id., p. 205.
[1093] 462 U.S. 198, 203 (1983) where the Supreme Court held as follows: "Although these statutes could be read to limit the estate to those "interest of the debtor in property" at the time of the filing of the petition, we view them as a definition of what is included in the estate, rather than as a limitation." See also See Douglas Baird, Elements of Bankruptcy, supra footnote 1055, p. 204. However, see the case of Bell-Tel Fed. Credit Union v. Kalter (In re Kalter), 257 B.R. 93 (M.D. Fla. 2000) where the court has held that where the secured creditor has repossessed his perfected security interest in the properties of the bankrupt shortly before the filing of the bankruptcy proceedings such repossessed property do not constitute the property of the bankruptcy estate and so the secured party need not turn over such property to the bankruptcy trustee.
[1094] See section 363 BC.
[1095] See section 362 (d) BC.
[1096] H.R. Rep. No. 595, 95th Cong., 1st Sess. 340, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6297. See id., David Epstein et.al, p. 79. This quotation again recapitulates one of the policy choices of bankruptcy law as stated by James White.
[1097] However, a secured creditor can discharge the automatic stay order where he proves to the bankruptcy judge that there is no debtor's equity in the collateral upon which his security interest was created and also the property upon which he created his security interest is not important in the reorganization of the debtor in a chapter 11 proceedings. However where it is shown that the equity of the debtor inheres on the property upon which the security interest is created, or the debtor will need the property in its reorganization, then the debtor may be required to provide adequate protection to the secured party for any loss as a result of the depreciation of the property whilst the automatic stay order subsists. See the case of In re Craddock-Terry Shoe Corporation, 98B.R. 250 (Bankr. W.D. Va.

discharged at the end of the case.[1098] Of great importance here is the delicate balance which the law strikes in maintaining balance during bankruptcy proceedings in the rights of the secured creditor to have the automatic stay discharged and the rights of both the debtor and other unsecured creditors whose interest may have inured in the secured creditor's security interest. The resolution of this may involve granting the secured creditor discharge on the automatic stay in deserving circumstances or requiring that the trustee provide adequate protection to the interest of the secured creditor on the collateral – which has been surrendered to the estate of the debtor - where the discharge cannot be granted. This adequate protection becomes necessary in situation where the trustee requires the collateral to effectively administer the estate. For example, in cases of floating lien where all the assets of the debtor are encumbered, and there are other unsecured creditors of the debtor and the proceeds of the estate can satisfy the full claims of the floating lienee and part of the claims of unsecured creditors.[1099] In this case, the trustee requires the assets of the debtor – which forms the collateral of the floating lienee - to administer the estate with a view to satisfying the full claims of the secured creditor first before claims of other unsecured creditors. Here, the automatic stay will likely not be discharged by the court; but instead the trustee would be required to provide adequate protection to the interest of the floating lienee on the collateral. The court in striking a balance in the competing interest in this case will

1988) where the ruled that the debtor should provide adequate protection to the creditors while the automatic stay order subsisted because the order could not be discharged since the debtor needed the collateral in its reorganization. See also Lynn LoPucki, Elizabeth Warren, Secured Credit A Systems Approach, supra footnote 1053, pp. 98 – 108.

[1098] However by the definition of the bankruptcy estate under section 541(a) (1) which includes all legal or equitable interests of the debtor in property as of the commencement of the case.' The automatic stay order excludes cases where the secured creditor has repossessed and sold the collateral of the debtor or even cases where the secured creditor has repossessed but has not yet sold the properties of the creditor as at the time of the commencement of the bankruptcy proceedings. This is because both the collateral repossessed and sold and the collateral repossessed but not yet sold cannot be said to have the legal or equitable interest of the debtor unless there is surplus accruing to the debtor upon the sale of the properties.

[1099] However, in a different scenario where the proceeds of collateral can only satisfy the claims of the floating lienee, but not the claims of any other creditor. There may not be any justification for the court in declining to grant a discharge of the automatic stay to enable the secured creditor realize his security in view of the fact the equity of the debtor or other unsecured creditors have not inured on the collateral of the floating lienee.

be guided by its judicial discretion in determining the best means for a secured creditor to enforce his security interest, yet without crippling the bankruptcy proceedings. The above scenario shows the dependency and complementarities of the two laws. It also accentuates the close connections of the two branches of laws in America since the bankruptcy proceeding affects the rights held by the secured creditor under Article 9.

4.4.1.2. Avoidance Powers of the Trustee under the United States Bankruptcy Code

Upon the commencement of bankruptcy proceedings under chapter 7, a trustee in bankruptcy is appointed to administer the bankruptcy estate of the debtor.[1100] This is a marked difference from chapter 11 procedure where the debtor remains in possession of its properties by being debtor in possession. The major duties of the trustee in bankruptcy are enumerated in section 704 BC to include the "*collection of the debtor's estate, reducing it to cash for distribution and preserving the interests of both the debtor and unsecured creditors*."[1101] To this end, the trustee main duty of gathering and protecting the debtor's estate foist upon the trustee, the onerous task of recovering the property of the debtor from secured creditors whom the properties were transferred to, before the bankruptcy, in an irregular or questionable circumstances that violate the bankruptcy code provisions thus making the transfer voidable in a bankruptcy proceedings.

The avoidance powers of the trustee in bankruptcy are known also as the trustee's strong arm powers; hence the designation of the pertaining clauses as the 'Strong Arm Clause' – provided in section 544 (a) BC. By virtue of this clause the bankruptcy trustee steps into the shoe of a

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[1100] See section 321 BC.

[1101] See Clarkson, Miller, Jentz, Cross, Business Law Text and Cases: Legal, Ethical, Global, and E-Commerce Environment, supra footnote 983, p.618.

hypothetical lien creditor with the mandate to avoid any transfer that a lien creditor would have avoided. One of the instances where the bankruptcy trustee can avoid any transfer that a lien creditor would have avoided is in the case of a security interest not perfected as at the date of bankruptcy petition. Where a secured creditor has an unperfected security interest at the date the automatic stay order was made by the court, then the trustee under this rule can avoid the security interest and such secured creditor becomes unsecured and will share in pro-rata, the proceeds of the estate of the bankrupt. According to Warren and Walt, the trustee can "*avoid any transfer of property of the debtor that is voidable by the hypothetical judicial lien creditor at the date of bankruptcy*."[1102]

Another avoidance power of the trustee on the properties that form the estate of the bankrupt is in relation to preferential payments made by the debtor. Under section 547 BC if the debtor pays to any creditor for an antecedent debt in preference to other creditors 90 days or within one year - where the creditor is an insider - before the commencement of the bankruptcy proceedings, and the payment or transfer enabled the creditor to receive more than he would have received under chapter 7, the payment or transfer so made in these circumstances may be recoverable by the trustee in bankruptcy as voidable preferences. However it is noteworthy to state that where such transfer is made for a contemporaneous exchange for new value then such transfer may be unassailable by the trustee in bankruptcy.

The two above examples are part of the intersections and interconnectivity between the rights of the secured creditor and that of the trustee that show that both laws are closely linked and each

[1102] See Warren and Walt, Secured Transactions in Personal Property, supra note 701, p. 492 see also section 544 (a) 1 BC.

require the other to function efficiently thus necessitating the inference that any parallel reform in one may need commensurate reform in the other to be effective.[1103]

4.4.2. Are there Close Linkages between Bankruptcy Laws and Secured Transactions Laws in Nigeria and Cameroon?

Though the Bankruptcy Act in Nigeria has become moribund and has fallen into disuse, it may be interesting to note that the major cause of absence of individual bankruptcy cases may not be lack of close linkages between the bankruptcy law and the secured transactions law. On the contrary, there are close linkages between the two. The Bankruptcy Act in Nigeria protects the rights of the secured creditor[1104] in individual bankruptcy petitions even more than the protection accorded secured creditors under the Bankruptcy Code in the United States. For example upon filing of the petition in bankruptcy, the court shall make an order called a ‘receiving order’ for the protection of the estate of the bankrupt.[1105] The receiving order has the same effect like the United States automatic stay order and whenever it is made it protects the properties of the debtor from the creditors. However, the receiving order only bars unsecured creditors of the debtor from commencing any legal action or legal proceedings without the leave of the court.[1106]Whereas the effect of the automatic stay under the United States Bankruptcy Code bars any act of the creditor - both secured and unsecured creditor - from trying to realize or enforce

[1103] See Tibor Tajti, Comparative Secured Transactions Law, supra foot note 48, p. 205.
[1104]Though the secured creditors here are only limited to the secured creditors in cases of individual bankruptcy proceedings and not in company insolvency proceedings. For example the lessor in a lease agreement, seller in a hire purchase agreement, mortgagee in a mortgage agreement, or any other secured creditor of an individual. There is no comparable section 10 (2) Bankruptcy Act provision under CAMA for secured creditors in company insolvency proceedings. Consequently, fixed and floating charges, mortgagees and debenture holders are also affected by the automatic stay order during the winding up proceedings of an insolvent company.
[1105] See section 3 of the Bankruptcy Act Cap B2 Laws of the Federation of Nigeria 2004.
[1106] See section 10 (1) of the Bankruptcy Act LFN 2004.

their rights whilst the automatic stay order is in force, the Nigerian Bankruptcy Act[1107] provide that the receiving order in individual bankruptcy proceedings does not affect the powers of a secured creditor from realizing or otherwise dealing with his security.[1108] This difference is instructive because in Nigeria, the secured creditor neither needs to apply to the court to have the receiving order vacated for him or wait till the end of the bankruptcy proceedings to commence the process of realizing its securities. This is good because the long time of waiting until the end of the bankruptcy proceedings or applying to court to vacate the receiving order can be critical both to the value of the collateral and prompt enforcement of the security interest. In a country where the judicial process is notoriously slow, such conditions of the receiving order - waiting till the end of the bankruptcy proceedings or applying the court to vacate the order - will add to the burden of the enforcement of secured transaction by the secured creditor. However it should be borne in mind that curiously, the receiving order bars both the rights of the secured and unsecured creditors in company winding – up proceedings and there is no reason proffered by the law for this discrepancy.[1109] This means that for a fixed and floating chargee, the receiving order bars them from enforcing their securities until it is either vacated or until the end of the insolvency proceedings. Where however the receiving order is discharged, then the fixed or

[1107]The section provides as follows: 10 (1) “On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter , except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose. (2) This section shall not affect the power of any secure creditor to realize or otherwise deal with his security.”

[1108] One of the probable reasons for the secured creditor not to be affected by the receiving order made in the bankruptcy proceedings may be that the bankruptcy laws in Nigeria is pro creditor.

[1109]Section 414 CAMA 2004 provides: “Where a company is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void.”

floating chargee would proceed to realize his security in line with the security agreement and this would normally be by the appointment of a receiver or receiver manager.[1110]

Another linkage between the two areas of law is the strong arm clause of the bankruptcy trustee under the Nigerian Bankruptcy Act. The trustee of the estate has avoidance powers similar to the avoidance powers of the United States trustee. The Bankruptcy Act provides that every conveyance, transfer of property, charge thereon, payment made, obligation incurred, judicial proceedings initiated or suffered by the bankrupt in favor of the creditor in the last three months prior to presenting the bankruptcy petition, which seek to give such creditor a preference over other creditors, shall be deemed fraudulent and void as against the trustee in bankruptcy.[1111]

With the above stated close linkages between the bankruptcy and secured transactions law in Nigeria, what is worrisome is that it does appear that the close linkages appear to be of inconsequential effect on the number of bankruptcy filings in Nigeria.[1112] Many plausible reasons can be advanced for the situation one of the reasons may be the underdeveloped nature of secured transactions laws and the bankruptcy laws in Nigeria which tend to stigmatize and criminalize acts of bankruptcy. Where the bankruptcy is stigmatized as it is in Nigeria, it will be difficult for people to utilize it despite the close linkages and this invariably have effect on the usefulness of the secured transactions, because if one of the usefulness of the secured transactions laws is for the secured creditor to protect itself during bankruptcy; it then means that

[1110]Appointment and duties of a receiver or receiver manager has been discussed in details under enforcement of security interest in chapter 3.
[1111] See section 46 (1) of the Bankruptcy Act 2004.
[1112] This is because there has not been any tangible impact on the filing of bankruptcy cases in Nigeria as a result of the close linkages of secured transactions law and bankruptcy law. This point is explained further is subsequent paragraphs below.

where there are no bankruptcy filings, the importance of secured transactions laws is relegated. This accentuates the need for reform, some of the areas where reforms are needed in both the Bankruptcy Act and CAMA include: the area of the removal of anti-debtor clauses in the bankruptcy Act which hinder the filing of individual bankruptcies; the encouragement and enforcement of more compromises and arrangements of debtor company with its creditors rather than allowing such ailing companies whose fortunes would have been turned for good to die an 'untimely' death of being wound-up.

For Cameroon, there is no profound close connection between wiping off debt and secured transactions law as it is in the US. This may have accounted for the non-utilization of the Uniform Act on Debts both by individuals and businesses. Hence the reconsideration of how is secured transactions and bankruptcy law linked is obviously needed. The lesson from America is that the Article 9-cum-bankrupcy law system does contribute to the overall efficiency of the system for the benefit of both consumer and business debtors. The bottom line is that both the bankruptcy laws of Nigeria and Cameroon should be reformed so that the predictable and full recognition of secured creditors' rights are set as the number one policy goal. The ends of the reform will be to make the secured transaction laws in both jurisdictions more efficient. A reform of the secured transactions law without a commensurate reform in the bankruptcy laws may not produce the desired result needed to encourage the availability and accessibility of credit which is needed for the growth of the economy. Consequently, indeed, American experiences with the policy choices underlying bankruptcy law can and should be exploited to guide the reforms in the two African countries focused upon in this thesis.

4.5. Article 9 and Consumer Protection Laws: Introduction

It is inherent in all consumer credit transactions that creditors may exploit their stronger bargaining position to their advantage. It is thus in realization of this fact, that the law has stepped in to regulate the relationship between a creditor and a debtor with a view to protecting the economically vulnerable party (debtor) from being unduly taken advantage of by the creditor. According to Williams, "*consumer protection begins with the recognition by a government that consumers often face imbalances in economic terms, educational levels and bargaining power [...].*"[1113] This is the reason for the enactment of several consumer credit protection laws and the setting up of public agencies especially in the United States[1114] to oversee the observance of the laws and entertain complaints from the consumers on the violation of their rights.

The curious question may be why placing emphasis on protection of consumer financing? Why is there no commensurate protection given to business financing?[1115] The first answer is the nature of consumer financing. It is general knowledge that consumer debtors (especially first time consumer debtors) are more susceptible to the tricks of the creditor than the merchants who are accustomed to the transactions. Thus whilst it may be difficult for the consumers to protect themselves, merchants presumably, can easily protect themselves; this tends to be the generally

[1113] See Jerry M. Williams, Redeeming the Consumer Exploitation Problem in Cameroon, published in Cameroon Purveyor of August 6 2010 available at < http://commonquarters.blogspot.com/ >; last visited on the 14th of February 2011.

[1114] The Federal Trade Commission (FTC) is the nation's consumer protection agency. Established in 1914, the FTC's Bureau of Consumer Protection works for the consumer to prevent fraud, deception and unfair business practices in the market place. The FTC does this through several ways, some of which include enforcing federal laws that protect consumers, providing information to consumers to help them exercise their rights and to spot and avoid fraud and deception. They also litigate civil and criminal actions against those who defraud consumers.

[1115] John A. Spanogle et al. asked same questions although they gave the clue to the answers thus "what is it that sets consumer law apart from other doctrinal areas that one might study? [...] Is it simply a different perspective, i.e., one of ostensibly unequal bargaining power between the parties, in recognition of which judges and legislative bodies seek to provide a legal 'handicap' to the weaker party? Is it a paternalistic effort to protect the weakest members of society from their own ignorance and vulnerability? Or is it a way of balancing the economic scales, correcting a market imperfection, due to the fact that in many consumer/merchant transactions the assumptions of the perfectly competitive ideal simply do not hold true?" See John A. Spanogle, Ralph Rohner, Dee Pridgen and Jeff Sovern, Consumer Law Cases and Materials, (Thomson West, 3rd ed., 2007), p. 1i.

recognized wisdom in other jurisdictions as well.[1116] Moreover, as stated above, the economic and financial imbalance of a consumer makes him vulnerable and hence the need for protection.[1117] When most corporations negotiate loans or sales credits, they usually involve either an in-house counsel or external counsel who vets the contract on behalf of the corporation. Also negotiations are usually conducted among two fairly equal parties and consequently many of the clauses in the loan or sale agreement are likely to be arrived at by both parties hence reducing the incidence of 'cram-down' of some clauses on the debtor. On the other hand in a consumer financing, all these features are conspicuously missing. The option of going to the negotiating table with an attorney may be too expensive for the consumer. Even where an attorney is involved, there is little that the attorney may do when the consumer is faced with the choice of 'take it or leave it' attitude of the banks and other lenders due to the wide disparity of inequality between the parties and the lack of other viable option for financing available to the consumer debtor.

Another probable reason for emphasis on consumer's credit protection is because the consequences of default on repayment on consumer financing are different from business financing.[1118] Consumer debtors many times bear the worst brunt of default in repayment than

[1116]In Germany for instance, in most commercial matters the law has two codes, the civil code governs the consumers where extra safeguards are put in place to guide consumers while merchants are governed by the commercial code where the protection afforded to consumers are most times absent. For example, section 766 of German Civil Code (BGB) provides: "for the contract of suretyship to be valid, the declaration of suretyship must be issued in writing. The declaration of the suretyship may not be made in electronic form. If the surety discharges the main obligation, the defect is remedied." This requirement for the declaration of suretyship to be in writing is to protect consumer surety. However section 350 (1) of the German Commercial Code provides that the rules as to form contained in sections 766 does not apply to a guarantee which constitutes a mercantile transactions upon the side of the surety. This means that the protection given to a consumer in suretyship contract does not extend to a guarantee given by a merchant.

[1117] Section 9 – 102 (26) UCC defines consumer transaction as a 'transaction in which (i) an individual incurs an obligation primarily for personal, family or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes.'

