Towards Reforming the Legal Framework for Secured Transactions in Nigeria – Perspectives from the United States and Canada

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Abstract

This thesis rests on the presumption that ease of access to credit is the cornerstone of every country's economic development, as no country may have any meaningful economic development if those willing to startup businesses or expand them, cannot obtain sufficient credit to do so.

The sufficient availability of credit to business entities especially the small and medium scale entrepreneurs (SMEs) is interconnected with the nature of a country's legal framework on secured transactions. A modern secured transactions law entails the use of personal property to secure credit, while an unreformed one – like Nigeria's, amongst other shortcomings like lack of public notification system, focuses mainly on the use of real property as collateral. This is however a big problem and quite unsuitable for economic development because most SMEs and other forms of business organizations in Nigeria may not always have sufficient real property collateral to secure credit – and as a result, do not always meet up with credit requirements from banks and other lending institutions. A secured transactions law which allows for the use of personal property as collateral, provides comprehensive rules of creation, perfection, priority, as well as judicial and self-help enforcement channels, creates confidence in lending by ultimately ensuring predictability, which no doubt makes credits sufficiently available for entrepreneurs.

Nigerian secured transactions law lacks the main features of a modern one because it provides no detailed rules (from creation to enforcement) on the non-possessory use of personal property to secure credit. It is not yet fully recognized in Nigeria how much detrimental it is that its secured transactions law is compartmentalized – what inherently makes the system unpredictable and not trustworthy to financiers. The summary effect of all this is that there is no sufficient flow of credit in the economy and this leads to economic underdevelopment. This thesis

therefore seeks to come forward with solutions that might significantly address some of Nigeria's economic problems, especially those that emanate from insufficient availability of credit. In looking for solutions, the thesis takes a critical look at the UCC Article 9, and is of the firm view that its unitary structure could offer a good example for Nigeria to follow in the reform of its secured transactions law. However, rather than rely exclusively on the US law, the thesis also takes a critical look at the Ontario Personal Property Security Act because in many respects, Canadian (Ontario) laws and the linked economic structures used to be closer to Nigeria's than those of the US.

It is therefore the position of this thesis, that through a comparative analysis that points out the commonalities and discrepancies between the two systems, the thesis will analyze those elements of UCC Article 9 and Ontario PPSA that could conveniently be adapted to suit Nigeria's local conditions. The idea is not to suggest the unaltered transplantation of the more suitable version of any one institution or rule, but rather to see why there was a need to, and how the Canadians managed to adjust the US transplants to local conditions – this comparative analysis would hopefully offer valuable tools to the Nigerian lawmakers towards the reform of Nigeria's secured transactions law.

Dedication

To all those who have learned *how* to think freely for themselves as well as resist easy conclusions

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Above all, I thank my BOT friends – a group of intellectuals of which I'm the least qualified.

Iheme, Chima Williams.

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List of Abbreviations

ACA	American Consumers Association
ADR	Alternative to Dispute Resolution
Afr.LR(Comm)	African Commercial Law Report
ALI	The American Law Institute
All NLR	All Nigerian Law Report
Article 9	Revised 1999 Article 9 of the United States Uniform Commercial Code
BC	Bankruptcy Code (United States)
BGB	The German Civil Code
BIA	Bankruptcy and Insolvency Act (Canada)
BOFIA	Banks and Other Financial Instititions Act
CA	Court of Appeal
CAC	Corporate Affairs Commission
CAMA	Companies and Allied Matters Act
CAP	Chapter
CEAL	Center for the Economic Analysis of Law
Cir.	Circuit
CISG	The United Nations Convention on Contracts for the International Sale of Goods (the 1980 Vienna Convention)
CJN	Chief Justice of Nigeria
CSCS	Central Securities and Clearing System
DIP	Debtor-in-Possession
EBRD	European Bank for Reconstruction and Development
ECOWAS	Economic Community of West African States
ERNLR	Eastern Region of Nigerian Law Report
HC	High Court
HCJ	High Court of Justice
JCA	Justice of Court of Appeal
JSC	Justice of the Supreme Court
LFN	Laws of Federation of Nigeria
NAFTA	North American Free Trade Agreement
NCCSL	National Conference of Commissioners for the Uniform State Laws
NLR	Nigerian Law Report
NSCC	Nigerian Supreme Court Cases
NWLR	Nigerian Weekly Law Report
OHADA	Organization for the Harmonization of Business Laws in Africa
OPPSA	Ontario Personal Property Security Act
p.	Page
PMSI	Purchase Money Security Interest
pp.	Pages
PPSA	Personal Property Security Act
s.	section
SC	Supreme Court
SCN	Supreme Court of Nigeria

SCNJ	Supreme Court of Nigerian Judgement
SME's	Small and Medium Scale Enterprises/Entrepreneurs
UCC	Uniform Commercial Code
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USC	United States Code
UTRA	Uniform Trust Receipt Act
WACA	West African Court of Appeal
WRNLR	Western Region of Nigeria Law Report

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Introduction

I. The core reasons for this thesis: A comprehensive reform of secured transactions law and its underlying benefits

First of all, this thesis does not intend to exclusively describe the law as is – whereas doing that to a certain extent would provide a clear background in certain instances, the thesis will also in many instances make some normative arguments and legal propositions. The reason for this is obvious – a thesis whose central aim is law reform should discuss law both from the positive and normative perspectives. Hoping that the reader has been alerted as to how issues will later unfold in the thesis, the author shall hereunder introduce the thesis ideas.

There are basically two types of credit transactions that exist in market economies, namely: secured and unsecured.[1] When a lender chooses to extend credit to a borrower without requesting something to back up the latter's promise to repay, its only hope of repayment is hinged on the borrower's promise[2]. However, where credit is given and secured by a collateral, a security interest in the collateral is created in favor of the lender, and upon the borrower's default to repay, the lender could use the collateral to satisfy its claim. In a nutshell, a legal framework which provides a detailed and predictable law on how security interests are created, perfected, prioritized and

[1]See LOUIS F. DEL DUCA ET AL, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE AND INTERNATIONAL COMMERCE (Anderson Publishing Co. Cincinnati Ohio, 2002), p. 2.

[2] Where credit is extended without demanding for collateral to back it up, the lender is advised to obtain some kind of control over the debtor's assets. Such controls like changing the password for the software that is needed to operate an equipment, or putting its lock on the door of a warehouse to ensure removal of goods are done with his consent.

enforced encourages lending, which ultimately leads to the sufficient availability of credit to all those who desire to do and expand business – hence, the economic development of that country.[3]

Article 9 of the US Uniform Commercial Code[4] (hereinafter: Article 9) and the Ontario Personal Property Security Act[5] (hereinafter: OPPSA or Ontario PPSA) are very good models that provide for comprehensive rules of creation, perfection, priority and enforcement of security interests in personal property and fixtures. For this reason and those that will later be stated, Article 9 and OPPSA have been chosen as benchmark models that will form the cornerstone of this thesis. Nigeria lacks a modern secured transactions law that provides comprehensive rules regarding the creation, perfection, and enforcement of security interest in personal property – lenders place high emphasis on real property collateral which invariably excludes many individuals, micro, small and mid-scale entrepreneurs who are usually unable to provide real property collateral from obtaining affordable credits. This is the major reason the author believes that it is exigent for Nigeria to consider a reform of its secured transactions law with close reference to Article 9 and OPPSA provisions together with any useful lessons that could be learned from a comparative analysis of the two models.

[3]See ZIEGEL S. JACOB, GEVA BENJAMIN, CUMING RONALD C.C., COMMERCIAL AND CONSUMER TRANSACTIONS – CASES, TEXT AND MATERIALS (Edmond Montgomery, Toronto 3rd edition, 1995), p. 3.

[4] Article 9 is the Article in the United States' Uniform Commercial Code that governs how security interests are created in personal property and fixtures in the securing of credits. Article 9 does not govern security interests in real property. Article 9 was revised in 1999 and 2001, and has been adopted in all the 50 states of the United States. See LOUIS F. DEL DUCA, ET AL, (Anderson Publishing Co. Cincinnati Ohio, 2002), p. 65. The designation "Article 9" is a bit weird considering that its bulky content is equivalent to a chapter in many other statutes.

[5] OPPSA is the Ontario version of the Canadian Personal Property Security Act (PPSA). In 1967, Ontario became the first common law province in Canada to adopt the PPSA with some modifications.

It is the author's suspicion however that an average lawyer or legislator in Nigeria will seriously question the need to transplant some elements[6] of foreign law or bother at all to learn any experiences and lessons that may come from comparing these laws to reform Nigeria's secured transactions law[7] in view of the saying that a known devil might be better than an unknown angel.[8] Notwithstanding this suspected reaction, the truth remains that the bulk of Nigerian security interest law is currently in a mess because the governing laws are based on a small set of disorganized statutes and conflicting court decisions. It is highly in order therefore, for Nigeria to reform its law on personal property to reflect the experiences of Article 9 and OPPSA so that both local entrepreneurs and foreign direct investors could optimally realize the benefits of credit sufficiency in the economy – what could eventually lead to economic development. This proposal is further supported by the fact that England whose laws Nigeria constantly looks up to, is currently

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[6] A.S. HORNBY, OXFORD ADVANCED LEARNER'S DICTIONARY, (7th edition, Oxford University Press, 2010), defines "transplant" as a "movement of somebody or something to a different place or environment". There are two exactly opposite views as to whether or not a law could actually be successfully transplanted from one jurisdiction to another. For those who doubt the success of legal transplantation, Pierre Legrand, has argued that if a law must be transplanted, then it can only succeed if other socio-cultural factors are transplanted alongside, for instance, the culture and language of the country of origin. See Legrand Pierre, *The Impossibility of "Legal Transplant,"* 4 MAASTRICHT JOURNAL OF EUR. & COMP. LAW 116 (1997). Eva Hoffman supported Pierre, and posited that "you can't transport human meanings whole from one culture to another any more than you can transliterate a text… because in order to transport a single word without distortion, one would have to transport the entire language around it…Indeed, in order to transplant a law, or a text, without changing its meaning, one would have to transport its audience as well". See EVA HOFFMAN, LOST IN TRANSLATION (Minerva, 1991) at 175. Alan Watson however argues that law can actually be successfully transplanted. See ALAN WATSON, LEGAL TRANSPLANTS, (University of Georgia Press, 2nd edition, 1993) at 21.

[7] "Security interest in personal property" as used in this thesis aims to encompass all transactions known to UCC Article 9 or Ontario PPSA plus those in existence in Nigeria.

[8] A new law usually introduces some changes in a legal system. Those who benefit from the wrong state of affairs that the new law has come to correct are usually reluctant and not enthusiastic about the new legal order. The proposal to transplant the UCC Article 9 model law on secured transactions to Nigeria is facing some confrontations from some established pressure groups who are already used to the obsolete system. In June 2013, the author visited four law firms in Nigeria, two in Lagos, and two in Benin City (names withheld). The author discussed the efforts of the World Bank's project through the Center for the Economic Analysis of Law (CEAL) to help Nigeria to acquire a new law of secured transactions. A good number of lawyers in the firms were not enthusiastic about the proposed secured transactions law because it will pose some initial difficulties, like getting to know the law and the cost of retraining staff.

being pressed by its scholars to consider a reform of its secured transactions law through the lens of Article 9.[9]

Owing to the incoherent and obsolete body of laws[10] that govern secured transactions in Nigeria, a lot of commercial hardships have often resulted, thereby necessitating the urgent need for reform[11]. The need for reform however, could only be fully appreciated when a look is taken at other jurisdictions[12] to see how they have fared as a result of secured transactions law reform. Judging from the available opinions expressed in textbooks[13] and journal articles[14] by some leading authorities in this area of law, it is now almost settled that the secured transactions law of a country to a large extent determines the level of its economic development. These opinions are further given a leg when it is considered for instance that Article 9 and OPPSA have helped a great deal in providing favorable conditions for the blossoming of businesses and the availability of sufficient

[9]See Andrew McKnight, *The reform of English law concerning secured transactions: Part 2,* 21(10) JOURNAL OF INT'L BANKING LAW AND REGULATION, 587 (2006), 598, where the learned author pointed out that there "[h]ave been calls for reform of the English security interest law going as far back as the Crowther Committee in 1971". Similarly, see Gerard McCormack, "Pressured by the Paradigm: The Law Commission and the Company Security Interests" in JOHN DE LACY (ed), THE REFORM OF UK PERSONAL PROPERTY SECURITY LAW: COMPARATIVE PERSPECTIVES (Routledge, New York, 2009), pp. 83-100.

[10] Nigeria acquired into its legal system, all the statutes of general application that were in force in England on or before January 1st, 1900. It also acquired the common law of England and the principles of equity. The sad story is that a bulk of these laws especially those that touch on secured transactions have remained unrevised since their acquisition and are no longer in tune with today's commercial realities.

[11] The Center for the Economic Analysis of Law (CEAL) embarked on a law reform project for Nigeria, and in 2009, it produced a draft law on secured transactions which has similarities with Article 9, but this draft is yet to come before the federal parliament. The draft is available at http://nigeria.ceal.org/docs/ (last visited on May 2014).

[12] The jurisdictions to be comparatively examined here include mainly the United States and the Ontario Province in Canada. However, the author finds the recent reforms in secured transactions law in Ghana, Liberia, Malawi, and Sierra-Leone very instructive.

[13]TIBOR TAJTI, COMPARATIVE SECURED TRANSACTIONS (Akademiai Kiado, Budapest, 2002), p.62.; FLEISIG HEYWOOD, et al, REFORMING COLLATERAL LAWS TO EXPAND ACCESS TO FINANCE, (World Bank 2006) , p.23.; VANIA SENA, CREDIT AND COLLATERAL (Routledge, New York, 2008), at p.13.

[14]See Robert, F. Reilly, *The Identification of Intangible Assets for Bankruptcy Purposes*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL; 40 (2008), see generally Cuming, R.C.C and Catherine Walsh, *Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property Security Acts*, 16 BANKING & FINANCE LAW REVIEW, 339 (2000-2001)., see Barkley Clark, *Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default*, 4 NORTH CAROLINA SCH. OF LAW BANKING INSTITUTE, 129 (2000).

credits to entrepreneurs and all other actors who need credit for one reason or the other that will ultimately improve the economy.[15]

Nigeria still retains a large number of laws transplanted from England[16] including secured transactions law which is scattered in several statutes and case law. While some of these earlier transplanted laws have since been amended by the British Parliament to accommodate modern trends in commercial transactions, the same set of laws remain unchanged in Nigeria. The effects of the continuous use of these obsolete laws are multifarious, and to a large extent have prevented the Nigerian economy from the desired development.

In view of the obvious lapses that are inherent in Nigeria's secured transactions law, this thesis posits that there is little or no need for a contentious debate to convince anyone as to whether Nigerian secured transactions law really needs reform, being that the matter loudly speaks for itself. Judging from the number of countries[17] that have already reformed their secured transactions laws and how those reformed laws have really helped in developing their economies, a proposal for reform of Nigeria's secured transactions law should be sufficiently understood by this favorable statistics. Part of what is needed to ground a conviction as to the link between secured transactions law reform and economic growth, is to show that elsewhere, where reforms on secured transactions

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[15] Both the OPPSA and Article 9 accommodate and regulate the use of Receivables and other kinds of personal property to secure lending. This makes it easy to acquire credit facilities and start up a business or reinforce same. See Gerard McCormack, *The Priority of Secured Credit: an Anglo-American Perspective*, 389 JOURNAL OF BUSINESS LAW, (2003), p.401.

[16]See *supra n.*10.

[17] In no particular order, the examples are: Australia, Canada, New Zealand, Poland, and most of the Central and Eastern European countries, the United States, Malawi, Liberia, Sierra Leone, etc. Also, the French speaking West African countries have adopted the Organization pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) law which has similarities with Article 9. Book IX of the Draft Common Frame of Reference which is a model law on secured transactions closely resembles Article 9, and is serving as a reform template for European countries. Similarly, UK scholars are pushing the British government to consider a reform of its secured transactions law through the lens of Article 9. For example, see the UK secured transaction law reform project, headed by Prof. Louise Gullifer. Available at https://www.law.ox.ac.uk/projects/Secured_transaction (last visited on September 11, 2015).

laws have taken place, such reformed laws were substantially the cornerstone of economic development.[18] This thesis therefore aims at exposing the inadequacies of the current secured transactions law in Nigeria (covering hire purchase, conditional sale, equipment leasing, consignments, warehousing, and so on) and how a modern secured transactions law in particular could be created to help boost economic development by increasing access to credit especially to SMEs.

II. The economic advantages of reforming Nigeria's secured transactions law

No doubt, there are quite a number of advantages of reforming Nigeria's secured transactions law.[19] First, if Nigeria's secured transactions law is reformed following the path of Article 9 and OPPSA, it would bring the various laws on secured transactions under one roof, thereby making the applicable law very certain, accessible and less controversial. Currently, there is no one statute in Nigeria that regulates secured transactions. Applicable laws each time are drawn from different obsolete statutes and court decisions which oftentimes contradict themselves.[20] Conflicting court decisions would not have posed great difficulty as they do today

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[18] See generally, *World Bank Building Effective Insolvency Systems* (1999) – A report from the Working Group on Debtor-Creditor Regimes, esp. pp. 1-12. Available at http://www.worldbank.org/ifa/ipg_eng.pdf (last visited on January 25, 2016).

[19] There are quite a number of literature on secured transactions law reform – but many of them did not focus on Africa and especially Nigeria – except the project of Center for the Economic Analysis of Law in 2009, which is yet to be completed. See http://nigeria.ceal.org/docs/ (last visited on September 12, 2015).

[20] The inconsistencies could be drawn from the following cases. In *Ellochim Nig. Ltd &Ors v Mbadiwe* (1986) NWLR (part 14) 47 at 165. The learned Justice condemned the use of self-help and said "It is no doubt annoying, and more often than not, frustrating, for a landlord to watch helplessly his property in the hands of an intransigent tenant who is paying too little for his holding, or is irregular in his payment of rents or is otherwise an unsuitable tenant for the property. The temptation is very strong for the landlord to simply walk into the property and retake immediate possession. But that is precisely what the law forbids." Ten years after in *Umeobi v Otukoya*, (1978)1 NLR. 172 SCN; the same Justice said "circumstances may exist in which a person may take an extra judicial remedial action to enforce

in Nigeria if there was a comprehensive statute that deals with secured transactions issues and serves as a true port of call when seeking to know what the law says – and could be used as basis for settling the conflicts engendered by conflicting court decisions.

Secondly, a reformed secured transactions law will provide a very predictable system of laws which governs the use of personal property as collateral as distinct from those of real property transactions, instead of muddling up both categories of property with the same governing laws. The result so far in Nigeria is that the logic of law applied to real property transactions is analogically extended albeit wrongly to personal property transactions. This happens because the distinction in terms of applicable laws for both categories of property is blurred – and this is one of the goals which can be achieved through secured transactions law reform.[21]

Thirdly, reformed secured transactions law is expected to allow for the use of every personal property as collateral for the security of credits[22] Currently in Nigeria (as already hinted at above), a huge emphasis is being placed on real property as the only desirable kind of collateral which can be used to secure lending, because Nigerian law does not yet provide a clear-cut legal

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his rights and still remain within the bounds of the law" see also the case of *Ojukwu v Military Governor of Lagos Sate* (1985) 2 NWLR (part 110) 806; where the use of self-help to recover property was condemned and the Supreme Court decision in *Civil Design Construction Nig. Ltd v SCOA Nig. Ltd*, [2007] 6 NWLR (Pt.1030) at 300, where Justice Onnoghen said that the self-help is uncivil and should not be found in the laws of civilized nations. But see *Awojugbagbe Light Industries Ltd v Chinukwe*, [1995] 4 NWLR (part 390) 379; where Bello CJN said that the use self-help/force to recover property is an integral part of a secured party's right.

[21] For a discussion concerning the inseparability of personal and property law and the dificulties associated with it in civil laws, see Tibor Tajti, *Could Continental Europe Adopt a Uniform Commercial Code Article 9-Type Secured Transactions System? The Effects of the Differing Legal Platforms*, 35 ADELAIDE LAW REVIEW, (2014), 149, at 163.

[22] This view is corroborated by FLEISIG HEYWOOD, et al, REFORMING COLLATERAL LAWS TO EXPAND ACCESS TO FINANCE (World Bank 2006); chapter 1. Furthermore, it is not that there is any law in Nigeria which states outright ban for the use of personal property to secure loan – instead, personal property is not attractive collateral due to lapses which this thesis will address. As a result of these lapses, the treasure hidden in the use of personal property to secure loan has been unexploited so far in Nigeria.

framework on the use of personal property[23] as collateral. The effect of this is that only a few who are able to afford land and buildings can secure credits and thus do business and expand. Small and medium scale entrepreneurs[24] who need credit in order to startup or expand businesses may not successfully do so because they typically have no real property to offer as collateral and their best asset type is usually inventory (products and services), as well as receivables for the products and services sold – yet the current legal framework in Nigeria does not support the full use of these assets as collateral for credit. In other words, Nigerian banks and other financiers are very reluctant to lend out sufficient credit facilities to borrowers with personal property collateral because the rules which govern them are uncertain and unsettled.

The case is worse for those who are potential entrepreneurs, who only have sound business ideas but do not have any kind of collateral to secure credits, so as to execute their ideas. Elsewhere, for instance in US and Ontario, the case is different, as small entrepreneurs can secure credit using their accounts-receivable from the new startup. In other words, what is basically required from potential entrepreneurs are sound business ideas and plans on how to realize profits from a startup. What makes this possible in US and Ontario in the author's view is mainly due to the existence of Article 9 and the OPPSA respectively which accommodate the uses of any kind of personal property as collateral to secure credit.

The fourth point is a beneficiary of the foregoing. If the Nigerian secured transactions law is reformed to include the use of an increasing panoply of personal property and fixtures as

[23] In Nigeria, personal property could be used as collateral in chattel mortgages, whereby the lender possesses the collateral until repayment. It is only incorporated debtors that can secure loans with their personal property yet continue to use them as factors of production under the arrangement of floating charges. See the ensuing chapters for details on floating charge. In chapter 3, arguments for its transformation into floating lien are canvassed.

[24] Nigeria's economy is still developing, the number of small and medium scale entreprises is larger than the large scale ones.

collateral, access to credit[25] would be much more enhanced and this would lead to an increase in the number of entrepreneurs doing business, which would ultimately lead to the desired economic growth. Furthermore, where the system encourages the growth of businesses due to easy access to credit, many jobs will be created as a result, thereby reducing high unemployment rate as well as enhancing the economy. This point also rests on the fact that in Nigeria currently, it is hard to launch a new venture to a great extent due to the difficulty in raising sufficient credit.[26] This eventually leads to a highly monopolized market because only very few who have the needed collateral are able to secure adequate funds from the lending industry to start or expand in their businesses. And also, being that initial entry into a line of business in a largely unregulated market

[25] BLACK'S LAW DICTIONARY, (9th edition, Thomson Reuters, 2009). p. 424, defines 'credit' "as the availability of funds either from a financial institution or under a letter of credit." Credit is very vital to the wellbeing of every economy. Many authors have expressed this view. For instance, Daniel Webster said that "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 all 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.

Credit is to money what money is to articles of merchandise. As hard money represents property, so credit represents hard money; and it is capable of supplying the place of money so completely, that there are writers of distinction, especially of the Scotch school, who insist that no hard money is necessary for the interests of commerce." To read a longer excerpt, see http://www.bartleby.com/73/359.html(last visited on the 30th of September, 2013). Daniel Webster made this speech in the United States Senate on the 18th of March 1834, and Henry Dunning Macleod quoted it in his book – THE PRINCIPLES OF ECONOMICAL PHILOSOPHY (Vol. 1, Longman Green- Reader and Dyer, 2nd ed., 1872).

Whereas, Macleod expressed this powerful opinion a century ago, the concept of credit, and how it can jumpstart any economy, especially in developing countries, still seems largely a story for future generations. Obama in his joint session address to the United States Congress on Tuesday, February 24th, 2009, amongst other things, lamented on the dire need of credit when he said in the following words "…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, farms buy equipment, and businesses make payroll. But credit has stopped flowing the way it should. Too many bad loans from the housing crisis have made their way onto the books of too many banks. With so much debt and so little confidence, these banks are now fearful of lending out any more money to households, to businesses, or to each other. When there is no lending, families can't afford to buy homes or cars. So businesses are forced to make layoffs. Our economy suffers even more, and credit dries up even further..." The complete 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 the 30th of September, 2013).

[26] For more information on the level of ease with which credit is obtained in Nigeria for starting up a business, see http://www.doingbusiness.org/data/exploreeconomies/nigeria/#getting-credit (last visited on the 25th of November, 2013).

has a lot of financial implications, the few Nigerian entrepreneurs doing business, do not usually have fierce competitors whose competitive activities could force down prices in the market. The end result is that there are high prices for items because only very few control the available businesses and by extension, the market.

III. Reasons for choosing UCC Article 9 and Ontario PPSA as benchmark laws

The reader may want to ask why the author has particularly chosen these two laws[27] as the benchmark for analysis. The reasons for choosing them are as follows. First, Article 9 was not 'born' grown up, and its current revised[28] version has been a product of critical reviews that incorporated many court decisions over a long period, together with some industry-developed practices, and experiences.[29] Article 9 has passed the test of time, and has improved with age,

[27] The OPPSA and Article 9.

[28] The Revised Article 9 took effect as from July 1, 2001 and has been adopted by all the 50 states in the United States.

[29]Williams and Jamie captured the changes Article 9 has undergone in these words: "Article 9 of the Uniform Commercial Code ("UCC") deals with secured transactions in which a creditor takes a security interest in a debtor's personal property or fixtures. In 1998, Article 9 underwent major revision; these sweeping changes took effect on July 1, 2001, and were adopted in all 50 states. In 2010, a Review Committee appointed by the American Law Institute and the Uniform Law Commission suggested several additional amendments to Article 9. These changes, which will go into effect on July 1, 2013, are not meant to substantively revamp Article 9, but rather to provide clarity on certain issues that were proving problematic in practice, particularly with regard to financing statement filings. For example: UCC section 9-102(a) (68) – The new rule provides increased certainty regarding the name of an organizational debtor used on a financing statement. Old Rule: The name on the "public record" was the correct name of a registered organization. New Rule: The name on the "public *organic* record" (defined as any record available for public inspection) is the correct name of a registered organization." Culled from Williams Mullen, & Jamie Bruno, *Changes to Article 9 of the Uniform Commercial Code with Respect to Filling UCC Financing Statements*, (2013); available at http://www.lexology.com/library/detail.aspx?g=7c91c4f6-4773-4d77-b389-92e2b35a45cf (last visited on the 30th of September, 2013).

Also for instance, the decision in *Benedict v Ratner*, 268 US. 353 (1925) rejected the view that accounts receivable could be assigned to a creditor as a form of collateral for credit. It was thought by courts then that debtor's continuous possession of property subject of security interest could result to ostensible ownership problem. Today, the opinion of court expressed in *Benedict* has been rejected by Article 9 which instead provided "filing" under section 9-205 UCC as a remedy to ostensible ownership problem.

thereby rising to the status of a tested example of an efficient secured transactions law. In view of the success stories about the easy growth of businesses and acquisition of credit in the US, many countries[30] have as a result, imported elements of Article 9 as tools for secured transactions law reform.

Similarly, many international instruments such as the United Nations Legislative Guide on Secured Transactions, Book IX of the European Draft Common Frame of Reference (DCFR), the European Bank of Reconstruction and Development (EBRD)'s Model Law on Secured Transactions, have genealogical traces to Article 9, even though sometimes the traces remain hidden. The spirit of Article 9 is fast infiltrating and diffusing into the legal systems of many countries particularly those with common law heritage. While not intending to encourage Nigeria to join every bandwagon, the author reasonably believes that transplanting some elements (in adapted forms) of Article 9 and OPPSA, together with some crucial lessons therefrom to Nigeria

[30] Personal Property Security Act (PPSA) is the name given to the personal property law of the various commonwealth countries. Canada was the first to adopt secured transactions law that resembles the Article 9 model in 1965, and in 1967 Ontario became its first province to adopt the Canadian PPSA. Other provinces have followed suit except Quebec, although Professor Tajti has pointed out in his book that Quebec although a civil law province "was forced to effectuate related reforms." Karen Redman corroborates this view as well. See – Karen Redman, *International Trade — Service Providers International UCC Equivalents,* published in the METROPOLITAN CORPORATE COUNSEL (2010), available at http://www.metrocorpcounsel.com/articles/13084/international-ucc-equivalents (last visited on the 1st of October, 2013). New Zealand adopted its PPSA in 1999, and Australia in 2009. Article 9 has also influenced many international instruments like the The United Nations Legislative Guide on Secured Transactions, United Nations Convention on the Assignment of Receivables in International Trade, the European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transactions, Book IX of the Draft Common Frame of Reference, (DCFR) etc. For more insight on how Article 9 influenced EBRD, see – John Simpson, & Joachim Menze, *Ten Years of Secured Transactions Reform*, BUTTERWORTHS JOURNAL OF INT'L BANK. & FIN. LAW, 16(1) (2001), pp. 5-12. Also TAJTI pointed out that in Hungary, secured transactions law reforms have been launched, see – the Civil Code Amendments from (1996 – 2000); in Russia (the Mortgage Law of 1998); Kyrgyzstan (the Law on Pledge of 1997); Latvia (the Law on Commercial Pledge, 1999). Even England which Nigeria often looks up for law reforms, has been recommended Article 9 model, following the Diamond Report [1989]. These are copiously discussed in TIBOR TAJTI, COMPARATIVE SECURED TRANSACTIONS (Akademiai Kiado, Budapest, 2002), pp. 214-216. See Cuming, R.C.C., *Article 9 North of 49: The Canadian Personal Property Security Acts and the Quebec Civil Code*, 29 LOYOLA OF LOS ANGELES LAW REVIEW, 971 (1996). Also see Tibor Tajti, *Viehweg's Topics, Article 9 UCC , the "Kautelarische Sicherheiten" and the Hungarian Secured Transactions Law Reform,* 6 VINDOBONA JOURNAL OF INT'L COMM. LAW & ARBITRATION, 93 (2002).

would contribute immensely to the solution of its economic quagmire as well as remedy the disharmony which its secured transactions law currently faces with other [especially neighboring] jurisdictions.

Canada[31] is one of those countries whose Personal Property Security Act (hereinafter: PPSA) drew so much from Article 9. The Canadian PPSA has been adopted by all the Canadian provinces except Quebec which has a civil law system, albeit as one learned author pointed out, Quebec has been pressured to equally make some reforms to achieve some kind of harmony with the other common law provinces.[32]

Although OPPSA has a lot of commonalities with Article 9, it has also some differences and idiosyncratic solutions that deserve to be examined. Ontario was the first common law province of Canada to adopt the Canadian PPSA. No doubt, OPPSA has been a large contributor to the economic success of Ontario due to its efficiency and comprehensiveness. The author shall make efforts to examine the commonalities and differences of the two with a view to determining which of their elements as well as underlying lessons would be most suitable for Nigeria. Another reason for comparing these laws rather than going straight to recommend one of them is that the usefulness of a law is much more apparent when it is compared with its kin. At the end of the comparison, policy and lawmakers are better convinced on the reasons or otherwise for the

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[31] Canada is a federation with ten provinces and three territories. One of its provinces, namely, Ontario is the focus of this thesis. 'Canada' as used in this thesis therefore does not refer to Ontario but the entire federation. Ontario as used in this thesis does not also represent Canada.

[32] See, TIBOR TAJTI, COMPARATIVE SECURED TRANSACTIONS (Akademiai Kiado, Budapest, 2002), p. 214. For a deeper analysis on how Quebec reformed its secured transactions law and the level of resemblance with Article 9, see the seminal article of Michael G. Bridge, Roderick A. Macdonald, Ralph L. Simmonds & Catherine Walsh, *Formalism, Functionalism, and Understanding the Law of Secured Transactions,* 568 MCGILL LAW JOURNAL / REVUE DEDROITDE MCGILL, 44 (1999), pp.649-664. See also Ronald C.C. Cuming, *Article 9 North of 49#: The Canadian PPS Acts and the Quebec Civil Code*, 29 LOYOLA OF LOS ANGELES LAW REVIEW, 971 (1996), at p.974.

recommendations of certain elements of both laws[33]. It is also believed that if Nigeria reforms its secured transactions law to resemble those of Article 9 and OPPSA, more Canadian and US entrepreneurs may become more interested in investing in Nigeria due to similarities in secured transactions law – this will certainly improve the Nigerian economy.

Nigeria has been made the primary beneficiary of this research not mainly because it is the author's country, but for a few more other reasons. First, the author knows firsthand, the existing problems of Nigeria's secured transactions law beyond what are contained in available literature. The firsthand knowledge of these problems is therefore necessary in making sound reform proposals. Second, Nigeria is the most populous[34] country in Africa with over 150 million people,[35] with a lot of mineral deposits and business opportunities that require credit financing[36] – so that, influx of foreign investments into the country as a result, will invariably open new vistas at the continental level, which other countries in Africa will benefit from. Third, Nigeria's economy ranks number one in Africa[37], which could mean that the economic and legal challenges that Nigeria faces are most likely similar with other countries in Africa especially the ones in the

[33] The weakness of a country's law is much apparent when compared with other countries that have reformed systems. By taking a look at developed systems (US and Ontario) that have had experiences which reflect in their secured transactions law – Nigeria in its quest to reform its secured transactions law could draw from the wealth of experiences buried in these models. On this point – see generally, MICHAEL BOGDAN, COMPARATIVE LAW, (Kluwer Law and Taxation, 1st edition, 1994).

[34]See http://countrymeters.info/en/Nigeria/ for latest information. (Last visited on the 25th of November, 2013).

[35]See the National Population Commission, Nigeria's website http://www.population.gov.ng/ (last visited on February 24, 2016).

[36] The Nigerian Investment Promotion Commission's website has some interesting details on the business opportunities in Nigeria. See http://www.nipc.gov.ng/whyng.html (last visited on 26th of November, 2013).

[37] Before 2014, South Africa's economy was the biggest in Africa. According to World Bank data, its Gross Domestic Product (GDP) as at 2014 stood at 350.1 billion USD. See <http://data.worldbank.org/country/south-africa> (last visited on February 3, 2016). However, Nigeria's economy surpassed South Africa's following the rebasing of the former's economy in the same year to account for sectors such as telecommunications, airlines, movie production, etc. According to World Bank data, Nigeria's GDP currently stands at 568.5 billion USD. See <http://data.worldbank.org/country/nigeria> (last visited on February 3, 2016). See also "Nigeria becomes Africa's biggest economy" (6 April 2014) *BBC News,* available at <http://www.bbc.com/news/business-26913497> (last visited on February 3, 2016).

Commonwealth.[38] This means that using Nigeria as a case study would be beneficial to other Commonwealth countries in Africa with similar legal and socio-economic challenges, who may use the research conducted in this thesis as guide towards reforming their own secured transactions law.

IV. A note on terminology

Nigerian law is richly endowed with a lot of English law's vocabulary which differs considerably from the language style in OPPSA and Article 9. Considering that this thesis primarily targets Nigerians and those interested in Nigerian law, the need to explain certain concepts which find roots in Article 9 and OPPSA is vitally important. First on the list is what is meant by "secured transactions."[39] This is the name given to the ninth chapter – strangely called an 'article' – in the Uniform Commercial Code, which applies to every transaction in the United States that is secured by personal property or fixtures and the function of which is to secure a sale or loan-credit.[40] Unlike in Nigeria where the term "secured transactions" may oftentimes be used to refer to real property transactions, in the US it is only restricted to transactions which are secured by personal properties or fixtures.

The reader may want to ask how "secured transactions" law differs from "security interest" law in the context of this thesis. The answer would be that "secured transactions" being a US

[38]The following are Commonwealth countries in Africa who may find this thesis relevant. They are: Botswana, Cameroon, The Gambia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Seychelles, Sierra Leone, South Africa, Swaziland, Tanganyika, Tanzania, Uganda, Zambia, and Zimbabwe.
[39] BLACK'S LAW DICTIONARY, (9th edition, Thomson Reuters, 2009) p.1475; defines 'secured transaction' as "a business arrangement by which a buyer or borrower gives collateral to the seller or lender to guarantee payment of an obligation.
[40]*Ibid*. at 713; defines 'fixture' as "personal property that is attached to land or building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home..." see UCC section 9-102 (a)(41).

nomenclature refers only to transactions secured by personal property (and fixtures) although the same term is randomly used in Nigeria to refer to transactions secured by real and personal property. "Security interest" law may be used to refer to real and personal property laws at the same time. Hence, one could oftentimes hear "security interest" in a building or car; meaning that the secured party has an *in rem*[41] interest in that building or car which served as a collateral for credit. For the purpose of this thesis, whose focus is only on personal property and fixtures, the term "secured transactions law" shall be used to refer exclusively to personal property while "security interest law", unless otherwise stated, shall be used to refer to both personal and real properties.

Second, the term *in rem* right was mentioned above and deserves to be immediately explained. It refers to the right which a secured party has over a collateral for the purpose of securing payment obligation on the part of the debtor. The common law equivalent is 'proprietary right.' This is different from right *in personam*[42] which is a right of a secured party towards another party rather than over an asset. Immediate examples of the latter are contracts of guarantee and indemnity.[43]

[41]*Ibid.* at 864 – "against a thing…involving or determining the status of a thing and therefore the rights of persons generally with respect of that thing". Graveson captured it in these words "an action *in rem* is one in which the judgment of the court determines the title to property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated." See RONALD H. GRAVESON, CONFLICT OF LAWS (7th edition, 1974) 98.
[42] BLACK'S LAW DICTIONARY, (9th edition, Thomson Reuters, 2009) p.862 – "against a person…involving or determining the personal rights and obligations of the parties…of a legal action brought against a person rather than property." Also Graveson said it is "an action whose object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgment in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action *in personam.*" See RONALD H. GRAVESON, CONFLICT OF LAWS (7th edition, 1974) at 98.
[43]See Section 4 of the Statute of Frauds 1677.

Also the term "charge" is capable of causing some confusion under the Nigerian law because a "charge" could refer to a form of *in rem* right over a debtor's asset until a payment obligation is met. In another sense, "charge" could refer to the "fixed charge" and "floating charge" from the viewpoint of Companies and Allied Matters Act.[44] In the case of a floating charge[45], it can only be created by an incorporated debtor[46] over its assets, to cover present and future assets until the occurrence of certain conditions (crystallization) which convert a floating charge to a fixed charge.[47]

Another term that deserves to be clarified is *"lien".* Its use in the US is much broader than in Nigeria which got the concept from English law. In Nigeria, *lien* arises by operation of law to the effect that a lienee has merely a right to retain an item of another (lienor) until a payment for a service rendered is made by the lienor; for instance, an artisan's lien. Albeit this limited concept

[44] See chapter one of this work for discussion on charges in Companies and Allied Matters Act, LFN 2004.

[45]The first English judge that was confronted with the concept of floating charge was Lord Macnaghten. First in *Government Stocks and Other Securities Investments Co. Ltd v Manila Rly Co* [1897] AC 81 at 87 he said that "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is the essence of such a charge that it remains dormant until the undertaking ceases to be a going concern, or until the person in whose favor the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default".

Seven years afterwards in *Illingworth v Houdsworth* [1904] AC 355 at 358, Lord Macnaghten also said "[a] floating is ambulatory and shifting in nature, hovering over 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". A year before *Illingworth*, Romer L.J in *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch. 284, had given a description of a floating charge – that a charge is a floating charge if "it is a charge over a class of assets present and future; that class will be changing from time to time; and until the charge crystallizes and attaches to the assets, the chargor may carry on its business in the ordinary way". Romer L.J however warned that this was only a description, although this description later became the hallmark of a floating charge. But after about a century since Romer L.J's description of a floating charge, Lord Millett in *Agnew v Commissioners of Inland Revenue*[2001] 2 AC, 710, warned that it was only the third characteristic in Romer LJ's description (freedom to deal with assets in the ordinary course of business) was the true characteristic of a floating charge. Lord Millett's view conforms with the court's opinion earlier on in *Siebe Gorman & Co. Ltd v Barclays Bank Ltd.* [1979] 2 Llyod's Rep.142.

[46] See ROY GOODE, LEGAL ASPECTS OF CREDIT SECURITY (Sweet & Maxwell, London, 3rd edition, 2003), p. 111.

[47] See chapter one of this thesis for a fulsome discussion on charges.

is known also by American law (the most important form being the 'mechanic's lien' which however, provides protection not only to mechanics but anyone that provides service)[48], it is crucial to understand the broader connotations of this term in the context of secured transactions law.

This brings the author to throw some light on what is meant by a "floating lien"[49] which is the kin (but hardly the full equivalent) of the floating charge in US law and – ever since the enactment of OPPSA – also in Ontario law. It is similar to the English floating charge which has briefly been explained above but differs significantly on some points which are that, while the English floating charge can only be created by incorporated entities with attachment only occurring upon crystallization, the floating lien can be created by any category of debtor, be a natural or legal person, and attachment of the lien occurs from the very start of the security agreement.[50] However, both floating charge and floating lien may encumber all the present and future property of the debtor,[51] and give the debtor an unfettered dominion to deal with the collateral in the course of his

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[48] The Black's Law Dictionary (9th edition, 2009) defines it as 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 *lien of the mechanic*; *artisan's lien*; *chattel lien* (for personal property); *construction lien* (for labor); *garageman's lien* (for repaired vehicles); *laborer's lien* (for labor); *materialman's lien* (for materials)".

[49] BLACK'S LAW DICTIONARY, (9th edition, 2009) p.1007 – "a lien that is expanded to cover any additional property obtained by the debtor while the debt is outstanding…it continues to exist even when the collateral changes in character, classification or location." For a more detailed discussion on floating lien, see chapters two three of this thesis.

[50] It is also possible for attachment of security interest against a collateral to be postponed under US law – but that has to be contracted for. That is, a secured party could postpone attachment, yet perfect by filing, (colloquially referred to as "blocking") on the term that his later performance of attachment requirements, would with respect to his priority status, relate back to the time of his perfection of the security interest. For more detail, see section 3.2.3 – chapter three.

[51] Let it not be forgotten that floating lien covers only the debtor's present and future acquired property with respect to the security agreement – it does not cover assets that were unspecified in the security agreement. On the other hand, the floating charge covers much more, hence all present and future assets of the debtor no matter where they may be located, specified and unspecified. For more information, see chapter IV in ROY GOODE, COMMERCIAL LAW (Penguin Books, 4th edition, 2010).

business, although in the case of floating lien, only personal property of the debtor specified in the security agreement and those being acquired afterwards are affected.

Furthermore, the word "collateral"[52] is used in both Article 9 and OPPSA to mean the debtor's property or asset, which is subject of a security interest in favor of the secured party, who could enforce it privately or by court action. This meaning shall be retained throughout the thesis unless otherwise stated. Article 9 as well as OPPSA brought compartmentalized personal property laws under one roof. Before Article 9, different types of transactions creating security interests had distinct designations, with parties as well being named differently.[53]As this caused communication problems, radical terminology simplification was undertaken by the drafters of Article 9. Consequently, now under Article 9 as well as OPPSA, the parties to a security agreement are referred to as "debtor" and "secured party." Furthermore, any transaction that creates a security interest in debtor's collateral in exchange for credit to the debtor is functionally deemed to be a secured transaction and the document evidencing it is simply designated a 'security agreement'.[54] Unless otherwise stated, this thesis shall refer to anyone under a security agreement who has a payment obligation as the "debtor", and "the secured party" or "secured creditor" as a person who is the beneficiary of the security interest in the collateral. The term "fixtures" has been mentioned

[52] See UCC section 9-102(a) (12) – the meaning of "collateral" in OPPSA and Article 9 is same in Nigeria.

[53]For instance, under a conditional sale agreement, the parties are known as "buyer" and "seller". In a pledge transaction, the parties were known as "pledgor" and "pledgee".

[54]BLACK'S LAW DICTIONARY (9th edition, 2009), defines it as "an agreement that creates or provides for an interest in specified real or personal property to guarantee the performance of an obligation. It must provide for a security interest, describe the collateral and be signed by the debtor. The agreement may include other important covenants and warranties."

a number of times – it is covered under the US and Ontario secured transactions, and means a personal property attached to land or building which becomes part of the land.[55]

Lastly, secured transactions law covers a whole range of transactions including those that rely on retained title – like hire purchase and conditional sale, and all transactions traditionally referred to as "security devices", for examples: charge, chattel mortgage, pledge, and lien. For the purpose of this thesis, all these transactions would be referred simply as secured transaction. Apart from some of the basic terminologies which have been explained briefly above, there are some others that do not deserve explanations at the moment. However, where they appear later on in the course of the thesis, an effort would be made to explain them sufficiently.

V. About the literature

The existing literature on Article 9 is vast because secured transactions law has long been in existence in the United States and Canada, cutting across virtually all commercial transactions.[56] This has substantially increased with the myriad of reforms starting with Ontario by the end of the 1960s. Many authors have written on the subject and there is a huge and terrifying avalanche of publications on Article 9 and OPPSA – such that a researcher could easily get lost in the smorgasbord of opinions. Whenever a discussion on secured transactions law is invited, Article 9

[55] See section 9-102(a) (41) UCC. A security interest in fixtures is perfected by fixture filing – that is, filing a financing statement in the real property registry of the county where security interests in real property are filed. See section 9-102(a) 40 UCC. See section 34 OPPSA for information on fixtures.

[56] Example, the financial size of equipment leasing and factoring industries in the US and Canadian economy is quite overwhelming. Equipment leasing industry alone in the US measured over US$740billion in 2013. The factoring sector has also a similar worth. See http://www.usafactoring.com/index.html https://www.leasefoundation.org/positive/index.cfm?fuseaction=display_article&artID=20715 (both websites were last visited on January 26, 2016).

UCC usually takes the front seat because it is the most comprehensive secured transactions law the author knows of. Grant Gilmore[57] played a crucial role in Article 9 drafting and afterwards became a quintessential author in secured transactions. Thus, his two-volume book entitled – *Security Interests in Personal Property*[58] has been described as a standalone in the US secured transactions law.[59] As quintessential as Gilmore's book is, however, it lacks mention of other jurisdictions – he wrote exclusively for the American audience and this could be viewed as one limitation of the book. Another limitation of this book (Gilmore's) is that it was based on the first version of Article 9, and therefore no longer contemporary, given the fact that Article 9 has been revised[60]. Although Gilmore's *Security Interest in Personal Property* and some other of his notable published works remain a guide, they are to some extent outdated in light of the Revised Article 9.[61]Another indispensable material is the official commentary to Article 9 that helps explain to the reader what the drafters of Article 9 and other Articles of the UCC possibly meant by the provisions.[62]Apart from Gilmore, many revered authors like Jame J. White and Robert S. Summers

[57]Grant Gilmore (1910 – 1982) who was one of the principal drafters of the UCC Article 9 was a law Professor at Yale Law School, University of Chicago Law School, the College of Law at the Ohio State University, and Vermont Law School. His two-volume book entitled "*Security Interests in Personal Property"*, published by (Little, Brown & Company, 1965); is almost indispensable for any researcher on secured transactions law. Gilmore's revered opinions (as well as those of other scholars) shall from time to time be referred to throughout this work.

[58] (Little, Brown and Co., Boston, 1965/reprinted in 1999). This two-volume books earned Grant Gilmore "James Barr Ames Prize" – Harvard Law School's coveted award for distinguished work in legal scholarship by persons who are not members of the Harvard faculty.

[59] ZIEGEL S. JACOB, BENJAMIN GEVA, & RONALD C.C. CUMING, COMMERCIAL AND CONSUMER TRANSACTIONS – CASES, TEXT AND MATERIALS (Edmond Montgomery, Toronto 3rd edition, 1995) p. 13 "…Gilmore is treated as the 'bible' of United States secured transactions law…"

[60] This is especially true when it is considered that the use of Investment Property as collateral for instance has been included in Article 9 which was not addressed in Gilmore's books.

[61]*Ibid*.

[62] UNIFORM COMMERCIAL CODE, 2009-2010, OFFICIAL TEXT AND COMMENTS (West, 2009).

have also written powerful texts on Article 9.[63] Whereas these texts swell up the US literature on the subject, they all share the same guilt of narrowness, with a focus only on US law.

From the Canadian perspective, there have been a lot of notable authors who have written on Personal Property Security Acts (PPSAs). Among them, Professor Jacob Ziegel[64] stands out. Ziegel is to Canada what Gilmore was/is to the US. Ziegel has written countless texts from the Canadian point of view and also played and still plays a very active role in the life and times of OPPSA. The textbook which Jacob Ziegel co-authored with Geva Benjamin and Ronald Cuming C.C. entitled *Commercial and Consumer Transactions, Cases, Texts and Materials*[65]deserves heightened recognition, although it hardly dealt with any of the provinces' PPSA in depth, but tried to give a rundown of each of them. However, *The Ontario Personal Property Security Act: Commentary and Analysis*[66] written by Jacob Ziegel and David Denomme provides a more in-

[63] BARKLEY CLARK, et al, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (Warren Gorham Lamont, 1993), HOGAN COOGAN, et al, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (M. Bender, 1980) 4 Vols., CLARKSON, MILLER, JENTZ AND CROSS, WEST'S BUSINESS LAW (Thomson, 9th edition, 2003), JAMES J.WHITE & SUMMERS S. ROBERT, UNIFORM COMMERCIAL CODE, (West, 6th edition, 2010), STONE BRADFORD & ADAMS KRISTEN, UNIFORM COMMERCIAL CODE, (Thomson West, 7th edition, 2008); RAY D. HENSON, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, (West Publishing Co, 2nd edition, 1979); DOUGLASS BOSHKOFF & GERALD BEPKO, SECURED TRANSACTIONS, (Herbert Legal Series, 2nd edition, 1988); WILLIAM H. HENNING & WILSON R. FREYERMUTH, UNDERSTANDING SECURED TRANSACTIONS, (LexisNexis, 4th edition, 2007); JOHN F. DOLAN, SECURED TRANSACTIONS AND PAYMENT SYSTEMS (Little, Brown and Company, 1995); DOUGLAS J. WHALE, SECURED TRANSACTIONS, (Barbri, 2006); JAMES BROOK, SECURED TRANSACTIONS, (Aspen Publishers, 4th edition, 2008); RICHARD H. NOWKA, MASTERING SECURED TRANSACTIONS, (California Academic Press, 2009).

[64] "Jacob Ziegel, Ph.D (London) is Professor and member of the English and Ontario bars. His first teaching post was at the University of Saskatchewan in Saskatoon where he taught from 1962-1966. He then taught at McGill University and Osgoode Hall Law School before joining the University of Toronto law school in 1975. Following his retirement in 1993, Professor Ziegel has remained very active, both in teaching and in pursuing his interests as editor in chief of the *Canadian Business Law Journal* and convenor of the Annual Workshop of Commercial and Consumer Law…" Culled from http://www.law.utoronto.ca/faculty-staff/full-time-faculty/jacob-ziegel (last visited on the 22nd of September, 2013).

[65] (Toronto, Edmond Montgomery, 3rd edition, 1995).

[66] ZIEGEL, JACOB S, & DENOMME, DAVID L, THE ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS (Toronto, Butterworths, 2nd edition, 2000).

depth analysis about OPPSA – their analysis of OPPSA will certainly shed light at dark corners in the course of this thesis. Like other texts pointed at, Ziegel and Denomme failed to offer any strong insight about other jurisdictions. Catherine Walsh[67] is also one of the renowned authors who have contributed to the Canadian literature on personal property law. In addition, Ronald C.C Cuming has contributed so much in this area of law and has made a specific research on secured financing in Nigeria.[68]Roderick A. Macdonald[69] is another important writer about the Canadian PPSA. He co-authored[70] a very long and detailed article on the functioning of the UCC Article 9 and how it affected the shape of the Canadian Personal Property Security Acts. Anthony Duggan and David Brown, co-authored a book: *The Australian Personal Property Securities Law – A Book For All Reasons*[71], which comments and digests the complexity of the Australian PPSA – the book gives

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[67] Catherine Walsh teaches and writes principally in the areas of secured transactions and private international law. She is currently a professor at McGill University. She has a long-standing commitment to law reform, and has been actively involved in a number of national and international reform initiatives, including two multilateral legal instruments developed by the United Nations Commission on International Trade Law. She is the co-author, with RONALD C.C CUMING & RODERICK WOOD, PERSONAL PROPERTY SECURITY LAW (Irwin Law, 2nd ed. 2012). See http://www.mcgill.ca/law/about/profs/walsh-catherine (last visited on the 11th of November, 2013).

[68] These are a few of his numerous publications: R.C.C. Cuming, *Second Generation Personal Property Security Legislation in Canada* 46 SASK. LAW REVIEW, 1 (1982), Cuming, R.C.C., "Harmonization of Law in Canada: An Overview", in Cuming, R.C.C. (ed.), in PERSPECTIVES OF THE HARMONIZATION OF LAW IN CANADA (University of Toronto Press in cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government's Publishing Center, 1985), Cuming, R.C.C., *Legal Regulation of International Financial Leasing: The 1988 Ottawa Convention*, 7 ARIZONA. JOURNAL OF INT'L & COMP. LAW, 39 (1989), Cuming, R.C.C., *Article 9 North of 49: The Canadian Personal Property Security Acts and the Quebec Civil Code*, 29 LOY. LOS ANGELES LAW REVIEW, 971 (1996). He has also done law reform projects for Nigeria. See R.C.C. CUMING, & YAIR BARANES, A MODERN SECURED FINANCING SYSTEM INVOLVING PERSONAL PROPERTY COLLATERAL FOR THE FEDERAL REPUBLIC OF NIGERIA (Washington, DC: The World Bank, Report of January 17, 2004). The Report is available upon request from Professor Cuming. See "*Assessment of Registry and Filing Archive Proposal, March 2010*" at http://nigeria.ceal.org/docs/ (last visited on the 11th of November, 2013).

[69] Roderick is a Professor of Law in McGill University, Canada. He is well published. See MacDonald, Roderick, A; *Exploiting the Pledge as a Security Device*, 15 REVUE DE DROIT DE UNIVERSITE DE SHERBROOKE 554 (1985), Martin Boodman & MacDonald Roderick, *How Far Is Article 9 of the UCC Exportable? A Return to Sources?* 27 CANADIAN BUS. LAW JOURNAL, 249 (1996).

[70] The other authors are Ralph L. Simmonds, Michael G. Bridge & Catherine Walsh, *Formalism, Functionalism, and Understanding the Law of Secured Transactions,* 4 McGILL LAW JOURNAL, 567 (1999).

[71] (Chatswood, LexisNexis, Butterworts, 2012).

a very detailed explanation to anyone that seeks to be familiar with the Australian version of PPSA and its idiosyncratic features especially as it differs from the Canadian PPSAs.

Philip R. Wood, although not a Canadian or American, deserves a standing ovation for discussing secured transactions law from the viewpoints of many jurisdictions. His books, most especially his *Comparative Law of Security Interests and Title Finance*[72] has risen to the status of a must read because it captures quite a number of jurisdictions and compares how these jurisdictions overlap or differ with respect to their secured transactions laws. However, whereas he was able to capture the secured transactions law of many jurisdictions in one single book, the opportunity cost was his inability to analyze each jurisdiction in appreciable depth. Furthermore, Part IV of Roy Goode's *Commercial Law*[73] is dedicated to "Secured Financing" and explains secured transactions in appreciable detail, enough to reinvigorate the understanding which the texts that are exclusively dedicated to secured transactions will establish in this thesis. Michael Bridge's *Personal Property Law*[74] although non comparative, and focuses exclusively on English law, discusses some topics on secured transactions which the author believes are relevant to this thesis because it provides some insight into the English system which is akin to Nigeria's and may be a useful tool for analysis.[75] Similarly, Professor Gerard McCormack's works will be highly relevant

[72](Sweet & Maxwell, 2nd Edition, 2007, Volume 2 in the Series). Also see – PHILIP R. WOOD, COMPARATIVE FINANCIAL LAW, (Sweet & Maxwell, London, 1995).
[73](LexisNexis UK and Penguin Books, 4th edition, 2010). Professor Goode has authored many other texts which shall be relevant to this thesis – books such as LEGAL PROBLEMS OF CREDIT AND SECURITY (2nd edition, Sweet & Maxwell, London, 1988), HIRE PURCHASE AND CONDITIONAL SALE, A COMPARATIVE SURVEY OF COMMONWEALTH AND AMERICAN LAW (The British Institute of International and Comparative Law, London, 1965), *A Pragmatic Conceptualist's Response,* 15 MONASH UNIVERSITY LAW REVIEW, 361 (1989), *Reflections on the Harmonization of Commercial Law*, in CRANSTON, ROSS & GOODE, ROY (eds.), COMMERCIAL AND CONSUMER LAW – NATIONAL AND INTERNATIONAL DIMENSIONS (Clarendon Press, Oxford, 1993).
[74] (Blackstone Press, London, 2nd edition, 1996).
[75] In the course of writing, the author shall rely or refer to the works of other international scholars whose works have become strong pillars in the analysis of comparative secured transactions. These scholars include Professor Tibor Tajti whose comparative works on secured transactions especially as it relates to the Central and Eastern European countries

and indeed replied upon in the course of writing this thesis given that his works touch not just on English secured transactions law, but also on US as well as Canadian secured transactions regimes.[76] Professor Tibor Tajti's book entitled *Comparative Secured Transactions Law* captures the jurisdictions of developed and developing countries – and the analysis conducted especially with respect to developing countries would serve as useful tools of analysis in this thesis. Also, the works Professor Atilla Harmathy, an eminent Hungarian scholar, will also be examined to find out the Hungarian experience and experiments with secured transactions law, from initially having something closer to the German system of secured transactions, to almost a radical shift towards the US Article 9 sometime in the early 90's following the fall of the Berlin Wall and the migration towards a market economy,[77]– certainly some lessons will be drawn to advise Nigerian lawmakers.

As earlier stated, Nigerian law on secured transactions is highly compartmentalized. Most Nigerian authors usually pick from the fragments to write about, such that it is easy to see book titles like *"Law of Securities for Bank Advances: Mortgage of Land"*,[78] *"Company Securities: Law and Practice"*[79]. There is therefore a paucity of local materials that discuss secured transactions law from a holistic perspective. Quite recently, some Nigerian authors have started to take bold steps – currently there is *Law of Secured Credit*[80]by Jelili Omotala, *Nigerian Law of*

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shall serve as useful tools for analysis. Similarly, Drobnig Ulrich has firmly demonstrated pure scholarship and his works are indispensable in the analysis of secured transactions law. The author also has similar conviction in the works of Louise Guillifer who currently heads the UK reform project on secured transactions. Also the works of Anna Veneziano (UNIDROIT), Bazinas Spiros (UNCITRAL) shall from time to time be consulted, given that these scholars are in the forefront of private law reforms, especially those affecting developing countries.

[76] See the Reference section for the list of Professor McCormack's works cited in this thesis.

[77]See Atilla Harmathy, *Secured Transaction in a Country of Transition: The Hungarian Experience*, 27 PENNSYLVANIA STATE INT'L LAW REVIEW, 757 (2009); Atilla Harmathy, "The EBRD Model Law and the Hungarian Law," in JOSEPH NORTON AND MADS ANDENAS (eds.), EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS (London, Kluwer Law International, 1998); Atilla Harmathy, *The Hungarian Law of Credit Security in Property* (1998) 9 EUROPEAN BUSINESS LAW REVIEW, 394 (1998), Issue 11/12.

[78]EMEKA CHIANU (Ambik Press, Benin, 2000).

[79] JOSEPH ABUGU (Lagos, University of Lagos Press, 2005).

[80] (Evans Brothers Nigerian Publishers Ltd, 2006).

Secured Credit[81]by Imran O. Smith and *Legal Aspects of Receivable Financing*[82]by Fidelis Oditah. Although this is a laudable achievement, at least a step forward, these texts majorly focus discussions on immovable properties. Of course, the reason is obvious – they could only discuss what is robustly known to the Nigerian legal framework. Their books therefore were mere assemblages of the fragmented security devices that calibrate the Nigerian secured transactions law. The Center for the Economic Analysis of Law (CEAL)[83] has been working closely with the Nigerian Government to bring about a secured transactions law which has the resemblance of Article 9, but this is yet to be a reality.

Apart from the desire to add to the amount of literature in this area, the author equally hopes that this thesis will act as a catalyst to the Nigerian Government to quicken their steps towards designing a secured transactions law that is substantially based on the adapted elements as well as experiences of Article 9 and OPPSA. Also, it is the author's desire that this area of law be quickly introduced into the curricula of higher education in Nigeria to prepare the minds of the current and new generation of lawyers for the proposed reform. If this is not done, the reformed law may within the first decade or two, suffer a cold attention due to high ignorance of it from the Nigerian business community. On the other hand, if the subject is introduced into schools' curricula any time soon, this work will add to the number of materials that will help Nigerian students to properly understand the unitary concept of secured transactions.

[81] (Ecowatch Publishers Nig. Ltd, 2001).
[82] (Sweet & Maxwell, London, 1998).
[83] CEAL is a non-profit research institute that provides legal and economic analysis of public policy issues. Being an affiliate of World Bank, it emphasizes on economic analysis of legal policy options and the development of alternative legal approaches that have more desirable economic consequences. See http://www.ceal.org/welcome.asp. Also see CEAL's project for Nigeria at http://nigeria.ceal.org/docs/ (Both were last visited on the 10th of October, 2013).

One other reason the author desires that Nigeria only adapts or takes over some elements of Article 9 and OPPSA models, is that the adapted elements which would capture the local realities of the country would make it possible for the SMEs[84] to try out their new business ideas which may lead to a high economic success. Apart from serving the SMEs, the reformed law from the lens of Article 9 might also lure in foreign direct investors, to see Nigeria as a viable terrain to startup businesses. All of this will in the long run contribute immensely to the reduction of Nigeria's high unemployment rate as well as bring about economic development. Currently, there are less cross border transactions between Nigeria and her neighboring countries who have adopted the OHADA[85] system. One of the major reasons for this apart from the obvious language barrier, is that there is lack of harmony in the laws which govern secured transactions in Nigeria and what are obtainable in these neighboring countries. The OHADA system although civilian in nature,

[84] In the Nigerian context, micro enterprise is defined as any industry with a labour size not beyond 10 workers or a total cost not exceeding N1.5million naira, which includes working capital minus the cost of land. Small scale enterprise is defined as an industry having between 11-100 workers or a total cost not exceeding N50million naira which includes working capital but excludes the cost of land. Medium scale is defined as an industry having between 101-300 workers or a total cost of over N50million but not exceeding N200million naira which includes working capital minus the cost of land. For more information on this, 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 Center, Lagos 2003) Number 4, p.8; available at http://www.cenbank.org/out/publications/guidelines/dfd/2004/smieis.pdf (last visited on 30th of September, 2013). Many other authors have expressed opinions about the importance of small and medium scale investors (SMEs). These authors unanimously agree that the SMEs are the engine of every economy because they create the highest number of jobs in most countries including Nigeria. See the works of the following authors: N.C Churchill, *The Five Stages of Small Business Growth*, HARVARD BUSINESS REVIEW, 30 – 50 (1983)., B. O. Awosika, *Evolving a National Framework for the Emergency of a Strong and Virile Small and Medium Scale Industry Sub-Sector in Nigeria*, being a Seminar Paper presented at MAN House, on the 5th of November, 1997. p.3.; Aremu, M.A, *Small and Medium Scale Enterprises As A Means of Employment Generation and Capacity Building In Nigeria,* being a Paper presented at the International Conference on Management and Enterprise Development on "Intellectuals and New Strategies for Sustainability Development of the Third World" held at Conference Center, University of Ibadan, Ibadan, Nigeria, between 5th - 8th of October, 2010., U. Gunu, , *Small Scale Enterprises in Nigeria: Their Start Up, Characteristics, Sources of Finance and Importance*, ILORIN JOURNAL OF BUSINESS AND SOCIAL SCIENCES, VOL. 9 (1 & 2), (2004), pp. 36 – 43.

[85]OHADA is the French acronym for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires", which translates as "Organisation for the Harmonization of Business Law in Africa". It is currently made up of seventeen African states. Unfortunately its website is only in French – see http://www.ohada.org (last visited on June 1, 2014).

shares a lot of similarities with the Article 9 model. When therefore, Nigeria reforms its secured transactions law in line with the tenets of UCC Article 9 model,[86] doing businesses with her neighbors[87] will be much more enhanced, as well as boil down to economic growth.

VI. Research questions

The chapters of this thesis which will be briefly described below shall answer these broad research questions – although not necessarily in the order in which they are listed. First, it will explore why there is a ripen need to reform Nigeria's secured transactions law by critically reviewing Nigeria's existing laws in this area. Second, it will answer why Article 9 and OPPSA are the chosen benchmark laws, and the reasons that justify their selection. Third, it will answer what elements of the compared models (Article 9 and OPPSA) are suitable for transplantation (in adapted form) to Nigeria? Fourth, the existent differences and commonalities between the two models and their significances to this thesis will be identified and addressed. Fifth, the crucial lessons and experiences which underscore the US and Ontario secured transactions laws, and how these lessons could be exploited in designing a tailor-made secured transactions law for Nigeria will also be identified and discussed. Sixth, the key challenges that the reformed secured

[86] In writing this thesis, the works of UNIDROIT that relate mainly to secured transactions law, UNCITRAL's Legislative Guide to Secured Transactions, book IX of the Draft Common Frame of Reference, EBRD Principles of Secured Transactions, the World Bank Group's secured transactions reform activities, will also be copiously consulted, as the works of these organizations are equally indispensable in the secured transactions law narrative.

[87] OHADA is made up of seventeen countries, and these countries surround Nigeria as neighbors. However, since OHADA member countries are French speaking coupled with the fact that OHADA is civilian in nature, Nigerians do not usually see the OHADA as a law they will fare well with in business transactions due to discrepancies in legal culture with the civilian system, and the fact that article 42 of OHADA makes French the working language. Regardless of these minor discrepancies, the author thinks that an Article 9 model-like law will augur well with Nigeria's legal tradition as well as give a possible room for synchronization between Nigeria and the OHADA members.

transactions law will face in the first few years will be predicted, and based on hindsight experiences of US and Ontario, pieces of advice will be offered, which if necessary should be incorporated into the "anticipated PPSL".[88] Seventh, as part of the rationale for embarking on this research anchors on the conviction that economic law reform is invariably linked to economic growth, this thesis will not fail to occasionally link the legal analysis to economic implications (economic analysis of law) to show the importance of the proposed reform.

Lastly, even though Article 9 and OPPSA are the benchmark for analysis, the author does not intend to address each and every single topic covered by them – for instance, conflict of laws is a big issue in Article 9 and OPPSA – simply because Canada and US are federal states, with secured transactions law being provincial or state law, respectively. Consequently, the states' and provinces' secured transactions laws differ especially with respect to change in the location of collateral. Moreover, as registration of security interests is not centralized on federal level in either of these countries and as collateral do often cross borders, issues on conflict of laws continue to overwhelm US and Canada. As opposed to that, in Nigeria, secured transactions law foreseeably will be a federal law with general application throughout the country, and therefore does not require much or any discussion on conflicts of law.

While coverage of conflicts of law rules in this work is not needed, field warehousing, as an idiosyncratic US security device hardly centered upon by contemporary Canadian, US or even international scholarship, deserves attention given that it might help to unlock the difficulty that is currently faced in the Nigerian agricultural sector. These two examples and more demonstrate that the idea of cherry-picking these topics and not necessarily minding whether they are given

[88] In this thesis, the term "anticipated PPSL" would be used to refer to any secured transactions law the Nigerian Parliament eventually enacts into being, to govern the use of personal property as collateral.

attention or not in either Article 9 or OPPSA lies squarely on the goal of adapting these models to fit specifically to what Nigeria currently needs.

VII. Road map for the thesis

This thesis will follow a simple but logical structure, by gradually developing the plot to answer why Nigeria's secured transactions law is ill-suited to modern business and financing needs, why there is need for change, and how to go about effecting the change. So **chapter one** will critically outline what the Nigerian secured transactions law presently is. It will further analyze why the identified laws are unsuitable nowadays, and hence the need for change. The chapter will go further to direct Nigeria to where solutions could be found, by suggesting OPPSA and Article 9 as sources for inspirations and tested legal solutions.

Chapter two will then proceed to make a comparative analysis between OPPSA and Article 9 with the goal to outline the commonalities and differences of the two models. This chapter may involve some deep analyses of complex concepts that may not be easily understood by a lay reader. So in order that this chapter achieves clarity to the reader, its analysis will follow a similar progression like the Tajti's building blocks of Article 9[89] and where necessary, issues would be made clearer in footnotes. The main aim of chapter two is to provide a comprehensive overview of both OPPSA and Article 9, so that it would be clear what each model best has to offer to Nigeria.

[89] See TIBOR TAJTI, COMPARATIVE SECURED TRANSACTIONS LAW (Akademiai Kiado, 2002) (the author identified the building blocks of secured transactions law under the UCC Article 9 as: a) the unitary concept of security interest; b) public notice filing; c) the concept of floating lien; d) a system of priorities; e) enforcement, and; f) the complementary role with other fields of law – eg, bankruptcy and consumer protection laws) – see pp. 141 and 400.

Chapter three will propose recommendations based on the comparisons in chapter two – the recommendations of this chapter are context specific and tailor-made for Nigeria, and if followed, would likely result to a well-functioning secured transactions law.

Chapter four will examine the linkages between secured transactions law and other close areas of law. It will focus on the secured transactions and bankruptcy interface, educating the reader/reformer that both are invariably inseparable, so that a reform in one aspect, invites a reform in the other as well. Furthermore, it will examine the linkages between secured transactions law and consumer protection law – with view of seeing how reforms in the consumer protection law of Nigeria could be made to reconcile with the proposed secured transactions law. The chapter is meant to reiterate the age-old notion that law is only divided in theory – but invariably undivided in practice. The thesis winds up with a conclusion, discussing the way forward by guessing who and what might be spoilers to the law reform, and how loopholes could be tightened to frustrate any antagonistic efforts to the reform. The thesis will conclude finally with predictions into the future, and how things might likely turn up with respect to secured transactions given the pattern of evolution of key events.

Chapter One
A Critical Review of the Current Laws on Secured Transactions in Nigeria

Chapter Summary

The reason for this chapter is to demonstrate to the reader that contemporary Nigerian secured transactions law is in dire need of reform because it no longer provides easy access to credits especially to the SMEs due to its compartmentalized form which lacks predictability and comprehensiveness. The chapter makes a critical assessment of the existing laws and discovers that a number of deficiencies exist. **First,** the existing laws provide vague requirements with respect to the creation and registration of security interests in personal property – of which in some cases, registration is not even required thereby creating the ostensible ownership problems between a secured party and a third party.

Second, due to the complex and outdated formalities that exist, lenders often lose out on technical grounds, or, would have to always hire professionals to comb through the compartmentalized and not-easily-comprehensible secured transactions law – what increases transactions cost, which is eventually borne by the debtor through high interest rates.

Third, the compartmentalized and unlinked nature of the various applicable laws often leads to conflicting priority rules amongst secured creditors and other lien holders – worsened also by the lack of a collateral registry that would have served both a publicity function as well as a system of perfection. As lenders are faced with these problems, coupled also by a weak enforcement mechanism – a slow judicial system, plus a legal framework which has not expressly allowed self-help repossession of collateral, the overall effect is the severe apathy towards lending, refusal to accept personal property as collateral, increase in lenders' monitoring costs, and the demand for high interest rates as protective measures against these deficiencies. The chapter argues that if these hindrances to affordable credits are removed through a secured transactions law reform, the Nigerian economy would definitely be better of.

1.1. The Nigerian legal system: A brief insight

The Nigerian legal system is heavily sprinkled with English law which has remained quite indelible in the system, partly due to the historical link Nigeria has with England. A cursory look into the Nigerian legal system therefore, reveals that English law forms a substantial part of Nigerian law, so much so that, a discussion on Nigerian law nearly always resembles to a large extent what could be obtainable in England.[90]

Furthermore, Nigeria is a federation with thirty six states[91] and the federal capital territory – Abuja. Each of the states including the federal capital territory has its own legal system, although there is a federal legal system that is applicable throughout the country. It is true to say that the Nigerian legal system is complex being that in addition to the idiosyncratic laws of each state as well as the federal law, it also allows the application of local customs in each state. This is cumbersome in reality being that there are several customs in one state, and a person relying on a particular custom in court would have the onus to prove that it exists, and that such custom is "not repugnant to natural justice, public policy, equity and good conscience"[92] – a situation that leaves a question as to what 'good conscience' might always mean and from whose perspective.

The extent to which the various states' legal systems is similar is owed to the period in Nigeria's history, between 1914 – 1951, when Nigeria practiced a unitary system of government,

[90] For an overview of the Nigerian Legal System, see AKINTUNDE OLUSEGUN OBILADE, THE NIGERIAN LEGAL SYSTEM (Spectrum Books Limited, Ibadan, 1979) chapter 1.
[91] The word "state" is the official designation of the component units. There are 36 of them in Nigeria and they include: Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara. See sections 2 and 3 of the 1999 Constitution of Nigeria.
[92] See section 18 of the Nigerian Evidence Act, 2011.

such that after becoming a federation, the uniform laws continued to apply to the various states until repealed or amended by a state's legislative body.[93]

The important question remains whether secured transactions law is a federal or state law in Nigeria? In Nigeria, the federal parliament has exclusive power to legislate on commerce, trade, banking, and bankruptcy matters.[94] From a careful reading of the second schedule to the 1999 Nigerian Constitution, the legislative houses of the thirty six states and the federal capital territory do not have the competence to legislate on secured transactions matters.[95] This implies that any enacted secured transactions law in Nigeria would have a uniform application across the country unlike in the US and Canada.

1.2. The importance of credit and why it makes sense to secure transactions

Economic growth and development are traceable to commerce and investments which are proverbially known as the lifeblood of every economy.[96] Furthermore, commerce and investments do not emerge automatically, but are amongst other things, sustained through financing and sufficient credit availability to entrepreneurs and business entities.[97] This is majorly attained by

[93] It is highly important to mention as well that the Constitution of the Federal Republic of Nigeria, 1999 as amended, (the Constitution) enumerates the areas where the federal government and state governments have power to legislate upon. Laws made by the federal legislative body are referred to as "Acts", while those made by states' legislative bodies are simply referred to as "Laws" – for example, Criminal Code Act will govern federal offenses, while the Criminal Code Law of a state governs state offenses. It is imperative to note that where a state law conflicts with a federal law on the same issue, the former is void to the extent of its inconsistency, while both federal Acts and state Laws are subservient to the constitution and void to the extent to which they conflict with the latter's provisions.

[94] See the second schedule to the 1999 Constitution of Nigeria (as amended) for the exclusive powers of the federal parliament (the National Assembly) in Nigeria.

[95] See the exclusive list in the second schedule to the 1999 Constitution of the Federal Republic of Nigeria.

[96] See ROY GOODE, COMMERCIAL LAW (Penguin Books, 4th edition, 2010) p. 619.

[97] A similar opinion was expressed in J. Bartholdy & C. Mateus, *Financing of SME's: an asset side story*, (2008) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1098347 p.2 (last visited on May 13, 2014).

borrowing from banks and other financial institutions,[98] who thrive essentially on interests that accrue from the credits they lend out.

When lending, a lender has basically two options. First, he may rely exclusively on the borrower's promise to repay having been satisfied on the feasibility of the borrower's idea; or secondly, he may request for collateral to back up the borrower's bare promise to repay. In truth, some lenders over time develop trust for a particular set of borrowers probably due to long and unbruised business relationships with them – meaning that the lenders believe that there exists a high probability that these borrowers will repay. The danger with relying on a trusted relationship, however, lies in the fact that notwithstanding the borrower's sincerity to repay, certain events which are unforeseeable[99] and beyond the borrower's power to prevent may occur, thereby making the borrower default without choice.

These events may be too grave as to force the borrower into bankruptcy and liquidation, thereby giving rise to the time when the strength of security interests is tested. At this point, the unsecured lender would struggle to satisfy his debt from the borrower's assets[100] with other creditors who probably were secured. The unsecured lender may discover to his chagrin that he will have to wait for others to satisfy their debts from the available assets of the borrower, before it ever gets to his turn.[101] Furthermore, it may not necessarily be bankruptcy and priority struggles with other secured lenders, but being that the only permanent factor is change, an otherwise well-behaved debtor could for no good reason become hostile against the lender and their relationship

[98]*Ibid*. at p.2.

[99] The debtor could become bankrupt, or suddenly face severe competitions in the market, forceful enough to drive him out of business. See generally – Boris Kozolchyk, *Secured Lendingand Its Poverty Reduction Effect,* 42 TEXAS INT'L LAW JOURNAL 727, (2007).

[100] A receiver will usually be appointed to manage and satisfy creditors based on the seniority of their security interests.

[101] Under the US bankruptcy regime, seniority of security interest is usually measured in this order: secured creditors, lien creditors, unsecured creditors, shareholders where the debtor is a corporation.

may get soured as a result, thereby placing the lender on a precarious position of not being repaid. In view of these highlighted reasons, it is therefore highly advised that a lender should secure his lending notwithstanding a long and trusted business relationship with a borrower.[102]

Therefore, it ought to be heeded to like an article of faith that lenders should try to always demand collateral to back up a lending transaction so that they would not have to seek judicial remedy upon default,[103] but to quickly pounce on the debtor's collateral to recover their investments.[104] This advice further makes sense considering the fact that it takes a lot of time as well as finance to pursue judicial remedy, and economic inflation may also devalue the initially lent credit at the lender's detriment. In worse cases, even if the lender succeeds in getting a favorable court judgment, he may not have any meaningful assets of the debtor against which to satisfy his judgment debt.[105]

Another reason that is worth considering is that when lenders opt not to demand collateral to back up lending, they try to cushion the effect of this risk by raising interest rates.[106] The borrower with no collateral may have no choice but to accept this high interest rate which will ultimately get transferred to his products and services, meaning that it will impede his competitive

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[102] For instance, the directors of an incorporated lender may be required to follow the good business judgment rule, or the fiduciary duties owed to the company by securing the credit it gives to borrowers even if the latter are trusted customers.

[103] This is especially so in a system that allows the use of self-help to repossess collateral upon debtor's default. For instance see Article 9-609 UCC.

[104]See Article 9-610(b) which empowers the secured party to repossess and sell collateral in either private or public market provided the commercial reasonableness standard is followed. The difficulty lies in credit-sales, whereby the seller is a small company selling products to a large retail company like Walmart or Tesco. If the latter refuses to provide collateral for the credit sale, but simply dictates terms on a "take it or leave it" basis that allows them to only repay at their own terms, then it might be difficult for the start-up company to insist on collateral from such a giant. However, where the giant company is the credit seller, the exact opposite is usually the case.

[105] Debtor may cunningly transfer assets to a third party or remove them from jurisdiction of the court – leading to the possibility that the secured party will not be paid even though he succeeds in getting a favorable court judgment.

[106] See – Boris Kozolchyk, *Secured Lending and Its Poverty Reduction Effect,* 42 TEXAS. INT'L LAW JOURNAL, 727, (2007), p.728.

ability with other business competitors who got lower interest rates because their debts were secured – and now sell their products and services at very competitive prices.[107] This may ultimately force the borrower with higher interest rates out of business and consequently result to liquidation of his business. Upon liquidation, the unsecured lender has nothing to fall back on and may resort to litigation, waste money to pursue the case till the end, and may have no assets to satisfy their judgment in the final analysis.

The need to secure lending in the case of banks, for example, has some advantages which transcend the interest of the bank. Banks do not actually own all the monies they lend to borrowers as some of them belong to depositors/customers of the bank. By lending, banks sustain from the interests that accrue from loaned sums. If therefore, banks fail to secure their lending transactions and all their borrowers default (non-performing loans) at a time due to a financial crisis for instance, it may mean that the ultimate losers from these unsecured arrangements would be bank customers who may not recover their savings – thereby leading to a systemic collapse of the economy. Although the foregoing discussion appears to be of general nature and true for most economies, the discussion has been undertaken in brief to also tell that it is true for the Nigerian society, and therefore, the country would have to necessarily reform its secured transactions law in order to make credit sufficiently available to business entrepreneurs.

1.3. The current nature of Nigeria's secured transactions law

The Nigerian legal system is comparatively young and full of experiments with transplanted legal concepts, mainly from England. Having adopted a legal system akin to that of

[107] *Ibid*.

England as well as some laws from her, [108] Nigeria has failed to revise a good number of them since adoption.[109] Some of the laws adopted from England which relate to commercial transactions and are still in force in Nigeria include but not limited to, the Sale of Goods Act of 1893, Conveyancing Act of 1881, Vendors and Purchasers Act of 1874, principles of common law and equity, just to mention a few.[110] Since all commercial transactions would have to find accommodation within the confines of the existing law, it means that Nigeria's secured transactions law applies mainly to transactions secured by title financing devices and security devices. The 'functional approach' to secured transactions which unifies retention of title and security devices into a whole (which US and Ontario have long accomplished) is yet to apply in Nigeria.

1.4. The compartmentalized and obsolete nature of Nigeria's secured transactions law in comparison with Article 9 and OPPSA

Nigeria's secured transactions law is highly fragmented and cannot be easily ascertained. In addition, the sources of law range from court decisions (which often are in disharmony),[111]

[108] The English law that became part of Nigerian law are: "(a) the received English law comprising: (i) the common law; (ii) the doctrines of equity; (iii) statutes of general application in force in England on or before January 1, 1900; (iv) statutes and subsidiary legislation on specified matters and (b) English law (statutes) made before October 1, 1960 and extending to Nigeria which are not yet repealed. Laws made by the local colonial legislature are treated as part of Nigerian legislation [,,,]." See at <http://www.nyulawglobal.org/globalex/nigeria.htm>; (last visited on May 5, 2014).

[109] For instance, the Bills of Sale Act 1878, Factors Act 1889, Infant Relief Act 1874, Judicature Act 1873, Merchant Law Amendment Act 1886, and many more are some of the English laws that were received into Nigeria, and have since been left unrevised. Consequently, these laws continue to pose serious obstacles to modern day commercial transactions.

[110] Specifically, the laws that are so directly relevant to secured transactions are Hire Purchase Act 1975, Sale of Goods Act, Pawn Brokers Act, Company and Allied Matters Act, 1990 – which regulates floating charges, security devices like chattel mortgage, pledge, charges and lien.

[111]The following proves the existence of disharmony amongst the Nigerian Supreme Court decisions. See *Ellochim Nig. Ltd & Ors v Mbadiwe* (1986) (part 14) 47 at 165 where the Justice condemned the use of self-help in harsh tones when he said: "It is no doubt annoying, and more often than not, frustrating, for a landlord to watch helplessly his

customary practices,[112] regulations,[113] to statutory laws.[114] These arrangements pose a lot of problems in fathoming what the law is, because apart from the difficulty in finding the law, there is also the unsolved problem of internal conflict of laws – depending on which part of the country is in question. The doctrine of implied repeal[115] which is applicable in many common law jurisdictions is not applicable in Nigeria, thereby creating situations where one commercial transaction is acceptable within the purview of one legislation or case law and unacceptable in

property in the hands of an intransigent tenant who is paying too little for his holding, or is irregular in his payment of rents or is otherwise an unsuitable tenant for the property. The temptation is very strong for the landlord to simply walk into the property and retake immediate possession. But that is precisely what the law forbids." Only ten years after, the same Justice in *Umeobi v Otukoya* (1978)1 Law Rep of Nig 172 (SCN) said "circumstances may exist in which a person may take an extra judicial remedial action to enforce his rights and still remain within the bounds of the law" see also the case of *Nkume v Registered Trustees of the synod of the Diocese on the Niger,* (1998) 10 NWLR (pt. 570) 514 which toed this line of thought, and the latest Supreme Court decision in *Awojugbagbe Light Industries Ltd v Chinukwe* [1995] 4 NWLR (part 390) 400, where the Justice gave his blessing on the use of self-help in the following words "A mortgagee, like a landlord exercising his right to possess after the expiry of his tenant's lease, or his agent who entered and took possession of the mortgage property in exercise of his right under the mortgage agreement is not liable for damages for forcible entry because the right to possess the property had become vested in the mortgagee and his agent, the receiver, and the forcible entry was done in furtherance of their rights to possession." These varying positions on the use of self-help to recover possession has been unhelpful to lenders or secured parties who are often confused as to the best method to utilize in realizing debt when a debtor defaults.

112 Customary law as well as statutory law governs alienation of interest in land. See http://www.nyulawglobal.org/globalex/nigeria.htm (last visited on May 5, 2014). Customary method of alienating interest in land has become highly problematic because it often lacks documentary evidence of transaction – a source of severe contention of title between successors in title of the initial parties especially if witnesses to the transaction have passed away.

113 See the Central Bank of Nigeria's (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) (Regulations, No. 1, 2015).

114 Statutes which govern mortgage transactions in Nigeria are also different depending on which part of the country the mortgage transaction took place. For instance, for the sake of mortgage transactions, Lagos is divided into two and each part is governed by a mortgage law different from the other part. Registration of Titles Law governs Lagos Island, Ebute Metta, Apapa, and parts of Surulere, while the rest of Lagos is governed by Conveyancing Act of 1881 as well as the East and Northern parts of Nigeria. Meanwhile, the states that were formerly part of the Western Region of Nigeria, are now being governed by their own Property and Conveyancing Laws. For further reading, see Clemet V W, *Mortgage of Unpartitioned Family Land as Security: Effect of the Majority Rule*, 1 PORT HARCOURT LAW JOURNAL, 34 (1991), p.37.

115The doctrine of implied repeal is a constitutional law concept which states that whenever a new law is passed, it impliedly repeals a conflicting older one. If this same logic is imported into the Nigerian judicial system, such that courts do not have to wait for older cases or statutes to be expressly overruled or repealed, it would obviate the circumstances of having multiple views on the same issue by the same court. For further reading on implied repeal, see – Jesse W. Markham, Jr, *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation under the Ballooning Conception of "Plain Repugnancy"* 45 GONZAGA LAW REVIEW, 437, (2009).

another equivalent law. Nigerian Judges who are 'lawmakers' in a sense, have not been sufficiently hardworking to overrule previous decisions which conflict with current reasoning in a new case. The end result of having two equal but opposite decisions, is confusion as to the actual applicable law to a particular situation. This ends up posing a lot of difficulties to attorneys who are faced a panoply of conflicting dcisions when advising their clients. This is also worrisome considering that banks and other lending institutions in Nigeria always fashion their regulatory policies in accordance with the Nigerian Supreme Court decisions, and it is often a big problem when there are two or more disagreeing Supreme Court decisions over the same matter.

1.5. The indispensable nature of "real mortgage" in the Nigerian secured transactions law narrative

1.5.1. Introduction: In rem rights versus personal rights

There are two major kinds of right that could be asserted over real and personal properties in Nigeria – right *in rem* or real right, and right *ad rem*, also known as personal rights or rights *in personam*. Right *in rem* refers to a right or power over a thing which the holder can exercise against any person in possession of that thing.[116] While a personal right is that which can only be exercised against a specific individual. Hence, whenever a claim is with respect to a specific thing, the action is *in rem* –for example, a claim of ownership of a car or specific portion of land. But if the claim refers to an obligation, for instance a claim for a performance of a contract of sale of a car, such a right is personal, meaning that a person rather than a thing is the subject matter of the right.[117]

[116] For a more robust understanding, see – R.B. Grantham & C.E.F. Rickett, *Property rights as a legally significant event*, CAMBRIDGE LAW JOURNAL, 62(3), (2003), pp. 717-749.
[117]A far more detailed explanation on *right in personam* is offered by Dorfman Avihay, *The Society of Property,* 62 UNIVERSITY OF TORONTO LAW JOURNAL, 563 (2012).

Goode also gives a shorthand formula for denoting the difference as "what I own and what I am owed."[118]

A right *in rem* therefore refers to either a power to recover a specific thing, or more often a right that may be exercised against any person with respect to a particular thing, while personal rights refer to persons who are mandated to perform certain obligations that are due. Under the Nigerian law, a real action refers to one in which an ownership or possession of an immovable property is determined. Consequently, land or building is the only thing that could be recovered as of right, because in the case of movable things, the right to recover a thing is not existent as the defendant could choose between returning the chattel and paying damages.[119] Hence, land or building is described as real property and movable things as personal property.[120] This aspect of Nigerian law remains an offshoot of English common law.

Furthermore, English law divides all personal property into two kinds of chose: choses in possession[121] and choses in action.[122] On one hand, a chose in action would include every personal right to a property, which can only be enforced by court action and not by taking physical possession.[123] Thus, if A owes B a thousand Euros, B has a chose in action over the amount. Patent rights, copyrights, trademarks and so on are further examples of choses in action, and these rights could also be assigned.[124] On the other hand, a chose in possession refers to a right to retake a

[118] Roy .M. Goode, *Ownership and Obligation in Commercial Transactions,* 103 LAW QUARTERLY JOURNAL, 433, (1987).
[119] ROY GOODE, COMMERCIAL LAW (Penguin Books, 4th edition, 2010) p. 32.
[120]*Ibid*.
[121] MICHAEL BRIDGE, PERSONAL PROPERTY LAW, (Blackstone Press Limited, 2nd edition, 1996) p. 3.
[122]*Ibid.* at p.3.
[123] See the court's definition in *Torkington* v. *Magee* [1902] 2 K. B. 427, 430, where it said "'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession."
[124]MICHAEL BRIDGE, PERSONAL PROPERTY LAW (Blackstone Press Limited, 2nd edition, 1996), p. 4.

chattel from another person who is using it without the owner's consent.[125] However, if the owner chooses to sue, he cannot recover the chattel as of right but could claim damages that could enable him get another of the same kind. It is important that this foundation on the kinds of property right is laid out because subsequent discussions have to rest on it considering the fact that modern secured transactions law creates only rights *in rem* against debtors' collateral.

1.5.2. Customary pledge of land differentiated from a mortgage of land

In Nigeria, two sets of legal devices, namely, customary law pledge[126] and English mortgage govern land transactions. This situation is problematic due to the difficulties posed by internal conflict of laws. For instance, under the Nigerian customary law system, land could be pledged.[127] The concept of land-pledge as a form of securing a credit transaction is done by putting the pledgee into possession of land by the pledgor while the latter retains ownership of land. The pledgee therefore is to be in possession and make use of the land until whenever the pledgor is ready to redeem. On the authority of the popular dictum of Mbanefo J, customary pledge of land is perpetually redeemable;[128] and the right to redeem is not merely extinguished because the pledgor did not redeem on the mutually agreed date. This is because 'once a pledge always a pledge',[129] meaning that a pledge transaction does not become an outright sale merely because the

[125]See the seminal article written on this by W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law* 33 HARVARD LAW REVIEW, 997 (1920).
[126]For a comprehensive discussion on customary law pledge of land in Nigeria, *see* J.F. FEKUMO, PRINCIPLES OF NIGERIAN CUSTOMARY LAND LAW, (Port Harcourt, F&F Publishers, 2002) chapter 6.
[127]See *Ikeanyi v Adighogu* (1958) 2 ERNLR 38.
[128]*Ibid.* at p.39.
[129] This maxim was applied in these cases: *Kofi v Kofi* 1 WACA 284 (redemption was possible even after seventy years), *Ebiassah v Ababio* (1946) 12 WACA 106 (after 60 years), *Leregun v Funlayo* (1956) WRNLR 167 (after 30 years).

pledgor did not redeem accordingly. The author believes that the inherent perpetual redeemability feature of a customary pledge which makes it impossible for the lender to sell it in the case of default, particularly makes it unsuitable for today's commercial transaction.

There are two types of land-pledge under the Nigeria's customary law, namely self-liquidating and non-self-liquidating pledges.[130] In the former, what is usually pledged is a land which is planted with economic crops.[131] Under this arrangement, the pledgee satisfies his principal loan and interest by harvesting the fruits of the land; and when he has duly satisfied his entitlement, usually over an agreed time period, he hands over possession of the land back to the pledgor. In this case, the pledgor is not necessarily required to take positive steps towards redeeming the loan but is to wait until the benefits arising from the use of the land by the pledgee are enough to discharge his (pledgor's) obligation in the transaction.

On the other hand, a non-self-liquidating pledge refers to when a vacant land is pledged, and the pledgee makes gainful use of the land by cultivating on it. In this case the pledgee is not obliged to give account to the pledgor because the use and enjoyment of the land before redemption are taken to be the interest of the loan. A pledgee is however advised to sublet his possession for a fee to a third party if he is unwilling to cultivate a land subject of a non-self-liquidating pledge. Following the principle that customary law pledge is perpetually redeemable,[132] pledgors do not most of the time redeem the pledge before their demise. The result is that most times the pledgee's successors-in-title take over possession of the pledged land without knowing the true state of things

[130]EMEKA CHIANU, LAW OF SECURITIES FOR BANK ADVANCES AND MORTGAGE OF LAND (Benin, Ambik Press, 2nd edition, 2004) p.195.
[131] Examples of economic crops are rubber, palm trees, cocoa trees, just to mention a few. The fruits they regularly yield could be sold in the market to realize cash proceeds.
[132]See *Leregun v Funlayo* (1956) WRNLR 167.

because the transaction was neither reduced into writing[133] nor registered in any land registry[134] as a reliable means of properly informing successors-in-title as to the true nature of interest.

The above types of customary law transactions are unknown to the English law of real property mortgage which Nigeria also adopted into its legal system. In a real mortgage transaction, the mortgagor confers the legal title of a land to the mortgagee on the arrangement that the mortgagee would re-convey the land to the mortgagor if the latter repays the borrowed sum with agreed interest.[135] In this instance, the mortgagee becomes the legal owner during the pendency of the mortgage transaction and could perform all transactions that are compatible with ownership,[136] at least in principle. For instance if the mortgagor defaults to repay on the agreed due date, the mortgagee can sell the property and apply the proceeds to the debt owed, and may even sue the mortgagor for any deficient sum provided he (mortgagee) sold the collateral in good faith.[137] Equity however has over the years imposed some standards that must be observed under mortgage

[133] Although section 4 of the Statute of Frauds, 1677 mandates that any transaction which alienates interest in land must be in writing to be enforceable, a lot of court cases in Nigeria have assented that alienation of interest in customary land transactions could be oral and evidenced by witnesses, so as to accommodate the low educational status of people in rural communities. This is evident in the following cases – being that a customary pledge of land is in the true sense, an alienation of interest in land. See *Kofi v Kofi* 1 WACA, *Ebiassah v Ababio* (1946) 12 WACA 106, *Leregun v Funlayo* (1956) WRNLR 167.

[134]A corollary to the point above is that most rural parcels of land are not properly delineated and therefore cannot be located on the map or registered in the land registry. This makes verification of land ownership claim difficult, as potential buyers or anyone seeking to deal with a particular parcel of land cannot check the registry to know the current status or its transactions history. This accentuates the problem of ostensible ownership, thereby making rural parcels of land unattractive as collateral.

[135] Black's Law Dictionary (9th edition) defines 'mortgage' as "a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms". See the seminal article by William H. Lloyd, *Mortgages—The Genesis of the Lien Theory* 32 YALE LAW JOURNAL, 233 (1923). Also see relevant chapters on mortgage in EMEKA CHIANU, LAW OF SECURITIES FOR BANK ADVANCES AND MORTGAGE OF LAND (Benin, Ambik Press, 2nd edition, 2004).

[136] See a fulsome discussion on the mortgagee's power of sale, in EMEKA CHIANU, LAW OF SECURITIES FOR BANK ADVANCES AND MORTGAGE OF LAND (Benin, Ambik Press, 2nd edition, 2004), chapter six.

[137]*Ibid* at p.118. Also see *Downsview Nominees Ltd v First City Corp* [1993] A.C. 295 PC (New Zealand) at 314, where Lord Templeman noted that a mortgagee need not act with "purity of purpose" and could go as far as harboring a "mixed motive" in realizing his money through sale of collateral.

transactions, in order to mitigate the hardships which mortgagors, being often the weaker party, suffer.[138] To this end, mortgagees owe mortgagors the equitable duty to account for the proceeds obtained from land or building during the pendency of mortgage. Such that the accumulated proceeds could be used to set-off[139] the debt owed by the mortgagor. Also, even though the mortgagee is the legal owner in a mortgage agreement, he is not allowed to make non-good faith sales when mortgagor defaults.[140] Before mortgagor's default occurs however, a mortgagee can assign his interest (never to sell) to a third party who must step into mortgagee's shoes subject to the terms of the mortgage agreement entered between the first mortgagee and the mortgagor.[141]

The above insight has been given to explain that two sets of laws are applicable to transactions which use land as collateral in Nigeria. This accentuates the claim that Nigeria's security interest law is mostly land-based and compartmentalized as well. It is left for parties to a credit transaction that intend to use land as collateral to make clear which law is applicable to it, whether it is the customary law pledge or the English mortgage law – if they fail to specify, the court is likely to examine the circumstances surrounding the transaction and apply the law with the most real connection to the contract.

At this juncture, it will be useful to point out that the applicable laws in Nigeria with respect to securing credits have been outpaced by current commercial realities and therefore, are very problematic to good economic realization due to the following reasons. First, land and building

[138] For more detailed study, see Loi C. Kelry, *Mortgagees exercising power of sale: nonfeasance, privilege, trusteeship and duty of care* JOURNAL OF BUSINESS LAW 7, (2010), pp.576-598.
[139]*Ibid.* at 576.
[140]*Ibid*. at 577.
[141] However, in order to protect the market, it is settled law that a bona fide purchaser for value without notice will always be protected. For a robust understanding on this frequently cited doctrine in defense of title in most commercial transactions, see – Owen L. Anderson, and Charles T. Edin, *The Growing Uncertainty of Real Estate Titles,* 65 NORTH DAKOTA LAW REVIEW, 1 (1989).

which are frequently demanded as collateral in Nigeria are not available to everyone who needs credit to start up a business or expand businesses.[142] Second, customary pledges are fraught with many issues that discourage their uses for securing credit transactions – rural pieces of land in most parts of Nigeria are not usually well delineated, and consequently their owners or those who have one type of interest or another on land cannot afford to register them in the land registry for public notice[143]. This may give rise to ostensible ownership problem, as a pledgee in possession may convince a foreign investor or someone not based in that particular community to purchase the land from him. The pledgee could even in dubious cases "arrange" for paid witnesses to endorse his ownership in front of a potential buyer who has no other place to verify the alleged title. This kind of sale would later be challenged by the pledgor or his heirs, often times leading to fights, and deaths in worse case scenarios. Third, the right to cultivate land in a customary land-pledge transaction has become commercially difficult to exploit because sometimes, a pledgee may not want to cultivate the land due to so many reasons and may not be able to find someone who could help him to cultivate it for a reasonable fee.[144]

[142] Apart from this truism, land and building are no longer the most valuable assets a debtor may have. Property rights in intangibles such as patents, copyrights, trademarks and names, service marks, inventory, equipment, just to mention a few, are by far more valuable in certain circumstances than real property. For instance, the monetary value of Coca cola's trademark as well as inventories may surely be more valuable than any physical asset it may have.

[143] Plots of land in non-rural places in Nigeria are usually delineated and are locatable on the map – with the landowners having certificates of ownership. These delineated pieces of land are perfected by registration of title in the state land registry where the land is located, and the title documents of the land could easily be used to secure credits because the lender could easily verify them at the land registry. However, in rural areas, where a large portion of the land space has not yet been delineated, proof of ownership is not usually based on the possession of a certificate of ownership, but by calling witnesses to assert that one is indeed the owner of the piece of land in question – thereby giving rise to the possibility of ostensible ownership problem or a situation whereby the so-called witnesses were paid to give false witness.

[144] Even where he finds someone willing to cultivate the pledged land on his behalf, the cost of labor may outweigh the possible profit in the final analysis, thereby making the entire transaction an exercise in futility from the cost-benefit point of view.

Fourth, there also may be crop failure due to climate change – thus, unexpected natural events like flood, earthquake, drought, or similar factors that could rob the pledgee of any possible benefit from the advanced loan is another reason that makes customary pledge unsuitable. In this modern time when business entities are required to keep thorough accounts of their businesses for audit and tax purposes for instance, it may be difficult to estimate whether crops that are yet to be harvested would actually place the pledgee under profit or loss under the current legal framework. Fifth, if pledgee is a bank with many customers to lend credit to, it would be unrealistic for a bank to cultivate several lands, in which case crops failure in one season could liquidate the bank.

When a claim about the obsolete and compartmentalized nature of Nigeria's secured transactions law is made, it is always made in comparison with a law that functions well elsewhere, in a legal system akin to that of Nigeria – in this case, the US and Canada (Ontario). Before Article 9 came into existence, US secured transactions law was compartmentalized[145] as well, and this resulted to an impeded access to applicable laws to commercial transactions – a situation that posed a lot of difficulties, including the abuses that stemmed from unpredictability. Having acknowledged these difficulties, a group of American scholars[146] converged to draft Article 9 and other articles of the UCC. Article 9 now governs secured transactions in the US being that all the

[145]A revered authority that discusses the nature of US secured transactions law before the coming of the UCC Article 9 is GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965/reprinted in 1999). Volume 1.

[146] Beginning in 1942, the Uniform Commercial Code (UCC) was jointly drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). The UCC is a soft law and not designed to have a binding effect but was to serve as a model for states for 'uniform' adoption. Once adopted either verbatim or with minor changes by a state, it became a law in force. Today, all the 50 states have adopted the UCC Article 9. Judge Herbert F. Goodrich was the Chairman of the Editorial Board of the Code's 1952 version which was drafted by top legal minds in the US, featuring Grant Gilmore, Karl N. Llewellyn, William A. Schnader, Soia Mentschikoff and so on. It is important to equally point out that more than 30 states in the US have adopted the 2010 amendments of Article UCC 9.

50 states have adopted it. Article 9 also brought innovations[147] that continue to oil the wheels of commerce – leading many jurisdictions[148] and international institutions[149] to find it worthy of adoption or source of inspirations. All this would later unfold in a logical sequence in this thesis, to show that the US experiences that led to the emergence of Article 9 are indeed useful sources for Nigeria's secured transactions law reform.

OPPSA is the Ontario version of the Canadian PPSA[150] – Ontario being the first common law province in Canada to adopt the Canadian PPSA. Before this, their experiences were similar to those of US prior to Article 9, being that they experienced fragmentation of secured transactions law as well. Of course, it is on record that the Canadian PPSA which Ontario adopted had ultimately come from Article 9, although with some modifications. The truth of the matter is that

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[147] Prior to UCC Article 9, a secured party had the right of unfettered dominion of the debtor's assets, and was practically involved in the management affairs of the debtor's asset through his policing right. As a matter of law, it was void to give the debtor an unfettered dominion or control over the collateral as *Benedict v Ratner*, 268 U.S. 353 (1925) accentuated. The main rationale behind this approach was to cure the ostensible ownership problem and to avoid any fraudulent misuse or transfer of the asset to a third party by the debtor at the secured party's detriment. This arrangement raised a number of disturbing issues, as the secured party's direct involvement and control could eventually lead to the collapse of debtor's business considering the fact that the secured party may always be risk averse, or the direct involvement of many secured parties could be catastrophic for the common debtor who may not be allowed to utilize his business expertise. Furthermore, it was realized that policing the debtor by the secured party will incur some costs that will eventually be transferred to the debtor, thereby depreciating his chances of making sufficient profits. Article 9 solved this problem by abolishing the secured party's right (except given by contract) to police debtor and instead, introduced the filing system to create public awareness on any asset which a debtor has previously created a security interest in, so that in general, secured parties will be ranked in accordance with their order of perfection after attachment of security interest in a particular collateral. See Article 9-205 and its official comment and balance it with the case of *Benedict v Ratner*, 268 U.S. 353 (1925). For the author's opinion about policing right of the secured party vis-à-vis Nigeria, see chapter three of this work. For a related discussion on the foregoing, see Peter F. Coogan, *Suggested Analytical Approach to Article 9 of the Uniform Commercial Code* 63 COLUMBIA LAW REVIEW, 1 (1963).

[148] Australia, Canada and New Zealand are ready examples of the countries that have reformed their secured transactions law through the lens of UCC Article 9.

[149]Ready examples are: United Nations Legislative Guide on Secured Transactions, Book IX of the European Draft Common Frame of Reference (DCFR), the European Bank of Reconstruction and Development's (EBRD) Model Law on Secured Transactions.

[150]The Canadian PPSA was adopted in 1967 as a model law which has close resemblance with the UCC Article 9. Ontario was the first common law province in Canada to adopt it with some modifications. As at present, all the provinces in Canada have adopted and modified the Canadian PPSA except Quebec which has the civilian system.

countries are often times sincere in acknowledging that they do have severe challenges in one sector or another of their economy. The best thing to often do in such a circumstance is to take a look at other countries that have experienced similar challenges and find out how they solved them. This approach of course, is cheaper than waiting to have one's own experiences especially where sufficient human and financial resources may not be available to engage in such voyage of discovery. Many countries have applied this technique including Canada, Australia and New Zealand, even though they are ranked as developed countries.

1.5.3. Real property mortgage

In Nigeria today, real property mortgage remains the most used form of securing credit transactions. A mortgage is "a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty that will become void upon payment or performance according to the stipulated term."[151] One of the well accepted definitions of mortgage is that which Lord Lindley MR gave in *Santley v Wilde*[152] that "a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given."[153]

A mortgage can be legal or equitable[154] and has two parties, namely, the mortgagor and mortgagee. The former is the owner of the land that serves as collateral for the credit advanced by the latter – the mortgagee. In a legal mortgage transaction, the mortgagor transfers the legal ownership of his land to the mortgagee as a security of the credit advanced to him on the

[151]BLACK'S LAW DICTIONARY, (9th edition, Thomson Reuters, 2009) p.1101.
[152](1899) 2 Ch.474, also adopted in *Inter City Bank Plc v F&FF Nig. Ltd*. (2001) 17 NWLR (pt. 742) 347 at 364.
[153] *Ibid.*
[154]See *Okuneye v First Bank of Nigeria Ltd* (1996) 6 NWLR (pt. 457) 745.

understanding that upon his default to repay, the mortgagee could sell the collateral and apply the proceeds to the owed debt.[155] It is usually understood by both parties that upon the repayment of the loan by the mortgagor, the mortgagee would re-convey the land back to the mortgagor.[156]

Ideally, a mortgage collateral exists as an assurance that the mortgagee will not lose his money if the mortgagor defaults, in which case the mortgagor may still be in possession of his land during the pendency of a mortgage. But circumstances exist where the mortgagee takes possession of the real collateral. In the case of a building, the mortgagee may lease to tenants who would pay rents to him. In that case, equity imposes on him the duty to account[157] for proceeds that accrued from the collateral and may be used to offset the mortgage debt, or the mortgagee might be the one to reimburse the mortgagor if the proceeds he has collected from the collateral outweigh the mortgage debt and interest. This is because, a mortgage exists primarily to secure a debt and resulting interests, and nothing beyond.[158]

Under the Nigerian law as earlier said, a mortgagor has three months grace period to redeem after the contractual date of redemption has passed,[159] meaning the mortgagee's power of

[155] However, in Nigeria a mortgagee's right to sell immediately after the contractual date has elapsed and the mortgagor is still in default, has been diluted. Hence, a mortgagee would have to wait for a grace period of three months after contractual default of the mortgagor in order to make a valid sale. See Section 20 of the Conveyancing & Law of Property Act (CLPA) and section 125 Property and Conveyancing Law in Nigeria.

[156] This practice is embedded in the popular maxim that "once a mortgage, always a mortgage". In Nigeria, courts have always applied this maxim to protect mortgagors who are viewed to always be the weaker party in most mortgage transactions. In *Gory v Nomuoja* (1969) Nig Comm LR 17 and *Obakpolor v Ekejija* (1977) Nig Court of App Rep 593; the court showed some considerable level of sympathy for the mortgagor by cutting off many technicalities in the agreement to hold that the mortgagor's right to redeem was not extinguished.

[157] This is one of mortgagor's equity of redemption. See section 125 Property and Conveyancing Law in Nigeria and *Adinde v Iwueke* (1974) Nig Comm LR 363.

[158] Any extra amount beyond the principal loan and interest which passes to the mortgagee in a mortgage transaction would result to an undue enrichment. See generally – J.O FABUNMI, EQUITY AND TRUSTS IN NIGERIA (Ile Ife, Unife Press, 1986) pp. 104 –106.

[159] See section 20 of the Conveyancing & Law of Property Act (CLPA) and section 125 Property and Conveyancing Law in Nigeria.

sale of collateral is ripe only after the passage of the grace period. After this period, the mortgagee can sell the collateral in good faith and may still approach the mortgagor for any deficient value. The meaning of good faith standard has been interpreted to mean that the collateral was sold in open market, with an open market price.[160] There have been instances where mortgagees sold collateral to their friends or family members[161] at ridiculously low prices and courts intervened by annulling the sales and barring the mortgagees from recovering any claimed deficient sum, and mandated them to pay the mortgagors a certain sum which represents a surplus that ought to have materialized had the sales been conducted in good faith. The open market value of a collateral is known from an independent expert's valuation of the land or building based on the prevalent market price. However, a mortgagee could sell at an undervalue market price but not at a gross undervalue.[162]

Equitable mortgages also exist in Nigeria. For instance, in *Ogundiani v Araba,*[163] the Supreme Court posited that equitable mortgages are created by (a) mere deposit of title deeds with a clear intention that the deeds should be taken or retained as security for a loan, and (b) by an agreement to create a legal mortgage. The court has further held that in addition to the two features above, a claim for the existence of an equitable mortgage must be underpinned by furnishing an oral or documentary evidence which proves that the title deed was deposited as security for a loan

[160]See *Taiwo v Adegboro* (1997) 11 NWLR (pt. 528) 224, where the court annulled a sale of property valued at N340,000 (US$2125) was sold at N140,000 (US$875).
[161]*Viatonu v Odutyo* (1950) 19 NLR 119, where the mortgagee sold to her husband who is a co-partner in the auctioneering firm. The court annulled the sale on the ground that the transaction was devoid of good faith.
[162]*Idowu v Jaiyeola* (1970) 1 African LR Comm 289.
[163] (1978) 1 Law Rep. of Nig. 280, 287–88.

and not for safe keeping.[164] These features are what distinguish an equitable mortgage from a lien.[165]

The Land Use Act 1978 (hereafter LUA) defines mortgage to include both legal and equitable mortgage.[166] However, LUA states that no alienation of interest in land is valid unless the consent of the Governor has first been sought and obtained.[167] Section 22 of LUA has therefore threatened the continued existence of equitable mortgage in Nigeria and has resulted into conflicting court decisions. While the court of appeal in *Jacobson Engineering Co Ltd v United Bank for Africa Ltd*[168]maintains that section 22 LUA has abolished the creation of mortgages by the deposition of title deeds, the same court after three years stated in *Okuneye v First Bank of Nigeria Ltd*[169] that the deposition of title deed ranks more or less with an agreement to create a legal mortgage and therefore is not caught up with the consent provision of section 22 LUA.

The author very much prefers the decision in *Okuneye* which jettisons the requirement to obtain governor's consent before the deposition of a title deed to secure a loan. Apparently, section 22 of LUA has constituted a clog on the wheels of commerce in Nigeria being that it requires the governor of a state to first of all give consent to any alienation of interest in land before such a transaction could be deemed valid. This is indeed a huge problem and a gap in LUA – being that a governor of a state in Nigeria is usually preoccupied with tight political schedules, and not practically able to handle all applications for alienation of interest in land in good time. The implication of this is that loan transactions of which land is intended to be used as collateral have

[164]*African Continental Bank Ltd v Yesufu* (1977) Nig Comm LR 212, 239.
[165]*Ibid.* at 239.
[166]See section 51 LUA.
[167]Section 22 LUA.
[168](1993) 3 NWLR (pt. 283) p.586.
[169](1996) 6 NWLR (pt. 457) 745.

to wait for governor's consent no matter how long this takes, which usually takes a year or more. This has been an impediment to economic growth, and the author is of the opinion that section 22 LUA should be repealed so that commercial transactions requiring mortgage of land could each time be hastened to enable credit flow in the system.

One other point that should not be brushed aside is that when a mortgage transaction is carried out by an incorporated company in Nigeria, it is known as debenture, and has additional requirements to fulfill unlike if the same transaction was carried out by a natural person. Thus, Section 650[170] of Nigeria's Company and Allied Matters Act (CAMA) 1990, was exactly copied from section 744 of the English Companies Act of 1985. Flowing from the wordings of section 650 of CAMA, one could rightly say from the language of CAMA that where an incorporated company borrows money and secures it with a real property, such transaction is called a debenture and not a mortgage, since the company thereby acknowledges indebtedness to the secured creditor.[171]

Section 650 above is further embellished by section 197(2)(d) CAMA which requires a compulsory registration of any charge on a company's asset with the Corporate Affairs Commission within 90 days of creation of such charge. The implication of failure to register is that the transaction would be void against a liquidator or creditor of the company.[172] This is exactly the distinction between a mortgage transaction carried out by a natural person and same transaction carried out by an incorporated company. Whereas a natural person need only register the mortgage transaction with a land registry, an incorporated company would have to register both in land

[170] "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 consisting of a charge on the assets of the company or not".
[171] EMEKA CHIANU, LAW OF SECURITIES FOR BANK ADVANCES AND MORTGAGE OF LAND (Benin, Ambik Press, 2nd edition, 2004) p.16.
[172] Section 197(1) CAMA.

registry and Corporate Affairs Commission. This is also problematic because being that incorporated entities are required to register both with land and company registries, they incur more transaction costs than natural persons. This extra requirement could be obviated if a single and online national registry is adopted to give notice to prospective creditors wanting to deal with a particular real property, whether created by a natural person or an incorporated company.

1.5.4. Chattel mortgage

A security interest could be created over a chattel by way of mortgage – a security arrangement whereby the proprietary interest in a chattel is conveyed to a mortgagee by the mortgagor subject to a cesser upon redemption, while the latter retains possession.[173] This security arrangement must be in the statutory form prescribed by the Bills of Sale Act 1882 in order to be valid.[174] The problem with chattel mortgage in Nigeria is that there is no registry for publicizing security interests in personal property, and hence, one may legitimately ask whether they could be named as 'mortgages' at all.

Furthermore, given that a chattel mortgagee only has title to the chattel while possession remains with the chattel mortgagor, the situation could give rise to an ostensible ownership problem, meaning that the mortgagor can deceive a third party into believing that he owns the chattel and may either sell it or use it to obtain credit from a third party. The Bills of Sale Act 1882 was enacted in England to curb the possibility of ostensible ownership, by providing registration of interest in the public registry to warn third parties about the encumbrances on chattels subject of mortgages, but while the Bills of Sale Act 1882 is a statute of general application in Nigeria, its

[173]See IMRAN O. SMITH, NIGERIAN LAW OF SECURED CREDIT (Ecowatch Publishers Nig. Ltd, 2001) p. 149.
[174]See section 9 thereof.

function is seriously paralyzed given that there is no registry for the registration of security interests in personal property.

So it could be said that whereas in principle Nigerian law recognizes the use of chattel mortgages to secure credits, its actual use to secure transactions has been non-existent because of lack of a national (personal property) registry that could provide notice to third parties. A more feasible practice in Nigeria that obviates the need for registry is possessory chattel pledge, although not without its problems.

1.5.5. Chattel pledge

A pledge of chattel to secure credit gives the pledgee the right to possession, and is created by transferring possession to the pledgee, while title remains with the pledgor.[175] When a chattel is pledged, it does not require any registration to give publicity because the pledgee is in possession and the issue of ostensible ownership will not arise on the part of the pledgor,[176] meaning that the pledgor may not successfully trick a third party to buy a chattel, the possession of which is in the hands of the pledgee.[177] To a large extent, this is the exact antithesis of chattel mortgage in the

[175]See generally – IMRAN O. SMITH, NIGERIAN LAW OF SECURED CREDIT (Ecowatch Publishers Nig. Ltd, 2001) chapter 8, pp. 176 – 187.

[176] Possession is one of the methods of perfection and when a collateral is possessed, the need to perfect by filing becomes unnecessary. This is also a recognizable method of perfection under the UCC Article 9 and OPPSA. In particular, see section 9-313 UCC, as well as section 22(1) OPPSA on perfection by possession. For a detailed information about the problem of ostensible ownership, see generally – Iwan R. Davies, *Ostensibleownership and motor vehicle financing inEngland: antipodean insights* JOURNAL OF INTERNATIONAL BUSINESS LAW, 9(11), (1994), pp.474 – 479.

[177] A possessory pledge is hardly the panacea of ostensible ownership though, as there could be a sub-possessory pledge whereby a creditor who lent money is given a car as collateral for example. Now having the car and keys in his possession and disposal, he (the creditor) could also transfer it to a third party whom he owes debt. That third party could further sell the car to a bona fide purchaser for value without notice who is always protected by the law. This hypothetical accentuates the problems that always exist where there is no registry for the publicity of security interests in personal property collateral.

English common law which Nigeria adopted because the chattel is perfected by possession unlike in chattel mortgage where it is non-possessorily perfected by registration. However, a pledge of chattel eases the dilemma of the pledgee, being that he can easily sell a chattel subject of a security interest to offset his debt instead of queuing up with other creditors in the event of default or bankruptcy of the debtor.[178]

However, while the problem of ostensible ownership is superficially cured by a pledge of chattel arrangement, it creates at least three major problems which could enervate the progress of the Nigerian economy. First, being that the pledgee is expected to remain in possession of the chattel, it prevents the pledgor from using the pledged chattel to produce and generate profit from his business.[179] In the end, the pledgor might not be able to meaningfully make use of the borrowed credit due to the depletion of his production assets, part of which are lying redundant in the hands of the pledgee[s]. Secondly, since the pledgee is merely holding chattel as an assurance of not losing his credit investment, the chattel might become outdated in the long run and lose its initial market value. This makes the position of the pledgee precarious as upon default of the pledgor, the proceeds realized from the sale of chattel in his possession would likely be insufficient to offset his debt, and he may spend so much money to litigate the deficient sum. This may not be same for a chattel mortgagee who is entitled to satisfy his debt from the pool of the debtor's current assets upon default or liquidation.

[178] To read how Poland has tackled issues arising from possessory pledge through the concept of *data certa* see section 2.4.3 in chapter two, below.
[179]For a more fulsome argument, see – Ulrich Drobnig, *Secured Credit in International Insolvency Proceedings* 33 TEXAS INTERNATIONAL LAW JOURNAL, 53 (1998).

Thirdly, a pledgee of chattel is expected to preserve and care for the chattel during the pendency of the pledge transaction.[180] Where the chattel is a livestock, the pledgee would have to feed and care for them since those are necessary for the survival and preservation of the livestock, albeit the pledgee is entitled to reimbursement of all reasonable expenses incurred while preserving or maintaining the chattel during the pendency of the pledge transaction.[181] This goes to further mean that the pledgee is disallowed to sell the pledged chattels before the contractual date of redemption. This is so, notwithstanding any inconveniences which the chattel caused – as doing so would be a fraudulent transfer that is inconsistent with the pledgor's ownership, and may therefore forfeit the security or become liable in the tort of conversion.[182] This again is admittedly burdensome on the part of the pledgee who is saddled with a responsibility to incur both reparable and irreparable expenses to preserve a pledged chattel – what could as well be a full time job.[183]

Fourthly, to reiterate what has somehow been stated above, possessory pledge is hardly a cure to ostensible ownership as often times, there could be a sub-possessory pledge where a creditor who has lent money is given possession of the pledged item, but which he eventually transfers to a third party for the securing of a financial obligation. The third party could in turn transfer it or sell it to a good faith purchaser. In searching for a solution to this problem, the author

[180] *Co-operative Supply Association Ltd v Inter-contractor Ltd* (1969) NCLR p.61.
[181] *Ahmed El-Hag v GKJ Amachree* (1962) LLR, p.10.
[182] Benefit and burden go hand in hand, and the inconveniences that arise from the possession of the chattels are deemed to be part of the contract. See *Johnson v Stear* (1863) 15 CBNS 330. Although under common law, an action for the recovery of chattel is not as of right, the plaintiff/pledgor can only ask for damages and not a compulsory return of the pledged collateral.
[183] A much nuanced approach is practiced in Nigerian communities where people usually pledge their chattels to get small loans from their friends, relatives or neighbors on the arrangement that the pledgee will make use of the pledged item until the loan is repaid. Pledgee's use of the item until loan is repaid is deemed to be the interest that ought to accompany the sum, meaning that the pledgor is expected to return the exact amount that was borrowed when he comes to reclaim his pledged item, and pledgee is not expected to keep the pledged item redundant.

suggests that Polish law has got a good solution to issues arising from possessory pledge transactions.[184]

1.5.6. Pawning of chattels

Pawning of chattels is almost nonexistent today in Nigeria because the legislation that governs it has been overtaken by events. The Pawnbrokers Act of 1917 only regulates pawn transactions where a loan not in excess of forty naira,[185] is made by a pawnbroker.[186] Initially, pawning of chattels was a viable means of raising credit amongst poor farmers and artisans who needed credit to expand in their businesses or sustain lives. This possibility is no longer existent as it is inconceivable for anyone today in Nigeria to take a loan of forty naira, meaning that any pawn transaction where the pawnbroker advances credit in excess of forty naira cannot be valid within the bounds of the statute.[187] The Pawnbrokers Act in Nigeria has stifled this viable means of raising credit due to its obsolete nature and the failure of the Nigerian parliament to amend it. Elsewhere, for instance in the US, pawning of chattels has become a very rich industry.[188]

However, the fact that the covered sum in the Pawnbrokers Act is infinitesimal compared to today's Nigeria does not mean that it has stopped being part of the Nigerian law. To that end, a

[184] See generally section 2.4.3 in chapter two.
[185] Forty naira is equivalent to about thirty cents of the US dollar. See <www.xe.com>.
[186] Section 2, Pawnbrokers Act of 1917 in Nigeria.
[187] Such loans in excess of forty naira will be deemed illegal, void and unenforceable against contractual parties. Similar ideology was expressed in *Hughes v Liverpool Victoria Legal Friendly Society* (1916) 2 K.B 482, *Re London County Commercial Reinsurance Office* (1922) 2 Ch. 67.
[188] Pawn brokering can be a very viable means for small and mid-scale entrepreneurs to raise credits to do business. For instance, Cash America which started as a pawn shop has today grown to be a viable means of supplying credit to SME's, and is even listed in the New York Stock Exchange, with 900 locations in the U.S and Mexico, and other countries. For more information, see http://cashamerica.com/AboutUs/CompanyHistory.aspx (last visited on September 1, 2014).

few words may be said as to how a pawn transaction works as well as its current challenges in Nigeria. First, when a person takes a pledge in pawn, the pawnbroker is obliged under the law to issue the pawner a pawn ticket,[189] or else, the pawnbroker shall not take a pledge of the chattel.[190] The pawnbroker is not given the liberty to charge an arbitrary interest over the transaction, but must charge in accordance with the rate prescribed in the schedule to the Act.[191] The lifespan of a pawn transaction is twelve months, plus a seven day grace period within which the pawner must redeem.[192] Having failed to redeem within this timeframe, the pawnbroker is entitled to become an absolute owner of the chattel if the loan was below one naira.[193] Where the loan is above one naira, the pawner has the right to redeem after the grace period provided the chattel has not been disposed by the pawnbroker.[194]

The person entitled to redeem the pawn is the holder of the ticket issued by the pawnbroker,[195] and upon the loss of the issued receipt, the pawner or the holder of receipt may apply to the pawnbroker for a printed form of declaration which the former shall swear before a magistrate.[196] The sworn declaration shall serve as a new pawn ticket which restores the rights and duties in the pawn transaction.[197] Also if the pawned item is lost by the pawnbroker, he shall pay for it by deducting the loan and interest, plus twenty five percent on the amount of the loan.[198] The pawner or the person entitled to redeem is also entitled to compensation upon a satisfactory proof

[189]See section 10 of the Act.
[190]*Ibid.*
[191]See section 11(1) and the second schedule to the Act.
[192]Section 12 of the Act.
[193]Section 13 of the Act.
[194]Section 14 of the Act.
[195]Section 20 of the Act.
[196]Section 24(a) of the Act.
[197]Section 24(b) of the Act.
[198] Section 21(1) of the Act

before a magistrate that the pawned item has depreciated in value owing to the inadequate care of it by the pawnbroker.[199] The magistrate then awards a compensation by deducting the estimated value of the depreciation from the amount payable to the pawnbroker.[200]

Like in mortgage, a pawnbroker is required to sell the pawned chattel by public auction and not by private disposition,[201] although he is allowed to purchase the chattel at the auction.[202] After the sale, equity mandates him not to unduly enrich himself and he is consequently required to remit any surplus realized from the auction sale to the pawner upon demand within three years after sale,[203] albeit after deducting the incurred expenses that arose from the auction. The Act gave the pawnbroker the leverage to retain the surplus for the sake of using it to offset any deficit arising from the sale of another pawned chattel by the pawner within twelve months.[204] One thing which was not provided and therefore unclear under this law, is whether a pawnbroker is entitled to recover a deficient sum after the sale of a pawned item. Since the right was not provided, it seems he cannot do so, and may have to bear the loss of any deficient sum after disposition.[205]

Essentially, the foregoing represents the unfortunate story of pawn transactions in Nigeria. Due to the fact that the maximum sum to be secured (forty naira) is too small an amount in the present day Nigeria, this viable means of obtaining credit is stifled. This means that anyone in Nigeria, who carries on the business of a pawnbroker and lends a sum above forty naira cannot

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[199] Section 23 of the Act.
[200] *Ibid.*
[201] Section 15(1) of the Act.
[202] Section 15(2) of the Act.
[203] Section 18(1) of the Act.
[204] Section 18(2) of the Act.
[205] It may not have been the intention of the lawmakers to leave the pawnbroker poorer from a transaction. A pawnbroker facing the dilemma of recovering a deficient sum may however rely on some other principles of law outside the Pawnbrokers Act.

recover his money because such a transaction would be deemed illegal by statute.[206] This is one of the problems of having a fragmented regime especially in Nigeria where statutory revisions are not frequently undertaken by the parliament. This is unlike the US and Ontario systems which functionally deem any transaction creating a security interest in a collateral as being governable by Article 9 and OPPSA respectively.

1.5.7. Lien over chattels or goods as a means of securing transactions

In two of the leading cases in Nigeria on lien, namely *Co-operative Bank of Eastern Nigeria Ltd v. Eke*[207]and *Afrotec Technical Services (Nig) Ltd v MIA & Sons Ltd,*[208] the courts have unanimously agreed that a lien is a right which a lienee can exercise over the property of the lienor as a form of security for any claim arising from the unfulfilled obligations of the lienor.[209] There are many instances that can give rise to the existence of a lien, ranging from a contractual relationship of parties whereby the lienee is in possession of either a chattel or a title document belonging to the lienor and retains it until the former has fulfilled a payment obligation, to other instances of lien, like the judicial lien.[210] The exercise of lien is self-help in nature, meaning that

[206] This means that a party seeking to enforce the pawn brokerage contract will not succeed before any competent court. Consequently, the *in pari delicto* rule will apply to the effect that the party in possession of a contested property when both are at fault gets to retain it. For more insight on this doctrine, see – Stinner G. Charles, *Estoppel and in pari delicto defenses to Civil Blue Sky Law Actions*,73 CORNELL LAW REVIEW, 448 (1988).
[207](1979) NCLR 491 at 501.
[208](2000) 15 NWLR (pt.692) p.730.
[209]*Ibid.* This is also similar in meaning with "mechanic lien" which means "a statutory lien that secures payment for labor or materials supplied in improving, repairing or maintaining real or personal property, such as building, an automobile, or the like" – see Black's Law Dictionary, (9th edition) at p.1008.
[210] For types of lien and their explanations, see generally – Seiden Donna Litman, *Judicial Lien Avoidance and the Homestead Exemption*, 3 JOURNAL OF BANKRUPTCY LAW AND PRACTICE, 319 (1994).

the lienee capitalizes on the fact that he possesses something of value which belongs to the lienor as collateral, and therefore a preferred alternative to judicial remedy.

In Nigeria, a lien can arise either by agreement of parties to a contract or by operation of law. A good example of when a lien can arise by agreement could be found in the *Afrotec's case*,[211]where the parties made it an express term that *Afrotec* (defendant/respondent) would have a right of lien and immediate possession of the chattel if *MIA & Sons* (appellant) would default in payment. The court upheld the clause in the parties' agreement which guaranteed the respondent's right to a lien of the appellant's machines until full payment was made. Apart from the fact that a lien can arise per agreement of parties,[212] it could also arise at common law[213] in the following circumstances.

First, where a creditor is in possession of a debtor's property and refuses to release it to the latter until full payment is made, the latter is said to be exercising a right of lien. This may happen for instance between an attorney and his client,[214] where the former is in possession of the latter's title document to a property which was given to him for the sake of litigation. The attorney may retain such title document until his client pays him in full.[215] This is widely referred to as the

[211] (2000) 15 NWLR (pt.692) p.730.

[212] A lien that arises per agreement of the contractual parties is regarded as a consensual lien. For more detail, see the Nigerian case of *Witt & Busch Ltd. v. Alraine (Nig) Ltd.* (1968) NCLR, p.301. Also see generally – McGrady D. Jake, *Lien on Me: The Failure of Idaho's Nonconsensual Common Law Lien Statute* 45 IDAHO LAW REVIEW 191, (2008). Also see the decision by the Supreme Court of the United States in *United States v. Ron Pair Enterprises, Inc*. 489 U.S. 235, where a copious distinction was made between a consensual and nonconsensual liens.

[213]*Witt & Busch Ltd. v. Alraine (Nig) Ltd.* (1968)) NCLR, p.301, *The People's Ferry Company of Boston, Claimants of the Steamboat Jefferson, Appellants, v. Joseph Beers and David Warner, Assignees Of B. C. Terry*, 61 U.S. 393.

[214]*Fletcher v. Davis,* 33 Cal. 4th 61, 66 (2004). For further details, see Suzanne Burke Spencer**,** *Ethical Enforcement of Attorney's Liens – Avoiding Traps for the Unwary*, (2014) *available at* http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=75(last visited on June 2, 2014).

[215] See *In re Hawkes; Ackerman v Lockhart* (1898) 2 Ch 1 per Lindley MR at pp. 6-7. This rationale was followed in the Nigerian case of *Sagoe v The Queen* (1963) 1 All NLR. 290 and also in the Australian case: *Elders Rural Finance Limited, Foster's Brewing Group Limited and Elders Limited v William Tapp* (1993) 113 FLR 351, by the Supreme Court of the Northern Territory of Australia, per Martin CJ.

solicitor's lien. Second, there is innkeeper's lien[216] which is typically when the right to retain an item is coupled with the right to also dispose of it and apply the proceeds of sale to liquidate the debtor's indebtedness.[217] This may happen in several circumstances where the lienee is in the business of keeping items for people for fees albeit within a limited period due to limited space in his warehouse. After a reasonable time has elapsed and the owner of property did not come to claim it, the lienee is entitled to dispose of the property and apply the proceeds to liquidate the charges arising from the expenses incurred in keeping the item.

Third, is where the creditor keeps money for the debtor and exercises the right to deduct money from the total sum of money which he keeps for the debtor.[218] Banks usually freeze a customer's account and deduct money from it to satisfy a debt which the customer owes the bank. This may also be applicable to professionals who manage funds for their clients and incur professional charges. In most cases these professionals could collect from the clients' fund to set-off any debt owed to them by the client rather than suing the latter for the recovery of fees. Lastly, under the Sale of Goods Act 1893,[219] a creditor is given the right to intercept chattels *en route* to the debtor and either sell or retain them in order to apply the proceeds of sale to liquidate the latter's indebtedness to him.[220]

[216]*Mulliner v. Florence* (1878) 3 QBD, p.484 and *Chesham Automobile Supply (Ltd) v. Beresford Hotel (Birchington) Ltd* (1913) 29 TLR, p. 584.
[217]*People ex rel. Klamt v. Loeffler*, *153* Misc. 781, 276 N.Y.S. 698 (N.Y. City Ct.).
1934). Further see – Jennings W. James Jnr., *Innkeepers' Liens and the Requirements of Due Process*, 28 WASH. & LEE LAW REVIEW, 481 (1971), available at http://scholarlycommons.law.wlu.edu/wlulr/vol28/iss2/14 (last accessed on May 23, 2014).
[218]Known as "Banker's Lien". See – *Batson v. Alexander City Bank*, 179 Ala. 490 (1912), *McStay supply Co v. Stoddard,* 35 Nev. 284, 297. For more detailed information see Zechariah Chafee Jr, *Right of Bank to Set off Deposit against a Depositor's Debt Despite Undisclosed Equity* 38 HARVARD LAW REVIEW, 6 (1925), pp. 800-804.
[219] The English Sale of Goods Act 1893, is applicable in Nigeria as a statute of general application.
[220]*Ibid,* at sections 39 and 41.

Being that this thesis is not aimed at discussing all the nitty-gritties of lien, there would be absolutely no need to go into all the various categories of lien that exist. The ultimate aim here is to point out that Nigerian courts have since recognized the use of lien as a viable means of ensuring that money due to a secured lender is indeed paid. The summary of the gist remains that whenever in a contractual relationship of any kind, the lender or the lienee who is entitled to a monetary payment by the lienor-debtor, can retain the latter's property or title documents until his money is fully repaid. Being that litigation is costly, time consuming, and the fact that a court judgment in the last analysis would have to be satisfied through the attachment of the debtor's asset[s], it makes sense therefore that time is saved by holding onto the property from the onset until money due is repaid.

No legal system the author knows of, has contested the legal validity of the use of lien. Nigeria therefore is not an exception, as this remains a viable means of being secured after services or money has been advanced to the debtor. It will also be necessary to point out here that the right to exercise lien over a debtor's property is cumulative, meaning that a creditor in addition to lien, may simultaneously pursue other avenues of recovering his money from the debtor albeit within the bounds of law. This right is cumulative because it may be possible that the property which the lienee is now exercising a lien over, is not valuable enough to liquidate the debtor's indebtedness, prompting the lienee therefore to use other avenues to fully satisfy his money claim. On the other hand, where the lienee chooses to sell the lienor's property in order to apply the proceeds to the latter's indebtedness, he must do so in good faith, meaning that the sale of property must be by public sale or if not so possible, the price realized must be equivalent to the open market value for that item.[221] Anything short of this might trigger suspicion and the lienee could be held accountable for any supposed surplus which ought to have resulted had the sale been done in good faith. This is because the law frowns at undue enrichment. Lastly, even though lien is known to Nigerian law and indeed a viable means of being secured, it is the author's argument that the governing rules be drawn from a reformed secured transactions law to increase predictability in contractual dealings.

1.5.8. Personal security: Contract of guarantee

The author finds it relevant to discuss personal security because they are still very relevant in the Nigerian context being that Nigerian secured transactions law is yet to develop to the the extent of gaining a systemic confidence amongst secured lenders. Since there is no law that establishes a trustworthy and good enforcement legal framework of secured transactions – especially in personal property, nearly always, personal guarantees issued by trustworthy individuals are preferred by financial institutions. It is for that reason a few paragraphs are dedicated here to address personal securities, even though it is admitted that personal securities properly so called are not within the immediate domain of secured transactions because they offer only rights *in personam* – neither is personal security a good alternative to a reformed secured transactions law because the biggest challenge of it is during bankruptcy of the debtor, when the guarantor realizes the weight of his insecurity.

[221] Where the sale was private and the realized sum being grossly low, bad faith sale would easily be presumed and may consequently lead to the annulment of sale. For more details, see generally – Farnsworth E. Allan, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code,* 30 UNIVERSITY OF CHICAGO LAW REVIEW, 666 (1963). Also see – Eisenberg A. Russell, *Good Faith under the Uniform Commercial Code-A New Look at an Old Problem,* 54 MARQUETTE LAW REVIEW, 1 (1971).

The governing statute with respect to contracts of guarantee is the Statute of Frauds,[222] which mandates that a contract of guarantee must be in writing[223] in order for it to be enforceable.[224] Noncompliance, that is, where a contract of guarantee fails to be in writing, although it would be valid, but unenforceable.[225] A contract of guarantee is one by which a person called the guarantor agrees to be held secondarily liable for the debt of another called the principal debtor, in the event the latter defaults to pay the creditor.[226]

In *R.E.A v Aswani Textile Ltd*,[227] the Nigerian Supreme Court defined contract of guarantee as meaning "a written undertaking made by one person to a second person to be responsible if a third party fails to perform a certain duty, for example a debt repayment."[228] In essence, the general principles which determine what are contracts of guarantee within the purview of the Statute of Frauds are: (1) the primary liability of a third person must exist or be contemplated;[229] (2) the promise must be made to the creditor[230] (3) there must be no liability by the surety independent of an express promise of guarantee; and (4) the main object of the parties to the guarantee must be the fulfilment of a third party's obligation.[231]

Resting on the principles above, it could be said that in a contract of guarantee, the secured creditor must first seek recovery of debt from the primary debtor, and can only resort to the

[222](1677).
[223] See the judgment of court in *Fitzgerald v Dressler* (1859) 7 C.B. (N.S) 374, 394, where a contract of guarantee was made orally, and the court held that it was unenforceable. Also see *Thomas v. Williams* (1830) 10 B. & C. 664 as well as section 4 of Statute of Frauds.
[224]Section 4 of Statute of Frauds (1677).
[225]See *Williams v Leper* (1766) 3 Burr 1886. This case although old, is still relevant today in Nigeria because the Statute of Frauds 1677 is still operative.
[226]*Smith v Wood* (1929) 1 Ch. p. 14.
[227] (1992) 3 NWLR (part 227) p. 13.
[228]*Ibid*. at para G.
[229]*Birkmyr v. Darnell*, 1 Sm. L.C. Iith ed. 299; *Mounistephen v. Lakeman*, L.R. 7 Q.B. 196; L.R. 7 H.L. 17.
[230]*Eastwood v Kenyon* (1840) 11 Ad & El 438 at 445.
[231]See *Harburg India-Rubber Comb Co. v. Martin* (1902) I K.B. 778, 786.

guarantor when the latter is unable to pay. Where the creditor sues the guarantor directly without first seeking recovery of debt from the primary debtor, his action may be deemed unriped and a jumping of gun. Being that guarantee is by nature a contract, most of the traditional rules of contract are applicable. For instance, a contract of guarantee is required to have a consideration[232] except if made by deed.[233] This goes to say that past consideration is sufficient to render a contract of guarantee void.[234] Owing to the nature of a contract of guarantee, the court in *Chellaram & sons (Nig) Ltd v Jackson &Anor*[235] has said that doubts which exist in a contract of guarantee should be constructed in favor of the guarantor – *contra proferentem*, so as to ensure that he is not thereby repressed owing to inchoate clauses in the contract, although the court is encouraged to look at the overall circumstances so as to fathom the objective intention of the parties.[236]

Furthermore, courts have over the years, devised means of protecting the guarantor by holding severally that where a contract of guarantee is varied no matter how slight without the consent of the guarantor, the guarantor becomes relieved of his obligations under the guarantee contract.[237] Other instances are where the secured creditor increases the limit of a guaranteed sum

[232]See *Barclays Bank of Nigeria Ltd v Okotie – Eboh* (1972) NCLR p. 174. "Consideration" here being the agreement of the lender to give the loan to the primary debtor in return for the guarantor's guarantee.
[233]*Younis v. Chidiak & Chidiak* (1970) NCLR p. 26 at p.30, lines 9 -12.
[234] A guarantee that is given based on a past consideration, that is, for a loan previously granted would be void. See *French v French* (1841) M & G, p. 664; *Astley Industrial Trust Ltd v. Grimeston Electric Tools* (1965) 109 S.J. p. 149. But see the exceptions enunciated in the following authorities that: (1) "where the creditor promises or the guarantor requests the creditor to forbear from suing the debtor or to extend the time of payment or to reduce the sum payable" see – *Younis v. Chidiak* (1970) NCLR p. 26 "where the guarantee is given in return for an undertaking by the creditor to continue to deal with the debtor r to grant him further credit". See *Ikomi v. Bank of West Africa Ltd* (1965) NCLR, p. 25 at p.35 lines 8 – 12. (3) "Where the guarantor frequently guarantees both past and future advances in return for such undertaking". See, *Harris v. Venables* (1872) LR 7 Exch. p. 235 to read how this reasoning evolved. Although these are first generation cases, the principles they embody in this respect still remain good law.
[235] (1967) NCLR p. 368.
[236]*Ibid*, at p.375, lines 5 – 7.
[237] See *National Bank of Nigeria Ltd v Awolesi* (1964) NCLR p.21, also see the same ruling in *First Bank of Nigeria Ltd v Pan BisBuilder* (1990) 2 NWLR (part 134) p. 647.

without the guarantor's consent, [238]where the creditor disregards a binding agreement to give the debtor some grace period,[239] meaning that the guarantor's position becomes prejudiced because a chance exists that if the creditor honored the grace period given to the debtor, the debtor might have raised money to pay off the debt without the guarantor becoming liable.

Another instance was that which the court enunciated in *National Bank of Nigeria Ltd v Awolesi*,[240] that where the principal debtor opens another bank account with the secured creditor other than that which was guaranteed, the guarantor's obligation shall be relieved off him.[241] In this case, the guarantor had guaranteed an account of the debtor which was overdrawn. While the account remained overdrawn, the primary debtor opened another account with the bank and transacted businesses with it without the knowledge of the guarantor. The court held that such practice was sufficient to relieve the guarantor of his obligation. However, the reasoning of the court would have been different had the guarantor's obligation extended to all the debtor's accounts with the bank as opposed to an obligation to a specific account.[242] Finally on this point, the guarantor will be discharged if the principal debtor gives additional security after the contract has been concluded, and the creditor accepts to vary his original rights, say by extending the period of redemption without the knowledge of the guarantor.[243]

The summary of the foregoing discussion is that indeed a contract of guarantee could be a means of getting secured after credit has been advanced to a debtor, since the creditor thereby gets

[238] See *African Continental Bank Ltd v Mohammed Khalil & Anor* (1971)1 NCLR, p.71. But it would instructive to add that where the guarantor has guaranteed several obligations in a series of contracts with the same parties, a variation of one obligation will not relieve him of all obligations but only that which was specifically varied – See, *Croydon Gas Co. v. Dickson* (1876) 2 CPD p.46.
[239] See *Oluboye &Anor v Ketting* (1972) NCLR p. 464.
[240] (1964) NCLR p.21.
[241]*Ibid*.
[242]*Ibid*.
[243] See *African Continental Bank Ltd. v. Mohammed Khalil & Another* (1971) 1 NCLR, p.71.

entitled to satisfy his claim from the guarantor's assets upon the default of the primary debtor. However, for the contract of guarantee to be effective, it must not be varied by the creditor and primary debtor without the prior consent of the guarantor as noncompliance to this will entitle the latter to a relief from his obligation under the contract. Nevertheless, instances that could materialize into a valid variation of contract must be any of those recognized by the law because anything short will not discharge the guarantor.[244]

Finally under this heading, the discussion so far has made the position of a guarantor very unattractive and one may wonder what his gain could actually be from a guarantee contract. Such question is sound considering that parties enter into a contract mostly to derive benefits, and a cursory look at a contract of guarantee may suggest that a guarantor is always at the losing end. This may not totally be a true conclusion because when a guarantor meets his obligation to the secured creditor following the primary debtor's default, the guarantor subsequently subrogates[245] by stepping into the shoes of the secured creditor and therefore entitled to reimbursement.[246] The right to subrogate only arises where the guarantor has paid the secured creditor, and not before repayment.[247] Thereafter, the debtor having benefitted[248] from the guarantor's payment, must indemnify the latter.[249] However, the guarantor having stepped into the shoes of the secured creditor becomes an unsecured creditor against the primary debtor and can only sue the latter to recover his money. This would take so long to realize being that in Nigeria, court proceedings are

[244]See *Egbert v National Crown Bank* (1918) AC p. 903.
[245]See *Universal Forest Prods. E. Div., Inc. v. Morris Forest Products*. LLC, 558 F. Supp. 2d 893 (E.D. Wis. 2008).
[246]See *Bank of the North Ltd v Misr (Nig) Ltd*. (1966) NCLR p. 155 at p. 118.
[247]*Ibid* at p. 118, lines 16 – 23.
[248] See *Onwukeme v Onwuegbu* (1970) NCLR p.399 at p. 448, lines 11 – 21. Since the debtor has benefitted from the guarantor's vicarious payment, he would be unduly enriched if he is allowed not to indemnify the guarantor.
[249]*Ibid.*

slower compared to US for instance. The author's suggestion therefore is that guarantee contracts should only be undertaken by those who are concretely sure of the debtor's character.

Another suggestion is that the guarantor should enter into a mortgage or bailment contract with the debtor, so that when the debtor defaults and the guarantor is made to pay, the guarantor could thereafter exercise all the rights of a bailee or legal mortgagee including the sale of collateral to realize his money. But this is hardly realistic because one of the reasons of the debtor's resort to a guarantee contract was probably the fact that he did not have sufficient collateral to cover his credit transaction with the secured creditor, and may not also have any collateral that the guarantor would hold on to after paying the secured creditor on the debtor's behalf – this is exactly one of the core challenges of a guarantee contract in Nigeria; and by extension, why it would make sense to have a reformed secured transactions law that would inspire confidence in lending to borrowers.

1.5.9. Personal security: Contract of indemnity

Contract of indemnity is one of the methods through which credit is realized in Nigeria. However, as important a method as it is, the rule governing its use is obscure and very often confused with other dimensions of contract. Before the court's decision in *Birkmya v Darnell*,[250] contracts of guarantee and indemnity were often confused.[251] The presiding judge in *Birkmya*, stated that a contract of guarantee in essence says "Let him have the goods; if he does not pay you,

[250] (1704) 1 Salk 27.
[251] This difficulty was evident in *Yeoman Credit Ltd v Latter* (1961) 2 All ER 294, (1961)1 WLR 828, at 835; *Pitts v Jones* (2007) EWCA Civ. 1301, (2008) QB 706; *Associated British Ports v Ferryways NV* (2009) EWCA Civ. 189, (2009) 1 Lloyd's Rep 595, at 1.

I will",[252] while a contract of indemnity as enunciated in *Mountstephan v Lakeman*[253] says "go on, Mountstephen, and do the work, and I will see you paid".[254] This formula reveals that in a contract of indemnity, the indemnitor is primarily liable,[255] meaning that there is no primary debtor.[256] This goes to further mean that there are only two parties to an indemnity contract, namely the indemnitor and indemnitee since the third party whose act the indemnitor indemnifies is not part of the contract.[257] The court is not however restricted to the title of a contract[258] when construing whether it is a guarantee or indemnity, as a holistic approach is taken to fathom this distinction.[259]

It is further interesting to point out that a contract of indemnity is not within the purview of the Statute of Frauds,[260] being that only contracts of guarantee were covered.[261] The implication of not being covered by the statute is that an orally made contract[262] of indemnity is enforceable against the indemnitor, and lack of writing will not make it unenforceable against him unlike in a guarantee contract.[263] It is however advisable for an indemnitee to evidence an indemnity contract in writing since an orally made promise might mistakenly be worded to mean a guarantee thereby making it unenforceable in the last analysis.

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[252]*Ibid*. This formula was also used in *Mountstephan v Lakeman* (1871) LR 7 QB 196.
[253] (1871) LR 7 QB 196.
[254]*Ibid*.
[255]See *Benthworth Finance (Nig.) Ltd v Ibrahim* (1969) NCLR p. 272, also see – *Apugo & Sons Co Ltd v African Continental Bank Ltd* (1989)1 CLRQ p. 87.
[256]See *Guild & Co. v Conrad* (1894) 2 QB 885.
[257] There is no consensus *ad idem*, (flowing from the third party), a vital element in the formation of contract.
[258] Meaning that often times, contracting parties have labeled their contract as one thing and meant another judging from the entire circumstances surrounding the contract. The duty of court is to ensure that it is not fooled by this mislabeling and therefore would have to dig deep to find out the objective intention of parties.
[259] See *Benthworth Finance (Nig.) Ltd v Ibrahim* (1969) NCLR p. 272.
[260](1677) applicable in Nigeria.
[261]*Ibid* at section 4.
[262] It will therefore become a matter of evidence for the party alleging the existence of an oral contract to prove same. This could be done for example by calling witnesses or any other form of evidential proof recognized in the Nigerian legal system – the Evidence Act, 2011.
[263] See section 4 Statute of Frauds (1677).

It is not discernible from the cases whether an indemnitor should be regarded as a volunteer, meaning that his assumption of the duty to indemnify the indemnitee upon the default of a third party was unsolicited and therefore cannot mandate the third party to reimburse him (the indemnitor).[264] This is especially true where there is no contract between an indemnitor and the third party over the indemnity of the indemnitee. An objection to this view may be that a third party who owes a debt is not however relieved from his obligation to pay merely because an indemnitor has paid on his behalf. This may be viewed as an unjust enrichment[265] and one could further argue that the indemnitor merely stepped into the shoes of the indemnitee and could hence recover from the third party – this may be counteracted however by the doctrine of privity[266] of contract. If there is no contract between a third party and an indemnitor for the latter to indemnify the indemnitee, it may be idle to argue that the third party has business at all with the indemnitor, and that the latter should be seen as a mere volunteer.[267] As earlier said, clear rules on indemnity contracts in Nigeria are yet to mature and are currently unsettled, although the fact that indemnity contracts remain a form of security in Nigeria is not affected.

[264] Black's Law Dictionary, (9th edition 2009), defines a volunteer as "a voluntary actor or agent in a transaction, especially a person who without an employer's assent and without any justification from legitimate personal interest, helps an employee in the performance of the employer's business."
[265]For in-depth analysis on "unjust enrichment", see generally – Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEXAS LAW REVIEW, 2083, (2001).
[266]See generally – J. W. Neyers, *Explaining the Principled Exception to PrivityofContract* 52 MCGILL LAW JOURNAL, 757 (2007). Also see, Hugh Beale, *Privity of Contract: Judicial and Legislative Reform,* 9 JOURNAL OF CONTRACT LAW, 103 (1995), at 112.
[267]See *Crocker v Sundance Northwest Resorts Ltd;* (1988) 1 S.C.R 1186, 51 D.L.R. (4th) 321("By agreeing to assume the risk the plaintiff absolves the defendant of all responsibility for it" at 1201).

1.6. The Nigerian-English floating charge: How did it come about?

Considering the overwhelming importance of this security device (floating charge) in Nigeria, and the center stage it occupies in this thesis due to its incompatibility with the unitary system of secured transaction being proposed, the author finds it very important to discuss it – first to provide a background of what it is, then later in chapter three, to further argue why it should be transformed to floating lien.[268] Floating charge[269] remains one of the beautiful creatures of English law aimed at providing incorporated entities[270] with credit to continue business operations notwithstanding that they may not have at the moment any equivalent (fixed) collateral to secure their borrowed credits[271]– being that in the nineteenth century, when the idea of a limited liability company was still at its nascent stage, lenders were reluctant to extend credits without physical securities.[272]

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[268] See section 3.5 in chapter three on why floating charge should be abolished or transformed in Nigeria, in view of the anticipated reformed secured transactions law.

[269]See generally, the chapters on "floating charges" in: ROY GOODE, LEGAL PROBLEMS OF CREDIT SECURITY (4th edition, 2008), JAMES W. GOUGH, COMPANY CHARGES (London, Butterworths, 2nd edition, 1996), JELILI OMOTALA, THE LAW OF SECURED CREDIT, (Evans Brothers Nig. Limited, 2006).

[270] Only incorporated debtors can create a floating charge. Human debtors cannot. See generally R.R Pennington, *The Genesis of the Floating Charge*, 23 MODERN LAW REVIEW, Iss.6, (1960), pp. 630 – 646. Lord Millet also provided a penetrating account of history in *Agnew v Commissioners of Inland Revenue* (a.k.a *Re Brumark*) [2001] 2 A.C 710 at 717. The following older decisions are equally succinct on the matter: *Re Panama, New Zealand, and Australian Royal Mail Co* (1870) 5 Ch. App 318, *Re Florence Land and Public Works Co, ex p Moor* (1878) 10 Ch. D 530; *Re Colonial Trusts Corporation, ex p Bradshaw* (1879) 15 Ch. D 465; *Re General South America Co* (1876) 2 Ch. D 337; *Re Hamilton's Windsor ironworks, ex p Pitman and Edwards* (1879) 12 Ch. D 707.

[271] Initially courts were antagonistic to the concept of using an asset yet to be owned as collateral. This was the same reason that made the American courts before the twentieth century not to accept the floating charge concept, a vehemence they later showed in *Benedict and Ratner* 268 U.S. 353 (1925). The earliest line of English cases that refused the concept of floating charge until the 1870 line of cases began to accept it are *Kings v Marshall* (1864) 33 Beav 565, *Re New Clydach Sheet and Bar Iron Co* (1868) LR 4 Eq. 601.

[272]This was mainly to avoid the problem of ostensible ownership. In the United States for instance, it was void as a matter of law, to leave personal property collateral exclusively in the hands of the debtor. The secured party was as a matter of law required to have the right to unfettered dominion over the collateral and could police the debtor in relation to his business activities. See *Geilfuss v Corrigan*, 95 Wis. 651; 70 N.W. 306 (1897); *Benedict v Ratner*, 268 U.S 354; 45 S.Ct. 566; Also for a more penetrating discussion on what the position of the law in the United States was before the advent of the Uniform Commercial Code, see – GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, (Little, Brown and Co., Boston, 1965/reprinted in 1999), Vol. 1, chapters 6 and 8.

But it is incontrovertible that sometimes (especially in the 21st century) the most valuable assets of a business entity are not the land and buildings it owns but its personal property assets – trading stocks, accounts-receivable, intellectual property, just to mention a few. There was a need therefore to create a formula by which assets of a company which have not yet into actual existence could be used as collateral. This need further made sense considering that companies do change their equipment regularly to acquire better ones. This regular replacement of equipment implicates two things in the case of a fixed charge. First, creditors of a company who have a security interest in equipment that need to be replaced would have to be notified and their consent first obtained. Second, both the debtor-company and the secured creditor[s] would have to execute fresh security agreement on the newly replaced equipment as common law required.[273] This generated a mighty inconvenience and the law needed to do something to circumvent this impasse. The answer was found in the floating charge device.

The decision of the House of Lords in *Holroyd v Marshall*[274]seemed to have birthed the floating charge idea. In *Holroyd*, the issue of assignments of after-acquired property to a secured creditor and whether or not items of machinery, which were not existing at the time the security agreement was executed, could become the subject of agreement at a later point in time to entitle the secured creditor who did not have security interest over them to have a priority claim. The court answered in the affirmative. Eight years after the decision in *Holroyd*, the floating charge concept became finally fine-tuned and its rough edges became clearly trimmed in *In re Panama, New Zealand, and Australian Royal Mail Co.*[275]In *In re Panama*, the debtor company charged its

[273] See – ROY GOODE, LEGAL PROBLEMS OF CREDIT AND SECURITY (London, Sweet & Maxwell, 3rd edition, 2003). p.121.
[274] (1862) 10 HL Cas. 191.
[275] (1870) 5 Ch App 318.

"undertaking and all sums of money arising therefrom"[276] whereby the amount was to be repaid under its debenture. The court interpreted the word "undertaking"[277] or "property"[278] to mean both income from the business as well as present and future property of the company. And even though the debenture holder was not to interfere with the business activities of the company until winding up, the debenture holder upon winding up is entitled to realize its security over the debtor-company's asset before the general creditors.[279]

1.6.1. The features of floating charge

The floating charge is a non-statutory security device which has not been defined by any statute. However, the meaning does not come merely from the label parties have decided to give to their transaction.[280] Since the evolution of this security device, rather than defining, courts have preferred to offer descriptive features of what it may be, such that the presence of these features in a security agreement would immediately confer it the title of a floating charge. Thus, the "classic and frequently cited"[281] description of a floating charge was that given by Romer LJ in *Re Yorkshire Woolcombers Association Ltd*[282], where he said:

> "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

[276]*Ibid.*
[277]See *In re Panama, New Zealand, and Australian Royal Mail Co case.* Also see the same interpretation in *Re Hamilton's Windsor Ironworks, ex p pitman and Edwards* (1879) 12 Ch D 707.
[278] See the court's interpretation in *Re Florence Land and Public Works Co, ex p Moor* (1878) 10 Ch D 465, especially at pp.546 – 547.
[279] For a fulsome discussion on the priority ranking of a floating charge, see chapter V entitled "Fixed and Floating Charges: Some Problems of Priority" in ROY GOODE, LEGAL PROBLEMS OF CREDIT AND SECURITY (London, Sweet & Maxwell, 3rd edition, 2003).
[280]See *Agnew v Commissioner of Inland Revenue* (2001) 3 WLR 454, [2001] 2 AC 710.
[281] The expression was used in *Re Spectrum Plus Ltd* (2005) 2 AC 680, (2005) UKHL 41.
[282] (1903) 2 Ch. 284.