[1118] Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 207.

the business debtors.[1119] The consequences of default in a consumer good financing will most likely be repossession, foreclosure and eventual disposition of the goods to recover the securities by the secured creditor. This is because, the probability of collecting the debt from other form are minimal, the exemptions laws may bar the secured creditor from collecting the debtor's other properties and the repossessed collateral can only be sold as secondhand goods. However, the consequence of default of repayment in business financing is different for many reasons: *first,* a wider arrays of assets of the business that can be used as collateral, for example all the assets of the business could be used as collateral in a floating lien security; *Second*, secured creditor may be competing with other creditors, namely secured, unsecured, statutory lien claimants for wages and taxes. In these cases, repossession may not be the best option available for the secured creditor as "*what is needed is the orderly reorganization or winding up of the enterprise in the hands of creditor's representative. Eventually the creditor will be paid off in money, and the importance of his initial taking of security is not that he will actually realize on it, but that being secured, he will rank higher in the distribution than his unsecured competitors.*"[1120] All the above reasons make it imperative to protect the consumer debtors in credit financing, and the remaining part of this chapter will be devoted to examining how the consumer debtors are protected in the United States specifically under the Article 9 and other consumer credit protection laws. It will also show that a good secured transaction law should have close linkages with consumer protection provisions to protect consumer debtors in obtaining credit. The examination of the United States consumer protection will afford this work the opportunity of x-raying the protection accorded to the consumers in consumer financing in Nigeria and Cameroon

[1119] The reason for bearing the worst brunt could be attributed to the different collateral available to both consumer and business debtors. See id., p. 206.
[1120] See Grant Gilmore, Allan Axelrod, Chattel Security in ROSS CRANSTON, (ed.), COMMERCIAL LAW (Dartmouth, 1992), p.367; see also Tibor Tajti, Comparative Secured Transactions Law supra footnote 48, p. 206.

and this will be the ground to make suggestions for the enactment of those consumer credit protection laws without which it may be difficult for consumers to borrow in both countries.

4.6. Close Links between Article 9 and Consumer Credit Protection Laws

The need to protect the consumer in consumer finance because of the reasons outlined above impelled the intention of including the treatment of consumer finance along the lines of the Retail Installment Selling Acts which were enacted in the 1940s. However the idea was dropped due to several reasons[1121] and consequently most of the consumer credit protection provisions were removed from the final draft of Article 9.[1122] Notwithstanding the fact that the substantial portions of the consumer credit protection laws are now contained in different legislations,[1123]

[1121]The reasons were that the consumer provisions were considered to be social legislations that are not appropriate in a general codifying statute, the feeling that the consumer provisions unfairly discriminated against banks and finance companies that were engaged in consumer finance and that the provision were weak in protecting the consumers. See Grant Gilmore, Security Interest in Personal Property, supra footnote 51, p.293.

[1122] See Grant Gilmore, Security Interest in Personal Property, supra footnote 51, p. 293, see also Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 207.

[1123] There are several consumer protection laws in the United States which for obvious reasons cannot be discussed here because of the confines of this work. However, this research will endeavor to mention some of them and briefly state what they intend to achieve in furtherance of overall consumer protection. There is the Uniform Consumer Credit Code of 1974 which under section 1.102 of the Act seek among other things: to make simpler for understanding the law governing consumer credit and usury; to provide benchmarks and ensure that there is access to credit to consumers; to ensure that consumers adequately understand the terms of the credit transactions they enter into with lenders and guide against monopoly in the supply of credit to consumers, thus by so doing the consumers will obtain credit at the best rate; to guard the consumer against the unfair practices of some lenders and as protect the legitimate interest of good lenders; to encourage the development of good and sound consumer credit practices; to enforce the regulation of the disclosure in consumer credit transactions to the Federal Truth in Lending Act.

Apart from the Uniform Commercial Credit Code of 1974, there is Consumer Credit Protection Act (15 U.S.C. 1601-1693 r) which is an amalgam of other consumer credit protection Acts structured in Titles I – IX. The Acts are as follows: Title 1 – Truth in Lending Act; Title II – Extortionate Credit Transaction Act; Title III – Restriction on Garnishment Act; Title IV – Credit Repair Organization Act; Title VI - Fair Credit Reporting Act; Title VII – Equal Credit Opportunity Act; Title VIII – Fair Debt Collection Practices Act; Title IX – Electronic Fund Transfer Act. The main objective of some of these legislations will be given herein. The Truth-in-Lending Act (15 U.S.C.1601-1667e)seeks to 'assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit and to protect the consumer against inaccurate and unfair credit billing and credit card practices.' It also seek to ensure that in consumer leasing, the lessee is given the accurate information needed to make an informed choice which terms is best appropriate and suited for him, this will enable the lessee to limit balloon payments . The Act also seeks to enforce accurate and meaningful disclosure of the lease terms in the lease advertisements. See section 1601of 15 U.S.C.

Credit Repair Organization Act (15 U.S.C. sections 1679 – 1679j) seeks to alleviate the hardship that consumer who have experienced credit problems face in getting new credit. To this end the Act established the Credit Repair Organization for consumer debtor s to help repair their credit ratings so as to get credit. The Act does

Article 9 applies to security interest in consumer goods. Indeed "the 'security' aspect of the consumer goods transactions (filing) continued within the coverage of Article 9."[1124] Nonetheless, Article 9 took into consideration the special circumstances and vulnerability of the consumer debtors and made provisions for consumer protection in its text. Towards this end, Article 9 is replete with provisions which are aimed at protecting the consumer debtors especially from the point of default of repayment by the debtor. Some of the consumer protection provisions of Article 9 are stated herein: one of the protections offered to consumer finance is the 60% rule which makes it mandatory for the creditor to dispose the consumer goods where 60%

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this by 'ensuring that the prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services and to protect the public from unfair or deceptive advertising and business practices by credit repair organization.' See section 1679 of 15 U.S.C.

Fair Credit Reporting Act (15 U.S.C. sections 1681 – 1681x) seeks to ensure that 'consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel insurance, and other information in a manner which is fair and equitable to the consumer, with regards to the confidentiality, accuracy, relevancy, and proper utilization of such information.' This Act has become necessary because of the fact that the banking system depends on the fair and accurate credit reporting and inaccurate and unfair credit reporting method negatively affect the proficiency of the system and also undermine the public confidence needed for effective functioning of the banking system. Hence, consumer reporting agencies role in the assemblage and evaluation of consumer credit information must be done with fairness, impartiality and respect for the consumers right of privacy. See section 1681of 15 U.S.C.

Fair Debt Collection Act (15 U.S.C.692 – 1692o) seeks to eliminate abusive debt collection practices by debt collectors. Considering that there are diverse use of abusive, deceptive and unfair debt collection mechanisms which has contributed to personal bankruptcies, loss of jobs, invasion of privacy and marital instability especially by consumer debtors. The Act also aims at promoting 'State action to protect consumers against dent collection abuses.' See section 1692 of the 15 U.S.C.

Electronic Fund Transfer Act (15 U.S.C. 1693 – 1693 r) is enacted to' provide a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund transfer systems. The primary objective of this title however is the provision of individual consumer rights.' This became necessary due to the fact that the use of electronic systems to transfer funds provide substantial benefits to consumers. However 'due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and intermediaries in electronic fund transfers undefined.' See 15 U.S.C., section 1693a. For the text of most of this consumer credit protection laws, see generally Douglas G. Baird, Theodore Eisenberg and Thomas Jackson, (comp.), Commercial and Debtor-Creditor Law: Selected Statutes, (Foundation Press, 2010), pp. 1373 – 1593; see also Steven Finlay, Consumer Credit Fundamentals, (Palgrave Macmillan, 2nd ed., 2009) , pp. 93 – 96.

Lastly, there are various States' Usury laws in the United States which aim at "preventing the exploitation of such a needy borrower by limiting the price that she may be asked to pay for a loan" In the case of Ghirardo v. Antonioli 883 P.2d 960 (Cal.1994), the court held that the "purpose of usury law is to protect the necessitous, impecunious borrower who is unable to acquire credit from the usual sources and is forced by his economic circumstances to resort to excessively costly funds to meet his financial needs." See also the cases of Jersey Palm-Gross Inc. v. Paper 658 So.2d 531,534 (Fla.1995); Nelson v. Associates Fin. Servs. Co., 659 N. W.2d 635 (Mich. Ct. App. 2002).

[1124] See Grant Gilmore, Security Interest in Personal Property, supra footnote 51, p. 293, see also Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 207.

of the repayment has been made. This ensures that the consumer debtor receives any surplus accruing from disposition of the collateral since on making a 60% repayment; the equity of the debtor would have accrued on the collateral.[1125] A corollary on the 60% rule in the protection of consumer debtor is the insistence of Article 9 that after default, the method, manner, time and place of the disposition of the collateral must be commercially reasonable otherwise the secured creditor will be liable to the debtor for its breach. Without the persistence that disposition of debtor's collateral must be made on commercially reasonable manner, the 60% would have no meaning because where the collateral is sold in an unreasonable manner the debtor may not still have any equity in the collateral even if the debtor had made more than 80% repayment. [1126] Another protection offered to the consumer is the without breach of the peace principle given as a condition for the repossession of collateral of by the secured party upon the default of repayment by the debtor. This principle is targeted at ensuring that the consumer debtor is given adequate protection even in the exercise of the secured creditor's right to repossess otherwise repossession companies could beat up recalcitrant debtors in a bid to repossess the collateral. Beyond the provisions of without the breach of peace principles contained in Article 9, the ability of the court to award damages when this breach of peace is breached and the award of punitive damages in deserving circumstances also strengthen the consumer protection mechanisms of Article 9.[1127] Another form of protection given to consumer debtor is the right given to the debtor to timely redeem his collateral repossessed by the secured party upon fulfillment of certain conditions which includes payment of the accelerated debt and reasonable

[1125] See sections 9 – 620 (e) and (f) UCC.
[1126] See section 9 – 610 (b) UCC.
[1127] See 35 A. L. R. 3d 1016, see the case of Williamson v. Fowler Toyota Inc, (OKla.SCt 1998) 1998 Okla. 14, 956 P2d 858.

expenses.[1128]However, this right remains in the realm of the theory as most defaulting debtors would not have money to repay the accelerated debt and reasonable expenses before the rights of a third party inures on the collateral. But it suffices to have such rights in order to protect the interest of the consumer debtors even after the collateral have been repossessed or foreclosed.

Admittedly, most of the protections given under Article 9 are not exclusive to consumer debtors alone; business debtors can also take benefit of it. However the point remains that this type of protection is tailored for consumer debtors under Article 9 and these provisions complement other several consumer credit protections laws enacted in the United States.[1129] It should be noted that where there is a conflict between other consumer credit protection laws and the provisions of Article 9, the provisions of the former supersede that of the later on the issue of consumer protection. For example section 1.103 of the Uniform Consumer Credit Code 1974[1130] provides that where there is a conflict between the provisions of the Uniform Consumer Credit Code and Article 9, the provisions of the former will prevail.

Notwithstanding the above, the relevance of the inclusion of consumer protection provisions in Article 9 to this work is that it stresses that no secured transactions law reform can be made without giving significant thought also to consumer protection considerations; similarly to the drafters of Article 9. The logic is straightforward: as much of the consumer protection rules are

[1128] See section 9 – 623 UCC.
[1129] See supra foot note 1122.
[1130] It provides as follows: "Unless displaced by the particular provisions of this Act, the Uniform Commercial Code and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions. In the event of inconsistency between the Uniform Commercial Code and this Act the provisions of this Act control."

outside Article 9, the transplantation of elements from Article 9 only would lead to a serious misbalance to the detriment of consumer debtors.

The importance of the close linkages between these two fields of law is, however, not visible from the text of Article 9 itself: to American scholars and practitioners all this is simply given. The real dimensions of the problem become visible when one juxtaposes Article 9 – together with its rules protecting consumer debtors – and all the other statutory laws located outside the UCC. At any event, the close links has helped Article 9 to serve the needs of consumer financing better. This is instructive to this work because in Nigeria and Cameroon - where the secured transactions laws and consumer protection laws are undeveloped and there is yet no appropriate and direct nexus between the two fields - the results are bound to be different. No one expects the secured transactions laws or any other branch of law in those jurisdictions to protect the interest of the consumer debtors. Sadly, it is this non-existent protection that consumers need to bolster them to borrow. It is even debatable whether there are consumer protection laws in both jurisdictions, and this mortgages the fate of consumer debtors in the hands of the creditors with little or no redress for them. Consequently, this work will turn to Nigeria and Cameroon to evaluate the extent (if any) of the consumer credit protection laws in both jurisdictions.

4.6.1. Consumer Protection and Secured Transactions Law in Nigeria

The Consumer Protection Council Act Chapter C25 Laws of Federation of Nigeria 2004[1131] established a Consumer Protection Council, with powers inter-alia to do the following: "*to*

[1131]The First Consumer Protection Act was enacted in 1992 by Consumer Protection Council Act No. C66 of 1992. This former Act has now become the Consumer Protection Council Act C25 Laws of Federation 2004. This law is available on line at < http://www.nigeria-law.org/ConsumerProtectionCouncilDecreeNo66Of1992.htm >; last visited on the 28th of March, 2011.

provide speedy redress to consumers' complaints through negotiations, mediation and conciliations."[1132]

The powers of the Consumer Protection Council as listed in section 2 of the Act cover commercial transactions and in particular product liability.[1133]Indeed, the whole gamut of the Act deals with defective products and the rights of the consumers who purchased them. There is no provision of the Act that deals in particular with the peculiarities of problems that can be encountered in consumer finance; i.e., there is no consumer credit protection in the law. Apart from the Consumer Protection Act, which is deficient in consumer financing protection, there are no other consumer credit protection laws as they are in the United States.[1134] Accordingly, it can

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[1132]Other functions of the Consumer Protection Council are as follows: "seek ways and means of removing or eliminating from the market hazardous products and causing offenders to replace such products with safer and more appropriate alternatives; publish from time to time, list of products whose consumption and sale have been banned, withdrawn, severally restricted or not approved by the Federal Government or foreign governments; cause an offending company, firm, trade, association or individual to protect, compensate, provide relief and safeguards to injured consumers or communities from adverse effects of technologies that are inherently harmful, injurious, violent or highly hazardous; organize and undertake campaigns and other forms of activities as will lead to increased public consumer awareness; encourage trade, industry and professional associations to develop and enforce in their various fields quality standards designed to safeguard the interest of consumers; issue guidelines to manufacturers, importers, dealers and wholesalers in relation to their obligation under this Decree; encourage the formation of voluntary consumer groups or associations for consumers well being; ensure that consumers' interests receive due consideration at appropriate forum and to provide redress to obnoxious practices or the unscrupulous exploitation of consumers by companies, firms, trade association or individual; encourage the adoption of appropriate measures to ensure that products are safe for either intended or normally safe use." See section 2 of the Consumer Protection Council Act of 2004.

[1133]According to the official web page of the Consumer Protection Council (CPC), the CPC works in the following ways: in order to provide redress to consumers, the CPC receives complaints from consumers; then calls the parties and negotiates, mediates and conciliates consumer complaints. The CPC obtains compensation, reliefs, and safeguards from the court for injured consumers or communities and also applies to court to protect the rights of the consumers. Again to eliminate hazardous products from the market and ensures that the products and services meet the required standards, the CPC undertake surveillance and law enforcement activities in the market place; it conducts quality tests and analyses on products and services; it compels producers of goods and services to adhere to quality standards; issues guidelines, regulations to producers of goods and services; bans the sale, distribution and advertisement of substandard and defective products and services; it also prosecute offenders when necessary. The CPC however has no statutory power to impose fines. It appears that the outcome of their investigation is to institute court proceedings against the defaulting companies with their findings. However a power of fine would have complemented their investigative power and made it more meaningful. See the official web page of the CPC available at < http://www.cpc.gov.ng/cpc/index.php >; last visited on the 28th March, 2011.

[1134]The equivalents of such laws as Truth in Lending Act, Extortionate Credit Transaction Act, Credit Repair Organization Act, Fair Credit Reporting Act, Equal Credit Opportunity Act, Fair Debt Collection Practices Act and Electronic Fund Transfer Act are non-existent in Nigeria.

be concluded that the close linkages between secured transactions laws and consumer protection laws are absent and this could be traceable to the fact that both the secured transactions laws and the consumer protection laws in Nigeria are undeveloped quite unlike the case in the United States.

The absence of consumer credit protection provisions in the Consumer Protection Council Act has consequences on consumers financing. As already stated, it leaves the fate of consumer debtors at the mercy of the creditors with no clear legal remedy except suing.[1135] A typical consumer finance transaction will involve a potential borrower walking into a bank to request for a loan. Upon the assessment of the borrower by the bank on the information supplied by him, the bank will determine all the indices of the loan agreement: i.e., the amount that can be given to borrower, the acceptable collateral, the rate of interest, the tenor of the loan. To this end, a boiler plate agreement which the borrower neither made input nor negotiated its terms will be given to him to sign on a 'take it or leave it' basis. In most cases the debtor does not even read the agreement or where the debtor does, he may not understand the technical or financial implications of some clauses; and worst still, the debtor did not retain the services of a legal practitioner. In event of any dispute or default of the obligation of repayment, the debtor may get to know about some clauses when an in-house counsel to the bank in a demand letter for repayment, draws the attention of the debtor to such clauses. Unfortunately, in a country where the level of consumer protection is still low or practically non-existent the secured creditor can

[1135] Instituting an action would not be the real alternative. One of the reasons of the consumer protection law is that ex-post facto litigation by the weaker and poor party – the consumer – is not a realistic option especially when the court does not award punitive damages in Nigeria. Consequently, the need to have good consumer credit protection laws with a pro-active Consumer Protection Council with powers to investigate and fine offending creditors is desirable to secure the interest of the consumer debtors.

insert unconscionable clauses[1136] in the loan agreement under the cover of freedom of contract since there are no consumer credit protection laws[1137] and the probability of the consumer to seek redress in court is minimal. This is because most consumers do not go to court for the obvious additional cost implication and the delay associated in going to court, consequently, they would rather cut their losses. Again without a clear consumer credit protection law in banker customer relationship, an attorney may find it difficult to successfully challenge the arbitrary actions of the creditor. At best, the attorney may base his client's case on the fact that the action of the creditor

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[1136] Unconscionability is a term used mostly in sales law in the United States. For two centuries the courts of equity have refused recognize any term in any commercial transaction that is unconscionable. In the old case of Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125, 28 Eng. Rep. 82, 100 (Ch. 1750) the court struck down unconscionable terms 'as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other hand.' Section 2-302 UCC provides as follows: 'if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result' the principle adopted by the court in determining the unconscionability of terms of the contract is whether in the "light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstance existing at the time of the making of the contract." See James White and Robert Summers, Uniform Commercial Code, Practitioner Treatise Series Volume 1 (Thomson West, 5th ed., 2006), p. 290, and the official comment to section 2 – 302 UCC.

Unconscionable terms in a secured transactions agreement will include the followings: lender accelerating repayment period of the loan at will even when there are no basis for the lender to deem itself insecure; or where the lender charges usurious interest; or where the lender resorts to intimidation and harassment in repossessing the security interest in the custody of the debtor. See Robert J. Hobbs, National Consumer Law Center, Fair Debt Collection, (6th ed. 2008).