> charge within the meaning of the Act which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics 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 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"[283]

One year later, the above description given by Romer LJ began to gain heightened acceptance – thus, it was reechoed by Lord Macnaghten in *Illingworth v Houldsworth*[284]when he said:

> "I should have thought that there was no such 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 ad 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."[285]

It is self-evident that the reason courts have avoided to give a definition of floating charge is due to its elusive quality that would readily defeat any definition no matter how intelligible. Hence the House of Lords stated in *Re Spectrum Plus Limited*[286]that the third characteristic of a floating charge which Romer LJ offered in *Illingworth*[287]is "the hallmark of a floating charge and distinguishes it from a fixed charge."[288] In other words, what is very important is to determine the "[c]ontrol that is exercised over the assets that fall within the scope of the charge…because it is now clear from *Spectrum* that the test to be applied is a more restrictive one and that the ability to

[283]*Ibid.* at 295.
[284] (1904) AC 355.
[285]*Ibid.* at 358.
[286](2005) 2 AC 680, (2005) UKHL 41.
[287]The third characteristic states that the charge would have to leave the company free to deal with the charged asset in the ordinary course of its business.
[288]See *Re Spectrum Plus Ltd*, (2005) UKHL 41 at 106.

remove an asset from the scope of the charge will result in the conclusion that the charge is floating and not fixed."[289] The main feature of a floating charge therefore is that the charge hovers over the debtor's present and future assets, which the debtor is free to use in the ordinary course of business until a crystallizing event occurs, thereby converting the floating charge to a specific one.[290]

1.6.2. The creation of floating charge

There is no particular form for creating a floating charge. As the court in *Agnew v Commissioner of Inland Revenue*[291] noted, the label parties give to a security agreement is immaterial in determining what the document actually is. This means that the mere fact that a document purporting to create a floating charge was labeled "floating charge" is not a conclusive evidence that it is so, as the intentions of the parties would have to be deciphered from the overall circumstances.[292] In other words, where an agreement shows the intention to charge the company's present and future assets with the simultaneous possibility that such assets would be freely used and disposed by the company in its ordinary course of business, a floating charge may be said to have been created irrespective of the label given to it.[293]

It is vitally important to note that courts have recently taken it seriously that the most distinctive element of a floating charge from any other is whether the debtor is allowed to use the

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[289]ROY GOODE, COMMERCIAL LAW (Penguin Books, 4th edition, 2010) at 723. Goode was anchoring his argument on the *Spectrum* decision.

[290] Buckley LJ in *Evans v Rival Granite Quarries Ltd* (1910) 2 KB 979 at 990. It is vitally important that the reader continues to bear in mind that floating charge, although originally an English law concept is also an integral concept of Nigerian law, such that the materials that apply or explain the concept in England, are equally useful in the Nigerian context.

[291][2001] 2 AC 710.

[292]See *Re Spectrum Plus Ltd* [2005] UKHL 41 at 119 and 141.

[293]See *Re Bond Worth Ltd* (1979) 3 ALL ER 919.

encumbered property in the ordinary course of its business. This means, although contrary to the erroneous belief that a fixed charge may not occur on a movable[294] or intangible as well as future assets of the debtor,[295] if a movable asset of a debtor is charged not to be used in the ordinary course of business, such charge would be deemed to be a fixed charge.[296] This difficulty was witnessed in *Arthur D Little Ltd v Ableco Finance LLC*,[297] where the debenture instrument created a charge over shares and dividends as well as other distribution rights. It happened that the debtor was not free to dispose of the distribution rights of the dividends because the creditor retained such rights. The court held that the charge over the shares was a fixed charge being that the distribution rights do not stand alone but linked to shares notwithstanding that the parties had stated it was separated from the shares.

1.6.3. Negative pledges, acceleration & insecurity clauses in relation to crystallization

In discussing crystallization of a floating charge, it is not usually common to merge it with some other legal concepts like negative pledge[298], acceleration and insecurity clauses.[299] Here

[294] The court in *Re Shoe Lace Ltd* (1993) BCC 609 at 622 – 623, per Sir Christopher Slade, held that it is possible that an immovable property could be a subject of floating charge.
[295]See *Tailby v Official Receiver* (1888) 13 App Cas 523, *Sieber Gorman & Co Ltd v Barclays Bank Ltd* (1979) 2 Lyod's Rep 142 at 159 per Slade J; *Boambee Bay Resort Pty Ltd (in liquidation) v Equus Financial Serives Ltd* (1991) 6 ACSR 532 at 535 per Mahoney JA; *Re Atlantic Medical Ltd* (1992) BCC 653 at 658 per Vinelott J; *Re New Bullus Trading Ltd* (1994) BCC 36 at 41- 42 per Nourse LJ.
[296]*Ibid.*
[297] (2003) Ch. 217.
[298] There is an overwhelming amount of literature on 'negative pledge' – a US terminology, which is used in retaining some level of control in contractual agreements. For concrete understanding of it, see the following articles – John Crosthwait, & Boardman Nigel, *Wither the negative pledge*, JOURNAL OF INT'L BUS. LAW, VOL 1(3), (1986); Tracy Hobbs, *The Negative Pledge: A Brief Guide*, JOURNAL OF INT'L BUS. LAW, 8(7), (1993), pp. 269-274. Mathew Hurlock, *New Approaches to Economic Development: The World Bank, the EBRD, and the Negative Pledge Clause*, 35 HARVARD INT'L LAW JOURNAL, 345 (1994).
[299]See – David Hahn, *The Roles of Acceleration*, 8 DEPAUL BUS. & COMM. LAW JOURNAL, 229,(2010).

however, the author has chosen to discuss the four concepts together for the primary reason that an understanding of what negative pledge, acceleration[300] and insecurity[301] clauses are, will help the reader to better understand ‘crystallization of floating charge’, and how a good crystallization clause may be drafted in a security agreement. The author has found it worthy to point out that most writers have discussed crystallization in the light of the occurrence of some specified events – an age-old formula that may not be of exclusive help to modern day secured creditors. While not stating that crystallization is on its own unnecessary, it would be more profitable to discuss it with an eye on these restrictive clauses which help a secured creditor to quicken the debtor’s bankruptcy, thereby curtailing any time wastage that would be detrimental to his interest. Hoping that this point has been established, that is, the need to discuss crystallization and restrictive clauses together, a brief description of these clauses will be attempted below.

A negative pledge also known as a restrictive[302] clause does not create a security interest per se.[303]According to Professor Gough, it is a restrictive covenant in a security agreement whereby the debtor agrees not to create any other security interest over its assets that would rank above or even at par with the floating chargee’s interest.[304] This is inserted to protect the floating chargee due to the nature of his interest, which generally allows the debtor to make use of the

[300] BLACK’S LAW DICTIONARY (9th edition) defines acceleration clause as “a loan agreement provision that requires the debtor to pay off the balance sooner than the due date if some specified event occurs, such as failure to pay an installment or to maintain insurance”.
[301] *Ibid*, at 866 – “a loan agreement provision that allows the creditor to demand immediate and full payment of the loan balance if the creditor has reason to believe that the debtor is about to default, as when the debtor suddenly loses a significant source of income”.
[302] See – W J. GOUGH, COMPANY CHARGES (London, Butterworths, 2nd edition, 1996), chapter 10.
[303] Tan Cheng Han, *The Negative Pledge as A "Security" Device,* SINGAPORE JOURNAL OF LEGAL STUDIES, (1996), pp.415 – 441, at p.416.
[304] W J. GOUGH, COMPANY CHARGES (London, Butterworths, 2nd edition, 1996), p.221.

assets and also create security interests over them.[305] Negative pledge is contractual in nature[306] and a breach of it could be deemed a breach of the contractual agreement thereby triggering off an action for breach and claim of damages. A negative pledge clause makes sense in the case of a floating charge because a floating chargee's interest ordinarily ranks below[307] that of a fixed chargee during the debtor's liquidation.[308] This is so, even if the fixed chargee was aware of the existence of the floating chargee's security interest,[309] but was not aware of the existence of the negative pledge clause.[310]

In order for a negative pledge to achieve its aim, it is advised that the floating chargee may assume the self-duty of monitoring the creditor's activities – that is, to know whether a subsequent charge has been created to rank above his interest so as to be able to act timely enough to counteract any act that is inimical to his interest as soon as a breach is perceived. According to Treitel,[311] being that a negative pledge is contractual in nature, the floating chargee may invoke the doctrine of anticipatory breach where it reasonably occurs to him that the debtor would likely breach the contractual clause, and consequently, could restrain the latter with a court injunction.[312] Let it be

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[305]See *Re Florence Land and Public Works Co, ex p Moor* (1878) 10 Ch D 530; *Re Colonial Trusts Corporation ex p Bradshaw* (1879) 15 Ch D 465; *Bank of New Zealand v Walter Guthrie Co Ltd* (1897) 16 NZLR 484.
[306]See *Fire Nymph Products Ltd v The Heating Centre Pty Ltd* (1992) 7 ACSR 365 at 370.
[307] See, *Wheatley v Silkstone and Haigh Moor Coal Co* (1885)29 ChD 715; *Robson v Smith* [1895] 2 Ch118, at 124. Also see *Re Benjamin Cope & Co* [1914] 1Ch 800.
[308] In *Wheatley v Silkstone and Haigh Moor Coal Co* (1885) 29 Ch D 715, the court firmly held that a subsequent specific charge ranked higher over a previous floating charge regardless of notice.
[309]W J. GOUGH, COMPANY CHARGES (London, Butterworths, 2nd edition, 1996) p.225.
[310]See *The English and Scottish Mercantile Investment Company, Ltd v Brunton* [1892] 2 QB 700. Also see *Welch v Bowmaker (Ireland) Ltd* [1980] IR 251; *Re Valletort Sanitary Steam Laundry Co Ltd* (1903) 2 Ch 654.
[311] See GUENTER H. TREITEL, THE LAW OF CONTRACT (London, Sweet & Maxwell, 13th edition, 2011) p. 844.
[312]See *Doherty v Alhnan* (1878) 3 App Cas. 709. Of keen interest is the dictum of Lord Cairns: "if there had been a negative covenant, I apprehend ... a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or

borne in mind at all times that a negative pledge does not create a security interest on its own but is only used to reinforce a security interest especially where the creditor's position is vulnerable, as in the case of a floating chargee. Hence, the Australian court teaches this lesson in *Bond Brewing Holding Ltd v National Australian Bank Ltd*[313] in the following words: "…[c]omplicated covenant of a kind commonly called 'negative pledge' in which lenders have in recent years often placed their faith, instead of taking conventional security, sometimes to their regret. For recent experiences have shown lenders that all the covenants in the world are no substitute for good old-fashioned security."[314]

The foregoing discussion leads us nicely to acceleration and insecurity clauses. An acceleration clause is typical to a loan agreement,[315] whereby repayment is in installments. Hence, where the debtor defaults in one installment, the creditor may in reliance to the acceleration clause, call for the payment of the entire loan and interest. This practice is to save him the time of suing for each installment default of the debtor who has shown enough signal of future defaults – in this way, the secured creditor's time and piecemeal litigation costs are saved. This same idea operates in a floating charge, that is, the acceleration clause in a floating charge document contains all the events that when they or any of them occurs, will lead to crystallization. It should be noted that crystallization is a process and not the same as the events that lead to it. It is a process whereby a floating charge is converted to a fixed charge due to the occurrence of certain implicit or explicit

inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves." This was also followed in *Marco Productions, Ltd v Pagola* [1945] 1 KB 111.

[313] (1990) 169 CLR 271. See also J.H. Farrar, *Floating Charges and Priorities*, 38 THE CONVEYANCER 315 (1974), p.318, J.H. Farrar, *The Crystallization of a Floating Charge*, 40 CONVEYANCER 397, (1976).

[314] *Ibid* at FARRAR, p.318.

[315] See BLACK'S LAW DICTIONARY (9th edition) p.12.

events.[316] The events that trigger off the crystallization process could be contained in an acceleration clause.

The insertion of an acceleration clause in a floating charge document seems to be the conventional practice already as every floating charge agreement includes some specific events that will accelerate repayment to the creditor rather than waiting for liquidation.[317] One flaw in the nature of a floating charge which the author has noticed is that a floating charge agreement is intended to ideally last as long as the company is a going concern. This view rests on Lord Macnaghten's comment in *Illingworth*[318] that "[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.*"[319] This further implies that if none of the events of crystallization as agreed by the parties occurs, and the company continues to be a going concern, the floating chargee will wait "forever" without getting back his money. This may not be investment friendly.

To surmount this therefore, the author is proposing (eventhough floating charge is proposed to be abolished in Nigeria, the analysis here could be useful to other jurisdictions where the charge operates), that in addition to acceleration events in a floating charge agreement, the insertion of an insecurity clause would be further necessary to make the floating chargee's position stronger. An insecurity clause unlike an acceleration clause, does not necessarily depend on the occurrence of

[316]See *UAC v. Inter-contractors* (1988) 2 NWLR (pt. 76) 303 S.C.
[317]Assuming parties in a floating charge agreement failed to stipulate any event that would trigger off the crystallization process, the liquidation of such company naturally will lead to a crystallization process.
[318](1904) AC 355.
[319]*Ibid.* (italics is mine).

a particular event. This means that if an insecurity clause is inserted in a floating charge agreement, the floating chargee may begin the crystallization process merely by deeming himself insecure.[320] It suffices that some news or events which occurred are enough to cause a reasonable secured creditor to be insecure of his investment – and consequently commence crystallization process – although what is reasonable fear may then depend on the court to say on a case by case basis. However, if this approach is adopted, that is, inserting insecurity clauses in a floating charge agreement, the creditor's fears and predicaments would be alleviated, thereby making a floating charge as attractive as its fixed charge counterpart.

1.6.4. The crystallization of floating charge

About two decades after the concept of a floating charge was birthed (in the cases discussed above), crystallization as a process also appeared.[321] Essentially, "crystallization is the process of conversion of the security from being floating in character into being specific or fixed. It is the possibility of crystallization which gives the floating charge its security aspect, viz, the ability of the chargee to resort to specific property of the chargor to satisfy the secured debt and in particular the right of the floating chargee to priority over general unsecured creditors in the winding up."[322] Gough's definition would mean that upon crystallization, the floating charge would 'attach'[323] or

[320] This is almost in line with Buckley LJ's opinion in *Davey & Co v Williams & Sons* (1898) 2 Q.B 194, where he stated that a floating chargee may give advance notice as a beginning process for crystallization.
[321]See *Re Standard Manufacturing Co* (1891) 1 Ch 627 at 640; *Edwards v Standard Rolling Stock Syndicate* (1893) 1 Ch 574 at 577; *Re Victoria Steamboats Ltd, Smith v Wilkinson* (1897) 1 Ch. 158 at 161 per Kekewich J.
[322]See W J. GOUGH, COMPANY CHARGES (London, Butterworths, 2nd edition, 1996), p. 35.
[323]See *Re Colonial Trusts Corporation ex p Bradshaw* (1879) 15 Ch D 465 at 472 per Jessel MR.

'fasten upon and bind'[324] the charged assets thereby converting them from 'dormant' security into an active security.[325]

Being that a floating charge operates within the realm of contract, crystallizing events are always left in the hands of the parties to determine. However, over a period of several decades, courts have, due to experiences, come up with some guidelines that may be deemed sufficient for the sake of knowing what amounts to crystallization. The following are some notable instances from court experiences that would implicitly trigger off crystallization. First, where a company goes into winding up as these cases[326] show, crystallization is triggered. Second, where a company ceases to trade[327] or carry on its business, crystallization would result. However, as Nourse J noted in *Re Woodroffes (Musical Instruments) Ltd*,[328] the ceasing to carry on business is not the same as stopping to be a going concern – the former can occur without the latter happening, but the converse is not necessarily true. This further goes to say that, the fact that a winding up petition has been filed, does not implicitly mean that the company has ceased to carry on its business.[329]

Third, if the company disposes of a substantial amount of its trading assets with the view to cease either trading or being a going concern,[330] such may be adjudged as being sufficient to trigger off crystallization. Fourth, it was also noted in *Re Hamilton's Windsor Ironworks Co, ex p*

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[324]See *Government Stock and Other Securities Investment Co Ltd v Manila Rly Co Ltd* (1897) AC 81 at 87.
[325] *Ibid* at 86.
[326]See *Re General South American co* (1876) 2 Ch D 337; *Hodson v Tea Co* (1880) 14 Ch D 859; *Wheatley v Silkstone and Haigh Moor Coal Co* (1885) 29 Ch D 715 at 719 – 719 per North J*; Brunton v Electrical Engineering Corporation* (1892) 1 Ch 434 at 440 per Kekewich J; Sadler v Worley (1894) 2 Ch 170; *Wallace Universal Automatic Machines Co* (1894) 2 Ch 547 *Re Crompton & Co Ltd, Player v Cromptom& Co Ltd* (1914) 1 Ch 954; *Re Universal Distributing Co Ltd* (1933) 48 CLR 171; *Re Asiatic Electric Co pty Ltd* (1970) 2 NSWR 612 at 612 – 613 per Street J.
[327]See *National Westminster Bank plc. v. Jones* (2001) EWCA Civ. 1541.
[328] (1986) Ch. 366 at 376 – 377.
[329]See *Edward Nelson & Co Ltd v Faber & Co* (1903) 2 KB 367 at 376 – 377 per Joyce J, *Re Victoria Steamboats Ltd, Smith v Wilkinson* (1877) 1 Ch 158 at 161 per Kekewich J.
[330]See *Hubbucks v Helms* (1887) 56 LJ Ch 536; *Hamilton v Hunter* (1983) 7 ACLR 295; *Torzillu Pty Ltd v Brynac Pty Ltd (1983) 8 ACLR 52.*

Pitman and Edwards[331] that where a chargee takes possession of the assets covered by a floating charge through seizure under power or license, that crystallization is said to have occurred. The same is true if the floating chargee appoints a private receiver[332] over the charged assets, or by another on his behalf,[333] or by court.[334]

Apart from the events stated above, which have over the years been deemed to be implied events that lead to crystallization, parties can equally agree to specify what would amount to a crystallizing event no matter how strange such specifications seem. This, of course, is contractual and its effect is automatic as scholars have noted, meaning that as soon as the specified event occurs, crystallization process is triggered. Upon the charge becoming crystallized, the floating chargee becomes entitled to appoint a receiver who could sell the company assets to realize money claim.

Admittedly, the concept of floating charge is very intricate and sometimes occupies more than a chapter in renowned texts, and cannot therefore be conveniently dealt with here. Its full picture is beyond the scope of this thesis. However, the author's aim is to show that the floating charge concept is operative in Nigeria and remains one of the viable means through which incorporated companies secure their credit transactions. Being that a floating charge cannot be granted by a human debtor, its usefulness is restricted as unincorporated enterprises like the sole proprietorship and certain kinds of partnerships cannot grant a floating charge – and this alone is a significant obstruction to access to credit and doing business. Therefore, it is the author's position

[331] (1879) 12 Ch D 707 at 710 per Malin V-C.
[332]See *UAC v. Inter-contractors* (1988) 2 NWLR (pt. 76) 303 S.C. See chapter four – section 4.2.1 (below) on the continued relevance of private receivership in Nigeria.
[333]See *Taunton v Sherriff of Warwickshire* (1985) 2 Ch. 319.
[334] See sections 388, 389, and 390 of CAMA. Also see *Okoya v Santilli* (1990) 2 NWLR (pt. 131)172.

that floating charge device be jettisoned in preference of 'floating lien' which is a natural content of the unitary system of secured transactions. Being that a floating charge does not attach until crystallization, it runs counter to the requirement under a unitary system that a security interest is not valid until it attaches.

Canadians, while adopting the unitary model resolved the floating charge's incompatibility with the 'validity' requirement in a unitary system by firmly holding that a security must first attach before it can be valid – what therefore distorts the fundamental attribute of floating charge. Thus in OPPSA, the floating charge was converted into a fixed one, however, with the permission to the debtor to continue dealing with the collateral in the ordinary course of business. In a sense, the floating lien is a security device made up by two combined elements of fixed and floating charges. For instance, the time when 'priority' is created stems from the fixed charge while the possibility to encumber present and future assets of all kinds (not only fixed tangible assets) and to have the right to continue dealing with the assets in the ordinary course of business – is a remnant of the floating charge.[335] Let the truth be told though, in Canada and US, parties to a security agreement could agree to postpone attachment, while the secured party perfects his unattached security interest by filing, on the arrangement that upon later fulfilling the requirements of attachment, his security interest vis-à-vis perfection and priority, will relate back to the time of filing.[336]

[335] For more details on the conversion of floating charge into floating lien and the underlining benefits that arise, see section 3.5 below.
[336] This is usually referred to as "blocking" in the United States – see section 3.2.3 in chapter three for more details.

1.7. Organized industries living from secured transactions law in Nigeria

1.7.1. Introduction

Every society is constantly evolving and law which provides basic regulations for every aspect of life cannot afford to be stationary and irresponsive to these evolutional changes. Being that the world has become a global village with cross-border transactions being highly on the increase, plus the heightened ease with which foreign practices diffuse to countries of non-origin, the private sector businesses in Nigeria seem to have run out of patience in waiting for a local and favorably forged legal framework. Consequently, many entreprises have gone ahead to import some industry-practices from advanced countries to solve their local problems, even though these practices have not been adequately provided for by the current legal framework. However, it should be noted that some of these imported practices can only work effectively when certain structures are put in place, for example, in addition to a robust legal framework on secured transaction, an online collateral (personal property) registry as a sharp weapon against secret liens.

In short, what the author tries to argue and demonstrate here is that Nigeria already has some "institutions" that could effectively employ the anticipated secured transactions law – thus, only minimal adjustments are needed on their part to fully exploit the law when it finally comes. To a large extent, the existence of these industries in the first place is a propitious indication that the anticipated secured transactions law would have promising prospects almost immediately after enactment. For instance, there are already a few professionalized warehousing companies[337] that so far do only terminal warehousing – meaning that it would be easier to entice them to also try

[337] See for instance the Integrated Warehousing Services Ltd – http://www.iwsng.com/ (last visited on January 29, 2016). This is just one out of the many warehousing companies in Nigeria.

out "field warehousing",[338] given that they already have the necessary equipment, staff, know-how, and so on, that would enable them to easily exploit this nuanced version of what they already know well. In the pages below, the author would briefly discuss a few industries that have so far been living from secured transactions in Nigeria – the idea is to raise awareness on the much that still lies unexploited due to lack of a reformed secured transactions law.

1.7.2. Factoring

Scholars acknowledge that factoring has had a checkered historical meaning[339] – what factoring means today in the US for instance is not the same as in Nigeria. It may not be necessary to delve into a historical account of how factoring emerged and its subsequent modifications in terms of meaning. It is sufficient to say, as Gilmore noted, that factoring in the early stage of its development meant an agent who was assigned some goods by the owner (principal) on the arrangement that the agent would sell them, remit the realized cash to the owner and collect his commission.[340]

The following definition can be found in the English Factors Act of 1889 which Nigeria adopted and still retains as part of its laws. Under the Factors Act, "[w]here a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of

[338] For more information on 'field warehousing' and its transplantability to Nigeria, see section 1.6.2.2., below for details.
[339]For a more penetrating treatment of "factoring", see generally – SALINGER FREDDY, FACTORING LAW AND PRACTICE (Sweet & Maxwell, London, 2nd edition, 1995).
[340] GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Boston, Little, Brown and Co., 1965/reprinted in 1999), p.128. Also see generally – Steffen and Danziger, *The Rebirth of the Commercial Factor* 36 COLUMBIA LAW REVIEW, 744 (1936).

business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."[341]

The practice of factoring following the definition above has majorly been the case in Nigeria especially amongst traders of goods. For instance, in major trading centers in Nigeria, shop owners usually have mercantile agents also called 'factors'[342] who are given some products to patrol in places a little distant away from the principal's shop, so as to capture the buying interest of any customer out there who may not otherwise have visited the principal's shop. The factor under this arrangement is asked to sell at a particular price, which he can as well inflate to his advantage provided he remits the agreed price to the owner of goods, so as to collect his commission. In a way, a factor in Nigeria serves as a promotional agent of products because it is in so doing that his sales increase, leading to increased commission. Analogously, the Nigerian concept of factoring is similar to the US idea of 'consignment'[343] under the UCC Article 9, and even though the Factor's Act does not expressly cover or use the term 'consignment', it is self-evident that 'factoring' in the Nigerian sense is the functional equivalent of 'consignment' in the US sense.

It is important, however, to pay attention to the fact that the factor's commission is based on what he has sold as no fixed salary is paid. He is an independent contractor and would have to

[341]Section 2(1) of the Factors Act 1889, applicable in Nigeria.

[342] In Igbo – one of Nigeria's principal languages, a factor is known as *onye oso ahia*, and they are very popular in many trading centers in Nigeria usually dominated by the Igbos as sellers. Nearly always, factors are the ones who first approach passers-by or potential buyers who have visited a trading center, convince them, and consequently lure them to their principals' shops. They are usually sweet talkers and good promoters of products.

[343] See section 1.8.6. below for a more detailed discussion on 'consignment'.

offset the expenses incurred in the process of selling a product through his earned commission. Nothing prevents a factor from taking up goods from different dealers provided he remits the money due to each of them in the end. Also under this arrangement, the factor can issue receipts for purchased goods to the buyers and pass on good title to the latter.[344] The factor can also exercise the right of lien over the principal's goods until his earned commission is paid. He can also set-off his due commission from any amount realized from the sale of the principal's (that is, the owner of goods) before remitting the balance to him. Where a factor sells goods which he is not authorized to sell to a bona fide purchaser for value without notice, the latter would retain possession and ownership as such cannot be divested from him by the first owner.[345]

Notwithstanding what has been said above, the meaning and practice of factoring today has changed, presumably due to the US influence in business law. In the US, factoring is understood as the assignment of rights to debts at discounted prices.[346] The assignee of debt pays the debt owner off and steps into his shoes to collect the full debt from the account-debtor. The assignee makes his profit from the difference between the given discount and the full debt value. Although this was not the original practice of factoring in Nigeria, it has nevertheless become a prevalent practice in Nigeria today, whereby the assignment of debt has become one of the major ways by which both natural and legal persons obtain immediate cash that could be used to finance immediate needs of a business. One notable problem, however, arises in cases where a company owns debt and assigns same at discounts to various assignees thereby creating multiple equitable

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[344] The transfer of title by a factor will not be affected by the *nemodat rule.* See sections 21 – 26 Sale of Goods Act, 1893 for exceptions of the *nemo dat rule*. Also take a look at Merrett Louise, *The Importance of Delivery and Possession in the Passing of Title,* 67(2) CAMBRIDGE LAW JOURNAL, (2008), pp. 376 – 395.
[345] Section 2(2) Factors Act 1889.
[346]SALINGER FREDDY, FACTORING LAW AND PRACTICE (London, Sweet & Maxwell, 2nd edition, 1995), pp. 9, 10, 17.

interest holders. In this case, the rule in *Dearle v Hull*[347]applies to determine priority amongst competing claimants by giving priority in the order in which the assignees notified the account debtor.

The use of the rule in *Dearle* in Nigeria as a method of perfection, rather than a public registry system is highly problematic because an assignee of debt has no way of knowing in advance how many assignees were before him and the amount of their monetary interest. So following the *Dearle* perfection method, when an assignee notifies the account debtor, he realizes for the first time that his interest is junior to some other assignees, which if he had known of in advance, probably would not have bothered to engage in taking the account-receivable. Today, this difficulty cannot occur in the US and Ontario because any encumbrance on receivables would be revealed by taking a look at the public registry – that should be the way forward for Nigeria in this regard.

In the US however, the factoring industry is much more developed. Also owing to advancement, receivable financing has become an offshoot of factoring and governed by Article 9 because it is used to secure transactions.[348] This further means that factoring in the strict sense differs slightly from receivable financing in that whereas the former deals with an outright sale of debts (governed by Article 2 of the UCC), whereby the buyer assumes the responsibility of obtaining payment from the account debtor, in receivable financing,[349] the secured creditor does not purchase the debt but advances credit to the debtor on the arrangement that the account-receivable of the debtor serves as the collateral. Depending on the agreement of both parties, the

[347](1828) 3 Russ 1.
[348] Owing to the US unitary system (*non-numerus claurus*), every transaction that creates a security interest in a personal property is governed by Article 9 of the US Uniform Commercial Code.
[349] See Tom Klausen, *The Difference Between Factoring and Accounts Receivable Financing*, THE NATIONAL BUSINESS CAPITAL, available at https://www.allbusiness.com/the-difference-between-factoring-and-accounts-receivable-financing-14847411-1.html (last visited on May 27, 2014).

creditor (now the assignee of the account-receivable), could notify the account debtor of his assignment and could receive payment directly. Being that an account-receivable is recognized under Article 9 as collateral, the secured creditor is required to file a financing statement so as to give notice of his interest as well as create priority.[350]

Having said the foregoing, the author is of the view that factoring is an industry that is worth developing in Nigeria as it is one of the means of obtaining immediate cash that could be used to invest in a profitable venture – instead of waiting until a future time when the full debt will be realized. This is because it is possible that the full value may be realized in future when the debt owner is not so much in need of cash or when inflation has hit to render the initial debt value less valuable.

In any case, the author submits that inasmuch as some Nigerian business owners have started to practice factoring in the sense just described above – although there is no adequate legal framework to support this kind of transaction, the author goes with the position that factoring and accounts-receivable are good economic tools but should be practiced along with good creation, perfection, priority and enforcement systems similar to those of Article 9 and OPPSA. In the case of factoring that deals with outright sale of debts at discounted prices, its use in Nigeria should be paralleled with regulatory rules protecting consumer-debtors against abuses and overreaches of established factoring houses.

[350] Section 9-310 UCC.

1.7.3. Warehouse-financing: The US perspective

First, a brief insight of how warehouse-financing is practiced in the country of its birth is necessary. In the US, field warehousing[351] evolved from terminal warehousing.[352] The latter represents an arrangement whereby goods are deposited by a borrower of credit to the field warehouseman for the benefit of the lender – meaning that a contract of bailment was created in favour of the lender whom the warehouseman (bailee) issues warehouse receipts[353] that represent the value of goods in the latter's possession. The warehouse receipts embodying the value of the bailed goods therefore become negotiable instruments and could be transferred to a third party – provided the transferee presents the receipts to the warehouseman in order for the latter to release the goods in his possession.

[351]See – GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Boston, Little, Brown and Co., 1965), chapter 6. Two cases give an apt definition – thus, in *Business Factors Inc. v. Taylor-Edwards Warehouse & Transfer Co.,* 585 P.2d 825, 828 (Wash. Ct. App. 1978), the court said "Field warehousing is a way of bringing about the security relationship of a pledge. It is an arrangement for allowing the pledger a more convenient access to the pledged goods, while the goods are actually in the custody and control of a third person on the pledgor's premises". *In re Covington Grain Co.,* 638 F.2d 1365 (5th Cir. 1981) the court said "Field warehousing is an arrangement whereby a wholesaler, manufacturer or merchant finances his business through the pledge of goods remaining on his premises. The arrangement is valid and effective where there is an actual delivery to the warehouseman by the bailor who has hired the warehouseman and given him exclusive possession of the warehouse goods." BLACK'S LAW DICTIONARY, 9th edition says it's "[a]n inventory-financing method by which a merchant pledges his inventory which is in the possession of a third party…and cannot be economically delivered to the creditor or third party, hence the borrower segregates part of the inventory and places it under the nominal control of a lender or third party so that the lender has a possessory interest."

[352]See generally, Yale Law Journal Company, Inc., *Financing Inventory Through Field Warehousing,* 69 YALE LAW JOURNAL, 663 (1960).

[353]Wynne Geoffrey, *Warehousereceipts past, present and future: Part 1*, INTERNATIONAL BANKING AND FINANCIAL LAW, vol.17(1), (1998), pp.8-10, – "warehouse receipt" was defined as "[a] document issued by a warehouse keeper stating that the goods certified on the warehousereceipt are held in his warehouse at the disposal of the person named on the warehousereceipt (usually the borrower). The warehouse keeper holds the goods as bailee and can only deal with the goods in a manner authorized by the borrower (the bailor). If the bailee deals with the goods in an unauthorised manner, he will take the risk and assume the liability for any loss suffered by the bailor as a result of the unauthorised dealing. If the bailee delivers the goods to an unauthorised person, he will also be liable in the tort of conversion for misdelivery."

Field warehousing in the opinions of scholars[354] which the author equally shares, evolved as a way to reduce the transaction costs involved in terminal warehousing – meaning that the cost of transporting goods to the lender and returning same to the borrower after credit has been repaid,[355] the cost of keeping the goods in a warehouse until the borrower redeems, and so on, are cut off in a field warehousing transaction.[356] Thus, the lender goes to the borrower's premises where the latter conducts his manufacturing business and leases a space in the warehouse for a nominal fee.[357] Then, goods corresponding to the amount of credit lent are demarcated from the rest of the borrower's inventory, usually by fencing or locking up. The lender appoints a warehouseman, usually an employee of the borrower who would have to take stock of the alienated goods and consequently issue warehouse receipts which then would have to be deposited with the lender. The warehouseman, would have to be given the warehouse receipt[s] before the corresponding value of the goods under his control is released to the bearer of the warehouse receipt. The lender under this arrangement need not file his security interest in the registry because he is deemed to be in possession of the goods – the warehouse receipts are deemed to be the equivalence of the goods, and a possession of the former implies the possession of the latter – and therefore perfected.

[354] See Joseph T. McGuire, *The Impact of the UCC on Field Warehousing*, 6 UNIFORM COMMERCIAL CODE LAW JOURNAL, (1974), pp 267–283, at 270. See also Tibor Tajti, *The Resurrection of Field Warehousing – The Booming Hungarian Field Warehousing Sector, the Incomplete English Narrative and the Unexplored Field Warehousing Law of the United States*, ACTA JURIDICA HUNGARICA, 55, No. 3, (2014), pp. 185-235 at p.192.
[355] See, Robert H. Skilton, *Field Warehousing as a Financing Device*, WISCONSIN LAW REVIEW, (1961), Part I, pp. 221–225.
[356] Field warehousing enables both parties to a transaction incur less costs because on one hand, the borrower is saved the costs of transporting goods to and from the lender's premises, and on the other hand, the lender is saved the costs of running a terminal warehouse that would have been used to receive goods from borrowers. See SWEETSER G. ALBERT, FINANCING GOODS (New York, Simmons-Boardman Pub. Corp. 1963), pp.365 –366.
[357] See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Boston, Little, Brown and Co., 1965), p. 151.

Although field warehousing has almost vanished from sight in the US – it is hardly used or mentioned by scholars in the current literature of US secured transactions, it is still imperative to note that during its booming days, it was organized in such a way that the employee of the borrower was usually the field warehouseman, a situation that immediately suggests that conflict of interests was irresistibly probable. The rationale behind this goes to the author's earlier reference to transaction costs. If the borrower's employee is not used, the alternative would be for the lender to employ his own warehouseman who will perform the task for a fee throughout the duration of the transaction between the lender and the borrower. This will definitely eat deep into the lender's expected profits. On the other hand, an employee of the borrower would more likely evince greater loyalty to the borrower than the lender – his permanent versus temporary employer dilemma will often arise. Even though conflict of interests seems very probable by using the borrower's employee, it is still much more feasible for the lender to engage the employee of the borrower. At best the lender could stipulate it in the agreement that the use of the borrower's employee as the warehouseman is a necessary condition for advancing the loan.

What the author advises to field warehousing practitioners is that the lender should engage the borrower's employee as field warehouseman, while simultaneously visiting the borrower's premises frequently and unannounced, to ensure that the field warehouseman does not surreptitiously collaborate with the borrower to dissipate the goods under his control. It is also further advised that the lender could insert in the agreement some conditions under the acceleration clause[358] – that upon his discovery that the goods under the control of the warehouseman have been dissipated no matter how little without his consent, that such a development would make the lender call for the total repayment of the loan. This would deter the borrower from yielding to any

[358] On how "acceleration clauses" function in an agreement, see – Hahn David, *The Roles of Acceleration,*8 DEPAUL BUSINESS & COMMERCIAL LAW JOURNAL, 229 (2010).

temptation of collaborating with his employee – over whom he has a larger influence and control than the lender.

Lastly, one question that begs to be asked is which of the parties in a field warehousing arrangement bears the risk of loss after the borrower's goods have been alienated by the lender and same later gets destroyed by a supervening circumstance, like an inferno or flood? A correct answer in the author's view would be that risk passes to the lender the moment the goods are alienated and managed for him by proxy notwithstanding that the goods still remain physically in the borrower's premises. This would mean that the borrower is not ordinarily obliged to bear the risk of loss for alienated goods in his premises, neither is he obliged to insure them if there was no agreement that modified this general rule prior to the destructive event.[359]

1.7.3.1. Warehouse-financing: The Nigerian perspective

Although the idea of warehousing and the use of warehouse receipts are currently in vogue in Nigeria, what is currently available can only qualify as terminal warehousing, and not field warehousing. The distinguishing feature of the latter from terminal warehousing, in the author's opinion, lies on the concept of "field" – meaning that in field warehousing, the creditor erects an artificial warehouse on the, or close to the premises of the debtor for the purpose of safekeeping the inventory-collateral as a bailee usually through the debtor's employee.[360]

[359]This opinion is reached considering the general wordings of sections 16 – 20 of the Sale of Goods Act 1893 which provide rules for determining when risks generally pass in a contract with respect to goods.

[360] This was a similar description given in *Business Factors, Inc. v. Taylor-Edwards Warehouse & Transfer Co.*, 585 P.2d 825, 828 (Wash. Ct. App. 1978), and *In re Covington Grain Co*..638 F.2d 1362, 1365 (5th Cir. 1981). Black's Law Dictionary (9th edition) defines "field warehousing" as follows: *"[It] is a method of financing an inventory that cannot economically be delivered to the creditor or third party. The borrower segregates part of the inventory and places it under the nominal control of a lender or third party, so that the lender has a possessory interest."*

In the case of Nigeria, the lender – usually a bank, asks the borrower to open a loan account[361] which the former controls. Then the borrower deposits some goods in the warehouse of an accredited[362] warehouseman who issues to the borrower warehouse receipts[363] which have all the details of the goods deposited including their monetary value. The borrower then deposits the warehouse receipts with the bank who keeps the receipts as collateral of the credit given to the borrower. When the borrower wants to have access to a portion of the warehoused goods, he would have to make payment to his loan account with the bank[364] that corresponds to the value of the goods he desires to access from the warehouse. The bank then releases the warehouse receipt that indicates the value of goods the borrower must access, and the warehouseman upon being presented with the warehouse receipt is obliged to release the goods. Furthermore, there is another version of warehousing that is practiced which stems from the fact that the requirements for becoming an accredited warehouseman in Nigeria is quite stringent[365] – a set of requirements that underpin the fact that Nigeria is a low trust/rule of law country, and business ideas copied from high trust/rule of law countries must be given additional reinforcements if they are to be of any

[361] This type of account does not operate as regular bank accounts. For instance, the borrower cannot draw out money as the money deposited therein is meant to serve as collateral (flawed asset) in exchange for the warehouse receipts. The bank therefore exercises control over the account and could draw from it without any permission from the account owner.

[362]For details on the requirements for accreditation and other vital information about warehouse operations in Nigeria, see http://www.abujacomex.com/pages/posts/warehouse-rules-and-regulations358.php (last visited on the May 28, 2014).

[363] "[A] document evidencing title to goods stored with someone else, especially a receipt issued by a person engaged in the business of storing goods for a fee. It is considered a document of title and may be a negotiable instrument, often used for financing, with inventory as security."— BLACK'S LAW DICTIONARY, (9th edition), p. 1721.

[364] The essence of this account is to give the bank the right to exercise control over the loan account. The money in the loan account each time corresponds with the released warehouse receipts. This practice, although prevalent, is yet to be judicially tested – hence, decisions on this are yet to be available.

[365] See the stringent requirements contained in the website http://www.abujacomex.com/pages/posts/warehouse-rules-and-regulations358.php (last visited on May 28, 2014).

meaningful benefit to the Nigerian business community, otherwise the possibility of such business ideas being hijacked by crooks to swindle unsuspecting customers remains high.

Owing to the fact that many are unable to meet with the industry's requirements to become terminal warehouse practitioners, some entrepreneurs erect warehouses which have several room partitions. The rooms are numbered and the lock to each room is specially designed to accommodate at least three security padlocks. This is to ensure that each party, namely the warehouseman, the borrower and the bank/lender, could be able to lock the room with their own padlock to ensure that access to the room where goods are deposited is not made without the presence of each of the parties.[366] Under this kind of arrangement, there is no issuance of warehouse receipts that function as negotiable instruments as each party each time has to be present to witness the amount of goods that is removed as a way to frustrate any plan or possibility of a party colluding with the warehouseman – especially between the borrower and the warehouseman, whereby they both collude against the bank to dissipate goods from the warehouse. One major drawback in the practice of terminal warehousing in Nigeria is that the two existing versions above incur lots of transaction costs. For instance, the borrower would have to transport his goods to the warehouse, an exercise that involves risks as well as costs.

More so, in the second version of terminal warehousing practiced in Nigeria, the borrower as well as the bank incurs more transaction costs. In the case of the bank, they would have to visit the warehouse each time the borrower intends to remove a portion of the deposited goods – the

[366]This kind of practice which evinces the existence of a great distrust amongst the parties concerned was reinforced probably after the only decision of the Nigerian court on warehousing in *Triana Ltd. v Universal Bank Plc* (2009) 12 NWLR (part 1155) 313 C.A. In *Triana*, the borrower colluded with the warehouse operator, and clandestinely removed goods from the warehouse without the knowledge of the bank. The reaction to this incident by banks is that goods kept in warehouses are not made accessible or removed by any of the parties involved; namely the bank, the borrower and the warehouse operator except all parties are present, of course with their keys.

bank would have to make all the journeys with all the attendant costs, which are invariably transferred to the debtor. It is submitted however that terminal warehousing is still young in Nigeria and the industry-practices are yet to be well judicially tested. This is to say that no other reported court decision was found as at the date of writing except *Triana*.[367] It is the author's opinion therefore that Nigerians indeed have the desire to exploit modern day commercial practices, and do in fact import many of these commercial practices from the advanced legal systems. However, such transplanted elements can only be completely meaningful if the Nigerian secured transactions law is completely reformed, as against the current practice of piecemeal and unadapted transplantation of concepts designed to work with a different set of regulatory factors and socio-economic conditions which are currently absent in the country.

1.7.3.2. The reasons "field warehousing" should be introduced in Nigeria

Given that agriculture is regaining fresh attention in Nigeria due to the global dip in crude oil and gas prices, the author strongly believes that it is high time 'field warehousing' is introduced – a warehousing arrangement whereby the secured creditor goes to the location of debtor's good to erect an artificial warehouse by demarcating and locking up a portion of the debtor's goods. It is further suggested that the ensuing field warehouse receipts be registered in the yet-to-be collateral registry where security interests in personal property will be registered, in order to give public notice.

The emergence of field warehousing will no doubt help Nigerian farmers to tremendously raise credits, and save them the costs and risks of transporting their produce to terminal warehouses

[367](2009) 12 NWLR (part 1155) 313 – Court of Appeal.

as a precondition for obtaining credits. This further makes sense considering that during the harvesting period, the few available terminal warehouses could hardly accommodate the heightened demand from farmers to store their produce – and this invariably results to the exponential increase in storage fees, thereby reducing farmers' profits as well as increasing the costs of goods when they eventually make it to the market. Furthermore, as many Nigerian farmers are yet to be sophisticated – that is, farming is still largely done with simple machines and very few farmers can afford to own or rent big transporting vans, the need for field warehousing further makes sense. This is because bulky goods or goods which require special handling and transporting would pose extreme difficulty to most Nigerian farmers if public warehouses remain the only option – the cost of transportation of goods on bad roads and insurance of the goods to minimize the likely risk of destruction on the way, all add to the transaction costs. These and many more reasons strongly call for the practice of field warehousing in Nigeria. Of course, the practice of field warehousing, or an industry living from it, would remain guided by secured transactions law, and as such it is advocated that its rules with respect to creation, perfection, priority and enforcement of security interests on personal property collateral draw exclusively from the anticipated PPSL.

Indeed, the functional approach to secured transactions remains the answer towards solving the panoply of issues stemming from the currently compartmentalized nature of Nigeria's secured transactions law. For instance, without the functional approach, it will be unclear as to how a priority conflict between a floating chargee and the holder of a security interest (warehouse receipts) in goods kept in a warehouse could be resolved – this is a big issue, and until it is adequately answered, the practice of any version of warehousing in Nigeria remains a big risk on the practitioners. This is another reason why a unitary-functional approach should be adopted to bring the chaos caused by compartmentalization of secured transactions to a sort of order.

1.7.4. Trust receipts

To start with, a trust receipt[368] does not mean what it immediately suggests on the surface – its true meaning does not revolve around the traditional meaning of trust whereby the trustee is the legal owner of trust property.[369] Trust receipt, was an invention by business owners to address the need of import finance in the 19th century US. Its judicial challenge later resulted, thereby adding to its complexity when the first generation of cases[370] accepted it as a method of financing. Contrary to the original idea of trust, the dealer (trustee) in a trust receipt does not own the goods in his possession as title to them remains with the financier.[371] Earlier attempts to unmask the difficulty that loomed with the concept argued that a trust receipt should be regarded as an agency relationship, whereby the financier was the principal while the dealer was the agent.[372] Again, this

[368] "A method of financing commercial transactions by which title passes directly from the manufacturer or seller to a banker or lender, who as owner delivers the goods to the dealer on whose behalf the banker or lender is acting, and to whom title ultimately goes when the banker's or lender's primary right has been satisfied." – BLACK'S LAW DICTIONARY, (9th edition, 2009), p. 1657. For a more penetrating treatment, see – GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Boston, Little, Brown and Co., 1965), chapter 4. Also see generally – Grant Gilmore, *Chattel Security: II,* 57 YALE LAW JOURNAL, 761 (1948).

[369]"The term "trust receipt is misleading, as it is not trust in the ordinary sense of an arrangement whereby the person in possession with legal title holds for the use of the beneficial owner. The holder of the receipt has legal title and the so-called trustee has himself a beneficial interest in the goods. A better descriptive term would be "agency receipt" or "bailee receipt" ". See K. K Mathew, *Trust Receipts*, 31.4 MICHIGAN LAW REVIEW, 558 (1933), p. 560. Available at http://www.jstor.org/stable/1281160?seq=3#page_scan_tab_contents (last visited on January 31, 2016).

[370] The following cases are helpful in understanding the concept, being that they were the earliest to uphold "trust receipt" as an independent security device. See – *Mechanics & Traders' Bank etc. v. Farmers & Mechanics' National Bank*, 60 N.Y 40 (1875) and *Farmers & Mechanics' National Bank v. Logan,* 74 N.Y. 568 (1878).

[371] *Ibid.*

[372]For a more detailed discussion, see the case of *Foreign Trade Banking Corporation v. Gerseta Corporation*, 237 N.Y 265, 142 N.E, 31 A.L.R 932 (1923) but see section 12 UTRA which now has abolished the agency theory that "even though the entruster has given the trustee liberty of sale, the Act provides that he is not to be held responsible as principal or as vendor under any sale or contract to sell made by the trustee." see – Robert H. Gorske, *The Uniform*

was problematic as the acts of an agent were deemed the acts of the principal, thereby putting the financier whose profit in a trust receipt transaction was quite minimal compared to the implications of being a principal to the dealer in respect of the inventories the latter had financed. Some scholars referred to trust receipts as a chattel mortgage involving three parties, namely the seller, the entrusting bank, and the buyer/trustee.[373]

Trust receipt in the US had a highly calibrated history of inconsistencies in legal logic – a situation that led lawmakers to enact the Uniform Trust Receipts Act (UTRA) in 1933, in order to achieve some level of consistency. Yet, trust receipt would have remained a financial device used exclusively by financially strong banks to finance imports if the automobile industry had not witnessed a gigantic growth.[374] In floor planning[375], for instance, which is an arrangement whereby a manufacturer or a financier of automobiles, television sets and other appliances deposit these items as part of the dealer's inventories which the latter is obliged to sell and remit money back to the financier or manufacturer – the dealer thrives on commissions from sales and not salaries.[376] In addition, the title of goods does not originate from the dealer, but from the financier or manufacturer who passes same directly to a third party who has purchased the inventory from

Trust Receipts Act as Adopted in Wisconsin, 38 MARQUETTE LAW REVIEW, 110 (1954); available at http://scholarship.law.marquette.edu/mulr/vol38/iss2/4 (last visited on May 28, 2014).

[373]See – Karl T. Frederick, *The Trust Receipt as Security,* 22 COLUMBIA LAW REVIEW, 395 (1922), p.546.

[374] TIBOR TAJTI, COMPARATIVE SECURED TRANSACTIONS LAW (Akademiai Kiado, Budapest, 2002) p. 133.

[375]"A loan that is secured by merchandise and paid off as the goods are sold – usually such a loan is given by a manufacturer to a retailer or other dealer (as a car dealer)" – BLACK'S LAW DICTIONARY, 9th edition, p.707. A case in point is *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 61 ADMIN. LAW JUDICIAL REVIEW, 415. Also, a general look at this article is advised: Young A. Lawrence, et al, *Some Critical Issues in Automobile Dealer Bankruptcies,* 64 CONSUMER FINANCIAL LAW QUARTERLY REPORT, 368 (2010).

[376]In any contractual arrangement, the payment of salaries by one party to another strongly suggests that the payee is an employee of the payer. Salaries are fixed payments regardless of the employee's output before payment, unlike a commission that is tied to performance and therefore not fixed. For an in-depth analysis, see generally, the recent seminal article by a learned writer: Morgan, R. Christopher, *Bryson v. Middlefield Volunteer Fire Department and the Changing Understanding of Volunteer as Employee*, 17 LEWIS & CLARK LAW REVIEW, 1223 (2013).

the dealer. These inventories in the dealer's possession are separate from his other inventories and upon the dealer's bankruptcy or liquidation, the inventories under a floor plan arrangement are not regarded as part of the dealer's assets that would be available to creditors to satisfy their money claims.[377] This form of financing arose from the fact that owing to the nature of the goods involved – cars, heavy duty equipment, and so on, it was not so easy for a dealer to purchase them outright in large numbers that could give potential customers the impression that they are goods for sale, and at good prices – because when goods for sale are held in a large number the impression that they are from genuine sources and in good prices is easily presumed.

In Nigeria, trust receipt is not part of the law, but certain practices witnessed in some sectors have the outlook or functional equivalence of trust receipts – although it is hardly known by that name, instead the term 'distributorship'[378] which appears to be a functional equivalent is normally used. The disheartening observation is that currently in Nigeria a contractual arrangement that has exactly the features of a trust receipt is usually interpreted by courts with the general rules of common law contract, and nothing more tailor-made. This was what the Americans suffered before the passage of UTRA – whereby different logics of law ranging from chattel mortgage to agency law were applied to trust receipt transactions. It shows also that a compartmentalized legal framework of secured transactions will continue to confuse and apply different logics of law as the Americans initially did during the early developments of trust receipt. Article 9 therefore

[377]This is because creditors can only satisfy their debts from the debtor's estate and not from what the latter does not own. Hence, under a floor plan arrangement, the title of goods being kept as inventories of the dealer reside on the financier and therefore cannot be part of the debtor's estate upon bankruptcy. Even when the inventories are sold to remedy the debtor's debts, the financier (secured party) under Article 9 has security interest in the proceeds of the inventories. See Article 9-102(a) 64 for the definition of "proceeds" and Article 9-315 for a secured party's claim to "proceeds." And the earlier cases on this: *Louisville Joint Stock Land Bank v. Radford,* 295 U.S 555 (1935), *Wright v. Union Central Life Ins. Co*., 311 U.S. 272 (1940).

[378] See section 1.8.6. below for a brief discussion on 'distributorship'.

brought every security and retention of title device under one roof, thereby providing well defined rules which would apply to any transaction creating a security interest in a personal property.

In brief, the use of trust receipt as a financing device has been seen in the Nigerian automobile industry as well as the sale of some home appliances like flat screen televisions and personal computers. In truth, Nigeria does not yet produce cars or any of these appliances but has either been a home for car assembly plants[379] or an outlet where foreign manufacturers sell their products. What usually happens is that a dealer in Nigeria having won the trust of a foreign manufacturer sets up a limited liability company where he keeps the foreign manufacturer's car products or home appliance products in his business premises for sale. The arrangement could be of two kinds – it is either that the Nigerian dealer has proved so trustworthy that the foreign dealer trusts him as not to request any kind of financing or at best retains title (conditional sale), or a Nigerian bank finances the purchases of the cars and retains titles to them. In the latter case, the bank becomes the owner of the cars, while the dealer sells them and becomes entitled to commission payments.[380] The bank's ownership is only as to the cars, as the business premises remains the sole responsibility of the dealer – meaning that he could also acquire some other

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[379] Nigeria has been a home of auto assembly plants – starting with Peugeot Automobile Nigeria company in 1975 http://www.peugeotnigeria.com/peugeot-in-country/. Currently there are other automobile assembly plants in the country including Stallion Group of companies http://stalliongroup.com/business-lines/assembly.asp and the more indigenous manufacturing/assembly plant –"INNOSON MOTORS" – http://innosonivm.com/en/About.Asp?ID=1. These companies make use of dealers to sell their vehicles, and the contractual arrangements follow the concept of "trust receipt", although not labeled as such. All three websites were (last visited on May 29, 2014).

[380] It is the author's opinion that in order for trust receipt financiers in Nigeria to maximally protect their interests, the bank/manufacturer should regularly police the dealer's activities as advised by the case of *Benedict v Ratner* 268 U.S. 353 (1925) so as to ensure that the latter does not engage in opportunistic behaviors by using the inventories in his possession to create security interests in favor of other creditors. Policing the debtor in this case would ensure that inappropriate dealings are discovered in time before they are too late. For an in-depth discussion, see generally – Thomas H. Jackson, & Anthony T. Kronman, *Secured Financing and Priorities among Creditors,* 88 YALE LAW JOURNAL 1143, (1979) and OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION (New York, Free Press, 1983), pp. 31-37, 241-44, and pp.252-58.

inventories from other financiers for sale provided he is able to differentiate and keep accurate records. This practice is prevalent in some parts of Nigeria especially in Lagos and Abuja which are the commercial hubs of Nigeria. It is easy to see business premises exclusively having hundreds of Toyota, Rio, Mercedes, Volvo cars and even heavy duty machines like caterpillars. The same is true for home appliances. The confusing thing about all these transactions is that they are often labeled what the parties want it to be called – even though that a thorough examination reveals that a transaction labeled “distributorship’, may have features which qualify them as conditional sale or consignment.

More problems exist with the current practice of trust receipt or its functional equivalents in Nigeria – for instance, in its respect, the problem of ostensible ownership exists coupled with the impossibility of the financier to perfect his interest in the inventories due to lack of a personal property registry where security interests in them would have otherwise been registered. This means that there is no way of giving notice to a third party to know the nature of the goods in the dealer’s possession in case the latter might attempt to use them to secure credits from a third party.

However, if the third party grants the dealer some credit based on the inventories, should he have priority over the financier (real owner) of the inventories or not? More problematic questions could be endlessly replicated which cannot be well addressed by the existing rules of contract, and owing to the fact that the current nature of Nigeria’s secured transactions law cannot fully address these questions, it becomes highly worrisome that business owners are importing financing concepts from across the globe which are not supported by the legal framework in Nigeria. Thus, if trust receipt must be of any real relevance – the need to get a ‘total package’ of these concepts and shun piecemeal importation becomes very necessary and urgent.

1.8. Retained title financing

1.8.1. Introduction

As earlier stated, Nigeria's secured transactions law is very compartmentalized and has been a seed-bed for many foreign financing concepts which are yet to be brought under uniformity. One of such imported concepts from England are the various title financing devices – suitable for a low trust society as well as a system whose public filing system with respect to security interests in personal property is yet to fully develop. In Nigeria, title financing has two major types that are widely used in practice, namely – conditional sale[381] and hire purchase.[382] In these two types of title financing, title of the purchased or hired good is retained by the seller/owner and only passes[383] to the buyer/hirer upon the fulfillment of the payment conditions contained in the agreement of both parties. Also, under these financial arrangements, the seller/owner does not need to file his interest in any registry, and could repossess the sold/hired good[s] from the buyer if the latter defaults in payment as agreed. The two title financing devices are hereunder discussed in detail.

[381]Conditional sale should not be confused with a credit sale contract. In the latter, the transaction is complete and legal title passes immediately to the buyer. While in the former, the buyer's obtains an equitable interest in the goods which grows gradually into a legal title as he makes payments to complete the full price of the goods – full ownership is therefore conditioned on full price payment. For a perfect distinction between a conditional sale and other similar title financing devices, see the English cases: *Forthright Finance Ltd v Carlyle Finance Ltd* [1997] 4 All E.R. 90; [1997] C.C.L.R. 84, CA (Civ Div) which followed *Helby v Matthews* (1895) AC 471.

[382]See generally – Hire Purchase Act 1917, Laws of the Federation of Nigeria, 2004.

[383]In the case of Nigeria – the Equipment leasing bill only covers finance lease. Section 2 of the Bill provides for finance lease which was defined under section 44 as "Finance lease is a lease involving rental – payment over an obligatory period sufficient in total to amortize the capital outlay of the lessor and also give the lessor some benefits." In other words, the title of the leased equipment does not pass to the lessee at the end, neither is he given any option to buy it at a nominal fee as done in a true lease. See UCC Article 2A, and for an in-depth analysis of "true lease" and "security interest lease", see Kaim, N. Anthony, *Classifying the Right to Rental Payment Streams Stripped Off a Lease: An Examination of the Issues Not Discussed In Commercial Money Center*, 86 TEXAS LAW REVIEW, 857 (2008).

1.8.2. Conditional sale

Conditional sale should not be mistaken for a credit sale.[384] The latter involves a type of sale whereby the seller sells goods to the buyer on the arrangement that the latter pays for it later – meaning that the sale was outright and full title passed onto the buyer. The buyer could pass a good title to a third party or do anything he pleases with the good on the basis of ownership. The seller's remedy in a credit sale is an *in personam* right to be paid the monetary value of the good which he can enforce against the buyer upon default by a court action – the seller therefore lacks the power to repossess the good having lost his *in rem* right in it after sale.[385]

A conditional sale (there is no statutory law that governs it in Nigeria)[386] is an agreement for sale whereby title does not pass to the buyer but remains with the seller until the latter has fulfilled payment conditions or any other conditions whatsoever agreed by both parties. It differs from a hire purchase in that from the beginning the buyer is committed to buy the good unlike in a hire purchase where the hirer has the discretion to own the goods after completing the instalment payments by paying a nominal fee in exercise of the option to buy. One question that will beg to be asked is whether risk passes with goods being sold to the buyer conditionally, or does risk in the good still remain with the title holder under a conditional sale arrangement? It appears that this may be modified by the parties' agreement, but on a general note, it is more likely the situation

[384] See generally – *Forthright Finance Ltd v Carlyle Finance Ltd* [1997] 4 All E.R. 90; [1997] C.C.L.R. 84, CA (Civ Div), *Helby v Matthews* (1895) AC 471.
[385] This was the exact holding of the court in *Hannin v Fisher* (1935) 5 Cal. App2d 673, 43 P2d 815. Moreover, an overwhelming amount of literature in this area of law, both in the US and England, agree to this distinction between a conditional sale and credit sale.
[386] However, having been imported from England, its use is governed by the ordinary rules of contract under common law.

that risk in the good passes to the conditional buyer, who has the responsibility to protect the good from damage or insure it against risks.[387]

Owing to the fact that conditional sale is governed by the Sale of Goods Act 1893, only personal property could be subject of a conditional sale agreement – meaning that the seller can easily lose his title in the good since he cannot ordinarily enter the buyer's place of business to repossess without either a court order or the buyer's consent, especially where such right of free entry was not provided for in the agreement.[388] Also, the matter could become more complicated where the good that was sold conditionally gets installed into an equipment unknown to the seller in the buyer's place of business, or affixed to the buyer's land, thereby triggering off the application of the land law rule – *the owner of land owns whatever that is affixed to it*.[389] In most situations also, depending on the nature of good, the problem of ostensible ownership could arise whereby the buyer poses to be the absolute owner of the good before an unsuspecting third party and consequently deceives him to buy it.

The seller in principle could assert his title against a third party whom the buyer has sold the property to, on the principle that the buyer could not have given what he did not in fact own.[390]

[387]The logic of law behind this conclusion is to prevent the conditional buyer from engaging in any opportunistic behavior during the pendency of the conditional sale contract – if the seller were to bear the risk of loss, then the conditional buyer will have no incentive to care and protect the goods in his possession, and could in a worse case scenario, collude with a third party to fraudulently do away with the goods, since the seller consequently bears the loss.

[388] However all the rights of an unpaid seller under the Sale of Goods Act 1893 could be invoked in the seller's favor. See sections 38 – 48 thereof for rights and remedies of an unpaid seller.

[389]See *Elitestone Ltd v Morris and another* [1997] 2 All ER 513, [1997] 1 WLR 687.

[390] What happens in case of conflict of interests in property between a conditional sale buyer and a floating chargee's interest on chargor's properties following crystallization? When a floating charge becomes fixed following crystallization, the floating chargee becomes entitled to satisfy his claim with the chargor's (the company's) property no matter where it is located. In this case, let us presume that the company that created the floating charge is also the seller in the conditional sale contract. Since it is only possession, iced with equitable interest that passes to the buyer in a conditional sale arrangement, it becomes a matter of legal interest versus equitable interest – and although possession is strong in law, a legal title holder can always defeat mere possession/equitable interest holder. However, in this case, when the floating chargee has become new title owner of property of the company which is in possession

However, this rule is not absolute and consequently, a loss of title could result where the third party proves that he was a bona fide purchaser for value without notice.

In conclusion, the author reasserts that conditional sale is well known and extensively used in Nigeria by sellers of goods, even though that it is not a convenient financing device for non-sellers financiers.[391] This is highly assuring in at least two ways – first, that the anticipated secured transactions law would generally not be falling on a dry soil, and second, users of conditional sale title device would likely have little or no difficulty in understanding the concept of purchase money security interest, which would be part of the anticipated secured transactions law.[392]

1.8.3. Hire purchase

Much of what has been said above concerning conditional sale applies also to hire purchase although some differences abound – the differences between hire purchase and conditional sale exist more in principle than they are in practice although admittedly, the dividing line is elusive,

of the buyer under a conditional sale, the author's opinion is that equity will always protect the conditional sale buyer, such that the new owner (the floating chargee) can only step into the shoes of the former owner (the company) and maintain all terms of the original contract. Since it is a matter of subrogation, any arising conflict will be resolved by the terms of the original contract. This view could hardly be sustained because most times the floating chargee's receiver creates a new company to which it transfers asset from the old company, thereby making them out of reach for the retained title holders whose interest were only against the old company. No Nigerian case the author knows of has ever been predicated or given direction regarding this dilemma. This is another compelling reason why the Nigerian secured transactions law should be reformed.

[391] This is in line with Professor Heindl's view who said that "…the principal objection to the conditional sale contract, however, lay in the fact that it could not be used with convenience where the financing was to be furnished by an individual other than the seller". See Warren A. Heindl, *Trust Receipt Financing under the Uniform Trust Receipts Act,* 26 CHICAGO.-KENT. LAW REVIEW, 197 (1948), p.199 – available at: http://scholarship.kentlaw.iit.edu/cklawreview/vol26/iss3/1 (last visited on January 31, 2016).

[392] For a fulsome discussion on purchase money security interest, see section 2.6.3 (chapter two) and section 3.6 (chapter three).

yet remains crucial.[393] Under a hire purchase[394] agreement, the price of a good is spread over installment payments by the hirer who is also given possession of the hired good. This does not in any way create any security interest although many writers have regarded it as a quasi-security.[395] Under a hire purchase transaction, risk in the good as well as the duty to maintain and repair the good remain the responsibility of the hirer. However, he can put an end to his rental liability by exercising his right under the agreement to terminate – and such exercise will not entitle the owner to recover the full price of the goods – as such would amount to penalty and would most likely be struck down by a court.[396]

It is also imperative to note that one distinctive feature of a hire purchase from a conditional sale is that in the former, the hirer can exercise the option to buy after duly completing the payment by installments. The purchase fee is usually nominal, but must be paid albeit at the discretion of the hirer. While in a conditional sale, the completion of payment of the good automatically entitles the buyer ownership in the good.

On one side of the coin, the foregoing discussion on conditional sale and hire purchase looks charmingly beautiful. However, it is heart-wrenching to discover that the other side of the coin bears the terrifying inscription of old age and obsolescence, especially when the following points are considered: First, conditional sale as earlier stated is not provided for anywhere in the Nigerian law. Notwithstanding that the law did not provide for it, business owners have found it a useful financing device – mainly used between buyers and sellers who have high trust for one another. The fact that conditional sale is known to Nigerian business owners is a strong indication

[393] ROY GOODE, COMMERCIAL LAW (Penguin Books, 4th edition, 2010), pp.755 –758.
[394] Cap H4 Laws of the Federation of Nigeria 2004.
[395] ROY GOODE, LEGAL PROBLEMS OF CREDIT AND SECURITY (Sweet & Maxwell, 2nd edition 1988), pp. 2-3, PHILIP WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE (Sweet & Maxwell, London 1980) para. 15.1.
[396]*Jobson v Johnson* (1989) 1 All ER 621, (1989) 1 WLR 1026.

that an Article 9 kind of system could have a high chance of success in Nigeria. The major reason conditional sale is not seen as creating a security interest over a property is because the seller's right is personal – that is, he is only entitled to the monetary payment of the good by the buyer through a court action and not a right *in rem* over the good.[397]

The present condition of conditional sale has been outpaced by today's commercial realities in Nigeria, and has reduced much of the device's importance to academic discussion. Second, hire purchase is a useful financing device and at least is provided for under the Hire Purchase Act in Nigeria. However, the fact that this law covers transactions involving only motor vehicles and other goods not more than two thousand naira in value,[398] makes the law very ridiculous – although in today's practice, parties under a hire purchase agreement do usually transact in goods beyond the two thousand naira ceiling amount. Notwithstanding this bypass, one could still say that the usefulness of this important financing device has largely been paralyzed due to its non-revision by the Nigerian parliament to accommodate today's reality – as the possibility to argue that a hire purchase transaction beyond the ceiling amount is illegal by statute firmly exists.

Third, both conditional sale and hire purchase generate the same problem of ostensible ownership – that is, they both leave goods in the hands of the buyer/hirer, who could deceive a third party that he has absolute ownership. In the end, the almighty defense of bona fide purchaser for value without notice wrestles out title from the original owner of goods. This is not healthy for economic growth, because absent a good filing system which gives notice to the general public

[397] ROY GOODE, COMMERCIAL LAW (Penguin Books, 4th edition, 2010), p.29.

[398] See section 1 of the Hire Purchase Act – 1990. Available at http://www.placng.org/new/laws/H4.pdf (last visited on March 31, 2016). Two thousand naira is roughly equivalent to 10 USD – see http://www.xe.com/currencyconverter/convert/?Amount=2000&From=NGN&To=USD (last visited on March 31, 2016).

wanting to deal with a particular good, the problem of ostensible ownership with its devastating effects will always arise. In sum, hire purchase is the equivalent of financing lease under US law – the latter is governed by Article 9. Again, this points to the fact that the Nigerian business community already has a sufficient background to easily digest the intricacies of a modern secured transactions law, being proposed here.

1.8.4. Conflict between title financing and floating charge: Another reason for reform

To a large extent, title financing is in conflict with the floating charge device, with respect to priority of title between a floating chargee and a buyer of property belonging to the floating chargor. Essentially, a debtor/floating chargor creates a floating charge over all his present and future property in favor of the floating chargee who advanced him some credits on the arrangement that upon crystallization, the latter's security interest would fasten over the floating chargor's property no matter where they may be located. This becomes a problem when the debtor/floating chargor is also a conditional seller who retains legal title to a property being sold until the conditional buyer completes payment – meaning that upon crystallization when the floating chargee's interest fastens on all debtor's/floating chargor's property, there would be priority conflict of interests between the floating chargee and the conditional buyer because legal title of the property being paid for by the conditional buyer is with the seller/floating chargor and consequently on the floating chargee following crystallization. Similarly, this difficulty could also occur in land transactions[399] where the buyer has made complete purchase payment to the seller

[399] See the House of Lords' decision in *Sharp v Woolwich Building Society* (1997) S.C (H.L.) 66, (1998) B.C.C. 115 where the court decided that a purchaser who has made full payment to a seller (who happens also to be floating

who happens to also be a floating chargor in another transaction. It could happen that shortly before legal title is transferred to the buyer who has made purchase payment under this circumstance, the floating chargee's security interest could crystallize on the property which has been fully paid for by the buyer but which legal title is yet to be bestowed upon him by the seller through formal registration processes that could take a while to accomplish.[400]

The crucial question to be asked therefore is how a priority conflict between a floating chargee and a conditional buyer would be settled? Surprisingly, no case seeking to answer this question has yet come before a Nigerian court, although this is not to say with any dogmatic finality that such matter may not arise in future. In the author's view, this is one of the strong weaknesses of having the floating charge coexist with title financing devices without a uniform rule of application. A reform of Nigeria's secured transactions law from the viewpoints of Article 9 and OPPSA is therefore needed to bring all security devices under one body of rules which will apply based on the functional approach to secured transactions.[401]

1.8.5. Equipment leasing

Nigeria is still developing in many aspects including physical infrastructures – roads, institutions, railways, airports, seaports just to mention a few, are still under construction. These

chargor) will not be deprived of the paid property if the floating chargee's interest crystallizes before legal ownership passes to the purchaser through registration formalities. This way, substance is made to prevail over form – also the hardship that would have otherwise occurred against the purchaser who didn't know of the floating chargee's interest is obviated. This conflict is made worse by the fact that a floating charge does not affect specified property of the debtor as in floating lien, but on all debtor's property no matter where they may be located.

[400] *Ibid.*

[401] For a collaborating discussion on this, see section 4.2.1. in chapter four *"Should the System of Private Receivers be abolished in Nigeria as in the US?"*

construction works can only be meaningfully undertaken by heavy duty equipment whose prices are not easily affordable by individuals and SMEs, yet their need in construction works remains almost indispensable for both the private and public sectors in Nigeria. The usual way to get around the obstacle posed by the high prices of these heavy duty equipment is the introduction of equipment leasing[402] whereby the need for one to purchase different costly equipment to undertake a construction is obviated – incorporated companies[403] could buy these equipment owing to their financial strengths and lease them out at affordably installment prices to people who have contracted to build physical structures, but ordinarily do not have the means to procure the needed equipment. Equipment leasing has become a prevalent financing method in Nigeria, yet as important as it is, no law has yet been made to govern its use. Recently though, a bill to that effect has been on the desk of Nigeria's parliament but is yet to be passed into law. What make up for this awaited law at the moment are the basic rules of contract which do not adequately address all the matters arising – such issues as right to repossession upon default, notice to the public to avoid ostensible ownership, priority over the equipment between the lessor and other creditors in case of liquidation of the lessee, creation and application of floating charges, and so on, are not provided for and cannot be addressed any meaningfully by the basic rules of contract.

It is in light of the above highlighted problems that the Equipment leasing bill emerged to intervene on the burning issues although not with any utmost dexterity – for example, the bill's

[402] For a more penetrating treatment, see generally – William J. Day, *Legal Aspects of Equipment Leasing by Small Businesses* 17 CAPITAL UNIVERSITY LAW REVIEW, 89 (1987), Chibuike Ugochukwu Uche, *Equipment leasing in Nigeria: Problems and prospects*, 3 JOURNAL OF INTERNATIONAL BANKING REGULATION, No. 4, (2001), pp. 381 – 396. Also see generally – Oko A Ndu, & Aham V. Anyanwu, *Problems of Equipment Leasing In Nigeria*, 2 INTERDISCIPLINARY JOURNAL OF RESEARCH IN BUSINESS, Issue. 7, (2012), (pp.1- 11). Currently, there is a bill pending before the Nigerian National Assembly on equipment leasing – http://www.nassnig.org/nass2/legislation.php?id=817 (last visited on May 29, 2015).

[403] Section 6 of the Equipment Leasing Bill mandates that the lessor must be a registered company in Nigeria. To access the proposed bill, see http://www.nassnig.org/nass2/legislation.php?id=817 as well as the Equipment Leasing Association of Nigeria http://www.elannigeria.org/Pulblication.html (last visited on May 29, 2014).

proposal for notification to the public was not fastidiously drafted, being that it did not disclose whether a single national registry or registries for each of the current thirty-six states will be created. Also in our 21st century world, registries especially in a country with a large population as Nigeria ought to be online[404] so that people could easily access the registry from every part of the country thereby reducing transaction costs and the possibility of ostensible ownership. Also physical registries are usually overcrowded during the day owing to the huge number of people that visit to conduct searches – this increases the tendency to ask or give bribes in order to facilitate one's request – a situation that would be obviated by developing an internet registry.[405] Furthermore, the author thinks that merely inscribing the lessor's name on the body of the leased equipment as a requirement that would help put third parties on notice – as the bill recommended,[406] cannot be a real panacea to ostensible ownership problem as such inscribed name could easily be erased by repainting the leased equipment.

Furthermore, section 17 of the bill is highly problematic in its meaning and it reads thus – "non-registration of a registrable lease agreement shall render the lease agreement invalid as

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[404] Ontario for instance has an online registration system. See section 41(1) Ontario PPSA. In, STIKEMAN ELLIOT, ONTARIO PPSA & COMMENTARY (Canada, LexisNexis Canada Inc; 2006), p.26, the author captured registration of collateral in Ontario in these words "The government of Ontario has established and maintains a central registration system for registrations under the PPSA. The purpose of this central system is to allow registration and searches of security interests to be conducted for the entire province of Ontario regardless of where the collateral is situated. While there is a central office in Toronto, there are numerous branch offices throughout the province where a search may be conducted or a registration may be and more recently it may be done online by those qualified entities that are registered agents. For a fee, anyone may conduct a search for security interests attaching to a particular debtors assets…" Even in countries in Sub-Saharan Africa like Ghana (https://www.bog.gov.gh/index.php?option=com_content&view=article&id=74&Itemid=141) and Liberia (http://www.registry.cbl.org.lr/) have internet registries where security interests in personal property could be searched. Both websites were last visited on April 8, 2016.

[405] The author (a practicing attorney in Nigeria) has firsthand experiences on how overcrowded physical land registries usually are in Nigeria, with many people sometimes waiting for a whole day just to conduct a search on land documents on behalf of their clients. It is always frustrating and the situation always makes it very easy for land registry officials to demand bribes in order to facilitate one's transaction in the registry. An online system will cure all this, and make transactions faster and cheaper as well.

[406] See section 18 of the Equipment Leasing Bill.

between the parties to the agreement but shall not render same unenforceable against any third party acting in good faith, for value without notice of the lease agreement."[407] The author thinks that the real intendment of this section was not to render a registrable lease agreement invalid due to non-registration but to make it rather unenforceable. This is because following the logical sequence, registration does not come prior to the formation of any agreement but vice versa. Evidently, section 17 of the bill is preposterous and suffers from logic as well as poor draftsmanship – consequently, it will pose undesirable difficulties when the bill becomes law.

Although the Equipment leasing bill is a step in the right direction, the author believes that much more is needed to strengthen the current status of Nigeria's commercial law. The concept of *half-loaf being better than none* especially in very crucial issues should be extirpated in lieu of embracing what is all-inclusively standard especially in comparison with other jurisdictions that have figured it to an appreciable extent. Business owners do not necessarily need to go to court each time to get clear interpretations of the law, as such increases transaction costs as well as waste precious time[408] that is inimical to economic growth. It is on that note that the author advocates for secured transactions law reform that would bring the various applicable rules in transactions involving personal property as collateral under a comprehensive system, with clear-cut governing

[407] *Ibid,* at Section 17.

[408] In Nigeria, an average case takes about eight years to move from a court of first instance to the apex court. There are usually many reasons why parties go to court, but most times, the problem is one of interpreting an unclear provision of law, which would have been avoided had the legislators done a thorough work in their legislative drafting so as to minimize the frequency of parties to go to court due to obscurities in the law. The average duration of a case in Nigeria is overwhelming. "For instance in *Bokini v John Holt & Co Ltd* (1937) 13 NLR 109 – a case concerning a mortgage transaction. It began 1930 and was decided in 1937 (7 years), *Bank of the North v Muri* (1998) 2 NWLR (part 536) 153, a matter concerning a mortgage transaction. It commenced in 1988 and was finally decided in 1998 by the Court of Appeal. (10years from the High Court to the Court of Appeals which was just one step). *Ojikutu v Agbonmagbe Bank Ltd* (Now called: Wema Bank Plc) (1996) (2) Afr. LR (comm.) 433. Also a matter concerning a mortgage transaction, it commenced at the high court in 1985 and was decided finally by the same court. (11 years) Although in this case, the parties tried to settle out of court several times. These few cases are just to show how slow litigation can be in Nigeria." taken from: Iheme, Chima Williams, *The Role of Self-help under the UCC Article 9: Lessons for Nigeria* (Budapest, CEU, 2013) LL.M thesis: foot note 131. Available at www.etd.ceu.hu/2013/iheme_chima-williams.pdf (last visited April 2, 2015).

rules on creation, priorities and perfection, as well as enforcement. Until that is done, the uses of these financing devices may continue to become stumbling blocks rather than building blocks for Nigeria's economy – being that the identifiable problems they currently engender due to lack of a comprehensive system of rules certainly outweigh any fringe benefits they give at the moment from being shabbily practiced. This is another strong reason why reform of Nigeria's secured transaction law is urgently needed.

1.8.6. Consignment distinguished from distributorship

Consignment[409] refers to a contractual arrangement whereby one party called the consignor delivers goods to the other party called the consignee on the agreement that the latter sells the deposited goods and returns the money realized less his commission, to the consignor.[410] Under this arrangement, the title of the goods does not reside in the consignee but on the consignor, from whom the title passes to a third party whenever the consignee sells any of the products deposited with him. It is important to note that the consignee is not under the employment of the consignee, neither is he a sales representative. He is an independent contractor, who is not entitled to salary payment and therefore not under the control of the consignor as to how he may carry on his business. This implies that the consignee has the self-duty to explore every genuine means of ensuring that he makes impressive sales as such also tell on the size of his take-home commission.

[409]"[u]nder the UCC, a transaction in which a person delivers goods to a merchant for the purpose of sale and the merchant deals in goods of that kind under a name other than the name of the person making delivery, is not an auctioneer, and is not generally known by its creditor to be substantially engaged in selling others' goods…and the transaction does not create a security interest that secures an obligation" – BLACK'S LAW DICTIONARY, (9th edition, 2009), p.350. This also tallies with the definition offered by White and Summers in their seminal text – JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE(West, 6th ed., 2010), at p.1165.

[410] *Ibid.*

In Nigeria, consignment is not covered by the Factor's Act but is utilized by business owners under the normal rules of contract. The practice is certainly not known by the name – "consignment". Contractual arrangements that closely resemble 'consignment' in terms of content are usually headed "AGREEMENT" – and courts have often bothered less to go beyond the basic rules of contract while interpreting issues that arose from them. Indeed, there are situations in Nigeria where persons who do not have enough money to startup retail sales of consumer goods enter into agreements with established producers/dealers who would be willing to immediately supply the trusted consignee with goods. The consignee (due to his very nature of being independent) could enter into consignment arrangements with many dealers at the same time provided he is willing to be sincere and remit monies accordingly.[411]

Once a transaction is deemed to be a consignment, some issues become immediately implied. First, title to goods remains with the consignor and only possession is given to the consignee. Second, risk passes with the goods in the consignee's possession, meaning that it is the responsibility of the consignee to insure the goods under his possession as he would be made liable to pay the full value notwithstanding the deterioration or destruction of the goods. Third, the consignee is not an employee or agent of the consignor but an independent contractor whose actions cannot bind the consignor.

Fourth, it is not possible to entirely prevent ostensible ownership[412] by filing due to the nature of the arrangement – goods from many dealers that have the same nature come in and go

[411] This is in accordance with Tajti's view when he penned in a seminal article that "the main reasons on the side of the consignee for engaging in consignment are that they typically do not have enough money to purchase those goods, or they have no access to credit, or they do not want to assume more debt." – Tibor Tajti, *Consignments and the Draft Common Frame Of Reference,* 2 PRAVNI ZAPISI: GODINA II, 358 (2011), p.364. Available also at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1983171 (last visited on November 2, 2014).
[412] This fear was adequately captured by WILLIAM D. WARREN AND STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY, (Foundation Press, 2007), at 349.

out almost immediately from consignee's business and they cannot be possibly registered and deregistered in the public registry.[413] The consignee could also pledge the goods to a third party, tricking the latter to believe that he owns them. Fifth, a person who has bought goods from the consignee cannot be deprived of it from the consignor because such a person could easily prove that he was a bona fide purchaser for value without notice.[414] Sixth, because a consignment (outside Article 9) is a contract per se, it does not create a security interest – thus, the consignor's right in the transaction is a personal right to be paid by the consignee for the value of goods supplied. The consignor (although he has retained title) could hardly ask for the return of the goods – the goods might have been mixed up with other goods of similar nature, thereby making it impossible to distinguish, or simply might have been sold.

The foregoing discussion on consignment differs significantly from distributorship.[415] Under a distributorship arrangement, the distributor is the absolute owner of the goods in his possession and therefore passes title directly to a third party. Distributorship therefore is an outright

[413] It is impracticable to check whether an equipment in a dealer's store which one is wishing to buy is encumbered in any way or not. A buyer of goods from a consignee will be able to establish a case of bona fide purchaser for value without notice, and therefore would have superior interest. In the case of Nigeria, there is not yet a registry where security interests in personal property are registered. Similarly, this also questions the use of document filing, because even if there were to be a collateral registry, a consignor cannot possibly register his security interest in the consignments via document filing. In US, the use of notice filing could at least inform the registry searcher that the goods in debtor's possession are in the nature of a consignment, thereby prompting relevant questions. On why notice filing instead of document filing should be made part of the anticipated secured transactions law, see section 3.2.2. (Chapter three) below.

[414]Tibor Tajti, *Consignments and the Draft Common Frame of Reference*, 2 PRAVNI ZAPISI: GODINA II, 358 (2011), p. 367. See p.369 as well, which addresses ostensible ownership problem as follows "The ostensible ownership problem in the context of consignment arises because of two things: *first,* the consignee is in the possession of goods the title on which remains with the consignor, and *secondly,* the consignee is empowered to sell those goods in his own name. In other words, to the outside world, he looks like the full owner of those goods having unrestricted rights to sell them. The retained title – if no public notice is given about its existence – remains a secret security known only by the parties to the transaction because the consignee may not just sell the consigned goods but may pledge them as collateral to obtain additional financing from third party creditors".

[415] "A franchise held by a person or company who sells merchandize usually in a specific area to individual customers" – BLACK'S LAW DICTIONARY, (9th edition, 2009) p.544. For a detailed discussion on distributorship, see generally, Kojo Yelpaala, *Strategy and Planning In Global Product Distribution—Beyond the Distribution Contract* 25 LAW AND POLICY IN INTERNATIONAL BUSINESS, 839 (1994).

sale of goods and could therefore be governed by all the rules under the Nigerian Sale of Goods Act 1893. For instance, the remedies of an unpaid seller under section 38 of the Act could be invoked by the seller of goods which includes but not limited to seizure of goods.[416] This distinction is important to bear in mind because not notwithstanding the facial resemblance that distributorship shares with consignment, both have different legal implications and applicable laws. For instance, the provisions of the Sale of Goods Act cannot apply to consignment because by its very nature it does not involve the sale of goods neither is it provided for in the Sale of Goods Act.

Distributorship has almost the same coloration with credit sale. In the former, the seller/dealer supplies goods to the buyer who sells the goods and returns the exact amount for the goods including any agreed interest sum to the seller. The buyer under a credit sale arrangement as well as distributorship is not entitled to any commission because he obtains title to the goods from the outset of the transaction. Exactly this reason – that is, non-entitlement of commission – is why producers or dealers in Nigeria prefer credit sale or distributorship to consignment. It is believed that a consignee may just keep goods of a particular consignor for shop decoration while he channels all efforts to sell those goods that will entitle him to higher commissions from other consignors. Apart from the applicable laws, one of the major differences between a credit sale/distributorship and consignment is that in the latter, the consignor does not lose his *in rem* right over the goods because title still resides with him notwithstanding that he has given up possession, at least while the goods remain unsold.[417] While in a credit sale/distributorship, the

[416]See sections 38 – 48, Nigeria's Sale of Goods Act 1893.

[417]"The transfer of the goods to the care of the consignee naturally presumes trust primarily on the side of the consignor, as he will run the risks of damage to goods, their loss and – of central interest to us – the possibility of losing the priority race with other creditors." – see, Tibor Tajti, *Consignments and the Draft Common Frame Of Reference*,PRAVNI ZAPISI: GODINA II, No. 2, pp. 358-397, (2011), at 364. The paper is also available at http://ssrn.com/abstract=1983171 (last visited on March 16, 2015).

seller exhausts his title at the moment of sale and therefore only has a personal right against the buyer for repayment.

Above all, courts should be weary of labels that parties give to their transactions and must be willing at all times to look beyond the surface – as such labels might have been placed with the sole intention to fool the court or to dodge the application of a particular law. Where parties have done this to fool the court, the court should not allow itself to be fooled but should be ready to pierce the veil by looking at the substance and circumstance. As Nigeria plans towards adopting the unitary system, the various species of agreements may well disappear with the reform – hence, the acid test would be the 'function', that is, whether a transaction created a security interest in a debtor's collateral in exchange for credit. This surely would be a good way of distinguishing between outright sales and secured transactions when the latter emerges. Lastly, the wisdom of Article 2 UCC (sales) could also be adopted in Nigeria in addition to filing requirement to cure ostensible ownership. This is known as the "sign-posting requirement" under section 2–326(3) (a) UCC, where the transaction is a consignment, to give the consignee's customer the notice of divided ownership – that is, that title to the goods in consignee's possession does not actually belong to him.[418] This of course is tangential to consumer protection,[419] and most importantly an *ex ante* remedy that would protect buyers in the Nigerian market.

[418] See *Ibid* at 367. White and Summers provided a good example of how courts insist on the UCC Article 2 provision on 'sign posting'. Thus, in *BFC Chemicals Inc. v. Smith Douglass Inc.*, 46 B.R. 1009, 40 UCC 1674 (E.D.N.C. 1985), the court required the compliance with UCC s. 2–326(3)(a) that the consigner has "shown evidence of a sign in fact and that the sign was conspicuously placed at the consignee's place of business." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (West, 6th ed., 2010), note 2, at 1165.

[419] See section 4.6 in chapter four for a discussion on consumer protection and secured transactions law interface.

1.8.7. Concluding thoughts and lessons

So far an attempt has been made to capture Nigeria's secured transactions law, including some relevant aspects of real mortgage law. From real property mortgage laws to personal property laws, one could easily see that these laws need to be reformed to fit better with today's commercial realities. Their current state is therefore assisting to impede desirable economic growth in the country – for instance Pawn Broker's Act, Hire Purchase Act, Sale of Goods Act, are a few of the business laws that if revised to match today's realities as well as made to function with a registration system, will definitely add strength and value to doing business in Nigeria. Also, Nigeria has not been enthusiastic enough to accede to secured transactions treaties that could boost business activities in the country – for instance, it is yet to become signatory to the United Nations Convention on the Assignment of Receivables in International Trade[420] – a treaty that could boost the export and import opportunities of business entities in the country by allowing them to use their receivables to finance cross-border transactions.

Furthermore, it has been seen that notwithstanding the fact that Nigeria is not forthcoming with reforms in secured transactions law to match with today's commercial realities, business entities – the banks especially, have continued to import secured transactions concepts from many parts of the world mainly from the US in order to imitate the practices of modern commercial transactions. For instance, field warehousing, factoring, trust receipts, and so on, are all foreign concepts that are not adequately provided for under the current legal framework. One may on a cursory look conclude that such importation of foreign concepts is indeed a step in the right direction or to put it mildly in the Nigerian expression – 'a half-loaf is better than none'. However,

[420] See the list of countries that are already members at – http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables_status.html (last visited on May 30, 2014).

the author believes on the contrary because no one ever puts a square peg in a round hole and expects a match – consequently when these concepts are imported into Nigeria and forced to function in an unreformed or unsuitable system, their incompatibility with the Nigerian terrain becomes a stumbling block to the economic growth of the country. Again, imbedded in legal principles is the culture and socio-economic realities of people where the principles developed – thus a direct transplant of secured transactions laws from every corner of the world without conscious adaptions to suit local conditions will for sure continue to make Nigerian judges apply the basic rules of contract to foreign commercial concepts that require specially designed rules.

It is for these foregoing reasons that the author believes that the Nigerian secured transactions law is highly due for reform if the country actually desires economic progress and the economic empowerment of its citizens. This is not to claim however that Nigeria's problems can totally be solved merely by reforming its secured transactions law – far from that. However, it is reasonably believed that a reform which brings all the fragments into one body of law and adjusted to serve today's commercial transactions would make the law more accessible and predictable as well as ensure more credit flow in the economy. It is at least a starting point.

The reader may now ask – supposing it is conceded that Nigeria's secured transactions law needs reform, how could a reform be achieved? In the introductory part of this thesis, the author proposed that Article 9 and OPPSA would be good sources from where Nigeria could draw lessons and inspirations for reform – this proposal was made based on the number of countries that have already toed this path as well as the inherent potentials that are embedded in both models. Apart from Canada, Australia and New Zealand for instance have also reformed their secured transactions law through the lens of Article 9. Singapore has also constituted a reform committee to reform its secured transactions law through the lens of Article 9. Many international institutions are also doing same because Article 9 unarguably remains an indispensable source with tested solutions. The cool breeze of reform has also reached the African shore – thus, apart from the signatories (Francophone African countries especially) of the OHADA treaty, Ghana, Liberia, Malawi, Sierra-Leone, have reformed their secured transactions law. Nigeria and other Commonwealth countries in Africa yet to reform their secured transactions law should therefore follow suit.

Canada and US once had compartmentalized regimes of secured transactions law. They realized how difficult it was to access the applicable laws and how much they were losing as a result of the unpredictability it created in their systems. It was therefore with good reasons that they decided to bring all secured transactions law under one roof with comprehensive rules on formation, perfection, priority, and disposition. Ontario for instance uses internet filing system which makes it super easy to conduct checks without incurring tremendous costs and wasting time – they (Canada – and by extension, its common law provinces) also drew lessons from Article 9. All this in the author's view would serve as a rich pool of experiences and lessons that would be of immeasurable assistance while reforming Nigeria's secured transactions law – an exercise that is full of mouth-watering prospects and economic benefits.

Chapter Two
A Search for Legislative Solutions vis-à-vis Nigeria's Secured Transactions Law: UCC Article 9 and Ontario PPSA Compared

Chapter Summary

This chapter compares the commonalities and differences between the UCC Article 9 and the Ontario PPSA – the comparison is meant to offer Nigerian lawmakers the various perspectives that emanate from these two models, to enable them cherry-pick those elements that could suitably be used to design an idiosyncratic legal framework for secured transactions. To some extent, both models are mutually similar, in that they utilize the unitary system of secured transactions, as well as have a similar set of building blocks – such that in many aspects, their comparison often pales into insignificance.

However, they significantly differ in the scope of personal property they accept as collateral – the UCC Article 9 being wider in this respect. They also differ on some technical points like a debtor's name on a financing statement, registry-search details, registry errors and consequences arising from such errors, and even on methods of perfecting security interests in different categories of collateral.

Very importantly also, the lived experiences of Americans and Canadians which copiously reflect on the nuanced approaches of both models are meant to offer a smorgasbord of lessons to Nigeria – for instance, part of the central inquiry is how the Canadians were able to modify the floating charge to floating lien. Both models differ also on choice of law rules, but as the Nigerian anticipated PPSL would be a federal law, such that internal conflicts of law would hardly arise, this chapter did not bother to delve into much analysis in that regard and explanations for not doing so are of course provided.

2.1. The nature of the United States secured transactions laws before the advent of UCC Article 9

Not all writers on Article 9 would be interested to dedicate some paragraphs to briefly educate the reader about the pre-Article 9 personal property security law, before going ahead to discuss the current Article 9 law. In that case, that is, in the absence of a brief history on pre-Article 9 regime, it is easy to go with the impression that the innovative ideas expressed in Article 9 were supernaturally conceived by Grant Gilmore and his colleagues who drafted the law. That was not exactly the case. Instead, Article 9 was an assemblage of past wisdom[421] – a product of many years of trials and errors from the pre-Article 9 independent security devices which then made secured financing fearsomely complicated and unattractive due to the plurality of governing concepts and rules.[422] The natural consequences were the impeded access and uncertainty as to the applicable law in secured financing and the uncertainty of a secured party's priority status during debtor's bankruptcy – being that there were no uniform rules that governed.[423] It was therefore normal to expect high level of mistrust and confusion about secured financing on the part of lenders.

The history of secured financing in the US was highly calibrated with commercial experiments on the subject – starting from the Statute of 13 Elizabeth (EZ) in 1571 after the founding of US. The interpretation widely given by courts then with regard to the eighteenth

[421]Article 9 was not "a new start or fresh approach as it is a reflection of work long since accomplished" See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965/reprinted in 1999), p. 290. He also reechoed something similar in one of his law review articles when he said that Article 9 was "an anthological collection of the most celebrated security law controversies of the preceding forty years."– Grant Gilmore, *Security Law, Formalism and Article 9,* NEBRASKA LAW REVIEW VOL. 47 No. 4 (1968) p.671.

[422] Read Professor Gilmore's confession at GRANT GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY, (Little, Brown & Company, 1965), s.9.2 at p.290.

[423] See Grant Gilmore and Alan Axelrod, *Chattel Security*, 57 YALE LAW JOURNAL, 517 (1948), p.761. In this article both learned authors lamented on the compartmentalized nature of US secured transactions law and proposed for the unitary system.

century EZ, forbade with respect to goods, the separation of ownership from possession, and transactions which conflicted with this position were deemed fraudulent and void.[424] In this case, possessory pledge was an example of a perfect security device in the eyes of EZ, but then, it did not meet up with the fast evolving secured financing which emphasized on non-possessory securities. As creditors and debtors sought ways to bypass the road-block posed by these statutes and case law in operation then, new ideas were born in the process. For instance chattel mortgage and its statutory regulations were endorsed and enacted by the US state legislatures[425] following its invention by secured creditors and debtors who were seeing the negative limitations of possessory pledges already in the first half of the 19th century.

With chattel mortgage in place, it became the first time it was statutorily accepted that ownership and possession could be validly separated, although the chattel mortgagee was mandated to register in the public registry in order to defeat third party claims on the collateral.[426] At this time also, chattel mortgage did not cover future advances, after-acquired property and its usefulness did not cover stock in trade financing,[427] but at least equipment financing[428] was adequately taken care of, while other progressive ideas were incubating.

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[424] 13 Eliz. ch. 5 (1571). Also see, *Twyne's Case*, 76 Eng. Rep. 809 (1601) in which an English farmer sold his sheep to Twyne while retaining possession. When another creditor of the farmer tried to seize the sheep, Twyne resisted and claimed the sheep to be his. The court held that such transaction was fraudulent because it was aimed at defrauding other creditors being that Twyne and the farmer had made a secret transaction which could hurt other creditors.

[425] See G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES sections 61-61e (Rev. ed.1940).

[426] See New York Lien Law, section 230 (was impliedly repealed by Article 9 of the UCC).

[427] See *Mitchell v Winslow* 17 Fed. Cas. 527 (D. Maine, 1843), *Griswold v Sheldon* 4 N.Y. 581 (1891).

[428] At a time when some states neither accepted conditional sale nor chattel mortgage, equipment leasing was accepted – although for instance in Pennsylvania, it was known as bailment-lease. See James A. Montgomery, *The Pennsylvania Bailment Lease*, 79 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 920 (1931) wherein the author said that the case of *Myers v Harkey*, 2. P. & W. 478 (Pa. 1831) was responsible for the creation of the bailment-lease, having come five years after the judicial abolition of conditional sale in *Martin v Marthiot*, 14 S. & R. 214 (Pa. 1826), *Stadtfield v Huntsman & Co.*, 92. 53, 55 (1879) where the court held that "It has long been an established rule in Pennsylvania, that a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase-money is paid, is fraudulent and void....".

Furthermore, owing to the complexities of document filing underlining chattel mortgage transactions in the 19th century era, conditional sale which is a title retention device came to the fore, essentially to bypass the difficulties of chattel mortgage transactions, as sellers retained titles to assets in possession of debtors. This however was not also without challenges during these experimental days of the US secured transactions regime.[429] First, it was unclear where the conditional seller should register his security interest, whether he should follow similar formalities as well as register in the same place as the chattel mortgagee, or not.[430]

Second, while conditional sellers pondered on where to register their interests in the goods in buyers' possession, the problem of ostensible ownership[431] glared on the face, and sellers often found themselves competing for title with bona fide purchasers for value without notice. It also seemed that conditional sale was only suitable for seller-financiers, as banks and other loan-credit financiers found it very unattractive due to the absence of a uniform rule that governed priority and perfection, and also the incontrovertible fact that the lines of business of a banker and a

[429] Courts were very antagonistic against conditional sale transactions and were always ready to invalidate them. See a few of the numerous cases: *Singer Manufacturing Co. v Smith*, 40. S.C. 529, 19 S.E. 132 (1893), *Turner v Brown*, 82 Mo. App. 30, 33 (1899); *Davis v Stonestreet*, 4 Ind. 101, 105 (1985).

[430]See *Columbus Merchandise Co v Kline*, 248 Fed. 296 (S.D Ohio, 1917), *Churchill v Demeritt*, 71 N.H 110, 51 Atl. 254 (1901). In fact, due to the uncertainties, conditional sale became a medium of bypassing the cumbrous requirements involved in chattel mortgage. Here are the views of two doyens of US secured transactions law – DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON SECURITY INTERESTS IN PERSONAL PROPERTY, (USA, Foundation Press, 1984) 40 ("…a common means of evading the chattel mortgage system was the conditional sale."); GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown & Company, 1965), 68, ("[T]he conditional sale promised a way of avoiding both the filing requirements and the cumbersome foreclosure procedures of chattel mortgage law…").

[431]See Charles W. Mooney, Jr. *The Mystery and Myth of 'Ostensible Ownership' and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALABAMA LAW REVIEW, 683 (1988) at footnote 14 "An ostensible ownership problem . . . exists whenever there is a separation of ownership and possession. Article 9's treatment of the ostensible ownership problem created by secured credit naturally leads one to ask whether the ostensible ownership problem created by leases or other bailments is different…" Being that pledge is as old as humanity, it was very difficult for early courts to loosen grip to accept conflicting perspectives. See the seminal article of Wigmore that comparatively shows the development of pledge. See John H. Wigmore, *The Pledge-Idea*: *A Study in Comparative Legal Ideas. II*, 10 HARVARD LAW REVIEW 321 (1937), p.389.

conditional seller are parallel. About a century after the birth of chattel mortgage, and in the efforts of trying to find something more suitable for non-seller financiers, the concept of trust receipt was conceived and used as a financing device that secures a creditor's interest in goods that are in debtor's possession.[432] This device was further enhanced by the advent of the Uniform Trust Receipts Act[433] (UTRA) – a model law which preceded the 1938 Bankruptcy Act,[434] made it possible for non-seller financiers to retain title of the goods in the debtor's possession as well as file a notice of the transaction in a public registry so that the problem of ostensible ownership does not arise. The fact that UTRA (one of Gilmore's sources of inspiration) covered stock-in-trade and after-acquired property in addition to public notification system, shows that it was really a modern financing device that suited trade.[435]

Yet, despite the existence of chattel mortgage and a separate recordation for conditional sale – and trust receipt, factor's liens, coupled with the positive impact they were making in the US commercial arena at that time, the overall score for secured financing was still very low. In addition to these independent security devices, the concept of public notification was already in

[432]Colvin P. Rouse, "*Bills of Lading* as *Collateral Security*", 16 KENTUCKY LAW JOURNAL, 235 (1928),p.235, *Baring v Galpin*, 57 CONN 352, 18 Atl. 266, 5 L. R. A. 300 (1889) *Leinkauf Banking Co. v Grell,* 70 N.Y Supp. 1083, 62 App. Div. 275(1st Dept. 1901). Also see the seminal article – L. Vold, *Trust Receipt Security in Financing of Sales*, 15 CORNELL LAW REVIEW, 543 (1930) Available at: http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1301&context=clr (last visited on October 15, 2014).

[433] For a general understanding of UTRA, see Richard W. Duesenberg, *Lien or Priority Under Section 10, Uniform Trust Receipts Act*, 2 BOSTON COLLEGE LAW REVIEW, 73 (1960), available at http://lawdigitalcommons.bc.edu/bclr/vol2/iss1/4 (last visited on October 15, 2014). Also see GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Boston, Little, Brown and Co., 1965), chapter 4, Grant Gilmore, *Chattel Security: II*, 57 YALE LAW JOURNAL 761, (1948). The following cases aptly discuss the early stage of trust receipt – *Mechanics & Traders' Bank etc. v. Farmers & Mechanics' National Bank*, 60 N.Y 40 (1875) and *Farmers & Mechanics' National Bank v. Logan,* 74 N.Y. 568 (1878).

[434] A more complete analysis on the history of UTRA may be found in Richard W. Duesenberg, *Lien or Priority Under Section 10, Uniform Trust Receipts Act*, 2 BOSTON COLLEGE LAW REVIEW, 73 (1960), esp. pp. 75-77 – http://lawdigitalcommons.bc.edu/bclr/vol2/iss1/4 (last visited on January 31, 2016).

[435]See section 2(3) UTRA as well as the court's decision in *Commercial Credit Corp. v Horan*, 325 III. App. 625, 60 N.E.2d 763 (1945).

existence at least for chattel mortgage transactions,[436] to cure ostensible ownership. From the foregoing therefore, one may wonder what the innovations of Article 9 really were, or rather what problems it came to solve since most of the elements that formed Article 9 were already known. However, it has been admitted by scholars that the deficiencies in pre-Article 9 personal property security law were based on the plurality of security devices that used different concepts of denoting title as well as different recording requirements imposed by varying statutes that were not of uniform application.[437]

The pre-Article 9 regime posed a lot of difficulties to secured creditors and potential creditors who were confused as to the particular recording statute, requirements or registry to conduct their searches. Similarly, priority status with respect to a common and contentious collateral in the event of a debtor's bankruptcy was extremely recondite – what to a large extent created an unpredictable system. Also, there was no tailor-made conflict of law rules that applied to disputes arising from multi-state transactions with respect to a common collateral – yet, the movement of collateral across states was inevitable. Furthermore, as emphasis was placed on form and not substance or function of a security, the result was ruinous with lenders losing out on technical grounds. This fomented mistrust and suspicion in the financing industry and anyone could easily guess the consequences – one of them was that lenders were not so willing to lend sufficient credits and businesses were shrinking.

[436] For instance, see the pre-code section 230 of the New York Lien Law. Also take a general look at – Peter F. Coogan, *How to Create Security Interests Under the Code and Why: Some Comparisons of Loan Transactions Under UCC's Article 9 and New York's Pre-Code Chattel Mortgage and Assignment of Accounts Receivable Law*, 48 CORNELL LAW QUARTERLY, 131 (1962-1963).

[437] See Warren A. Heindl, *Trust Receipt Financing under the Uniform Trust Receipts Act*, 26 CHI.-KENT. LAW REVIEW, 197 (1948), pp. 199-207.
Available at: http://scholarship.kentlaw.iit.edu/cklawreview/vol26/iss3/1 (last visited on January 31, 2016).

Having been armed with hindsight knowledge on the pre-Article 9 problems, Gilmore and his colleagues[438] embarked on drafting a secured transactions law that was set to prune the problematic branches of the old law by introducing a unitary concept of secured transactions that subsumed all title based transactions and the intricate formalities that characterized them in pre-Article 9 era.[439] It adopted the functional approach[440] as a formula for denoting secured transactions, such that a transaction was sufficient to be brought under Article 9 rules if it created a security interest (in rem) in a personal property or fixtures of a debtor in exchange for credit, regardless of the name the parties labelled it. Article 9 therefore put an end to the multiplication of new and differently named security devices. At all times, the shorthand formula that answers the basic and most fundamental question was whether a transaction created a security interest in the collateral, if yes, the creation, perfection, priority, enforcement and remedies (except court damages and specific performance), arising from the transaction were subjected to the single set of rules enshrined in Article 9.

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[438]Professors Allison Dunham and Karl Llewellyn were also among the great minds behind the "birth" of UCC Article 9 – the unitary model system of secured transaction.

[439] The major innovation in US secured transactions law was the introduction of unitary concept of secured transactions by the 1962 version of Article 9. It brought a death kiss on the fragmentary concept of having multiple security devices that were governed by different rules. An important early discussion on Article 9 was captured by Grant Gilmore in his seminal article. Although the Article 9 provisions on which his article was based have changed due to frequent revisions, the structure and language of the article still leave so much clue that could assist in unlocking the difficulties that generally sprinkle in the latest version. See Grant Gilmore, *The Secured Transactions Article of the Commercial Code,* FACULTY SCHOLARSHIP SERIES, Paper 2558, (1951). Available at http://digitalcommons.law.yale.edu/fss_papers/2558 (last visited on October 15, 2014).

[440] For a thorough and penetrative study on the functional approach to secured transactions, see the seminal article written by Michael G. Bridge *et al*, *Formalism, Functionalism, and Understanding the Law of Secured Transactions*, 44 McGILL LAW JOURNAL, 567 (1999).

2.2. A brief highlight of the Canadian experiences before the PPSA

According to geography, Canada is the second largest country in the world in terms of land mass.[441] It used to be a colony of Britain until 1867 when it became a self-governing dominion.[442] The population of Canada is about 31 million people and it is made up of ten provinces and three territories.[443] Its economic development is somehow comparable to what is obtainable in the US. It is also a federal state[444] with a legal system that was fashioned out from the British common law, except in the Quebec province that got its legal tradition from the French civil law system. Canada shares some similarities with the US especially in terms of legal system, and it is true to a large extent that the evolutional experiences recorded in the US business law are invariably similar with those of Canada. Of utmost importance to this thesis is the investigation as to why Canada significantly broke ties with English law in this domain and rather harmonized with US – thus, the similarities as well as differences in their secured transactions laws have become sources of interest given that Nigeria was in many ways (especially in legal system) closer to Canada than US due to common colonial heritages from Britain.

In Canada, the federal parliament is the highest law making body on matters exclusive to its legislative competence, and laws made by it are called "Acts" and rank higher than those made by the various provinces in issues of conflict, being that the federal laws apply to the whole of Canada while provincial laws are limited in application to the province that made it.[445]Considering

[441]Seehttp://www.mapsofworld.com (last visited on October 16, 2014).
[442] For a concise but rich version of Canada's history, See "Discover Canada" (2012) available at http://www.cic.gc.ca/english/pdf/pub/discover.pdf (last visited on October 16, 2014) particularly at p18.
[443] *Ibid* at p.19.
[444]Canada has federal, provincial, territorial and municipal governments – and the various responsibilities and lawmaking powers were spelt out in the 1867 British North America Act, also known as the Constitution Act, 1867. In particular, see sections 91 – 95 thereof.
[445]See section 91 of the Constitution Act 1867.

that all the provinces have common law tradition except Quebec, the laws which governed personal property before 1967 were largely drawn from the English common law principles and the various fragmented security laws that were in force. The same compartmentalization problem which the Americans faced with their secured transactions law before the advent of Article 9 were similar to what the Canadians faced before the advent of the Canadian PPSAs.[446]For instance, although field warehousing and trust receipts were unknown in Canada or were of very limited use, certain other retention of title devices that empowered an unpaid seller to retain title to property were in operation, the chattel mortgage device, the floating charge device, and so on, were all in operation with confusing priority rules.

Canadians realized that it was necessary to borrow from the experiences of their southern neighbor – the US, who had once plied the road they were on. Efforts were put in place to fashion a personal property security law that has good resemblance with Article 9. This was done, and in 1965, Canada came up with the PPSA (a model law) that was largely drawn from the preliminary version of Article 9. And this was consequently adopted by the various common law provinces with some alterations of course. Whereas, Article 9 of the UCC operates like a code, and has been adopted by all fifty states with almost no noticeable alterations[447] – and therefore achieved unification of secured transactions law in the US, in Canada, the various PPSAs[448] are dissimilar and consequently pose some measure of difficulty with respect to inter-provincial transactions. However, it is pertinent to note that Article 9 is a state law, just like the various Canadian PPSAs

[446]"[t]he tangled mass of law created by various statutes and judicial decisions urgently needed a bulldozer to clean away the chaos… and cried out for replacement by fresh and modern statute" – F.M CATZMAN & A.S ABEL *et al*, PERSONAL PROPERTY SECURITY LAW IN ONTARIO (Toronto: Carswell, 1976) at 1, cited in STIKEMAN ELLIOTT, ONTARIO PPSA & COMMENTARY (Canada, LexisNexis, 2006), at p.1. Here, PPSA means Personal Property Security Act.
[447]See http://www.uniformlaws.org/Acts.aspx (last visited on October 16, 2014).
[448] It should be carefully noted that whereas UCC Article 9 is called "secured transactions" in the US, in the Canadian provinces (except Quebec) it is generally called "personal property security law.''

are provincial laws. Therefore, both Article 9 and the PPSAs operate side by side with federal legislations of which the latter are higher in status when both come in conflict – a ready example is the ever resulting conflict between the PPSAs and the security rights created under certain Canadian Acts like the *Assignments and Preferences Act, Bulk Sales Act*, *Pawnbrokers Act,* and the famous section 427 of the Bank Act.[449] In the US, certain transactions that touch on security interests in personal property may sometimes be outside the scope of Article 9 if that transaction has a specific federal statute that covers it.[438]

Notwithstanding the differences, what all the PPSAs have in common leave much to be appreciated – most importantly is the fact that they all have embraced the unitary concept of secured transactions.[450] Under the various PPSAs, the title given to a transaction is no longer relevant, rather any transaction that functionally creates a security interest in a personal property is brought within the coverage of a province's PPSA.[451] By modelling its personal property security law to resemble that of the US to a large extent, Canada paved way for the meaningful realization of the benefits in North Atlantic Free Trade Agreement (NAFTA) it signed with US

[449] For a masterful discussion regarding the conflict between the Canadian provincial PPSAs and section 427 of the Bank Act, see Ronald C.C. Cuming, *Fitting a Square (Federal) Peg in a Round (Provincial) Hole: Rationalizing Section 427 Bank Act with Provincial Property Security Law*, 73 SASKATCHEWAN LAW REVIEW, 1 (2010), pp. 1-4.

[450]See section 2 of the Ontario PPSA. In US certificate of title statutes, statutes giving rise to agricultural lien are all tangential to secured transactions. For Nigeria, this should mean that the anticipated secured transactions law should expressly mention the Acts that would function along with it as also obtainable in US and Canada.

[451]Using the Ontario PPSA as example, see section 2 thereof. However, this would be subject to the exceptions listed in section 4 of the same law.

and Mexico[452] – needless to mention that Mexico has also managed to reform[453] its personal property law to resemble Canadian and US secured transactions laws. The rest of the chapter will examine the similarities and dissimilarities of Ontario PPSA and Article 9 – what will offer a full panoply of options for Nigeria in its quest to reform its secured transactions law.

[452] The NAFTA treaty has been controversial in Canada because according to Canadian law, treaties have dual ratification processes – the federal and provincial governments ratify before the treaty can have domestic effects. Although all sub-national governments have ratified the NAFTA treaty, it remains a big question as to which government (federal or provincial) will be responsible when NAFTA provisions are breached by a sub-national government. This question is raised in view of Chapter 11 of NAFTA which states in essence that members (the three countries that are parties to the treaty) have the obligation to ensure that NAFTA provisions are observed in their countries. It would be apt in the circumstance to read "Chapter 11 of NAFTA and the Provinces – Will the Constitutional Question be Asked" available at http://www.thefreelibrary.com/Chapter+11+of+NAFTA+and+the+provinces--will+the+constitutional...-a0348646550 (last visited on October 16, 2014). Also see the seminal articles based on how Canada and U.S have fared with the NAFTA treaty – Concerning Canada, see, Stephen A. Scott, *NAFTA, the Canadian Constitution and the Implementation of Int'l Trade Agreements, in Beyond NAFTA: An Economic, Political and Sociological Perspective* 238 (A.R. Riggs & T. Velk eds. 1993), for the US situation, see Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade Systems Despite U.S. Constitutional Constraints*, 17 MICHIGAN JOURNAL OF INT'L LAW, (1996), Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 MINNESOTA JOURNAL OF GLOBAL TRADE, 45 (1998).

[453]For a penetrative study, see Ronald C. Cuming, *Harmonization of the secured financing laws of the NAFTA partners*, 39 ST. LOUIS UNIVERSITY LAW JOURNAL, 809 (1995), Todd C. Nelson, *Receivables Financing to Mexican Borrowers: Perfection of Article 9 Security Interests in Cross-Border Accounts*, 29 UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW, 525 (1998), p.546 – in this article, the writer said the Mexican secured financing law "should be harmonized with those in effect in Canada and the United States, as well as those in other countries entering into free trade agreements with NAFTA countries", Hale E. Sheppard, *Overcoming Apathetic Internationalism to Generate Hemispheric Benefits: Analysis of and Arguments for Recent Secured TransactionsLawsinMexico*, 10 JOURNAL OF TRANSNAT'L LAW & POLICY, 133 (2001). See also the highly informative articles by Boris Kozolchyk on the justifiable reasons for the harmonization of Mexico's secured financing law with those of their NAFTA counterparts – see, Boris Kozolchyk, *The basis for the proposed legislation to modernize secured financing in Mexico*, 5 U.S – MEXICO LAW JOURNAL 43 (1997), p.48, Boris Kozolchyk, *What to do about Mexico's antiquated secured financing law*, 12 ARIZONA JOURNAL OF INT'L & COMP. LAW 523 (1995), pp. 526-28.

2.3. Formation of security agreements under UCC Article 9 and Ontario PPSA[454]

It has been mentioned in the introductory sections above that both Article 9[455] and OPPSA[456] have adopted the unitary concept of secured transactions – meaning that the form or title which a transaction is named is no longer an important factor to consider when the applicable law is in issue. Rather, what is of utmost importance is the function the transaction performs, such that Article 9 or OPPSA[457] as the case may be would become applicable if it happens that the transaction created a security interest in a debtor's personal property in exchange for credit advanced by the secured creditor.[458] With respect to personal property collateral, this ultimately means that under both regimes, gone are the days of such designations as "chattel mortgagor and chattel mortgagee", "conditional seller and buyer", "hire purchase vendor and purchaser", "pledgors and pledgees", with differing rules that apply. Both legal regimes have substituted these designations given to parties to various secured transactions with "secured party" and "debtor", – and any agreement that creates a security interest in personal property/fixtures is simply called a "security agreement".[459]

[454]The author has chosen the Ontario PPSA as a benchmark law instead of any other province's PPSA for at least two reasons. First, Ontario was the first common law province to adopt the Canadian PPSA in 1967 – being the first, it has longer experiments with personal property security law, as well as more tested solutions through a well-developed case law stemming from the Act. Second, Ontario's economy is the most robust in Canada – this means higher volume of economic activities, and by implication, a higher rate at which the Ontario PPSA is judicially tested. This in the author's opinion offers more data for the analysis required in this thesis. For a thorough insight about the Act, see generally Jacob Ziegel, *The Draft Ontario Personal Property Security Act*, 44 CANADIAN BAR REVIEW, (1966) 104.
[455]See section 9-109(a) UCC.
[456] See section 2 OPPSA.
[457]See Gerard McCormack, *Personal Property Security Law Reform in England and Canada*, 113 JOURNAL OF BUSINESS LAW, (2002), 120.
[458]*Ibid.*
[459] For the definitions of key terms in both legal regimes, see section 9-102 UCC, and section 1 OPPSA. However, a New York court has held in *In re Wingspread Corp.,* 107 B.R 456, 461 (Bankr. S.D. N.Y 1989) that "[f]or there to be a valid and enforceable security agreement, a formal and separately signed document labeled "security agreement" is

It is imperative therefore to examine how a security agreement is created under both legal regimes. It is common to Article 9 and OPPSA that an enforceable security interest is created on a debtor's collateral when the security agreement contains the fact that (1) the debtor has right to the collateral,[460] (2) the creditor gives value[461] for it, (3) the collateral is described in a security agreement,[462] and (4) which is signed or authenticated by the debtor.[463] These are the minimum requirements that must be present under both regimes in order for a security interest in a collateral to be enforceable. As a matter of terminology under both regimes, "attachment" is equal to enforceability of security interest in a collateral between the parties.[464] In other words, once the three requirements above have been satisfied by the parties to a secured transaction, the requirement of *attachment* as a minimum precondition for enforcement under both regimes

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not necessary…courts have to read several documents together and look at the surrounding circumstances to find the existence of a security agreement."

[460] See a case decided under Article 9 on the necessity of the debtor to have right in the collateral – *Banner Bank v First Community Bank*, 76 U.C.C Rep. Serv. 2d. 919 (D. Mont. 2012). A case decided based on the Ontario PPSA, states that it must be more than a right to possession – see *Marcel Equipment Ltd. v Equipment Benoit DÁrmours & Fils Inc.*, [1995] O.J. No. 673, 9 P.P.S.A.C. (2d) 31 (Gen. Div.). It was the same viewpoint in *Euroclean Canada Inc. v Forest Glade Investments Ltd*. (1985), 4. P.P.S.A.C. 271. (Ont. C.A.); leave to appeal to Supreme Court of Canada was refused, [1985] S.C.R. viii.

[461] See *In Re Duckworth*, 79 U.C.C Rep. Serv. 2.d 533 (Bankr. C.D. Ill. 2013). See also the definition offered in section 1-204 of the UCC. And in OPPSA, it was defined in section 1 as "any consideration sufficient to support a simple contract and includes an antecedent debt or liability". In addition to the statutory definition, see the following illustrative decisions on what acts could sufficiently constitute 'value' under OPPSA – *Asklepeion Restaurants Ltd v 791259 Ontario Ltd.*, [1996] O.J. No. 1456, 11 P.P.S.A.C. (2d) 320 (Gen. Div.); aff'd, [1998] O.J. No. 2273, 13 P.P.S.A.C. (2d) 295 (C.A) – past indebtedness could constitute value – and, *Heidelberg Canada Graphic Equipment Ltd. V. Arthur Anderson Inc.*, [1992] O.J. No. 2530, 4 P.P.S.A.C (2d) 116 (Bktcy) – where a secured party waives his right to call for the loan or repossess collateral, such could sufficiently constitute value under a security agreement.

[462] See *In Re Brown*, 479 B.R 112, 56 Bankr. Ct. Dec. (CRR) 286, 78 U.C.C. Rep. Serv. 2d 653 (Bankr. D Kan. 2012).

[463]See section 11(2) OPPSA, and the instructive cases that have pronounced on this – *Astral Communications Inc v. 825536 Ontario Inc. (Trustee of)*, [2000] O.J No. 96, 15 P.P.S.A.C. (2d) 256 (C.A.), *Garry v Sternbauer Estate*, [2000] O.J. No. 2704, 1 P.P.S.A.C. (3d) 51 (S.C.J). Under Article 9, the equivalent of section 11(2) OPPSA (the requirements for attachment) could be found is section 9-203 UCC, and a seminal case is *In re Bucala*, 464 B.R 626, 76 U.C.C. Rep. Serv. 2d. 691 (Bankr. S.D. N.Y. 2012).

[464]It is important to note here that "attachment" in this context is different from the procedural measure known by some state laws in US, and also in Nigeria – whereby following a creditor's court judgment, a bailiff executes the judgment by "attaching" (seizing) the judgment debtor's property – eventually sold, and the proceeds used to offset the creditor's debt claim.

becomes fulfilled and the secured party could validly enforce the security agreement against the debtor if the latter defaults.[465]

Under both regimes, there are instances however under which the third requirement above may be excused without necessarily affecting the enforceability of the agreement. This is when the collateral subject of the security agreement is already in the secured party's control or possession[466] – because the likely rationale behind the description of collateral in a security agreement is to provide good evidence of the encumbrance of collateral in the secured party's favor.[467] In addition, a potential creditor who has gazed at the registry and becomes inquisitive owing to the scanty information there, could ask the debtor to show him the security agreement to know exactly from the described collateral the ones that are encumbered. Therefore, where the agreement is oral and collateral is in the secured party's possession, the fear addressed by the third requirement above, essentially to guard against the emergence of ostensible ownership in the collateral becomes obviated. Similarly, closely linked to 'attachment' is that the Statute of Frauds within the context of UCC Article 9 requires a security agreement to be in a written form.[468] However, this requirement is jettisoned if the security interest is pledged, being that a security interest in collateral to be perfected by possession need not be in writing as already stated – a ready example being a

[465] This long standing position was reaffirmed by the court in a recent case – *Melancon v Countrywide Bank,* 73 U.C.C Rep. Serv. 2d 739 (E.D. La. 2011).
[466]See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (West Publishing Co, United States, 6th edition, Practitioner Treatise Series, Vol. 4, 2010), p.122.
[467] It is important to note that the absence of a lucid description of collateral in the security agreement has always incurred the wrath of courts to the extent of nullifying the defective security agreement. Hence the use of super generic descriptions in the security agreement is not allowed. Disobeyers have had their security agreements voided at the court's instance. For example, in *Sanders v Comerica Bank, Inc*., 274 S.W. 3d 861, 68 UCC2d 147 (Tex. App. 2008), the parties described collateral as "shares of stock", assets, general intangibles in the security agreement and the court held that such super-generic descriptions did not specifically identify the construction equipment as to create a security interest in them.
[468] See section 9-203 UCC, and its Official Comment 3.

pawn transaction where possession in a collateral is transferred to the pawnbroker in exchange for cash.

In an instance where a security agreement does not exist, and the security interest is not perfected by a possessory pledge, but the transaction evidently appears to be within the Article 9 coverage, the court may admit it as valid by applying the "composite document rule". What this entails is that the court will consider a series of separate documents (as if they were one) evidencing the security agreement, and will subsequently create an enforceable security interest against collateral by reading the documents in their entirety. Needless to add that the documents being specified in this rule must be authenticated by the parties; otherwise, the security agreement will be deemed invalid in the last analysis.[469]

As has been stated, once the requirements for attachment listed above have been met, the security interest in the collateral attaches, and the created *in rem* right becomes enforceable against that specific collateral.[470]The enforcement of security interest right against a collateral is a critical time for a secured party because it is the process that quickens the awakening of other competing interests in the collateral. The rule as would later be effectively discussed in this chapter is that

[469] See *In re Bucala*, 464 B.R. 626, 76 U.C.C Rep. Serv. 2d 691 (Bankr. S.D. NY. 2012), where it was stated that a security interest attaches to a debtor's collateral if he has signed or authenticated a security agreement that describes the collateral. However, the description must not be exact, or in one document – thus, "for there to be a valid and enforceable security agreement, a formal and separately signed document labeled 'security agreement' is not necessary…courts have read several documents together and looked at the surrounding circumstances to find the existence of security agrrements." A similar outcome was reached in *Re Bollinger Corp* (1980) 614 F.2d 924. A more complete discussion on 'composite document rule' could be found in JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (West Publishing Co, United States, 6th edition, Practitioner Treatise Series, Vol. 4, 2010), pp. 126-133.

[470]However, section 10 of OPPSA, states that the secured party is required to deliver a copy of the security agreement to the debtor in the following words: "where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor within ten days after the execution thereof, and, if the secured party fails to do so after a request by the debtor, the Superior Court of Justice, on the application of the debtor, may order the delivery of such a copy to the debtor."

between two unperfected security interests, the one that first attached is preeminent, while between two perfected security interests, the first to be perfected is superior subject to some exceptions that would later also be discussed.[471] This goes to say that under both regimes, a secured party who stops at attachment and bothers not to perfect may not worry itself if and only if all subsequent secured creditors do not perfect their security interests or the debtor has enough collateral to fully satisfy all classes of secured creditors upon the former's default or bankruptcy. In addition to those, an unperfected security interest holder would also lose out to a bona fide purchaser for value without notice who purchased in the ordinary course of business.[472]

In any case, and as already hinted at above, under both regimes, a security interest must first attach to a collateral before an interest in such collateral is eligible for perfection. Even when an act of perfection is initiated before attachment, like when a secured party files in the registry before attachment takes place, perfection of the collateral under such instance is postponed or is kept in abeyance until security interest in the collateral attaches.[473] Therefore, "perfection" unlike "attachment" as has been impliedly stated in the foregoing discussion is not compulsory under both legal regimes and its absence does not touch on the validity of a security interest – however, only between the parties to the transactions. Though, (as would be later discussed in this chapter), the choice not to perfect a security interest is nearly always accompanied with severe consequences.

[471] See section 9-322(d) UCC. See also section 30(1) OPPSA. See sections 2.4, 2.4.1, 2.4.2 below.
[472] See section 9-320 UCC. Also see section 28(1) OPPSA. For an interesting discussion on "buyer in due course", see Richard L. Barnes, *UCC Article Nine Revised: Priorities, Preferences, and Liens Effective only in Bankruptcy,* 82 NEBRASKA LAW REVIEW, 607 (2004).
[473] See section 3.2.3 below for a discussion on this – usually called "blocking".

With respect to the nature and formation of security agreements in both Article 9 and OPPSA, Nigeria has two major lessons to draw, namely; that it is no longer profitable to retain its compartmentalized system whereby different security agreements are differently named with different applicable rules.[474] Second, the cumbersomeness associated with the compartmentalized system in Nigeria breeds, or could breed a lot of confusion, distrust, unpredictability, and endless litigations on technicalities – what could eventually lead to a severe apathy in lending and consequently weaken the economy to a terrible extent. Once Nigeria has adopted the unitary system and consequently lessen confusion in this area, other problems that are left could become more manageable and eventually, its secured transactions law could evolve to a self-standing point.

2.4. Perfection and priority under Article 9 and Ontario PPSA

Perfection[475]under both regimes is highly important being that a perfected security interest ranks above an unperfected one and also one perfected later in time. And as such, a holder of a perfected security would have to satisfy his claim (in the order of seniority) from a common collateral before an unperfected security holder does.[476] A holder of a perfected security interest

[474]See Alejandro Alvarez de la Campa, *Increasing Access to Credit through Reforming Secured Transactions in the MENA Region* 37 (The World Bank, Policy Research Working Paper No. 5613, 2011) – in this paper the author canvassed convincing arguments in favor of secured financing law reform. The arguments therein are in all fours with those of the author in this work. Also, read a brief but insightful article that makes good arguments for secured transactions law reform by renowned experts in the field – Heywood Fleisig, Mehnaz Safayian, & Jevgenijs Steinbuks, *The World Bank Group, Unlocking Dead Capital: How Reforming Collateral Laws Improves Access to Finance* 2 (Public Policy for the Private Sector, Note number 37, 2006), available at http:// siteresources.worldbank.org/INTTOPCONF3/Resources/307Safavian_Fleisig_ Steinbuks.pdf. (Last visited on October 17, 2016).

[475] See sections 9-308 through 9-316 UCC, and parts III and IV of OPPSA.

[476] An interesting and penetrating discussion on priority and its effects could be obtained from – The Yale Law Journal Company, Inc., *Selected Priority Problems in Secured Financing under the Uniform Commercial Code,* 68 YALE LAW JOURNAL, 751 (1959). See section 20(1) OPPSA for the consequences of an unperfected security interest.

also ranks higher than a subsequent lien creditor. The general rule as it regards perfection of security interests is that priority is determined not from the time the security interest attached but from the time it was perfected except the parties specifically agree to postpone attachment.[477] This means that perfection brings a secured creditor on the queue of creditors to be satisfied from the debtor's assets, and seniority on the queue is based on the order of perfection. Of course, this rule has exceptions which would be discussed hereunder.[478]

2.4.1. Methods of perfecting a security interest under Article 9 and OPPSA

Under both legal regimes, there are four common methods of perfecting a security interest in collateral.[479] The most prominent is by filing a financing statement, [480]essentially known as 'registration' in Nigeria, and Canada.[481] The second is by possession,[482] which is used or must be used for money-collateral, certificated securities, tangible chattel paper, negotiable instruments[483] – although OPPSA differs a bit by maintaining that any collateral could be perfected by

[477] A more complete discussion concerning postponement of attachment per parties' agreement could be seen in section 3.2.3 below.

[478]A reader interested in a contrary view of Article 9 and OPPSA regarding the priority of security interests (the first to file or perfect rule) should consult article 17 of the EBRD Secured Transactions Model Law, which stipulates that priorities of security interests rank in the order of their creation. Although this seminal article seems outdated due to the fact that Article 9 has been revised, the brilliance with which the writer elucidated his points is legendary and could aid in the understanding of contemporary debates centered upon Article 9-like secured transactions law. The reader is kindly advised to read it alongside the revised Article 9. See Robert Dugan, *Buyer-Secured Party Conflicts under Section 9-307(1) Of the Uniform Commercial Code,* 46 UNIVERSITY OF COLORADO LAW REVIEW, 333 (1975).

[479] See sections 9-308 through 9-316 UCC. See also Part III of OPPSA for details.

[480] See section 9-502 UCC.

[481] See section 23 OPPSA. OPPSA uses the term "registration" while Article 9 UCC uses the term "filing". Both mean the same thing.

[482] See section 22(1) OPPSA, and section 9-313 UCC.

[483] See section 9-313(a) UCC for the full list of items perfectible by possession, and section 22(1) OPPSA.

registration.[484] The third is 'control,'[485] which is also used in perfecting some kinds of intangible collateral provided for under both legal regimes.[486] Fourthly, certain security interests –for instance –the security interest of a purchase money security interest lender on consumer goods is automatically deemed perfected as soon as it attaches to the debtor's collateral.[487] The various perfection methods will now be discussed below in detail.

2.4.2. Perfection by filing

It could rightly be said that one of the reasons Article 9 and OPPSA adopted the *non-numerus clausus*[488] approach to secured transactions is to admit every form of personal property and fixtures to serve as collateral. This obviously is exemplary and supportive to trade and secured financing as majority of people could more easily afford to use whatever personal property they own to obtain credit from financiers. However, the use of personal property as collateral comes with several challenges (secret liens) which could indeed be very problematic if there is no public notification system to alert the general public that certain assets used as collateral have been encumbered by a security interest or – in the case of security interests in collateral perfected by other methods in Article 9 and OPPSA (control and possession), the existence of robust mechanisms to prevent any abuse of using a collateral to secure multiple lending transactions that outweigh the collateral in value.

[484] See section 23 OPPSA.
[485] For list of items perfectible by 'control', see section 9-314 UCC and section 22.1(1) OPPSA.
[486] *Ibid.*
[487] See section 9-309 UCC for the full list of security interests perfected automatically upon attachment.
[488] For further insight on "numerus clausus" which is not within the immediate precincts of this thesis, see – Bernard Rudden, "Economic Theory v. Property Law: The Numerus Clausus Problem", in OXFORD ESSAYS IN JURISPRUDENCE, (Third Series, 1987), p.239.

To solve this or at least minimize the chances of getting defrauded if due caution is observed, Article 9 and OPPSA commonly provide for public registry system[489] – hence, a security interest in personal property and fixtures collateral could be perfected by filing (or registering) a financing statement in the public registry.[490] Filing or registration[491] is not synonymous with perfection[492] and so, only an enforceable security agreement can be perfected by filing – and for those security interests which can be perfected by filing at the public registry, priority is determined by the order of filing the financing statement, subject to the security interests which perfect automatically following attachment.[493]

Talking about the financing statement, the minimum content requirements both legal regimes commonly prescribe are that a financing statement provide the name of the debtor and secured party, their addresses, as well as indicate the nature of collateral which the financing statement covers. This minimum content otherwise called 'notice filing'[494] as against 'document filing'[495] is common to both Article 9 and OPPSA, and is meant to alert a potential creditor that a particular collateral which is in the hands of a debtor is already encumbered or likely to be. Notice

[489] See section 41 OPPSA which creates the registration system. Also see section 9-501 UCC.

[490] See the Appendix for the cost of filing and searching financial statements in a select number of jurisdictions.

[491] OPPSA uses the word "registration" to mean filing as Article 9 would call it. However, from the English perspective, Goode is of the opinion that registration should be used when referring to document or transaction filing. See ROY GOODE, COMMERCIAL LAW (London, LexisNexis & Penguin Books, 4th edition, 2010), p.692, esp. at footnote 26.

[492] Filing or registration is not synonymous with perfection because the former is only a method of perfection and not perfection itself. If a security interest is perfected through another method other than by filing/registration, it suffices, and a secured party filing afterwards can only queue behind.

[493]See section 9-309 UCC for these exceptions. Also see generally – James J. White, *Reforming Article 9 Priorities in Light of Old Ignorance and New Filing Rules,*79 MINNESOTA LAW REVIEW, 529 (1995).

[494] See section 9-502 UCC. See section 3.1 of the General Regulations under OPPSA – for the contents of a financing statement.

[495]For a more penetrating discussion on both methods of filing, see Gerard McCormack, *Notice Filing versus Transaction Filing – A Comparison of the English and U.S. Law of Security Interests*, 5 INSOLVENCY LAWYER, (2002), pp.166-174. "Document filing" could also be called "transaction filing". In this thesis, both terms have been used interchangeably.

filing – with its scanty provision of details of a transaction, is only meant to be a starting point for a secured party to conduct further investigations on its own about the collateral in question. In order to assist interested persons in their registry search, the searcher could request further information from the debtor. And in turn, the debtor has the right to request for information from the secured party, with the latter being under a legal obligation to provide the former with the requested information within a stipulated period of time.[496]

Some scholars have argued in favor of the use of notice filing in lieu of document filing – pointing fingers to the cumbersome nature of the latter, what could otherwise debilitate the efficient functioning of a registry due to the volume of entries and files.[497] Notice filing is a product of several decades of experiences and failed experiments in US and Canada – for there was a period when the exact copy of a mortgage agreement was required to be filed as a precondition for its validity.[498] It could be said that such practice may have been satisfactory then, but when compared with today's commercial realities, it becomes immediately obvious that document filing would cut-off the use of inventories and receivables to secure transactions. Thus, the increased role of shifting types of collateral in modern commerce – that is, inventories simultaneously requiring too many changes of entries in the filed security agreement, all constitute strong factors that make

[496] See section 9-210 UCC and its Official Comment 3.

[497]The volume of paperwork, or the time it would take registry staff to scan them into the system, as well as navigate through bulky papers, would, for highly populated countries (where millions of lenders could file in the registry), overburden and reduce registry efficiency. For a detailed discussion on why "notice filing" is more ideal than "transaction filing" see GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), pp. 466 – 480. Professor Tajti also shares Gilmore's view on this, and has canvassed convincing points in favor of notice filing. For more details, see TIBOR TAJTI, COMPARATIVE SECURED TRANSACTIONS (Akademiai Kiado, Budapest, 2002), pp.146 – 150.

[498]See GILMORE (ibid).

document filing with respect to personal property collateral, as opposed to real property mortgages, a problem.

Apart from the fact that the use of inventories to secure transactions would be greatly weakened by the practice of document filing, in addition, what is gained in providing a copious amount of detail and clarity to a third party is lost when it is critically considered that the use of document filing is diametrically opposed to the preservation of a debtor's trade secrets and other sensitive details usually contained in security agreements.[499] Most businesses thrive on secret ideas or methods, and if all of that were to be revealed through the filing of a transaction document, it could eventually lead to the collapse of the registry system as most business people would prefer not to file, than reveal their business secrets to the public for possible copying.

In any case, if the details generally provided by a debtor regarding the nature of collateral become discrepant with what is found in the (notice)financing statement, such discrepancy no matter how minor, would apparently be enough to trigger the potential creditor's suspicion to conduct more inquiries about the collateral and if need be, avoid to take it as security.[500] The act of filing a financing statement in the public registry is unarguably the major innovative strike against the problem of ostensible ownership which posed serious threats to the use of non-

[499]One author has however taken the opposite view by expressing huge fears about notice filing – he argues that it could lead to a problematic situation whereby the information provided in the registry is not sufficient to inform the searcher of registry the exact collateral that is encumbered – this scanty information in the form of notice filing equally has some concomitants risks. For further information, see Richard Calnan, The Reform *of* the Law *of* Security, BUTTERWORTHS JOURNAL OF INT'L BANKING & FINANCIAL LAW, 88 (2004), pp.89-90.

[500]This view is the same as that offered in the Consultative Report – *Company Security Interests*, prepared by the Law Commission set up to look at the reform of England and Wale's personal property security law. Currently in England and Wales, as well as Nigeria, transaction/document filing is used in corporate filing and it has its disadvantages due to bulky paper works, and its incompatibility with inventory financing. As these three countries are now interested in online filing, the need to adopt notice filing seems inescapable for them. For more details on this, see Gerard McCormack, *The Law Commission's Proposals on Company Security Interests Considered*, COMPANY LAW NEWSLETTER, 20 (2004), pp. 1-5.

possessory collateral in secured financing in both US and Canada before the advent and adoption of the unitary model of security interest.

To summarize, it could be said on behalf of Article 9 and OPPSA that neither legal regime claims that notice-filing nor the publicity of the registry system is the panacea to ostensible ownership problem. However, they both firmly agree to make filing processes very easy on the filer by providing for notice filing instead of document filing, as well as also using the debtor's name to conduct search in the registry.

2.4.3. Perfection by possession

Possession in law, is a very chameleonic and fluid concept. Its varying meanings permeated almost every aspect of law, from property law to criminal, and its existence in Article 9[501] and OPPSA[502] is evidently due to the two models' common law background. This is not to say that possession has or ought to have outlived its purpose because as could be objectively seen from Article 9 and OPPSA, not all kinds of collateral can be conveniently perfected by filing – an example is money (cash) collateral which must be perfected by possession.[503]

[501]See section 9-313 UCC. See an illustrative case on possession as a method of perfecting security interest in tangible collateral – *Farm Credit of Northwest Florida, ACA v Easom Peanut Co.*, 75 U.C.C Rep. Serv. 2d 553 (Ga. Ct. App. 2011). To understand the dynamics of possession with respect to the perfection of security interests in collateral, see David A. Ebroon, *Refection By Possession In Article 9: Challenging the Arcane but Honored Rule,* 69 INDIANA LAW JOURNAL, 1193 (1994). Above all, see GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), chapter 14, esp. pp. 449-52.
[502]See section 22(1) OPPSA. Also see E.L.G TYLER & N.E PALMER, CROSSLEY VAINES' PERSONAL PROPERTY, (London, Butterworths, 5th edn. 1973) pp. 411–412.
[503] See section 9-313(a) UCC for the full list of items perfectible by possession, and section 22(1) OPPSA.

Historically, especially following the decision of the Star Chamber in *Twyne's case,*[504] possession was seen as the perfect tool that would prevent fraudulent transfer with respect to an asset encumbered by a security interest – consequently, ownership and possession of property were said to be inseparable. However, it has been well argued by scholars[505] to a convincing extent that transfer of possession as a perfection method is no longer suitable in many contexts. In fact, in contemporary commerce, the dominance of non-possessory security devices that are to be perfected otherwise and not by transfer of possession over the collateral, makes this perfection method to increasingly pale into insignificance.[506] This is further evident when it is considered that the transfer of a debtor's production assets to a secured creditor as collateral, eventually leaves those assets redundant and unproductive in the hands of the creditor who may unlikely recover his full money value by selling the depreciated collateral, or may not have the needed storage facilities or resources to preserve them. Although, exceptions could be made in the case of chattel paper, certificated securities, and the like, which do not regularly feature as part of debtors' equipment.

In addition, transfer of possession as a perfection method could sometimes yield the same results it seeks to avoid in the sense that a potential secured creditor who intends to finance a transaction in exchange for a security interest in a collateral cannot possibly know whether the collateral in the current secured creditor's (new debtor) possession is actually his own – what otherwise could have been avoided by taking a look at a filed financing statement to know about

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[504](1601) 76 ER 80.

[505] In fact one of the cardinal arguments of the unitary model is that debtors should be allowed to possess collateral that are being subject of security interests so as to utilize them in production activities and be able to generate profits and repay debts. This arrangement surely serves the secured party's interest as well as the economy in general. Drobnig is one of those scholars who have argued this point to an appreciable point – see Ulrich Drobnig, *Secured Credit in International Insolvency Proceedings,* 33 TEXAS INTERNATIONAL LAW JOURNAL, 53 (1998).

[506] However, the author could not find any available statistics that shows the amount of security interests that get perfected by possession versus other methods of perfection. However, it is conceded that it is still early to finally conclude that perfection by possession is increasingly phasing out given the fact that under section 9-313(a) UCC and section 22(1) OPPSA, security interests in quite a number of collateral are still perfected by possession.

the property presented as collateral. To this extent, what is gained by avoiding one ostensible ownership incident sometimes creates another another through a backdoor. In the end, the economy suffers due to constraints inherent in possessing collateral as a method of perfection. It was partly due to this dilemma that filing as a method of perfection was introduced to address to a large extent the ills engendered by possessory securities under Article 9 and OPPSA. In fact, OPPSA states that it is possible to perfect all kinds of collateral by registration thereby giving the secured party the liberty to choose between possession and registration for those collateral which could be perfected by possession under OPPSA.[507] It is therefore strongly advised that when a party finds itself in doubt as to whether to file, the benefit of doubt should be resolved in favor of filing to avoid negative consequences later on. With the expansion of types of personal property that could be used for secured financing – for example, intangible collateral, it becomes crystal clear that perfecting security interests in intangibles cannot be possible by possession – filing has therefore taken a large space in the perfection of security interests in collateral as Article 9 and OPPSA commonly provide.[508]

To make a favorable argument for possession though, one could say that it is an inexpensive method of perfection, given that filing fees as well as the time invested in filing processes are saved. In the case of Article 9, the hairsplitting distinction of determining whether a motor vehicle is an inventory of a dealer in which case it must be perfected under Article 9 rules or whether it is used by him in the ordinary course of his business – in which case it must be perfected in

[507] Section 23 OPPSA states 'Registration perfects a security interest in any type of collateral'.

[508] It seems to the author that neither Article 9 nor OPPSA has adequate rules on possessory pledges. In fact, in the case of OPPSA, section 23 thereof states that every security interest in personal property collateral could be perfected by registration – even money collateral. However, Polish law offers a robust set of rules with respect to possessory pledges, and some lessons could be learned from the Poles in the event Nigeria desires to reform its possessory pledge rules, of course as part of the secured transactions law regime. See generally the Polish Registered Pledge Act 1996 for details.

accordance with the state certificate of title statute of motor vehicles[509] would not arise in possession method of perfection. This distinction is not easy to make and the possibility of one's security interest to be deemed unperfected on a technical ground could make a secured party to simultaneously file under Article 9 registry as well as under the relevant motor vehicle statute recordation system, thereby heightening the cost for perfection. In any case, the author's opinion is that the amount of money and time invested in filing cannot truly be equated with the numerous disadvantages stemming from non-filing that affect both the secured party and potential secured creditors willing to extend credits.

Furthermore, both legal regimes commonly pose two questions. The first is as to the meaning of possession within the context of both legal regimes,[510] while the second is as to the identity of the person who should possess the collateral.[511] Whereas constructive pledge is not within the purview of OPPSA, actual possession is well acceptable. Thus, where a key to a vehicle is possessed rather than the vehicle itself, OPPSA deems such as incapable of qualifying as possession within the context of its provision.[512] Also, a debtor cannot be a secured party's agent for the purpose of being in possession under OPPSA, instead the collateral must be possessed by

[509]See section 9-311(2) and (3) UCC. However under OPPSA, a security interest in motor vehicles can also be registered in personal property registry as deducible under section 43.1(1) OPPSA.

[510] Possession in Article 9 provision that arises under Article 2 or 2A could either be constructive or actual. This was categorically stated in *Ancile Inv. Co. Ltd v Archer Daniels Midland Co.*, 784 F. Supp. 2d 296, 74 U.C.C. Rep. Serv. 2d 91 (S.D. N.Y. 2011). Under OPPSA, Ziegel and Denonme argue that constructive possession is outside the scope of section 22 of OPPSA. See JACOB ZIEGEL & DAVID DENONME, ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS (Toronto: Butterworths, second edition, 2000), p.178

[511] Section 22 OPPSA makes it clear that the debtor's agent cannot hold the collateral for the secured party – this was perhaps targeted at field warehousing situations where the secured party appoints the debtor's employee to be the warehouseman. But since field warehousing still operates in the US, constructive possession cannot yet be doomed to the dust-bin.

[512] See section 62(b) OPPSA. Two prominent Canadian legal scholars – Professors Ziegel and Denonme, conclude that rendering an equipment unusable cannot satisfy section 22 OPPSA. However this could be sharply contrasted in a recent US case, namely, *In re Rose*, 2010 WL 1740635, 71 UCC2d 864 (Bankr. D. Neb. 2010) where the possession of the key to a safe (box) perfected the security interest in the box's contents.

a secured party or his agent and held as collateral.[513] However, it could rightly be argued that Article 9 accepts both actual and constructive possession – for instance, the whole concept of field warehousing in the US whereby the creditor carves out a portion of the debtor's goods in the latter's business premises and appoints the debtor's employee to be in charge of them, is predicated essentially on constructive possession. Looking at both regimes, the collateral which they provide to be perfected by possession are invariably the same – the common denominators being tangible chattel papers, instruments, negotiable documents of title, and money.[514]

To conclude, the author would like to draw attention to Polish law with respect to how it has dealt with possession vis-à-vis ostensible ownership – perhaps, Nigerian lawmakers might want to also consider it when drafting the anticipated PPSL. Polish law tackles ostensible ownership problem by insisting under its Article 329 of the Civil Code, that an agreement for the establishment of a pledge on rights has to be executed in writing with *data certa* (that is, certified date by a notary). The certified date therefore provides an evidence of creation of the possessory pledge agreement, which makes it pretty much difficult to deceive an unsuspecting third party with the pledged item, as the third party could demand to see the certificate issued by the notary to ascertain if possession is genuine. According to Professors Messmann and Tajti, under Polish law

[513] However, this cannot be the case as already stated due to the continued practice of field warehousing – see chapter one of this thesis (section 1.5.2.) for more details on field warehousing. For a comparative and brilliant analysis of field warehousing, see Tibor Tajti, *The Resurrection of Field Warehousing – The Booming Hungarian Field Warehousing Sector, the Incomplete English Narrative and the Unexplored Field Warehousing Law of the United States*, ACTA JURIDICA HUNGARICA, 55, No. 3 (2014), pp.185 – 235.

[514] See section 22(1) OPPSA for the list of tangibles that can be perfected by possession. Also see generally, section 9-313 UCC for the category of tangibles that can be perfected by possession. Although Robert Clark's article was premised on the old version of Article 9, the main points of his discussion remain unaffected and could still help the reader to comprehend some technical points regarding possession as a method of perfection under Article 9 and by extension OPPSA – being that OPPSA was originally conceived from the first version of UCC Article 9. See generally, Robert Charles Clark, *Abstract Rights versus Paper Rights under Article 9 of the Uniform Commercial Code,* 84 YALE LAW JOURNAL, 445 (1975).

"[t]he consequence of noncompliance with the statutorily required specific form, such as writing, with signatures certified by a notary, is nullity."[515]

2.4.4. Perfection by control

"Control"[516] as a method of perfection did not exist in the first generation of Article 9[517] and OPPSA.[518]It was introduced by the 1994 revision[519] of Article 8 (Investment Property) whereby 'control' was recognized as a method of perfecting security interests in investment securities and deposit accounts. Needless to say, this perfection method then found its way into the 1999 revision of Article 9, and has become the method of perfecting security interests in deposit accounts, investment property – such as stocks, bonds, electronic chattel paper, letter of credit rights, and such kinds of interests that exist in brokerage and banking account forms.[520] It could

[515]For a more penetrative treatment on how Polish law treats pledges, see STEFAN MESSMANN & TIBOR TAJTI (eds), THE CASE LAW OF CENTRAL AND EASTERN EUROPE – ENFORCEMENT OF CONTRACTS (European University Press, Bochum, Germany, 2009), p.612.

[516] According to three renowned scholars in this area of law, "perfection by control occurs when the creditor has taken whatever steps are necessary to be in a position to sell the collateral without any further action by the debtor". The author of this thesis adopts this as a working definition of 'control'. See RONALD CUMING, CATHERINE WALSH, & RODERICK WOOD, PERSONAL PROPERTY SECURITY LAW (IRWIN Law Inc, 2005), p.233.

[517] See section 9-314 UCC and the Official Comment 3. Professor Greene's seminal article explains deposit account to a very thorough extent. See generally, Dwight L. Greene, *Deposit Accounts As Bank Loan Collateral Beyond Setoff to Perfection – the Common Law Is Alive and Well*, 39 DRAKE LAW REVIEW, 259 (1990). On the implications of deposit's account inclusion in Article 9, see Ronald C.C. Cuming & Catherine Walsh, *Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property,* 16 BANKING & FIN. LAW REVIEW, 339 (2001), p.365.

[518] See section 22.1(1) OPPSA. For details on how control is used under the Australian PPSA, see ANTHONY DUGGAN & DAVID BROWN, THE AUSTRALIAN PERSONAL PROPERTY SECURITIES LAW – A BOOK FOR ALL REASONS (Chatswood, LexisNexis, Butterwords, 2012), pp.103-108.

[519] White and Summers claim in their book that the idea of 'control' as a method of perfection, came into Article 9 after the revision to Article 8 in 1994. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (West Publishing Co., USA, 6th edition, Practitioner Treatise Series, 2010), p.180.

[520]See sections 9-106, 9-104, 9-105, 9-107, 9-314(a) UCC. In *Counceller v. Ecenbarger Inc*,. 834 N.E.2d 1018, 59 UCC2d 524 (Ind. App. 2005), the court held that "control" is the only method of perfecting security interests in deposit accounts and letter of credit rights. See also *United States v Two Bank Accounts*, 2009 WL 803615, 68 UCC 2d 382 (D.S.D 2009). OPPSA does not yet accommodate deposit accounts, letter of credit rights, healthcare insurance

be argued, similar to Professor Lipson, that the community of banks and brokers in US was highly influential towards the introduction of control under Article 9 as the main method of perfection of security interests in the above mentioned types of collateral – given their lobbying power on lawmakers towards protecting their industries' interests.[521] This is easily understandable given the high risk involved if a secured creditor-bank were to solely rely on registry searches as the only verification tool for encumbrances on a debtor's securities accounts. Similarly, if a non-bank secured party were to rely solely on the information found in the registry regarding the state of debtor's account balance in the latter's deposit account, without any form of withdrawal restriction right towards it – the possibility of waking to see that the debtor has entirely withdrawn the deposit account is high. To prevent this potential abuse by debtors, 'control' as a method of perfection was devised to serve as an *ex ante* remedy – meaning that between a bank and its debtor,[522] the former could rely on the common law remedy of set-off to unilaterally withdraw money out of a debtor's (customer's) deposit account without recourse to the debtor in the event of the latter's default,[523] instead of joining other secured creditors to contest priorities.[524] However, a non-bank secured

receivables, and a few others as collateral. – see section 4 OPPSA. But see the Securities Transfer Act (STA) – which is in force across Canada. Under the STA, control as a method of perfecting security interests in certificated and non certificated securities could be found in sections 25 and 26 thereof. For a penetrating discussion from the Canadian perspective, see Robert M. Scavone, *Cash Collateral under the PPSA: The Case of Control,* 53 CANADIAN BUSINESS LAW JOURNAL, 263 (2012), esp at p.280.

[521]See Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law,* 21 EMORY BANKRUPTCY DEV. JOURNAL, 421 (2005), pp. 464-467. For a detailed discussion on 'control' as a perfection method under Article 9, see the article generally.

[522] According to section 9-109(d) (13) UCC, an assignment of a deposit account in consumer transaction is non-permissible within Article 9 UCC.

[523] See *United States v Two Bank Accounts*, 2009 WL 803615, 68 UCC2d 382 (D.S.D. 2009) (where the bank's right of set off coupled with control defeated the secured party's security interest). However, section 9-208 UCC imposes upon a secured party who has control of a deposit account, letter of credit rights, and investment property, the duty to relinquish control when there is no secured obligation as well as promise to give value to the deposit account holder. See also its Official Comments 2–4.

[524]See section 9-104(a) (1) UCC. It should also be noted that section 9-342 UCC requires a depositary bank to disclose the existence of a control agreement to a third party if its customer so requests.

creditor wanting to enjoy a similar right, would have to enter into a tripartite 'control agreement'[525] with the debtor and its depositary bank,[526] whereby the latter (the bank) agrees to act as the third party secured creditor would instruct with respect to the debtor's deposit account,[527] such that without the debtor being priorly informed, his deposit account could be unilaterally withdrawn to satisfy the secured third party's claim.[528]

Although both legal regimes recognize control as a method of perfecting security interests in investment property, Article 9 provided more detail on it – meaning that under Article 9 the various kinds of collateral listed above, (including deposit account as original collateral[529]) must be perfected only by control[530] while OPPSA (which excludes deposit account as original collateral) makes it only optional to use control to perfect security interest in investment property

[525] Article 9 uses the phrase "authenticated record" with reference to security agreements – which means a signed agreement in physical form, or that which is authenticated in an electronic format.
[526] See section 9-104(a) (2) UCC.
[527] It is very crucial to note that according to section 9-104(a) (3) UCC, where the third-party secured creditor did not execute a tripartite control agreement, he could still acquire 'control' if and only if the deposit account is created in his name as the customer of the depository bank. See also Ronald Cuming & Catherine Walsh, *Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property,* 16 BANKING & FIN. LAW REVIEW, 339, (2001), p. 366.
[528]Further see sections 9-312(b), 9-31 and 9-327 UCC. A more complete discussion on this was undertaken by the following authors – see Ingrid M. Hillinger et al, *Deposit Account under the New World Order*, 6 NORTH CAROLINA BANKING INST. 1 (2002) (the authors provided a detailed discussion on deposit account collateral under Article 9), Ben Carpenter, *Security Interests in Deposit Accounts and Certificates of Deposit under Revised UCC Article 9,* 55 CONSUMER FIN. LAW QUARTERLY, 133 (2001). (In this article, the author deeply explores the methods of creating control on deposit accounts, and obtaining security interests in them as original collateral). G. Ray Warner, *Deposit Accounts as Collateral under Revised Article 9,* 19 AMERICAN BANKR. INST. JOURNAL, 18 (2002), (the author describes how attachment, perfection and enforcement of a security interest in deposit account could be undertaken); Bruce A. Markell, *From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9,* 74 CHI.-KENT LAW REVIEW, 963 (1999) (the author discusses history and emergence of deposit accounts in Article 9).
[529] The 1972 version of Article 9 at section 9-104(1) excluded "a transfer of an interest in any deposit account" from its scope except in cases where the "money" in the account was only identifiable proceeds coming from some other kinds of collateral. Given that OPPSA shares grand similarities with the 1972 version of Article 9, deposit account as original collateral is still unrecognized. On this and much more, see S.L. Harris & C.W. Mooney, *How Successful Was the Revision of UCC Article 9: Reflections of the Reporters* 74 CHI.-KENT LAW REVIEW, 1357 (1999) at p.1364.
[530]See *Counceller v Ecenbarger Inc.* 834 N.E.2d 1018, 59 UCC2d 524 (Ind. App. 2005).

– because, it uses the word "may" when it says that "a security interest in investment property may be perfected by control of the collateral"[531] – a provision that corresponds with its position that 'registration' could be used to perfect security interest in any collateral.[532] However, it does seem incontrovertible that with the advent of securities that exist in dematerialized form, and over-the-counter trading of securities, it has become indispensable for a third party to consult the secured party or bank who is in control of these dematerialized securities or deposit account for questions when confronted by a debtor wishing to use them as collateral, because, indeed, filing in this context would be highly inadequate to prevent secret liens.[533]

The idea behind control, which closely resembles that of possession is that a third party being presented a collateral like deposit account or its kins should reasonably ask questions about encumbrances, and could request the depositary bank through the debtor's (bank customer's) permission[534] to see any existing control agreement with respect to the presented collateral. If the debtor refuses to honor the secured party's requests in this regard, his refusal should be sufficient to arouse suspicion from the third party regarding the secured party's (bank's or broker's) likely encumbering interest.[535]

[531] See section 22.1 OPPSA.
[532] See section 23 OPPSA.
[533] For further reading, see Randal Picker, *Perfection Hierarchies and Nontemporal Priority Rules,* 74 CHICAGO-KENT LAW REVIEW, 1157 (1999). See also Robert M. Scavone, *Cash Collateral under the PPSA: The Case of Control*, 53 CANADIAN BUSINESS LAW JOURNAL, 263 (2012), p.266.
[534] See section 9-342 on the issue of debtor's permission before a control agreement being requested for is produced by the depositary bank. For a similar provision under OPPSA regarding investment property and secured party's right to request for security agreement, see section 18(1) (d) thereof.
[535] "Control is the intangible's equivalent to possession of tangibles…security interests in intangibles for which there is no indispensable "res" to be possessed (like a negotiable instrument) cannot be perfected by possession. Yet some of these intangible interests can be put under the "control" of a secured creditor to the exclusion of others, and this will put third parties on notice." See JAMES J. WHITE & SUMMERS S. ROBERT, UNIFORM COMMERCIAL CODE, (West, 6th edition, 2010), p. 1210. In addition, see section 9-104 and its Official Comment 3, sections 9-105, 9-107, and 9-314 of the UCC Article 9 for the instances where 'control' is required as a method of perfection.

Having said the foregoing, it would be recalled that the perfection of security interests in investment property in US and Canada differ considerably with respect to deposit account collateral – given that the 2012 Securities Transfer Act (STA) in force across Canada, does not allow 'control' to be used as a method of perfecting security interests in deposit accounts. Instead, registration is still being used as a method of perfection in deposit accounts unlike in the US where control is now the main method of perfection of security interest with respect to this collateral.