[1137] The author's family is presently a victim of high handedness and unconscionable acts of a bank in unilaterally increasing the interest rate, tenor of a loan and arbitrary charging of penalties without even recourse to my family. Sometimes in 2008, my family took a loan from one of the banks in Nigeria. The security the bank asked for was in form of a 'personal' security. The security demanded was that we sign an open check and give to the bank that will be drawn in a current account. Anytime we default on repayment, the bank will deem itself and accelerate the repayment and then insert the whole amount outstanding, insert the current date and present it to the bank drawn on the check for payment. If the check as is expected does not clear: i.e., the bank does not get value on the check, the bank will now lodge a complaint to the police that my family gave a dud check which is a crime - giving out a check knowing full well there is not enough money in your account. One can be prosecuted for such offence under section 419 B (B) of the Criminal Code Act Chapter 77 Laws of the Federation of Nigeria 1990 and on conviction may be sentenced to three years imprisonment.

As usual, the bank fixed the interest rate at 18.95% and the tenor of the loan to be 60 months commencing from May 2008. Midway into the repayment schedule, we noticed that instead of the monthly repayment to be reducing, it was stagnating on a particular amount despite the monthly repayments made. We wrote to them only to discover that the bank unilaterally increased the interest rate about 6 months into the repayment from 18.95% to 20.95% and has built in so many penalties into the repayment schedule without informing us. Worst still, in order not to give us a higher monthly repayment schedule, the bank also increased the tenor from 60 months to 65 months. When we discovered all these and confronted them the bank haughtily showed us a clause in the agreement that gave the power to unilaterally vary the terms of the loan agreement without recourse or notice to us. Until present, there are tons of correspondences between us and the bank still trying to resolve the issues of arbitrary increase and penalties charged by the bank.

is unconscionable. This term is fluid and the court finding of the acts as unconscionable would be on a case by case basis. Many courts may not been willing to hold that the act of the secured creditor is unconscionable in the face of a clause in the agreement that gives the right to the credit provider to do what he has done. Freedom of contract is still given much reverence in Nigeria although there are few exceptions to it.

Regrettably, the Consumer Protection Council whose functions under section 2 of the Act include inter-alia the provision of speedy redress to consumer complaints through negotiation, mediation and conciliations are helpless in such cases. Being government agencies, they are bugged down with bureaucracy. Mediation and conciliation of complaints may take as much time as a court case would have taken if it were filed in a court. It is also possible that the officials of the Consumer Protection Council may be compromised by the wealthy creditors like the banks.

The unconscionable practices are not limited to the formal banking institutions in Nigeria alone. Other organizations or individuals who engage in other form of consumer financing in Nigeria also exhibit some form of arbitrariness and unconscionable acts in their credit transactions with consumer debtors. There are cases where hirers in a hire purchase agreement forfeit their cars or other items which forms the subject of the hire purchase agreement on default of payment of a periodic installment even after paying substantial percentage of the cost. The seller takes back the car or the goods and keeps it without selling the good even when the equity of the hirer has inured on the property. However, unlike the case of the banker-customer relationship, where there are no consumer credit protection laws, the Hire Purchase Act has consumer protection provisions. The Hire Purchase Act prohibits the seller from taking back the property when the hirer or buyer has paid fifty percent of the purchase price in goods other than motor vehicles and three-fifths of the purchase price in motor vehicles.[1138] The Hire Purchase Act further stipulates that in cases where the buyer has made such payments above but has defaulted in three or more installments, the buyer can only recover the goods upon instituting an action in court, although the law allows the seller to keep the goods in order to protect it from damage or deterioration whilst the suit subsists.[1139] The law further prohibits entering into premises to repossess the goods that are subject to hire purchase agreements.[1140] However, the hard facts are that, notwithstanding all these consumer protection provisions contained in a Hire Purchase Act, sellers are known to take back the goods that is the subject of hire purchase agreement from the hirers or buyers without instituting a matter in court for the repossession.[1141]Sellers also keep the

[1138]Section 9 (1) of the Hire Purchase Act provides as follows: "where goods have been let under a hire-purchase agreement and the relevant proportion of the hire-purchase price has been paid (whether in pursuance of a judgment or otherwise) or tendered by or on behalf of the hirer or any guarantor, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by action and except as provided by subsection (5) of this action." Section 9 (4) provides as follows: "In this section and elsewhere in this Act, 'the relevant proportion,' where the reference is to the relevant proportion of the hire-purchase price of any goods or to the relevant proportion of a part (however described) of that price, means – (a) in the case of goods other than motor-vehicles, one – half; and (b) in the case of motor –vehicles, three fifths."

[1139]Subsection 5 of section 9 provides "In the application of the provisions of this section to motor-vehicles, where three or more installments of the hire-purchase price of a motor –vehicle under the agreement are due and unpaid, the owner may remove the motor vehicle to any premises under his control for the purpose of protecting it from damage or depreciation and retain it there pending the determination of any action, and the owner shall be liable to the hirer for any damage or loss which may be caused by the removal."

[1140] Section 3 (a) of the Hire Purchase Act provides: "The following provisions in an agreement shall be void, that is to say, any provision – (a) whereby an owner or a person acting on behalf is authorized to enter upon any premises for the purpose of taking possession of goods which have been let under a hire – purchase agreement or is relieved from liability for any such entry."

[1141] This ugly incident happened to the author's cousin living in Rivers State of Nigeria. He bought a bus for commercial transportation business on hire purchase agreement from the owner and made monthly agreed upon installments to the owner. As a security for the hire purchase agreement, the owner registered the bus in his own name and gave the hirer a photocopy of the licenses. Some of the terms of the agreement were as follows: upon the completion of the payment the owner would execute a change of ownership in favor of the hirer; the bus was to be packed at the residence of the owner every night upon the close of each working day; the default of any two installments were foreseen to lead to the owner taking back his bus without any compensation to the hirer; the hirer would maintain the car and keep it in a road-worthy condition.

Having paid over 80% of the purchase price by installments, the hirer defaulted on two installments, however, not because of his fault. Namely, due to engine faults, the bus was parked at the mechanic and could not be exploited to generate income from which to pay the installments. As a result of this, the owner went to the mechanic goods without selling them and giving back to the hirer any surplus that may have accrued upon payment of a substantial percentage of the purchase price. This surely deprives the hirer of the surplus that may have accrued to him had the goods been sold in a commercially reasonable manner. Probably, the impunity with which the sellers breach the customer protection provisions of the Hire Purchase Act is their realization that most consumers who engage in hire purchase may not be aware of the existence of their rights in the Hire Purchase Act. Moreover, even where the consumers know of such rights, the cost and length of time in litigation process would certainly deter them from instituting an action to get remedy.[1142] Such hirers may not even be aware of the existence of the Consumer Protection Council which may protect their rights. Even where they know of the existence of the CPC, they may question the wisdom in reporting the sellers since, the CPC may connive with sellers to deny them justice.

In conclusion on the two scenarios above, in the case of the banker customer relationship, what is needed is the protection of consumer debtors by enacting the consumer credit protection laws as in America. Such consumer credit laws like Truth in Lending Act, Extortionate Credit Transaction Act, Credit Repair Organization Act, Fair Credit Reporting Act, Equal Credit Opportunity Act, Fair Debt Collection Practices Act and Electronic Fund Transfer Act will check

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and collected the car, took it to his own mechanic, repaired the car and terminated the hire purchase agreement. All entreaties to the owner to sell the bus, take the remaining 20% of the outstanding sum and give the hirer the surplus as his equities that had inured in the bus by having paid 80% on the hire purchase price - fell on deaf ears. The owner repaired the car and entered into another hire purchase agreement with a new hirer.

[1142]Due to the fact that by virtue of section 1 of the Hire Purchase Act, the value of the goods must not exceed N2,000 (approximately $20) unless the hire purchase agreement is for a motor – vehicle, most of the goods in purchased through hire purchase are motor vehicles. The motor vehicles are purchased by lower class people in Nigeria who are not interested in pursuing the case in court as any other expenses incurred in trying to get remedy against the seller may be seen as throwing good money after bad money. For example the case of the author's cousin is case in point. He never knew of his right and if he ever did know, it was very unlikely that he would have pursued his case against the seller.

the unconscionable acts of the banks in their relationship with the consumer debtors. Enactment of such laws will not be enough as the experience of hire purchase contracts have shown the consumer debtors like hirers or buyers in hire purchase contracts also need to be told of the rights and be assisted in enforcing them. This could be done through seminars, symposium, conferences or other methods through which the protection accorded to the consumers could be spread to them. The problem may be how to identify the prospective consumer debtors both in a hire purchase agreement and consumer borrowers in the bank. However, informing consumers of their rights without considerably empowering them financially may not yield the desired result as those rights may not be enforced. Empowering the consumers financially may be by introducing contingency fee, treble damages or punitive damages, this way the consumers may find incentive to sue and these damages may deter any prospective creditor from engaging in arbitrary and unconscionable acts in consumer financing. Another alternative is to equip the Consumer Protection Council to take up such cases on behalf of the indigent consumers in court and get judgment for them. Also, the Consumer Protection Council's power of negotiation, mediation and conciliation may be exploited positively in favor of the consumer debtors in a hire purchase agreement. This way the consumers may have the incentive to report such acts of the sellers if the consumers know that the Consumer Protection Council can help remedy the injustice meted out to them by the seller. At the bottom of the crisis is the perception, and rightly too, by the society that cases take inordinate long years to get adjudicated in court, consequently a quicker determination of court cases may also change the psyche of people to institute matters in court to remedy an injustice.

4.6.2. Uniform Act Organizing Security and Consumer Protection Law in Cameroon

Cameroon does not have any consumer protection laws either on the general level of commercial transactions or on the specific context of consumer credit protection. There is also no established authority or agency of the government charged with the responsibility of protecting, informing and enforcing the rights of consumers. Many scholars are advocating for laws on consumer protection in Cameroon [1143]and also the setting up of an national consumer agency to be called Cameroon Consumer Protection Agency that will be responsible for *"promoting and protecting the interest and welfare of consumers through: enforcement of consumer legislation, advocacy, research, education and awareness."*[1144] The calls by Williams for the enactment of consumer protection law and the establishment of the Cameroon Consumer Protection Agency is a follow up to his previous article where he had documented some of the abuses and deprivations suffered generally by the consumers in Cameroon.[1145] It suffices that all the calls for the enactment of a general consumer protection law in Cameroon is not quite the focus of this chapter – i.e., examining the close links of secured transactions law and the consumer credit protection law. However, the enactment of a general consumer protection law may be a stepping stone to the enactment of consumer credit protection law.

The absence of consumer credit protection law is undermining the protection of consumers in credit financing. Worst still, there is no consumer protection provisions in the Cameroon secured

[1143] See Samgena D. Galega, Strict Liability for Defective Products in Cameroon? Some Illuminating Lessons from Abroad, Journal of the African Law, Vol. 48, No.2 (2004), pp. 239 – 267.
[1144] See Jerry Williams, Redeeming the Consumer Exploitation Problem in Cameroon, supra footnote 1112.This is basically the function of the Consumer Protection Council in Nigeria under section 2 of the Consumer Protection Council Act of 1992.
[1145] See Jerry Williams, The Consumer Exploitation Problem in Cameroon, published by the Cameroon Purveyor of June 22, 2010 available at < http://commonquarters.blogspot.com/2010/06/consumer-exploitation-problem-in.html > last visited on the 14th of February 14, 2011.

transactions law – Uniform Act Organizing Securities. Just like in Nigeria, the consumer debtors are at the mercy of creditors in Cameroon and this has hampered the efficiency of the Uniform Act Organizing Securities. It has also discouraged consumer borrowings in Cameroon. This may account for the apathy of the people in both societies to bank loans and the resort of the society to indigenous form of borrowing – hence the flourishing of njangi and esusu in Cameroon and Nigeria respectively.

In conclusion, in line with the reform of the secured transactions laws in Cameroon, this research will advocate for the enactment of consumer credit protection provisions in the substantive secured transactions laws – Uniform Act Organizing Securities. Furthermore, other separate consumer credit protection laws should be enacted as they are in the United States. The realization by consumers that their interests are adequately protected in consumer financing will encourage the consumers to borrow, and the same time discourage creditors from their high handedness and arbitrariness in consumer financing. This will make secured transactions laws in Cameroon to function better and thus boost the development of the economy of Cameroon. A reform of secured transactions laws in both jurisdictions without corresponding reforms in the area of consumer credit protection laws would not produce the desired result needed in the area of secured transactions. This conclusion thus prompted this research to look at consumer credit protection laws in the United States which have contributed to the efficient performance of Article 9.

Chapter 5

Legal Transplantation: What is Exportable from Article 9 to Nigeria and Cameroon?

5.1. Introduction: The Concept of Legal Transplantation

The concept of legal transplantation is as old as mankind spanning over some centuries. Alan Watson defined legal transplantation *"as the moving of a rule or a system of law from one country to another or from one people to another."*[1146] The processes of the legal transplantation are mostly through governmental channels, i.e., by legislative or judicial processes.[1147] Apart from governmental channels, there is another type of legal transplantation which is through private contracting in the age of globalization.[1148] But, what is of interest to this research is the legal transplantation through governmental channels. According to Li-Wen Lin, legal transplantation by governmental channels has taken place in sequences globally and can be traced back several centuries ago.[1149] However Lin identified four phases of legal transplantations in the last century. The first wave of large scale legal transplantation of laws through governmental channels began during the period of colonialism. The colonialist needed laws and legal institutions to govern the colonies which they annexed, naturally the laws that were handy and could serve the colonialist purposes were the colonial masters' laws which ensured that there was stability in the colonies and the continued subjugation of the colonies politically and economically. Being politically and administratively in charge of their colonies with little or no opposition from the citizens, the colonialist transplanted their laws unhindered

[1146] See Alan Watson, Legal Transplants, (Edinburgh Scottish Academic Press Ltd, 1974) p. 21.

[1147] According to Irma Valderrama, "the term leasing was transplanted into France vide a decision of the judiciary dated 29 November 1973 changing the term of leasing to credit bail, a French word, given the rejection to the use of American terms, even if in this case, credit bail will only describe one type of leasing: financial leasing, different from leasing that includes both financial and operational leasing." See Irma Johanna Mosquerra Valderrama, LEGAL TRANSPLANT AND COMPARATIVE LAW, International Law: Revista colombiana de derecho internacional, diciembre numero 002, Pontificia Universidad Javeriana, Bogota Colombia p. 273 available at < http://redalyc.uaemex.mx/redalyc/pdf/824/82400207.pdf >; last visited on the 19th of March 2010.

[1148] See Li-Wen Lin, Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example, 57 American Journal of Comparative Law 711 (Summer 2009), p.711.

[1149] Id., 711.

into all their colonies which were under them and some of these laws exist until date.[1150] For example during the period of colonization in Nigerian, it was very easy to effect legal transplantation using the laws of the colonial masters - the English law - this was because the colonial masters were in control of government and power and could decide which laws govern any issue in Nigeria. For example section 20 of the Supreme Court Ordinance of 1914 of Nigeria provided inter-alia as follows: *"[…] the common law, the doctrines of equity, and the statutes of general application which were in force in England as at January 1, 1900 shall be in force within the jurisdiction of the court."*[1151] Indeed the colonialist transplanted all the laws that governed almost all the issues in Nigeria during colonial period. British colonialists transplanted Nigerian criminal law, [1152]evidence act and commercial laws. Nigerian customary laws were subjected to scrutiny by the colonialist. The colonialists declared some of the customs and traditions in Nigeria barbaric. Indeed customs and traditions in Nigeria were only allowed to be practiced if they passed the three tests set by the colonial masters which are as follows: if the cultures and traditions are not repugnant to natural justice, equity and good conscience, secondly if they are not directly or indirectly incompatible with any law for the time being in force, and thirdly if the customs and traditions are not contrary to public policy.[1153]

[1150]An example is the Nigerian Evidence Act which was introduce into Nigeria by the colonialist in 1945 and the Bill of Sale Act still subsist as the extant Evidence Act and Bill of Sale Act in Nigeria until date. However, these laws co-existed with some indigenous customary laws that passed the tests set by the British colonialist. The test is further explained in the subsequent paragraphs.

[1151] See Derek Asiedu-Akrofi, Judicial Recognition and Adoption of Customary Law in Nigeria, The American Journal of Comparative Law, Vol. 37, No. 3 (Summer, 1989), pp.571-593, at p. 571.

[1152] The colonial administration transplanted Nigerian Criminal Code which was first published on 1st of June 1916. See H.F. Morris, How Nigeria Got Its Criminal Code, Journal of African Law, vol. 14, No.3, (Autumn, 1970), available at < http://www.jstor.org/stable/744581?seq=2 >; last visited on the 1st of April, 2011.

[1153] Id. p. 578, see also The High Court Law, Eastern Region of Nigeria No. 29 of 1955, section 22; Northern Region High Court Law No. 8 of 1955, section 34; Native Courts (Amendment) Law 1960 Northern Region, No.10 of 1960, Section 6 (a). The court has struck down some of the customs and traditions of the people on the basis of the three tests in the cases of Laoye v. Oyetunde (1940) Appeal Cases 170;Edet v. Essien (1932) 11 NLR 47; Eshugbayi Eleko v. Officer Administering Government of Southern Nigeria (1931) Appeal Cases 662. In Edet v. Essien, there was a custom that any child born during the subsistence of marriage will be presumed to be the child of the husband where the paternity of such child is in issue, the court held that a custom which gave the respondent the

The second wave was the consequences of the aftermath of the post World War II which period saw a number of newly independent countries borrowing laws from western countries. It is instructive to note that both the colonial legal transplantations and post World War II legal transplantations of the laws *"tended to be blanket transplants of a certain legal system, which facilitated the formation of legal families."*[1154] The third wave of legal transplantations was the legal reforms embarked upon the governments of the Central and Eastern European countries (former socialist countries) in the early 1990's following the disintegration of former USSR.[1155] There is another wave of legal transplantation which is driven by globalization.[1156] Globalization appears to the major rationale for the growth of legal transplantation in the world economy.[1157]

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two children born to the appellant (their real biological father) due to the failure to repay the respondent his dowry was repugnant to natural justice equity and good conscience. Again in Eshugbayi Eleko v. Officer Administering Government of Nigeria, the custom which permitted that a deposed traditional ruler must be banished from his people to another distant community all the days of his life was also struck down for being repugnant with natural justice, equity and good conscience. Also in Re Adadevoh 13 W.A.C.A. 304 (1951) where a Yoruba custom of giving legitimacy to children by acknowledging paternity was in issue, the court said, though in obiter that where a custom encouraged promiscuity, such custom would be contrary to public policy. The culture of inheriting the wives of the deceased by the male relatives of the deceased was held to be barbaric. However, these three tests are now codified in section 14(3) of the Nigerian Evidence Act. Other jurisdictions of the world changed their customary laws sometime in their history to facilitate development or growth. For example Hungary had a customary law that prevented the pledging of the land of the noble as collateral during the medieval period largely because the country was ruled by land aristocratic class during this period. However, Hungary had to change this custom in order to move from feudalism to capitalism and to ensure also that banks could give credit as non utilization of land as collateral impeded credits from banks. See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, pp. 295-297.