No statistical data exist yet to back this claim, but that notwithstanding, one could rely on logical inference to say that if control as a perfection method is not extended to deposit accounts as done to investment property under sections 25-28 STA, banks and secured creditors in Canada would find deposit account very unattractive or less preferable collateral compared to its close kins capable of being perfected by control.[536] However, the Canadian Supreme Court decision in *Caisse Drummond*[537] offers another perspective to this narrative which of course has implications on the Canadian provincial PPSAs. Normally, the right of set-off is contractual, and only gives a right *in personam* and not *in rem* – the latter is a requirement for the formation of a security interest in personal property collateral under the Canadian PPSAs.[538] Yet, in *Caisse Drummond*, the court allegedly applied the "functional approach", saying that a bank's right to set off, if coupled with a

[536] The idea of perfecting deposit account collateral via control has also seeped into the EU – see the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002, as amended by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009. Under the Australian PPSA 2009 – control is used in perfecting "ADI Accounts", that is, deposit accounts. In the UK, the Law Commission proposed for control in their consultation paper with respect to the reform of English PPSL. See the Law Commission, Consultation Paper No. 164, "Registration of Security Interests: Company Charges and Property other than Land, a Consultation Paper" (London, the Stationery Office, 2002). The author of this work also recommends a similar regime for Nigeria's secured transactions law.

[537] *Caisse Populaire Desjardins de l'Est de Drummond v Canada* (2009) 2 C.C.R. 94 (S.C.C.).

[538] For instance, see section 2 OPPSA.

"flawed asset"[539] arrangement, would give rise to a security interest in deposit account.[540] Robert Scavone – the chair of Personal Property Law Committee of the Ontario Bar Association, in reaction to *Caisse Drummond,* stated that the court's position was only an endorsement of "workarounds over the years" by banks and legal practitioners.[541]

To sum up, a few more issues should be made clearer. Before the Canadian Supreme Court's decision in *Caisse Drummond*, control as a method of perfection under the various Canadian PPSAs was only restricted to investment property.[542] If ever deposit account was taken as collateral, the only means of perfection was by registration – unlike in the US, where control has become the main perfection method in deposit account collateral.[543] Even when the filing method is utilized to perfect an interest in a deposit account, the security interest of the party having control is preeminent. To this extent, the difference between the US and Canadian perspectives with respect to deposit account becomes crystal. However, following *Caisse Drummond,* these differing approaches have unarguably unified following the court's position that the right to set off, if coupled with flawed asset agreement in deposit account, would sufficiently create a

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[539] Flawed asset is "an agreement between a bank and its customer under which money deposited by the customer with the bank (that is, the "asset") is not repayable until certain events have occurred (usually, repayment of indebtedness due to the bank from the customer). Under a flawed asset arrangement, the customer and the bank agree that the cash deposit is "flawed" in the sense that it will only become repayable if a previous condition is fulfilled. This means that if the customer goes into liquidation, the liquidator's right to the deposited monies will be no better than the customer's right was, and the liquidator will be prevented from distributing the cash held in the account unless the condition has been met." Culled from < http://uk.practicallaw.com/9-202-2152> (last visited on February 9, 2016). See also *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214.

[540] *Caisse Populaire Desjardins de l'Est de Drummond v Canada* (2009) 2 C.C.R. 94 (S.C.C.), paras 41-42.

[541]See Robert M. Scavone, *Cash Collateral under the PPSA: The Case of Control,* 53 CANADIAN BUSINESS LAW JOURNAL, 263 (2012), p.275. A critique of *Caisse Drummond* could be found in Ian J. Binnie, *Comment on Caisse Populaire Desjardins de l'Est de Drummond v Canada,* 26 BANKING & FIN. LAW REVIEW, 327 (2011).

[542] For instance see section 22.1 Ontario PPSA, section 24.1 Saskatchewan PPSA, etc, which provide control as a perfection method with respect to investment property.

[543] See section 312(b)(1) UCC – "A security interest in a deposit account may be perfected only by control under Section 9-314".

perfected security interest in the deposit account. Given that it has long been decided that the *obiter dicta* of the Canadian Supreme Court bind the provincial courts,[544] the novelty introduced by *Caisse Drummond* has changed the provincial PPSAs position on deposit account, which can now be perfected by control – although the option to also perfect by registration was not necessarily obliterated by the court.

2.4.5. What lessons can Nigeria draw from the above rules of perfection?

Already, the above methods of perfecting security interests in personal property are known to the Nigerian secured transactions law although not in any appreciable detail.[545] What is rather lacking is the fact that there are no detailed rules that operate as a code for the perfection of personal property, as one would always have to find out what a particular statute or common law principle says about perfection of interest in a type of property. This is partly because Nigeria's secured transactions law is a product of much borrowing of legal concepts from different legal systems – from England especially. As a result, possessory securities still enjoy full attention on the commercial stage and the disadvantages of having possessory security agreements dominate the system have already been discussed above. It is pertinent therefore to have an all–inclusive

[544]This was the court's position in *R v Sellars* (1980) 1 S.C.R. 527 (S.C.C.).

[545] For instance, perfection by possessing the collateral has long been part of Nigeria's common law. Although, filing to give public notice of security interest on personal property in Nigeria is limited only to corporate transactions whereby the company in question is requested under section 197 CAMA to file copy of a security agreement (document filing) in the Corporate Affairs Commission's registry. Banks and Brokerage institutions in Nigeria have also been perfecting their security interests through the control of the monies or stocks in their possession under the common law principle of "set-off". What has rather been lacking is the harmonization of these methods – through a body of rules that govern security interest regardless of the sector in which it was created. Also given the rise in the use of stocks as securities in Nigeria, it is strongly advised that it ratifies the UNIDROIT Convention on Substantive Rules for Intermediated Securities. The convention is available http://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf (last visited on September 28, 2015).

framework in this area of law that introduces the unitary system together with a national electronic filing system that will create public awareness across the country on encumbered assets serving as collateral.

Furthermore, if a national registry for the filing of security interests on personal property as well as rules on creation, perfection, priority and enforcement similar to those of OPPSA and Article 9, (but of course, in adapted forms), are introduced in Nigeria, their effective operations could lessen the fear of ostensible ownership – which has become one of the major reasons Nigerian lenders frequently resort to possessory securities. Also Nigeria has a good number of financially strong corporations as well as a functioning capital market that attract a good number of foreign direct investors. This means that "control" as a method of perfection would be profitable if well developed and statutorily backed up as a method of perfecting security interests in intangible collateral.

Thus, Nigerian lawmakers should profit from the US and Canadian experiments on control – meaning that control should be added in the anticipated PPSL as a method of perfecting security interests in both investment property and deposit accounts. Especially in the latter, given that banks are the biggest source of credit in Nigeria, it is vitally important that they are allowed to use control or control agreement to secure their positions. In order not to diminish the relevance of the yet-to-exist collateral registry, it is further suggested that secured parties perfecting by control should be required to also register their interest. The essence of the registration component in this context would be to notify registry searchers that there is already an encumbrance on the deposit account or investment property collateral. Then, the searchers could perhaps on that basis request the debtor to produce the control agreement or any details that might be of relevance towards making financial decisions. However, the bank's or broker's failure to register in this context should not affect its priority – this is said given that a third party being presented with a deposit account or securities account is impliedly under a constructive notice that the bank or broker might have control – and should therefore make relevant inquiries to determine the scope of encumbrance on the collateral.

2.4.6. The continuous perfection rules under Article 9 and OPPSA when debtor or collateral changes location

The US and Ontario secured transactions laws differ on the grace period rules of re-perfection when the debtor or collateral changes location from one state or province to another.[546]Grace period accords to the reality that the secured party cannot possibly monitor efficiently the debtor's or collateral's re–location as soon as it occurs – therefore, a grace period has to be given for re–perfection; otherwise, the whole function of secured transactions law could be highly impeded.[547]

Furthermore, where a debtor changes location by moving its chief executive office to Ontario for instance, a security interest in intangibles or non–possessory collateral would remain perfected in Ontario within sixty days after the debtor's change of location or within fifteen days after the secured party got a notification of the debtor's relocation.[548] However, if the secured party fails to re-perfect his interest in Ontario within this grace period, his security interest in the collateral would become unperfected in Ontario and would relate back to the day the debtor entered

[546] See *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc* (2004) 28D.L.R. (4th) 487.
[547] For the rules on re-perfection under OPPSA when a debtor or collateral changes location, see sections 5 and 7 thereof.
[548] See section 7 OPPSA.

Ontario for the purpose of determining priority. These same rules also apply if it was the collateral that changed location.[549]

However, continuous perfection rule is a bit different under Article 9 from what is obtainable in OPPSA. Ordinarily, no problem would usually arise when the debtor relocates to a new location, and a secured party immediately re-files in that debtor's new location. However this is not always simple because there are times the secured party would not be immediately aware of the debtor's relocation and may take some time to discover it. This would result into terrible hardships if the secured party is not given enough time within which to re–perfect in the debtor's new location. Article 9 therefore provides a countervailing solution to ameliorate the hardship that would otherwise accrue from the unannounced relocation of the debtor, by providing for a period of four months during which time a secured party is required to re-perfect its security interest in the debtor's new location.[550]

It should be further understood, that four months period[551] is only activated where the perfection period under the debtor's former jurisdiction has elapsed or where a debtor transfers a collateral subject of a security interest to another who is to become a new debtor in another

[549] *Ibid.*
[550] Read the opinion of a learned author in a seminal article – D. Farrell, *Post-Filing Changes and Their Impact on the Continued Perfection of Security Interests,* AMERICAN BANKRUPTCY INSTITUTE JOURNAL, (2002), p.18, who captured the rationale behind the Article 9's use of debtor's location instead of collateral location, when he said that "[i]n certain respects, revised Article 9 has reduced the ongoing monitoring obligations of those secured creditors who perfect by filing. In particular, the elimination of collateral location as a determinant of the proper jurisdiction within which to file a financing statement has freed secured creditors from the concern that their perfected status may be jeopardized in the event their debtors surreptitiously move collateral to another jurisdiction. In addition, the clarification that revised Article 9 has brought with respect to organizational changes by a debtor should diminish the uncertainty and confusion that secured creditors previously experienced when confronted by such changes."
[551] See section 9-316(2) UCC.

jurisdiction, the security interest in the secured party remains perfected for one year – whichever is first.[552]

2.4.7. Continuous perfection rules compared: Implications on secured creditors and buyers

Both the OPPSA and Article 9 seem to have a unity of purpose in their continuous perfection rules which are to protect secured creditors from the potential deceits of some debtors, as well as protect bona fide purchasers for value without notice.[553] Viewed quite critically, it does appear that the OPPSA continuous perfection rules tend more to favor an innocent third party who has purchased a collateral, than the secured party in a security agreement. This is clearly exemplified in the sixty days period during within which time a secured party must re–perfect in the new jurisdiction (if it wishes to retain seniority) where the collateral has been moved to, or a period of fifteen days if the secured party gets to be aware of the relocation. OPPSA provides that where re-perfection is not done within this time-frame, the security interest of the secured party becomes subordinate to that of a bona fide purchaser for value without notice.[554]

In contrast with OPPSA, Article 9's continuous perfection rule appears to favor the secured party more because it offers a period of four months[555] to the secured party to re–perfect in the debtor's new location, and states also that the interest of the secured party is senior where it

[552] See section 9-316(3) UCC.

[553] For a brilliant discussion on the 'buyer in the ordinary course of business' and how his security interests in collateral interplay with those of secured parties – see Mike Gedye, *A Hoary Chestnut Resurrected: The Meaning of 'Ordinary Course of Business' in Secured Transactions Law,* 37 MELBOURNE UNIVERSITY LAW REVIEW, 1 (2013).

[554] See section 5(4) OPPSA. At least in comparison with the US (Article 9) provisions, it could be rightly said that OPPSA is more buyer protective than Article 9 given the huge difference in the number of days for grace period in refiling in a new jurisdiction (Article 9 gives 60 days, while OPPSA gives 15 days).

[555] See section 9-316(a) (2) UCC.

conflicts with that of a bona fide purchaser for value without notice during the grace period.[556] Of interest, is also the fact that Article 9 does not count on the secured party's knowledge of the debtor's relocation as a factor to reduce the four month grace period, unlike the OPPSA does.[557] In other words, the knowledge of the secured party about the debtor's relocation does not reduce the former's time within which it is required to re–perfect.

From the author's perspective, the relocation of a personal property collateral is likely to be more frequent and easier to execute than the relocation of a debtor, especially where the debtor is an incorporated company whose relocation or intention to relocate could attract some publicity in the media, enough to alert a secured party. Therefore a secured party under OPPSA would have to spend more resources in conducting regular checks on the collateral because it has lesser time to re-perfect unlike its Article 9 counterpart.

The author further thinks that fifteen days which the OPPSA offers to a secured party to re–perfect in the new jurisdiction of the collateral upon coming to knowledge of the relocation is very short because in most cases, fifteen days could mean ten working days.[558] The secured party may not be able to organize itself to go to file in the new jurisdiction of the collateral especially if the secured party was outside jurisdiction by the time it learned of the debtor's relocation of collateral.[559] One problem also which the fifteen days rule poses is that OPPSA did not exactly

556 See section 9-316(b) UCC, especially Official Comments 2 and 3 thereof.
557 See section 5(2) b OPPSA. However, under the Article 9 equivalent (section 9-316), notifying the secured party of the debtor's or collateral's relocation does not reduce the period of his grace period to refile unlike OPPSA does.
558 In USA and Canada, public offices open from Monday to Friday. So a party having only 15 days would lose 4 days to weekends, thereby shortening his time within which to re-perfect in the new jurisdiction where the collateral has moved. This is a plausible conclusion being that section 5(2) (b) OPPSA did not say *15 working days* but simply "15 days".
559 This raises concerns being that hypothetically, a secured party could be away for a business trip in another country which could last more than 15 days. Thus, if he is notified by email immediately upon his arrival to the business meeting, he is then faced with the dilemma of either canceling his business appointment there and fly back to Canada

define the means or what exactly may constitute knowledge on the side of the secured party. It did not further state who has the onus to prove exactly when knowledge was gained as to know exactly when fifteen days elapse.[560]

The question which begs to be asked is whether a secured party who is out of the country but learns of the debtor's relocation of collateral through a friend or the media could be said to have gotten notified and should abandon everything else to return in order to re-perfect in the new jurisdiction of collateral within fifteen days?[561] Since the fifteen days rule and how knowledge is constituted are not clearly stated in OPPSA, the burden is left for the courts to use their discretion to determine on a case by case basis. The author therefore fears that since what and how knowledge is constituted, or which party has the burden of proof are unknown, OPPSA in its desire to protect buyers more than secured creditors, creates serious uncertainties that could really prove problematic in secured financing.[562]

From the foregoing, the author is of the view that it is easy to conclude that Article 9, which provides more protection for the secured party by offering a longer grace period is better in this regard. This is because secured creditors provide credits to investors, and should not in any way be made to lose out in their financial investments due to the debtor's or collateral's relocation

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to refile in other to retain priority or to hire someone to do so on his behalf – this is so especially as the Ontario filing registry is yet to be fully accessible outside Ontario – hence the need for re-perfection in a new jurisdiction within 15 days, so that searchers in the new jurisdiction will not be misled for long.

[560]See section 5(2) (b) OPPSA.

[561] This question is posed because section 5(1)(b) OPPSA only says "[w]ithin fifteen days after the day the secured party receives notice that the goods have been brought in…" The question then is who exactly is eligible to give notice to the secured party? This is not so obvious from the wordings of section 5.

[562] Critics of this work might say that the fear being nursed here is somewhat exaggerated, given that in practice, no court cases have sprung yet from these hypotheticals. However, in the author's view, the absence of cases on the issues does not justify the uncertainty of law in this regard.

which they were unable to control.[563] This view further gives an additional support to the truth that a repressive regime on secured creditors would result to an erosion of enthusiasm to lend, and over time the economy would be negatively affected by insufficient credit.[564] For other systems trying to follow the path of Article 9 with respect to continuous perfection rules, it might be useful to know that "four months" could be a source of controversy as to what it actually means – there could be divergent interpretations on the exact length of "four months"[565] in days, and since its effect here touches on priority, OPPSA seems to be clearer on this by saying fifteen days and not "half a month" which could either mean fourteen days, fifteen days or neither.

2.4.9. Lessons on choice of law: would it be an issue for Nigeria?

In Nigeria, issues pertaining to banking, bankruptcy, trade, and commerce are exclusively legislated upon by the federal parliament (National Assembly)[566] – meaning that the various thirty-six states do not have competence to legislate on these issues. The implication of this for Nigeria with respect to enacting a unitary-like system of secured transactions law is that only the National Assembly would have competence to legislate on secured transactions law without any input from

563 Although based on old Article 9, this article illustrates the buyer-secured party dichotomy – see Robert Dugan, *Buyer-Secured Party Conflicts Under Section 9-307(1) Of the Uniform Commercial Code,* 46 UNIVERSITY OF COLORADO LAW REVIEW, 333 (1975).

564 See FLEISIG HEYWOOD, et al, REFORMING COLLATERAL LAWS TO EXPAND ACCESS TO FINANCE (World Bank, 2006) at p.42.

565 In Nigeria, the definition of "month" is very varied. Two Supreme Court decisions contradict each other on the matter. Thus in *Akeredolu v Akinremi* (1985) 2 NWLR (pt. 10) 787, 798, the Supreme Court interpreted a month to mean 'a time from any day of the month to the corresponding day in the next month less one' – for instance, from June 13th to July 12th. However, before the decision in *Akeredolu*, the same court had directed that a month be computed from '[t]he first day of any month to the last day of that month' – this sometimes could mean 59 days. See *Oyekoya v GB Ollivant (Nig) Ltd* (1969 1 All NLR, 131. It is suggested that 'days' rather than 'months' be used when drafting the anticipated secured transactions in order to avoid multiple interpretations on the exact duration of a 'month'.

566 See the exclusive legislative list, contained in second schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

states' legislatures – being that a secured transactions law invariably implicates issues in banking, bankruptcy, commerce and trade. Thus, given that the National Assembly is constitutionally authorized to exclusively enact a personal property law for Nigeria, the implication of this is that although Nigeria is a federal state, secured transactions law can only be a federal law – the chances of varying state laws are therefore obviated.

Furthermore, it is an advantage for Nigeria that only the National Assembly has exclusive jurisdiction to legislate on secured transactions law because the internal conflict of law issues that sprinkle heavily on the secured transactions law of the various provinces in Canada and US are not expected to arise.[567] This would make the application of secured transactions law very uniform with less technicalities arising from inter-states transactions except when federal high courts located at different parts of Nigeria choose to give different interpretations for the same provision

[567] Conflicts of law issues are inherently 'poisonous' to the idea of free movement of people and capital – an essential criterion for robust economic growth – the movement of people and goods should not create a big source of litigations. These issues could vanish, perhaps completely, with full harmonization of secured transactions laws. In the case of Canada, the thought of a full harmonization could at best be called a 'wishful thinking' being that the various provinces have power to enact their personal property law that best suits their local conditions. This belief is also shared in the US, where one state could be radically different from another in many ways, even in culture – take Utah and New York, or California and Louisiana for example – the degree of local differences is overwhelming, and the need for these differences to be taken into account in the laws that govern some sensitive aspects of the American society or any other society for that matter is vitally important. No other writer in the author's opinion has elegantly captured the negativities of these conflict issues as Hans Kuhn did. See Hans Kuhn, *Multi-State and International Secured Transactions under Revised Article 9 of the Uniform Commercial Code*, 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW, 1009 (2000). This degree of differences exacerbated by the existence of choice of law rules in both jurisdictions (US and Canada) will invariably be non-existent in the Nigerian legal setting, being that the Nigerian legal system started on the notion of unity of legal culture – what has long been internalized. Although there have been a lot of aspersions and frictions in trying to live with this concept of unity of legal culture as the constitution 'imposed' – what many think is unsustainable and unrealistic, the issue of internal conflict of laws however, will not arise with respect to secured transactions in Nigeria – being that the federal government has the exclusive power to make laws in that regard.

of law. Even when that happens, such discrepancies could easily be reconciled by the Supreme Court whose decisions have uniform application across the country.[568]

This is not the case in the US and Canada where the component units have or could have variations in their secured transactions law because they do have power to legislate on such matters[569] – although in the US, all fifty states have substantially adopted Article 9 model law almost to the extent of achieving full harmonization, there still are other differences emanating from states' autonomy to include or exclude as they deem fit.[570] In Canada, because of the significant differences that exist in the various PPSAs, its choice of law rules for perfection and priority are very varied owing to the differences.

Furthermore, Article 9 separates the applicable law for tangible collateral – the law where the tangible collateral is located governs only 'the effect' of perfection or non-perfection.[571] In essence, it governs only the priority. While the debtor's location governs perfection in the tangible collateral, [572]the author thinks that the separation of the law governing perfection and priority with respect to tangible collateral could pose a significant confusion if perfection and priority are not

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[568] Eso (J. S. C. as he then was) in *Okoniji v. Mudiaga Odge* (1985) 10 S. C. 267 at 268, 289, lamented over the lower courts' failure to judiciously follow the decisions of higher courts. The learned Justice warned that "[i]n the hierarchy of courts in Nigeria, as in all other free common law countries, one thing is clear, however, learned a lower court considers itself to be and however, contemptuous of the higher court, that lower court is still bound by the decision of the higher court...I hope it will never happen again whereby the Court of Appeal in this country or any lower court for that matter would deliberately go against the decision of this court and in this case, even to the extent of not considering the decision when those of this court were brought to the notice of that court. This is the discipline of law. This is what makes the law certain and prevents it from being an ass". A similar admonition was also made by Ogbuagu J.S.C in *Osakue v. Federal College of Education (Technical) Asaba* (2010) 10 NWLR (Pt.1201) 1 at 34.

[569] See section 92(13) of the Canadian *Constitution Act 1867* which gives provincial governments the right to legislate on property and civil right.

[570] In the US, the power of the state to legislate on property could be traceable to the Bill of Rights, particularly the 10th Amendment – which in essence states that powers not expressly given to the federal government are to be exercised by the state or the people. Since section 8 of the US Constitution did not give Congress the power to legislate on property, the power to do so resides with each state to enact a law in that regard that governs its territory.

[571] See generally, section 9-301 UCC.

[572]*Ibid.*

determined by the same jurisdiction's law. It is the author's view that Nigeria has no need to look at Article 9 or OPPSA conflict of laws rules with any hope of transplanting its elements, being that the Nigerian version of PPSL will not generate such issues. If any lesson should at all be learnt from their conflicts of law issues – Nigerian lawmakers should ensure that these issues are avoided from the beginning by not amending the constitution to transfer the power to legislate on personal property to the state governments.

Another lesson that Nigerian lawmakers should learn is the following – that if the National Assembly enacts a secured transactions law (an Act), it would rank equally with other previously enacted Acts by it which could conflict with that of secured transactions.[573]This is further the case because the doctrine of implied repeal whereby a newly enacted statute impliedly overrules a

[573] For instance, going by second schedule to the Constitution of the Federal Republic of Nigeria, 1999 – the federal parliament has power to exclusively legislate on banking, consumer protection, and bankruptcy issues. Laws made pursuant to these items will rank equal in status with the anticipated PPSL. However, until the "doctrine of implied repeal" becomes an integral part of Nigeria's jurisprudence in law making exercise, a lot of controversies arising from contradictory provisions of equally ranking statutes will continue to be unavoidable – especially when it is truthfully the case that the Nigerian federal parliament (National Assembly) is proverbially slow in reacting to issues pertaining to conflicts amongst statutes, law reform, or revision. Having a proactive legislature has been reduced to wishful thinking and this is majorly because the existent gatekeeper laws which screen potential legislators in Nigeria are so weak that often times, grossly incompetent fellows easily infiltrate themselves into the parliament.

As at the time of writing this thesis, the Nigerian Constitution provides that the minimum academic qualification to be a federal legislator is high school certificate (see section 65(2) Constitution of the FRN, 1999 (as amended). This is no longer reasonable considering the fact that our 21st century global world presents quite a set of complicated issues and challenges which require intelligent responses that could hardly be tackled by the majority of lawmakers who find themselves in the Nigerian legislative houses. Again this strongly reaffirms the truth that secured transactions law, no matter how elegantly drafted from the beginning cannot be a panacea to economic quagmire because issues are bound to occur on the pathway of experiments, and thus, require prompt responses to amend problematic laws in order to ensure that citizens/investors' trust and confidence in law are not badly eroded as a result of the unfixed lapses.

In any case, the efficient function of other vital institutions in the country (other than a modern secured transactions law), must be in place before a giant leap in the economy could be contemplated – economic success is always an evolutional process and a step in the right direction is always better than none at all. See the final conclusion of this thesis for more details on the additional factors that would likely impede the efficient function of any enacted secured transactions law in Nigeria and how those factors could be timeously arrested.

contradictory preexisting one,[574] does not apply in Nigeria. This is a problem, and it should be expressly inserted in the anticipated PPSL that its provision shall prevail when they conflict with the preexisting laws.[575] Another option is to expressly mention in the PPSL, those statutes/laws that should be made subordinate to the PPSL– this is the Ontario approach.[576]

2.5. Priority under Article 9 and OPPSA

The big attention given to perfection of security interests and the underlying intricacies are in essence meant to determine who has priority over collateral when security interests are in conflict.[577] It would to a large extent be irrelevant to discuss priority if a debtor's pool of assets

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[574] For a fulsome discussion on the subject, see Winston Chew, *Doctrine of Implied Repeal by Deseutude – A Legal Anachronism or Viable Principle,* 5 SINGAPORE LAW REVIEW, 139 (1984).

[575] For instance, being that the Nigerian Constitution empowers only the federal parliament to enact secured transactions law, (*see second schedule to the 1999 constitution – as amended*) it raises a legitimate worry as to whether some other federal statutes might conflict with the PPSL in which case it becomes difficult to know which would be followed, and of course render the PPSL impotent a kind of. This looming uncertainty if not addressed, either by inserting a provision in the PPSL that repeals any conflicting statutes, could cause chaos – for instance, floating charge is contained in the Company and Allied Matters Act, 2004. Thus, it remains a big question what Nigeria would do to address the obvious incompatibility between the floating charge concept which cannot effectively co-exist with a unitary model and the entire concept of floating lien which is a natural content in the unitary model that was birthed in the US. One option is to do thorough research on other laws that will conflict and expressly repeal them in the PPSL or to state generally that the PPSL will supersede earlier statutes where they come in conflict.

[576] See section 2 OPPSA which in addition to stating that the Act adopts a functional approach to secured transactions, went further to expressly mention certain key security devices and their statutes as now being subject to OPPSA provisions. The Nigerian PPSL should do something similar in one of its provisions.

[577] The basic priority rules are contained in section 30 OPPSA and section 9-322 UCC. 'Priority Rules' occupy a big portion of Article 9 and OPPSA texts – this is because a secured party's hierarchical status determines whether he will partake in the debtor's estate, being administered by the bankruptcy trustee. Gilmore devoted 419 pages in his two-volume texts to discuss priorities as they affect different collateral – no writer yet has been able to capture priority issues in such elaborate detail as it relates to UCC Article 9. Although his two volume texts were not based on today's version of Article 9, they no doubt remain very relevant in understanding the underlying intricacies of the subject – this is more so, considering the fact that Gilmore was one of the fountainheads behind the drafting of UCC Article 9 and his *ghostly* voice which still echoes loudly from his texts remains legendary. See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, pp. 654-1072. In addition, the following articles are seminal with respect to a discussion on Article 9 priorities – although also based

could adequately satisfy all classes of creditors when the debtor defaults – in which case there would not be any need for a lender to worry if he would realize his money. But because this is not always[578] so, there has to be a way of determining the order by which all classes of secured creditors could satisfy their security interests – starting from the most senior class to the least, subject to minor exceptions, like in purchase money security interests.[579] In the case of debtor's bankruptcy, priority contest extends to three main classes of creditors – preferred creditors, secured creditors and unsecured creditors.[580]

Even though the debtor's assets were to be so valuable as to satisfy all classes of creditor, the issue of priority between a secured creditor with an unperfected security interest and a bona fide purchaser for value without notice would still bother our minds. Determining a lender's priority status in respect of a common collateral is vitally important because it is a strong factor in determining how much a lender is willing to lend or not to lend at all. Without detailed priority rules which give a lender an accurate idea of where he stands on the priority queue, the whole essence of Article 9 and OPPSA would be largely unrealized. Yet, the rules governing priority are

on previous versions of Article 9, the core ideas and the explanations offered by the authors remain highly relevant even with today's version of Article 9. See Peter F. Coogan, *Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien",* 72 HARVARD LAW REVIEW, 838 (1959) and David G. Carlson, *Rationality, Accident, and Priority under Article 9 of the Uniform Commercial Code*, 71 MINNESOTA LAW REVIEW, 207 (1986).

[578] Even though a secured party figures that a debtor has more than enough assets to satisfy all his creditors, it still remains a big challenge how he will fare when the debtor sells the collateral to a third party in the ordinary course of business – the claim of bona fide purchase would defeat the secured party with an unperfected security interest.

[579] Before the advent of Article 9 as earlier said in section 2.1 above, priority issues existed very disorderly and bred so much confusion as it was not easy to determine issues of priority involving more than one financing device with respect to a common collateral. The existence of priority rules for every secured transaction creating a security interest in collateral remains one of the major breakthroughs in US and by extension, Canadian secured financing regimes. For the minor exceptions to the general rule of priority, (purchase money security interests and its kins), see generally, section 9-324 UCC.

[580] WILLIAM D. WARREN & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY (New York, Foundation Press, 7th edition, 2007), pp.466-468.

not absolute and admit exceptions due to some justifiable policy reasons behind OPPSA and Article 9 which would be explained below[581].

2.5.1. Basic priority rules among competing security interests: First in time, first in right

The basic priority rules in OPPSA[582] and Article 9[583] commonly provide for the first to file or perfect rule. What this means is that except in purchase money security interest situations, and its kins[584] earlier perfected security interests in a collateral are entitled to priority over later perfected security interests in the same collateral, regardless of the method of perfection used.[585] In essence, both regimes figuratively support agility in race – who is first able to win the race to the registration office or perfect by other methods, and not whose security interest was first

[581] See section 9-324 UCC. For the OPPSA equivalent, see section 33 thereof.

[582] Section 30(1) OPPSA states as follow: "If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral: 1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection. 2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration, i., the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and ii., the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest. 3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection. 4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment."

[583] Article 9-322 (a) [General priority rules.] "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 interests 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. (2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien. (3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected".

[584] See 9-324 UCC and section 33 OPPSA.

[585] See section 9-323 – Official Comment 3 in the revised Article 9 (2000) and the Example 1 thereof for a good illustration of the first to file or perfect rule.

created.[586] The first to file or perfect rule has two elements. The first element is that priority with respect to security interests perfected by filing, seniority is determined by the order of filing. This rule is meant to provide certainty as it is easier to prove who filed first with the registry's time, instead of relying on the time of creation of security interests which could be problematic to determine. Similarly, the major policy reason could be to preserve the relevance of the filing system which could be greatly undermined if secured creditors were allowed to determine priority on the basis of creation of security interests, but could not provide public awareness for same through registration.[587]

The second element is that security interests are ranked in the order of their perfection, regardless of the method of perfection used. Here, security interests perfected by possession or control come to the fore. Unfortunately, with respect to possession or control methods of perfection, neither Article 9 nor OPPSA has robust rules either to sufficiently warn a third party about the existing encumbrances on the assets being re-used by a debtor as collateral, or a clear formula on how to establish seniority of interests perfected by control or possession. This is because if the debtor and secured party for instance have only an oral agreement and the transferred possession – in which case they end up with evidence law on how to prove the existence of the

[586] See section 9-322 and its Official Comment 4, Example 1.
[587] In *Chicago District of Carpenters Pension Fund v Tessio Construction Co.*, 2003 WL 21312664, 51 UCC2d 268 (N.D. Ill.2003) the court expressed its unwillingness to sacrifice the certainty provided in first to file rule, regardless of the possibility that in this case, hardship on the beneficiaries of the pension fund was probable. Before the decision in *Chicago District of Carpenters Pension Fund,* a Minnesota court has arrived at the same *ratio*. For full details, see *In the Matter of Bruce A. Smith,* 326 F. Supp. 1311 at p. 1315 (D.C. Min.) (1971). In like manner, a good number of Canadian decisions have expressed the view that knowledge of a secured party about the existence of a security interest does not affect his priority status supposing he filed first. This was expressed in the following cases: *Bank of Nova Scotia v Gaudreau* (1984), 48 O.R. (2s) 478, 4 P.P.S.A.C 158, 27 B.L.R 101 (H.C.J), *B.M.P and Daughter Investment Corp. v 941242 Ontario Ltd.* (1992), 96 D.L.R. (4th) 741, 11 O.R. (3d) 81 (Gen. Div.); *Frankel v Canadian Imperial Bank of Commerce* (1997), 12 P.P.S.A.C (2d) 306, (1997) O.J. No. 2671, 47 C.B.R. (3d) 244 (Cameron J.); *The Robert Simpson Co. Ltd v Shadlock* (1981), 119 D.L.R. (3d) 417, 31 O.R. (2d) 612 (H.C.J); *National Trailer Convoy of Canada Ltd v Bank of Montreal* (1980), 10 B.L.R 196, 1 P.P.S.A.C 87 (Ontario H.C.J).

possessory pledge. As already hinted at above, Polish law for instance is clearer on this point – by making it mandatory for a possessory pledge agreement to be in writing, and the date of agreement certified by a notary – that way, the date of creation as well as seniority could easily be established.[588]

Another interesting feature in Article 9 and OPPSA is worth pointing out. This is the authorization of a secured creditor (by contract) to file a financing statement even before its security interest attaches to the debtor's collateral, yet on the basis of that alone such secured creditor who filed first before his security interest attached could defeat another secured creditor who subsequently created and perfected its security interest in the same collateral by filing – if and only if the first secured creditor goes ahead to fulfill the requirements for attachment.[589] In that case, perfection of security interest of the first creditor *relates back* to the time he first filed.[590] That way, first to file defeats first to perfect if security interests on the collateral for both competitors were perfected through filing. The rationale behind this is also to protect the filing system for its use in creating public awareness – because in the scenario just painted, both Article 9 and OPPSA commonly expect that the second secured creditor who went ahead to perfect his security interest by filing ought to have checked the registry. By checking, he would have been

[588] A more complete discussion was already undertaken above: on the Polish method vis-à-vis possession, see section 2.4.3. On 'control', capturing US and Canadian perspectives with lessons for Nigeria, see sections 2.4.4. and 2.4.5. above.
[589] This conclusion is accommodated within section 9-322(a) (1) UCC. For deeper insight, see also the Official Comment 3 to 9-322UCC and the case of *Brodie Hotel Supply, Inc., v United States of America,* 431 F.2d 1316, C.A. Alaska (1970).
[590] This should always be understood though from the perspective of first to file or perfect rule – if two competing security interests were perfected by filing the first to be filed supersedes regardless of whether security interest had attached at the time it was filed. However, this cannot be the case if the second secured party perfected in a way other than filing – in which case first to perfect rule governs.

able to know that a prior security interest was already existing, thereby prompting him to ask relevant questions.[591]

The only argument that may be used to challenge this position of OPPSA and Article 9 regarding priority is that the act of 'blocking' other potential secured creditors by going ahead to file before security interest attaches could be greatly abused by some lenders.[592]Being that both legal regimes are ardent supporters for sufficient availability of credits to debtors, the author opines that it should be deemed an abuse in egregious cases if a secured creditor goes ahead to file without first giving value, thereby defeating the primary purpose of entering into a security agreement – which is to make credit available to debtors. By refusing to first give value but goes ahead to file,[593] he becomes a 'dog in the manger' and indeed blocks the debtor's (especially in SME financing) the chances of getting credits from other potential secured creditors who could be willing to grant him credits. It would work seriously against the debtor if potential secured creditors take a look at the registry and become uninterested to lend credit for assets that have been encumbered through filing, yet the debtor has not received value in their respect. The debtor becomes stranded, unable to get credit and do business, and this could cast aspersions on the efficacy of Article 9 and OPPSA, or any country's secured transactions law strictly modeled after them.

[591] This was the courts' view in *First National Bank & Trust Co v Atlas Credit Corp*., 417 F.2d 1081, 6 UCC 1223 (10th Cir. 1969), *In re smith*, 326 F. Supp. 1311, 9 UCC 549 (D. Minn. 1971); *Bloom v Hilty,* 427 Pa. 463, 234 A.2d 869, 4 UCC 821 (Pa.1967) and *In re Mann*, 318 F.Supp. 32, 8 UCC 132 (W.D. Va. 1970).

[592] For instance, even the court could not fathom correctly what was supposed to be done in this kind of circumstance – hence when Home Savings filed a financing statement but never executed a security agreement, the court held that MorAmerica who later executed a security agreement and filed with respect to the same collateral was subordinate to Home Savings. This was a wrong conclusion being that Home Savings did not have a security agreement and its first filing was meaningless in the priority fight. For full details of the case, see *MorAmerica Mortgage Co v Home Savings Association* 654 S.W.2d 654, 36 UCC 1025 (Mo.App.1983).

[593] See *Carson restaurants International Ltd v A-I United Restaurant Supply Ltd* (1989) 1 W.W.R. 266, 72 Sask. R. 205, 8 P.P.S.A.C 276 (Q.B) where the court had the chance to discuss this. Essentially, courts in their equitable jurisdiction (resting especially on the doctrine – *ubi jus, ibi remedium*) could mitigate circumstances where a secured party tries to exploit the debtor.

Even though it may be argued that the secured party filed in advance following the debtor's consent to do so, it may well be that the debtor was pressured to do so, judging from the secured creditor's stronger position in bargaining – such that disbursing credit to the debtor is on the condition that the secured party is allowed to file in advance. Circumstances may abound where the secured creditor having filed to block other potential creditors, delays terribly in advancing credit to the debtor – yet the only option the debtor has may be to file a termination statement (which is by the way the duty of the secured party) so as to lift the encumbrance on the collateral and open doors for other creditors[594].

The drafters of Article 9 and OPPSA may have been aware of this possibility but their preference for the contrary is very much rooted to the preservation of the registration system and not to encourage any attitude that might impede its use. This is because a potential secured creditor ought to first take a look at the registry to determine if collateral is free from any encumbrance – he should not therefore be protected for his reckless neglect of the registry as that would be accepting from the back door what was expelled from the front. In any case, a secured creditor who does not imbibe the habit of first checking the registry before executing a security agreement with a debtor and disbursing him credit, would have no way of knowing if the requirements for attachment have been fulfilled by an existing secured creditor, or if other secured creditors have already perfected by filing – he should therefore merit no special protection under both regimes.

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[594] This corresponds largely with the decisions in a few Canadian cases where the first to register rule was abused – the courts relied on their general powers to apply principles of equity to remedy unjust situations and acts exclusively based on bad faith. See *Carson restaurants International Ltd v A-I United Restaurant Supply Ltd* (1989) 1 W.W.R. 266, 72 Sask. R. 205, 8 P.P.S.A.C 276 (Q.B), followed later in *Starthcona Brewing Co v Eldee Investment Corp.* (1994) A.J No. 245, 17 Alta. L.R. (3d) 405, and was distinguished in *Canadian Imperial Bank of Commerce v .Menitzer (Trustee of)* (1993), 23 C.B.R. (3d) 161 (Ont. Gen. Div.) Also see *Fotti v 777 management Inc;* (1981) 5 W.W.R. 48, 9 Man. R. (2d) 142, 2 P.P.S.A.C. 32 (Q.B).

To summarize, both Article 9 and OPPSA generally agree to the following: that a perfected security interest is senior to an unperfected security interest as well as a security interest perfected later in time. That between two perfected security interests, the first to be filed is senior if both security interests were perfected by filing, or the first to be perfected, if they were validly perfected by different methods.

2.6. Major exceptions to the first to file or perfect rule under Article 9 and OPPSA

2.6.1. The law's 'favorite child': Buyer in the ordinary course of business

It is the common position of OPPSA[595] and Article 9[596] that a buyer in the ordinary course of business could take free from any security interest given by the seller even though it is perfected and the buyer knows of it, provided the buyer did not know that the sale constituted a breach of a security agreement.[597] This is because, Article 9 and OPPSA are commonly interested in protecting the merchandise market by striking a reasonable balance between the lending and buying markets. There are some circumstances in which a buyer in the ordinary course of business cannot be reasonably expected to know that the collateral he is buying is subject to a perfected security

[595] See section 28(1) OPPSA.

[596] See section 1-201(b) (9) UCC.

[597] Section 1-201 (b) (9) defines "Buyer in ordinary course of business" as "a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices". This definition is invariably the same with the one given in section 28(1) OPPSA. see generally – Skilton H. Robert, *Buyer in Ordinary Course of Business under Article 9 of the Uniform Commercial Code (and Related Matters)*, WISCONSIN LAW REVIEW, 1 (1974). Some US recent cases have been restricting their definition of the term within the confines of section 1-201 UCC, – *CIT group/ Commercial Services, Inc. v. Constellation Energy Commodities Group*, 78 U.C.C. Rep. Serv. 2d 674 (E.D. Ky. 2012), *CNH Capital America LCC v Progresso Materials Ltd.*, 78 U.C.C Rep. Serv. 2d 1007 (S.D. Tex. 2012).

interest. An immediate example may involve those situations whereby a collateral which was perfected in one jurisdiction changes location into another jurisdiction – both Article 9 and OPPSA in such circumstance give the secured party a grace period within which to re-file.[598] During this grace period to re-file,[599] the debtor could deceitfully offer the collateral to an unsuspecting buyer whose search in the registry of the collateral's new location could not have revealed any information about the collateral. Such buyer under this circumstance would qualify as a buyer in the ordinary course of business and would therefore receive a passionate favor from the law.

Furthermore, the rationale behind this rule is also deeply rooted to the concept of after-acquired property[600] especially in inventory financing where the changing stocks are all automatically perfected, yet the debtor is allowed to dispose of them in the ordinary course of business. A buyer buying from such a debtor might of course know that the security interest in the stocks has been perfected, but such knowledge is insufficient to inform him that the sale is constituting a breach of a secured party's security agreement with the debtor (seller). If buyers in the ordinary course of business are not protected, then nothing bought from a regular supermarket for instance may be free from prior security interests, neither is a consumer (buyer) expected to

[598] See section 5(2) (b) OPPSA and section 9-316(b) UCC.
[599] See *Ibid* – grace period between 15 and 60 days for OPPSA, and between four months and one year for Article 9.
[600] The after-acquired property clause in a security agreement, also referred to as 'floating lien' is to the effect that a secured party could execute a security agreement, coupled with a financing statement which perfects his security interest in the debtor's present and future assets – such that the secured party's security interest in personal property to be acquired gets perfected as they are acquired without a fresh act of perfection. For details, see Peter F. Coogan, *Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien",* 72 HARVARD LAW REVIEW, 5 (1959), pp. 838-88 and Wyatt W. John, *The Floating Lien under the UCC*, 67 AMERICAN BUSINESS LAW JOURNAL, 5 (1967), p. 293. These two authorities, though aged, are still relevant with respect to floating lien and priority discussion under Article 9.

visit the registry before going to purchase in a supermarket – even if he does, market will come to a halt if he is not expected to take free of any security interest.[601]

In any case, it should be remembered at all times that knowledge of existence of a perfected security interest is not what disqualifies a buyer from enjoying this 'favoritism' accorded to him by law – rather his knowledge that the sale constituted a breach of security agreement is firmly required to nail him.[602] The burden of proving 'knowledge' naturally rests on the party who alleges that the buyer was aware that such sale constituted a breach of the third party's right in a security agreement[603] – what might be difficult to prove considering that 'knowledge' is a mental state, and ought to be actual – though it could be argued to also be constructive.

2.6.2. Future advance clause – would a security interest granted to cover future advances amount to a PMSI?

Both OPPSA and Article 9 allow for the use of future advance clauses.[604] It is commercially realistic that most credit advances to a debtor by a secured creditor are not one-time in nature – thus, circumstances exist where business prudence requires that the debtor receives credits when needed and the need being substantiated.[605] This may be for a number of reasons – it could be that

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[601] This market reality is what sections 9-320 UCC and 28(1) OPPSA have tended to address.

[602] Thomas Waldrep tried to expatiate the import of former 9307(1) which is now the current section 9-316(b) UCC. The section no doubt requires the buyer to act with good faith throughout any transaction he intends to claim the defense of buyer in the ordinary course of business. See generally – Thomas W. Waldrep, Jr., *Sections 9-307(1) and 1-201(9) of the Uniform Commercial Code: The Requirement of Buying from a Person in the Business of Selling Goods of That Kind*, 58 INDIANA LAW JOURNAL, 335 (1982). For a broader consideration of the topic, see generally, GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II. Chapter 35.

[603]For a general overview on burden of proof and how it works in civil cases, see a recent article by Haynes Andrew, *The Burden of Proof in Market Abuse Cases*, JOURNAL OF FINANCIAL CRIME, Vol. 20, Issue 4 (2013), pp.365-392.

[604] See section 13(2) OPPSA, section 9-204 UCC.

[605] Future advance is provided for under section 9-204 UCC and its Official Comment 2, as well as section 9-323 UCC. For the OPPSA equivalent, see section 30(3).

the secured party does not have in one block all the credits the debtor needs. It could also be that owing to the level of risk associated to a debtor's business, it makes business sense that he receives credit when needed, and the need proved by documents. The assured but intermittent supply of credit enables him to test different lines of investments with only part of his capital – meaning that in the case of an unexpected and devastating event, he could depend on a future advance to resuscitate his business.

Whatever the reason may be for resorting to the use of future advances, the big question is what the position of the secured creditor is with respect to advances made after the first one? Supposing that the secured party perfected his security interest on the first advance and filed a financing statement,[606] after which other secured creditors made advances and perfected security interests with respect to the same collateral. The question then is what would be the priority status of the first secured party with respect to the future advances vis-a-vis the security interests of subsequent secured creditors who advanced and perfected in respect to the common collateral?

The answer that Article 9 and OPPSA commonly offer with respect to future advances is that the security interest in a collateral created with first advance continues to automatically affect future advances. In other words, a secured party's priority regarding each subsequent advance is not determined from the date of that subsequent advance, but will relate back to the date of first perfection of the first advance. This goes to mean that a secured party with a future advance

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[606] It is compulsory to indicate in the financing statement that a future advance exists in the debtor's favor otherwise the subsequent future advances would not be deemed to be perfected from the time the first advance was made and perfected. This was the court's decision in *Coin-O-Matic Service Co. v. R.I. Hospital Trust Co*., 1966 WL 8987, 3 UCC 1112 (R.I.Super.1966) and same verdict was reached in the following cases as well: *Re Hagler*, 1972 WL 20786, 10 UCC 1285 (Bankr.E.DTenn.1972), *Texas Kenworth Co. v. First Nat'l Bank of Bethany,* 564 P.2d 222, 21 UCC 1512 (Okla.1977), *ITT Indus. Credit Co. Union bank and Trust Co*; 615 S.W.2d 2, 30 UCC 1701 (Ky.App.1981).

agreement will enjoy priority over subsequent secured creditors if the secured party perfected his first advance.[607]

However, retaining priority over future advances comes with a strong procedural requirement on the part of the secured party who enjoys the future advance priority – thus, for a secured party with future advance clause to retain seniority over subsequent secured creditors, he must disclose such in the filed financing statement.[608] The reason for this is to provide enough warning for subsequent creditors who would need such vital information to determine whether extending credit to the debtor is wise considering that an existing perfected security interest would rank above theirs. Non-disclosure of a future advance in the filed financing statement could lead to an opportunistic behavior on the debtor's part who could obtain double financing and give a misleading impression to a subsequent financier that priority was still to be governed by the general first to file or perfect rule. Where the secured party fails therefore to disclose that he provides the debtor with future advances, both Article 9 and OPPSA are of the view that he should not enjoy priority in the future advances against the interests of subsequent secured creditors.[609]

One drawback with disclosing a future advance clause in the financing statement is that potential secured creditors are scared to provide finances to the debtor, even when the debtor has repaid a substantial part or all of his debts to the future advance secured creditor, the latter might

[607] See section 9-322(a) (1) UCC and its OPPSA equivalent at section 30(3). See generally – University of Chicago, *Priority of Future Advances Lending under the Uniform Commercial Code*, THE UNIVERSITY OF CHICAGO LAW REVIEW, Vol. 35, Issue 1, (1967), 128-150. Also available at http://www.jstor.org/stable/1598950 (last visited on October 24, 2014).

[608]This was the court's decision in *Coin-O-Matic Service Co. v. R.I. Hospital Trust Co*., 1966 WL 8987, 3 UCC 1112 (R.I.Super.1966).

[609]*Ibid.* Also see section 9-322 UCC and the relevant Official Comments therein.

be undisposed to immediately file a termination statement.[610] The interlude between when the debtor fully repays and when the future advance secured party files a termination statement, the debtor would have lost the opportunity of being financed by other potential secured creditors – the debtor is therefore stuck to one financier and has to bear with all his whims and caprices. In any case this is the 'lesser evil' compared to if the debtor and secured party with future advance clause were to mislead potential secured creditors to part with their money through non-disclosure of the future advance clause in the financing statement, yet get the these secured creditors to 'sit' on a bedraggled and low ranking seat upon the debtor's bankruptcy. The debtor who wants to allow the insertion of a future advance clause in a financing statement is strongly advised to ensure that he does so only when the future advances are large enough to be a good alternative to what might be obtainable from other secured creditors. If not, it would not make a good business sense for the debtor to insert, or allow the secured party to insert a clause that could inhibit potential secured creditors from extending credits to him.

One question that the author has encountered during informal debates with colleagues on this subject is whether a security interest created to cover future advances could possibly amount to a purchase money security interest,[611] being that the line of credit opened to the debtor could enable him to purchase in the future the needed assets that could jumpstart or enlarge his business – especially where the future advance is large enough to solve his later needs in the business. The short answer to this question is in the negative, at least from the author's perspective. This is

[610] In *First National Bank and Trust v Sec. National Bank and Trust Co. of Norman, Okla.*,678 P.2d 837, 38 UCC 640 (Okla.1984) the court said that where the security agreement contains a future advance clause, such clause will continue to remain effective even though the entire debt was at one time fully repaid. This reasoning of court probably proceeded from the fact that the lifespan of a financing statement is five years – meaning that even though the debt was repaid but a termination statement was yet to be filed, the secured party with future advance clause would still retain priority if he at any time makes an advance within the timeframe.
[611] See section 2.6.3 below for a more detailed discussion on purchase money security interest.

because assets purchased with money from a future advance arrangement could be covered by a floating lien, but the latter cannot cover assets purchased under a PMSI arrangement. In fact, the philosophy behind the creation of PMSI is to neutralize the excessive power possessed by a floating lien creditor[612] who gives a one-time credit, and secures himself with the debtor's present and after-acquired personal property covered by the security agreement. Also, another difference might be that a floating lienor gives a one-time credit and afterwards, does nothing extra to improve the debtor's business even in times of business downturns. Instead, he could fold his arms and wait for the bankruptcy day to come, when he shall step out to fully satisfy himself with every available assets – while a secured party with a future advance clause, maintains presence in terms of a revolving line of credit even when the debtor might be experiencing difficulty and needs some money to nurse his business back to health.

The author concludes by saying that a future advance clause in a security agreement cannot amount by any means to a PMSI because both are different in principle, being that a secured creditor who has opened lines of credit cannot be able to identify the exact collateral that his future advances were used in purchasing – this is a core requirement when establishing a PMSI claim in collateral.[613]Since a PMSI claim must always satisfy the definition of a PMSI, it could be rightly argued that it is not the same with a future advance clause.

Nigeria does not have a legal framework that provides clear-cut rules on future advances with respect to personal property collateral. Future advances are sometimes created by banks in

[612] See generally on floating lien – Minh Van Ngo, *Getting The Question Right on Floating Liens and Securitized Assets*, 19 YALE JOURNAL ON REGULATION 85 (2002), and the Chapter 11 (especially from page 359) in GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. I, which discusses floating lien in an elaborate detail.

[613] In the case under reference, the court had maintained that the establishment of a PMSI must be in accordance with its definition. See Sherri A. Saucer, *Mbank Alamo National Association v. Raytheon Co.: A Strict Interpretation of Article Nine's Purchase Money Security Interest*, 36 LOYOLA LAW REVIEW, 501 (1990) at footnote 10.

favor of debtors who have offered real property collateral, but it is all a matter of contract. No statutory rules. As a result of this lack, secured creditors cannot safely advance future credits based on the initially perfected security interest on a collateral. As it stands, and with emphasis on real property mortgage for instance, in Nigeria, a secured party could be protected for the first advance but not subsequent advances which cannot be known by looking at the registry. Unfortunately, no case has yet bothered on this in Nigeria. What this entails, is that the secured party would have to execute new security agreement and perfect same in the land registry each time it advances to the debtor – this is cumbersome and cost ineffective. It is submitted that the anticipated PPSL should therefore include future advance possibility in light of the foregoing discussion – from the OPPSA and Article 9 perspectives.

2.6.3. Purchase money security interest – the 'darling' of law

The concept of purchase money security interest (hereafter: PMSI) is common to OPPSA and Article 9 and is basically a security interest with super-priority created over specific new assets financed or supplied by a purchase money lender who enjoys the super-priority.[614] PMSI's genealogy is traceable to the common law conditional sale and other retained title financing devices like hire purchase and security leases[615] – which in essence involve situations where the seller of good retains title to it until full payment is made by the buyer. In other words, PMSI entails that the debtor acquires specific new assets, financed by the purchase money lender. [616] Furthermore, under common law the seller was to have priority if the buyer sold the good to

[614] See generally section 9-103 UCC and section 33 OPPSA.
[615] JACOB S. ZIEGEL & DAVID L. DENONME, THE ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS (Toronto, Butterworths, 2nd edition, 2000), p.281.
[616] See section 9-103 UCC for the definition of PMSI, and section 33(1) OPPSA.

another before completing payment, being that legal title still remained with the seller[617] – which also entitled him to use the equitable remedy of 'tracing' to locate the good in the hands of a third party – unless the third party could prove he was a bona fide purchaser for value without notice.[618] When US and Ontario adopted the unitary system of secured transactions law, such that all transactions creating any form of security interest was to surrender to Article 9 or OPPSA rules respectively, PMSI found its way into Article 9, and eventually into OPPSA.[619]

To qualify as a purchase money lender, the lender must have financed the debtor in the latter's acquisition of specific new assets either by selling the new assets to the debtor on credit or by granting the debtor loan that would be used to specifically purchase the new assets – and the assets in fact get purchased with the given loan.[620] When this is the case, and the lender further observes some procedural requirements under Article 9 and OPPSA,[621] his security interest in the assets which he financed their purchase, becomes superior to other secured creditors of the debtor – in particular, the floating lienor whose security interest extends always to the debtor's present and future assets (or a substantial part of it) within the precinct of the security agreement. This

[617] This was the decision of court in *C. I. T. Corp. v. Guy,* 170 Va. 16**,** 195 S. E**.** 659 (1938).

[618] See generally – Glenn Garrard, *Conditional Sale at Common Law and as a Statutory Security*, 25 VIRGINIA LAW REVIEW, 559 (1938-1939).

[619] See section 9-324 UCC for the super-priority accorded to PMSI, and section 33(1) OPPSA.

[620] See Official Comments 3 and 4 of section 9-324 UCC, esp.; the examples therein. Courts have seriously insisted that a claim in PMSI must meet up with the definition accorded to it – such that where a debtor buys some assets with his own money during the time he expects loan from a bank or lender – if the loan is eventually given to the lender, it will not qualify the lender to claim purchase money priority on those purchased assets. This was the court's decision in *Corim, Inc. v Belvin,* 202 Ga. App. 396, 414 S.E.2d 491, 17 UCC2d 624 (1991), and also in *Bank v Purdy*, 205 Ill. App. 3d 62, 150 Ill. Dec. 420, 562 N.E.2d 1223, 14 UCC2d 271 (1990), where the court held that the debtor's possession of assets before loan was granted, did not grant a purchase money status to the lender.

[621] Except in consumer goods, the purchase money lender is expected to perfect his security interest by filing in non-consumer goods when the debtor receives possession of the collateral or within 20 days thereafter, while additionally, a PMSI in inventory requires the debtor to give notifications to existing secured creditors who have security interests in the debtor's inventory. See section 9-324(a) UCC especially the Official Comment 3 of thereof, which gives a detailed explanation. The OPPSA equivalent is contained in section 30(2), although OPPSA provides 15 days as compared with Article 9's 20 days grace period within which time to notify the relevant stakeholders.

arrangement self-evidently creates an exception to the rule that priority of security interests amongst secured creditors with respect to the debtor's assets is determined from the date of a secured creditor's filing or perfection[622] – that is, earlier class of secured creditors enjoy priority over later ones with respect to the debtor's assets.

It is important to emphasize that the accordance of a PMSI privilege on a purchase money lender must strictly be based on the fulfillment of two major conditions which are contained in the PMSI attributes or definition. ***First***, the purchase money lender must finance the debtor in *acquiring new assets* that it did not previously have.[623]***Second***, the money so advanced by the purchase money lender must be used for purchasing the new assets[624]and cannot be used for any other purpose. These two major criteria sharply differentiate a purchase money lender from general secured creditors under Article 9 and OPPSA.

It should also be noted that both regimes commonly provide that PMSIs in consumer goods get automatically perfected upon attachment – this is probably so, considering the usual nature of consumer goods – they are not as costly as capital goods. The policy reason could be that transaction costs would be higher, and it would be very inconvenient if the purchase money lender

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[622] The basic priority rules are contained in – Section 9-322 UCC, and section 30(1) OPPSA.

[623]Held by courts in *Bank v Purdy*, 205 Ill. App. 3d 62, 150 Ill. Dec. 420, 562 N.E.2d 1223, 14 UCC2d 271 (1990), and *Valey Bank v Estate of Rainsdon*, 117 Idaho 1085, 793 P.2d 1257, 12 UCC2d 823 (Idaho App.1990) where the bank was denied PMSI status because the money it gave the debtor was used in paying for something else other than the assets being claim by the bank. A court of Appeal decision in Canada also excluded a sale and lease back of the sold item from serving as security, as held in *Unisource Canada v Laurentian Bank of Canada* (2000), 47 O.R. (3d) 616 (C.A), which seemed to have followed the earlier decision in *Re Speedtrack Ltd* (1980), 11 B.L.R. 220, 33 C.B.R. (N.S.) 209, 1 P.P.S.A. 109 (Ont. S.C).

[624]*In re Brooks*, 1980 WL 98467, 29 UCC 660 (Bankr.D.Me.1980*), N.Platte State Bank v prod. Credit Association of N. Platte*, 189 Neb. 44, 200 N.W.2d 1, 10 UCC 1336 (1972) and *ITT Commercial Fin. Corp. v Union Bank and Trust Co of N. Vernon*, 528 N.E.2d 1149, 7 UCC2d 901 (Ind.App. 1988). A percipient study of these cases, reveals the courts' insistence that money advanced to the debtor (of which the lender purports a PMSI claim) must indeed be used in purchasing the assets on which purchase money claim is made. See also, *Heidelberg E; Inc. v Weber Lithography, Inc* 213 A.D.2d 127, 631 N.Y.S.2d 370, 27 UCC2d 1081 (N.Y.A.D. 2 Dept.1995). Above all, see the Official Comment 3 to section 9-103 UCC for a pellucid elucidation.

were to be required to file in consumer goods – what could also overwhelm registry offices with numerous entries and files.[625] Compared to the less costly nature of consumer goods, the possible benefits to be gained by filing PMSIs in consumer goods are less than the increase in transaction costs which may eventually be borne by the consumer debtor who already might be witnessing some hardships in his small business. Although both OPPSA and Article 9 gave a definition as to the meaning of consumer goods, its actual meaning is still recondite – not as clear cut as it sounds.

For instance, both legal regimes define consumer goods as "goods that are used or acquired for use primarily for personal, family or household purposes".[626] Yet, as clear as this definition purports to be on the surface, it could sometimes be vague, subject of varying interpretations and conclusions, and a seed-bed of litigations – for example, there could be different understandings as to what could be for a personal use? Could a person purchase a trailer-truck and drive around for pleasure just for the sake of driving? Could a farmer's wagon used in gathering crops as well as driving his family qualify as personal use? What about mobile homes?,[627] – just to mention a few. These borderline cases are not so easy to decipher as to know whether a PMSI in them should be perfected by filing or not. However since litigation is costly, it is strongly advised that when it comes to some of these borderline cases, a secured party should file since it is not certain whether an ensuing litigation would be in his favor.

[625] JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (West Publishing Co, United States, 6th edition, Practitioner Treatise Series, Vol. 4, 2010), p.151.

[626] See section 1(1) OPPSA and section 9-102(23) UCC.

[627] This dilemma presented itself before the court in *In re Sewell*, 32 B.R. 116, 37 UCC 303 (Bank. N.D.Ala.1983), rev'd 79 B.R. 36 (N.D.Ala.1984) whereby the argument that a mobile home was a consumer good because it is for personal use met with the challenge whether it was not subject to the special perfection accorded to motor vehicles. This dilemma was one of the factors that prompted James Whites' seminal article on how certainty could be achieved on borderline cases – see generally, James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, LOYOLA LAW REVIEW, 26 (1993), pp.823-42.

2.6.4. The logic behind PMSI

Under Article 9 and OPPSA, the PMSI rationale is closely linked to the concept of floating lien – a device that perfects security interest in debtor's present and future acquired property[628] just with one-time perfection by filing. The use of after acquired property to secure lending makes good sense considering the nature of many businesses that make use of shifting stocks as well as dispose and restock inventories – the debtor is allowed to continue to deal with his goods in the ordinary course of business. The concept is unarguably an indispensable tool in modern commerce and without it, the use of inventory to secure lending would be impossible. Thus, the only way to use shifting stocks (inventory) to secured lending – bearing in mind that it is practically impossible to register each and every stock that goes in and out of debtor's business, is to provide for a floating security which allows the holder with a one-time perfected interest to satisfy his claim from the debtor's present and after-acquired property within the security agreement – even though the future property were yet to be owned by the debtor at the time of signing the security agreement.

This ability to extend claims to present and after-acquired property of the debtor makes the floating lienor ordinarily very powerful. However, Article 9 and OPPSA are of the common view that circumstances may exist whereby the debtor faces a visible hardship in his business that could discourage further financing from existing secured creditors who may just be waiting for bankruptcy time, to scramble for the debtor's assets. It may only just be that the debtor needs some new assets that could tremendously assist in jumpstarting his business back to life, yet a new sympathetic lender who believes that the debtor's request for assets infusion could possibly revive

[628] Being a concept, the term 'floating lien' is not contained in Article 9 or OPPSA texts, rather its life is derived from the after-acquired property clause provisions contained in section 9-204 UCC and section 12 OPPSA – which permits a secured party to create security interest in a debtor's present and future property. Without the floating lien device, inventory financing would have been practically impossible to undertake – and to accommodate this vital form of collateral in financing, floating lien was the answer although with its own challenges as well. See also Official Comment 2 to section 9-204 UCC for a more robust explanation.

his business would under the temporality rule, be subordinated to the perfected security interest held by a floating lienor and other prior secured creditors. Following the first to file or perfect rule, there would be no incentive for a new lender to intervene and save the debtor's dying business by supplying or financing new assets. Thus, this ensuing negative disposition on the part of a potential financier towards financing a distressed business would not be apropos with the economy as businesses would hardly be saved – what could lead to job losses and economic downturn.[629]

When a debtor's business is experiencing hardships which naturally stimulates fear among his secured creditors, that business of the debtor shall soon come to an end, no rational lender at such time would want to pump in money or finance assets for the debtor, when he knows his generosity would only fetch him the back seat following the first to file or perfect rule. In this kind of conundrum, Article 9 and OPPSA offer an incentive for any lender who infuses assets by according such lender with purchase money priority status – which overrides a previously perfected security interest of a floating lienor that would ordinarily have extended arms to the newly infused assets. PMSI operates to contain the enormous power which the floating lienor enjoys that could create a situational monopoly that thwarts the possibility of the debtor's alternative access to credit, especially at critical moments. This is not to say that floating lien is anti-business growth, in fact it supports it – being that it is the only way the use of shifting stocks/inventories could be practically utilized as collateral. Instead, Article 9 and OPPSA only

[629] See the seminal article written by Jackson and Kronman in support of the use of PMSI, being that it prevents the possibility of the secured party to create a situational monopoly as well as enables the debtor to seek other lines of credit when he thinks fit. See Thomas H. Jackson & Anthony Kronman, *Secured Financing and Priorities among Creditors*, 88 YALE LAW JOURNAL, 1143 (1979).

balanced the equation between allowing the use of after-acquired property as collateral, and the necessity of saving dying businesses by treating the rescuer kindly and fairly.[630]

To summarize, when PMSI is created on consumer goods, the purchase money lender need not perfect his security interest – it automatically gets perfected following attachment. However, where PMSI is created over non-consumer goods, other than inventories, the purchase money lender has a specified period[631] within which to perfect his security interest. If he does perfect within the specified time, he enjoys priority over a floating lien creditor. His procedural duty is however extended when it concerns inventories.[632]

Article 9 and OPPSA have a common exception to the foregoing discussion. When it involves the creation of purchase money security interest in inventories, the procedural requirements of a PMSI holder becomes a bit further stretched under Article 9 and OPPSA.[633] To retain priority over existing secured creditors – especially floating lien creditors in the infused assets which form part of debtor's inventories, three conditions must be well satisfied. First, before the debtor possesses the collateral, the PMSI in the collateral must have been perfected.[634] The understanding of possession in this circumstance is safely assumed to be physical possession of the collateral as any other understanding would invariably overcomplicate the issue. Second, both

[630] A brilliant discussion on the balancing of a floating lienor's and purchase money lender's interests in their debtor's business, see John Jeremie, *Gone in an instant – The Death of "Scintilla Temporis" and the Growth of a Purchase-Money Security Interest in Real Property Law*, JOURNAL BUSINESS LAW, 363 (1994), pp.364-369. (Although talking mainly about real property, the logic of PMSI as used in the article was very much the same as in personal property).
[631] Twenty days to perfect under Article 9 – see section 9-324(a) and 15 days to perfect under OPPSA, see section 30(2).
[632] See section 33(1) OPPSA. In addition to perfecting within 15days, he is also required to give notice to existing secured creditors whose interests would be affected by his PMSI. The Article 9 equivalent is contained in section 9-324(b).
[633] *Ibid.*
[634] See section 9-324(b) (1) UCC, section 33(1) (a) OPPSA.

regimes commonly maintain that before the debtor obtains possession of the collateral, the purchase money lender is statutorily required to give notice[635] to secured creditors whom he knows of their prior security interests or who have filed financing statements covering the inventories which the purchase money lender's infused assets formed part of.

Third, both regimes commonly require that an authenticated notice by the purchase money lender be sent to any other secured party, stating that he intends to acquire a purchase money security interest in the debtor's newly acquired assets which would ordinarily form part of the inventories that the other secured creditor has perfected by filing a financing statement.[636] The holder of a conflicting security interest in the inventory must receive the notice within twenty days before the debtor acquires possession of the newly infused assets that form part of his inventories.[637]

The likely policy reason why both regimes require the giving of notifications to prior secured creditors about a purchase money lender's intention to acquire a PMSI in new assets that form part of debtor's inventories is traceable to the possibility that such prior secured creditors might have created revolving lines of credit to the debtor. Therefore to avoid double financing, which is bound to create complicated issues of priority, the PMSI creditor is required to notify other secured creditors having security interests in the debtor's inventories – who possibly created future advances of credits in favor of the debtor. Armed with such notification from a PMSI holder, they could discontinue further advances of credit knowing full well that a superior interest has been created by the debtor with respect to a part of his inventory or asset pool. If both regimes did not make 'prior notification' a stringent requirement, a debtor could fraudulently obtain future

[635] Section 9-324(b) (2) UCC, section 33(1) (b) OPPSA.
[636] Section 9-324(b) (4) UCC, section 33(1) (b) OPPSA.
[637] Section 9-324 (c) UCC, section 33(1) (c) OPPSA.

advances from a secured creditor – yet, such future advance secured creditor could be defeated by a PMSI holder because the former's credit arrangement does not exactly go by the name of PMSI. Where these requirements are not judiciously complied with by a purchase money lender, he cannot enjoy priority over existing secured creditors whose security interests in the debtor's inventory were perfected first, following the temporality rule.[638]

There is the frequently asked question as to whether a purchase money lender's priority in the infused assets follows also in proceeds arising from the sale of the assets?[639] For instance where the debtor sells the encumbered inventory in the ordinary course of business, being that the buyer in the ordinary course of business without knowledge that the sale violates a third party's security interest right enjoys the law's protection, the purchase money lender cannot trace the collateral in the bona fide purchaser's hand but could trace the proceeds realized from the sale in the debtor's hands. The question becomes more complicated when the money realized from the sale is deposited in a deposit account whereby the bank is the debtor's creditor also. This seems to be a grey area with scanty judicial precedents – the author opines (although contrary to Professor Ziegel's view) that by depositing the proceeds with a bank, the bank perfects its interest by control and the purchase money lender's priority becomes subservient to the bank's right of set-off.[640]

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[638] See the justifications given in Official Comments 4 and 5 to section 9-324 UCC.

[639] A short answer is in the positive – that if the security interest in PMSI was perfected, the proceeds emanating from the sold PMSI collateral remain also perfected and could be traced – this however is limited to identifiableness. If the purchase money lender cannot identify the exact collateral that was covered by PMSI or the exact proceeds, he loses out to the floating lienor. This is also what the Official Comment 8 to section 9-324 UCC says – the reader is kindly advised to see it for a more detailed explanation.

[640] See section 2.4.4, above for a more complete discussion on 'control'. Ziegel's view is opposed to the current understanding of Article 9, and even Canada quite recently. In fact, the Official Comment 4 to section 9-327 UCC categorically states that bank has priority over money in the deposit account it controls over any other secured creditor. This firm stance of Official Comment 4 to 9-327 UCC settles a long existing dilemma expressed in many cases before now, whereby courts have been confused of what to hold – some cases said that Article 9 was silent on the issue of priority between a banker and a secured party under Article 9 with respect to proceeds kept in a deposit account which the former controls, while another line of cases held that the banker's right to set off was subservient being that it is

2.6.5. The challenges posed by PMSI

The foregoing has been able to state that PMSI is an asset infusion device, designed by law to lessen the monopolistic powers possessed by a lender who enjoys an after-acquired property right from using such powers to create a situational monopoly, and tie its debtor's hands from seeking additional funding either from him or a third party. However, the foregoing discussion has only shared the beautiful part of PMSI's story, in that, nothing yet is known about a possible disadvantage of taking up a PMSI.

The author has identified two implications that are common to the PMSI discussion under Article 9 and OPPSA. First, a PMSI holder is restricted to the infused assets – ordinarily a floating lienor's security interest would extend to any after-acquired assets that are not covered by a PMSI due to the first to file or perfect rule. Hence, being that a PMSI claim is specifically limited to the identified-infused assets, a purchase money lender could run a risk of only being left with depreciated assets when the debtor defaults, unlike a floating lienor who could satisfy his security

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a contractual right in conflict with a statutory right. These views were touched upon in the following cases: *National Acceptance Co of America v Virginia Capital bank*, 498 F Supp. 1078 at p.1083 (E.D. Va.) (1980), *Universal C.I.T Corp v Farmers Bank of Portageville*, 358 F.Supp. 317 (E.D. Mo., 1973) and *Anderson, Clayton & Co. v First American Bank of Erick*, 614 P.2d 1091 (Okla. S. Ct.) (1980).

Professors Ziegel and Denonme, while commenting on the OPPSA equivalent of Article 9-327, which is contained in section 40(1) OPPSA, concluded that a banker's right to set-off cannot be superior to a secured party's or a PMSI holder who had traced proceeds into a deposit account in which the banker controls. See JACOB S. ZIEGEL & DAVID L. DENONME, THE ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS (Toronto, Butterworths, 2nd edition, 2000), pp. 209–212. The authors admitted that their views contradict with that of Professor Goode – a doyen of English commercial law – ROY GOODE, LEGAL PROBLEMS OF CREDIT AND SECURITY (London, Butterworths, 2nd edition, 1988) Chapter six.

To see the forgoing discussion from the perspective of Saskatchewan (a common law province in Canada), see R.C.C. Cuming, *Security Interests in Accounts and the Rights of Set-Off*, 6 BANKING & FINANCE LAW REVIEW, 299 (1991), wherein the author's view corresponds largely with the one stated by the Official Comment 4 to section 9-327 UCC as well as the view of Prof. Goode on the matter. With close reference to what is most appropriate for Nigeria, the author of this work disagrees with Professors Ziegel and Denonme on this matter and aligns his view with that stated by Official Comment 4 to section 9327 UCC – following the Canadian Securities Transfer Act (2012) and the Supreme Court of Canada's decision in *Caisse Drummond* (supra), thus, the used-to-be differing positions of Canada and US with respect to control and deposit account, have converged. See section 2.4.4., above.

interest from all other assets of the debtor that are not PMSI-encumbered. Thus, a purchase money lender cannot satisfy his interest with non-PMSI assets of the debtor, such that what was an initial advantage to him being that his infused assets were not to be claimed by the floating lienor becomes a huge disadvantage if the PMSI collateral have greatly depreciated in value at the time of default, and he would have to become unsecured (right *in personam*) with respect to any deficient sum.[641]

Second, being that the purchase money lender is statutorily required to prove that the infused assets he claims were actually bought with the money he lent to the debtor, there is a palpable difficulty in identifying the assets if they have so mixed up with other fungible assets of the debtor. The burden of proving that a set of assets was infused through the financing of the purchase money lender is on him[642] and where these assets have mixed up, it could be very difficult to identify. This problem would usually arise because most times the segregation of infused assets from other regular assets of the debtor could be impracticable, and where it appears feasible, it is not without heavy costs on the part of the purchase money lender. The question then is who should bear the cost of segregating the infused assets from the other assets of the debtor?[643] These

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[641] It is apparent that where a PMSI holder in equipment is unable to fully satisfy his money claim from the supplied assets due to the assets' depreciation in value, he can either sue the debtor for the balance or join other unsecured creditors of the debtor to share the latter's assets pro rata with them for the defient sum. For more details, see George G. Triantis, *Financial Slack Policy and the Laws of Secured Transactions*, 29 JOURNAL OF LEGAL STUDIES, 35 (2000), pp. 55-59.

[642] See section 9-103 (g) UCC and its Official Comment 7(c). Section 33 OPPSA is however silent on the issue of burden of proof, but courts in Canada have agreed that it rests on the purchase money lender. See *Dube v Bank of Montreal* (1986), 27 D.L.R. (4th) 718, 45 Sask. R. 291, 7P.P.S.A.C. 233 (C.A.), varg 5 P.P.S.A.C. 269 (C.A.), and *Canadian Imperial Bank of Commerce v Marathon Realty Co.* (1987), 40 D.L.R. (4th) 326, also reported in [1987] 5 W.W.R. 236 57 Sask. R. 88 (C.A.).

[643] Given the fact that the purchase money lender has the burden of proof, it means that he has the duty to make identification of the infused assets easier for himself. If he chooses to ensure the segregation of the infused assets, this would of course incur him costs – the cost of policing or ensuring that assets are not mixed up might cut so deep into his expected profits from the purchase money transaction.

questions do not have easy answers, yet the questions must be answered before a purchase money lender is able to know in the end which assets came from him and should not form part of those that would satisfy a floating lienor's security interest.

The author's suggestion and by extension, an advice to Nigeria, is that the infused assets (equipment) be either stamped with the purchase money lender's registered mark or name – or with a customized inscription on the assets – whichever is better, to ensure easy identification of the PMSI assets.[644] But this solution cannot be feasible where the infused assets form part of the debtor's inventories which have perfect resemblance with other products, so much so that it is not possible to write on the inventories or distinguish between the newly infused stocks and other stocks that form part of the inventories. This makes tracing the PMSI-inventory very difficult – and leaves the purchase money lender only with the right to trace proceeds realized from the sale of the PMSI-inventory.[645] The narrative becomes hopelessly circular when the realized proceeds are paid into a deposit account[646] of which the depositary bank has control.

[644] This suggestion is similar to the "sign posting requirement" under section 2–326(3) (a) UCC with respect to consigned goods. However, they differ because consignment refers to inventory (goods for sale), while PMSI assets in the nature of equipment are what the debtor uses for production and may not necessarily be displayed at one place in the debtor's business premises, and unlike consigned goods, they do not give immediate impression that they are for sale. In the context of PMSI, the author thinks that the requirement of inscribing the purchase money lender's sign on the supplied assets would be a better cure of ostensible ownership in Nigeria.

[645] Section 33(1) OPPSA gives the PMSI lender in inventory to enjoy priority with respect to proceeds realized from the sale of inventory, but paid into a deposit account of which another secured party has a perfected security interest, regardless of the time of registration. But this is not the case where the secured party is a bank, having control.

[646] See the analysis on section 2.4.4., on the supremacy right between a secured party and a depositary bank with respect to proceeds of which the latter has control.

2.7. Default – rights and remedies of a secured party under Article 9 and OPPSA

It could well be argued that the strength of Article 9 and OPPSA with respect to their ability to provide sufficient credits for doing business through organized set of rules starts to be tested from the moment of debtor's default.[647] How efficient Article 9 and OPPSA are able to confront risen issues after default determines whether a continuous pledge of confidence or otherwise in them would be maintained. Post-default mechanisms could also determine to what extent lenders are willing to lend being that an improper handling of situations resulting from unclear legal provisions might result to an apathy in lending, if secured lenders are not sure of recovering their invested money easily. In the same vein, stringent measures against debtors could eventually also lead to an apathy in borrowing and doing business – what could boil down to a situation of massive unemployment. It is agreed that some sort of balance has to be maintained and all of that converts itself into action from the moment the debtor defaults – 'default' is a game changer in secured transactions, and both Article 9 and OPPSA have a great deal of commonalities in their approaches to default.

[647]Ulrich Drobnig, *Basic Issues of European Rules on Security in Movables*, in JOHN DE LACY (ed), THE REFORM OF UK PERSONAL PROPERTY SECURITY LAW: COMPARATIVE PERSPECTIVES (Routledge-Cavendish, 2010) 449, cited in Tibor Tajti, *Could Continental Europe Adopt a Uniform Commercial Code Article 9-Type Secured Transactions System? The Effects of the Differing Legal Platforms*, 35 ADELAIDE LAW REVIEW, Volume 35 Number 1, 149 (2014), at 157. The article is also available online at http://www.adelaide.edu.au/press/journals/law-review/issues/alr-vol-35-1/ch10-alr-35-1-tajti.pdf (last visited on October 26, 2014).

2.7.1. Default – some commonalities and differences between Article 9 and OPPSA

OPPSA defines default as "the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event whereupon under the terms of the security agreement the security becomes enforceable."[648] Article 9 however did not provide a definition for default but left parties to a security agreement the contractual freedom to define what should constitute default in their agreement.[649] Gilmore and Ziegel, both of whose works are strong authorities in US and Canadian secured transactions laws respectively, settled on two tests for determining default. First, they both agreed that failure on the part of the debtor to pay or perform a secured obligation when such is due constitutes an automatic default. This is usually the case when a security agreement is silent on what should constitute default.[650]

The second test resting on the freedom of contract is common to both regimes and rests on the position that default is determined following what the parties have stated as the constituting elements in their security agreement.[651] What could concisely be said about default under both

[648] See section 1(1) OPPSA.

[649] However, the Official Comment 3 to section 9-601 UCC categorically states that Article 9 "leaves to the agreement of the parties the circumstances giving rise to a default…" This was the exact holding of the court in *Padin v Oyster Point Dodge,* 397 F.Supp.2d 712, 59 UCC2d 553 (E.D.Va. 2005), and *Chesapeake Investment Services Inc. v Olive Group Corp*. 2003 WL 369682 Sup. Ct. Jan.30, 2003. See also, DOUGLAS J. WHALEY, SECURED TRANSACTIONS (Barbri, 2006), p.146. For a very thorough treatment on the various provisions that elicit discussion on default under Article 9, see Timothy R. Zinnecker, *The Default Provisions of 1999 Article 9 of the Uniform Commercial Code: Part I,* 54 BUSINSESS LAWYER, 1113 (1999). Part II of the article by the same author is equally relevant and could be found at http://scholarship.law.campbell.edu/cgi/viewcontent.cgi?article=1053&context=fac_sw (last visited on October 26, 2014).

[650] GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965/reprinted in 1999), vol. II. p.1193, and JACOB S. ZIEGEL & DAVID L. DENONME, THE ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS (Toronto, Butterworths, 2nd edition, 2000), p.482. Also, where the parties fail to stipulate the meaning of default, its ordinary meaning in contract will be resorted to fill the gap. The court applied this approach in *Cofield v Randolph County Comm'n*, 90 F.3d 468, 30 UCC2d 374 (11th Cir. 1996).

[651] *Ibid.* See also *First National Bank v Beug,* 400 N.W.2d 893, 3 UCC2d 856 (S.D.1987) where the party's contract defined the elements of default which the court endorsed.

regimes is that beyond the debtor's inability to repay credit and interest when due, both parties could choose other elements that constitute it, although some elements of reasonability is expected.[652] If the constituting elements are unconscionable, the court might in its equitable power and frequent desire to protect the weaker party, refuse to enforce the deemed unconscionable elements of default.[653]

For the benefit of the secured party whose 'prophecies' may not be accurate enough with respect to the chosen elements that constitute default, he is strongly advised to include an insecurity/acceleration clause in the security agreement which gives him the right to declare default at any time he deems himself insecure.[654]This is a technique and a shorthand formula that covers

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[652] For a detailed list of elements of default compiled over time through the lens of several cases, see the seminal work of William B. Davenport, *Default, Enforcement and Remedies Under Revised Article 9 of the Uniform Commercial Code*, 7 VALPARAISO UNIV. LAW REVIEW, 265 (1973). Available at: http://scholar.valpo.edu/vulr/vol7/iss3/1 (last visited on October 26, 2014).

[653] See section 9-603 UCC and its Official Comment 2, which says that the parties can set what constitute default provided it is not "manifestly unreasonable" – for instance, whatever is set as a defaulting element should not permit the secured party to breach the peace. For cases of abuses and the concomitant reactions of courts, see the following cases *Parks v. Phillips*, 71 Nev. 313, 289 P.2d 1053 (1955), (where the court held that repossession of vehicle 30 days before the due date was premature and insecure clause could not have qualified in the circumstance. In this case damages claimed by the debtor was upheld).

Also in *Roy v. Goings*, 96 Ill. 361 (1880) (a realization of a defect in mortgage transaction on crop was asserted as being enough to trigger the insecurity clause. Court held that the exercise of the insecure right was not done in good faith. And in *Furlong v. Cox*, 77 Ill. 293 (1875) (the repossession of a collateral which was cardinal to a business operation on the reliance of insecurity clause was invalidated. Court held that the debtor could not have given the consent to repossess an asset without which the operation of his business was impossible. These cases were extracted from the footnote 14 in William B. Davenport, *Default, Enforcement and Remedies under Revised Article 9 of the Uniform Commercial Code*, 7 VALPARAISO UNIVERSITY LAW REVIEW, 265 (1973), available at http://scholar.valpo.edu/vulr/vol7/iss3/1/ (last visited on October 26, 2014). See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II; at p.1197, esp. footnote 3. The two tests above are hereby recommended to feature into the Nigeria's anticipated PPSL.

[654] Insecurity/acceleration clause is an old device that has long been accepted in common law contract. Earlier cases from US include: *General Motors Acceptance Corp. v Shuey*, 243 Ky. 74, 47 S.W.2d 968 (1932), *Street v Commercial Credit Co;* 35 Ariz. 479, 281 p.46 (1929) From England and Canada: *Hoodless v Long* (1921), 67 D.L.R. 600, 51 O.L.R. 419, 21 O.W.N. 248 (C.A.); *Sawyer-Massey Co. v Dagg* (1911), 18 W.L.R. 612 (T.D.); *Ransom v Case* (1924), 27 O.W.N. 63, *Protector Endowment Loan & Annuity Co. v Grice* (1880), 5 Q.B.D. 592, 49 L.J.Q.B. 812, 43 L.T. 564 (C.A.); *Walker v Mason* (1957), 21 W.W.R. 374 (B.C.S.C.); *West City Motors Ltd v Delta Acceptance Corp. Ltd* (1961), 40 D.L.R. 92d) 818.

possible events that might lead to default after the conclusion of a security agreement.[655] It is not compulsory that the clause bears the name "insecurity clause" in the agreement, rather insecurity clause could be gleaned from the general wordings of the agreement. However, this contractual right could only be accorded validity if it is exercised in good faith and reasonableness without any intendment on the secured party to hurt the debtor.[656] In the last analysis, it is left for the court to determine on case by case basis, whether the good faith and reasonableness tests were passed in the exercise of insecurity right under a security agreement.[657]

2.7.2. What's next after default?: Cumulative rights versus the doctrine of Marshalling

Both Article 9 and OPPSA offer the secured party a smorgasbord of remedies such that once default has occurred, the next thing a secured party would logically do is to exercise one or all of his rights cumulatively against the collateral. OPPSA slightly has a longer list of remedies,[658] but the ones both regimes share in common are the right to retain collateral,[659] the right to take

[655] Section 16 OPPSA reads thus "where a security agreement provides that the secured party may accelerate payment or performance if the secured party considers that the collateral is in jeopardy or that the secured party is insecure, the agreement shall be construed to mean that the secured party may accelerate payment or performance only if the secured party in good faith believes and has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy." For the UCC equivalent, see section 2A-401 UCC.
[656] See section 1-208 UCC for the good faith requirement that should be exercised – also in Article 9 transactions. This is also evident is section 16 OPPSA which uses the phrases: "good faith" and "commercial reasonableness" to qualify the right to act based on an acceleration clause.
[657] For a more general discussion on acceleration/insecurity clauses and their measurement tests of reasonability and good faith, see JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (USA, West Publishing Co; 6th edition, Practitioner Treatise Series, 2010), pp. 405-416.
[658] See generally, section 59(1) OPPSA which states that "where the debtor is in default under a security agreement, the secured party has the rights and remedies provided in the security agreement and the rights and remedies provided in this Part and, when in possession or control of the collateral, the rights, remedies and duties provided in section 17 or 17.1, as the case may be".
[659] See section 9-620 UCC, and its Official Comment 5 for explanations. See also section 65(2) OPPSA.

possession or without removing it from the debtor's premise, render equipment unusable and dispose of same in the debtor's premises,[660] the right to dispose the collateral[661] and the right to sue for the debt.[662] As already said, these rights are cumulative[663] – meaning that a secured party may use them simultaneously until his full claim is realized provided that he exercises his rights in good faith.[664]

However, where Article 9 and OPPSA suspect that they accorded so much power to a party – usually the secured party, they have commonly provided a way to whittle down such powers so as to avoid severe hardship on the debtor or other interested parties. With respect to the secured party's right to enforce his remedies cumulatively, the doctrine of marshalling[665] has been chosen by both regimes to checkmate the use of these remedies by senior secured creditors in a way that would not seriously jeopardize the genuine interests of junior secured creditors. In the absence of

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[660] See section 62 OPPSA, and section 9-609 UCC and its Official Comment 6. An example that fits to this particular right may be to remove a vital part of the debtor's equipment that makes it cease to function. Another good example may be to change the password of the computer system that controls the debtor's business operation, or by installing a software into the system that enables the secured party to disable function upon debtor's default. Paralyzing the debtor's business this way, might force him to quickly repay debts or make frantic efforts to arrive at a compromise with the secured party.

[661] See section 9-610 UCC and especially its Official Comments 2 – 5, for explanations on what a secured party should do before disposal. See also section 63 OPPSA.

[662] See sections 59(2), (7) and 64(3) OPPSA, and section 9-601 (a) UCC and its Official Comment 6.

[663] See section 58 OPPSA and section 9-601(c) UCC and its Official Comment 5 which states that the secured party could "[s]imultaneously exercise his remedies if he acts in good faith".

[664] See section 1-208 UCC – all provisions of the UCC including Article 9 must be carried out in good faith.

[665] An equitable doctrine that ensures that a senior secured party that is entitled to two funds first of all exhausts one before resorting to the second, so that other junior creditor[s] might have something left to satisfy their owed debts. Courts in US and Canada have been resorting to the use of this doctrine under their power to use equitable principles to ensure fairness in secured transaction dealings between parties. For a masterful discussion of the doctrine, see B. CLARK, THE LAW OF SECURED TRANSACTION UNDER THE UNIFORM COMMERCIAL CODE (A.S. Pratt: Arlington, VA, revised edition, 2000), pp. 4-108. See also, Labovitz I.D, *Marshaling under the U.C.C: the State of the Doctrine,* 99 BANKING LAW JOURNAL, 440 (1982). To read cases that established the marshalling doctrine, see C*ulpepper v. Aston,* 2 Ch.Cas. 115, 117 (1682), *Merchants & Mechanics Bank v. Sewell,* 61 F.2d. 814 (5th Cir.1932); *Meyer v. United States,* 375 U.S. 233, 236, 84 S.Ct. 318, 11 L.Ed.2d 293 (1963); *Houston v. Phillips,* 189 F.2d 15 (5th. Cir. 1951), *In re Beacon Distributors, Inc.,* 441 F.2d 547 (1st Cir.1971) – these cases are still relevant as they have largely formed the basis upon which courts define the doctrine in contemporary cases.

such check as marshalling doctrine does, it would be absolutely unenticing to be ranked as a junior secured creditor – this would result to gross unwillingness to lend after one or two secured creditors have lent and encumbered common collateral. That way the debtor's ability to obtain credit and expand in his business would be seriously hindered – and this is perhaps the policy reason behind the doctrine or why it is still retained till date.

Here is an example of how it could function – where a senior secured creditor has security interest in inventory and equipment for example and a junior secured creditor has a security interest in only inventory, the doctrine in such circumstance obliges the senior secured creditor to exhaust the equipment before resorting to the inventory, but not simultaneoulsy. For the doctrine to be invoked, it should be shown that the contesting parties have a common debtor who owns two funds of which one of the secured creditors is entitled to satisfy his claim from both funds – and that resorting to the two funds would create a terrible hardship[666] to the other junior secured creditor. The doctrine is rooted in OPPSA and Article 9's keen interest to maintain fairness and balance of interests – taking into account the vulnerable position of any interested party in a security agreement or affected by it, the consequences that may abound from stretching a right too far.[667]

[666] This was the court's position in *S. Lotman & Son, Inc v Southeastern Financial Corp.* 263 So.2d 499 (Ala.) (1972).
[667] Courts deciding transactions based either on Article 9 and OPPSA, have been expressly empowered by both legal regimes to resort to equitable powers and other doctrines of law rooted to fairness in order to ensure that good justice is done. See section 1-103 UCC and its Official Comments 1, 2, & 3 that expressly empower courts to resort to supplemental rules to support the provisions of the Code. This is a natural part of OPPSA – a provincial law that interplays with federal laws and the common law principles that are of general application especially if they have been recognized by the Canadian Supreme Court. For a more penetrating treatment of the doctrine, see generally – Bruce Macdougall, *Marshalling and the Personal Property Security Acts: Doing unto Others...*, UNIV. BRITISH COLUM. LAW REVIEW, vol. 28:1, (1994), pp. 91-122. Also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368570 (last visited on October 29, 2014).

2.7.3. Enforcing security interests privately: Article 9 & OPPSA compared

The provision of self-help remedy for the secured party is grounded on many commercial realities. Article 9[668] and OPPSA[669] have the common understanding that their efficacy rests delicately on enforcement – that the ability of a secured party to realize his money quickly is vitally important, so that he could remain always motivated to give credits which are the life blood of any economy. The other alternatives to self-help remedy as in Article 9 and OPPSA are the rights of a secured party to render collateral unusable in the debtor's premises, sell it, or retain it in satisfaction of debt.[670]However, majority of US and Canadian scholars on secured transactions support the secured party's right of self-help to recover collateral[671] as that will continue to ensure their enthusiasm to lend out credit. If this were not to be the case, they argue,[672] it will constitute a huge impediment towards the full realization of secured creditors' financial investments – eventually leading to the insufficient supply of credits on the market. For example, the several delays associated with litigation could lead to unpleasant situations whereby the subject-matter of litigation depreciates significantly in value before the apex court could give its verdict.

[668] See section 9-609 UCC.

[669] See section 62(1) OPPSA for the right to repossess collateral upon debtor's default under a security agreement. The wordings of section 62 OPPSA – "upon default under a security agreement, the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law", give the impression that the right to repossess by self-help is only a contractual right as well as draws validity from other laws. However, Wright J in the Canadian case – *Mid-Canada Radio Communications Ltd v Mechanical Services (1979) Ltd* [1984] 2 W.W.R. 569, 31 Sask. R. 286, 25 B.L.R. 187, 3 P.P.S.A.C. 203 (Q.B.), opined that "Unless otherwise agreed" should instead mean that the right is statutorily inherent unless the parties expressly exclude it in their contract. For a masterful discussion on this, see JACOB S. ZIEGEL & DAVID L. DENONME, THE ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS (Toronto, Butterworths, 2nd edition, 2000), p.506.

[670] See section 9-609 UCC and section 62(b) OPPSA.

[671] It is important to note that even though all the common law provinces in Canada provide for self-help repossession of collateral following debtor's default, Alberta, the Northwest Territories, and Nunavut "restrict the exercise of self-help remedies by providing that a seizure pursuant to a security agreement must be undertaken by a civil enforcement bailiff or sheriff" See RONALD C.C. CUMING, CATHERINE WALSH & RODERICK J. WOOD, PERSONAL PROPERTY SECURITY LAW (Toronto: Irwin Law, 2005), p.529.

[672] See Anita G. Wandzura, *The Enforcement of Security Interests Against the Personal Property of First Nations Persons on A Reserve,* 39 OTTAWA LAW REVIEW 1, (2008), p.6.

Additionally, litigation especially in protracted court matters could be very expensive to the extent that money spent on litigation equals or becomes higher than the possible profits to be realized from the contentious transaction – this could slowly poison the enthusiasm towards lending.[673]

Viewed from the angle of commercial realism, one sees that self-help notwithstanding some jurists' criticisms against its use, is a significant means by which OPPSA and Article 9 retain relevance – because self-help remedy remains the least stressful method by which a secured party realizes the money owed him by the debtor. However, nothing in the foregoing discussion should be taken to mean that the efficacy of self-help remedy in the US or Ontario is of universal application – much has to do with the level of rule of law in place in a country.[674]

No doubt, there is a high probability of abusing the right to repossess by self-help on the part of the secured party or the repo-man.[675] To checkmate as well as reduce the likelihood of abuse, both Article 9 and OPPSA have commonly imposed a very stringent yet fluidly designed concept known as "without the breach of peace" test,[676] which is used in measuring the level of civility applied during the repossession of debtor's collateral by the secured party. The effect of its breach is very colossal to a secured party's case – meaning that where a secured party breaches

[673] In the US and Ontario (also in Nigeria) each party to a litigation bears its own litigation costs – this is a common practice in common law systems, while in civilian systems, the losing party in addition to bearing its own costs, also bears the litigation costs of the winning party. The common law approach which mandates each party to bear its costs could easily discourage a secured party with a small money claim from suing, thereby discouraging him from granting small credits that micro and small enterprises might request for.

[674] See chapter three (section 3.7) for a discussion on how Article 9 and OPPSA kind of self-help may be adapted to fit local conditions in Nigeria.

[675] This is perhaps why the province of Alberta requires the involvement of sheriffs and bailiffs in the private enforcement of security interests in a debtor's collateral. See Part 5 of Alberta's Civil Enforcement Act 2000 entitled "Seizure of Personal Property". Available at http://www.qp.alberta.ca/documents/Acts/C15.pdf (last visited on February 15, 2016), pp. 43-46.

[676] See section 9-609 (b) (1) UCC. OPPSA did not expressly state the "without the breach of peace'' restriction in any of its provisions. However, the decision of Schroeder J.A in the celebrated Court of Appeal's case of *R v Doucette* (1960), 25 D.L.R. (2d) 380, 384; 129 C.C.C. 102, [1960] O.R. 407, 33 C.R. 174 (C.A.) has fully stated that a secured party can only repossess if a breach of peace would not occur in the process.

the peace in the process of repossessing collateral, the court will mostly likely condemn his act and perhaps award punitive damages against him.[677] Unfortunately for the secured party, this doctrine was not defined in Article 9 and OPPSA, and courts are allowed to interpret what it means in each case by considering every relevant circumstance.[678] As would be expected, judicial

[677] The breach of peace requirement was infringed in the following cases and the court did not hesitate to frown upon the secured party's action: See *General Finance Corp. v Smith*, 505 So.2d 1045, 3 UCC2d 1278 (Ala.1987); *Sanchez v Mbank of El Paso,* 792 S.W.2d 530, 12 UCC2d 1169 (Tex.App.1990), where the independent contractor entered debtor's premises with security dogs to facilitate repossession – the court was not amused. See also *Nicholas v Metropolis Bank,* 435 N.W.2d 637, 8 UCC2d 270 (Minn. App.1989), *Sammons v Broward Bank,* 599 So.2d 1018, 17 UCC2d 1371 (Fla.App.1992). See section 9-625 UCC. And on remedies for a secured creditor's failure to comply with part 6 of Article 9 UCC, see generally, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (USA, West Publishing Co; 6th edition, Practitioner Treatise Series, 2010), pp. 1353 – 1358. Courts have also held that the duty not to breach the peace cannot be delegated to a third party, hence the courts have viewed it from agency law that he who acts through another, invariably acts by himself. Although an independent contractor is not regarded as an agent, it remains whether courts are ready to buy this argument to exonerate a secured party who had employed repo men's services to repossess collateral. Thus in *Williamson v Fowler Toyota Inc.,* 956 P.2d 858, 36 UCC2d 951 (Okla. 1998) the court rejected the argument of independent contractor, while in *Clark v Associations of Commercial Corp.* 877 F.Supp.1439, 26 UCC2d 601 (D.Kan. 1994), the court reiterated the duty cannot be delegated. Also see *Mauro v Gen. Motors Acceptance Corp.*, 164 Misc.2d 871, 826 N.Y.S.2d 374, 28 UCC2d 393 (1995), *Merrell v Consumer Portfolio Services*, 2007 WL 530784, 62 UCC2d 49 (W.D.Mo.2007); *Robinson v Citicorp National Services Inc,* 921 S.W.2d 52, 29 UCC2d 393 (Mo. App.1996); and *Rand v Porsche Fin. Services;* 216 Ariz. 424, 167 P.3d 11, 64 UCC2d 155 (Ariz.App. 2007).

[678] Different courts have differently appreciated the meaning of the "without the breach of peace" requirement. It was not without good reason though that the drafters of UCC Article 9 left it statutorily undefined. The essence was to allow different courts to use their discretion to accommodate reality of each circumstance in order to ensure good justice – that way, the law could retain relevance for long while simultaneously accommodating unforeseen realities or practices.

The following cases show the fluidity of the doctrine. Thus, in *Henderson v Sec. Nat'l Bank,* 72 Cal.App.3d 764, 140 Cal.Rptr.388, 22 UCC 846 (1977) (breaking the lock to gain entrance into debtor's premises was deemed sufficient to breach the peace), while in *Deavers v Standridge,* 144 Ga.App. 673, 242 S.E.2d 331, 23 UCC 834 (1984) (abusive words on the debtor was enough to constitute a breach of peace). In *Ivy v General Motors Acceptance Corp.*, 612 So.2d 1108, 20 UCC2d 381 (Miss. 1992) (the collision of the towing van with the debtor's car was deemed sufficient); while in *Nicholson's Mobile Home Sales, Inc v Schramm,* 164 Ind. App. 598, 330 N.E.2d 785, 17 UCC 574 (1975) (touching the body of the debtor without his consent in the process of repossession was deemed sufficient). In *DeMary v Rieker*, 302 N.J. Super. 208, 695 A.2.d 294, 33 UCC2d 315 (1997) (the repo man threw the debtor out of the tow van, and the court held it to have breached the peace). But contrast all these cases with *Chapa v Traciers and Associates* 267 S.W.3d 386, 66 UCC2d 451 (Tex.App.2008), where surprisingly the court held that repossession of a car parked on the driveway whereby the debtor's children were in it at the time of repossession thereby causing their mother to panic did not constitute a breach of peace. It could be seen from the few cases above that it is not easy to exactly fathom what could or cannot escape the doctrine's net – being that both oral and physical confrontations could easily constitute a breach of peace as the cases show. One would have thought that *Chapa's case* would have been a good one for breach of the doctrine especially in the light of *Deavers* (supra). However a few commonalities could be deduced from the cases: the court would generally want to know if the secured party's entrance into debtor's premises was authorized or whether there was an objection from the debtor or his privy during the repossession.

opinions that have developed around this doctrine as to what in fact constitute it are quite esoteric – the actuality is much nuanced, to the extent that a look at the precedents could hardly be of assistance in charting a reliable course with which to safely navigate through the various inconsistencies that are sprinkled over case law in this regard.[679]

Since it is difficult to accurately prophesy what could exactly constitute a breach of peace at all times, lawyers in their ingenuity have devised a method to circumvent the difficulty. Hence, the use of independent contractors to repossess collateral. An independent contractor hired to repossess a debtor's collateral is allowed to use his professional discretion to ensure that he does not breach the peace during the repossessing transaction. If he does, he would be liable for his actions being that he is not an agent of the secured party at least in label.[680] Today in the US and Canada (Ontario), a repossession industry has fully grown out of the independent contractor technique with the endorsement of law,[681] although it is still very controversial amongst judges as to whether a secured party could entirely be left off the hook if he uses an independent contractor who breaches the peace or whether an independent contractor no matter the title he calls himself is indeed an agent of the secured party being that he was recruited to act on the instruction of a secured party to repossess the debtor's collateral.[682] Notwithstanding the fluidity of "without the

[679] *Ibid.*

[680] The independent repossessor is strongly advised to insure his future actions with an Insurance Company – that way his liabilities stemming from breach of the peace in the context of collateral repossession would be covered.

[681] For more details about repossession companies in the US, see – http://repoman.websitedesigningamarillo.com. See also Ralph Thomas, *The Auto Repossession Business,* available at http://www.pimall.com/nais/n.repo.html. To read about the repossession industry in Canada in general, see http://www.repocanada.com/about.html. For Ontario, see http://www.quickrepo.com/repo-companies/Ontario.php (the four websites were last visited on October 28, 2014).

[682] See *Nichols v. Metropolitan Bank,* 435 N.W.2d 637 (Minn. App. 1989) – Bank was held liable for the act of the repossession company. Also *Sammons v. Broward Bank,* 599 So. 2d 1018 (Fla. App. 1992); and *Nixon v. Halpin,* 620 So. 2d 796 (Fla. App. 1993). In these three cases, the courts held that the secured party's duty to repossess peacefully was non-delegable. One could say that where the secured party is perceived to be richer than the contracted repossessor, the former may not easily be left off the hook because of the 'deep pocket principle' in agency law.

breach of peace",[683] a critical look at the plethora of cases especially from the US in this regard, reveals that some convergence has already been reached. Thus, instances where the secured party encounters the debtor's protests against the repossession, where the secured party intimidates or walks into a debtor's house or premises, and so on, would apparently yield an outright condemnation by the courts, sometimes leading to the award of punitive damages.[684] While instances where a secured party repossesses without confronting the debtor – like towing a car parked at a drive way or public place, such that the debtor upon later realizing that his car is missing, is faced with the thought that his car might have been stolen, could qualify as not breaching the peace.[685]The author advises collateral repossessors in all three jurisdictions – Nigeria,[686] Ontario and the US that since both a secured party and debtor are not likely to tell the same story in court vis-à-vis the repossession, the secured party is strongly advised to video the self-repossessing process to show that the repossession took place without the debtor's resistance – it is a matter of evidence after all, and the burden of proof is heavily on the secured party/repossessor if he must succeed in court as well as avoid punitive damages from being awarded against him.

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[683] Official Comment 3 to section 9-609 UCC is highly instructive as it concerns "breach of peace" – "… [T]his section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. In considering whether a secured party has engaged in a breach of the peace, however, courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of collateral. This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer…"

[684] See section 9-625 UCC on the consequences of non-compliance with the breach of peace requirement – see especially the Official Comment 3 which gives a robust explanation on the effects of non-compliance of the section. See *General Finance Corp. v Smith,* 505 So.2d 1045, 3 UCC2d 1278 (Ala.1987); *Sanchez v Mbank of El Paso,* 792 S.W.2d 530, 12 UCC2d 1169 (Tex.App.1990).

[685] For instance in *Williams v Ford Motor Credit Co,* 435 So.2d 66 (Ala.1983), whereby the car was repossessed at around 4am – Mrs. Williams did not object but merely said her documents were in the car, which the repo-man handed to her and towed the car away. In court, Mrs. Williams admitted that the repo-men were not harsh with her during the repossession. The court did not hold that the circumstance violated the "without the breach" requirement.

[686] See chapter three of this work for tailor-made recommendations for Nigeria concerning repossession of collateral via self-help.

2.7.4. Disposition of collateral: Secured party's obligations

It is common to OPPSA and Article 9 that when a secured party has successfully repossessed collateral he could choose to do one of two things – either retain it[687] or sell it to recover his money.[688] Except where the secured party has agreed to take collateral in full satisfaction of the debtor's debts, he is empowered to sue the debtor for any deficient amount should the collateral fail to yield full value out of a well conducted sale.[689] The converse is also the case under both regimes – where the sale of collateral yields excess amount than was owed, the secured party is obliged to return the surplus to the debtor.[690]

Both OPPSA and Article 9 also require the secured party to act in a "commercially reasonable manner" throughout the disposition process.[691] His duty in this regard is divided into things he should do before sale, and things he should do in the process of sale. With respect to secured party's pre-sale duty, both regimes commonly require him to send authenticated notices to the debtor and other interested parties regarding which collateral is intended to be sold, the

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[687]See section 9-620 UCC, and its Official Comment 5 for explanations. See also section 65(2) OPPSA.

[688] See section 9-610 UCC and especially its Official Comments 2 – 5, for explanations on what a secured party should do before disposal. See also section 63 OPPSA.

[689] See section 9-615 UCC and its Official Comments 2 and 4. And section 63(2) OPPSA.

[690]*Ibid.*

[691] See section 9-627(b) UCC and the explanation provided in Official Comment 3 thereof. See also section 63 OPPSA which captures it as follows "upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any commercially reasonable repair, processing or preparation for disposition…" The drafters of Article 9 in their desire to leave certain terms undefined so as to give courts the leverage to determine issues based on peculiarity of circumstances, did not define what exactly should be deemed to be commercially reasonable. This could be disadvantageous sometimes being that things may well depend on the level of a counsel's advocacy prowess and the level of emotions aroused in the court. For a fulsome discussion on this, see Jack F. Williams, *Debunking the Myth Engulfing Article 9 Collateral Dispositions*, 9 AMERICAN BANKRUPTCY INSTITUTE LAW REVIEW, 703 (2001). See also, *Prince v R & T Motors, Inc.,* 59 Ark.App. 16, 953 S.W.2d 62, 34 UCC 2d 261 (1997) where the court said that the debtor has to satisfy the evidential burden when the secured party submits evidence that he conducted disposition in a commercial reasonable manner – the debtor would have to demonstrate to the court that the secured party did not.

method of sale and venue – so that the possibility of colluding with the auctioneer is obviated.[692] Furthermore, both regimes require the secured party to always act in good faith throughout disposition, and acts such as minor repairs to put the collateral in good shape, cleaning, and so on, are well expected of him in order to increase the collateral's market value.

The various duties Article 9 and OPPSA commonly require a secured party to perform before sale are frail in nature, being that he is also authorized by both regimes to sell collateral in its present condition.[693] However, cleaning up and making minor repairs especially where such have become a long established practice would go a long way to prove that his disposition was conducted in a commercially reasonable manner. The secured party is also expected to sell the collateral in the market that could fetch a good price for the collateral whether in private or public markets[694] – being that the ultimate goal of OPPSA and Article 9 is to ensure that the best price is

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[692] See sections 9-611, 9-612, 9-614, 9-615 UCC, and section 63(4) OPPSA which bother on the notification of all relevant stakeholders prior to the disposition of debtor's collateral. Although section 9-611 UCC requires the secured party to send "a reasonable authenticated notification of disposition, some courts have held that actual knowledge of the debtor regardless of whether he became aware through a written notice was sufficient, which corresponds with the provisions of 1-201 (25) and (38) UCC – a case in point is *FDIC v Jahner,* 506 N.W.2d 57, 24 UCC2d 692 (N.D.1993). However, four years after this decision, a New York court in *Medallion Funding Corp. v Helen Laundromat, Inc.,* 1997 WL 835420, 34 UCC2d 250 (N.Y.Sup.1997), extended the boundary and held that oral notice was sufficient provided the debtor was sufficiently made aware of the sale. But, see *American State of Killdeer v Hewson,* 411 N.W. 2d 57, 63 (N.D. 1987), where the court was of the opinion that lack of notice was not on its own sufficient to ground a conclusion that a disposition was commercially unreasonable – some other factors have to be considered together with lack of notice.

For more details on notification before disposition, see the article by Judy Woods, which succinctly captures the revered notion that 'notification' of interested parties before sale is a cardinal feature of a commercially reasonable disposition – see Judy L. Woods, *Survey: UCC Law: Survey of Recent Developments of Law Concerning the Uniform Commercial Code and a Brief Introduction to Revised UCC Article,* 34 INDIANA LAW REVIEW, 1099 (2001), p.1105. For the OPPSA equivalent, see section 63(4) thereof. But see the Ontario case – *Pampena v Cartolano* (1984), 3 P.P.S.A.C. 258 (Ont. Co. Ct.) which states that only debtor is entitled to notice of disposition. This case was decided based on the old OPPSA which did not contain the equivalent of section 63(4) (b) of the current OPPSA. Although no opportunity seems to have presented before a court for its overruling – this makes the case still worth our attention. However it is obviously unlikely that a secured party relying on *Pampena* today as a basis for not giving relevant notices to persons so entitled before disposition, will succeed because an interested party other than the secured party could easily distinguish it with the current OPPSA provisions under 63(4) (a) – (d).

[693] See section 63(1) OPPSA and section 9-610(a) UCC.

[694] Section 63(2) OPPSA and section 9-610 (c) UCC.

realized from the sale of debtor's collateral. In this regard, the end could justify the means. When the secured party has done all of these including his duty to notify all relevant parties in case they might want to be present during sale, the secured party may then be given a 'pass mark' in the commercially reasonable standard test – a low price notwithstanding.[695]

However, where the secured party sells to a crony,[696] did not keep the collateral in a good condition before sale,[697] did not notify all relevant stakeholders,[698] the usual inference to be drawn from such (in)actions is that he did not act in a commercially reasonable manner in disposing the debtor's collateral. The consequences of such behavior on the part of the secured party is that he might be asked by court to refund some money back to the debtor – a sum adjudged to be the reasonable worth of the collateral had commercial reasonableness been observed in the sale.[699] A

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[695] See *Textron Financial Corp. v Vacation Charters, Ltd.*, 77 U.C.C. Rep. Serv. 2d 64 (M.D. Pa. 2012) and *Citibank, N.A. v Solow,* 92 A.D.3d 569, 76, 939 N.Y.S.2d 361, 76 U.C.C. Rep. Serv. 2d 917 (1st Dep't 2012). The answer is the same in Ontario – see JACOB S. ZIEGEL & DAVID L. DENONME, THE ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS (Toronto, Butterworths, 2nd edition, 2000), p.518.

[696] For sale to a crony to give rise to suspicion of collusion, the price realized from such sale must have been grossly low compared to the market value. Hence, where a person related to the secured party purchases at a good price, then the court could hardly impeach the sale on the ground of commercial unreasonableness. For more elucidation on a secured party's act of selling to "persons related to" him, do a combined, but percipient reading of sections 9-102, 9-615(f) UCC and the Official Comment 7 to 9-615. This was the court's holding in *Commercial Credit Group, Inc v Falcon Equip., LLC of Jax,* 2010 WL 144101, 70 UCC2d 839 (W.D.N.C. 2010).

[697] Section 63(1) OPPSA gives the debtor the right to sell "in its condition" or in the language of Article 9-610 (a) "in its present condition". However, recall that the overall spirit of both legal regimes regarding disposition is that disposition be done in a commercially reasonable manner. What this entails is that a secured party is reasonably expected to keep the collateral in a state that would attract best price. This is in line with the explanation given in Official Comment 4 to section 9-610 UCC. Despite this, a Saskatchewan court while interpreting the equivalent of their "in its condition" in *Canster Trucking Ltd. v. Bank of Nova Scotia,* (1986) 48 Sask. R. 136, 7 P.P.S.A.C. 105 (Q.B.), chose a literal interpretation in place of a purposive one. This in the author's opinion is wrong and undermines the overall objection of the section. Therefore the US decisions which have chosen always to interpret the Article 9-610(a) with the spirit of the section should be preferred in Nigeria, when Nigerian judges begin to face cases bordering on this issue.

[698] As stipulated in 63(4) (a) – (d) and Sections 9-611, 9-612, 9-614, 9-615 UCC.

[699] For instance, see *Folks v Tuscaloosa County Credit Union* 989 So.2d 531, 64 UCC2d 957 (Ala. Civ.App.2007), where the secured party repossessed the debtor's Lexus and sold it to the son of a director of the Credit Union for US$1,000 – when the estimated worth of the car was $12,500. The court allowed for $12,500 damages in favor of the debtor, despite the $1,000 already paid to him in respect of the disposition.

corollary to this is that the debtor is relieved from paying any deficient sum since a well conducted sale would have achieved full value and settled the secured party and other stakeholders.[700]

The award of punitive damages is common to US and Ontario courts and in egregious cases involving improper dispositions, the courts might be inclined to award it[701] against the secured party to discourage such behavior in the future by potential secured parties. It should be noted however that under both regimes, not waiting to sell at a favorable season, or merely selling collateral to a friend or crony is not enough ground to object to a sale although it might give a legitimate ground to review the disposition process.[702] But a secured party who adduces evidence to evince that the value realized from a crony sale is same or higher than would have realized from a public sale, or that selling in piecemeal rather than in bulk was done with a sincerity of purpose towards achieving the best price, would be left off the hook.[703] The law is not interested so much in the method of disposition, rather, whether in view of every relevant circumstance, the price realized from private disposition was reasonably sufficient. Just like the "without the breach of

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[700] This was the court's view in *Foley v. Capital One Bank, N.A.,* 383 S.W.3d 644, 78 U.C.C. Rep. Serv. 2d 587 (Tex. App. Houston 14th Dist. 2012).

[701] See section 9-625(c) (2) UCC and the six Official Comments to the section for a robust discussion on the consequences of noncompliance on a secured party who had sold the debtor's collateral in a non-commercially reasonable manner. Section 67(2) OPPSA, succinctly states the consequences for non-compliance as follows: "where a person fails to discharge any duties or obligations imposed upon the person by Part V, section 17 or subsection 34 (3) or 35 (4), the person to whom the duty or obligation is owed has a right to recover compensation for any loss or damage suffered because of the failure and which was reasonably foreseeable, and, where the collateral is consumer goods, the debtor has a right to recover in any event an amount equal to the greater of $500 or the actual loss or damages". On US case law, see *Davison v First Bank Trust Co,* 609 P2d 1259 (Okla. 1979), where the court awarded punitive damages against a bank that sold at a terribly low price in a private disposition. The court said the bank's act was "malicious and willful". For Ontario's position on punitive damages, see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36, where the court in stating when the award of punitive damages is appropriate said "the test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour". The court set a C$1 million as punitive damages against insurers. Also in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196, punitive damages is awarded in circumstances where the innocent party can prove that the defendant's act was "malicious, oppressive and high-handed [such] that it offends the court's sense of decency".

[702]See *Commercial Credit Group, Inc v Falcon Equip., LLC of Jax,* 2010 WL 144101, 70 UCC2d 839 (W.D.N.C. 2010).

[703]*Ibid.* This is also a logical inference from the general provisions of both OPPSA and Article 9.

peace" requirement above, commercial reasonableness is fluid and undefined under both regimes – being that the fluidity helps courts to achieve fairness at all times upon a careful evaluation of surrounding circumstances in every case.

2.7.5. Disposition: Consumer goods versus right to strict foreclosure

This right is commonly provided by OPPSA and Article 9 to satisfy the reality, that sometimes the secured party could deem it wise to accept the retention of the debtor's collateral either in full or partial satisfaction of the latter's debt.[704] It is an offer he makes which the debtor must accept or reject within fifteen days, as in OPPSA,[705] or twenty days under Article 9.[706] Where the retention is in partial satisfaction of debt, it obviously reveals that the debtor would still repay the outstanding balance to the secured party[707] – while the retention of collateral in full satisfaction of debt otherwise known as 'strict foreclosure', entails that the debtor has fully discharged his payment obligation to the secured party.[708]

One may question what could necessitate a secured party in the US or Ontario from opting for strict foreclosure, notwithstanding the existent probability that the retained collateral might in the final analysis worth less than the owed debt. The author identifies a few reasons as being responsible for this frequently engaged approach of the secured party acting under OPPSA or

[704] Section 65(2) OPPSA states "in any case other than that mentioned in subsection (1), a secured party may, after default, propose to accept the collateral in satisfaction of the obligation secured and shall serve a notice of the proposal on the persons mentioned in clauses 63 (4) (a) to (d)". See also section 9-620 (a), (b) and (c) UCC.
[705] See section 65(3) OPPSA.
[706] See section 9-620 (c) UCC.
[707] See section 64(3) OPPSA and section 9-616 UCC.
[708] See section 9-622 UCC and section 65(6.1) OPPSA. For a masterful discussion on strict foreclosure, see JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, (USA, Thomson Reuters, 6th edition, 2010), pp. 1338–1342.

Article 9. These common reasons are: *First,* the process of disposition is fraught with a lot of requirements and technicalities which if not fully complied with, could lead to unhappy consequences that are inimical to the secured party's claim.[709] For instance, by opting for strict foreclosure, a secured party is relieved of the requirement to issue notices to relevant stakeholders before sale[710] – what could be a cumbrous and exorbitant duty if the other relevant stakeholders are many and diversely located.

Second, he is also relieved of the associated costs of a formal sale and all of its arrangements which ordinarily would deplete the realized sum and consequently lead him to a position of suing the debtor for the deficient value[711] – an option that is gloomy especially when it is pondered that litigation expenses could incur him more costs than was deficiently owed by the debtor.[712] *Third,* with strict foreclosure, the secured party may keep collateral and sell when it is very optimal for him to do so – depending on the collateral, the best price could be achieved during the time the collateral in question is not regularly available in the market, such that scarcity could

[709] See *In Re Downing,* 286 B.R. 900 (Bankr. *W.D. MO*. 2002), where the court outlined the basic contents of a disposition notice as comprising the description of the debtor and secured creditor, the collateral, the method of disposition, statement that the debtor is entitled to accounting, the time and place of public sale or the time after which any other disposition is to be made. Furthermore, in consumer-goods cases: the description of any liability for a deficiency of the person who is notified and a telephone number to ask for the redemption price.

[710] In *Gilligan v Briar Hill Lanes, Inc.,* 250 A.D.2d 809, 673 N.Y.S.2d 711, 37 UCC2d 854 (N.Y.A.D. 1998), the court held that the failure of the secured party to provide debtor with notice of retention of stocks entitles the debtor to the surplus gained from sale. This means that lack of notice to the debtor about an intended retention of collateral by the secured party invalidates the strict foreclosure deal. The rationale for this position was explained by the court in *Mountaineer Investments LLC v Health,* 165 Wash. App. 10088, 76 U.C.C Rep. Serv. 2d 196 (Div. 3 2011) in which case the court explained that "the apparent purpose of the notification requirement is to give the consumers a chance to redeem their property or to find others to bid on it and thus maximize the proceeds."

[711] See section 64(3) OPPSA. Also, when the secured party's disposition in *In re MarMc Transp., Inc.,* 469 B.R. 84, 76, 56 Bankr. Ct. Dec. (CRR) 20, 76 U.C.C. Rep. Serv. 2d 862 (Bankr. D. Wyo. 2012) was challenged in court thereby requiring him to prove that his sale of collateral was in a commercially reasonable manner, his failure to adequately discharge the burden led to an adverse inference against him, that the disposition did not follow the commercial reasonableness standard – consequent upon which his request for the deficient sum was denied by the court.

[712] See *GECC v. Stelmach Construction Co.* 45 UCC. Rep. Serv. 2d 675 (D. Kans. 2001). Disposition in this case was deemed reasonable because the secured party exhausted the pre-sale cautions. The court held that despite the realized low price, the debtor was liable for the deficient sum.

skyrocket price and lead to a large profit.[713] This is closely connected to the *fourth* reason which is that a secured party having strictly foreclosed, could elect to sell collateral in piecemeal if doing so would lead to mouthwatering profits. *Fifth,* the secured party is saved from the burdensome requirements to sell collateral in good faith and commercially reasonable manner – since he is not required to account to the debtor of any surplus made, he is entitled to keep surplus and that could motivate him to achieve best price.[714]

Sixth, the debtor also is relieved from being possibly sued for any deficient value which is invariably the case when following the normal disposition method, a lot of disposition expenses are incurred and settled before the secured party could apply the remainder towards the debt owed him. Being that the outcome of strict foreclosure is synonymous to ownership,[715] there is no limit to what a secured party could do with a collateral he had retained in full satisfaction of debt – provided that upon selling such collateral for an under-value price he does not fall back to the debtor for the deficient price. Somehow, especially in consideration of all the complicated rituals

[713] The right to sell at will which is inherent in a foreclosure deal could be highly profitable. Absent a foreclosure deal, the secured party is not usually allowed to keep collateral for so long and sell when he so desires. This could trigger the remedies under section 9-625 UCC. Although section 63(3) OPPSA says a secured party "may delay disposition of all or part of the collateral for such period of time as is commercially reasonable", both legal regimes no doubt mean that such delay must be reasonable and geared towards realizing the best price – deliberate delays arising from a positive intention to obtain high price must be adequately proved in court when the debtor sues the secured party for abuse or non-compliance with the relevant provision.

For instance, in *Bank Clifton v Fernandez,* 844 F.2d 279, 6 UCC2d 302 (5th Cir. 1988), the court held the disposition as not commercially reasonable because the secured party delayed for two years. The predicament of the secured party remains the fact that he cannot deduce from cases the exact amount of time his delay would be permissible, instead his chances depend largely on how robust his evidences are, and how he is able to convince the court that the delay was worth it and geared towards satisfying the spirit of the law – this apparently depends on hiring a good and experienced attorney, which may again depend on how much is a good lawyer worth versus the secured party's overall money claim from the debtor.

[714] Section 65(6.1) OPPSA says "after the deemed election under subsection (6), the secured party is entitled to the collateral free from all rights and interests in it of any person entitled to notification under subsection (2) whose interest is subordinate to that of the secured party and who was served with the notice". The subsection 6 referred to, talks about strict foreclosure. The equivalent of this under Article 9 is section 9-622 UCC. Also see its Official Comment 2 for some brilliant insights.

[715] Section 65(6.1) OPPSA and section 9-622(a) UCC.

involved in disposition which could still puzzle the ablest minds in this area of law, it seems self-evident that strict foreclosure is a better deal for the parties than going through the hassles of sale.[716]

The exception to the use of strict foreclosure which is common to Article 9 and OPPSA is its nonuse in consumer goods[717] – where the debtor has repaid at least sixty percent value of the collateral.[718] In that regard, the secured party is absolutely barred from retaining the collateral in full satisfaction of the owed debt. In the author's opinion, two policy rationales compete as being behind the exception. *First,* a sixty percent or more repayment shows that the debtor has acquired a strong equity in the collateral and it would be unfair to rid him of it – for perhaps, he might redeem it.[719]The s*econd,* is based on the real likelihood that the eventual market worth of the collateral might be higher than the outstanding forty percent – or being that only forty percent or less is outstanding, the secured party might bother less in using his best effort to seek a price higher than forty percent. A pursuit of forty percent or less balance could possibly create low motivation on the part of the secured party towards seeking a high price for the collateral. In the end, a low price of forty percent or less is realized which ultimately denies the debtor of any possible surplus that could have accrued had the secured party embarked on the selling process with a strong motivation to achieve high price.

[716] This view corresponds with Gilmore's. See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, pp.1216 -1220.
[717] Section 65(1) OPPSA and section 9-620 (e) UCC.
[718] Section 65(1) OPPSA and section 9-620 (e) UCC.
[719] See the next subsection below for a discussion on debtor's right to redeem.

2.7.6. The debtor's right to redeem collateral

Gilmore identified that this particular right of the debtor could be traceable to the old common law practice in real property mortgage transactions,[720] whereby the mortgagor is allowed to redeem his property within a reasonable time; which however elapses when the mortgagee sells the property. Somehow, this historical practice found its way into Article 9[721] and OPPSA.[722] In essence, both regimes commonly provide that before the secured party disposes of collateral, the debtor is entitled to redeem if he tenders the full value of the debt owed, plus any accrued interest.[723] This is in order, since the sole interest of a secured party in a security agreement is to realize his money – so if a debtor has tendered full sum, there is absolutely no logical need to embark on the process of sale, since in any case, he is expected to remit back any surplus he realizes from the sale. Additionally, there seems to be no objective incentive for the secured party to refuse redemption because it saves both parties the hassles of disposition and the possible result of suing for any deficient value.[724]

Furthermore, by allowing the debtor to redeem, he is given back his collateral which he apparently has known better to efficiently operate in the management of his business – and this would obviate the stress and cost of starting afresh to learn how to use another type or similar version of the sold collateral, with all the attendant costs of re-learning. Two eminent scholars in

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[720] See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, p.1216.
[721]See section 9-623 UCC.
[722] See section 66(1) OPPSA.
[723]*Ibid.*
[724] This corresponds with Gilmore's view when he said that "the best and simplest way of liquidating any secured transaction, default having occurred, is for the secured party to keep the collateral as his own free of the debtor's equity, waiving any claim to a deficiency judgment. This avoids the tricky and difficult problem of arriving at a fair valuation of the collateral as well as the expense and delay involved in sale or other methods of foreclosure, judicial or non-judicial." See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, p.1220.

this area of law – Professors Cuming and Wood have tried to extend the boundary in the debtor's favor by suggesting that a debtor could redeem his collateral at the current market value.[725] The author of this work disagrees with this view and does not believe it could be a right interpretation of the relevant provisions of law.[726] Their view also does not seem to be a logical inference of Ontario's[727], British Columbia's[728] PPSA and Article 9's[729] positions on redemption.

Secondly, the question that should be answered is that if the debtor is allowed to redeem at an extant market value (public or private?), what happens if the said market value is lower than the debt owed – in which case, would the debtor be liable for the outstanding deficient value? Professors Cuming and Wood's answer to this is in the negative. A corollary question to Professors Cuming and Wood would be – what if in deference to their view, the debtor is required to redeem at a current market value which turns out to be higher than the debt owed? Looked critically, it does seem that the eminent Professors' proposition has the possibility of being repressive on the secured party – a result that could be calamitous to any economy that depends on credit-lending. The foregoing has been stated with the intention of advising Nigerian judges not to follow a position similar to that of Professors Cuming and Wood, as that could pose a lot of difficulties to the efficient realization of the unitary system's benefits.

[725]See – R.C.C. CUMING & R.J. WOOD, BRITISH COLUMBIA PERSONAL PROPERTY SECURITY ACT HANDBOOK, (Toronto: Carswell, 3rd edition, 1996), pp.453-456.

[726] Redemption right of the debtor which Professors Cuming and Wood were commenting on is contained in section 62 of the British Columbia PPSA. Its OPPSA equivalent is contained in section 66 OPPSA. Section 62 BC PPSA states that "at any time before the secured party or receiver has disposed of the collateral or contracted for its disposition under section 59, or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61(a) a person entitled to receive a notice of disposition under section 59 (6) or (10) may, unless the person has otherwise agreed in writing after default, redeem the collateral by tendering fulfillment of the obligations secured by the collateral…"

[727] See section 66 OPPSA.

[728] See section 62 of British Columbia's PPSA.

[729] See section 9-623 UCC.

As said, the exercise of the right to redeem is dependent on the continuous availability of the collateral in the hands of the secured party after the lapse of reasonable time to redeem.[730] Being that the debtor's right to redeem has the backing of law, the question that presses irresistibly to be asked is what happens in a situation whereby the secured party has concluded a contract with a third party to sell the repossessed collateral and immediately after the conclusion but before delivery of the collateral, the debtor signifies intention to redeem? The answer commonly given by Article 9 and OPPSA[731] is to the effect that the debtor's right to redeem collateral continues to subsist until the secured party has disposed of it or entered into a contract with a third party to dispose it.

The burden of proof is on the debtor to prove that the secured party has not disposed of, or entered into any contract with a third party to dispose collateral at the time he requested to redeem it.[732] An ensuing rhetorical question would be – whether a debtor who was not able to raise enough money to repay the secured party until the repossession of it could be able to raise money as quickly as possible to redeem his collateral before the secured party sells it off? – the beauty of it is that

[730] See section 9-612(a) UCC, and on the fluid nature of 'reasonable time', see *Parco Corp. v Vigliarola*, 611 F.Supp.923, 41 UCC 680 (E.D.N.Y.1985).

[731] See section 9-623 (c) UCC and section 66(1) OPPSA. A combined reading of both sections of law reveals that the right to redeem continues to subsist until the secured party has disposed collateral or entered into a contract for its disposition. See also the Official Comment 2 to section 9-623 UCC for further explanations.

[732]See *Ibid.* As at the time of writing this thesis, it seemed cases were yet to develop from section 66(1) OPPSA and section 9-623 (c) UCC because no case, from the author's research was found to have been predicated solely on the sections. This might lead to a hasty conclusion that gaps identified in those sections are trivial and hardly rear up in practice. In any case, given that in theory, those gaps exist, that is, circumstances could exist where the secured party had concluded contract – perhaps have received part payment from a third party with respect to a debtor's collateral, but yet to deliver up possession to him, – and at the same time, the debtor seeks to tender full price to redeem collateral. The secured party would either have to breach his contract with the third party and pay damages (what if the third party asks for a specific performance?), or the secured party breaches the sections of law under reference. This hypothetical example could occur, and it is imperative therefore that Nigerian lawmakers give decent thoughts and ensure that similar gaps do not make it to the anticipated PPSL.

neither Article 9 nor OPPSA mandates the secured party to offer the debtor a certain number of days as grace period, before going ahead to sell.[733]

2.7.7. Enforcement via judicial means: *The law's 'most trusted child'*

Until sometime during the last century, self-help remedy was confined to criminal law in the form of self-defense – which was meant to be cautiously utilized in preventing imminent dangers that threatened one's life.[734] Even at that, the validity of its use was measured with the proportionality test in order to guard against possible abuses. The US and Canadian (Ontario) legal systems had initially thought that introducing this kind of remedy to civil issues was unthinkable and essentially barbaric – hence courts in the past strongly insisted that in civil issues, the only way of settling any dispute was through court actions.[735] This insistence made good sense several centuries ago when law had just fully taken over the course of human affairs, and it obviously seemed that allowing self-help remedy[736]in private dealings was tantamount to reintroducing

[733]See *Ibid.*

[734] See Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?* NEW CRIMINAL LAW REVIEW, VOL. 11, No. 1 (2008), pp.52-53. Available at http://www.bu.edu/lawlibrary/facultypublications/PDFs/Simons/Selfdefense.pdf (last visited on November 13, 2014). For more discussion on self-defense in criminal law, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (4th ed. 2006); pp. 283–87, WAYNE LAFAVE, CRIMINAL LAW (4th ed. 2003), pp. 541, 555. Furthermore, in explaining the perception of self-help in Europe, especially in Central and Eastern European countries, Professor Tajti posits that "…Civil law systems display open hostility to self-help, an indispensable element of the Unitary Model. This position stems from civil law systems' very limited concept of self-help. The concept hardly goes beyond averting imminent threats to one's property or life and only with proportionate measures. This hostility is more than a minor conceptual discrepancy as it demonstrates the entire civil law system's view of enforcement by reducing the role of self-help to a minimum." See Tibor Tajti, *Could Continental Europe Adopt a Uniform Commercial Code Article 9-Type Secured Transactions System? The Effects of the Differing Legal Platforms*, 35 ADELAIDE LAW REVIEW, Volume 35 Number 1, 149 (2014), at p.160.

[735] This perhaps explains why under common law, the remedies available to an innocent party who intends to remedy a breach were damages, injunctions, and specific performance.

[736]An author has defined self-help remedies as "legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a civil wrong."

through the back door what was just expelled from the front. Judges then, used every drop of ink in their possession to sternly castigate self-help remedy in civil matters whenever such issues presented on their desks as well as not hesitating to award punitive damages in order to ensure that their stern warnings sank properly.[737]

For the judges, litigation (court enforcement) was the most trusted means of serving justice and no other means was allowed to come close. But as society gradually developed in all aspects of life, such that modern commerce and secured financing had shifted from their traditional forms, coupled with increased volumes of transactions, it made sense to contemplate that laws governing these aspects cannot afford to remain rigid and indifferent to realities.[738] Societal realities have led to the recent growth of alternatives to disputes resolution and regulated self-remedy in civil matters. Again, in yester centuries when law and human relations were still developing and population was not as large as now, courts could afford to efficiently manage the number of litigations that flew into their dockets. That is not true nowadays – and if every settlement of dispute were to be resolved through court action, the courts' dockets will boggle to the seams. That of course would slow down the speed of dispensing justice – which apparently would impact negatively on modern commerce and secured financing – where lenders' desire to timeously

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Douglas I. Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND LAW REVIEW, 845, (1984), p.850.

[737] See FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I (2d ed. 1923), p. 574.

[738] For example, in 2012, following a recess of the US Congress, President Obama made some recess appointments of top officials to fill in positions in Consumer Financial Protection Bureau and the National Labor Relations Board without passing through Congress. The Justice Department's Office of Legal Counsel said the appointments were lawful in view of "a practical construction" of the Recess Appointments Clause. The President's act could be viewed as a resort to self-help, as he tried to justify his act by appealing to the urgency of the situation. See http://perma.cc/L9CL-7MB3 (last visited on October 29, 2014). For the various reactions from the American Public regarding President Obama's act, see Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, New York Times – April 22, 2012. Available at http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html (last visited on October 29, 2014).

conclude deals and make profits without being caught up in inflations is hampered. All of these were the underlying reasons Article 9 and OPPSA allowed self-help repossession of collateral by the secured party with the caveat of not breaching the peace. This did not however abolish the old time method – recovery via court means.

You would recall that suing the debtor for the owed debt is one of the rights OPPSA and Article 9[739] offer a secured party under a security agreement. Sometimes, a secured party who does not wish to go through the intricacies involved in self-help repossession, and the possible consequences that accrue from improper utilization of self-help might just sue the debtor for the debt. What does he do – he involves his lawyer who follows court's procedures in filing the necessary documents towards enforcement of the security agreement. If the secured party emerges victorious in the litigation, he obtains a writ of *fieri facias*[740]that enables him to seize the debtor's property through a court bailiff who eventually conducts sale – the realized proceeds are used to offset the secured party's claim.[741]This approach of resorting to court to realize owed debts is common to OPPSA and Article 9[742]

However, this is not always simple. There is the possibility that a dishonest debtor would transfer or dissipate his assets during the pendency of litigation – such that the secured party's

[739] See sections 59(2), (7) and 64(3) OPPSA, and section 9-601 (a) UCC and its Official Comment 6.
[740]A "[j]udgment establishing the lien, and ordering the property sold for the satisfaction thereof, may be enforced by writs of fieri facias or venditioni exponas; but if by fieri facias, the clerk shall indorse thereon the fact that the lien has been established, and a description of the property. Upon the entry of such judgment by the district court, all the papers and a certified transcript of the judgment shall be transmitted to the clerk of the circuit court; and thereupon such clerk shall enter the action on the execution docket, record the judgment, and issue a writ of fieri facias or venditioni exponas, as on judgments entered in that court." Culled from http://definitions.uslegal.com/f/fieri-facias/ (last visited on October 29, 2014).
[741] It should be noted that from the wordings of section 9-615 (a) UCC, and 64(1) OPPSA, the debtor is required to bear the expenses of disposition – being that all reasonably incurred expenses are first of all deducted before he gets the remaining balance, if any.
[742] See section 9-601 UCC and section 59(2) OPPSA.

judgment is rendered barren because there are no assets of the debtor to satisfy his claim. The debtor could even declare himself bankrupt towards the eve of court judgment and make matters more complicated. It is therefore strongly advised that a secured party who has chosen to enforce through judicial means should bear this possibility in mind and plan a counter action by applying for certain interim remedies. For instance, in Ontario (but not in the US),[743] a secured party could convince a court to issue a Mareva[744] injunction that would bar the debtor from removing some of his assets from the court's jurisdiction – the essence of which is to ensure that the secured party upon emerging victorious has some assets to satisfy his judgment with. Another possible device is the garnishee order – which is a freezing order obtained from a court against the debtor's banker for instance, [or any other third party in control of the debtor's money-account] to freeze the debtor's account or asset until judgment is reached.[745]

[743] In *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc,* 527 US. 308 (1999), the US Supreme Court expressly rejected the application of any injunction (equivalent of Mareva) that restricts the debtor/defendant from moving his assets out of court's jurisdiction pending the outcome of a case. "[I]n an opinion delivered by Justice Antonin Scalia, the Court held that the District Court lacked the authority to issue a preliminary injunction preventing defendants being sued by creditors from disposing of their assets pending adjudication of the creditor's contract claim for monetary damages because such a remedy was historically unavailable from a court of equity. Allowing federal courts to grant creditors such injunctions "could radically alter the balance between debtors' and creditors' rights… and might induce creditors to engage in a race to the courthouse...which might prove financially fatal to the struggling debtor." Culled from https://www.oyez.org/cases/1998/98-231 (last visited on October 2, 2015). For scholarly critiques of this Supreme Court decision, see the following seminal articles – David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM LAW REVIEW, 2161 (2005)., available at: http://ir.lawnet.fordham.edu/flr/vol73/iss5/8, and Lawrence Collins, *United States Supreme Court Rejects* Mareva *Jurisdiction,*115 LAW QUARTERLY REVIEW, 601, (1999), p.604.

[744] See Lord Denning's seminal judgment in the case that gave birth to this asset freezing order – *Mareva Compania Naviera SA v International Bulkcarriers SA* (1975) 2 Lloyd's Rep. 509. The rationale was also followed in *Aetna Financial Services v. Feigelman*, [1985] 1 S.C.R. 2 – where the Canadian Supreme Court stated that "the gist of the Mareva action is the right to freeze exigible assets when found within the jurisdiction, wherever the defendant may reside, providing, of course, there is a cause between the plaintiff and the defendant which is justiciable… However, unless there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction, the injunction will not issue". See also a similar explanation offered by an Ontario court in *R. v. Consolidated Fastfrate Transport Inc.*, 1995 7150 (ON SC). Mareva injuction is of English origin and is applicable in Canada (Ontario) and Nigeria, but not in the US.

[745] For a masterful discussion on judicial enforcement and the ex parte remedial devices that a secured party could use to ensure that the debtor does not remove assets from the jurisdiction of court during litigation. See TIBOR TAJTI, COMPARATIVE SECURED TRANSACTIONS (AkademiaiKiado, Budapest, 2002), pp. 194 -196.

In the author's opinion, judicial enforcement would have been an equally sumptuous alternative, ranking at par with self-remedy if courts were not to be proverbially slow in delivering their judgments. This is usually the case, and more so, when lawyers contribute in clogging the efficient function of court's wheels by frivolously raising preliminary objections, seeking adjournments, and playing all other sorts of waiting games – perhaps to enable debtor more time to transfer or hide assets, and so on. As already hinted at, many disadvantages and loop holes which could be manipulated to self-advantage abound with the judicial enforcement mechanism. In any case, especially when viewed critically, one realizes that the disadvantages affect the parties and commerce at large.

Take for instance a secured party who has many debtors that defaulted – if he chooses to recover all his claims through court means, he would not only incur huge costs in litigating the different claims, but could also run the risk of having to be entitled to devalued assets in the end, towards remedying his debts. Furthermore, the possibility of even getting a barren judgment in the final analysis remains highly probable. On the part of the debtor, if his bank account is frozen or owing to a Mareva injunction, he is unable to use his trucks and other relevant assets to move out of court's jurisdiction to procure inventories – he would invariably cease to meaningfully operate his business – being that he would still need to pay his workers, repay installment loans, maintain all running costs, and stock up inventories during the pendency of litigation. What of if the bank goes bankrupt before the end of litigation and unable to repay the money that was frozen – how do we determine who bears the loss especially if the plaintiff lost the case? – bearing in mind that the secured party/plaintiff brought the calamity on the debtor/defendant by initiating the freezing order.[746]

The freezing of a debtor's bank accounts and assets does not exactly cater for how he would significantly remain in business until the court's final decision on the substantive suit. In the end, the economy would be negatively affected if potential creditors become reluctant to lend money or instead, lend with high interest rates to cover up for these lapses – or the possibility that the debtor might lay off his workers because his assets have been frozen pending litigation outcome. These are unanswered questions that pro-judicial enforcement scholars should endeavor to adequately answer. The effects of layoffs could only be imagined with all of the associated ripple effects that could lead eventually to chain and systemic defaults. All these reasons lend credible supports to the regulated use of self-help to repossess collateral and it should be deemed a welcome development especially by countries with slow judicial systems. At best, both judicial and private enforcements should be in existence and used cumulatively as OPPSA and Article 9 have permitted – this is a direct advice to Nigeria and its lawmakers with respect to the anticipated PPSL.

[746] For a more insightful decision, the case of *Flightwise Travel Service Ltd v Gill* [2003] EWHC 3082 (Ch), would be instructive being that it spelled out what the party seeking the injunction must fulfill as well as the circumstances that would make a court to issue it.

2.8. Sharper differences between Article 9 and OPPSA: Another source of lessons for the efficient design of Nigeria's anticipated PPSL

2.8.1. Differences with respect to registry search

These are very technical yet important aspects in the functions of Article 9 and OPPSA – being that after the secured party has filed, the debtor may wish to obtain additional financing from a potential secured creditor using the same collateral that the secured party already has a security interest in. In such circumstance, the natural thing such potential secured creditor would do is to visit the filing registry to search whether there is a superior interest with respect to the collateral the debtor is presenting. The question that would come to mind is what data would the potential secured creditor search with?

The two models differ significantly in their approaches regarding registry searches. The UCC Article 9, unlike OPPSA, does not cover motor vehicles that are personally used by the debtor – motor vehicles are not registered in the regular personal property registries but are registered in the appropriate motor vehicle registration office of each state in the US. In Ontario, this is different, as the personal property registry accommodates also vehicle registrations using the vehicle identification number (VIN).[747] Under OPPSA,[748] the debtor's name and or the VIN (where motor vehicle is involved) could be utilized in conducting search at the registry while under Article 9, only the debtor's name is required. However, both regimes differ on how exactly a debtor's name should look like on a financing statement.

[747] See section 43(1) OPPSA.
[748] See section 46 OPPSA.

Before going further, it is imperative to note that the 2010 Amendments of UCC Article 9 introduced a few changes to the 1999 revised version of Article 9[749] – changes geared amongst others, towards elucidating more clearly the provision of the revised Article 9 as to what a name of an individual debtor actually is or should look like. This was lacking in the 1999 version of Article 9,[750] and thus, became a breeding source for litigations. The 2010 amendments entered into a uniform effect as at July 1, 2013[751] and have currently been adopted by twenty eight states in the US. The amendments suggest two alternatives to states as to what or how the name of a debtor should be registered. Alternative A, known as the "only if" rule[752] requires that the secured party or the filer of a financing statement uses the name on the debtor's unexpired driver's license, or in the event the debtor does not have a driver's license, the debtor's name under current law, or the debtor's surname and first personal name. This alternative gives three possibilities of what an individual name of the debtor could be. Alternative B, known as the "safe harbor" rule[753] states that the name of the debtor on the financing statement should be the debtor's individual name – but also provides that the name of the debtor on his driver's license or his surname and first personal name would be sufficient.

The issue of debtor's name is different under OPPSA – the arrangement of name is specified under the OPPSA Regulations,[754] – which require the name of a natural debtor to be arranged with the first given name, initial of the second given name (if any), and surname. This is different from those given by the 2010 amendments in the following ways. First, under OPPSA,

[749] See also sections 3.12.1. and 3.12.2 below for more details on the 2010 amendments to UCC Article 9.
[750] See section 9-503 (1999 Revised UCC Art. 9).
[751] Edwin E. Smith & Bingham McCutchen, *A Summary Of The 2010 Amendments to the Official Text of Article 9 of the Uniform Commercial Code,* COMMERCIAL LAW NEWSLETTER, (2010), p.4. Available at https://apps.americanbar.org/buslaw/blt/content/2011/01/0004a.pdf (last visited on November 14, 2014).
[752] *Ibid* at p. 5.
[753] *Ibid.*
[754] See section 16(1) thereof.

there is no requirement that the debtor's name be as that on his unexpired driver's license as the 2010 amendments state. The requirement that debtor's name on the financing statement conforms with the name on his driver's license might be confronted with the challenge that not everyone owns or drives a car. This reality further makes sense in poor or emerging economies where many debtors or even SMEs may not own cars either due to impecuniousness or other reasons. Furthermore, the fact that driving licenses do expire after a few years might create some challenges resulting from the automatic change of name.

The second difference is that OPPSA states that the initial of debtor's second given name could also be included in the financing statement, unlike the 2010 amendments which did not provide for any such opportunity, except if that is how the debtor's name is under 'current law'. However, a reported case has shown that the initial of the second name of debtor is more serious than the wordings of OPPSA Regulation suggest.[755] Hence, in *Re Weber*,[756] the initial of the debtor's second name was omitted by the secured party, and the court in interpreting the requirement of debtor's name on the financing statement as stipulated by the OPPSA Regulations, held his security interest to be unperfected – maximum compliance of the relevant section of the Regulation was compulsorily required. The third difference, going by the suggested name arrangement under the 2010 amendments, the debtor's surname comes before his first personal name, suggesting for instance, that "Barrack Obama" (where Obama is the surname) should be written as "Obama Barrack", while according to the OPPSA Regulations[757], it should read either as "Barrack H. Obama" or "Barrack Obama".

[755] See section 16(1) OPPSA Regulations.
[756] (1990), 73 O.R (2d) 238, 48 B.L.R. 1.
[757] See section 16(1) OPPSA Regulations.

Being that the name on the debtor's driver's license is to be used following the 2010 amendments, the secured party would have to figure out himself which name on the driver's license is his surname or first personal name. The fourth difference is in line with the date of debtor's birth[758] requirement in the OPPSA Regulations. A secured party that is registering a financing statement for a human debtor, is obliged to supply his date of birth together with his name. This date of birth requirement under OPPSA is not required under Article 9.

2.8.2. Differences in search logic: Varying degrees of tolerance regarding an error of debtor's name on a filed financing statement

Case law has successfully established in Ontario that there are two types of search when searching up an individual debtor in the registry. Drawing from a combined reading of two sections[759] of OPPSA Regulations, two types of search have been deduced as discussed also in *Re Best*[760]– they are *specific* and *non-specific* searches – of which the former is the preferred practice in Ontario. The former consists of a situation whereby the debtor's first name, initial of his second name, and surname are imputed in the registry system together with his date of birth. While a non-specific search would amount to imputing anything short of this full information – say, a search with the debtor's first name and surname. In *Re Best*, the court held that a registration revealed by a non-specific search but incapable of being revealed by a specific search is invalid since an opposite view would impliedly mean that an effort to include the initial of debtor's middle name

[758] See section 3(1) OPPSA Regulations.
[759] See sections 3(1) and 16(1) OPPSA.
[760] (1997), 33 O.R. (3d) 416 (Gen. Div.).

and date of birth is unnecessary.[761] Hence following the decision in *Re Best* and the relevant provisions of the OPPSA Regulations,[762] only specific searches are acceptable in Ontario. This means that the search logic in Ontario registry is designed to be a pure garbage in, garbage out – such that, where a debtor's name was incorrectly stated on a registered financing statement, a search of the registry with the debtor's correct name would not reveal the filed financing statement.

The seriousness of this specific search logic was tested in *Bank of Nova Scotia v Clinton's Flowers & Gifts Ltd.*[763] In this case, the debtor's name as contained in the registered financing statement was "Clinton Flowers" instead of "Clinton's Flowers" – it was held that the discrepancy in both names was capable of materially misleading a reasonable person, and therefore outside the protection offered by OPPSA that "a financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission".[764] From *Clinton's Flowers* case it could be seen that Ontario courts construe what could mislead a reasonable person, very strictly. Even two decades after the *Clinton's Flowers* case, Ontario Courts have not departed from the zero tolerance approach. Thus, the same approach was demonstrated more recently in *Fairbanx Corp. v. Royal Bank of Canada,*[765] whereby the debtor's name was misspelt as "Friction Technology" instead of "Friction Tecnology" (the latter being the name in its articles of association). The court held that the error was sufficient to invalidate the financing statement.

[761] This would increase the volume of information that searchers contend with while trying to decipher who their real debtor is – to that extent, specific search is better.
[762] See sections 3(1) and 16(1) of OPPSA Regulation.
[763] (1991) 2 P.P.S.A.C. (2d) 139 (Ont. Ct. Gen. Div.).
[764] See section 46(4) OPPSA.
[765] 2010 ONCA 385 (Ont. C.A.).

However, the foregoing discussion would take a different tone under Article 9, which adopts the non-specific method of search when it says that "if a search of the records of the filing office under the debtor's correct name using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9-503(a), the name provided does not make the financing statement seriously misleading".[766] This Article 9 position is apparently in sharp contrast with what the Ontario court has held in *Clinton's Flowers* and *Fairbanx Corp*. It does appear that the Article 9 approach is set out to protect a secured party who had made a mistake in filing, by stating that regardless of the error made by the filer, if a search with the debtor's correct name would reveal the wrong one, the filer's (secured party) mistake could not be deemed to be materially misleading. On one hand, it could be seen that whereas the Ontario position gives zero tolerance for mistakes – geared more towards protecting registry searchers so as to prevent a situation where they would have to contend with enormous information before fathoming whom their debtor is in the registry; Article 9, on the other hand is out to protect secured party filers for whatever errors they have made even at the expense of registry searchers. Article 9 has gained reputation for treating secured parties with kid-gloves at the expense of some other active players in the context of secured transactions, perhaps in the view that they provide the needed credits for the economy to thrive.

Similarly, the protection accorded to secured parties by Article 9 in contradistinction with OPPSA is further evident in the wordings of Article 9 that "if a debtor so changes its name that a filed financing statement becomes seriously misleading under section 9-506: (1) the financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or *within four months after the change* and (2) the financing statement is not effective to protect a

[766] See section 9-506 (c) UCC.

security interest in collateral acquired by the debtor more than four months after the change unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change".[767]

Following the 2010 amendments which state that the name of the debtor as contained in his unexpired driver's license is sufficient and desirable, it could be deduced that the expiration of the debtor's driver's license could validly constitute a name change to which this section borders. It is imperative to further note that upon a name change, the secured party has a four month grace period to amend the financing statement to reflect the debtor's new name. However, during this four months period, the secured party's security interest would cover the debtor's collateral acquired on and after the date of name change until four months have elapsed.

It is important to highlight one problem that might obviously arise from the foregoing discussion on Article 9's position regarding the name of debtor in a financing statement. It pertains to choice of law rules under Article 9 which stipulate that "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in collateral".[768]Where the collateral is possessory, what governs is the law of collateral's location – this means that the name on a driver's license with respect to non-possessory collateral might be irrelevant with respect to when the involved collateral is possessory in which case, a driver's license issued by that state where collateral is located is needed – being that a driver's license in the US is state specific.[769]

[767]See section 9-507 (c) UCC.
[768] See section 9-301(1) UCC.
[769] See https://www.usa.gov/visitors-driving (last visited on April 11, 2015).

It is interesting to realize that OPPSA offers a grace period but the length of time given by the two regimes differ significantly. Hence, "where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected *thirty days* after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days".[770]

A percipient look at Article 9 and OPPSA provisions on the foregoing discussion, reveals the following differences: First, Article 9 gives a four month grace period to a secured party to file an amendment of the financing statement to reflect the name change of debtor, during which time the secured party shall still enjoy perfection, while OPPSA gives the secured party thirty days to do so or take possession of the collateral. Second, and the most striking difference is that OPPSA talks about knowledge of the secured party regarding the name change of debtor[771] – meaning that the thirty days grace period begins to count as from the day he learns of the debtor's change of name?[772] This in the author's opinion is inchoate and could be a source of litigation being that the burden of proof is on the debtor or any interested party to show that the secured party had knowledge but refused to file a financing change statement. This would be a matter of evidence, and a debtor is strongly advised to send the secured party a written message as to his name change for ease of proof.[773]

[770] See section 48(4) OPPSA which is the equivalent of section 9-507 (c) UCC.
[771] See section 48(4) OPPSA.
[772] Not even section 69 OPPSA which purports to define what "learns" or "knows" could be is helpful in solving the ambiguity of section 48(4) OPPSA.
[773]The lessons that accrue from the foregoing discussion would be more elaborately discussed in the chapter three of this thesis.

2.9. Certain kinds of collateral accepted under Article 9 but beyond the scope of OPPSA

Essentially, OPPSA was initially modelled after the 1972 version of Article 9. However, as realities of time evolved in the US, thereby prompting some counterbalancing responses, the types of collateral accepted under Article 9 were expanded to include new ones. They were mainly those personal property that could more conveniently be perfected by control. Thus, revised Article 9 introduced the following assets as capable of being used to secure transactions. OPPSA however does not accommodate them yet, and that becomes one of the significant differences between Article 9 and OPPSA which a comparative analysis of both models should not brush aside. These new collateral under Article 9 are:

2.9.1. Commercial tort claims

The easiest way to prove that commercial tort claim is not a collateral within the scope of OPPSA is to look at its "applicability" and "non-applicability" sections.[774]A look at both sections reveals that commercial tort claim is not covered as one of the recognizable collateral under OPPSA while it is well accepted as good collateral under Article 9.[775] It is admitted that this category of collateral came with the 1999 revised edition of Article 9 – hence, one could say that the reason commercial tort claim is not within the coverage of OPPSA could be due to its absence in the old version of Article 9 which formed a large background for OPPSA.

[774] See sections 2 and 4 of OPPSA respectively.
[775] See section 9-102(a) (13), 9-109(d) (12). See *Helms Certified Packaging Corporation*, 551 F.3d 675 (7th Cir. 2008) which explains the inclusion of commercial tort claims as part of Article 9's collateral. While, *In re Pacific/West Communications Group, Inc.*, 301 F.3d 1150 (9th Cir. 2002) gives guidance as to how courts should interpret the newly expanded collateral under Article 9.

Essentially, "commercial tort claim" is defined as "[a] claim arising in tort with respect to which the claimant is an organization or an individual and the claim arose in the course of the claimant's business or profession. It does not include damages arising out of personal injury to or the death of an individual".[776] A careful reading of this definition reveals that Article 9 has excluded the common law tort by restricting tort claims to those that arise from businesses and not personal injuries or death.[777] A few other details to note regarding commercial tort claim is that "[a] security interest does not attach under a term constituting an after-acquired property clause to a commercial tort claim."[778] It is further interesting to note that "once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort"[779] – payment intangible being a recognized collateral under Article 9.[780]It may be recalled that UCC Article 9 is a state law, and with respect to commercial tort claim, both parties to a security agreement would have to check if the applicable state law permits its assignability otherwise it might be that no security interest in the assigned commercial law would attach in the event the applicable state law prohibits it assignability.[781]

776 See section 9-102 (a) (13) UCC.

777 See *Epicentre Strategic Corp, Michigan v Perrysburg Exempted Village School District*, 60 U.C.C Rep. Serv.2d 166 (N.D. Ohio. 2005) where the court upheld the use of torts arising from business dealing as good collateral. See also *In re American Cartage,* 2011 WL 3831891 (1st Cir. Aug. 31, 2011), where breach of fiduciary duty and civil conspiracy were held to qualify as commercial tort claims.

778 See section 9-204(b) (2) UCC.

779 See Comment 15 to section 9-109 UCC. See also *Espinosa v United of Omaha Life Insurance Co.,* 60 U.C.C. Rep. Serv.2d 321 (N.M App. 2006).

780 See section 9-109 (a) (3) UCC.

781 See section 9-102(13) UCC and its Official Comment 5(g).

2.9.2 Agricultural liens

Again, OPPSA expressly excludes any lien arising from statute or law from being eligible for perfection against a collateral.[782] This logically follows that agricultural liens are excluded in OPPSA basically due to their non-consensual nature. This is understandable though, given that Article 9 and OPPSA are majorly concerned with consensual security interests and not those that arise by operation of statute or any law. However, Article 9 provides that agricultural lien could be perfected on farm products.[783] A farm-supplier taking out an agricultural lien on farm products is required to perfect his interest by filing[784] because agricultural liens and security interests are governed by the same rules of priority under Article 9,[785] unless the relevant statute conferring the lien expressly states that the perfected agricultural lien would have priority.[786]

It would be specious to go with the impression that agricultural lien is formed whenever a lender lends money to a farmer and uses the latter's farm products to secure it. Instead, it should be noted that an agricultural lien must meet three requirements within the context of Article 9. First, the agricultural lien must be a creature of statute.[787] Second, it must be created for the benefit or favor of a person that in the ordinary course of its business supplied goods or services to a debtor in connection to his farming business, or leased real property to him in connection with a debtor's farming operation.[788] Third, the lienholder must not possess the debtor's personal property that

[782] See Section 4(1) (a) OPPSA.
[783] See section 9-102(a) (5) UCC for the definition of Agricultural lien. See also JAMES J. WHITE & SUMMERS S. ROBERT, UNIFORM COMMERCIAL CODE, (West, 6th edition, 2010), pp.1174-1176.
[784] See section 9-310(a) UCC.
[785] See section 9-322(a) UCC.
[786] See section 9-322(g) UCC.
[787] See section 9-102 (a) (5) UCC.
[788] *Ibid.*

the lien covers. Once these three basic requirements are met, an agricultural lien becomes validly formed.