1154 See Li-Wen Lin, Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example, supra footnote 1148, p.711. However, it is apt to state that this research does not propose blanket transplants which tend to copy law word for word from the country of origin to the recipient country.

1155 Bahaa El-Dean has advocated for reforms of Egyptian secured transactions law reforms based on the models of EBRD model Law on secured transactions and Hungarian secured transactions. It is instructive that Hungarian reforms on secured transactions carried out in 1996 and 2000 were as a result of the disintegration of the USSR. See Bahaa El-Dean, Privatization and the Creation of Market-Based Legal System: The Case of Egypt, supra footnote 2. The experiences of Central and Eastern European countries in legal transplantation and how it may be of benefit to Nigeria and Cameroon in the legal transplantation of the compatible elements of Article 9 is discussed further in this chapter. See infra, pp. 424 – 435.

1156 According to Gerber David, globalization "[…] brings laws and legal cultures into more direct, frequent, intimate and often complicated and stressed contact. It influenced what legal professionals want and need to know about foreign law, how they transfer, acquire and process information and how decisions are made. We might expect the field of comparative law, therefore to be full with efforts to comprehend globalization and its impacts on law and to develop strategies for dealing with them." See Gerber David, Globalization and Legal Knowledge: Implications for Comparative Law, Tulane Law Review, Vol. 75, 950 (1990).

1157 See Irma Johanna Mosquerra Valderrama, LEGAL TRANSPLANT AND COMPARATIVE LAW, supra footnote 1147, p. 264.

Legal reforms at the state level in the era of globalization tend to transplant fragments of rules from several legal systems and then integrate them into one single rule. The result of this is reduced importance of the dichotomy of legal families.[1158] This combination of fragments of rules from various legal families leads to standardization or harmonization of rules.[1159]One unique attributes of legal transplantation in globalization age is that the transplantation could be done both by state actors and non state actors. The non state actors could do this through the instrumentality of 'legal standardization or harmonization movement.' However, legal transplantation by these non state actors also passes through the usual transplant method which is government legislation. For example "*the International Accounting Standards Board (IASB), a nonprofit, private sector organization, develops international standards for financial reporting; International Organization of Securities Commissions (IOSCO), which includes public and private securities regulators, develops international principles of securities regulation*."[1160]

One may curiously ask why legal transplantation? Imbedded in this work is the major reason of legal transplantation – there is a strong correlation between good laws and good, wealthy and industrialized nations and the corollary is that bad laws can only lead to a bad and

[1158] See Takao Tanase, Global Markets and the Evolution of Law in China and Japan, 27 Mich. J. Int'l L. 873, 876 (2006); see also Li-Wen Lin, Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example, supra footnote 1148, p. 712.

[1159] According to Lin, there are "hard and soft approaches" to this type of legal standardization. The hard approach would be the case of OHADA member countries where member countries are obligated to adopt the OHADA Uniform Acts and enforce same in their respective countries as their national laws on the areas of laws covered by the OHADA Uniform Act. The soft approach is what is seen in UNCITRAL Legislative Guide on Secured Transactions 2010, OECD Corporate Governance Principles, UNCITRAL Model Law on International Commercial Arbitration and UNIDROIT Principles of International Commercial Contracts. This kind of standardization or harmonization is a combination and contains the best practices of many legal families and is usually a product of international negotiation and not wholesale adoption of particular system. See Li-Wen Lin, Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example, supra footnote 1148, p. 712.

[1160] Id., p. 713.

underdeveloped nation.[1161] Accordingly legal transplantation is necessary because a country needs good laws to regulate every aspects of its life (private, public, commercial), in order for a country to aspire to enviable heights. Consequently one of the ways to ensure good laws is to import or effect a legal transplantation of the compatible elements of such model laws into the country.

Besides this simplistic answer, Irma Valderrama has proffered five thoughtful reasons why there is legal transplantation. According to him, legal transplantation happens for several reasons and some of the following reasons are: "*authority; prestige and imposition; chance and necessity; expected efficacy of the law; political, economic and reputational incentives from the countries and third parties.*"[1162] Of all the reasons of different authors articulated by Irma Valderrama for the legal transplantation, Sacco theory of prestige accords with the reason for the transplantation of the compatible elements of Article 9 to Nigeria and Cameroon. Sacco theory of prestige

[1161] For example in the area of secured transactions, bad laws like unreformed secured transactions laws which place high premium on real property collateral which the potential micro, small and mid - scale entrepreneurs do not have contributed in cutting access to credit in low and middle income countries. Where access to credit is cut off to these set of people, the economy would hardly grow. Heywood Fleisig et al, give a statistics of many firms in low and middle income countries that cannot meet collateral requirement for loan; in Africa while 19% of the firm do not apply for credit because the requirements are too high, 51% of firms are rejected because they have insufficient collateral; in East Asia 20% of firms do not apply for loan because of high requirements while 70% are rejected for insufficient collateral; in Eastern Europe and Central Asia, 13% of firms do not apply for loan because of high requirement while 72% of firms application for loan are rejected for insufficient collateral; in Latin America and the Caribbean, 23% of firms do not bother to apply while 39% of firms application are rejected for insufficient collateral and in South Asia, 31% of firms do not apply for loan because of high requirements while 72% of firms do not meet the collateral requirement of the banks. The result is that "Most firms face collateral requirements they cannot meet and get none of the benefits of collateral from the assets they own. For these firms a lender's request for collateral does not represent an opportunity for better credit terms; it is a code for refusal of a loan." See Heywood Fleisig, Mehnaz Safavian and Nuria de la Pena, Reforming Collateral Laws to Expand Access to Finance, supra footnote 18, pp. 9 – 10. Again due to inadequate legal framework to secured transactions, Flesig estimates that Bolivia looses between 5 percent to 10 percent in GDP. See Heywood Flesig, The Power of Collateral: How Problems in Securing Transactions Limit Private Credit for Movable Property, The World Bank, Public Policy For the Private Sector Note No. 43, April 1995, p. 1.

[1162] Beyond the five reasons there are yet other reasons for legal transplantation which can be a combination of two or more of the reasons stated above. See Irma Johanna Mosquerra Valderrama, Legal Transplant and Comparative Law, International Law: Revista colombiana de derecho internacional, diciembre numero 002, Pontificia Universidad Javeriana, Bogota Colombia, supra footnote 1147, pp. 261– 276. See also Gianmaria Ajani, By Chance and Prestige: Legal Transplants in Russia and Eastern Europe, 43 American Journal of Comparative Law 93 (1995).

believes that legal transplantation can also be as a result of acceptability of the laws by the recipient because of the belief by the recipient country of the qualitative nature of the laws and institutions. Sacco opines that legal transplantation on the theory of prestige takes place *"because of the desire to appropriate the works of others. The desire arises because this work has a quality once can only describe as prestige."*[1163]As opposed to imposition, prestige evokes the feeling of voluntary acceptance by the recipient of another country's laws and institutions based on the quality of the laws and institutions. The prestige theory presupposes that the law sought to be transplanted is efficient and there are immense benefits derivable by the recipient country upon transplantation of the laws and this include economical, political and social gains to the recipient country. As already stated in the introduction, it is the realization of the efficiency of the Article 9 in the United States and the economic benefits Nigeria and Cameroon stand to gain from the transplantation that this research is proposing for its transplantation.

Apart from the Sacco's theory of prestige there are reasons for transplantation although these reasons do not play any role in the proposed transplantation advocated for in this work.[1164]

[1163]See Irma Johanna Mosquerra Valderrama, Legal Transplant and Comparative Law, International Law: Revista colombiana de derecho internacional, diciembre numero 002, Pontificia Universidad Javeriana, Bogota Colombia, supra footnote 1147, p. 266.

[1164] The leading proponent of authority being the reason for legal transplantation is Alan Watson. Watson's theory of authority being a reason for legal transplantation is mostly seen in private law where there is dearth of legislation and laws are made by Judges who are not traditionally assigned the law making role, so in order to justify their decisions in the absence of legislation they need authority from legal transplantation. According to Watson, "[…] the prevalence of legal transplants, the main method of legal development is in large part due to the need for authority." See Alan Watson, Legal Culture v. Legal Tradition, a paper presented at the Conference of Epistemology and Methodology of Comparative Laws in the Light of European Integration, Brussels, October 24-26 2002, p. 2; see also Irma Johanna Mosquerra Valderrama, Legal Transplant and Comparative Law, International Law: supra footnote 1147, p. 265.

The theory of chance and necessity is postulated by Örucu to mean that legal transplantation does not just occur as a result of choice but as a result of chance or necessity. Using the Central and Eastern European states as an example, Örucu opined that the legal transplantation taking places in these countries is because of the necessity to join the European Union. See E. Örucu, Family Trees For Legal System: Towards a Contemporary Approach, a paper presented at the Conference of Epistemology and Methodology of Comparative Laws in the Light of European Integration, Brussels, October 24-26 2002, p.9; E. Örucu, Critical Comparative Law: Considering

All the reasons for legal transplantation as postulated by these scholars overlap and are interrelated to one another. For example Sacco's theory of prestige; Schauer's economic and reputational incentives and Berkowits, Pistor and Jean–Francois Richard's efficiency can all be grouped together as one reason for transplantation. Suffice it to say that the importance of mentioning these authors theory is for this research to show that there are many possible reasons for legal transplantations and perhaps there are other reasons which have not been mentioned by this work.

Paradoxes for Legal Systems in Transition, Electronic Journal of Comparative Law; J. Smits, A European Private Law as a Mixed System, (1998) 5MJ 328. However, the problem with Örucu theory is that many of the reforms in Central and Eastern Europe occurred not necessarily because of the need to join EU. For example, the reforms that occurred in the Hungarian secured transactions laws both in 1996 and 2000 were not inspired by the need to join EU but by simply the reason that the unreformed secured transactions law Hungary had before then was inadequate to engender credit into the system. The two reforms were driven by the economic benefits of having a good secured transactions law and not necessarily the necessity to join the EU.

The concept of the expected efficacy of the law as a reason for legal transplantation was propounded by the combined research embarked by Daniel Berkowits, Katharina Pistor and Jean–Francois Richard on cross-national legal transplantation, where they opined that laws are transplanted due to the efficiency of the laws that is sought to be transplanted and this makes the recipient country to blind copy the laws word for word without regard to the differences in the two legal environment. The result of the blind copying is that the transplanted laws do not fit or work well in the new environment as the legal, economic, political and social environment where the law was taken are most times different from the recipient countries.

Tajti has raised same concerns with regards to the Hungarian secured transactions reforms when he asked whether the aim of the Hungarian reform was to create a modern and efficient credit economy or to have "unconditional adherence to the traditional rules contained in the civil code." See Tibor Tajti, Viehweg's Topics, Article 9 UCC, the "kauterlarische Sicherheiten" and the Hungarian Secured Transactions Law Reform, supra footnote 65, p. 115. Catherine Wash echoed their views when she quoted their research as follows: "The way in which a formal legal order incubated in Europe was transplanted into other countries was a far more important predictor of the effectiveness of legal institutions than the association of that transplant with any particular legal family […]. The quality of transplantation process counted far more than the content of the transplant effect." See Daniel Berkowits, Katharina Pistor, Jean-Francois Richard, Economic Development, Legality and the Transplant Effect, Centre for International Development, Harvard University Unpublished working draft paper November 1999, p.2 in CATHERINE WALSH, THE "LAW" IN LAW AND DEVELOPMENT. LAW IN TRANSITION: ADVANCING LEGAL REFORM, Autumn 2000, p.10.

Another reason of legal transplantation as articulated by Schauer is the political, economic and reputational incentives which are premised on the supply and demand concept. Here the economic unequal relationship constitutes a factor of influence for legal transplantation. Because of the economic dependency of a country on the other, the economically dependent country is influenced to transplant the laws of the country with stronger economy. For example one of the reasons why Ontario transplanted some elements of Article 9 may possibly be the trade between Canada and United States. Though, Cameroon cannot be said to be economically dependent on Nigeria, still, many of the banks in Cameroon are owned by Nigeria and this may be a factor that could sway Cameroon to harmonize its secured credit laws with Nigeria. See Frederick Schauer, The Politics and Incentives of Legal Transplantation, Harvard University Centre for International Development Working paper No. 44, Law and Development Paper No. 2, April 2000, available at <http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/cid/publications/faculty/wp/044.pdf > last visited on the 21st of April 2011.

5.2. Can Laws be Transplanted?

The issue of legal transplantation of laws has dominated legal discourse and has been placed on the front burner by the works of eminent scholars.[1165] While some scholars have opined the impossibility of legal transplantation of laws and legal institutions arguing that a law that is transplanted in a new legal environment cannot work or function as it did where it was taken from,[1166] there are other scholars who have risen against harmonization of laws[1167] irrespective

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[1165] See Alan Watson, *Legal Transplant and European Private Law*, vol. 4.4 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2000) available at < http://www.ejcl.org/44/art44-2.html >; last visited 20.1.2010; Prakash Shah, Globalization and the Challenge of Asian Legal Transplants in Europe Singapore Journal of Legal Studies (2005) 348- 361 available at < http://law.nus.edu.sg/sjls/articles/SJLS-2005-348.pdf >, last visited on the 20th of January 2010. Alan Watson, Legal Transplants: An Approach to Comparative Law, (Athens and London: The University of Georgia Press, 2nd ed., 1993), H. Patrick Glenn, Legal Systems of the World, (Oxford University Press, 2000), Werner F. Menski, Comparative Law in Global Context: The Legal Systems of Asia and Africa, (London: Platinum Publishing Ltd, 2000), Kenneth W. Dam, The Law-Growth Nexus – the Rule of Law and Economic Development, supra footnote 685.

[1166] See Pierre Legrand, *The Impossibility of Legal Transplants* 4 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW (1997) pp. 111 – 124, Pierre Legrand, *European Legal Systems are not Converging*, *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY*, January 1996 p. 79. In the area of secured transaction, the UNCITRAL 13th session held in 1980 then concluded that it was impossible to unify and harmonize laws in the field of secured transactions. According to the Commission in 1980, "worldwide unification of the law of security interests in goods […] was in all likelihood unattainable." The reason for their position then was the existence of many divergent legal systems and the need to also to harmonize and unify other related areas of law to security interests i.e., insolvency laws if the harmonization in secured transactions laws was to be meaningful. See UNCITRAL 33rd Session, 12th June – 7th July 2000, New York, A/CN.9/475 – Security Interest – Current activities and possible future work, Report of the Secretary – General, para. 5, available on < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/536/57/PDF/V0053657.pdf?OpenElement >; last visited 4th of April 2011. Also, Ulrich Drobnig had expressed pessimisms on the possibility of harmonization of secured transaction when asked by UNICITRAL to prepare a "study on the legal principles governing security interest in the various systems of the world." See Report of the Secretary – General: Study on Security Interest (1977) U.N. Doc. A/CN.9/131, para. 4.2.1, p. 218, reprinted in 8 Y. B. Int'l Trade L. 171, 218 (1977); 1977 U.N. Doc. A/CN.9/SER.A/1977. However, it should be noted that UNCITRAL's position on this issue has changed as the Commission believes that there can be harmonization in the field of secured transactions law. To this end UNCITRAL has a Legislative Guide on Secured Transactions. See Sandeep Gopalan: From Cape Town to The Hague: Harmonization Has Taken Wing, available at < http://www.law.upenn.edu/journals/jil/jilp/articles/1-1_Gopalan_Sandeep.pdf >; last visited on the 11th of April 2011.

[1167] For Garoupa and Ogus, "Mandatory harmonization of legal rules in order to generate a uniform legal culture could be the response to a coordination failure, thus solving the free-riding problem. However, it could also be a serious policy mistake (e.g., if convergence is absent due to very high costs of adjustment). Different legal cultures may co-exist due to different preferences as well as due to technological constraints (in this context, institutional design and rent-seeking).Harmonization should tackle the latter but not the former."
See Nuno Garoupa, Anthony Ogus, A Strategic Interpretation of Legal Transplants, A paper presented at the annual meeting of EALE at Aveiro, Minho, Pompeu Fabra, October 2003 available at http://mle.economia.unibo.it/Papers%20MTM/Garoupa%20-%20Legal%20Transplants.pdf last visited 15th March, 2011.

of the fact that the imperatives of globalization has made harmonization of laws a foregone conclusion.

Alan Watson, a leading proponent scholar of legal transplantation in response to the Legrand's opposition to legal transplantation on the ground that it is impossible to effect a legal transplantation stated thus: "*it is rules - not just statutory rules - institutions, legal concepts, and structures that are borrowed, not the 'spirit' of a legal system. Rules, institutions, concepts, and structures might almost be termed tangibles, can easily be reduced to writing, and are accessible.*"[1168] However Watson concedes that the transplanted rules cannot be expected to have the same effect as the source law in the new environment because of the different ethos where the legal rule is transplanted, but transplantation over a period of time produces similar effect as the laws at the source, there still might be some differences. According to him, "*likewise I find it hard to imagine that anyone would believe that the borrowed rule would operate in exactly the way it did in its other home. What I think is significant in the context of this paper is not the identity of interpretation but the fact that identity of rule does lead to much greater similarity between the two systems. In no way should one neglect the differences.*"[1169]

In the light of above submissions by Watson, the critical question in the transplantation of Article 9 to Nigeria and Cameroon would be whether the policy choices behind the enactment of Article 9 should be paid regard to in the transplantation process. It is obvious that the policy choices behind Article 9 have been the unseen and unwritten forces that have propelled the enforcement and interpretation of Article 9. For example, where Article 9's exploitation of wide range of

[1168] See Alan Watson, Legal Transplant and European Private Law, supra footnote 1165.
[1169] Id.

personal properties as collateral is transplanted to Nigeria and Cameroon without the underlying policy choice behind it in the United States: i.e., the making available of wide array of personal properties as collateral for secured transactions, it may still be possible that the banks in Nigeria and Cameroon would still not recognize these personal properties as acceptable collateral and insist on real property collateral in granting credit. The court may defer to the banks' wishes that it is only real property that is acceptable as collateral, since a security agreement is a contract between the secured creditor and the debtor and thus a security agreement can only be entered into by willing parties who are at ad – idem. In this case, the essence of the legal transplantation of Article 9 wide range of personal properties as collateral is defeated. Therefore the legal transplantation of the provisions of Article 9 out of the context of its unwritten policy choices may be an exercise in futility, the effect of the transplanted law may not at the end be similar to the effect of Article 9 in the United States and this may give credence to Legrand's theory of impossibility of legal transplantation. The challenge is that quite unlike the general principles governing the draft of EBRD Model law on Secured Transactions[1170] - which could be called its 'policy choices' – some of the Article 9 policy choices are not written in the text of the law but can be extrapolated from indirect sources.[1171] This makes it difficult to decipher Article 9's policy choices.

However assuming that the policy choices of Article 9 are easily decipherable, can they be transplanted? This is the problem which Watson and other proponents of transplantation are

[1170] See the introduction to the EBRD's Model Law on Secured Transactions.

[1171] For example Article 9 close linkage with bankruptcy laws shows that Article 9 want to protect the interest of secured creditor both in and out bankruptcy, while its' close linkage with consumer protection laws show that encourages borrowing for all persons in the society including debtors by maximally protecting the interest of financially weak and vulnerable consumer debtors.

facing - the impossibility or impracticality of transplanting the spirit of law[1172] i.e., policy choices behind a law which will help in the acceptability of the law to a given society. This is because a policy choice behind a law is a nebulous concept, it arises from the peculiar needs of that society and the underlying vacuums which that enactment of that law is suppose to fill. The void could be social, political, economic or legal needs which the enactment of that law seeks to fill. In its simplest form, a policy choice behind the enactment of the law is the unwritten reason behind the enactment of the law. Regrettably, societies' innate needs differ and a legal transplantation of a law which was enacted in the origin environment to fill particular societal needs or vacuum cannot produce the same results in the new environment as it did in the original environment. This reality, Watson to a limited extent agrees with, but positively believes that with time identity of rule does lead to much greater similarity between the two systems. Notwithstanding the argument above, one thing is certain, what is transplanted is the law which serves the policy choices. Consequently, the research believes that the argument above does not in any way remove the efficiency of the transplanted law in a new environment especially where the transplanted law meets the needs of the recipient society, and not out of tune with the economic, social, political, legal and cultural norms of the society and above all, the transplanted law is given the enabling environment to succeed.

Besides the above debates, the issue of the usefulness of having the traditional wholesale adoption of laws and its institutions by the developing countries without regard to the

[1172]The spirit of the law is the intent of the authors of the law as can be deciphered through the reading of the text of the law as opposed to the letters of the law. Seen in this context, it is the policy choice of the law. Black Law Dictionary defined both the letter of the law and spirit of the law as follows: "Letter of the law – the strictly literal meaning of the law, rather than the intention or policy behind it" and "Spirit of the law – the general meaning or purpose of the law, as opposed to its literal content." See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, pp. 924 and 1437.

peculiarities of the people or the systematic adoption of law with due regard to the recipient society's social, religious, political, economic, legal and cultural norms are still engaging the minds of scholars.[1173] The issue is core to the proposed harmonization as advocated in this work and it determines the failure or success of the proposed legal transplantation and the consequent harmonization of Nigeria and Cameroon secured transactions laws.

Using the Canadian Personal Property Security Act as a case study where UCC Article 9 was transplanted having regard to distinct peculiarities of the "*Canadian legal tradition and public policies"*[1174]one will clearly advocate for the systematic transplantation of laws with high regards to the legal, economic, social and political peculiarities of the society.[1175] However, this option is

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[1173] See Kenneth W. Dam, The Law-Growth Nexus - the Rule of Law and Economic Development, supra footnote 684, p. 224, the legal transplantation in this book focused both on the desirability of the transplant of legal reforms and institutions necessary for the growth and development of developing world. In it he disagrees with the earlier notions of wholesale transplants and advocates for a transplant which will take into considerations the social, cultural, and religious norms of the society as the transplants that is more effective. According to him ' I know that the first instinct of lawyers, which is simply to transplant world-class legal institutions to developing countries, will most likely produce little more than a harvest of dead leaves. The Institution important to development are more likely to bear fruit if they evolve out of roots already growing in the soil of that particular countries'.

[1174] A comparison of the 1993 Saskatchewan Personal Property Security Act [S.S. Ch. P – 62 (1993) (Can.)] and that of UCC Article 9 will show that though there are many similarities but the Canadian PPSA also has many differences with Article 9, which was the model used for the transplantation. Indeed in other the areas that the law differ, the Canadian PPSA copied the English law in that regards, to an extent it will not be wrong to say that the Canadian PPSA is a combination of United States Article 9 and English laws on secured credit transactions. Some of the area of differences between Canadian PPSA and the United States Article 9 are as follows- the preference of the British style fixed charge in the Canadian PPSA as against the US floating lien concept, the appointment of the receiver- manager whose job is to run the business of the creditor or commercially wind up the business of the debtor in order to realize the securities of the secured creditor, though the Canadian PPSA adopted the simple filing system, the computerization of the filing system went beyond of what is obtainable in the United States, computerization of the personal property registries ensures that all registrations are effected at a single central registry in a province.

This registry serves both for registering financing statements and for conducting searches for already registered encumbrances and the registry enables searches to be conducted anywhere in the world. Again another point of difference is the Canadian perfection of security interest by way of registration of security interest in all types of collateral, including money, and negotiable instrument, this is different because Article 9 provides for the perfection of some certain kinds of collateral to be only by possession or control. Gain Canadian PPSA does not have self-help repossession. See Ronald Cuming, Symposium: Is the UCC Dead, or Alive and Well? International Perspective: Article 9 North of 49: The Canadian PPS Acts and the Quebec Civil Code, 29 Loyola of Los Angeles Law Review (29 Loy L. A. L. Rev) 971.

[1175]According to Bahaa citing his interview with Kamal Aboul – Magad, professor of law, Cairo Law, "Juridical importation is analogous to an organ transplantation; both must take into account the peculiarities of the donor and not without its own quandary; having much regard to the distinct circumstances of the local recipient system has its side effects, it may considerably water down the transplanted law in the guise of deferring to local peculiarities; which eventually would make worthless and meaningless the idea of transplanting a good law. Although Canadian transplantation of Article 9 was successful, that experience may be misleading if embraced by other countries. This is because the economies of Canada and the United States in so many respects were at par, or almost at par, even before the transplantation. Canada has had a developed and fairly efficient legal system – including successfully functioning personal property securities laws in the common law provinces – even before the Article 9's arrival and hence the Canadian's task was "only" to adapt their system to the American one.[1176]

As opposed to that, there is a very wide gap between Nigeria and Cameroon on one side and the United States on the other side; irrespective that Nigerian personal property law stem from the very same source as the Canadian – to wit, English law. Still, when reforming the secured credit laws in Nigeria and Cameroon there should be caution in deferring too much to the peculiarities of the Nigerian and Cameroon systems not to water down the transplanted laws. Finding the proper balance between paying due regard to local conditions and yet transplanting something that would in reality produce economic benefits is, needless to say, a hard task this thesis is also trying to find. However, suffice it to say that the society is willing to follow changes when the

the recipient." See Bahaa El-Dean, Privatization and the Creation of a Market Based Legal System: The Case of Egypt, supra footnote 2, p. 206.

[1176]For example, Cuming has this to say about the Ontario personal property security laws before the legal transplantation of some provisions of Article 9 to Ontario province: "For many years prior to the enactment of the first PPSA in Ontario in 1966, the personal property security laws of common-law provinces provided effective legal devices for both consumer and business financing." See Ronald Cuming, Symposium: Is the UCC Dead, or Alive and Well? International Perspective: Article 9 North of 49: The Canadian PPS Acts and the Quebec Civil Code, supra footnote 1174, p. 971.

transitioning is gradual and the changes take into consideration the peoples' economic, legal, political and socio-cultural distinctiveness.

5.3. The Great Debates – The Holes in the Argument against Harmonization

The second key proposal of this work is the proposed harmonization of the Nigerian and Cameroonian secured transactions laws. Transplanting uniformly some of the compatible elements of Article 9 to Nigerian and Cameroon will lead to the harmonization of secured transactions laws in both jurisdictions which is the desired expectation of the author in looking at the two jurisdictions.[1177] Despite the overwhelming gains of harmonization, there have also been debates whether harmonization or standardization[1178] will lead to a better standardized law for the member countries engaged in the harmonization. Pistor[1179] has analyzed the pros and cons of harmonization and standardization of laws as opposed to regulatory competition from the economic efficiency point of view. She identified the advantages of harmonization to include the followings: harmonization and standardization achieve conformity in the contents and quality of law across different countries and this prevent a 'race to the bottom'[1180] by some countries which may lower their investment rules inordinately to attract foreign capital and investment at the expense of basic standards. Another advantage according to Pistor is that harmonization or

[1177] Indeed harmonization can be affected by other several ways apart from legal transplantation of a model law. See supra footnote 42.

[1178] Standardization of rules according to Pistor is the level of specificity of law. According to her, "while standards embody only the legal principles, legal rules are much more specific not only about their goals of that rules but also, for example as to the type of behavior they address." The essence of standardization is to improve national legal institutions. Standardization here will lead to legal convergence and this will reduce transaction cost for transnational investors especially in countries with institutions that are less developed. Consequently, standardization is one way to harmonize laws and institutions. In this research, since one of the aims of this work is to use the use Article 9 to improve the quality of the national legislations in both Nigeria and Cameroon, that will be standardization, and this process will seek to harmonize by converging the secured transactions laws in both countries. See Katharina Pistor, The Standardization of Law and its Effects on Developing Economies, 50 Am. J. Comp. L. 97 (Winter 2002), p. 97.

[1179] See id., p. 103.

[1180] Id., p.104.

standardization result in lowering transaction cost for market participants which encourages international trade and commerce, improving the quality of legal institutions in some countries which otherwise had low quality of law and legal institutions. The other gains of harmonization include ensuring consistency in the application, interpretation and enforcement of the law.[1181]

Despite these advantages, harmonization has its own setbacks which according to Pistor are as follows: *first*, it may lead to adoption of comparatively substandard rules. The threshold of the standardization may be a problem; where the 'lowest common denominator' may be lower than similar rules in some other countries whose members are parts of the harmonizing countries. *Second*, it may lead to foisting on such countries the unintended consequences of lowering the quality of their rules. *Third*, it may also prevent such countries from changing their laws with the dynamics of time and adapting to better rules since adaptation to better rules may alter the harmonized rules. *Fourth*, harmonization may eventually not lead to the conformity of rules since conformity in the contents of law may not be easily achieved because many rules are not freestanding which require these rules to get cross-references or further explanation in the form of explicit or implicit references to other rules, legal terms or concepts. Conformity becomes difficult when more explanations or cross-references are needed in rules.[1182]

[1181] According to Katharina "The purpose of standardizing legal rules is to achieve conformity in the contents and quality of law across different countries. Additional expectations are usually associated with the standardization of law, including lowering transaction costs for market participants, improving the quality of legal institutions in some countries, and ensuring consistency in the application, interpretation and enforcement of the law." See id. p.107.

[1182] These disadvantages made Pistor to prefer regulatory competition over harmonization. According to her "In the end, this argument favors decentralized lawmaking and by implication, regulatory competition over harmonization. But the point is not that regulatory competition consistently produces superior law, but that it produces law in a way that its relevance will be understood domestically and that innovations and adaptations will take place endogenously through the process of socioeconomic and political change." Id., p. 107.

Much as this research agrees with the potential advantages and some disadvantages of harmonization or standardization of rules as put forward by Katharina Pistor, yet it does appear that her criticisms from the economic efficiency point of view is inappropriate. The essence of harmonisation or standardization is to improve the quality of laws of some countries which have hitherto unreformed and substandard laws; it does not make sense from the economic efficiency point of view, to use such laws that are sought to be improved as the benchmark for the harmonization of laws for the group of countries. This will certainly be counter-productive as the aim of harmonisation is not to reduce the quality of laws of some of the harmonizing states. In most situations, countries with reformed and high quality laws are looked upon as the threshold, such laws are usually used as the benchmark to encourage other countries to step up the quality of their laws. There may be some resistance from the countries whose law are at the low ebb, allowances are made for such countries with weak laws to upgrade their laws with a specified time.[1183] Before new member states are allowed to join the European Union, their laws and legal institutions are usually checked and in most cases they are asked to step up weak laws and institutions before they are allowed to join the European Union.

Again, her theory of the lowest common denominator does not mean that each country is not free to increase their standards, the lowest common denominator may be the threshold which no country may go below, countries are allowed to set their rules above the threshold. The European Union directives are instructive in this regard; countries are allowed to implement the minimum standards contained in the directive but are free to set their rules over and above the

[1183] A good example is the Transitional Arrangement of the Agreement on the Trade –Related Aspect of Intellectual Property Rights. At take off of the TRIPS, developed nations were given one year for their laws to conform to the agreement; developing nations were given 5 years while least developed nations were given 10 years. See the Transitional Arrangements contained in Articles 65 and 66 of the Agreement.

threshold. Consequently the disadvantages of harmonisation as postulated by Pistor are indeed the perceived strength of harmonization of laws.

In all, harmonisation of secured transaction laws between Nigerian and Cameroon using a model law like the UCC Article 9 will not certainly suffer from the disadvantages opined by Pistor since Article 9 is not only a standard and model law, but Article 9 remains the most developed law in the field of secured transactions. The questions to be answered are whether the compatible elements of Article 9 can be transplanted successfully in both jurisdictions.

5.4. What to Transplant?

When the question of whether it makes sense to effect a legal transplantation has been answered in the affirmative, then the question of what to transplant becomes inevitable. The question of what to transplant depends on several variables between the recipient country and the laws or institutions sought to be transplanted. For example a former communist country that wishes to become a capitalist society: i.e., embracing liberalization and market economy and as well privatizing the formerly government owned economic institutions, may have to first transplant the economic 'structures' that will sustain capitalism and privatization.[1184] The country will first transplant commercial and private laws like property laws, contract laws, company laws that will guarantee protection of properties of the people that are to be acquired either through the privatization of the properties that were formerly state owned properties or through other lawful

[1184] In this regard, Harmathy opines that the transition from socialist economic system to a market economy requires "the creation and increase of private firms, privatization of state enterprises, bringing about a flexible labor market and creation of a capital market." See Attila Harmathy, The EBRD Model Law and the Hungarian Law in JOSEPH NORTON AND MADS ANDENAS (eds.), EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS, supra footnote 687, p. 199.

means. On the other hand, a capitalist country with commercial and private laws in place that wish to implement a privatization process will only transplant the privatization laws as it already has the economic structures on ground to sustain the privatization process. For example, when Nigeria wanted to privatize some of hitherto government holdings in public companies, all she needed was to enact a Privatization Act to give the privatization process a legal backing.[1185]

According to two scholars who have worked on law reform in the Central and Eastern Europe market economy, Thomas W. Waelde and James L. Gunderson,[1186] legal transplantation or reform is not just about copying codes and statutes, it is much more than that. Legal transplantation in the area of market economy involves two levels of reform, the first level concerns the introduction of the 'founding blocks' of laws that a market economy requires to set up the fundamental capitalist relationship for example ownership laws, contract and company laws. These laws guarantee that people's properties rights are protected and they are the most important for a reform from communism to capitalism. Beyond the guarantee, the second level will be to guarantee that there are regulatory frameworks or social safety nets to monitor and restrain the greed in the economic activities; these regulatory laws like the competition laws, consumer protection laws and labor laws make sure that society is protected from the economic activities of the entrepreneurs. Although one can argue that Waelde and Guderson's experience with legal transplantation was with former communist Central and Eastern European countries whose legal system of communism was totally different from the western world- capitalism, thus

[1185] See Privatization and Commercialization Act of 1988, Bureau of Public Enterprises Act of 1993 and the Public Enterprises (Privatization and Commercialization) Act of 1999.
[1186] See Thomas W. Waelde, James L. Gunderson, Legislative Reform in Transition Economics: Western Transplant – A Short – Cut to Social Market Economy Status? 43 International and Comparative Law Quarterly 347; see also Frederique Dahan, Law Reform in Central and Eastern Europe: The Transplantation of Secured Transactions Laws, European Journal of Law Reform, 2 Eur. J. L. Reform (2000) p. 369 at 374 available at < http://heinonline.org/HOL/Page?handle=hein.journals/ejlr2&div=29&g_sent=1&collection=journals#379 >; last visited on the 19th of March 2011.

necessitating legal reform from the scratch (from communism to capitalism); however, their exposition on how to introduce reforms to a legal system in form of legal transplantation is apt in this case. Their postulation serves as a check lists in the proposed legal transplantation of the compatible elements of Article 9 to Nigeria and Cameroon although both countries are already capitalist countries.

Although, Nigeria and Cameroon already operate a market economy and consequently have in place the founding blocks of laws that hold a market economy like property laws that guarantee ownership, contract and company laws, but the social safety nets laws or the institutional mechanisms to enforce the regulatory laws are too weak and the regulators do not instill confidence that the peoples' economic rights will be protected at critical times. For example, as have been examined in the chapters 3 and 4, both the enforcement of a security interest and consumer credit protection mechanisms in Nigeria and Cameroon are still weak resulting in general apathy and lack of confidence in engaging in secured transactions by the secured party and the debtor. Consequently what shall be transplanted will not only be the compatible elements of Article 9 but other necessary structures that will make Article 9 work efficiently in Nigeria and Cameroon. This issue will be analyzed further in the course of this research on the changes required to effect a legal transplant of Article 9.

5.5. The Changes needed for the Legal Transplantation of the Compatible Elements of Article 9 to Nigeria and Cameroon

Going by the present great disparities in secured transactions laws of Article 9 on one hand and that of secured transactions laws both of Nigeria and Cameroon on the other hand, it goes beyond a mere wish or dream to have the compatible elements of Article 9 transplanted in Nigeria and Cameroon. Having examined in the foregoing paragraphs some of the great advantages that await Nigeria and Cameroon upon successful legal transplantations, the stage is set to analyze the challenges to the legal transplantations. The sub-topic will also discuss what Nigeria and Cameroon may possible do to overcome the challenges with a view to having a successful legal transplantation. To some, it may sound contradictory and hence defeats the grammatical meaning of words to say that changes need to be done to Nigeria and Cameroon to have the 'compatible' elements of Article 9 transplanted to both jurisdictions. Compatibility here does not mean that no more work is needed to be done before the transplantation: it means that with some social, legal, cultural and economic modifications in the both societies, these 'compatible elements' can fit and work well in both jurisdictions.

However, it requires the political, legal, social, economic and cultural will from the stakeholders i.e. both the government and the industry practitioners to effect changes in many aspects of both societies to make Article 9 transplantable.[1187] It should be noted that all the changes are interwoven and may intersect one another. For example, a legal change to enact laws to establish and regulate repossession companies can also be an economic change depending upon which side one is examining it. The establishment of a repo-company is not only a legal issue but an economic issue because of economic implications to the country in terms of job creation and the positive impact on the economy.

[1187] See Anthony Duggan and Michael Gedye, Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change, supra footnote 27, pp. 655 and 678.