As a general rule, a farm-supplier taking perfected agricultural liens on farm products (livestock, crops, farm implements)[789] as collateral in exchange for loan would have a super-priority interest over a secured party's consensual security interest on the same collateral. This is because (as stated earlier), the former arises by operation of law for the benefit of the farm-supplier supplying goods, services, or labor to the farmer. Viewed critically, this arrangement is analogous to, or rather, has a comparable resemblance with mechanic's lien given that an agricultural lien gives the farm-supplier a lien against the encumbered farm products. It is vitally important to note that in US, the state statute that creates the agricultural lien governs upon the lien's attachment, and after the three requirements above have been basically met.

However, as hinted at above, Article 9 requires that the agricultural lienholder files a financing statement for the purpose of lien perfection, as noncompliance would mean that the agricultural lienholder's interest would be subordinate to a secured creditor's security interest or another agricultural lienholder with a perfected interest in the same farm products. A further point to note is that whereas Article 9 provides for filing in the jurisdiction where the debtor is located, it simultaneously posits that the local law of the jurisdiction where the farm products are located would govern issues of perfection and priority related to the farm products. It therefore goes without saying that in order to perfect an agricultural lien, the farm-supplier in addition to Article 9's requirements, must also satisfy the requirements for perfection imposed by the state where the farm products are located.

[789] See section 9-102(34) for a full list of items defined as 'farm products'.

Another point that deserves mention is that even though Article 9's general rule with respect to priority is that conflicting perfected security interests should be ranked in accordance with their order of perfection or filing, it however provides by way of an exception that a perfected agricultural lien would rank higher than a conflicting security interest on the same farm product if the state applicable statute provides so in favor of the former.[790] The implication of this is that a perfected agricultural lien would trump a pre-existing security interest on the same farm product, although subject to two requirements that must be met as early hinted at – namely, the agricultural lien must be perfected, and the statute creating the agricultural lien must provide for the super-priority status.

In consideration of the foregoing, the advice that flows naturally to a secured party advancing a loan in exchange for a security interest in farm-product is to conduct the regular registry checks as well as review the applicable state agricultural lien statutes[791] to know whether the applicable statute provides for the super-priority of a perfected agricultural lien regardless of the time of filing, or entirely silent about super-priority

[790] For a deeper understanding on why perfected agricultural liens have been given super-priority, which has to do majorly with the way farming is generally perceived in the US especially following the Great Depression, see Donald W. Baker, *Some Thoughts on Agricultural Liens Under the New U.C.C. Article 9*, 51 ALABAMA LAW REVIEW, 1417 (2000), pp.1417-18.

[791]In US, a state could have different statutes that qualify as 'agricultural lien statutes' – thus, a secured creditor or a farm supplier has to conduct research on what exists, depending on the kind of farm product he is supplying or wanting to take an agricultural lien in. For instance, the state of Iowa has seven agricultural lien statutes, namely the Landlord's Lien, the Custom Cattle Feedlot Lien, the Commodity Production Contract Lien, the Agricultural Supply Dealer's Lien, the Thresher's or Cornsheller's Lien, the Lien for Services of Animals,'s and the Veterinarian's Lien. See Wyatt P. Peterson, *Revised Article 9 and Agricultural Liens: An Iowa Perspective* 8 DRAKE J. AGRIC. LAW 437, (2003), p.442. Available at https://encrypted.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwja1tG-xoHLAhXLiywKHd9jBnIQFggeMAA&url=http%3A%2F%2Fstudents.law.drake.edu%2Faglawjournal%2Fdocs%2FagVol08No2-Peterson.pdf&usg=AFQjCNHxEhMg0gvv1CoPnMJ5Co6JYuYNKg&bvm=bv.114733917,d.bGg&cad=rja (last visited on February 18, 2016).

Given that agriculture is beginning to regain an enormous attention in Nigeria,[792] the lesson that follows from the foregoing is that it should not escape the attention of lawmakers to create a similar super-priority status for agricultural liens perfected with respect to farm products – as such would support and boost farming operations if suppliers of farm products are given this level of priority and protection, thereby reducing Nigeria's heavy importation of food products.[793] A super-priority status would incentivize farm suppliers of vital products like – fertilizers, crop seeds, farm implements, services, and so on; which farmers, most of whom are impecunious need almost on a daily basis to sustain their agri-businesses. Also, given that secured transactions law is foreseeably a federal law in Nigeria, it becomes almost needless to add that the agricultural lien statutes creating super-priorities must also be federal law.

2.9.3. Healthcare insurance receivables

Healthcare insurance receivable, that is, the right to receive payment for healthcare goods or services which arise from an insurance policy,[794] is a recognized collateral under the revised Article 9. It is "[a]n interest or claim under a policy of insurance which is a right to payment of a

[792] See the brilliant lecture entitled "Transforming Nigeria's Agriculture", given by the former Nigerian Minister of Agriculture and Rural Development, Dr. Akinwumi Adesina, at the Inauguration of the Agriculture and Food Security Center of the Earth Institute of Columbia University, New York, USA on September 10, 2013, where he was expounding on the prospects and benefits that lie in developing agriculture in Nigeria. Available at http://agriculture.columbia.edu/events/past-events/inaugural-seminar-the-nexus-of-agriculture-environment-and-livelihoods/transforming-nigerias-agriculture/ (last visited on February 18 2016).

[793] Keith G. Meyer, *Should the Unique Treatment of Agricultural Liens Continue?,* 24 INDIANA LAW REVIEW, 1315 (1991), p.1315 – (where the author posits that farm-suppliers who supply to farmers perhaps on credit ought to enjoy super-priority as good encouragement or incentive to agree to supply them goods and services, perhaps on daily basis – and this will help agri-businesses). Also, see generally Jason Finch, *The Making of Article 9 Section 9-312(2) Into Model Provision Section 9-324A: The Production Money Security Interest: Finally a Sensible "Superpriority" for Crop Finance,* 5 DRAKE JOURNAL OF AGRIC. LAW, 381 (2000).

[794] See section 9-102(a) (46).

monetary obligation for healthcare goods or services provided or yet to be provided",[795]OPPSA however excludes healthcare insurance as eligible for collateral being that it does not generally apply "to a transfer of an interest or claim in or under any policy of insurance or contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account".[796] A comparison of both regimes reveals that they are in apparent conflict with respect to the acceptability of healthcare insurance receivable as collateral. It is vitally important to note that under Article 9, other kinds of insurance other than by the name "healthcare insurance receivable" are not acceptable as collateral unless to the extent they become proceeds.[797] Given that insurance in Nigeria is not as robustly utilized as in the United States, the author's suspicion is that including any insurance related collateral in the anticipated PPSL will not be suitable for secured financing. Perhaps, this could be contemplated in the future as Nigeria advances and experiments or matures more with insurance transactions – after all, it was only two decades ago that the United States included healthcare insurance receivables as collateral.

2.9.4. Letter of credit rights

One of the collateral that Article 9 admits which OPPSA does not is the "letter of credit rights". Essentially, meaning "a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a

[795]Section 9-102 (46) UCC.
[796]See section 4(1) (c) OPPSA.
[797] See section 9-109(d) (8) UCC.

letter of credit".[798] It is important to note that the perfection of interest in letter of credit right is only by control[799] and if perfected in accordance with Article 9 rules,[800] the secured party with control would have priority over a secured party without control with respect to the same letter of credit rights.[801]

Under Article 9 the beneficiary's interest in the letter of credit proceeds is defined as "letter-of-credit rights"[802] – thus, this retains the contrast between "assignment," which in essence points to the alienation of the right to proceeds,[803] and "transfer," which essentially refers to the alienation of the right under a letter of credit to draw.[804] The latter is governed by UCC Article 5, while Article 9 rules cover the creation and perfection of a security interest in assignments of letter of credit rights, but not their transfer. Thus, whereas a beneficiary under Article 9 does have the right to transfer the right to draw under a credit, such transfer is only possible with the bank's consent – and it could be asserted that such transfer in not within the purview of secured transactions.

On the contrary, where the transaction is an assignment of letter of credit rights, the beneficiary does have the ability to assign, having first obtained the nominated bank's consent of which the bank may not unreasonably withhold.[805] In such case, the transaction could be said to be within the purview of secured transactions and governable under Article 9 rules. Thus, the core distinguishing feature is that the UCC Article 5 governs a transferee's rights because the transferee

[798] See section 9-102(a) (51). For the definition of "letter of credit", see Article 5-102 of the UCC.
[799]See section 9-107 UCC. For details on how to perfect by 'control' see section 2.4.4 above.
[800] See sections 9-107 and 5-114(c).
[801] See section 9-329(1) UCC.
[802] See section 9-102(a) (51) UCC.
[803] See articles 48 and 49 of the International Chamber of Commerce, Pub. No. 500, ICC Uniform Customs and Practice for Documentary Credits (1993).
[804] See section 9-107 UCC, especially Official Comments 3 and 4.
[805] See John F. Dolan, *Security Interests in Letter-of-Credit Rights*, 74 CHI.-KENT LAW REVIEW, 1035 (1999), p.1040.

is not a secured party, while Revised Article 9 governs an assignee's rights because the assignee is a secured party within Article 9's definition. It is highly pertinent to note that one may not easily make sense of the transactions involving alienation of interests under a letter of credit without a meticulous appreciation of this distinction between transferees and assignees and between transfer of drawing rights and assignment of letter-of-credit rights.

2.9.5. Deposit account

Article 9, unlike OPPSA, governs a security interest in deposit accounts[806] arising either directly from a deposit account or as proceeds from a collateral, although "an assignment of a deposit account in a consumer transaction"[807] is excluded from the ambit of Article 9. Going by Article 9's definition, deposit account "means a demand, time, savings, passbook, or similar account maintained with a bank."[808]A deposit account could also mean cash proceeds.[809]

It should be carefully noted that whenever a deposit account is evidenced by an Article 9 instrument, it becomes automatically excluded from the term "deposit accounts".[810] The temptation to overlap deposit account with other kindred collateral could exist. To remain clear, Article 9 provides three ways by which a secured party through control could perfect his security interest in deposit account.[811] First, where the secured party is a bank that maintains the debtor's deposit account, it could satisfy its claim without obtaining any prior consent of the debtor.[812]

[806] See section 9-104 UCC. See section 2.4.4., above for more detail on deposit account and the way a security interest in it is perfected.
[807]See section 9-109(d) (13) UCC.
[808]See section 9-102(a) (29) UCC.
[809] See section 9-102(a) (9) UCC.
[810]Official Comment 12 to section 9-102 UCC.
[811] See section 9-104 UCC.
[812]*Ibid.*

Second, control by the secured party could also come when the debtor, secured party and the bank have agreed in an authenticated record (a tripartite control agreement) that the bank will comply with instructions originated by the secured party, directing disposition of the funds in the deposit account without further consent by the debtor.[813] The third method of establishing control by a secured party is when he (the secured party) becomes a customer of the bank where the deposit account is maintained for the purpose of the deposit account collateral. This idea was culled from Article 5 of the UCC[814]– whereby upon the secured party becoming a customer with respect to the deposit account of the debtor, he becomes entitled, although not exclusively to withdraw from it but also to close it.[815] It should also be noted that a secured party enjoying control with any of these methods becomes subject to the numerous duties which Article 9 imposes on secured party who has possession or control of collateral.[816]

2.9.6. Electronic chattel paper

Another collateral under Article 9 which is not yet recognized in OPPSA is the electronic chattel paper – it only accepts chattel paper. Chattel paper from the perspective of OPPSA is "one or more than one writing that evidences both a monetary obligation and a security interest in or a lease of specific goods."[817] The difference between chattel paper and electronic chattel paper is that the latter is contained in an electronic format as could be gleaned from Article 9 which says

[813] See section 9-104(2) UCC. Also, the meaning of "authenticated record" as used in section 9-104(2) could be found in section 9-102(a) (7) and (69) UCC. A combined and percipient reading of both sections would reveal that "authenticated record" could be a written or electronic form of document. However, the bank is empowered under section 9-342 UCC to refuse to enter such agreement specified under section 9-102(a) (2).

[814] See section 4-104 UCC.

[815] See sections 4-401(a) and 4-403(a) UCC.

[816] See sections 9-207(c) and 9-208(b) (1) (2) UCC for the various duties.

[817] See section 1 OPPSA.

that an electronic chattel paper is one when evidenced by a record or records consisting of information stored in an electronic medium.[818]Furthermore, Article 9 and OPPSA have a common understanding of what chattel paper is.[819] One could therefore say that the difference between OPPSA and Article 9 in this regard, is the latter's recognition of an electronic version of a chattel paper.

To obtain control of an electronic chattel paper however, a secured party under Article 9 would have to fulfill six requirements.[820] Thus, a secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored and assigned in such a manner that, first, a single authoritative copy of the record that is unique and identifiable as well as unalterable exists.[821]Second, the secured party is well identified as the assignee record.[822]Third, the secured party or his designated custodian is in maintenance of the authoritative copy after it has been communicated to him.[823]Fourth, the secured party participates in any change or revisions of copies that add or change an identified assignee of the authoritative copy.[824]Fifth, it is ensured that any copy of the authoritative copy is clearly identified as a copy and not as the authoritative copy.[825]And lastly, any revision of the authoritative copy is readily identifiable as an authorized or

[818] See section 9-102(a) (31) UCC.
[819] Section 9-102(a) (11) UCC defines chattel paper. Compare this with the definition of chattel paper in section 1 OPPSA.
[820]See section 9-105 UCC.
[821]Section 9-105 (1) UCC.
[822]Section 9-105(2) UCC.
[823]Section 9-105(3) UCC.
[824]Section 9-105 (4) UCC.
[825]Section 9-105 (5) UCC.

unauthorized revision.[826] Once these are complied with by a secured party, he is deemed to have fulfilled the requirements for exercising control under Article 9.[827]

No doubt, the introduction of electronic chattel paper in Article 9 is a major innovation shift towards a more enhanced recognition of the role of information technology in today's commerce where chattel papers are increasingly being stored in electronic format. As Nigeria is on the continuous journey of revamping its economy to accommodate every personal property collateral, and in light of the fact that its capital and financial markets are increasingly making use of the documents that would together qualify as chattel paper or electronic chattel paper under US law, it is suggested that this also feature in the yet-to-be enacted secured transactions law.

2.9.7. A Registrar's certificate of search as evidence of registry content?

This is another way OPPSA differs from Article 9. The former provides that a filer having paid the filing fees could obtain the registrar's certificate which is proof that a particular search was conducted using a particular set of details – this certificate bears the registrar's signature and date as marks of authenticity. Where a registrant registers by himself and relies on the issued copy of the financing statement which was accurately completed, he cannot afterwards rely on the assurance funds in the event his copy turns out erroneous since that cannot be deemed to be a system error as stipulated by OPPSA. It will not also be deemed a system error if a registrant dials the registry and obtains a verbal information with respect to the contents of a filed financing

[826]Section 9-105(6) UCC.

[827]For a penetrating discussion of electronic chattel paper, see Jane Kaufman Winn, *Electronic Chattel Paper under Revised Article 9: Updating the Concept of Embodied Rights for Electronic Commerce*, 74 CHI.-KENT LAW REVIEW, 1055 (1999), pp.1056-1067.

statement as that cannot entitle him to have recourse to the assurance funds in the event the registry official was in error.

It is vital at this juncture to understand a crucial point – that is, for a person to qualify for recourse to the assurance fund, the registrar's certificate being relied on must not just be wrong but "[I]ncorrect because of an error or omission in the operation of the system of registration, recording and production of information under Part IV" of OPPSA.[828] A fair interpretation of this is that the registrar's certificate must be wrong owing to the malfunctioning of the registry's system and not due to the erroneous registration made by the registrant or inaccurate search request that failed to yield the relevant details contained in the registry. The assurance fund provision in OPPSA was tested in *Bank of Nova Scotia v. Clinton's Flowers and Gifts Ltd,*[829] whereby the bank properly filled out the paper form, but during data entry, the registry officials omitted the apostrophe in "Clinton's". As a result, the bankruptcy trustee could not find the entry in the registry. The bank also claimed to have perfected its security interest in the collateral and therefore entitled to priority. The court held that the error made by the registrar in entering the data did not entitle the bank to the assurance fund.

It is submitted that restricting liability to only errors emanating from a system malfunction and not those made by registry official would end up to defeat the primary purpose of setting up the assurance fund which is to compensate those who suffered losses as a result of errors made by the registry. It should not be restricted only to system errors as that would absorb the costly errors made by registry officials as well as makes it almost impossible to resort to the assurance fund

[828] See section 44 OPPSA.
[829](1991) 2 P.P.S.A.C. (2d) 139 (Ont. Ct. Gen. Div.).

even on the face of suffered hardships. It is further submitted that on this basis, the court's decision in Clinton's Flowers was *per incuriam*.

Chapter Three
Tailor-Made Recommendations for the Reform of Nigeria's Secured Transactions Law based on the Comparative Analysis between UCC Article 9 & OPPSA Models

Chapter Summary

This chapter distills tailor-made lessons from the comparative analysis between Article 9 and OPPSA models – giving perspectives that have so far escaped the attention of lawmakers in Nigeria vis-à-vis secured transactions law. It recommends the unitary system of secured transactions – the copious benefits of reducing the compartmentalized nature of Nigeria's secured transactions law into a comprehensive whole. It argues that as a general rule, the first to file or perfect rule should be adopted with respect to security interests in personal property, while also allowing purchase money security interests (or agricultural liens as argued in chapter 2) to be exceptions to the system of priorities, in order to respectively ensure the timely growth or rescue of businesses and agri-businesses.

Furthermore, it identifies that the lack of registry for the registration of security interests in personal property has resulted to ostensible ownership problems as well as lenders' apathy towards the acceptance of personal property as collateral – what has so far told harshly on the Nigerian economy, given that a big number of entrepreneurs wanting to borrow to start or expand businesses are denied access to affordable credits. The emergence of a personal property collateral registry would be an automatic death sentence to the old rule in *Dearle v Hull* which has caused many problems in its capacity as a perfection method of security interests in certain types of personal property in Nigeria.

Lastly, amongst other issues also dealt with in this chapter, it further analyzes the problematic issues connected with enforcement of security interests in personal property following a debtor's default or bankruptcy. It is proposed that a secured creditor could use self-help to repossess collateral if he follows some recommended guidelines which would ensure that the debtor is not abused in repossession process. It is argued that this would be a more efficient enforcement system that will incentivize lenders to lend credits at affordable rates.

The 1st Recommendation:

3.1. The unitary-functional approach to security rights in personal property should be adopted

This is one of the core reasons the author has engaged in this research – to propose the transplantation of a unitary system of secured transactions law or some of its building blocks to Nigeria in suitably adapted forms.[830] Currently, Nigeria has a compartmentalized system of secured transaction which is unarguably unmodern.[831] This further means that currently, there are many security and retained title devices with different names and applicable rules – for instance, lien, chattel pledge, chattel mortgage, hire purchase, conditional sale, and so on.[832]

The title and form of the security devices are still basically considered rather than the function these security devices perform. The problem with this is that, rather than a single set of applicable rules to them, there are different applicable rules as there are security devices, regarding their creation, perfection, priority and enforcement. Hence, it is not easy to determine priority amongst secured creditors in the event of the debtor's bankruptcy, when these various security

[830] The concept of unitary system of secured transactions started with the UCC Article 9 – US law on secured transactions. It provides comprehensive rules regarding creation, perfection, priority and enforcement of security interests in personal property and fixtures, regardless of the form the transaction took. For a pretty solid discussion, see Tibor Tajti, *Could Continental Europe Adopt a Uniform Commercial Code Article 9-Type Secured Transactions System? The Effects of the Differing Legal Platforms,* 35 ADELAIDE LAW REVIEW, 149 (2014). Available also at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512802 (last visited January 19, 2015).

[831] An unreformed system is not necessarily unmodern. 'Modern secured transactions law' is used to refer to systems that support the availability of credit as well as have uniform rules regarding creation, perfection, priority and enforcement of security interest in personal property and fixtures. Contemporary literature in this area solidly agrees that the US Article 9 is a quintessential example of a modern secured transaction. For a more penetrating discussion on this, see the document produced by the United States Agency for International Development, *Establishing Modern Secured Financing Systems In Developing Economies*, available at http://webcache.googleusercontent.com/search?q=cache:T2RUpa8OMkUJ:www.chemonics.com/OurWork/OurProjects/Documents/FS%2520Share%2520Final%2520Report/Links/PIR%25201/FS%2520Series%252010%2520Secured%2520Finance_Primer.pdf+&cd=4&hl=en&ct=clnk&gl=hu (last visited on January 19, 2015).

[832] See section 1.8 above for more details on some of the security and retained title devices in Nigeria.

interests in different categories of debtor's assets are set to compete for priorities. A typical example is the floating chargee – whose security interest upon crystallization, comes into conflict with buyers under conditional sale.[833] Thus, circumstances exist or could exist where a company enters into a conditional sale contract with buyers, of which the latter only acquires legal title upon full payment of the goods.[834] Thus, where crystallization occurs, the floating chargee finds himself contending priority of titles with the company's buyers who have made substantial payment to the company, but have acquired only equitable interests, or have completed payment but were yet to formally acquire title following delays in registration and completion of other procedural requirements which are *sine qua non* to the perfection of legal title.

In light of the above mentioned challenges, significantly posed by the current system of secured transactions law in Nigeria, the author recommends that title-based secured financing be subsumed into a unitary model – thereby creating a comprehensive system, rather than the existent panoply of security devices with different applicable rules, as well as the difficulties such

[833] See the locus classicus case of *Aluminum Industrie Vaassen BV v Romalpa Aluminium* Ltd [1976] 1 WLR 676, CA, where the court validated romalpa clauses in contract and gave them priority – thus, goods purchased are still the property of the seller until full payment of them have been made by the buyer.

[834] It is vitally important to note that floating charge upon crystallization, converts to a fixed charge on all of debtor's property, and consequently entitles the chargor to seize them and sell until his money is fully recovered. However, the English courts have long made it clear (*Romalpa, ibid*) that such powerful tool handed to a floating chargor cannot be used to injure third party creditors who are unconnected to the floating charge transaction. Thus, in *Kiwi Packaging Ltd v Isaac* (1997) 8 NZCLC 261, 399, HC (NZ), the New Zealand high court, drawing inspiration from the decision in *Romalpa*, empowered unpaid sellers in the context of crystallization to recover property supplied to a company which was yet to be fully paid for. However, the forgoing cases could be contrasted with *Segard Masurel v Nicol* (2008) 10 NZCLC, 264, 386 (HC) – even though New Zealand enacted a Personal Property Security Law in 1999, it did seem that the court in *Segard* was still hunted by the old ghost of floating charge when it held that an unpaid seller under a conditional sale had already passed title and therefore outside the protection offered in *Kiwi Packaging* case where the court held that an unpaid seller was bound to recover and could obtain damages against the receiver if the latter already disposed of the goods. For more details, see Michael Arthur, *10 years of the Personal Property Security in NZ: Lessons and Trends*, PERSONAL PROPERTY LAW CONFERENCE – ADELAIDE LAW SCHOOL, (2003), p.14. Available at https://law.adelaide.edu.au/documents/other/ppsa-10-years-of-ppsa-in-nz.pdf (last visited on March 26, 2015).

arrangement poses.[835]The main rationale is to bring every security device under one law in order to improve predictability and access to the applicable law as well as reduce complexities and costs associated with having a compartmentalized system of secured transactions law.[836]The author submits that abolishing the possibility of naming security agreements as the parties please, and the adoption of the functional approach towards personal property security rights, whereby the security function a particular transaction performs is considered, regardless of the form in which it appears. This way, the confusion and dilemma associated with strange forms of security agreement, the dilemma of what laws may govern them, and the incertitude posed by different applicable rules of creation, perfection, priority and enforcement of security interests would be obviated.[837]

Being that a unitary system of secured transactions is currently absent in Nigeria as at the time of writing, the consequences of the absence is telling very hard on the economy – lenders are not exactly sure on how their priority status on a common collateral will be determined in the event of the debtor's default or bankruptcy, and are therefore not willing to lend out sufficient credits.

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[835] This does not mean that the various title financing security devices should disappear from the Nigerian scene, rather, the laws governing their use should be uniform to provide certainty and confidence to financiers especially in the context of bankruptcy.

[836] If the unitary system is adopted, it could prevent the high costs of maintaining multiple registries for the various security devices – although Nigeria has no registry yet where security interests in personal property are broadcast, except for corporations. However, the existence of several security devices with distinct rules of perfection could lead to the creation of different registries where security interests created by those multiple security devices will be registered. This was the US and Canadian experience before the advent of UCC Article 9 and PPSA respectively, and in fact was one of the reasons the unitary system was enthusiastically pursued.

[837] Nigeria followed the English formal approach as opposed to the functional approach. However, the good news is that even England has been taking serious steps towards reforming their secured transactions law to have some core features of UCC Article 9. This is enough reason to alert Nigeria, that it is also time for it to consider the adoption of the functional approach as in Article 9 model – especially where the 'formal approach' has proved grossly inefficient to address its economic issues. Professor Goode gave a detailed account of the numerous efforts England and Wales have made towards reforming their secured transactions law in line with UCC Article 9. To read about the various efforts, see ROY GOODE, LEGAL PROBLEMS OF CREDIT AND SECURITY, (England, Sweet & Maxwell Limited, 3rd edition, 2003), p. 5 esp. n.17. Also see the solid presence of UCC Article 9 in the Law Reform Commission's Consultation Paper regarding the reform of UK's personal property security interest law. Available at http://lawcommission.justice.gov.uk/docs/cp164_Company_Security_Interests_Consultation.pdf (last visited on January 19, 2015).

The resulting situation inhibits sufficient availability of credit in the Nigerian society which eventually could lead to insufficient growth of businesses and high rate of unemployment. Therefore by creating a uniform set of rules for all security devices in Nigeria, the governing law will not only be easily accessible, but will also provide certainty of priority to secured creditors – this no doubt will sufficiently address the problems highlighted above.

Critics to this recommendation might argue that the unitary system of secured transactions is a radical departure from the more established doctrine of freedom of contract which enables parties to agree on whatever transaction they want, and have a law of their choice apply to it. Similarly, that the unitary system would presumably have the possibility to 'over-capture' assets which a debtor did not intend or envisage would be within the precinct of a particular secured transaction. Second, they might also argue that the advocated unitary system would be a severe cut on the heart of the established property law in Nigeria – and the cost of learning this new area of law would scatter settled waters – the resulting but unintended consequences of which are not readily visible to current debaters on the subject.

Third, some might argue, similar to Professor Goode,[838] that the unitary system is far more costly due to the need to perfect or re-perfect security interests at various times, compared to the status quo where parties do not have to bother about registration fees after they have concluded a security agreement – this consequential increase in transaction cost could eventually be transferred to the debtor by way of high interest rates. However, these objections – although quite germane, do not necessarily trump the already highlighted benefits that accrue from the unitary approach to

[838]See Roy Goode, *Security in Cross-Border Transactions,* 33 TEXAS INTERNATIONAL LAW JOURNAL, 47 (1998), p.49.

secured transactions, considering also the multitude of countries including the UK,[839] that have tilted, or are tilting towards Article 9-like secured transactions law.

The 2nd Recommendation:

3.2. Collateral registry, notice filing, & first-to-file or perfect method should be indispensable components of the anticipated PPSL

3.2.1. The need for a public notification system

The rationale behind public notification of security interests in personal property is firmly rooted to the saying that secrecy is the badge of fraud.[840] The creation of a public filing system whereby security interests in a debtor's collateral are registered to inform the public that a particular type of debtor's assets has been encumbered is key to arresting the problem of ostensible ownership.[841]Furthermore, where there is no public registry system for personal property,[842] the

[839]See the Law Commission, *Company Security Interests*, (2005) available at http://www.lawcom.gov.uk/project/company-security-interests/ (last visited on October 19, 2015).

[840] For a penetrating treatment on how filing is presumed to be a notice to the whole world and the implication of that presumption, see a seminal article by John de Lacy, *Constructive Notice and Company Charge Registration* (2001) 65 CONV. 122.

[841] For an interesting discussion on ostensible ownership, see Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, THE JOURNAL OF LEGAL STUDIES, Vol. 12, No. 1 (Jan., 1983), pp. 53-67. Available also in http://www.jstor.org/stable/724278?seq=1#page_scan_tab_contents (last visited on January 19, 2015).

[842] Currently in Nigeria, public filing as it concerns security interests in personal property (floating charge) is only restricted to incorporated companies registered under Part A of the Companies and Allied Matters Act (CAMA) 2004. Thus, only corporate registries located at Corporate Affairs Commission offices exist to notify the public about corporate transactions concerning personal property – a concrete example is the requirement to file a copy of floating charge agreement created by a company under section 197(1) of CAMA. This means that security agreements involving natural persons vis-à-vis personal property are not yet publicly reported, and this is exactly why a reform is

possibility that debtors might use encumbered assets in their possession to secure debts which when combined with other undisclosed secured debts from other secured creditors, outweigh the overall value of the property presented as collateral, would be high. Also the existent tendency that the debtor might use one collateral to obtain several financings from several creditors who are unaware of preexisting security interests could easily metamorphose to a cavalcade of litigations towards establishing priorities – what not only involves huge costs but also creates a pathway for suspicion and lack of enthusiasm to lend, unless with high interest rates. It is submitted that this practice or the possibility of exploiting secured creditors through the challenges x-rayed above could largely be frustrated by providing an online registry system where security interests in personal property could be registered. Part of the consequence for failing to establish an online registry to tackle the above challenges is, or will be the continuous demand for real property as collateral in exchange for credit. The reason for this would anchor on the commonsense judgment that real property is far easier to monitor, almost free from the ostensible ownership problem which arises mainly from the debtor's unfettered dominion and use of personal property collateral – or where personal property is demanded, the secured party would prefer to be in possession of it. However, this will yield low economic returns for two reasons: first, as the Nigerian economy grows larger, it becomes increasingly visible that debtor's valuable assets may not be in land and buildings but in personal property.

Second, the secured party's possession of debtor's production assets as a way of preventing ostensible ownership, leaves the debtor with little assets to produce with, and unable to make enough profits to repay debts. This inability to make goodly profits due to low level of production-

urgently needed to bring into existence a system whereby transactions creating security interests in personal property and fixtures, whether by legal or natural persons are publicly broadcast in a common registry, so as to drastically reduce the ostensible ownership problem as well as notify potential creditors who could rely on information therein to make informed decisions before lending.

assets, in a worst case scenario, swiftly results into bankruptcy with the concomitant losses of jobs, and a poorer economy, generally. Additionally, apart from the fact that the debtor's assets lie dormant and unproductive in the hands of the secured party, the latter invariably incurs costs in keeping the collateral including the assumption of risk for their loss if he fails to insure them.[843]

With respect to the foregoing, let it be first of all stated that Nigeria has two types of public registry. The first are land registries where only land transactions are registered.[844] Thus, real property mortgage (not chattel mortgage) transactions, and other land related transactions could be registered in a state's land registry where the mortgage transaction took place – and both transacting parties must be natural persons. Second, where a corporate entity is one of the parties in the land or real property mortgage transaction, the requirement is further reinforced, hence the transaction must in addition to being registered in the relevant land registry, also registered in the relevant corporate registry. The Corporate Affairs Commission (CAC) registry is the closest Nigeria has got which has a resemblance of registry of security interests in personal property as in US and Canada, because they also accept registration of charges against the personal property of corporate entities.[845] Corporate registries in Nigeria are physically located at CAC offices. In these offices, a person upon paying search fees could check out the fixed and floating charge agreements which a particular company has concluded.[846] This means that secured transactions which involve

[843] It is important to say at this juncture that although the registry could provide public notice of a secured party's security interest in a debtor's collateral to other secured creditors so that they could rethink whether to accept the same asset as collateral for a second-ranking position. But more so, the secured party is equally concerned with what the debtor will do with the collateral in his hands, and this is the 'unfettered dominion' problem of which debtor/collateral 'policing' is proposed as good solution. See section 3.10 below for a fulsome discussion on "policing''.

[844] For example, see the Lagos State Land Registry in Nigeria at <http://www.lagoslands.com/directorates/land-registry-directorate/historical-background/> (last visited on January 19, 2015).

[845] This does not include partnerships, sole proprietorships or sole traders in Nigeria. Only incorporated companies under Part A of Nigeria's Companies and Allied Matters Act are covered. See the website of the Corporate Affairs Commission in Nigeria for details – <http://new.cac.gov.ng/home/part-a-registry/> (last visited on January 19, 2015).

[846] See the Appendix for the cost of search and registration of charges in the CAC.

either personal or real property cannot be registered with the CAC registry if the transactions exclusively concern two natural persons. It is correct therefore to say that currently in Nigeria, individuals do not utilize any registry to file security interest in personal property of debtors, to create public awareness.

3.2.2. The need for a notice filing system

It is also interesting to point out that in both land and corporate registries in Nigeria, what is registered with respect to a transaction is a copy of the contract document– known as "document filing".[847] For instance in corporate transactions encumbering the personal or real property assets of a company – the secured creditor is expected to register a paper-copy of the charge document with the Corporate Affairs Commission.[848] This is no longer a sustainable practice because it leaves registration offices to boggle to the seams with paper files.[849] It also makes things generally

[847]Document filing as opposed to notice filing, entails filing a copy of an entire contract in the registry. See section 197 of Nigeria's Company and Allied Matters Act (CAMA) which mandates that a copy of charge document be filed in the corporate registry. This practice was "borrowed" from the UK where it has been a practice although its Law Reform Commission has proposed a takeover of the US type – 'notice filing'. See section 3.74 of the UK Company Security Interests (committee's report), available at http://lawcommission.justice.gov.uk/docs/lc296_Company_Security_Interests.pdf (last visited on March 26, 2015).

[848] See section 197 CAMA 2004 which reads in part "[S]ubject 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 any creditor of the company, *unless the prescribed particulars of the charge together with the instrument, if any, by which the charge is created or evidencedhave been or are delivered to or received by the Commission for registration in the manner required by this Act or by any enactment repealed within 90 days after the date of its creation"* (italics mine).

[849] The usual practice of registry staff at CAC offices is to meticulously evaluate any document presented for filing so as to ensure that it totally complies with the statutory requirements under Part A of CAMA. Apart from the fact that this takes a lot of time, it makes registry officials very slow and inefficient due to the enormous amount of paperwork they have to contend with on a daily basis. It is therefore imperative that any practice that requires lesser amount of paperwork to be filed should be more preferable. This practice is the equivalent of Part 12 English Companies Act 1985 which mandates the registrar of company matters to carry out similar scrutiny on submitted documents. Implicit in this task imposed on the registry staff is the possibility to be liable in the event that some errors pass undetected. However, a reform of this practice is currently incubating in the UK, and Nigeria should equally have a rethink –

difficult and inefficient in the corporate registries due to the enormous amount of paper-works that registry personnel have to contend with in addition to the requirement that they first peruse through the presented charge-documents and pass value judgment – what could be very burdensome as well as make the registry staff subject to liability for undetected errors.[850]The author submits that a more practical and efficient method is the notice filing system which is enough to inform the general public about the existing encumbrances on a debtor's personal property used as collateral.[851] Notice filing usually entails the provision of basic information to the general public that certain type[s] of debtor's personal property or fixtures have been encumbered. In essence, it entails that the filed document (financing statement) is not a copy of the security agreement of the parties, but merely a notice regarding the nature of agreement the parties have engaged in, in addition with the addresses, signatures of the parties as well as the description of collateral that are encumbered by the security agreement.[852]This minimal level of information, which the notice

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hence the essence of this thesis. See section 3.74 of the UK Company Security Interests, available at http://lawcommission.justice.gov.uk/docs/lc296_Company_Security_Interests.pdf (last visited on March 26, 2015).

[850] The requirement of registry staff to pass value judgment on presented papers prior to registration has been removed in US and Canada, as well as in many other jurisdictions (countries) owing to the enormous weight it places on the shoulders of registry staff. For instance the UK has taken steps towards reforming this practice. See *ibid.*

[851] It should be added, parenthetically, that the position of a potential secured creditor who has searched the registry but wishes to obtain additional information is not jeopardized by notice filing. He could approach the debtor for this purpose – to obtain every information regarding the encumbered asset which the latter has presented as collateral. If the debtor refuses to oblige him with full information, the potential secured creditor could walk away. Since the debtor is the one in need of credit, it is always in his own interest to make available any information a potential secured creditor desires to know about the collateral he has presented. To ensure that debtor is placed in a position where he could easily provide requested information, he should be given the right to request information from the secured party vis-a-vis their security agreement, and the latter must oblige him with it within a specified time (14 days from the day of request) or be liable for any loss arising from his failure to do so.

[852] See section 9-502 UCC. Its Official Comment 2 deserves extensive quotation being that the author considers it as being a perfect representation of his impression about notice filing. It says in part: "[t]he notice filing indicates merely that a person may have a security interest in the collateral indicated. Further inquiries from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-210 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. However, in many cases, information may be forthcoming without the need to resort to the formalities of that section. Notice filing has proved to be of great use in financing transactions involving inventory, accounts, and chattel paper, because it obviates the necessity of refiling on each of a series of transactions in a continuing arrangement under which the collateral changes from day to day. However, even in the case of filings that do not necessarily involve a series of transactions (e.g., a loan secured by a

filing method provides, is meant to be the starting point for any potential secured creditor in his voyage of inquiries towards unearthing any evidence that might exist against his interest. It is admitted that this mission of inquiries, evidently puts additional burden including monetary costs and time on a potential secured creditor.

However, it is the author's opinion that this minimal burden is highly offset by the advantages which accrue from keeping the filing registry free from terrifying load of paper documents as well as the increased efficiency of registry staff whose efficiencies are generally bogged down as a result of the numerous pages they are made to go through each day. To balance the equation, it is admitted that notice filing notwithstanding its revered advantages might lead to a situation whereby an existing secured creditor refuses to provide the security agreement or information contained therein to potential secured creditors upon the latter's request. A way to ensure against this intentional abuse is not necessarily to arm every potential secured creditor searching the registry with the right to be supplied requested information by an existing secured creditor – instead the position adopted by Article 9 corresponds largely with the author's view – that is, only the debtor should be approached for information and he may in turn request from the existing secured creditor who would have a specific time to honor the request.[853]

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single item of equipment), a financing statement is effective to encompass a transaction under a security agreement not in existence and not contemplated at the time the notice was filed, if the indication of collateral in the financing statement is sufficient to cover the collateral concerned. Similarly, a financing statement is effective to cover after-acquired property of the type indicated and to perfect with respect to future advances under security agreements, regardless of whether after-acquired property or future advances are mentioned in the financing statement and even if not in the contemplation of the parties at the time the financing statement was authorized to be filed." For an interesting read on the subject, see Douglas G Baird, *Notice Filing and the Problem of Ostensible Ownership*, THE JOURNAL OF LEGAL STUDIES, Vol. 12, No. 1 (Jan., 1983), p. 53.

[853] See section 9-210 UCC. Its Official Comment 3 offers an interesting explanation and it's worthy of lengthy quotation. It says that "[a] financing statement filed, may disclose only that a secured party may have a security interest in specified types of collateral. In most cases the financing statement will contain no indication of the obligation (if any) secured, whether any security interest actually exists, or the particular property subject to a security interest. Because creditors of and prospective purchasers from a debtor may have legitimate needs for more detailed

Additionally, as already stated above, it would be recalled that notice filing entails the indication of only the nature of debtor's assets that is encumbered, on the financing statement – this makes it possible to accommodate inventory and after acquired collateral which cannot be possibly described in detail at the time of entering into a security agreement due to their changing nature. In brief, where the practice of notice filing is absent, both time and money would be grossly expended in continuous "document filing" in order to cater for the shifting nature of inventory and after acquired property. To exemplify the difficulty that underscores document filing, the following hypothetical would suffice. Thus, apart from inventory financing, the debtor in a construction business for instance, could possibly sell some of his tractor-machines and purchase other kinds of machines he needs most at some point in time. In which case the sold tractors that were well described in the filed security agreement become misleading for a searcher in the registry.

Under notice filing however, such sale will not affect the financing statement because it only indicates the nature of assets that is encumbered and not individual items as contained in the security agreement. Whereas in document filing, selling each tractor that was described in the security agreement makes the registered document false and grossly misleading; and therefore requires immediate correction in the registry. This means that countless corrections would be made and paid for (by who?), as a debtor uses and disposes collateral in the ordinary course of his

information, it is necessary to provide a procedure under which a secured party will be required to provide information. On the other hand, the secured party should not be under a duty to disclose any details of the debtor's financial affairs to any casual inquirer or competitor who may inquire. For this reason, this section gives the right to request information to the debtor only. The debtor may submit a request in connection with negotiations with subsequent creditors and purchasers, as well as for the purpose of determining the status of its credit relationship or demonstrating which of its assets are free of a security interest." The forgoing section offers interesting lessons to Nigeria and should reflect in the anticipated PPSL. Additionally, where the debtor requests for relevant information as envisaged by section 9-210 UCC, it is advocated that an unreasonable withholding of such requested information should make the secured party liable in damages suffered as a result of his failure to provide information.

business as any floating security would allow – such difficulty would hardly arise in the notice filing system.

Another drawback with document filing is its potential to leak out sensitive personal details, and trade secrets contained in a security agreement of parties to the public when the entire security agreement is filed.[854] This could lead to the possibility of people visiting the registry solely in search of sensitive information contained in security agreements which could hamper the interest of contractual parties, especially if obtained by a debtor's competitors.[855] For this, and some other reasons already mentioned, it would make sense if Nigeria adopts the notice filing system in its anticipated PPSL – because if the unitary system is introduced, and obtaining credit to do business becomes easier, then it logically follows that the number of people wanting to utilize the collateral registry would be high, especially in the light of Nigeria's high population of over 150 million.[856] This means that document filing in all of its ramifications would be inefficient as

[854] Additionally, it is possible that debtor might wish to keep the interest rate he is paying secret (particularly from his competitors), or unusual kind of restrictions or covenants requested by a special secured party which he (the debtor) would not usually grant. In that case, keeping such compromises in front of public gaze might establish a trend of which potential secured creditors would make bold to demand. In the same manner, the secured party might have struck a special deal that gave the debtor a reduced interest rate – what the former would not want the public to be aware of for similar reasons as those of the debtor. For further elucidation on this point – see Peter Coogan, *Public Notice Under the UCC and Other Recent Chattel Security Laws, Including 'Notice Filing'*, 47 IOWA LAW REVIEW, 322 (1962).

[855] Security agreements usually contain specific descriptions of debtor's assets and their values – what the debtor may wish to keep secret from the public sight. This is therefore one of the challenges notice filing solves by ensuring that scanty information is filed, enough to give a general picture of the debtor's encumbered collateral – thus, the starting point for further inquiries.

[856]As of the last national census in 2006, the population was about 150 million. It ought to have increased enormously by now (2016). See http://www.population.gov.ng/ (last visited on February 19 2016). Thus, if Nigeria's secured transactions law is reformed to accept personal property as collateral, many Nigerians will have increased access to credit being that it is comparably easier for majority of the population to afford personal property collateral than the real property type. The implication of this increased number of transactions is that the filing registry would be seriously overburdened with papers, if filing is paper-based – or worse, if document filing system is retained – both would be nothing but an outright hindrance on Nigeria's economic development. It is no longer debatable that a modern secured transactions law ought to go hand in hand with online registry where security interests in personal property are registered – although the Germans, respecting their venerable source of law (the BGB civil code) which is hostile to the concept of public notification of security interests would argue otherwise. For further details, Haussmann's article is seminal – see Jens Hausmann, *The Value of Public Notice Filing under Uniform Commercial Code Article 9: A*

both registry staff and filers would be hard-pressed to cope with bulky security agreements that would be filed in the registry each day – with the lives of registry staff being continuously subjected to the risk of being crushed by a huge paper avalanche.

Lastly on this point, notice filing accommodates future advances – because a secured party who has filed a notice indicating that he has a security interest in all of debtor's personal property covered by the security agreement could subsequently enter into another security agreement with him, with aim of giving additional credits especially when the debtor is in dire need of it. In this case the second or third advancement of credits becomes perfected with the first notice filing – while under a document filing practice, the secured party would not be covered by the initially filed copy of the security agreement – and would have to queue behind other secured creditors– which of course might discourage him not to advance further credits to the debtor. The other side of the story which would also have to be taken into consideration by lawmakers when deciding whether to go for document or notice filing is that the latter easily triggers suspicions and doubts on a potential secured creditor as to whether it is at all sensible to ever be a second ranking creditor, since the first ranking creditor could always manage to be on top with future advance priority.[857] That way, when the first ranking secured creditor makes future advances, the existing common collateral becomes critically insufficient to cover junior creditors who invariably will not be aware of what is going on between the debtor and his first ranking secured creditor.

Comparison with the German Legal System of Securities in Personal Property, 25 GEORGIA JOURNAL OF INT'L & COMPARATIVE LAW, 427 (1996), p.452.

[857] See LINDA WIDDUP & LAURIE MAYNE, PERSONAL PROPERTY SECURITIES ACT: A CONCEPTUAL APPROACH (Wellington: Butterworths, revised edition, 2002), pp. 134-135.

3.2.3. Dealing with the first-to-file or perfect rule and the issue of 'blocking'

Another concrete issue that deserves a robust attention is the proposal that the first to file or perfect rule[858]should be an indispensable content in the proposed unitary system. If Nigeria adopts the unitary system then it will make good sense to adopt the first-to-file or perfect rule[859] as well as its exceptions.[860] Thus, the idea that the priority of security interests ranks in their order of creation has to be dropped.[861] This idea is still applicable with respect to personal property transactions in Nigeria due to the absence of registry for publicizing security interests in personal property. Consequently, ostensible ownership as well as using one collateral to obtain several financings that cumulatively outweigh the value of the collateral is rampant. Because there is no way of knowing secured creditors that are already on the priority queue, the senior creditor with first priority interest could go into 'hiding', only to later spring up and challenge a later secured party who had advanced enormous amount of credits to the debtor. When this kind of situation is challenged in court, the first to create rule would be applied or if the court is kind especially in

[858] See section 9-322 UCC.

[859] See section 9-322 UCC and section 30 OPPSA.

[860] Generally, see the exceptions to this rule in sections 9-317, 9-320 and 9-321 UCC. For the OPPSA equivalent, see section 33.

[861] A contrary opinion could be found in Article 17.2 of the EBRD Model Law on Secured Transactions which states that priorities of security interests are determined by their order of creation, unlike the US Article 9 or the Ontario PPSA. For lack of writing space, see the following authorities for more insight into the EBRD Model Law: Gerrard McCormack and Frederique Dahan, *The EBRD Model Law on Secured Transactions: Comparisons and Convergence*, COMPANY FIN. & INSOLVENCY LAW REVIEW, *65* (1998), pp. 67-8, John A. Spanogle, "A functional Analysis of the EBRD Model Law on Secured Transactions", in NORTON & ANDENAS (eds), EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS (Kluwer, 1998)., JOHN SIMPSON, et al, SECURED LENDING IN EASTERN EUROPE – COMPARATIVE LAW AND THE EBRD MODEL (Oxford: Oxford University Press, 2007) and John Simpson and Joachim Menze, *Ten Years of Secured Transactions Reform,* JOURNAL OF INT'L BANKING & FIN. LAW, 5 (2001).

land matters, it could apply the proprietary estoppel rule[862] to hold that the first secured creditor had misled the second by keeping dead quiet all along while the latter was advancing credits.[863]

The author submits that Nigeria's current approach of first to create rule is outdated and should give way to first to file or perfect rule of perfection once a registry for publicizing security interests in personal property is launched. First-to-file or perfect means that where two competing security interests were perfected by filing, the first to be filed should be senior notwithstanding the possibility that the secured creditor who filed first, filed prior to creating a valid security agreement. Whereas, where two competing security interests were not commonly perfected by filing, the first to be perfected is senior.[864]

In the US, there is a practice which has sprung from one of the perfection provisions of Article 9 – which in essence gives a potential creditor the allowance to file prior to concluding a security agreement with the debtor. This practice is designed to "ward off" other potential secured creditors as well as maintain priority even if these potential creditors validly conclude security agreements with the debtor and perfected their security interests consequently by filing. This

[862]See *Willmott v. Barber* (1880) 15Ch. D 96 – the test case on proprietary estoppel, where the English court led down the requirements that must be proved by a person relying on the doctrine in order to establish a proper claim of proprietary estoppel.

[863] However, the burden of proving that a "hiding" and silent creditor was aware of later transactions between debtor and another creditor who was 'intentionally' quiet is on the creditor alleging the fact, as his success depends largely on how much of this claim he establishes through the preponderance of evidence.

[864] See section 9-322 UCC and section 30 OPPSA. In Nigeria currently, the rule in *Dearle v Hull* (1828) 3 Russ 1, is the alternative to public notification system in personal property (especially choses in action) involving human debtors. The rule maintains that between two or more equivalent but contesting claims (equitable interests) over a property, the order of priority shall be determined by noting the order in which the claimants notified trustee of the asset in question. The major problem with this rule is that there is no way of knowing preexisting interest holders until a holder approaches the trustee – thereby creating possibilities for the owner of debts or assets to fraudulently create multiple interests whose total value grossly outweigh the available asset. In *Ward v Duncombe* [1893] AC369 at 393, Lord Macnaghten expressed dissatisfaction with the rule when he said "I am inclined to think that the rule in *Dearl v Hull*, has on the whole at least produced as much injustice as it has prevented." This kind of notification system regarding personal property has been replaced in the US and Canada as well as in many other advanced systems with the public notification (registry) system – which the author also proposes for Nigeria.

practice commonly referred to as "blocking"[865]has been validated by courts. Even though it could be argued that this practice is unfair in the sense that it boils down to confer priority on a creditor who has no valid security agreement at the time of filing, – in response, it has been argued that deciding otherwise would whittle the integrity of the registry system. Thus, a potential creditor who cared enough to look at the registry before concluding a security agreement would have known that the collateral was already encumbered and whether or not to proceed as a lower ranking secured creditor.[866] It is the author's view that this practice which sprouted from Article 9 and also entrenched in OPPSA, should not be made part of Nigeria's perfection rules. The reason is that it might lead to a situation whereby a secured creditor blocks others by filing prior to giving value to the debtor[867] – a situation that could leave the debtor stranded of cash, and this invariably frustrates the essence of having the unitary system which is aimed at providing the debtor with sufficient credits to do business.

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[865] This practice is supported by section 9-502(d) UCC. What basically happens is that a potential creditor files prior to concluding a security agreement with the debtor, such that upon concluding a valid agreement later (attachment), the status of his security interest relates back to the date of filing. See the UNCITRAL Legislative Guide to Secured Transactions (Paragraphs 38-40) available at https://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf (last visited on October 21, 2015).
See HEYWOOD FLEISIG et al, REFORMING COLLATERAL LAWS TO EXPAND ACESS TO FINANCE (World Bank Publications, 2006), p. 40. Also see *In the Matter of Bruce A. Smith,* 326 F. Supp. 1311 at p. 1315 (D.C. Min.) (1971). In like manner, a good number of Canadian decisions have expressed the view that knowledge of a secured party about the existence of a security interest does not affect his priority status supposing he filed first. This was expressed in the following cases: *Bank of Nova Scotia v Gaudreau* (1984), 48 O.R. (2s) 478, 4 P.P.S.A.C 158, 27 B.L.R 101 (H.C.J), *B.M.P and Daughter Investment Corp. v 941242 Ontario Ltd.* (1992), 96 D.L.R. (4th) 741, 11 O.R. (3d) 81 (Gen. Div.).

[866] This appears to be one of the snags of notice filing – it is easy for a secured creditor to put up a scanty information that the debtor's category of collateral is already encumbered, even when a valid security agreement between the parties is yet to exist. This will not happen if copy of a security agreement were required to be filed, in which case entering first of all into a valid security agreement becomes a precondition for filing.

[867] Giving value (money) is one of the essential ingredients in creating a valid security agreement under Article 9 and OPPSA. It is taken to be the most important ingredient because it's what basically enables the debtor to run his business.

In the event Nigeria transplants this particular provision of Article 9 (blocking), the author advises debtors to be weary and cautious of exploitative secured creditors. Thus, since filing prior to the attachment of a security interest can only happen with the debtor's consent, a diligent debtor could always deny a potential creditor the consent to do so. Given that 'blocking' has the potential of undermining the filing system as analyzed above, it is vitally important that Nigerian lawmakers expressly provide ab initio in the anticipated PPSL, that 'blocking' is invalid, because allowing such practice might create uncertainty as well as reduce reliability in the filing system – debtors and their secured creditors cannot afford to engage in acts capable of reducing reliability in the filing system, yet seek protection from the secured transactions law. For that reason, the author recommends for Nigeria – that except in agricultural liens and purchase money security interest situations, [868]the first-to-file after attachment should prevail where two competing security interests were perfected by filing, following attachment,[869] while the first to perfect prevails where both security interests were perfected via different methods.

[868] See chapter two for a fulsome discussion on purchase money security interest. For the rationale behind PMSI, see Thomas Jackson and Anthony Kronman, *Secured Financing and Priorities Among Creditors,* 88 YALE LAW JOURNAL, 1143 (1979), pp. 1171-8. For a contrary view, see WILLIAM J. GOUGH, COMPANY CHARGES (London: Butterworths, 2nd edition, 1996) at p.436.

[869] In the anticipated PPSL, the first to file priority should exclude "blocking" which exists in section 9-502(d) UCC.

The 3rd Recommendation:

3.3. Where there is conflict between a secured party's perfected security interest in proceeds and a third party's control of same, the latter's interest should be preeminent

Whatever is obtained from the disposition of collateral is deemed as proceeds.[870] Under Article 9 and OPPSA, a secured party, in trying to satisfy the debt owed by the debtor, is empowered to either lay hold on the collateral or its proceeds or both until his claim is satisfied. This right of a secured party to go beyond the disposed collateral and pounce on proceeds, generates other serious concerns. An immediate example is when the proceeds in question are paid into a deposit account which a banker controls,[871] as well as have set-off claims. Even in real property law, Nigeria has no statutory or specific solutions for this particular situation – thus, if a mortgagor of land sells a mortgaged property and pays the proceeds into a deposit account with a bank, there is no legal framework upon which the mortgagee could predicate his interest on the paid-in proceeds. Instead, following the common law contractual rules of set-off, the banker with set-off claims against the depositor/debtor, could well satisfy its claim before a secured party does.

The position of Article 9 and OPPSA as to whether the perfected right of a secured party in proceeds should supersede that of a third party who is in control is very recondite.[872]Apart from

[870] See section 9-102(64) UCC, and section 1 OPPSA.

[871] See section 2.4.4., above for a more complete discussion on using control method to perfected security interests in deposit account.

[872] Generally, see section 9-327 UCC. Interestingly, its Official Comment 4, entitled "Priority of Bank" offers a helpful explanation concerning the priority struggle between a secured party and banker with respect to paid-in proceeds into a deposit account. Thus, "the security interest of the bank with which the deposit account is maintained normally takes priority over all other conflicting security interest in the deposit account, regardless of whether the deposit account constitutes the competing secured party's original collateral or its proceeds. A rule of this kind enables banks to extend credit to their depositors without the need to examine either the public record or their own records to determine whether

the resolution given in favor of the banker with respect to the debtor's proceeds in his control as stated in the official comment,[873] it is not easily deducible from the provisions as to which of them – the secured party who has traced proceeds to the debtor's bank account or the banker who has set-off right should have priority. Nigeria should therefore be weary of this source of conflict and avoid same from the onset by stating categorically who should have priority in the event of conflict – this is a bespoke lesson from a percipient and critical study of Article 9 and OPPSA.[874]

Additionally, the genuineness of a banker's claim should not be brushed aside or relegated to the bottom being that circumstances exist where a debtor could borrow from a third party – say a bank and its genuine interest to set-off from the debtor's deposit accounts should be incontestable. This is an important issue to Nigeria being that banks are still the major source of financing – not even the Nigerian capital market could generate the volume of funds the banks do for the business community and those desiring to obtain credits, especially the SME's. Hence, it is vitally important that Nigerian lawmakers thoroughly consider this conflict from the beginning and possibly resolve in favor of the banks in such circumstance as Article 9's official comment has directed.[875]

another party might have a security in the deposit account..." The OPPSA equivalent of the foregoing is contained in section 40 OPPSA – regrettably therein, the priority question was left unresolved and this has led Ziegel and Denonme to say that section 40 OPPSA could not have ranked the banker's right of set-off (contractual right) over a deposit account, higher than a secured party's security interest which is statutory. See JACOB S. ZIEGEL & DAVID L. DENONME, THE ONTARIO PERSONAL PROPERTY SECURITY ACT: COMMENTARY AND ANALYSIS (Toronto, Butterworths, 2nd edition, 2000), p.209. It is the author's view, that the explanation given in Official Comment 4 to section 9-327 UCC, which gives bank the general priority over monies (proceeds) in the deposit account it controls is the better approach for Nigeria.

[873]Official Comment 4 to section 9-327 UCC.

[874]For a full analysis on this, see section 2.4.4., above.

[875] See Official Comments 3 and 4 to section 9-327 UCC.

At this juncture, it would be helpful to reiterate the common position of Article 9 and OPPSA – that if a secured party perfects a security interest in collateral, the interest remains perfected in proceeds gotten from selling that collateral. This is easy to conceptualize. However, the matter begins to get complicated when the proceeds are paid into a deposit account to mix up with other monies such that it becomes difficult to know exactly how much was the paid-in proceeds, especially if the exact paid-in amount is unknown to the secured party.[876] Also, it could happen that the bank is owed by the debtor from a transaction that is unconnected with the deal the debtor and secured party had. Under normal rules of contract, the bank in this circumstance is reasonably entitled to set-off its claim from the proceeds deposited in the debtor's bank account which the bank controls.

The controversial question is whether the secured party's right to trace proceeds in this circumstance supersedes a third party's right to set-off claim from the proceeds he controls. Article 9 uses the word "identifies"[877] as the watch word when tracing collateral, which makes it difficult to know whether stocks added to existing ones in electronic form could in fact be identified. With respect to this dilemma, OPPSA[878] is unhelpful as well. Both regimes obviously did not contemplate this gap and courts have not been able to have enough opportunity to expound fully on this.[879] But this is a dangerous hole which Nigeria might fall into if it does not pay attention to

[876] This is also a problem when proceeds are in a form of goods which are fungible. When they eventually mix with other fungible goods, for instance mixing up several varieties of cocoa seed (contained initially in several bags) would make the contents of each bag untraceable and unidentifiable. In such circumstance, the tracing right of a secured party regarding his proceeds could be deemed to have ceased.
[877] See section 9-315 UCC.
[878] Section 25 OPPSA states as follows "where collateral gives rise to proceeds, the security interest therein, (a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free of the security interest; and (b) extends to the proceeds".
[879] However, see the analysis in section 2.4.4 above with respect to the Canadian's Supreme Court decision in *Caisse Drummond.*

it while designing its PPSL – and it is vitally important that the hole be avoided *ab initio* in order to minimize litigations and associated costs that proceed generally from unclear provisions of law.

So here is what is recommended for Nigeria – since the banks in Nigeria are the biggest players in terms of providing credit facilities, it would be better to resolve the conflict in their favor as earlier stated.[880] This also concerns stockbrokers and similar entities who maintain brokerage accounts for their clients. Since there is no way a third party [banks and stockbrokers for instance] could possibly verify the encumbrance on money proceeds which the debtor deposits in his brokerage or deposit account it would be unfair to hold that their interests be made subject to the secured party's, when the bank or stockbroker is already in control. It would be highly unreasonable for the banker or stockbroker for instance, to surrender deposited money or stocks to a secured party, then sue the debtor afterwards who might have no additional asset to satisfy the owed debt – such would be incongruous with commonsense. Nigeria should therefore specify in its anticipated PPSL that such scenario would be resolved in favor of the third party (bank or stockbroker for instance) who is already in control.[881]

[880] See the explanation given by Official Comment 4 to section 9-327 UCC.
[881] For a more complete discussion on this, see sections 2.4.4 and 2.4.5 above.

The 4th Recommendation:

3.4. The title of a bona fide purchaser for value without notice should be immune against claims by secured creditors, although the latter's security interests continue in the proceeds of the sale or exchange of collateral

The major concern of Article 9 and OPPSA is to ensure the provision of sufficient and affordable credits to the business community as well as those who might need credit to accomplish one plan or another. To that end, a good number of provisions in both legal regimes are dedicated to settling issues related to security agreements between a debtor and a secured party. What cannot be avoided though is that sometimes, circumstances exist whereby the collateral subject of a security interest gets into the hands of a third party who acted in good faith in its acquisition. An immediate example could be drawn from the after-acquired property clause in a security agreement that covers inventories of the debtor – whereby he is allowed to deal with them in the ordinary course of business. The meaning of "ordinary course of business"[882] apparently involves a situation where the debtor sells part of the inventories or assets subject of security interests to a third party who purchases in good faith without knowledge that the sale violates another's security interest.[883] The rest of the society, apart from the secured party and debtor, fall under this category of people who could qualify as good faith purchasers from markets. Such a buyer in the ordinary course of

[882] See section 9-320 UCC. See also section 28(1) OPPSA and Linden J's exposition on "buyer in the ordinary course of business" in *Fairline Boats Ltd v Leger* (1980), 1 P.P.S.A.C 218 (Ont. H.C.J), at p.222.
[883] Seethe given definitions under section 1-201 (9) UCC, and section 28 OPPSA.

business[884] is maximally protected by law if he purchased without knowledge that the sale constituted a breach of the secured party's right.[885] The author argues that without the protection of the buyer in this circumstance, purchasing from any supermarket would be fraught with risks of buying products of which the secured party has superior interest – what is not without adverse implications.

The position of Article 9 and OPPSA is that where a buyer purchases collateral in the merchandise market where that kind of collateral in question is sold, or where he buys a collateral from a non-market overt which the secured party did not perfect interest in by filing– in both circumstances, the third party buyer would qualify as a bona fide purchaser for value without notice.[886] Currently in Nigeria, this is highly problematic due to the absence of a public filing system where security interests in personal property collateral are publicly registered.[887] Instead, the use of security devices whereby title to leased or sold property is retained until full repayment is rampant with their inherent problem of ostensible ownership. For instance, a buyer in a conditional sale or hire purchase contract, could present the property in his possession to an unsuspecting third party who is misled to buy without any opportunity to verify in any public

[884] For further exposition on "buyer in the ordinary course of business", see Mike Geyde, *A Hoary Chestnut Resurrected: The Meaning of 'Ordinary Course of Business' in Secured Transactions Law*, 37 MELBOURNE UNIVERSITY LAW REVIEW, 1 (2013).

[885] See section 9-317 UCC.

[886] This is an exception of the general rule in sections 9-201 and 9-315(a) (1) UCC which states that the security interest in a collateral continues notwithstanding sale. However, section 9-317(b) UCC protects a good faith purchaser of goods without notice that the sale constitutes a violation of secured party's right. Even section 9-320 UCC allows certain good faith buyers to take free notwithstanding the existence of a perfected security interest – an example would be a purchaser of inventory from a supermarket, which is subject of a floating lien. A case in point is *Fournier v Tichenor*, 944 S.W.2d 398, 31 UCC2d 571 (Tenn.App.1996). However, note that where proceeds are paid into a deposit account, and a banker-creditor has control, his interest will be senior over that of the secured party. See the Official Comments 3 and 4 to section 9-327 UCC.

[887] The exception is in the case of floating charges which are registered in Corporate Affairs Commission's offices. See section 197 Companies and Allied Matters Act, LFN 2004.

registry whether the seller has good title. The long established opinion of the Nigerian courts has been that the position of the bona fide purchaser for value without notice is unarguably sacrosanct and cases of this kind should always be decided in his favor – end of story.[888]

All this is expected to take a new dimension with the advent of a unitary system of PPSL which not only will subject contracts with retention of title to the rules of the unitary system, but will also create an online national registry where security interests in personal property would be available to the public – what would be a death knell to the problem of ostensible ownership. In that case – a bona fide purchase defense should be restricted to where the buyer buys inventories that are subject of a floating security from a store[889] or recognized markets where goods of the kind are sold secondhand.

[888]The cases of *Le Neve v. Le Neve* (1747)1 Ves Sen 64: Wh. & T. ii 157, and *Willoughby v. Willoughby* 1 TR. 763, are few of the old English decisions that charted a privileged path for the good faith buyer. In Nigeria, the bona fide purchaser for value without notice defense is a strong one being that nearly always, security interests in personal property that arise from commercial transactions, do not get registered in any public registry. This difficulty is equally experienced in real property transactions, whereby owing to the fact that most plots of land in the rural part of Nigeria are not officially titled, a prospective and good intentioned buyer would be unable to conduct checks against encumbrances as well as verify title in the land registry. Often times, the transactions turn to be hoax, notwithstanding that the buyer might have made sufficient oral inquiries. (Sometimes a fraudulent seller could arrange a number of fake witnesses who would testify that he is actually the sole owner of the land – they all disappear after money has exchanged hands). In many instances as this, the courts were quick to switch to the equity side of their conscience, and have severally upheld the buyer's plea of bona fide purchaser for value without notice. A case in point is the Nigerian Supreme Court decision in *Alhaja Juradat Animashaun v G.A Olojo,* (1990) NWLR (Pt.154) 111. Although the author agrees with the justifiable reasons that entitle a bona fide purchaser for value without notice to take free of a security interest, it would be apropos to introduce public registries, preferably online registries especially for security interests in personal property in order to combat the problem of ostensible ownerships – what will ensure that lenders do not lose their financial investments in front of the 'almighty' plea of bona fide purchase for value without notice.

[889] The author proposes that the defense of bona fide purchaser for value without notice should be restricted to inventory purchases and those bought from regular markets – that is, goods bought from supermarkets and regular markets where things of that kind are sold. Aside this, bona fide purchase defense should not extend to anyone who buys a personal property without taking a look at the registry as is the case today in Nigeria where people sell and buy electronic gadgets on the street. After the PPSL/public registry has come on board, plea of the doctrine should only succeed where the buyer searched the registry but could not find any subsisting interest in the property tendered for sale. Also, as Nigeria is expected to have a uniform PPSL that applies across the country, together with a single national online filing system – meaning that the problems encountered in US and Canada for change of collateral or debtor location and the grace period to re-file would not be encountered, one is hopeful that this positive feature would help address a whole lot of problematic issues that are ongoing.

The author argues that it would be ludicrous to expect anyone that walks into a store to buy consumer good for instance, to first of all go to the registry to conduct checks. Even with the knowledge that the debtor's inventories (lathes for instance) are subject of a floating security as the filed financing statement (notice filing) would easily reveal, it still cannot be expected that a prospective buyer would have knowledge of whether buying the lathes violates a secured party's security interest in them, simply by taking a look at the filed financing statement. Doing business would be impossible if it were to be the case, or rather, inventory financing would be a factual impossibility.

Similarly, a bona fide purchaser should be allowed to defeat a secured party who did not file a financing statement covering his security interest in a non-inventory collateral. A corollary to this is that a buyer who visits the registry and discovers that the filed financing statement refers to a broad coverage of assets belonging to the seller, which are not capable of being known individually from the notice filing, has an extended duty to request additional information from the seller – if possible, he should request to see the security agreement. These efforts are what would reinforce his claim of being a bona fide purchaser for value without notice, being that he exhausted reasonable efforts in ensuring that the purchased item was free of any prior security interest.

Finally, while it is vitally important to ensure that no stumbling block is kept on the pathway of secured lenders, being that they provide the needed credits for doing business in Nigeria, equally important however, is the well-functioning of merchandise markets, where majority of Nigerians visit on a daily basis to purchase items. It is submitted therefore, that this should be well balanced, so that the final outcome is not made repressive neither on credit lenders nor merchants who sustain the economy to a large extent. Very frequently, Nigerian courts resolve in favor of bona fide purchasers – this ‘over-pampering’ could easily be negatively exploited as a debtor could arrange with someone to purchase at a merchandise market with the hope of buying back the collateral later. But designing tailor-made as well as clear-cut rules with inspirations from Article 9 and OPPSA[890] would lessen the heat that is currently being faced in this area of law in Nigeria.

The 5th Recommendation:

3.5. The floating charge should be transformed into floating lien so that the benefits of ‘after-acquired property’ could be fully exploited in the context of secured transactions

The narrative of modern secured financing would be incomplete if the concept of after-acquired property was outside the precinct of secured transactions – that is, debtor’s personal property that are not yet in existence by the time of signing a security agreement, excluded from being used as collateral. In expatiating this view, it would hardly be an exaggeration to say that bulk of the wealth in every economy is locked up in inventories[891] – because most times, goods produced by corporations eventually end up in retail stores for sale.

[890] See chapter two – section 2.6.1. above, for Article 9 and OPPSA positions concerning a bona fide purchaser and a secured party regarding debtor’s collateral.

[891] According to section 9-102(a) (48) UCC, “‘Inventory’ means goods, other than farm products, which: (A) are leased by a person as lessor;(B) are held by a person for sale or lease or to be furnished under a contract of service;(C) are furnished by a person under a contract of service; or (D) consist of raw materials, work in process, or materials used or consumed in a business”.

However, the shifting nature of inventories[892] makes it practically difficult for secured creditors to re-perfect each and every time new inventories are restocked – this is why a financing statement should ideally contain the nature of debtor's collateral being covered (notice filing)[893] and not a detailed description of them because retail stores could change the types of inventories they sell – sometimes fundamentally different due to a particular period of the year.[894] Furthermore, in a typically busy retail store, inventories are sold and restocked within few hours so that no one can ever be reasonably expected to perfect security interests in the shifting stocks by filing each time they get restocked.

Therefore the answer as to how to possibly accommodate inventories as collateral rests in the concept of floating lien[895] – which is a fixed charge coupled with the permission of the debtor to use and dispose encumbered assets in the ordinary course of business. In addition, the floating lien can be created by both natural and artificial persons unlike the floating charge[896] that its use is restricted to artificial persons.[897] A floating lien could be created over inventories to cover present and after-acquired assets of the debtor within the confines of the security agreement – so that provided the initial security interest in the inventories was perfected, the floating lienor's

[892] Inventories available for sale usually start their journey as raw materials, then eventually as finished products in retail stores. The transformative processes occur quite swiftly that it becomes practically impossible to perfect security interests in transitory raw materials or the finished products, given their usually short period on store shelves before they are sold out.

[893] See section 3.2.2., above for discussion on notice filing.

[894]For instance owing to the different seasons each year, some stores usually replace winter clothing with summer's, or could change towards selling a kind of products the retail store owner thinks would be more profitable. The fluctuations could be so erratic that trying to capture the changes in a financing statement by filing and refiling would not only be very costly as to flatten any profit from the transaction, but extremely cumbersome as well to undertake.

[895] See chapter two (section 2.6.3) for a penetrating discussion on floating lien.

[896] The floating charge emerged in English law as a creation of the Chancery Court which did so in response to the 'capital-hungry' companies at that time. For a detailed account of the genesis of floating charge, see Robert R. Pennington, *The Genesis of the Floating Charge,* 23 MODERN LAW REVIEW, (1960), p.630.

[897] See *National Westminster Bank plc. v Spectrum Plus Ltd* [2005] UKHL 41.

interest in subsequent inventories gets automatically perfected in them and becomes senior[898] to those who perfected interests in the debtor's present goods but after the floating lienor's initial perfection.[899] The only party whose security interest would supersede a floating lienor's in inventory financing should be the bona fide purchaser for value without notice that the sale constituted a breach of the secured party's right.[900]

Currently, what Nigeria has is the floating charge device which is restricted to the use of incorporated companies. The device entails that attachment in the debtor's property be postponed until crystallization.[901] Floating charge is also wider in scope in the sense that when it crystallizes, it converts to a fixed charge on all debtor's property including those under title retention transactions with a third party buyer. Furthermore, there is a fundamental feature of the floating charge device that makes it very incompatible with the unitary system – which is the fact that attachment of security interest to debtor's property is postponed to crystallization. Meanwhile, under OPPSA and Article 9's unitary system, for a security agreement to be valid, there must first be attachment of security interest to the debtor's collateral.[902] It is unfortunate that the floating charge device would be fundamentally distorted if the concept of crystallization is removed from

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[898] For a masterful opinion, see Peter F. Coogan, *Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien",* 72 HARVARD LAW REVIEW, 838 (1959). See also the Official Comment 2 to section 9-204 UCC as well section 12 OPPSA for further details on floating lien.

[899] This follows the basic rule of priority in Article 9 UCC and OPPSA which is known as *first to file or perfect rule.* See section 9-322 UCC and section 30(1) OPPSA. Thus, a floating lienor's interest having been initially perfected, gets *automatically* perfected in present and future property of the debtor.

[900] It should be noted that the secured party has the burden of proving that the third party buyer who claims the defense of bona fide purchaser for value without notice, was not indeed a bona fide purchaser. This is because the third party being already in possession of the collateral is not expected to have the burden of proving himself wrong.

[901] Usually default in payment or winding up of a company could trigger off crystallization. But what constitutes it could also be a creature of contract. For a penetrating treatment, see generally – Karen Hogg, *Floating Charges and Automatic Crystallization,* 1 CORPORATE & BUSINESS LAW JOURNAL, 68 (1988).

[902] See section 9-203 UCC and section 11 OPPSA.

it, yet it is necessary for Nigeria to transform the floating charge into floating lien because the latter is a natural content of Article 9 kind of unitary system.

Furthermore, the Americans never had the floating charge device unlike the Canadians who adopted it from English law. However, with the adoption of the unitary system in the Canadian common law provinces, floating charge became subsumed – thus, OPPSA expressly states that floating charge is governed by its provisions.[903] This means that the device would have to surrender to the application of OPPSA rules regarding creation, perfection, priority and enforcement. It further means that the concept of postponing attachment until crystallization, has gone with the wind of reform in Canada (Ontario's) secured transactions law. Today, floating charge in the Canadian common law provinces is only discussed from the perspective of history and not as part of its existing secured transactions law.[904] Its existence as a historic remnant was confirmed by the Canadian Supreme Court's dictum in *Royal Bank of Canada v. Sparrow Electric*,[905] stating that "[p]rior to the PPSAs reform, transactions that formerly were regarded as floating charge are now deemed as fixed charges but coupled with the permission of the debtor to deal with encumbered assets in the ordinary course of business".[906]

Therefore, the author proposes that the Ontario's secured transactions law reform experience which created a hybrid of fixed and floating charges, similar to the US floating lien should serve as lesson to Nigeria as to what it should do with its floating charge vis-à-vis the anticipated PPSL. The author recommends that floating charge which is at loggerhead with the unitary system because of its core feature of postponing attachment until crystallization, as well as

[903] See section 2 OPPSA.
[904]*Ibid.*
[905] [1997] S.C.J. No. 25, [1997] 1 S.C.R. 411, 44 C.B.R. (3d) 1, 143 D.L.R. (4th) 385.
[906] *Ibid.*

crystallizing on all of debtor's property, should be transformed into floating lien and made to become part of the anticipated PPSL.[907]This would mean that after the anticipated PPSL comes alive, the acid test towards determining the applicable law will be the so called functional approach – that is, whether a particular agreement created a security interest in personal property or fixture which the debtor owns or has sufficient interest in favor of a secured party, and in exchange for credit. If so, then the anticipated PPSL will govern regardless of whether the agreement is labeled a "floating charge" or by any other name.

In conclusion, it is vitally important that the floating charge is transformed into floating lien in order to be compatible with a core feature of the unitary system from the viewpoints of Article 9 and OPPSA – that is, attachment being a precondition for the validity of security agreement.[908] For the floating charge to be made part of the unitary system which requires attachment from the onset of the formation of security agreement, its (the floating charge's) dismemberment to exclude crystallization together with its inherent feature of postponed attachment is a must. Furthermore, floating charge covers all assets of the debtor whether real or personal, whether specified or not, and this makes it very problematic as nearly always, a floating

[907] While formulating the PPSL, the Nigerian legislators could expressly state that the various provisions of the Company and Allied Matters Act 2004, which contain the floating charge device are repealed. Furthermore, that any provision of any other law (except the constitution) which comes in conflict with the PPSL remains subservient to the PPSL.

[908] Official Comments 2 to section 9-204 UCC explains that "[a] security interest arising by virtue of an after-acquired property clause (floating lien) is no less valid than a security interest in collateral in which the debtor has rights at the time value is given. A security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party – such as a supplemental agreement covering the new collateral is required…It validates a security interest in the debtor's existing and (upon acquisition) future assets, even though the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral…" In contrast, the floating charge only yields an equitable interest which matures to a legal interest upon crystallization. For a brilliant comparison of floating charge and its American kin (but hardly the equivalent), see Lynn M. LoPuck et al, *Optimizing English and American Security Interests*, 88 NOTRE DAME LAW REVIEW, 1785 (2013). Available at http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1140&context=ndlr (last visited on April 4, 2015).

chargee's crystallized interest comes in conflict with retention of title transactions between the debtor and third party. Meanwhile, with the floating lien, only specified nature of assets of the debtor contained in a security agreement are affected. This logically follows that those assets not captured by the security agreement would be unaffected.[909]Similarly, another weakness of the floating charge lies in the fact that upon debtor's default, it transforms itself to a fixed charge thereby placing the floating chargee always at the back position of existing fixed chargees – this is because in a floating charge agreement, the attachment of a security interest to debtor's collateral is postponed until the time of crystallization.

Since the floating lien covers only debtor's personal property as defined in the security agreement, and the floating lienor's security interest has no need of crystallization upon debtor's default, and would not have to contest priority with secured creditors who have security interests in debtor's real property, the author proposes that it is a better alternative for Nigeria's PPSL. This further means that when the PPSL comes into force, floating security will have to be restricted to personal property and fixtures since PPSL will not govern real property transactions. This will be a good development for Nigeria given that the opportunity to exploit the floating lien device extends also to human debtors: partnerships, and sole proprietors who constitute a large number in Nigeria's business terrain, thereby allowing this category of debtors to use their inventories as collateral for credits – what surely will have enormous positive impact on the Nigerian economy.

[909] Preexisting claims of the debtor as well as future commercial torts are not covered by floating lien. See Official Comments 3 and 4 to section 9-204 UCC.