Considering that Article 9 is to a very great extent a crystallization and standardization of the evolution of a long economic, social and cultural traditions of the American society that have spanned over 200 years in the area of secured transactions, it will be a failed mission to transplant Article 9 without making necessary changes to accommodate the sudden transformations in the area of secured transactions. On the other hand, Nigerian and Cameroon emerging economies do not have the luxury of time to pass through such a long process of slow evolution and this necessitates the need for transplantation. Writing on a similar need and justification for transplantation of secured transactions to the Central and Eastern Europe, Frederique Dahan opined that *"because transition economies cannot afford and do not wish to go through the same process of slow and tentative development as the developed economies did in the past in order to achieve their modern legal and regulatory structures, they must to a large extent import them."*[1188]

It should be pointed out that the changes suggested in this regards are by no means exhaustive. Normally it is expected that as the newly transplanted laws begin to operate, there will be need for more changes which shall be effected as the need arises. Again, these changes suggested are not cast in stone; it could be amended or revised to bring it in conformity with the full effects of the transplanted laws. What is important at the end of the day is that the transplanted laws become operational and as efficient as in the origin country – United States.

It is against this milieu that this research will consider the all the necessary changes required both in Nigeria and Cameroon societies for effective legal transplantation of the compatible elements

[1188] See Frederique Dahan, Law Reform in Central and Eastern Europe: The Transplantation of Secured Credit Transactions Law, supra footnote 1186, p. 372.

of UCC Article 9. It is expected that the legal transplantation to both countries will set in the motion for possible harmonization of the secured transactions laws in both jurisdictions in this regard. These changes will be discussed below.

5.5.1. Legal Changes

It is easy to opine as follows: “copy and paste;” i.e., copy the provisions of Article 9 and enact same into law in Nigeria and Cameroon and the legal transplantation is completed. This postulation may not work in view of other legal prerequisites that must be implemented before a statute like Article 9 will work effectively in Nigeria and Cameroon. In other words, there should be a legal ‘surgical operation’ to remove all legal impediments that will hinder the efficient operation of transplanted compatible elements of Article 9. First and foremost, it should be determined what the compatible elements of Article 9 that would be transplanted are?[1189] This is because the determination of what are to be transplanted is germane in knowing what changes are to be made to the legal system. For instance, if Article 9 enforcement mechanisms[1190] are to be transplanted to Nigeria, then all the decisions of the Supreme Court in Nigeria that have previously decided that self-help is not part of Nigerian law and is despicable will have to cease to be good law and will be overruled by the new transplanted legislation or overruled in a subsequent judgment of the same court. Again, if Nigeria would adopt the concept of expanding the personal property that can be used as security interest by a debtor, then all the chastisement,

[1189] The continuous use of the phrase, ‘compatible elements or features of Article 9’ all through this work may have kept the reader in suspense of what this translates to in practical terms. If this is the case, then the reader may not have to wait longer to know what it means, the compatible elements is unraveled in pp. 548 – 552 infra on the sub-topic on the recommendations and suggestions on what parts of Article 9 that can be transplanted to Nigeria and Cameroon.
[1190] Here Article 9 enforcement machinery would encompass both private and public forms of enforcement like the self help repossession or enforcement pursuant to judicial process.

arrest and prosecutions of sacked bank executives on whimsical charges of giving unsecured loans would have to abate.

Closely connected to the success of Article 9 in the United States is the presence of a bankruptcy law which gives bankrupts the opportunity to start life all over again by discharging the dischargeable debts of the bankrupt without stigmatizing the person and also provides for the reorganization of businesses with a view to helping the businesses repay their debts. Consequently for a successful implementation of transplanted Article 9 to Nigeria, the Bankruptcy Act which tends to criminalize and stigmatize bankrupt persons[1191] has to be amended and the arrangement and compromise provisions CAMA reformed. No right thinking entrepreneur will want to venture into any enterprise when there is always the risk of failure, and the consequences of such failures may spell doom for the person in holding responsible positions in the society. Many factors may contribute to the failure of a business ventures despite the assiduousness of the entrepreneur, it is more worrisome in Nigeria because of the breakdown of infrastructural facilities that could have contributed immensely in helping businesses to succeed. Punishing an entrepreneur for trying unsuccessfully to contribute to growth of the economy, will demoralize and deter other genuine entrepreneurs and this will hinder the growth of the economy. However, this research does not recommend that the windows of the discharging a debtor's debt should be wide open even for persons who recklessly set out to squander credit obtained from creditors. Drawing insight from the United States Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, the wheat should be shifted from the chaff and accordingly, genuine debtors should be given the opportunity to start life a second time without the legal disabilities hanging on their heads like the sword of Damocles and businesses

[1191] See chapter 4 on the stigmatization and criminalization of bankrupt persons in Nigeria.

who are distressed but have the capacity to repay their debt if given more moratorium should be reorganized.

Another issue is the legal machinery for the setting up of specialized institutions necessary to implement Article 9. Going back to the issue of self-help repossession, if it is transplanted in Nigeria and Cameroon, it is clear that there are neither professional repossessor companies that could enforce repossessions civilly and in the orderly manner as it is done in the United States,[1192] nor any law that is regulating such companies. Laws should be enacted that will properly regulate repo-companies considering that the act of repossession can be delicate and if not handled properly with the professionalism it deserves it can lead to breach of public peace and violence. This is one area that must be regulated and monitored with much care, as situations abound in Nigeria where overzealousness in performing one's duties has marred the tasks assigned leading to the public revolt against the excessiveness of such person(s). This research concedes that the establishment of private repossessor companies with the powers given to them as in the United States may be one area that may generate a lot of conflict and backlash from the society due to experiences of some people in the hands of some of the law enforcement or quasi-law enforcement agencies.[1193] Even the Nigerian Police Force with all its acclaimed trainings has

[1192] In the United States, there are several hundreds of repo. companies that a secured creditor can use. In California alone there are more than 13 repo. companies listed which can provide efficient services to the secured creditor, some of the companies are: Wm Maloy Co. of 241 S. Loara Anaheim, CA 92802; Angeles City Towing of 13209 Paxton Street Paicoma, CA 91331; American First Asset Recovery Inc. of Berth 204 Anchorage Road, Wilmington CA 90744, the full list of the repo companies is available at < http://www.quickrepo.com/repo-companies/California.php >; last visited on the 22nd of March 2010.

[1193] Example is the Lagos State Traffic Management Authority (LASTMA), (a government agency, made up of individuals, who has no special training as Police or other law enforcement agencies) whose duty is to direct traffic in a congested city like Lagos Nigeria has suddenly become a Police Force on its own, arresting drivers and extorting bribes from them instead of charging traffic defaulters to court. The situation of LASTMA official high-handedness and extortion has become so bad that the bus drivers and other cannot bear it any longer. This made the bus drivers in Lagos to go on withdraw their busses on the road and embark on demonstration to protest the extortion and high-handedness of LASTMA officers on the 12th day of April 2010. See The Sun Newspapers of the been in most cases unnecessarily brutal in carrying out their duties, thereby infringing on one's human rights. However with proper scrutiny and regulations[1194] and award of damages to the debtors for inappropriate or unlawful repossessions, their excessiveness will be put in check. Apart from the repo-companies, there is also need to set up laws that will guide the formation and regulation of other specialized industries that will operate the new secured credit law in Nigeria and Cameroon.

Again, the laws on enforcement of secured transactions in Nigeria and Cameroon will be revised to make for efficient enforcement of securities by the secured creditor.[1195] The civil procedure rules of both countries especially Cameroon must be revised and the impediment to speedy enforcement expunged from them. In Cameroon, there should be private option of the enforcement of security interest which shall complement the court assisted method provided in the law. This law may entail not only the speedy enforcement of secured credit transaction laws but generally the speedy enforcement of all laws in both jurisdictions. The above list is not exhaustive. It only gives an idea of what legal changes need to be made for the transplanted compatible elements of Article 9 to work well in both jurisdictions.

5.5.1.1. Economic Changes: Lowering of the Interest Rate

The whole discussion on the importance of a new law for secured credit transactions is that credit will be made available to a larger percentage of the society either on a consumer or business

13th of April 2010 available at < http://www.nigeriamasterweb.com/paperfrmes.html > last visited on the 13th of April 2010.

[1194] The scrutiny and regulation of the activities should be done by a government regulatory agency who will oversee the work of repo-companies. The scrutiny and regulation will include but not limited to setting prerequisites for registering a company as a repo-company, registration, training of the members on the need to be civil to debtors as well as threat of sanctions of de-registration of erring repo-companies.

[1195] See supra chapter 3 for the discussion on speedy enforcement of secured transactions.

finance purposes. Whether it is for consumer or business financing, the bottom line is that credit is accessible to the society and this ultimately leads to growth and development of the economy. Since the economy is the ultimate beneficiary of this credit, it is fair and does make sense to effect some economic changes for the legal transplantation of the Article 9. Economic changes herein include the lowering of the high interest lending rate.

For Article 9 to be transplanted effectively in Nigeria and Cameroon there is need to reverse some economic policies of the government in both countries. One of such policies is the interest rates banks charge on credit facilities advanced to their customers. In its simplest form, interest rate is the percentage price a borrower of money pays to the lender in return for the use of the borrowed sum which is usually the percentage of the principal sum payable for a one-year period.[1196] The bank's interest rate in a country determines to a great extent the ability of a consumer debtor to repay the loan. A consumer borrower may be constrained to forgo borrowing where the consumer may not be able to repay the principal sum and its high interest rate from his earnings. On the other hand, in business financing, the cost of credit which includes the rate of interest is one of the issues to be taken into consideration in deciding the price of the goods or services. Consequently interest rate has a direct correlation to the prices the society pays for goods or services. Where the interest is high, an entrepreneur may nevertheless borrow money but will pass the interest alongside with other cost of production to the price of the goods in the market. This will invariably result in high prices, inflation and economic downturn with rippling effects in the society. Also the high rate of interest rate is one of reasons for companies closing down in Nigeria. It is estimated that about 820 manufacturing companies have closed between 2000 and 2009 in Nigeria due to various factors including high interest rate and lack of long term

[1196] See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 888.

credit.[1197] Interest rate affects investments, inflation and unemployment. High or low interest rate is a monetary economic policy of the government and it is regulated by the government through the country's Central Bank or other departments or agencies designated for such purposes.

In Nigeria Central Bank of Nigeria gives the ceiling for lending interest rate a commercial bank can charge from its customers. The ceiling rate differs from one sector of the economy to another sector.[1198] However the average lending interest rate from banks to their customers for the sector was around 22% as at 30th of July 2010. Records of the lending rate from Deposit Money Banks to their customers are published periodically by the Central Bank of Nigeria the last being the record of the interest rate in July 2010.[1199] Indeed the interest rate was cut down by the Central Bank to enable banks lend money to their customers.[1200]

In Cameroon monetary policy decisions is taken within the framework of the Central African Region by BEAC[1201] which is unified under a regional grouping known as Economic and

[1197] According to the President of the Manufacturers Association of Nigeria, Alhaji Bashir Borodo, "aside from the problems of energy, other challenges faced by manufacturers have been compounded in the last 24 months by unfavorable terms of credit to the [manufacturing] sector. Manufacturers continue to groan under the high interest rates and lack of long term credit." See Vanguard Newspapers of 24th July 2009 with the title 820 Manufacturing Companies Close Down in 9 years, available at < http://allafrica.com/stories/200907240878.html >; last visited on the 8th of April 2011.

[1198] The sectors of the economy regulated are agriculture, mining and quarrying, oil and gas, manufacturing, real estate and construction, general commercial, mortgages, transport and communication, finance and insurance and government.

[1199] The last lending interest rate of all the Deposit Money Banks to their customers in Nigeria can be found on the Central Bank of Nigeria website at < http://www.cenbank.org/OUT/2010/PUBLICATIONS/BSD/INTEREST%20RATES%20AS%20AT%2030TH%20JLY%202010.PDF >; last visited on the 23rd of February 2011.

[1200] See Thisday Newspapers of April 9 2009, with the caption 'Nigeria: CBN cuts Interest rates to boost lending' available at < http://allafrica.com/stories/200904090376.html >; last visited on the 23rd of March2010.

[1201] As stated earlier, BEAC is the acronym for Banque des Etats de l'Afrique Centrale in French or Bank for Central African States in English, it is situated in Yaoundé Cameroon and it is the Central Bank for the following countries Gabon, Equatorial Guinea, Cameroon, Central African Republic, Chad and Congo Republic. The bank issues a single currency (CFA franc) and defines monetary policy for these countries. See Afrique en ligne of 29th of October 2009 with the caption Cameroon: BEAC Governor to remain at post temporarily, available at <

Monetary Community of Central African States (CEMAC),[1202] but the interest rate which commercial banks charge on extending credit facilities to the citizens is regulated by the Ministry of Economy and Finance. The Bank's lending interest rates is 22% having being increased from 17%.[1203] This high percentage of interest rates are affecting the propensity of people to borrow money from the banks and also driving both foreign (especially those foreign investors who may want to source funds locally) and local investors away from investing in Nigeria and Cameroon. According to the United States Doing Business report of Cameroon, "*Foreign investors are able to obtain loans on the local market, but usually prefer to borrow offshore due to very high domestic interest rates and the unavailability of long-term capital in the domestic market.*"[1204]

When one juxtaposes these interest rates in Nigeria and Cameroon to the average interest rates of 5% - 7% for secured credit and 9% - 11% for unsecured credit charged by most banks in many states in the United States either on mortgages, credit card or other loan facilities to customers, it then becomes clear why there are more people in the United States who are ready and willing to take either consumer or business credits from financial institutions than in Nigeria and Cameroon. Without many borrowers and lenders, Article 9 would not have been a success story in the United States, and the intermediate industries[1205] that live on the Article 9 would have become extinct.

http://www.afriquejet.com/news/africa-news/cameroon:-beac-governor-to-remain-at-post-temporarily-2009103037277.html >; last visited 23rd of March 2010.

[1202] See Aloysius Ajab Amin, Developing a Sustainable Economy in Cameroon, p. 294 available at < http://books.google.com/books?id=0yewbFW06aYC&pg=PA289&lpg=PA289&dq=cameroon+banks+interest+rates&source=bl&ots=g2WIGyOWmT&sig=_QMoS6-x6bfDt93ZN7S8CR0FK48&hl=en&ei=sn-pS_ijOo6gsgOPv_SYAw&sa=X&oi=book_result&ct=result&resnum=8&ved=0CCkQ6AEwBw#v=onepage&q=cameroon%20banks%20interest%20rates&f=false >; last visited on 23rd of March.2010.

[1203] Id. p 294, see also Armel Kouassi, Tennifer Apkapuna and Henok Soededje, Cameroon, p.24 available at < http://fic.wharton.upenn.edu/fic/africa/Cameroon%20Final.pdf >; last visited on the 24th of March 2010.

[1204] See Armel Kouassi, Tennifer Apkapuna and Henok Soededje, Cameroon, supra footnote 1203, p.39.

[1205] Repo. companies, Field warehouse companies, Trust receipt companies, Floor-plan Companies.

It therefore becomes imperative that there should a change of monetary policies of the government of Nigeria and Cameroon to reduce the interest rates charged by banks on loans to customers to encourage both consumer and business finance. With the apathy of customers to borrowing arising out of high interest rates among other reasons, legal transplantation of Article 9 in Nigeria and Cameroon will be an exercise in futility, not producing the desired results economically.

5.5.1.2. Social Changes: Corruption, Mismanagement of Resources, and Lack of Corporate Governance Culture

Social changes relate more to the changes the society and individuals rather than the government will make to ensure the effective legal transplantation of Article 9 to Nigeria and Cameroon. Social changes in the context of this research mean behavioral patterns of both natural and artificial persons in the society, whose actions may negatively affect the successful workings of the transplanted Article 9.

Where a company accesses a credit facility from a bank, the reasonable expectation from such company is that the company should apply such funds for the purpose for which it was borrowed. This ensures that the companies' operations are enhanced, more production or services are undertaken for the good of the economy and the company makes more profits from which it repays the loan. But where the credit is not used for the intended purpose for which it was accessed; either for the reasons of mismanagement of resources, corruption, fraud or lack of good corporate governance, then the credit has been mismanaged or misappropriated and the continued survival of the company is at risk.[1206]

In the above scenario, corruption, fraud and mismanagement of the resources of the company produce the same result. A company whose officers or directors engage in either mismanagement of resources, fraud, corruption or lack of corporate governance is on its way to insolvency and this has implications on the staff, secured and unsecured creditors of the company, and the society in general. Although these factors have been part of the major afflictions of the companies in Africa, the companies in the western world are also not immune from this scourge. The fall of ENRON and the enactment of Sarbanes-Oxley Act of 2002 were as a result of lack of good corporate governance, misappropriation and misapplication of the resources of the company[1207] and the deliberate cover-up of the true state of the company by its auditors – Arthur Anderson.

Whilst corruption, fraud, mismanagement of resources and lack of corporate governance principles are mostly endemic to big corporations and multinationals, mismanagement of resources and lack of managerial competence afflict SME's. This is because many SME's are owned and run by sole proprietor, family members or close partners where members take part in the management of the enterprise. So accountability and probity amongst the partners or owners of the enterprise are fairly guaranteed; however what usually bring such enterprises down are

[1206] Whilst mismanagement may be as a result of incompetence of the officers, corruption or fraud is a deliberate effort aim at stealing the resources of the company.

[1207] Apart from ENRON, other companies in the western world have suffered same fate and enmeshed in scandals that forced them into insolvency and consequently wound up- Tyco International, Adelphia, Peregrine Systems, WorldCom are some of the companies that have been wound –up on ground of insolvency.

mismanagement of resources and bad business decisions which arise mainly due to incompetence and lack of managerial acumen amongst the owner(s) of the enterprise.

In Nigeria and Cameroon, several private, public limited liability companies and government owned companies have ceased to exist due to corruption, fraud, mismanagement of resources and lack of corporate governance.[1208] Where companies cease to exist for the above reasons, creditors hardly recover their credits and most secured creditors consider this factor in fixing the high interest rates for lending, and also demanding for higher value of collateral as a guarantee in event of default or bankruptcy. This undercuts the aim of this thesis – making credit available for wider number of people on more favorable terms.

In conclusion, the changes required in this area are to eschew corruption, fraud, mismanagement of resources of the company and in its place to ingrain the corporate governance principles in the management of the corporations. For micro, small and mid-scale enterprises, good governance must be enthroned; the managers must not mismanage the resources of the enterprises and must engage the services of qualified professional managers as soon as the enterprise has the resources to pay for such services. This will ensure growth and development of the economy.

5.5.1.3. Technological Changes

Technological changes entail being computer savvy and all other technological processes in this contemporary age. Technological changes in Nigeria and Cameroon generally, are not only

[1208] Public limited Liability companies like Golden Guinea Plc, Consolidated Breweries Limited, Progress Bank Plc, Nigerian Airways, Nigerian Telecommunications, Imo Modern Poultry Farms, Albraka Airlines, Bellview Airlines, are just a few of the companies that have ceased to exist due to mismanagement and corruption. Indeed mismanagement and fraud were the major reasons of government privatization of its shareholdings in major corporations in Nigeria. See also the assertion by Manufacturers Association of Nigeria that about 820 manufacturing companies closed down in Nigeria between 2000 and 2009 in supra footnote 1197.

necessary for the implementation of transplanted compatible elements of Article 9, but also essential in business transactions in the modern-day commerce. Whilst cash economy is still the bedrock of the Nigerian and Cameroonian economies, [1209]credit economy has taken over in the many advanced countries of the world.[1210] Again although there has been the introduction of debit card system by banks in Nigeria,[1211] its use is limited to withdrawal of cash from automated teller machine. Most sellers and service providers[1212] in Nigeria do not have the facility to receive payment through debit or credit card yet. As against this situation in Nigeria and Cameroon, most of the business transactions in the western world are now conducted by debit or credit cards even when the purchase is made inter parties within a country. For most businesses that are transacted across national boundaries, almost all of them are done on the internet, there is

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[1209] People in Nigeria and Cameroon still pay cash for most of their purchases for goods and services. Most cars both brand new cars and fairly used cars (second hand cars) are purchased with cash in both jurisdictions. Apart from cash, some sellers may demand for bank draft (and not the buyer's check) where the amount involved in big to carry cash. For example where one wants to buy a real property that may cost millions of Naira (Nigerian currency) and CFA (Cameroonian currency); the seller may demand that the buyer pays with a bank draft.

[1210] According to Steven Finlay, "For many people in modern society credit has become an integral part of everyday life. [….] towards the end of 2000s, the American public has a combined debt of more than $13trillion. Of this, about $10.5 trillion was accounted for by mortgages and other lending secured against residential property. The remaining $2.5 trillion was mainly in the form of credit cards, personal loans and hire purchase agreements (The Federal Reserve Board 2008, p.102). To put these figures in perspective, the entire gross domestic product of the US in 2007 was $14.1 trillion. Personal debt in the US rose steadily in real terms between the early-1980s and the late-2000s. At the start of the 1980s the average American had total debt equal to around half their annual income. By the late -2000s this had risen to almost twice annual income. A similar pattern of growth in personal debt has also occurred in the UK, parts of Europe and many other regions." See Steven Finlay, Consumer Credit Fundamentals, supra footnote 1123, pp. 2 – 3. See also Tibor Tajti, Viehweg's Topics, Article 9 UCC, the "kautelarische Sicherheiten" and the Hungarian Secured Transactions Law Reform, supra footnote 65, p. 93 – 131.

[1211]In Nigeria debit card was introduced not too long ago, debit card came into existence on or about the year 2000 and as at year 2010, and as a result now almost every bank account holder has a debit card or has access to obtain a debit card from ones bank. According to Olatokun and Igbinedion, as at March 2006, two million debit cards have been issued by 13 banks to their account holder customers in Nigeria. The introduction credit card was on or about in the year 2007 and as at 2010, credit card is available to about 10% of bank account holders. Bank's criteria for giving out credit card to bank customers are stringent and this ensures that only credit worthy customers receive bank credit cards. It is usually giving to upper level workers (both private and public workers), whose salaries and other entitlements meet a certain threshold set by the bank; or business men and women whose monthly turnover meet a certain threshold or high net worth individuals like politicians, pastors, diplomats. See Wole Michael Olatokun, Louisa Joyce Igbinedion, *The Adoption of Automatic Teller Machines in Nigeria: An Application of the Theory of Diffusion of Innovation* in ISSUES IN INFORMING SCIENCE AND INFORMATION TECHNOLOGY Volume 6, 2009 available at < http://pdfcast.org/pdf/the-adoption-of-automatic-teller-machines-in-nigeria-an-application-of-the-theory-of-diffusion-of-innovation >; last visited on the 11th of September 2010.

[1212] With the exception of some five star hotels in Nigeria like the Transcorp Hilton Hotels Abuja, Sheraton Hotels in Abuja and Lagos, International Conference Hotel Abuja and few others.

hardly any business transaction one cannot conduct on the internet: from buying personal properties on the internet by visiting popular sites and shops like e-bay, Amazons, Best Buy Stores, Office Depot, hp, dell to making reservation and payments for airlines, busses, trains, accommodations, the list is endless.

Merchants are not left out of the technological advancements, businesses spanning over hundreds of millions of dollars are conducted through the internet, funds are transferred through the banks by means of electronic telegraphic transfer and wire transfer. Bank guarantees and bill of lading, letter-of-credits, promissory notes, and confirmatory notes are sent and received through the internet by means of scanned documents, attachments to e mail, fax messages. The world has really become a global technology village and these technological advancements impact on every aspect of humanity, especially in the laws and ways of conducting businesses across border, consequently Nigerian and Cameroon, indeed other African countries must adjust and become technologically savvy otherwise, they will be left out.

In the area of secured transactions, Article 9 is replete with provisions that bring to the fore the importance of technology in our modern day commerce, filing and searches are conducted electronically using the computer search engines, the provisions of electronic chattel paper is also instructive in this regard. This research has advocated for Nigeria and Cameroon to transplant the Article 9 computerized filing system. The computerized filing system can only work well where the legal practitioners and other staff of the filing office have the technological know-how to use the filing system. This leads credence to technological changes that are advocated here. A sure way to achieve this would be to require all legal practitioners and staff of the filing office in both jurisdictions to undergo some courses in computer studies.

Technological advancement is sine qua non with literacy[1213] and also with a minimal level of western education. One cannot be technologically advanced when one is illiterate and the literate level of people in Nigerian and Cameroon societies are comparatively lower to other western world although Cameroon has a one of the highest literacy level in Africa.[1214] The low level of literacy and uneducated people in African societies especially in Nigeria is also attributed to many factors amongst which the underdeveloped nature of societies and the poverty level in the societies which has prevented some families from sending their children to schools. However whatever may be the reason of low level of literacy and education amongst the societies in Nigeria and Cameroon should be decisively dealt with to enable the people to acquire technological knowledge otherwise the rest of the world of today will leave the Nigerian and Cameroonian societies' centuries behind.

5.5.1.4. Cultural Changes

Cultural changes here refer to the cultural stereotypes of the people's apathy in borrowing money from banks. These are the negative perceptions people have as a result of the years of perceived discriminatory practices of the banks in cutting off access to credits to ordinary citizens. The reason for the lethargy of people to accessing credit from banks can be summarized under the following three headings: (a) the high lending interest rate being charged by the bank which the

[1213] Literacy is defined as being able to read and write a language and also being knowledgeable and educated. See Bryan Garner, (ed.), Black's Law Dictionary, supra footnote 3, p. 1017.

[1214] Cameroon's literacy level is 68% (male literacy is put at 77% while female literacy is put at 59.8%), supra footnote 1203, p. 8.

people perceived as being too usurious;[1215] (b) the insistence on real property collateral by the banks; (c) the unsympathetic and uncompromising stand on the banks in foreclosure and disposition of collateral in event of default of repayment even though there were 'legitimate' predicaments of the debtor warranting the default.[1216] This list is endless as most people have different though connected reasons to loathe getting credit from the bank. This has made the bank the last and unwanted recourse to seek for credit. A consumer debtor in Nigeria and Cameroon will exhaust all other avenues to get credit from friends and relations and will go to the bank only when they cannot help. Regrettably, the success story of the 'esusu' in Nigeria and 'njangi' in Cameroon are all traceable to this apathy to bank loans by the people. A spillover of the apathy has affected even the micro-credit financial institutions especially in Nigeria. A consumer debtor's apathy to the conventional commercial banks credit facilities has beclouded his perceptions of the micro-credit financial schemes. Whilst the first ground has been discussed earlier, the second and third grounds of negative stereotypes will be discussed together.

Before the inception of banking, the Nigerian and Cameroonian societies agreed that collateral is a sure way for a creditor to secure his loan. Nevertheless, the insistence of banks on real property collateral which are in most cases beyond the reach of the consumer debtors and micro, small and mid-scale businesses evoke negative perceptions of borrowing from the minds of the people. Although right from time, debtors have been offering real property as collateral for loan in pledge of real property; however there are differences between the pledge of real property under

[1215] High lending rate has been discussed under economic changes in this chapter. See supra pp. 431 – 435.

[1216] These are the three major reasons of people's apathy to borrowing from banks from the interviews of about 25 small and mid-scale entrepreneurs interviewed in the course of this research. These interviews were carried out from December 1st 2009 to December 20th 2009 on market women and other artisans. Again, there is video interview of small and mid-scale entrepreneurs in Cameroon on Njangi and the reasons for opting for njangi instead of borrowing from banks and other financial institutions. See Njangi –Women and Micro Banking System in Cameroon, A FaraFina – TV production available at < http://microbankfinance.com/njangi-women-and-micro-banking-system-in-cameroon-www-deinvideofilm-de.html > last visited on the 23rd of March 2011.

the indigenous pledge system and the mortgage of real property as collateral demanded by banks. The big difference is that while there is the possibility of foreclosure by banks on the collateral upon default of repayment, there has been the concept of ‘redeemability’ of pledged land under the indigenous pledge system. Most people are not comfortable with the idea of foreclosure of the collateral (especially real property collateral) by the bank even upon default of repayment obligations. This is principally due to the fact that land is associated with life, and people hold their land sacred as it is the source of link with their ancestors. For a bank’s insistence on real property as collateral and the bank’s proclivity to foreclose the land and sell same upon the default of the debtor is seen as anathema and unimaginable by the people.

Though, an average Nigerian and Cameroonian is committed to repaying the loan when due, but in the unlikely event of unforeseen predicament which has made it practically impossible to repay the loan (examples the death of the borrower, the sudden sickness of the borrower that has prevented the borrower from engaging in the trade or profession which would have yielded the income for the repayment of the loan), the debtor though regrets the breach of contract, subconsciously expect some form of empathy from the lender. Where the secured creditor is a bank, the anticipated sympathy would be a fantasy, instead the bank enforces the provisions of the security to the latter and either forecloses on the collateral or deals with the collateral according to the provisions of the contract to realize its securities irrespective of the ‘genuine’ reason of the default by the debtor. It is obvious that the banks and other financial institutions are not fraternally related to the debtors. The relationship is purely business and in strict business relationships, emotions and fraternity are relegated to the background otherwise business will crumble. These are the obvious considerations from the bank in insisting on implementing the provisions of the security agreement to the later.

Nonetheless, there is the need to strike a balance on this issue. The compromise will predicate on the need for the society to imbibe the cultural changes with a view to removing the premeditated mindset against borrowing from formal financial institutions like banks, and also the need for the banks to take some steps to give the act of lending and borrowing a human face, so as to endear themselves to the hearts of the society. To this end, the bank can work out a rescheduling of debts with the defaulting debtor if the reason for the default is a temporary setback which can be corrected by granting more moratoriums. It is indeed the interest of the bank to grant more moratoriums to their customer because it actually increases their income in the form of interest rates from such loans. Though the banks in Nigeria normally grant moratorium to a defaulting debtor, the problem is that the bank charges penalty for default which is another extra percentage on the loan and adds to the obligations of the debtor. The compromise solution would be to grant moratorium to the defaulting debtor on the same terms (i.e., on the same interest and without penalty for default) as the subsisting loan to enable the debtor recover from his predicament and recommence the repayment of the loan facility.

The above suggested compromise with the earlier discussions on lowering the interest rate are some of the ways to give secured transactions a human face, and to change the mindset of the society towards taking credit from the formal financial institutions. It is inevitable that when these reforms are made by the banks, the people's perception to borrowing from the banks will change and this will result to the much needed cultural changes. At the long run, the indices of the measurement of the success of the legal transplantation of Article 9 to Nigeria and Cameroon will be the increased number of business and consumer borrowings, on a wider range of personal properties, and at relatively less stringent conditions with its positive impact on the growth and development of the both economies.

5.5.1.5. Political Changes: the Political Will to effect a Legal Transplantation

It is not a coincidence that the political change is reserved as the last change required to successfully transplant the compatible elements of Article 9 to Nigeria and Cameroon. Obviously, political change is about the most important change as legal transplantation would not be effected in the absence of political changes even if all other changes are in place. The political change here relates to the political will[1217] to effect a legal transplantation. As already stated earlier, during the period of colonial rule in Nigerian, it was very easy to effect legal transplantation using the laws of the colonial masters - the English law - this was because the colonial masters were in control of government and power and thus had the political will to decide which laws govern any issue in Nigeria. But with independence and democracy in Nigeria, law making have assumed a different dimension. Nigeria practices a presidential system

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[1217] 'Political will' has been severally defined by different people but has yet remained an ambiguous concept. 'Political will' is stated to be a concept 'which is never defined except by its absence.' See L. Hammergren, Political Will, Constituency Building, and Public Support in Rule of Law Programs, (1998) available at: < http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PoliticalWill.pdf > p. 12 last visited on the 29th of April 2011. It in concrete terms 'refers to the desire and determination of political actors to introduce and as well as embark on reforms that will bring significant and persistent changes in the society. It is difficult if not impossible to divorce political will from sustainable development [...] political will in a developing country rest in the hands of the government and the ruling political party [....]' see Stephen N. Asek, Political Will and Sustainable Development, available at < http://www.tigweb.org/express/panorama/article.html?ContentID=7659 > last visited on the 29th of April 2011. It has also been defined as and as, 'requiring [...] a sufficient set of political actors with a common understanding of a particular problem on the public agenda genuinely intends to support a commonly perceived, potentially effective policy solution,' see Post Lori, Raile Amber, Raile, Eric, Defining Political Will, Paper submitted to the 2008 Annual Meeting of the National Communication Association ; available at <http://www.allacademic.com//meta/p_mla_apa_research_citation/2/5/5/7/7/pages255774/p255774-2.php>, p. 5 last visited on the 29th of April, 2011.

of government where the role of legislation is done by the legislative arm of the government[1218] and assented to by the president (executive) to become law. The case of legal transplantation of Article 9 to Nigeria will likewise follow the same channel i.e., there must be a bill on secured transactions law[1219] incorporating the compatible elements of Article 9 sought to be transplanted that will be duly passed by both houses of the National Assembly and then assented to by the president. In other words, the legal transplantation of the provisions of Article 9 into Nigeria for example will involve the concurrence of the executive and both houses of the national assembly. These members of the National Assembly come from different diverse political, religious, ethnic, social, economic, cultural backgrounds. Being elected by their people, the members of the National Assembly are primarily elected to represent the interest of their people[1220] in the act of law making. In representing the interest of their people, these lawmakers have opposed the passage of some bills on religious grounds though Article 9 has no religious colorations.[1221]

However faced with the shenanigans that at times confront some bills at the national assembly, one begins to appreciate the expediency of having the political will to withstand the opposing forces that may challenge the legal transplantation. The reasons of the opposition to the law may be trivial and the forces may be religious, social, cultural, and economic. It may just be from

[1218] The legislative arm in Nigeria comprises of two houses, the Senate and the House of Representatives and both are jointly called the National Assembly. See section 4 of the Constitution of the Federal Republic of Nigeria 1999.
[1219] Probably called the Personal Property Security Act or any other name that may be given to the bill by the sponsors of the Act.
[1220]However, there may be other clandestine interest the legislators are representing like banks, insurance, leasing houses or warehousing especially if any of these groups secretly funded the legislator's campaign bills.
[1221] An example is the passage of Child Rights Act in 2003 which some members of the National Assembly objected to the bill because sections 23 and 24 of the bill proscribe marriage to a girl of less than 18 years, some legislators who are Muslims perceived the bill to be anti-Islam as Islam permits marriage to a girl below the age of 18. Sections 23 and 24 were modified before the Muslim law makers agreed to pass this bill. It is good to know that in Nigeria and Cameroon there are no anti-American sentiments. Nigeria copied her presidential system of government from America and also fashioned her Securities and Exchange Commission and the enabling law Investment and Securities Act (ISA) No. 45 of 1999 from the United States. Consequently, this research sees no insurmountable challenge to the path of legal transplantation of the compatible elements of Article 9 especially to Nigeria.

people who hitherto have benefited at the expense of the society under the current unreformed secured transactions laws. For example, if the new law includes consumer credit protection clauses, the banks may want to oppose it because the new law will guard against the banks unconscionable acts and their transactions with debtors may attract more scrutiny from the regulators and courts. Opposition to the reform may come from unexpected quarters like lawyers who are rooted in old English system and are not susceptible to new ideas for fear losing their clients or learning the new ideas. For whatever reasons it is better to anticipate opposition for the passage of the new law and hence, have the political will to deal with it, than to be confronted with it unexpectedly. It will amount to sheer fantasies to expect that a sweeping reform law on the secured transactions that will affect the dominant position of the banking sector, industries that live on the secured credit, registrars of charges and others will pass through the National Assembly without strong opposition. This is the reason for advocating for the political will to withstand such opposition and to ensure that the law is passed to effect the legal transplantation no matter whose interest is adversely affected by it. [1222] Where there is political will, the funds to carry out the reform would not be an issue as the Federal Government of Nigeria could easily provide all the funds needed for the transplantation.

[1222]The advice of Al-Dean of the need to summon the courage to deal with oppositions to reforms is apt in this case. According to him, "It should be understood that many market oriented reforms face opposition from those who benefit from the status quo, those who perceive change as a threat to their interests, or simply those who deem any departure from well established legal tradition is something wrong that ought to be opposed. Accordingly opposition will fight change using all means, including misinformation and sophistry. For reform process to bear fruit and to deal with different forms of opposition policy makers must fully appreciate the drawbacks of the system, they must propose a well studied new system, show the logic behind it, its costs and benefits and then have the courage to stand behind it. Any change aiming at bringing benefits comes at a cost (even psychological one), policy makers should be able to show the overall economic benefits of legislative changes and show that the benefits outweighs whatever costs are involved." See Bahha El-Dean, Privatization and the Creation of Market-Based Legal System, supra footnote 2, p. 132.

The situation is not too clear in Cameroon, the current President Paul Biya has been the president for the last 29 years, having assumed power since 6th of November 1982. The president has practically revised the constitution to accommodate his hanging unto power by providing that a president can be re-elected to serve for a 5-year term in perpetuity.[1223] The scope of this research does not extend to analyzing the legality or legitimacy of his government, but suffice it to say that his continued stay in power is as a result of the influence or control he wields over this Central African Country - Cameroon. The president appoints the Prime Minister and members of the cabinet, while the 180 member of the unicameral National Assembly legislature is elected by the people every five year. However the President can shorten or lengthen the tenure of the legislature.[1224] With the above power of the President over the country and the legislature, it may be easier to summon the political will to pass a law to effect the legal transplantation of Article 9 in Cameroon than in Nigeria if the President is inclined to do so.

Closely connected with the political will power to pass the laws in both countries (Nigeria and Cameroon) there is the issue of harmonization of laws in the areas of secured transactions laws between Nigeria and Cameroon. For Cameroon it may be easy since they already have harmonized laws in most of their commercial laws with other 15 OHADA member countries. Again, they have a single currency with other seven Central African States with a common Central Bank situated in Yaoundé Cameroon. From the harmonization antecedent of Cameroon, it is highly probable that Cameroon will want to harmonise their secured transactions law with

[1223] The Cameroon 1972 constitution provided that for a person can only occupy the post of president for only two terms of 5 years each. When Biya came to power he changed the provision that extended it to 7 years for two terms in 1996. Upon expiry of his tenure he reduced the number of years to 5 years but removed the clause that allowed him to stay for only two terms in 2008. Consequently he can now remain as president in perpetuity as long as he can ‘win’ elections.

[1224] See supra footnote 1203, p. 9.

Nigeria (a country with the biggest market in Africa) for the immense opportunities in commerce and trade that the harmonization will afford her. Most probably, the same may not be said of Nigeria because of the following reasons: the political, economic, religious cultural diversities earlier mentioned which may see members of National Assembly polarised along these diversity lines on an issue. Even though the issue will be of benefit to the interest of majority of Nigerians; opposition may come from some people or groups whose position or interest may be threatened with the reform and possible harmonization. Again, the unique conservative nature of the Nigerian leaders which is a relic of British rule may play a role in hindering the proposed reform and possible harmonization. In such situation, the political will to carry out these reforms for the greater interest of the nation becomes apposite.

In conclusion, there is the need to have the political will power to make the desired changes to enable the legal transplantation of the compatible elements of Article 9 to be made without which even if other changes are effected, the quest for legal transplantation will be an effort in futility.

5.6. Recommendations and Suggestions on the Compatible Elements of Article 9 that can be transplanted in Nigeria and Cameroon

This research has said so much already about legal transplantation of Article 9 to Nigeria and Cameroon especially in this chapter. In particular, the chapter has dealt among other things with the issues of: the concept of legal transplantation; the benefits Nigeria and Cameroon stand to derive in embarking on the proposed legal transplantations; the present challenges that will militate against the successful legal transplantations hence the need to make changes for the smooth and effective legal transplantation. Having examined the above issues, there are two questions that should agitate the mind of the reader. The *first* is whether Article 9 is to be transplanted in its entirety or should the transplantation be selective? While the *second* is whether the transplantation should be gradual or better still be in phases or ‘one off’ transplant? To answer the first question, it is instructive to draw inferences from the views of Cumming. According to him, “*The genius of Article 9 lies in the fact that it reflects the needs of modern business financing and, as such, its basic concepts are universal. This universality was early recognized in common-law provinces of Canada and more recently in Quebec. It would be unreasonable to expect that every aspect of Article 9 will find acceptance in jurisdictions that have legal traditions and public policy choices that differ from those of the United States.*”[1225] This view of Cuming on the effect of transplanting Article 9 in Canadian jurisdiction is true in both jurisdictions. The proposed changes discussed in subtopic above to make Article 9 workable in Nigeria and Cameroon is ipso facto evidence of different legal traditions and public policy considerations between Nigeria and Cameroon on one hand with that of the United States. This research posits that even with the required changes proposed above, Article 9 in its the entirety cannot be transplanted to Nigeria and Cameroon and this informed the choice of words ‘compatible elements of Article 9’ which have been used consistently in this research.

The elements of Article 9 herein that would be compatible to the both jurisdictions are the ‘building blocks’[1226] of Article 9 as have been discussed in chapters 2, 3 and 4 of this thesis. At

[1225] See Cuming supra footnote 1174, p. 989.
[1226]Tajti shares this same position when he opined as follows: “The first, primarily conceptual note is that in applying the preferred comparative method one should try to have a complete picture of any foreign law chosen as a model. It is of utmost importance to identify all the building blocks that make any one secured transactions law successful. The task should then be to ensure that those building blocks exist and work in the host legal environment.”See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 125. This is exactly what this research will strive to achieve.

the risk of repetition, the features are the unitary and comprehensive nature of Article 9[1227] which stated the scope of the UCC Article 9. Again, Article 9 attachment and perfection systems - perfection by possession, control and by filing should be transplanted. The filing system in the United States which has brought about centralized and simplified computerized filing system in each state in America should be transplanted. This will make it easier for filings and searches to be conducted on the assets of the debtor for any encumbrances by potential lenders. Centralized and computerized filing will also remove uncertainties brought about by the presence of several registers for filing and the difficulties associated with manual filings.

Article 9 priority system and the floating lien should be transplanted. It is obvious that the priority rules under the Nigerian and Cameroonian secured transactions laws or bankruptcy laws are inadequate to deal with the new 'specie' of security interests and transactions. Again Article 9 enforcement mechanisms should be transplanted. The problem is that Article 9 enforcement efficiency depends on some other enforcement rules in the United States that is outside of Article 9. The question is whether those other non-Article 9 enforcement mechanisms should also be transplanted? The answer is in the affirmative. It is obvious that transplantation of Article 9 enforcement machinery without the other complementary rules will produce less than satisfactory result in both jurisdictions. Enforcement being one area where the laws in Nigeria and Cameroon are lacking its effects, anything short of the whole Article 9 enforcement 'package' may be insufficient.

Article 9 close links with consumer credit protection laws and bankruptcy laws needs comments here. Though there are few consumer credit protection clauses in the main text of Article 9, the

[1227] See section 9 – 109 UCC.

bulk of consumer protection laws are outside of Article 9 and these laws complement Article 9's consumer finance. This is also the case with bankruptcy law. The question then is whether there should be parallel reforms in Nigeria and Cameroon in the areas of consumer credit protection and bankruptcy so that these laws will contribute to the efficiency working of the transplanted secured transactions laws? The answer is in the affirmative because any transplantation without corresponding reforms in consumer credit protection laws and bankruptcy may lead to an undesirable result.[1228]

On the second question whether the transplantation should be gradual or in phases, this work believes that the transplantation should be in gradual. In advocating that the transplantation be in phases, the research agrees with Tajti that many issues would have to be taken into consideration in planning a reform of this nature namely: the level of economic development, the availability of the industries living from secured transactions in the recipient countries and even the level of computer and technological know-how of the industry practitioners and other segments of the society and also the spread of the of the "security idea."[1229] This suggestion has become imperative due to the transplantation proposed. Whilst Nigeria is ripe for the introduction of certificated and dematerialized securities, same cannot be said of Cameroon which does not have a functional stock exchange at the moment. Also the introduction of the commercial tort claim and health-care –insurance receivables as collateral in both jurisdictions at the moment may be overly ambitious considering the level of personal property collateral existing in both countries presently. Consequently, it behooves on the reformers to know exactly when to introduce which reform to achieve maximal effect.

[1228]The issues of parallel reforms in the areas of consumer protection and bankruptcy laws have been discussed in details in chapter 4 of this work.

[1229] See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 343.

In conclusion having analyzed the general situation of Nigeria and Cameroon that may affect the exportability of compatible elements of Article 9 to Nigeria and Cameroon, and also drawing from the experiences of other jurisdictions like Canada that have successfully imported Article 9 into their jurisdictions, this chapter has answered in the affirmative that yes the compatible elements of Article 9 can be transplanted in Nigeria and Cameroon. This is conditional upon the ability of effecting some certain changes in both societies. It will thus be an exercise in futility to do a transplant without putting the necessary changes in place.

Conclusions

6.1. The Score Card

The evolution of secured transactions in the United States has crystallized in the adoption of Article 9 by all the States and the spreading of the Article's principles to the Canadian provinces, New Zealand, some parts of Central and Eastern Europe and recently also to Australia.[1230] This evolution, spanning almost two centuries has resulted in the availability of credit and thus, has contributed tremendously to the growth and industrialization of the American economy. This trend of process has inspired the central theme of this research and the thesis hypothesis – that credit is good and it is a necessary prerequisite for the development of any economy. From the beginning of 20th century, the proposition that credit is good and is indispensable to human existence galvanized some indigenous societies in Africa to devise a way to source for credit, even though not so much on the basis of business finance but on consumer financing purposes. This resulted in indigenous inventive ways of raising credit before the advent formal banking institutions. One natural conclusion would have been that with the advent of banking institutions and formation of government in post–colonial Africa, the quest to make credit more available in the African societies would have been pursued with vigor. It is therefore puzzling why post-colonial African governments in general - and Nigeria and Cameroon in particular - have ignored this theory of the indispensability of credit. This is so even when Nigeria and Cameroon have been operating capitalist economies since independence. It is even more worrisome because this area - making credit available for the development of the economy - is one of the few areas where governments need not spend much money to develop. All that is needed is for government to provide good legal and economic framework to enable secured financing to flourish. The rest

[1230] For example, the effective computerized filing system of personal properties security interest in Romania is attributable to the Article 9 computerized filing system. Also Article 9 inspired the EBRD Model Law on Secured Transaction which the Central and European countries use in reforming their secured transactions laws.

probably would have been done by the private sectors like banks and non-bank financial institutions which may have exploited the opportunity provided by the government to advance their profitability. Seen in this light, the governments of Nigeria and Cameroon have no defense for the neglect of providing the legal and economic reforms for the availability of credit for most people in both societies at less stringent terms. It would have been a less expensive way to ensure that there is reasonable level of growth and development in the economies of both countries as it is the US. Whilst the research may commend Cameroon to a limited extent for the adoption of the Uniform Act on Securities alongside with other fifteen OHADA member countries in 1998, the commendation may be pyrrhic. The Uniform Act provisions are out of tune with modern day demands of secured transactions.

It is against this insight that this research has looked at the legal impediments to the availability of credit in Nigeria and Cameroon using a successful model which has contributed immensely to the availability of credit in the United States – Article 9 of the UCC – as a benchmark. The aim of this research was to seek ways of importing new ideas into Nigeria and Cameroon that would remove the legal, socio-economic impediments to availability of credit, stimulate the availability of credit and galvanize the use of credit for both consumers and businesses. The expected end result would be to make the lives of the people in both countries better off.

Within the context of the above aim, the work analyzed the secured transactions laws in the three jurisdictions of interest. In general, what was examined was a journey through three secured transactions laws: where the societies were coming from; where they are now and what are the likely expectations of Nigerian and Cameroonian secured transactions laws in the future in view of the proposed transplantations. On the evolution of the three jurisdictions secured transactions laws which was examined in chapter 1, the research discovered that as against the rich history of the United States secured transactions laws, which was characterized with the secured transactions industry practitioners inventing ways to create devices to make credit available for people, there was not much in the evolution of the secured transactions of Nigeria and Cameroon societies. However, the research showed that Nigeria and Cameroon presented a vivid picture of societies that found themselves in a quandary of lack of credit, devised a means to communally help one another with the aim of solving the general predicament facing the society. The result was the creation of esusu and njangi in both countries which was substantially in pari-materia with each other both in form and in content.

Not too concerned with the seeming 'uneventful' past secured transactions histories of Nigeria and Cameroon as they say 'past belongs to the past,' the research devoted chapters 2, 3, 4 of the work to beam the search lights on the present laws of both countries in comparison to Article 9. The research discovered - as already stated earlier - that in the US, the development had culminated in the first comprehensive secured transactions law – Article 9 which has been severally revised and serving proficiently the business and consumer financing needs of a highly industrialized society like the US. Again quite unlike Article 9, there are no comparable comprehensive laws in Nigeria and Cameroon which could sustain such new forms of secured transactions. Among other challenges facing the availability of credit and secured transactions in Nigeria and Cameroon; there has been a mismatch in the collateral requirement by the banks and other financial institutions to what the consumers and other small scale businesses can provide as collateral, the interest rates are way beyond what the debtors can afford, and there are no social or economic safeguards in consumer financing. This, thus resulted in a disconnect between the formal lenders and debtors and have been some of the reasons of society's negative perception of credit in both jurisdictions. In other words, the lack of credit is as a result of the weak legal, economic and social framework in both societies.

It was with these revelations that the research - in a bid to provide solutions to these malaises - proposed the transplantation of some companionable features of Article 9 into laws of Nigeria and Cameroon in order to reform the laws of both countries in this regard. Another reason for the proposed transplantation was to use the same as flagging the process of harmonization of the secured transactions laws in both countries. In view of the profound social, economic, cultural technological and legal differences between the United States on one hand and Nigeria and Cameroon on the other, two things became obvious: *first* not everything in Article 9 could be transplanted, but only the compatible elements of Article 9. Given the differences, this work identified the compatible features of Article 9 that could fit into the laws of both countries in order to have good secured transactions laws that will make credit available and thus improve the economies of both countries. *Second*, it also became clear that even with the compatibility of the features of Article 9 that are sought to be transplanted, there are some impediments to their transplantation to Nigeria and Cameroon. Accordingly, several road blocks were identified by the research that would have prevented the successful transplant of the features to Nigeria and Cameroon. The impediments were not only legal issues alone, but there were other social, cultural, political and technological blockades on the way to legal transplantation of compatible features of Article 9 to both countries. To this end, the research suggested changes that need to be made to make the companionable elements of Article 9 workable in both countries.

6.2. The Future of Nigerian and Cameroon Secured Transactions Laws

Whilst the research into the legal 'transplantability' of Article 9 to Nigeria and Cameroon is an open ended research with its success measured in practical terms, the harmonization of secured transactions laws of countries is a process.[1231] Whereas the quintessence of the transplantation is to have a good secured transactions law in Nigeria and Cameroon which will enable more consumer and business financing, the whole essence of the research is to explore ways of having a successful transplantation that is practicable, workable and will be efficient in serving the interest of secured creditors, debtors and the society. Therefore, no matter how extensive this research is, there are issues that may be germane for a successful transplantation that are quite 'unknown' to the researcher and hence not reflected upon herein. Even some of the hypothesis and proposals developed in the course of this work can only be tested for their correctness in practical terms: i.e., having the compatible elements of the US Article 9 UCC successfully transplanted in Nigeria and Cameroon and working as efficiently as in the United States.

Even after transplantation, more research need be done to fine tune or correct the perceived lapses that may necessarily arise in the system. This would be the work of the regulatory agencies in both countries. Whilst the Central Bank of Nigeria and the Central Bank of Cameroon are best suited to oversee the affairs of the banks, other agencies should be created by the governments of both countries to supervise the non-bank financial institutions and other specialized industries that would exploit the new laws. The aim would be to check the laws regularly to see areas of possible improvement or revisions within the ambit of the framework of

[1231] According to Tajti, 'the harmonization of security interest law differs from the harmonization of most other areas of law because it is a process. While the adoption of the 1980 Vienna Sales Convention has essentially concluded the harmonization of sales law, such result cannot be expected to happen in the field of secured transactions." See Tibor Tajti, Comparative Secured Transactions Law, supra footnote 48, p. 369.

having efficient secured transactions laws in both countries. Thus this is an ongoing research with the probability of changes occurring on any or all the parts of the work provided the changes are aimed at providing a better environment for the transplanted Article 9 to function well; considering that the societies where the laws are transplanted are different in most respects from the society of the origin of the law. In the light of the above, this research may not claim to have achieved its aim until the compatible elements of Article 9 are successfully transplanted to Nigeria and Cameroon and working and then the secured transactions laws of both jurisdictions are harmonized using the transplanted law. Herein lies the uncertainties of the time when the researcher can proclaim **research accomplished**. However the researcher would be contented for now if upon the reading of this work, it stirs into consciousness of people of like minds who may concur as follows: that there is need to reform the secured transactions laws in Nigeria and Cameroon; there is also justification to the use Article 9 as a model law for the reform through the instrumentality of legal transplantation and there are economic benefits accruable to both countries to harmonize their secured transactions laws using the transplanted Article 9 elements.

No matter how well the theoretical research on the transplantation of Article 9 is conducted, the final success of the reform and transplantation largely depend on two variables. *First* is the commitment of the stakeholders to this objective. Stakeholders encompass three broad categories of institutions and persons namely: government (ministry of justice, ministry of economic development or finance, Central Banks of Nigeria and Cameroon, legislators and other department of government connected with the proposed reforms and transplantation); industry practitioners in the field of secured transactions (including legal practitioners, bankers, leasing companies, factors, field warehouse companies and other professionals in this field); and the debtors (consumer and business debtors).[1232] Incidentally, these three broad categories of stakeholders are also the institutions or persons that need to make the required changes discussed earlier to bring about reforms in this field of law. In other jurisdictions that have successfully reformed their secured transactions laws, the commitment of the stakeholders accounted for the success of the reforms. The Australia and New Zealand's enactment of the Article 9 inspired Personal Property Security Act are good examples in this regard.[1233]This research believes that such commitment is needed in Nigeria and Cameroon. Whilst legal practitioners may support the reform, the same may not said of banks which have undue advantages under the old order. To this end, it may well be possible that banks (especially in Nigeria) may lobby against the reform, it is thus in this context that the political will by the government discussed earlier becomes apposite in steering the reform and transplantation process to a successful end.

The *second* factor is the implementation and especially the enforcement of the transplanted Article 9 by the governments of both countries, and the cooperation and willingness of the people to respect, accept and embrace the law in order to give the law a chance to succeed. Interestingly, whilst research can provide the best method of implementation and enforcement of

[1232] The categories of persons stated herein accords with Tajti's view of the broad support a reform should receive. According to him: "[…] no reform could be truly successful without having the support of politicians, academics, judges and eventually a substantial part of the potential addressees." See Tibor Tajti, *The Trento Project: The Way to Rediscover Each Other in Europe and Beyond* in MAURO BUSSANI & UGO MATEI (ed.), OPENING UP EUROPEAN LAW, (Stampfli Publishers Ltd, 2007), p. 148.

[1233] According to Duggan and Gyede, "The Australian and New Zealand experiences tell a similar story about the recipe for successful personal property security law reform. Sound policy arguments alone are not enough. Successful law reform requires a coalition of government, stakeholders and reformers. In Australia, there had been support for reform from within academic circles for many years, but the impetus for change did not come until the Commonwealth Attorney-General enthusiastically adopted the cause in 2005. His intervention provided the political leadership necessary to win over stakeholders and neutralize the anti-reform lobby. In New Zealand, the sequence of events was slightly different, but the end result was the same. There, the impetus for reform came from within the legal profession itself, and this came about at least in part because leading commercial law practitioners were involved in developing the proposals from the outset. In other words, the profession had an ownership stake in the reform agenda and so they did not have to be sold on the reform, as was the case in Australia and England. […]." See Anthony Duggan and Michael Gedye, Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change, supra footnote 27, p. 678.

laws by the authorities, acceptability and obedience to the law by the people is a function of other variables. Whilst acceptability of the law by the people is as a result of people's perception of the law as being good and beneficial for their society, obedience to the law depends on the acceptability of the law and the effective enforcement mechanisms put in place by the authorities to punish violators.

Since the subjective criteria of how the people may perceive the law as a good and beneficial law in order to willingly obey the law may be difficult to measure and project, considering that there are divergent interest in the society, it then becomes expedient that the objective criteria of enforcement is emphasized to actualize the implementation so that the transplanted Article 9 would command obedience from the people of Nigeria and Cameroon. It is only when transplanted Article 9 elements work efficiently in both countries that credit would be available to a greater majority of the people on more favorable terms.

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