The 6th Recommendation:

3.6. To prevent a stranglehold on a debtor by its floating lienor, the purchase money security interest must be regarded as an exception to the first to perfect, first in rights rule

As earlier stated,[910] inventory financing would have been pretty much difficult to realize had the floating lien concept not been developed – a debtor's present and after acquired property could be encumbered with a one-time perfection.[911] This however makes a floating lienor powerful being that he could frustrate the debtor's ambition to seek alternative financing to further expand business – given that subsequent financiers are made subordinate to the floating lienor's interest following the first-to-file or perfect rule.[912]This degree of control of the debtor's business affairs, acquired through an after-acquired property clause could be grossly abused by the floating lienor – leaving the debtor with no robust alternative to financing. The drafters of Article 9 and OPPSA figured this possibility – that although inventory financing is vitally important in modern secured transactions and could only be made possible through a validation of after-acquired property clause in security agreements, the power of the floating lienor should however be whittled, to enable the debtor seek alternative financing when necessary.[913]

[910] See section 2.6.4 above.
[911] This concept is well entrenched in section 9-204 UCC, which states that a security agreement "may create or provide for a security interest in after-acquired collateral." This of course excludes commercial tort claims as was decided in *Waltrip v Kimberlin*, 164 Cal.app.4th 517, 79 Cal.Rptr.3d 460, 67 UCC2d 224 (2008). In a floating lien transaction, as the official comment 2 to this section 9-204 states, the debtor "has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral" as was exactly decided in *Maryott v Oconto Cattle Co.*, 259 Neb. 41, 607 N.W.2d 820, 41 UCC2d 279 (2000). Also see section 12 OPPSA which echoes similar sound as section 9-204 UCC.
[912] This is clearly seen in the words of subsection 9-322(a) (1), and further buttressed in example 4 to official comment 5 to 9-322 UCC.
[913] Scholars of modern secured transactions law usually refer to this enormous power of the floating lienor as constituting "situational monopoly." For a masterful discussion – see Thomas H. Jackson & Anthony Kronman,

More so, circumstances could exist whereby the debtor is facing hardships in business that make him appear unattractive for further financing – potential secured creditors would naturally conceive the fear of financing a 'dying' business that might eventually end in liquidation, given that they would be positioned at the back of the priority queue.[914] The unfortunate implication of this is that with the existence of after-acquired property clause, businesses would hardly be saved once they begin to experience hardships – because, no such incentive to save a dying business by injecting new assets is accommodated under the first-to-file or perfect rule.[915] As a remedy, both Article 9 and OPPSA created an incentive for any creditor that takes the audacious step to save a debtor's dying business – by supplying him with new assets or funds that could help to jumpstart the business. Commonsense and justice would demand that in such scenarios, a heroic step to save a dying business by infusing assets or funds should not be 'punished' with a backseat position.[916]

The answer was found in the concept of PMSI.[917] The debtor could create a PMSI that enables him to expand his business without the subordination of the PMSI holder's interest to that

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Secured Financing and Priorities among Secured Creditors, 88 THE YALE LAW JOURNAL, 1143 (1979), p.1162. Available also at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2069&context=fss_papers (last visited on January 21, 2015).

[914]See Gerard McCormack, *Super-Priority New Financing and Corporate Rescue*, JOURNAL OF BANKING LAW, 701 (2007), pp. 703-714. (Discussing the need to allow a new financier's security interest to have a super-priority status with respect to the new assets he injected into the debtor's business). See also generally, James J. White, *Death and Resurrection of Secured Credit* 12 AM. BANKR. INST. L. REV (2004), p 139-92.

[915] It should also be noted that the relevance of PMSI is not only visible in the context of close insolvency of the debtor, but in 'peace times' as well. Thus, with respect to equipment financing, an industry specialized in "selling" peculiar large value equipment – for example, the acquisition of construction machines through financial leases (which is the main method of acquiring such heavy equipment). In such case, acquisition of such new equipment is possible only if the floating lien creditor agrees that his security interest would not cover the newly acquired assets.

[916] Professor Lloyd thinks of PMSI as a fairness concept – and that should be borne in mind when settling legal disputes that involve PMSI. See Robert M. Lloyd, *Refinancing Purchase Money Security Interests*, 53 TENNESSEE LAW REVIEW, 1 (1985), p.11 ("[D]uring the nineteenth century the purchase money super-priority was transformed from a formalistic concept ... to an equitable concept in recognition of the inherent fairness of giving first claim to the assets to those who parted with their money to make possible the assets' acquisition.").

[917] See subsections 2.6.3 to 2.6.5 of this thesis above (chapter two) for discussions on PMSI from the comparative perspectives of Article 9 and OPPSA. Professor Carlson captures PMSI in an elegant language. His seminal words read in part: "[P]urchase money, as that odd phrase is used in Article 9 of the Uniform Commercial Code (UCC), does

of a floating lienor's. However, to establish a PMSI in inventory, the PMSI holder must prove that some identifiable inventory-assets of the debtor were supplied by him or that he gave the debtor some funds which were indeed used in procuring the inventory.[918] If the PMSI holder could perfect its security interest, as well as establish these conditions, he is allowed to take priority interest in those assets[919] – in this circumstance, the floating lienor whose interest ordinarily covers the PMSI holder's assets under the after-acquired property clause is made subordinate of the PMSI holder with respect to the infused assets. The burden of proving that some identifiable assets of the debtor are under the PMSI coverage is on the PMSI holder. This can be very difficult if the PMSI holder cannot be able to trace and prove infusion of the assets by him. Failure to prove this requirements, means failure to meet up with the statutory requirements for PMSI priority, hence the loss of priority to the floating lienor.

From the lessons gathered from comparing Article 9 and OPPSA with respect to PMSI, the author advises a PMSI holder in Nigeria under this circumstance to ensure that he stamps his sign on the supplied equipment being that they might mix up with other fungible assets the debtor uses

not refer to "money" at all but to a type of loan—a loan that finances the purchase of the collateral that secures the loan. Article 9 treats purchase money security interests rather differently from other types—particularly with regard to their priority. Perhaps most significantly, the purchase money priority breaks the monopoly power an after-acquired property lender might have over the debtor. If a security interest automatically attaches to everything a debtor has, a supplier extending credit to the debtor without the benefit of a purchase money status thereby makes a contribution to the welfare of this creditor.

This is to say that the loan will not be forthcoming, as charity is not a hallmark of trade credit—not intentionally so, anyway. If the debtor has no cash and nevertheless is in need of supplies, the purchase money priority makes provisioning the debtor possible over the opposition or indifference of the after-acquired property lender, because the purchase money security interest has priority over the after-acquired property security interest. Often this is justified by the claim that the purchase money lender is the "founder of the feast" and simply deserves a higher priority than the after-acquired property lender for this broader reason. Or the after-acquired property lender has a "stranglehold" over the debtor that ought to be broken. Because purchase money priority has its relevance principally against after-acquired property liens, it appears quite late in the history of commercial liens on personal property, simply because the after-acquired property clause was vindicated only late in our history…", see generally – David G. Carlson, *Purchase Money under the Uniform Commercial Code*, 29 IDAHO LAW REVIEW, 793 (1993).

[918] See section 9-324 UCC and section 33 OPPSA.

[919] *Ibid.*

in production – the essence of this would be to help him fulfill the 'identification' requirement which is pivotal to his case. If this is not done, he may not be able to distinguish between the assets he infused and the preexisting ones of the debtor which are either subject to an after-acquired priority clause or belong to another purchase money lender of the debtor.

Furthermore, where the PMSI holder did not supply assets directly to the debtor but merely financed the acquisitions, he still has the burden to prove that the assets he claims a PMSI in were purchased pursuant to the enabling loan he provided. Since it is all about evidence – in discharging the burden of proof on him, the PMSI holder is strongly advised not to give cash to the debtor to buy the assets, instead he could pay a supplier or manufacturer of the assets intended to be infused, and then ask the debtor to pick up the assets from the supplier/manufacturer.[920] The essence is to establish enough layers of evidence that the assets were indeed financed by him – this of course entails proper documentation and safe keeping of all payment and relevant receipts concerning the acquisition of the infused assets.

More so, as the analysis would show below, Nigeria should maintain a slightly different position in its anticipated PPSL as opposed to Article 9 and OPPSA's regarding the PMSI holder versus floating lienor conflict. Admittedly, both the floating lien concept and PMSI are vitally important in modern financing – the latter exists to break the situational monopoly or stranglehold of the floating lienor on the debtor, as well as save dying businesses when no creditor would ordinarily help out.[921] It is equally important to note that keeping the debtor's business solvent

[920] Note critically that Official Comment 3 to section 9-103 states that "the concept of 'PMSI' requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as PMSI if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price."
[921] Gilmore was one of the drafters of the UCC Article 9 – therefore, the author considers his opinion on PMSI priority a must read for anyone intending to fully grasp the intricacies underlying this topic. See Grant Gilmore, *The Purchase Money Priority*, 76 HARVARD LAW REVIEW, 1333 (1963).

through the PMSI holder's infusion of assets or granting an enabling loan to the debtor to acquire the needed assets is equally beneficial to preexisting secured creditors. However, apart from the delicate burden of proof on him, a PMSI holder may run the risk of having to satisfy his claim with depreciated assets which he supplied being that he is not allowed to look beyond the infused assets in satisfying his claim – this is a great limitation which a floating lienor would not ordinarily face.

Based on the foregoing, the author proposes contrary to Article 9 and OPPSA positions that the requirement imposed on a purchase money lender to give notification of his PMSI in inventory to preexisting secured creditors who hold conflicting security interests in the same inventory, should not be included in the anticipated PPSL.[922] This practice might discourage earlier secured creditors from advancing the debtor further credits after the PMSI holder broadcasts that he already has extended credit to the debtor. After all, the credit advanced by the PMSI holder in inventory might be insufficient for the debtor's business needs. In the author's opinion, there should simply be no need to distinguish PMSI in equipment and inventory, with the additional requirement of notification for the latter – it should be sufficient that a PMSI holder in inventory

[922] See section 9-324(c) UCC. The author's view about PMSI is grossly similar with the Singaporean Law Reform Committee on secured transactions. Singapore is also reforming its personal property security law from the lens of UCC Article 9. Its reform committee disapproves of Section 9-324(c) UCC kind of treatments for PMSI. The following wordings of paragraph 22.3 of its Reform Committee's report are illustrative: "[I]n some countries, (referring especially to US), the law is or proposals have been made that the holder of a purchase money security interest in inventory (as opposed to equipment and machinery) must notify the holder of a prior security interest, such as a floating charge, in order to obtain super-priority. The Sub-Committee, however, is not persuaded that there should be a difference between purchase money security interests in equipment as opposed to inventory. Both play a part in keeping a business going and neither can be said to be more crucial than the other. Moreover, notification of a prior secured creditor is unnecessary since the requirement that a financing statement describing the purchase money security interest be filed within a specified period from the time of acquisition of the inventory or equipment already implies that the prior secured creditor who wishes to make more advances to the debtor can check the register and discover the exact nature of the new inventory or equipment". The report is available at http://www.sal.org.sg/digitallibrary/Lists/Law%20Reform%20Reports/Attachments/17/bill_of_sale.pdf (last visited on February 14, 2015).

filed to perfect his security interest, without the additional burden and cost to notify each and every existing secured creditor who has security interest in the same inventory.

Thus, preexisting secured creditors who have created a line of credit for the debtor could regularly check the registry to know if any new and conflicting security interest exists, before each credit line gets transferred to the debtor. Future advance secured creditors could also protect themselves by inserting a 'negative plegde' clause in the security agreement that mandates the debtor to inform them prior to his receipt of the PMSI holder's inventory supply – at least it would be easier for a debtor who would most likely have a list of email contacts of all his secured creditors to execute this notification task.

Another practice in Article 9 and OPPSA with respect to PMSI, which the author finds unsuitable for Nigeria is the fact that the purchase money lender in goods other than debtor's inventory can only have super-priority if he perfected his security interest upon debtor's receipt of collateral or twenty days thereafter.[923]The author argues that it might be evidentially burdensome to determine when exactly the debtor received collateral as to determine when twenty days afterwards will elapse – given Nigeria's state of development, establishing this level of evidence which is pivotal to a claimant's case will be highly onerous.

Looking at all this, the author suggests to Nigerian legislators to see the possibility of dropping the requirement that a PMSI holder wanting to take PMSI in debtor's inventory must notify other secured creditors that also have security interests in the debtor's inventory within twenty days.[924] This is suggested due to the difficulty in knowing exactly when debtor received

[923] See section 9-324 UCC.

[924] The disadvantage with this proposal is that if the PMSI holder is not required to notify existing security interest holders in the inventory he intends to take PMSI in, the existing secured creditors might still extend the debtor some

possession of PMSI assets so as to begin the countdown of twenty days. However, the legislators would have to consult the adroit observation made by one of Article 9's official comments on this matter.[925] Although it will not be wise to predict with a dogmatic finality what exactly will be best for Nigeria in this circumstance, the author makes these suggestions, although contrary to the tested US and Ontario positions, but very hopeful that given Nigeria's local conditions, its legislators would be able to enact an efficient PPSL if they adhere substantially to these tailor-made proposals.

credits, such that existing collateral of the debtor becomes far less worth than the secured debts. On the other hand, if the PMSI holder does not give enough credits to the debtor to solve his business problems, the latter will find it difficult to obtain additional credits from other existing secured creditors who have already been notified.

[925] See Official Comment 4 to section 9-324 which adeptly states as follows: "[T]he arrangement between an inventory secured party and its debtor typically requires the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though it has already given a purchase money security interest in the inventory to another secured party. For this reason, subsections (b) (2) through (4) and (c) impose a second condition for the purchase money security interest's achieving priority: the purchase money secured party must give notification to the holder of a conflicting security interest who filed against the same item or type of inventory before the purchase money secured party filed or its security interest became perfected temporarily under Section 9-312(e) or (f). The notification requirement protects the non- purchase money inventory secured party in such a situation: if the inventory secured party has received notification, it presumably will not make an advance […]." See also Official Comment 8 of this section. The author is however skeptical of this position as being viable for Nigeria already canvassed above.

The 7th Recommendation:

3.7. To encourage lending, security interests in personal property should require a quick and low-cost method of enforcement which whenever occasion demands should be extra- judicial, but peaceful

The long established opinion amongst a dominant number of Nigerian judges is that self-help is barbaric, and that a civilized nation as Nigeria should not tolerate its use[926]– for them, every dispute ought to be settled by court actions or through other recognized alternatives to dispute resolution. As already stated earlier, the absence of a statutory right to repossess collateral by self-

[926] In *Ellochim Nig. Ltd & Ors v Mbadiwe* (1986) NWLR (part 14) 47 at 165, the Justice roundly condemned self-help as follows "It is no doubt annoying, and more often than not, frustrating, for a landlord to watch helplessly his property in the hands of an intransigent tenant who is paying too little for his holding, or is irregular in his payment of rents or is otherwise an unsuitable tenant for the property. *The temptation is very strong for the landlord to simply walk into the property and retake immediate possession. But that is precisely what the law forbids".* See the case of *Ojukwu v Military Governor of Lagos Sate* (1985) 2 NWLR (part 110), 806 – which condemns repossession via self-help. See also the Supreme Court decision in *Civil Design Construction Nig. Ltd v SCOA Nig. Ltd*, [2007] 6 NWLR (Pt.1030) at 300, where Justice Onnoghen, delivering the lead judgment expressed his strong disapproval of the use of self-help to recover possession, when he decried "[E]ven under the common law, 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 court".* [Emphasis by the author].

Based on the perspectives of US and Canada (Ontario), the author strongly advises that modern secured financing should accord secured creditors the right to repossess collateral for many obvious reasons: (1) Courts, especially in Nigeria are proverbially slow in rendering their decisions – so that a total reliance on them would deny secured creditors the opportunity of recovering their money in good time, as well as strengthens the possibility of being caught up by high inflation. This would consequently lead to a general apathy or suspicion to lend large sums to debtors – what would constitute hindrance to robust economic growth. (2) Recovery through court action is more expensive being that both parties to the suit would have to pay attorney fees and other kindred costs. In the end, the expected profit from a transaction is eroded by litigation costs. Being also that the debtor usually bears the cost of litigation – because all reasonable expenses are first of all deducted before the secured party applies the remainder towards the debt owed, the debtor runs the risk of being liable for a deficient sum. When that happens, it means the secured party would have to launch a fresh lawsuit since that is the only permissible way to recover claims – thereby raising an adroit question as to what will be of a situation where the deficient sum owed by the debtor is less than attorney fees. There is also the risk that the price of collateral would be low at the end of litigation owing to the availability of a newer version of the collateral – for example, Dual core processor personal computers produced a decade ago, would worth very low in today's market because of the availability of their latest model counterpart with higher processors (core i7 for example). For these reasons and more, Nigeria ought to give secured creditors self-help repossession right provided it is done without breaching the peace – and that some laid down procedures were followed prior to exercising it.

help in Nigeria, bearing in mind the country's slow judicial system, could be said to have a close link with lenders' apathy towards lending.[927]

At all times, and as a general rule, lenders of credit should not be hindered from easily realizing their money claims. Hence, given that Nigerian courts are exceedingly slow in rendering their decisions, which also get executed following the bailiff enforcement system,[928] it would be injurious to the function and realization of the goals of the anticipated PPSL, no matter how well drafted, if sole reliance in placed on the courts with respect to recovering possession of collateral. A quick and easy enforcement of security interest against debtor's collateral is a key ingredient in the robust growth and development of the Nigerian economy given that it will encourage lenders to lend. However, the pursuit of this goal should be in parallel with debtors' welfare in mind, by ensuring that no private enforcement mechanism is designed to lead to the abuse of debtors by secured creditors.[929] No magic formula exists to ensure impeccable results, but in the author's opinion, some hope might lie in providing a kind of self-help remedy that stands in between the interests of the secured party and debtor.

[927] See "Making Finance Work for Nigeria" (World Bank Report, 2009), pp.152-156. Available at http://siteresources.worldbank.org/INTAFRSUMAFTPS/Resources/Making_Finance_Work_for_Nigeria.pdf (last visited on October 23, 2015).

[928]For instance in *Bokini v John Holt & Co Ltd* (1937) 13 NLR 109 – a case concerning a mortgage transaction (7 years), *Bank of the North v Muri* (1998) 2 NWLR (part 536) 153, a matter concerning a mortgage transaction (10years from the High Court to the Court of Appeals), *Ojikutu v Agbonmagbe Bank Ltd* (Now called: Wema Bank Plc) (1996) 2 Afr LR (comm.), 433 – also a matter concerning a mortgage transaction (11 years).

[929] On self-help repossession from a comparative perspective, see Gerard McCormack et al "Synthesis Report", in GERARD McCORMACK & REINHARD BORK (eds) SECURITY RIGHTS AND THE EUROPEAN INSOLVENCY REGULATION (Cambridge, Intersentia, 2016), chapter 2.

US and Canada (Ontario) respectively inserted self-help remedy in Article 9[930] and OPPSA[931] as a vital tool that helps the secured party to facilitate recovery of collateral provided the secured party repossesses without a breach of peace – it may suffice to say that this has so far been working for them although not without occasional hiccups.[932]However in the case of Nigeria, its court decisions are divided on the admittance and use of self-help in repossessing collateral. One of the two groups of cases[933] states categorically that the use of self-help is uncivil and the citizenry ought to always approach the court for the resolution of disputes. Thus where a person resorts to self-help (except in criminal self-defense[934]), he could be liable to exemplary damages.[935] While the other group of cases states that circumstances could exist under which the use of self-help would be allowed.[936] These mutually contradictory positions held by the Nigerian courts make the validity of self-help unfathomable and recondite. The author is of the opinion that the use of self-help to recover possession of collateral could be highly beneficial to the Nigerian economy if its rough edges are carefully trimmed to suit Nigeria's local conditions. This pruning exercise can

[930] See section 9-609 UCC. In the context of this research, the author would like to emphasize that 'self-help' be understood only as a statutory right that enables a secured party to repossess his debtor's collateral in satisfaction of the former's in rem security interest. Thus, by this logic, a security interest in receivables could be collected by out of court enforcement if the debtor defaults simply because the secured party has an in rem security in the receivables. However, strict foreclosure is not treated as self-help here because the right to retain debtor's collateral in full or partial satisfaction of debt must be consensual, the debtor would have to sanction the strict foreclosure for it to be valid. Thus, even though strict foreclosure obviates the need for court enforcement, thereby seeming to be a functional equivalent of self-help, in the author's view, it would hardly be termed as such in the context of the foregoing analysis due to the already given explanation. See section 2.7.5 above on strict foreclosure for more detail.

[931] See section 62(1) OPPSA.

[932] See section 2.7.3 above for a deep layered analysis of repossession of collateral via self-help from the perspectives of US and Ontario.

[933]See *Ellochim Nig. Ltd & Ors v Mbadiwe* (1986) NWLR (part 14) 47 at 165.

[934] See Section 288 of the Nigerian Criminal Code on self-defense, and also the case of *Baridam v. State* (1994) 1 NWLR (Part 32), p.250, where the Supreme Court fully analyzed the proper use of it.

[935] See Hakeem Ogunniran, *Awarding Exemplary Damages in Tort Cases: The Dilemma of Nigerian Courts,* JOURNAL OF AFRICAN LAW, volume 36 / Issue 02 (1992). Available at http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=5243580.

[936] See *Umeobi v Otukoya* (1978) All N.L.R 140, and *Awojugbagbe Light Industry Ltd. v. Chinukwe* (1995) 5 NWLR (Pt.390) 409.

majorly be accomplished by providing regulated self-help remedy that would serve a good commercial function for the Nigerian economy while ensuring against abuses of debtors.

Driven by this quest for a tailor-made kind of self-help remedy, the author argues that the protective measure contained in Article 9 and OPPSA against abuses of the right to repossess collateral via self-help is grossly insufficient to address the Nigerian realities – and a new set of measures suitable for Nigeria are required to reinforce the "without the breach of peace" protective measure. The reasons for this position as well as proposals are discussed below.

3.7.1. Will the "without the breach of peace" standard be a sufficient protection to Nigerian consumer debtors?

In the author's view the use of self-help to repossess collateral "without breaching the peace"[937] will yield positive results to the Nigerian economy in the sense that lenders by not mandatorily going to court to spend money and time in order to repossess collateral, will always be motivated to lend out sufficient and cheap credits. This is further supported by the fact that under the Nigerian legal system, each party to a litigation bears its own costs – meaning that a

[937] See Official Comment 3 to section 9-609 UCC for insight regarding the breach of peace standard. Under section 62 OPPSA, breach of peace or its equivalent was not stated therein. Instead, the section states that "the secured party has, unless otherwise agreed, the right to take possession of the collateral by *any method permitted by law*." (Emphasis mine). This means that a secured party's re-possessory act is examinable beyond the scope of OPPSA and extends to other relevant laws that might be in breach. Furthermore, see the abstract of Ryan McRobert, *Defining "Breach of the Peace" In Self-Help Repossessions*, 87 WASHINGTON LAW REVIEW, 569 (2012), where the author opines that "[s]ince Roman times, creditors have invoked the limited extrajudicial remedy of self-help repossession. Pre-colonial English laws also allowed for a limited repossession remedy outside of the courts, provided the creditor accomplished the repossession without a "breach of the peace." The Uniform Commercial Code (UCC) has allowed for the self-help remedy since the 1950s, making it available for any secured party in the event of contractual default so long as there was no breach of the peace. The drafters of the UCC, however, failed to define what constituted a "breach of the peace," choosing to allow the courts to flesh out the definition in a fact specific, ex post fashion. This has resulted in a lack of clarity and consistency across jurisdictions as each court attempts to craft a breach of the peace requirement without guidance from the UCC. This article argues that courts across the country should adopt a two-part test for determining whether a breach of the peace occurred during self-help repossession. The two-part test involves three per se rules of exclusion followed by consideration of two factors to reach a final decision".

lender would have low incentive to litigate a matter involving a paltry sum because litigation costs will invariably outweigh whatever profit that is involved. This negatively implies that the SME's looking for small credit sums to start-up businesses may not easily get them if the secured party is only allowed to sue in the event of debtor's default. If litigation is therefore the only means of recovery, lenders would continue to prefer real property as collateral instead of personal property which depreciates easily, because the former (apart from being easier to monitor) is more likely to appreciate during the pendency of litigation – this would of course work against the entire idea of using personal property as collateral. A hasty opinion after a study of Article 9 and OPPSA, might consider however that the easiest approach to remedy the above challenge caused by judicial slowness in Nigeria is to introduce the loosely qualified[938]self-help remedy – to allow secured creditors repossess collateral upon default.

However, the author is highly conscious of the fact that the right to repossess collateral via self-help is highly susceptible to the overreaches of secured creditors, and this is made worse by the fact that the "without the breach of peace" standard which protects the debtor (especially consumer debtors) can only be realized *ex post facto* – that is, the secured party abuses or breaches the standard, then debtor goes to court if he only has the following: money, time and evidence to prove his case. The Nigerian society is different from the US or Ontario – and this difference (in the case of US or Ontario) means that an abused debtor could file a lawsuit and obtain decision pretty much faster than his Nigerian counterpart who might wait for seven years or more to even get a judgment, let alone a proper compensation.[939]

[938] "Without the breach of peace" is not a sufficient protection mechanism against debtor abuses – especially in the Nigerian context as the author's analysis shows below.

[939] Cases in point are: *Bokini v John Holt & Co Ltd* (1937) 13 NLR 109 – a case concerning a mortgage transaction (7 years), *Bank of the North v Muri* (1998) 2 NWLR (part 536) 153, a matter concerning a mortgage transaction (10years

Furthermore, it is relatively easier to obtain evidence of a secured party's abuse in the US[940] or Ontario[941] with the help of higher level of technological development. This is not so in Nigeria where most streets or homes do not even have circuit camera televisions that monitor events, thereby making evidence of abuses very difficult to obtain, and to depend largely and delicately on the oral testimonies of debtors. Again, apart from the fact that an average debtor in the US or Ontario is richer than his counterpart in Nigeria which enables the former to more easily foot costs for litigation, he is also more culturally inclined to litigation as a way of resolving disputes no matter how minor – as opposed to a typical Nigerian who due to cultural dispositions, would rather do anything to avoid litigation.[942]

The sad reality is that an average Nigerian debtor faced with a slow judicial system, lack of good evidence of abuse, and money to litigate his claim would most likely not sue to prove that the secured party repossessed violently and in breach of peace. All this, proves to a large extent that the "without the breach of peace" standard will be grossly insufficient to protect Nigerian consumer debtors unlike their US or Ontario counterparts – therefore, abuses by secured creditors

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from the High Court to the Court of Appeals), *Ojikutu v Agbonmagbe Bank Ltd* (Now called: Wema Bank Plc) (1996) 2 Afr LR (comm.), 433 – also a matter concerning a mortgage transaction (11 years).

[940] See Kate Dailey, *The rise of CCTV surveillance in the US*, BBC NEWS MAGAZINE, (2013). Available at http://www.bbc.com/news/magazine-22274770 (last visited on March 4, 2015).

[941] See, *CCTV Cameras in Ontario*, available at http://locksmithiq.com/2014/12/19/cctv-cameras-ontario/ (last visited on March 4, 2015).

[942] While searching for authorities to justify this claim, it appears that no one has yet analyzed the visible attitude of average Nigerians towards litigation. However, as a practicing attorney, the author relates from his experience that due to the win-lose concept of litigation, an average Nigerian despises it even when s/he has a good case. This general attitude partially anchors on the fact that litigation as a means of dispute resolution (apart from its high costs) was part of the colonial package and has not properly sunk in the people as the most trusted means of resolving disputes. On the average, Nigerians are more inclined to mediation as more reliable method due to its win-win concept, given that Nigeria is more of communal than individualistic society. In light of this background, it is therefore vitally important to ensure that litigation is not made the epicenter or the only means through which the debtor could vindicate his claim. However, apart from court, and in the absence of any other viable alternative to dispute resolution vis-à-vis debtor's default, it could at least be ensured through strategic designs in the PPSL that the possibility of abusing the debtor by the secured party through violent repossession is flattened.

against debtors in Nigeria would likely be graver and more frequent if "without the breach of peace" standard as in Article 9 and OPPSA is the only protective measure against self-help remedy. Yet, this is not to concede that self-help remedy be entirely deleted from the proposed PPSL in Nigeria.

3.7.2. Repossession of collateral by self-help: A tailor-made solution for Nigeria

The author proposes that the anticipated PPSL should make it highly intolerable[943] to repossess a debtor's (especially a consumer debtor's) collateral without following a procedure similar to the following. A secured party or anyone[944] acting on his behalf, seeking to repossess debtor's collateral, must first of all file an *ex parte* complaint to the Commission,[945] requesting it to issue him with a permission to repossess debtor's collateral which he has a security interest in. The secured party should be made to assure the Commission about the genuineness of his claim by filing an affidavit which states facts that the debtor is in actual default, or has triggered an acceleration clause in the contract by his conduct and therefore in breach of the security agreement. Having filed this affidavit, the Commission must issue him a written permission to repossess the debtor's collateral.[946] By ensuring that the secured party states his claims in an affidavit, he

[943] Punitive damages (perhaps to be specifically provided in the PPSL statute) could be awarded against a secured party who breaches any led down procedures meant to be followed, before repossessing collateral.
[944] This procedure for repossession will apply equally to a repossession company (repo-men), repossessing debtor's collateral on behalf of the secured party.
[945] The PPSL should create a commission capable of suing and being sued, which shall serve as a regulatory body mainly for issues connected with repossession of collateral by self-help. The Commission could also be in charge of managing the public registry for security interests in personal property. This will make it self-financing being that it can generate its own funds through registration fees and thus be able to cater for its running costs.
[946] It is left for the legislators to determine the number of days within which the commission must issue the permission after a secured party has filed an affidavit stating that he has a genuine reason to repossess.

assumes the risk of later being sued for perjury, for lying under oath if it turns out that his claims were untrue – this would discourage frivolous applications to the Commission to repossess debtor's collateral.

It is the author's opinion that the secured party be further required to file another affidavit to the Commission within a reasonable time after repossession (to be specified), stating whether or not he repossessed debtor's collateral peacefully.[947] Failure to file this second affidavit, will have an adverse and irrefutable presumption that repossession was not done peacefully – and the debtor complaining afterwards about the secured party's violent repossession may not necessarily have to prove abuse to establish his case.[948]Also, in the event it turns out that any content of the filed affidavits above is untrue, the Commission may report the secured party to the police, and the court could award huge fines against the secured party for lying under oath – there should be no option of imprisonment in this context. The possibility of paying fines will achieve an *ex ante* as well as a deterrent effect on secured creditors not to breach peace or abuse debtors during repossession.

Furthermore, in order that the commission does not engage in so many suits against perjuring secured creditors, if it deems fit, and before granting permission to the secured party to repossess collateral, could ask him to deposit some percentage of the money he seeks to recover through debtor's collateral (to be given back to him afterwards following a peaceful

[947] Nothing should prevent the commission from requesting secured creditors or debtors to send any requested document to a dedicated email address in order to minimize paperwork in the Commission. The commission would have discretion to make rules within the limits of its powers on how to be efficient in discharging its duties.
[948]A debtor whose collateral was repossessed violently is strongly advised to immediately lodge complaints to the Commission so as not to be caught up by the laches and acquiescence doctrine.

repossession).[949]The essence of the deposit is first, to ensure that the secured party understands that the deposited sum in the Commission's account would most likely be forfeited if he fails to be peaceful in his repossession, and also to ensure that upon the debtor successfully proving that the secured party was violent, part[950] or all the money deposited by the latter will immediately be used to compensate the debtor for any damages he suffered, which the Commission shall have discretion to determine. A party dissatisfied with the Commission's decision could appeal to the federal high court for judicial review – and the court's review will be final. A secured party wishing to recover through court action, could use the summary judgment[951] procedure meant for accelerated hearings.

Lastly, it is predicted that once the PPSL comes alive in Nigeria, an industry will inevitably spring from self-help repossession[952] – just like in the US and Canada, where professionals have majorly taken over the business of repossession, known also as the "repo-men". This kind of industry will likely grow out of the Nigerian PPSL. When it does, it is highly important to ensure that operators of the industry are well regulated in order to minimize any possibility of abusive conducts against debtors. One way to do that is to strengthen the gatekeeper rules that qualify those seeking to run any repossession company. In that regard, it is highly recommended that they first

949 After a specific number of days (to be determined by the legislators) of filing the second affidavit that he (secured party) repossessed peacefully, and the debtor does not lodge a complaint that the secured party abused, the Commission shall release the deposited sum to the secured party. Or in the alternative to requesting the debtor to deposit money, the Commission could request him to make promise under deed – stating that he will pay any damages accessed from his violent repossession of debtor's collateral – whichever one that is adjudged as capable of being more efficient, should be adopted.

950 The secured party should be given the balance of his deposit where only part of it was used to compensate the debtor.

951 See for instance Order 11 of the Lagos high court civil procedure rules 2012 and Order 21 of the Abuja high court civil procedure rules 2004, which are faster methods of litigating claims without going through the hassles that calibrate the regular method of civil trials in Nigeria.

952 There are several companies in US and Canada that offer collateral repossession services. See for instance http://www.americanrecoveryspecialistsofwpa.com/about.html (last visited on February 22, 2016).

of all register as a corporate entity– with high threshold of paid-up share capital. Second, obtaining operation license should be based on some conditions – the applicants must not have any criminal record, must have a first university degree at least, must have had a certain level of work experience (to be specified in terms of years), and perhaps an insurance policy that could be triggered on demand.

The licensing should be in stages, with a probationary period of five years, during which the license holder must maintain a particular high sum in an escrow account with a bank of which the Commission will be beneficiary, following a 'control agreement'. This amount will serve as deterrence not to engage in abusive conducts as the money in the escrow account will be used to satisfy any judgment of court in the event the license holder is found liable of some abusive conduct during the probationary period. The essence of keeping the deposit in an escrow account for five years is to ensure that within this period, the license holder must have internalized standard ethics along the line, has gained some foothold as well as high reputation in the industry – to the extent he would do anything almost, to prevent the tarnishing of his reputation in the industry. Again, it will prevent the entry of crooks whose intention would be to come in with the hope of leaving as soon as possible after they have amassed wealth through abusive repossessions. In any case, what has been suggested should be taken as minimum requirements to be fulfilled – measures must be put in place to ensure that crooks do not invade the industry and make life difficult for debtors. In addition to all this, withdrawing license should be based on zero tolerance approach, so as to warn potential abusers the consequences that await them for doing so.[953]

[953] To learn about certification and licensing of auto repossessors in the US, see Lainie Petersen, *How Does One Become a Certified Auto Repo Man?* Available at http://smallbusiness.chron.com/one-become-certified-auto-repo-man-12773.html (last visited on October 24, 2015).

The 8th Recommendation:

3.8. Adopting private disposition as well as 'good faith' and 'commercial reasonableness' standards as useful tools of evaluating dispositions of collateral

3.8.1. The US and Ontario solutions

After a secured party has repossessed collateral, the next question is what he would do with it.[954] An option under Article 9 and OPPSA is to dispose it in either a private or public market provided that best price is realized.[955] At this stage, an insincere secured party choosing to sell in a private market, may want to play a "fast game" on the debtor by selling the collateral to a crony[956] at an undervalue price through a shady arrangement.[957] If he does that and not able to realize enough money to satisfy his full claim, the debtor will become liable for the deficient sum – what of course is repressive and unfair to the debtor. However, Article 9 and OPPSA at this stage also strongly expect the secured party to act in good faith throughout the disposition processes.[958]

[954] See chapter two above, for a detailed analysis on disposition of collateral.
[955] See section 63(2) OPPSA and section 9-610 (c) UCC, and its Official Comment 10. Under 63(8) OPPSA, the secured party is not permitted to purchase debtor's collateral in a private disposition.
[956] See sections 9-102, 9-615(f) UCC. The decision of the court in *Commercial Credit Group, Inc v Falcon Equip., LLC of Jax,* 2010 WL 144101, 70 UCC2d 839 (W.D.N.C. 2010) shows that they are ever vigilant against such dispositions, and would gladly annul them on the face of compelling evidence.
[957] See Official Comment 7 to section 9-615 UCC, for brilliant insight regarding private versus public dispositions of collateral.
[958] See section 9-610 (b) UCC and its Official Comment 2 on commercial reasonableness of disposition. See also section 63(2) for the OPPSA equivalent.

He is expected to amongst other things do the following: (a) do some cleanups on the collateral if doing so would heighten the selling price – even though he is empowered to sell 'as is'– doing some minor repairs or cleanups would weigh favorably heavy on the court's mind when evaluating his conduct, (b) notify all relevant stakeholders about the sale, the time, the venue and the intended method of disposition, (c) advertise the sale in order to attract more buyers (d) sell to the highest bidder (e) use his best effort to secure the best price for the collateral.[959]

Where the secured party fails to carry out these expectations to a satisfactory level, the disposition would be deemed not to have passed the commercially reasonable test. His disposition of the collateral is also measured with good faith[960] standard to ensure that no gap is exploited to injure the debtor's interest. Both doctrines were not given a closed-ended definition by Article 9 and OPPSA – the essence is to allow judges in each case to use their discretionary powers to determine if the secured party's actions could cross the high bars of both doctrines.

3.8.2. Disposition of collateral in Nigeria: Adopting lessons from US and Ontario

In Nigeria, the commercial reasonableness towards the disposition of a debtor's collateral is assessed a bit differently from the perspectives of Article 9 and OPPSA. Disposition under Nigerian law is very much anchored on the Auctioneer's Act 1928.[961]This is to say that private disposition is not allowed as secrecy is deemed to be the badge of fraud. Furthermore, auctioning

[959]*Ibid.*
[960] For a masterful discussion on good faith purchase, see generally, Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE LAW JOURNAL, 1057 (1954).
[961] See sections 4 and 30 – the former provides procedures for the granting of license to anyone who wishes to be an auctioneer, while the latter section, lays out the ethical duties. The official website of Nigeria's Certified Institute of Auctioneers could be found at http://certifiedinstituteofauctioneers.org/blog-2/ (last visited October 24, 2015).

debtor's collateral mandates the auctioneer to give notice[962] as well as observe some ethical duties similar to those which Article 9 and OPPSA regard as "commercially reasonable".[963]It is interesting to further note that the auctioneer is mandated to submit a statement under oath to the commissioner, which gives a detailed account of the disposition – thereby subjecting him to the possibility of being tried for perjury in the event he acted fraudulently. This practice, together with the possibility of introducing electronic disposition of debtor's collateral in order to eliminate abuses and corruption should be carried over to the anticipated PPSL as they demonstrate the capability to highly discourage auctioneers/secured party from being fraudulent with disposition of debtor's collateral.[964]

It is essential to point out here that the Nigerian law on disposition as exemplified by the Auctioneers' Law and practice focuses more on real property collateral and may not be suitable for personal property disposition. For that reason, the author proposes that private disposition should be included in the anticipated PPSL because it is faster to conduct compared to public disposition which is fraught with formalities. Similarly, private disposition ensures that certain kinds of collateral which are perishable and may not be able to wait for the formalities of public

[962]See sections 30 and 31 of the Nigerian Auctioneer's Act 1928.
[963]See section 38 of the Nigerian Auctioneer's Act 1928.
[964] In addition to any disciplinary measures that would be meted against any auctioneer that acted fraudulent, it is further suggested that bidding and auctioning of debtor's collateral could be done online to remove or reduce the possibility of auctioneers' collusion with their cronies, which frequently occurs in the physical method of auctioning in Nigeria. This idea comes from the Hungarian practice, whereby before 2003, the appointment of bankruptcy trustees was heavily criticized because of abuses of appointment of trustees which favored and disfavored some debtors. As a reaction, an electronic selection system was introduced – a system that is run entirely by the Hungarian Ministry of Justice. The software in use randomly chooses the trustees but takes into account the location of the debtor and the residence of the person-to-serve-as trustee, thus eliminating favoritism in appointment to an appreciable degree. This shows how the use of technology could help to eliminate collusion and abuses in the appointment of auctioneers and their relationship with secured creditors in Nigeria. Thus, Nigeria is strongly advised to adopt a similar approach in the disposition of debtor's collateral especially with the coming of the anticipated PPSL. See generally, Judit Török, (Hungarian Supreme Court Justice) "Commercial Enforcement and Insolvency Systems" – a paper delivered during THE WORLD BANK GLOBAL JUDGES FORUM, at Pepperdine University School of Law, Malibu – California, between 19-23 May, 2003.

sale are quickly disposed with lesser transaction costs. Generally, it is less costly to use private disposition in that resources poured into advertisements/notice, as well as settling auctioneers and their incurred expenses are obviated. This further means that bulk of the money realized from the disposition of debtor's collateral would go towards offsetting the owed debts than using a huge part of it to settle disposition expenses as obtained in public disposition – thereby creating a big probability of having the debtor liable for deficient sum.

In sum, under this subheading, the author proposes that the Nigerian lawmakers insert the doctrines of good faith and commercial reasonableness in the PPSL as tools that would enable judges to freely evaluate dispositions whether conducted privately or publicly. It is important for Nigerian Judges to note that courts in the US and Ontario do not always consider "low price"[965] as a self-standing factor in determining a non-commercially reasonable disposition or one that is devoid of good faith. The test of commercial reasonableness is more procedural – hence where a secured party exhausted the statutory procedures but obtained low price, he cannot be held to have breached the standards – this approach is lacking in the Nigerian context where low price is almost an irrefutable presumption that a particular disposition lacked good faith.[966] It is strongly advised

[965] Low price is only one of the indicators a court considers to determine if a sale was conducted in a commercially reasonable manner. Low price is not self-sufficient in constituting a breach of the sale requirement but must require additional factors to stand. This is because if all other sale procedures are complied with, the bidders might bid very lowly contrary to prior expectations. Such situation should not be held against the secured party. As usual, the court is advised to always look at all surrounding circumstances in order to arrive at a just decision. Furthermore, see the Official Comment 10 to 9-610 UCC entitled "Relevance of Price", which states that "[w]hile not itself (low price) sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable. Not also that even if the disposition is commercially reasonable, section 9-615(f) provides a special method for calculating a deficiency or surplus if (i) the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor, and (ii) the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor has bought."

[966] This was the attitude of the Nigerian Supreme Court in *Okonkwo v Cooperative & Commerce Bank (Nig) Plc* [2003] 8 NWLR (part 822) 347.

that Nigerian judges take the observance of disposition procedures before sale as the benchmark rather than the sold price of collateral.[967] After all, it could happen that the collateral has generally depreciated due to the availability of a newer model of the collateral in the market – for instance, personal computers manufactured a decade ago could hardly yield satisfactory sums today, due to their obsolete technology. In any case the burden of proving that the collateral were sold at a fair market price lies on the secured party and he must be able to discharge it adequately.

Good faith, although broader than commercial reasonableness in terms of scope,[968] has been a long standing concept in the Nigerian commercial law and already familiar to lawyers and judges. However, commercial reasonableness standard is more market oriented and tailored specifically towards collateral disposition – it should very much be introduced into the Nigerian PPSL as a measurement rule for determining fair dispositions. Nigerian Judges could like their American counterpart, award punitive (exemplary) damages against secured parties who have breached[969] the commercial reasonableness standard – that would surely warn potential abusers to be cautious so as not to incur exemplary damages. In addition, the author proposes that where the secured party is found wanting in this regard, that is, breaching good faith and commercially reasonable standards, the debtor should be discharged totally from paying any deficient sum. That is, the court could investigate how much the collateral was worth in the open market so as to have a fair idea of the amount of money the secured party could be made to refund the debtor. This

[967] This advice is against some US decisions where courts declared a secured party to be in breach of the doctrine merely owing to a low price. See *Credit v Long* 292 Mont. 238 971 P.2d 1237, 37 UCC2d 1214 (1998).

[968] Professor Farnsworth analyzed extensively the broadness of good faith principle and how this broadness should be understood within the context of Article UCC 9. For a penetrating treatment, see Allan E. Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, THE UNIVERSITY OF CHICAGO LAW REVIEW, Vol. 30, No. 4 (1963), pp. 666-679. Available also at http://www.jstor.org/stable/pdf/1598757.pdf (last visited on March 30, 2015).

[969]For instance, see *Davidson v First Bank Trust Co,* 609 Pd 1259 (Okla. 1976), where the court awarded punitive damages against the bank.

proposal is quite similar to the so-called "absolute bar" rule in the US which operates to deny a secured party from further recovering any deficient value from the debtor where the former failed in sending out appropriate notices or fulfilling any other duty which ought to have been performed before disposition.[970]

In any case, a balance between a debtor's and secured party's interest must be struck by courts with the aim of realizing the overall aims and objectives of the anticipated PPSL – such that where the court thinks that the application of the "absolute bar" rule will be highly repressive on the secured party, he could be offered an opportunity to prove that notwithstanding his actions and omissions, low price of the collateral was still unavoidable.[971]

[970] For a penetrating discussion on this, see Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters,* 74 CHICAGO-KENT LAW REVIEW, 1357 (1999), p.1400.

[971] See *Norton v. Commercial National Bank of Commerce* 398 S.W.2d 538 (Ark. 1966), where the court applied the rebuttable presumption rule in the following words "[a] chattel such as a car may well be a thousand miles away before the debtor learns of its sale without notice. It would be manifestly unfair for the creditor to derive an advantage from its own misconduct. We think the just solution is to indulge the presumption in the first instance that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law" For this rule, see also the Official Comment 4 to section 9-626 UCC.

The 9th Recommendation:

3.9. As a matter of necessity, 'strict foreclosure' should be included in the anticipated PPSL to complement judicial and extra judicial enforcements of security interests in personal property

The statutorily imposed standards of disposition could be very cumbrous to observe and not all secured parties may be willing to go through the hassles of disposition – bearing in mind as well that breaching the good faith and commercial reasonableness standards might easily incur them the court's wrath and punitive damages.[972] A secured party who is not willing to engage in all this could make an offer to the debtor – offering that he (the secured party) be allowed to retain the collateral in full satisfaction of debt. Under Article 9 and OPPSA, the debtor must object within twenty[973] or fifteen days[974] respectively if he is not interested – otherwise the offer would be deemed accepted after the lapse of time. The secured party is also required to notify other relevant stakeholders about his intention to retain collateral in full satisfaction of debt.[975]

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[972] See *Davison v First Bank Trust Co*, 609 P2d 1259 (Okla. 1979).

[973] See section 9-620(c) UCC. Its Official Comment 3 offers a helpful explanation. Thus, "…the debtor consents if the secured party sends a proposal to the debtor and does not receive an objection within 20 days. Under subsection (c) (1), however, that silence is not deemed to be consent with respect to acceptances in partial satisfaction. Thus, a secured party who wishes to conduct a partial strict foreclosure must obtain the debtor's agreement in a record authenticated after default. In all other respects, the conditions necessary to an effective partial strict foreclosure are the same as those governing acceptance of collateral in full satisfaction." In addition see subsections 9-620 (e) - (g) for prohibitions of disposition in consumer goods where the debtor has paid up to sixty percent, as well as prohibition against partial strict foreclosure in consumer goods. See section 65(1) for the OPPSA equivalent.

[974] See section 65(6) OPPSA.

[975] Nigerian law does not accommodate strict foreclosure. Only judicial foreclosure is accommodated through the various mortgage laws. These laws are outdated in view of today's commercial realities, and have been described by the Attorney General of Nigeria (2013) as "[i]nvolving processes that are very cumbersome and time-consuming…" To read full length of the article which laments on the deplorable state of foreclosure laws in Nigeria, see Joseph Jibueze, *Adoke, Others Seek Mortgage Laws Reform*, THE NATIONS NEWSPAPER, 25 June, 2013 available at http://thenationonlineng.net/new/adoke-others-seek-mortgage-laws-reform/ (last visited on October 31, 2014). Strict foreclosure is susceptible to abuses just like any other security device – secured creditors have abused it in the past. Thus, in the US, there was a period (1972 version era of UCC 9) when the drafters wanted to get rid of it. However,

The advantages of strict foreclosure[976]are that the debtor is relieved of any deficient sum that might have resulted from selling at low price. The secured party as well is no longer under the obligation to dispose in a commercially reasonable manner and may wait to dispose whenever he likes or thinks he could obtain the maximum price. He is not also obligated to account for any surplus sum to the debtor. The likelihood of going to court to determine whether a disposition was commercially reasonable which exists where the secured party has elected to dispose is totally avoided in strict foreclosure. It is a more peaceful manner of terminating a security agreement with a balanced allocation of risks between a debtor and secured party. For example, if the secured party sells afterwards and obtains a terribly low price, he does not go to the debtor for the deficient sum neither is the debtor entitled to any realized surplus after accepting the strict foreclosure offer.

Nigeria does not yet have strict foreclosure, [977]– not even a private receiver enforcing a floating charge could transfer assets into the ownership of the secured creditor in satisfaction of debts – instead, he is compulsorily required to efficiently manage them for the benefits of his

by the Revised Version of 1999, it was recognized that actually it is a good device and the drafters again promulgated it though subject to more detailed rules as would be explained below.

[976] See *Connecticut Nat. Bank v. N.E. Owen II, Inc*., 22 Conn. App. 468, 578 A.2d 655 (1990), which generally elucidates the procedures of strict foreclosure. For a good overview, see Water Benzija, *Secured Creditor's Pre-Petition Strict Foreclosure Strips Debtor of Ownership of Assets*, 30 AMERICAN BANKRUPTCY INSTITUTE JOURNAL, 42. Available at http://www.halperinlaw.net/documents/BenzijaABIArticle.pdf (last visited on October 31, 2014).

[977] Professor Wechsler equates foreclosure by sale as being a functional equivalent of strict foreclosure when he said that "…after foreclosure, the mortgagee was not obligated to account to the mortgagor for any surplus value in the property at the same time, procedural obstacles effectively prevented the mortgagee from collecting any deficiency. The foreclosure action left the mortgagee with clear title to the property and resulted, in effect, in the mortgagee exchanging the debt for the land. This procedure is now called strict foreclosure. It was not known as strict foreclosure in England, nor was it in any sense "strict"…" See Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure-An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL LAW REVIEW, 850 (1985), p.857, available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4406&context=clr (last visited on October 27, 2015).

It should be noted that foreclosure by sale as practiced in fourteenth century England applied only to real property, and not personal property – and today, the author is almost sure that there is no strict foreclosure from the purview of UCC Article 9 in England.

appointers and stakeholders.[978] What Nigeria has is judicial foreclosure – which is applicable only in real property mortgage transactions, and entails that the mortgagee commences action in court, furnishes evidence concerning the debts owed, together with a proposition to take over the debtor's land or building in satisfaction of the owed debt.[979] The mortgagor (the debtor) is allowed to file a defense to counter whatever claim the mortgagee has.[980] In the event that the debt is indeed owed, and the mortgagor agrees or is unable to show good reason why the mortgagee should not take over possession, the court may authorize the mortgagee to take over possession, and the court's judgment becomes an evidence of his legal title.

It is submitted that judicial foreclosure which is commonly used in real property transactions in Nigeria is cumbersome and expensive to undertake. Attorney fees and time spent in the course of it, tremendously deplete the final gain. Furthermore, the concept of judicial foreclosure which involves going to court to seek order to take over the debtor's property cannot effectively be utilized in personal property transactions. It would be inefficient most of the time to go to court in order to take over a property that might eventually worth less than the litigation expenses. It is therefore imperative that judicial foreclosure is not included in the anticipated PPSL. Instead, strict foreclosure from the perspectives of Article 9 and OPPSA[981] is proposed, which is

[978] Section 393 of Nigeria's Company and Allied Matters Act, outlines the main duties of receivers as follows: "A person appointed a receiver of any property of a company shall subject to the rights of prior encumbrancers, take possession of and protect the property, receive the rents and profits and discharge all outgoings in respect thereof and realize the security for the benefit of those on whose behalf he is appointed, but unless appointed manager he shall not have power to carry on any business or undertaking. A person appointed manager of the whole or any part of the undertaking of a company shall manage the same with a view to the beneficial realization of the security of those on whose behalf he is appointed..." See also the case of *Intercontractors Nigeria Ltd. v. UAC Nigeria* (1988) 2 NWLR (part. 76), p. 280, where the court reiterated s.393 of CAMA.
[979] See the dictum of Elias CJN in *Federal Administrator General v. Cardoso* (1973) NSCC 577, 580, where he said that a mortgagee "[m]ay sue for foreclosure or he may exercise his right of sale of the property by action at law".
[980] *Ibid.*
[981] See section 2.7.5 above for Article 9 and OPPSA perspectives on Strict Foreclosure.

in more consonance with modern commercial realities. This recommendation further makes sense when it is considered that the Nigerian judicial system is slow in dispensing justice – an average case takes more than seven years to move from the court of first instance to the apex.[982] In light of these challenges, strict foreclosure is strongly recommended for the anticipated PPSL.

The 10th Recommendation:

3.10. Transplanting the 'Benedict ritual' – reasons why failing to do so will be highly detrimental to the Nigerian business community vis-à-vis the PPSL

Comparative law analysts sometimes fall into the error of brushing contexts aside – they sometimes assume that principles of law that work well in one country would work the same way in another, regardless of contextual differences. This presumption is erroneous as many comparative scholars have confessed to the truism that such neglect in the transplantation of legal principles from one country to another would usually yield a "harvest of dead leaves" in the recipient country, if local factors are not adequately considered.[983]

As Nigeria plans to follow the path of Australia, Canada, Hungary, Liberia, Malawi, New Zealand, Romania, just to mention a few – countries that have reformed their secured transactions

[982] For instance in *Bokini v John Holt & Co Ltd* (1937) 13 NLR 109 – a case concerning a mortgage transaction (7 years), *Bank of the North v Muri* (1998) 2 NWLR (part 536) 153, a matter concerning a mortgage transaction (10years from the High Court to the Court of Appeals), *Ojikutu v Agbonmagbe Bank Ltd* (Now called: Wema Bank Plc) (1996) 2 Afr LR (comm.), 433 – also a matter concerning a mortgage transaction (11 years).

[983]See KENNETH W. DAM, THE LAW-GROWTH NEXUS – THE RULE OF LAW AND ECONOMIC DEVELOPMENT (Washington DC, Brookings Institution Press, 2006), p.6.

laws in line with the UCC Article 9, the unhelpful temptation for Nigerian lawmakers could be to join the bandwagon without seriously taking into account some of the Nigerian local conditions that must deserve tailor-made solutions. This is not to say that the fundamental idea behind UCC Article 9 should be altered – there ought to be a unitary concept of security interest that would reduce the compartmentalized nature of secured transactions law in Nigeria to a sort of order.

A quick look at the secured transactions law of Australia, the Canadian common law provinces, New Zealand and the US, shows that they have all adopted the concept of floating lien – a device that enables a secured party to perfect security interest in the debtor's present and future property by filing a one-time financing statement that states so. This further means that the debtor could continue to deal with his encumbered assets in the ordinary course of business including to sell them to buyers especially where they are inventories.[984] Whereas this might work hitches-free[985] in high rule of law countries like Australia, Canada, New Zealand and the US, it is doubtful if a low rule of law country like Nigeria would reckon as much success in that regard – unless it first of all patches up some holes that might be negatively exploited by some Nigerian debtors. For instance, in those high rule of law countries mentioned above, individual identification is no longer a problematic issue as most of the citizens' bio data and relevant information are available on

[984] See section 9-205 UCC. In fact, this section directly repealed *Benedict v Ratner*, 268 U.S. 353 (1925). Under the Benedict rule, a debtor was not allowed to have an unfettered dominion or control over the collateral. The requirement to police the debtor was also part of the secured party's right. However, according to the Official Comment 2 to section 9-205 UCC, the right to police has been left to be a matter of contract between the debtor and secured party and not as a legal requirement as 'Benedict rule' stated. The author believes that the Benedict rule which statutorily used to entitle a secured party to police debtor/collateral in the 19th centrury US, should be reincarnated in Nigeria because of the reasons canvassed under this subheading.

[985] This is not to totally say that policing of debtors is not done in these countries. However, if it is done, such practice does not have support from an express provision of the personal property security law. It is usually a matter of contractual agreement between the debtor and secured party, which court may or may not enforce when a dispute arises from policing. For instance under the US Article 9, policing is not expressly provided as a statutory right, but may be a contractual right per the parties' agreement as the Official Comment 2 to section 9-205 UCC explained.

databases and could easily be accessed by key government agencies. This is to say that in developed countries, a debtor who executes a floating lien in inventory, or creates a purchase money security interest in assets in favor of a purchase money lender, but goes ahead to fraudulently sell the entire assets and thereafter disappears, could easily be traced due to the existence of high technological development, reliable identification databases, as well as other efficient mechanisms that have long been put in place to combat fraud, long before the advent of the unitary system.[986] It could therefore be that the reason fraudulent cases on the part of the debtors are not often experienced in those advanced countries is due to the fact that debtors know how little a chance they have to escape from the hands of the law enforcement agents if they act fraudulently.

Nigeria is not yet as technologically advanced as the countries mentioned above, and does not yet have a comprehensive identification database that accounts for every citizen or resident in the country.[987] These gaps could be negatively exploited by debtors, especially when the law enforcement agents do not have the latest technology and equipment to efficiently track down individuals – the truth is that, currently, it would be easier for a Nigerian debtor to dupe his secured creditors and successfully hide away from reach, than would his counterpart in Canada or US. This

[986] This should not be taken to mean that crooks or fraudulent activities are totally non-existent in advanced countries where the unitary system cum floating lien are used. Instead, in comparison with Nigeria, the probability that fraudulent debtors will be caught in developed countries is far higher than if same occurs in Nigeria. This big difference, and the need to ensure that it is not negatively exploited by Nigerian debtors, is what of course must deserve tailor-made designs in the anticipated PPSL.

[987] Although recently the idea that not much success could be achieved as a country without an identification database has come alive in the government's agenda. As a result, National Identity Management Commission (NIMC) Act has set up NIMC to oversee the realization of this dream. However, the commission is yet to begin registration. See http://www.nimc.gov.ng/index.htm (last visited on November 19, 2014). The emphasis here is on human debtors, as corporate debtors could easily be tracked.

reality in Nigeria is a big threat to the survivability of the anticipated unitary model that would provide for the floating lien concept.[988]

In fact, some dubious debtors in Nigeria could specifically open up businesses with the intention to dupe – they obtain several credits from different banks in respect of the same collateral, create several PMSIs with several purchase money lenders, and then sell all the assets in their possession and disappear. Even if the debtor is eventually sued *ex post facto*, the slow judicial system could take several years to decide the matter – and that is not a guarantee that the secured creditors would have any reasonable assets of the debtor to satisfy their judgment at the end of the prolonged litigation. It would perhaps take one or two successful fraudulent deals by debtors to send a hard shock in the spines of lenders, and the new PPSL will be doomed to the dustbin by the business community.

The foregoing is essentially a reflection of the Nigerian reality on the possibility of debtor's intentional abuse of the floating lien concept, and what should be done to avoid negative exploitation remains the ultimate question as well as challenge. As a remedy, and in view of Nigeria's idiosyncratic factors already hinted at above, it is proposed that its lawmakers ensure that they expressly provide in the anticipated PPSL, the right of secured creditors to police debtors or collateral – this will ensure that issues about whether or not it is legal to police debtors do not arise or used as red herring to diminish the core idea behind the PPSL. Returning to the initial intuition behind this proposal, it suffices to say that if 'policing right' is not expressly inserted in the PPSL, experienced lenders would still police their debtors, but some debtors might challenge

[988] The floating lien concept is synonymous with the after-acquired property clause which is contained in section 9-204 UCC and section 12 OPPSA. For a brilliant discussion on floating lien, see Minh Van Ngo, *Getting the Question Right on Floating Liens and Securitized Assets,* 19 YALE JOURNAL ON REGULATION, 85 (2002).

the act in court. In court, Nigerian judges in their usual legalistic approach[989] towards interpretation, might hold misguidedly that the legislature would have inserted 'policing right' into the PPSL if they thought fit, and its absence therefore, means that it is not to be made part of the acceptable practices in the lending industry.[990]

If the Nigerian Supreme Court ever gets to adopt this position, which it likely will, owing to its past antecedences,[991] then such precedent could provide debtors with strong ammunitions for fraudulent tactics which would yield them windfalls at the expense of secured creditors. This situation could eclipse the numerous benefits that are accruable from the PPSL. It is further submitted that this would deal a hard blow on lending confidence as well as cause non-negligible bite on the Nigerian economy. For instance, the business community might be highly reluctant to lend large sums of money knowing full well the danger or the high possibility of the debtor to disappear with the loan, being that they are not authorized to police debtors and the collateral.

As the Nigerian parliament is not usually fast[992] in responding to issues like this through swift legislative amendments, the anticipated PPSL might deepen the already existing misery in

[989] A 'legalistic approach' as opposed to a pragmatic approach towards judicial decision-making entails a strict deduction from a major premiss of law to its conclusion, irrespective of whether the reached result is absurd. For more about the different approaches towards judicial decision-making, see RICHARD POSNER, HOW JUDGES THINK (Massachusetts, Harvard University Press, 2008), pp. 174-178.

[990] The current Chief Justice of Nigeria – Justice Mohammed, in support of legalism, said "…the Judiciary is duty bound to act in accordance with the dictates of the law as it stands and not as critics would like it to be. In this sense, naïve idealism is but a pale imitation of legal certainty…'' For a full speech, see Ahuruka Isah, *Supreme Court's Judgments Follow Law, Not Sentiments*, THE GUARDIAN, Tuesday 23 February 2016. Available at http://www.punchng.com/attack-on-judiciary-misguided-cjn-nba/ (last visited on February 23, 2016).

[991] See the cases (*Ibid*).

[992] There are a lot of obsolete laws in Nigeria. Most of the laws that were wholly adopted from England have not been revised to meet today's needs, yet Nigerian legislators are amongst the best paid in the world. For instance, as important as the law of crimes in every society, the Nigerian legislators have failed to revise the Criminal Code Act, which was received from England a hundred years ago – the result is that the fines stated in the code are no longer comparable to the offenses they punish. Like other sections, section 251 of the Code states "Any person who, not being a person serving in any of the armed or police forces of Nigeria, wears the uniform of any of these forces, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform, in

the secured lending industry if the legislators fail to expressly insert from the beginning, the right of a secured party to police the debtor and collateral when the need reasonably arises. As hinted at earlier, policing right is not expressly contained in Article 9 or OPPSA, and some scholars think that it was doomed to the gallows alongside the Benedict's case.[993] In *Benedict v. Ratner,*[994] the US Supreme Court held that a secured party ought to always exercise dominion and control of the debtor's business or collateral which he has a security interest in. In other words, the secured party was required by law to police and exercise dominion over collateral or business of the debtor in order to contain or prevent the possibility of ostensible ownership problem – what was fondly known as the *Benedict Ritual*.[995] Thus, any secured financing arrangement that did not conform to this was deemed null and void. The court's fear as expressed in *Benedict*, was mainly due to the fraud-in-law doctrine which sternly viewed the idea of debtor being given an unfettered dominion over collateral. Thus, the possibility that the debtor could use the collateral in his possession to deceive an unsuspecting third party towards believing that the collateral in his (debtor's) possession is not encumbered with any existing security interests was high. So when Article 9 introduced filing system, the policing requirement was no longer a matter of law but contract, as one of the official comments to Article 9 succinctly puts it.[996]

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such manner or in such circumstances as to be likely to bring contempt on that uniform, or employs any other person so to wear such uniform or dress, is guilty of a simple offence, and is liable to imprisonment for three months or to a fine of forty naira".(underlining by the author). Forty naira is roughly equivalent to 30 cents of a US dollar.

[993]268 U.S. 353 (1925).

[994]*Ibid.*

[995]Unlike under the current UCC Article 9 – then in the US, 'policing' was a legal precondition for the validity of a security interest. Today it is not a precondition and parties to a security agreement could create a fully valid security interest in the debtor's personal property even if the secured creditor does not police the debtor. However, the risk for not policing the debtor is borne by the secured creditor. For a deep-layered commentary, see GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown & Company, 1965), vol. 1, from p.252.

[996] See Official Comment 2 to section 9-205 UCC which states "…that a security interest is not invalid or fraudulent by reason of the debtor's liberty to dispose of the collateral without being required to account to the secured party for proceeds or substitute new collateral. As did former section 9-205, this section repeals the rule of Benedict v Ratner,

Although 'official comments' are merely persuasive and not equal to the Article 9 text, they are no doubt the most reliable interpretations of Article 9's provisions, and in this case, the filing provision[997](without even taking a look at its official comments) is believed to have expressly abolished policing right in the US secured transactions law. The author submits that if the absence of an express provision of policing right in the UCC Article 9 is not breeding severe problems for the Americans and Canadians, it is perhaps due to the existence of other strong institutions that collaborate to make lending hitches-free.

3.10.1. Why the 'policing' of debtor or collateral would make sense in Nigeria

A subtler, but more important advantage of debtor-policing is that it helps the secured creditor to gain invaluable insights regarding the health status of a debtor's business – what could guide his actions and prevent him from being hit by an unfortunate surprise regarding the debtor's insolvency. Furthermore, a secured party that has gained sufficient knowledge of the debtor's business operations through policing, is better armed to unearth hidden assets of the debtor and possibly sell them if they qualify as collateral or proceeds. The actuality is much nuanced, and Nigerian lawmakers should therefore be cognizant of these perspectives to policing as well as

268 U.S. 353 (1925), and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over collateral…although this section repeals Benedict, the filing and other perfection requirements provide for public notice that overcomes any potential misleading effects of a debtor's use and control of collateral. Moreover, nothing in this section prevents the debtor and secured party from agreeing to procedures by which the secured party policies or monitors collateral or to restrictions on the debtor's dominion. However, this Article leaves these matters to agreement based on business considerations, *not on legal requirements."* (Italics mine). The Ontario PPSA did not provide for policing right neither did it give a hint as to whether such should be a matter of contract. Instead, full reliance is placed on the public notification system, – this is not sufficient for Nigeria. Official Comment 2 which addresses some of the implicit risks underlying sole reliance on the filing system should favorably be considered in the Nigerian context.

[997] See section 9-205 UCC.

recognize new vistas that are inherent in the foregoing analysis, in order to design a bespoke PPSL.[998]

Even though this thesis tries to extract lessons from the US and Canadian secured transactions laws, it is constantly aware of the wide differences in economic and social developments that are behind these laws when compared to Nigeria's. Thus, whenever necessary, even buried and forgotten concepts of US and Canadian laws are exhumed and dusted for possible use in the Nigerian context. Consequently, the author recommends the importance of using some ideas from *Benedict's* case to reform Nigeria's secured transactions law notwithstanding the fact that although *Benedict's* case is only a historic remnant in the US, it is no doubt highly relevant for Nigeria at this stage of its economic/rule of law development. Even with the existence of a Benedict-like rule, it would be crucial to clearly point out that a secured party could create a valid security interest if he chooses not to police the debtor. However, all the risks stemming from not policing the debtor are to be borne by him because even though the anticipated PPSL will provide for a public notification system as well as ensure priority vis-à-vis other secured creditors on the basis of first-to-file or perfect rule, nothing guarantees that there will be anything to enforce upon, if the debtor had fraudulently disposed of the collateral.

The likely policy questions or objections that might arise from those who would counter the idea of inserting a policing right in the anticipated PPSL in Nigeria are – ***first,*** that allowing the secured party to police collateral of the debtor would incur high costs which eventually would be transferred to the debtor in the form of high interest rate. This concern is legitimate, although should be balanced with a rough compromise. Thus, whatever cost that is transferred to the debtor

[998] A useful guidance on how emerging markets could police collateral/debtor is found in, Tibor Tajti, *The Resurrection of Field Warehousing – The Booming Hungarian Field Warehousing Sector, the Incomplete English Narrative and the Unexplored Field Warehousing Law of the United States*, ACTA JURIDICA HUNGARICA, 55, No. 3 (2014) 185 – 235, pp.192-205.

cannot be equal to the possible systemic collapse that could stem from a categorical prohibition of policing right, due to the numerous loopholes in the Nigerian system that could easily be exploited.

Perhaps, the existence of the right to police debtor/collateral could give birth to a mature policing industry[999] whereby secured parties could contract with personnel in the industry to diligently carryout policing activities on their behalves – over time, the cost of policing borne by one debtor would drastically drop as professionals take over, gain economies of scale, and invent efficient mechanisms.[1000] This surely would be a better deal for Nigeria that well satisfies its local realities – instead of strictly following the American and Canadian pathways on this particular subject-matter, given the fact that Nigeria embodies fundamentally different realities. A case in point for instance would be the existence of micro and macro high levels of corruption in Nigeria coupled with weak institutions – what could sufficiently frustrate any foreign concept designed to be predicated largely on high social trust. Although, policing hardly promises to be a panacea to debtor's intentional abuse or fraud, it would however be a big mistake to trust Nigerian debtors fully as PMSI and floating lien transactions seem to strongly suggest. If this cautionary advice is

[999] In the US for instance, policing has produced and sustains the existence of field warehousing industry. Basically, field warehouse lenders lend money to debtors even when they have taken a look at the registry and found the existence of a floating lien created over debtor's present and future property. Following the first to file or perfect rule, a field warehouse lender advancing money to a debtor and getting a portion of the latter's goods that has been demarcated from others, is subordinate to the security interest of the floating lienor. The floating lienor's security interest covers equally the demarcated goods in favor of the field warehouse lender due to the first to file or perfect rule. Yet, the reason the operators of this industry still flourish in the US is due to their debtor/collateral policing tactics, as Professor Tajti identifies. The field warehouse lender depends on his ability to police the debtor and collateral, and would always likely be aware of the health of debtor's business – an advantage he has over a floating lienor, and what indeed would enable him to know when exactly to pounce on debtor's collateral before his business finally goes bankrupt, which is when other secured creditors would be alerted to act. For more details on field warehousing and why it still has not totally been forgotten despite the UCC Article 9, see Tibor Tajti, *The Resurrection of Field Warehousing – The Booming Hungarian Field Warehousing Sector, the Incomplete English Narrative and the Unexplored Field Warehousing Law of the United States*, ACTA JURIDICA HUNGARICA, 55, No. 3 (2014) pp. 185 – 235, 193. Available also at http://www.akademiai.com/content/j1473r0020264319/fulltext.pdf. Field warehousing is also practiced in Canada – See http://www.collateralcert.com/ (both websites were last visited on November 19, 2014).

[1000] As the know-how on efficient policing spreads, fees charged by experts will most likely decrease competitively. Similarly, as the rule of law index as well as social trust increase, there will be a corresponding decrease in the need to police debtors or collateral.

not heeded to, then the anticipated PPSL might only end up in enriching some rogue-debtors, before the parliament could wake up to remove obstacles. However, it is not a must that Nigerians would have to pass through such crucible of horrible experiences before the right thing is done, hence the essence of this work.

The ***second*** objection might be that the fears expressed above are being highly exaggerated because after all, Nigerian businesses have been coping with the floating charge device, which entails that the debtor continues to use his encumbered assets in the ordinary course of business, including the right to sell them to buyers, until crystallization, when the floating chargee's interest converts to a fixed charge. A concise response to this would be that floating charge is created only by incorporated entities while the floating lien can be created by both human and artificial persons.[1001] This fundamental difference accentuates the baseline logic that human debtors could more easily disappear from the scene than corporations, essentially because the latter's critical decisions do not usually emanate from a single individual. In addition, the winding up processes of a corporation could take some time to complete and usually involve a lot of stakeholders – the publicity created in the processes is certainly sufficient to alert secured creditors of the company. Even in the event of winding up, a liquidator is appointed to liquidate corporate assets and satisfy creditors' claims according to their rights in bankruptcy. This is not the case with human debtors

[1001] Even though there is no known statistical data in Nigeria establishing in how many cases the floating charge has indeed been abused by floating chargees, it suffices to say based on the author's observation that the lack of trained detectives in the country who could monitor business debtors, and the fact that even banks do not usually have a special department whose personnel are saddled with the task of going out regularly to monitor assets of which the bank's interest is involved, the possibility of debtors abusing assets under floating securities is therefore high.

who could easily disappear and leave no traces of assets for creditors. This is a strong reason why the floating lien device should be balanced with policing right of the debtor/collateral.[1002]

The 11th Recommendation:

13.11. Commercial torts, agricultural liens, deposit accounts, and electronic chattel papers should feature into the anticipated PPSL

As stated earlier, one of the main ideas behind the unitary system is the grand emphasis on function rather than the form of security interests. This reasoning could also be extended to the scope of collateral – the idea being to accommodate as many collateral as possible if they can perform a security function, so that debtors would have a wild spectrum of collateral to use in accessing credits.[1003] In this regard, Article 9 is more up to date being that it has accommodated

[1002]It was probably due to the fact that the 'disappearance' of corporations is relatively more difficult compared to natural persons, that the floating charge device was restricted to their use. Thus, since floating lien would be used both by incorporated and human debtors, it is highly imperative that the right to police debtors be introduced in the anticipated PPSL. Commenting on the importance of policing and how it will gradually become part of any system over time, Tajti elucidates as follows: "As professional industries know how important policing is and how to do policing, the system could rely on the expertise and wisdom of the participants to secured transactions: something that is simply non-existent in emerging systems. The ensuing discussion on field warehousing which is not only a security but also a *control* device is a way to shed light exactly on these hidden aspects of secured transactions law. Put simply, the narrative of field warehousing is also a story on policing hopefully leading to the realization that this security device is one of the best methods for high risk finance in emerging systems..." – see Tibor Tajti, *The Resurrection of Field Warehousing – The Booming Hungarian Field Warehousing Sector, the Incomplete English Narrative and the Unexplored Field Warehousing Law of the United States*, ACTA JURIDICA HUNGARICA, 55, No. 3 (2014), 185 – 235, at p.201.

[1003] On the scope of collateral under Article 9, (which is similar to, although wider than that of OPPSA), see, Cynthia Grant, *Description of the Collateral under Revised Article 9,* 4 DEPAUL BUSINESS & COMMERCIAL LAW JOURNAL, 235 (2006).

the use of these collateral while OPPSA is yet to recognize them as such.[1004] It is the author's recommendation that Nigerian lawmakers incorporate these collateral in the anticipated PPSL for the following reasons. First, the Nigerian legal system already recognizes personal tort claims because the law of tort has been part of Nigerian law since several decades. Therefore, it would be interesting and easy for businesspeople to relate with the concept that torts arising from a debtor's business can possibly be used as collateral. In most cases in Nigeria, debtors usually neglect to pursue tort claims that arise from their businesses due to slow judicial proceedings or the fact that the transaction cost of pursuing such claims might eventually be higher.[1005] Therefore, the inclusion of commercial tort claims would convert tort claims that arise from businesses into collateral capable of being assigned, and used to secure transactions.

Second, agricultural lien rights should also be included in the anticipated PPSL because Nigeria is increasingly depending on agriculture especially of recent – when following the global fall in crude oil and gas prices, attention to other sectors of the economy, especially agriculture has heightened. There are a lot of farmers, matched also by a good number of financiers or suppliers

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[1004] Sections 2 and 4 OPPSA, if fastidiously read together, and contrasted with section 9-109 UCC, reveals that whereas commercial torts, agricultural liens, deposit accounts, and electronic chattel paper have been well accepted as collateral under Article 9, their acceptance in OPPSA is a task the present-day generation in Ontario should tackle.

[1005] Pursuing commercial tort claims has not yet gained as much heightened attraction in Nigeria as in US or Canada. The reason for this could partially be attributed to the fact that exemplary (punitive) damages which courts award in many other jurisdictions against a negligent tort-feasor, is not as popular in Nigeria than in US and England. Even though in deference to the English decision in *Rookes v Barnard* [1964] AC 1129, Nigerian courts have followed suit in awarding exemplary damages in torts, some Nigerian scholars continue to think albeit erroneously that exemplary damages should have no place in civil law. See Lawrence Atsegbua, *The Supreme Court's Approach to Exemplary Damages*, Vanguard Newspaper, April 25, 2013. Available at: http://www.vanguardngr.com/2013/04/the-supreme-courts-approach-to-exemplary-damages/ (last visited on April 12, 2016). However, the author believes that recognizing commercial tort claims as valid collateral, coupled with increased affection for punitive damages by Nigerian courts, could yield enough incentives for use of commercial tort claims as collateral. Sadly, at the moment, it is not easy to calculate how much Nigerians are losing by failing to fully recognize the 'treasure' hidden in commercial tort claims. For the attitude of Nigerian courts generally regarding tort claims, see Hakeem Ogunniran, *Awarding Exemplary Damages in Tort Cases: The Dilemma of Nigerian Courts,* JOURNAL OF AFRICAN LAW, volume 36 / Issue 02 (1992). Available at http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=5243580.

who in the ordinary course of business, supply these farmers with credits or farm products that sustain these agri-businesses. Thus, if the unitary system of secured transactions comes alive with agricultural lien recognized as in Article 9, Nigerian farmers would consequently have less difficulty in obtaining credits whereby the secured creditor takes agricultural liens in the farmers' farm products. Under Article 9, a perfected agricultural lien in farm products is not only recognized, but also superior to a prior perfected security interest on the same farm product provided the governing agricultural lien statute provides for the super-priority status.[1006] However, agricultural lien is outside the scope of OPPSA.[1007]

It is the author's suggestion therefore, that given the fact that Nigeria is currently paying serious attention to its agricultural sector more than ever before due to the continuous fall in crude oil and gas prices, Nigerian lawmakers should therefore endeavor to add "agricultural lien" and its corresponding super-priority status on farm products in the anticipated PPSL. This proposal is anchored on the prediction that in the near future, agriculture in Nigeria would attain a venerable height, and preparing a legal framework that would effectively tap from such boom is strongly advised.

[1006] See section 9-102(a) (5) UCC. See also section 9-322 UCC and its Official Comment 12 which states that "[s]tatutes other than this Article may purport to grant priority to an agricultural lien as against a conflicting security interest or agricultural lien. Under section 9-322(g), if another statute grants priority to an agricultural lien, the agricultural lien has priority only if the same statute creates the agricultural lien and the agricultural lien is perfected. Otherwise, section 9-322(a) applies the same priority rules to an agricultural lien as to a security interest, regardless of whether the agricultural lien conflicts with another agricultural lien or with a security interest. Inasmuch as no agricultural lien on proceeds arises under this Article, subsections 9-322(b) through (e) do not apply to proceeds of agricultural liens. However, if an agricultural lien has priority under section 9-322(g) and the statute creating the agricultural lien gives the secured party a lien on proceeds of the collateral subject to the lien, a court should apply the principle of subsection (g) and award priority in the proceeds to the holder of the perfected agricultural lien."

[1007] See section 4 OPPSA.

Third, at least thirty percent of Nigerians have bank deposit accounts,[1008] and this will presumably increase as the country further develops economically. Hence, it would be profitable to include "deposit accounts" in the list of acceptable collateral, provided that some measures of perfection are taken[1009] to ensure that a secured creditor in control is not disadvantaged.[1010] In any case, as the Nigerian economy grows from strength to strength, and as regulation becomes more robust and protective of consumer debtors, it is highly believed that more citizens will get to own bank accounts suitable for use as collateral, thereby making access to credit easier to realize.

Fourth, in 2011, Nigeria amended its Evidence Act to accommodate electronic evidence.[1011] Before then, evidences generated electronically were not accepted in courts as good evidence.[1012] Before 2011, it was not possible to propose anything that was electronically generated – but that is history now. Hence, in light of the new Evidence Act, electronic chattel paper should be included in the anticipated PPSL as acceptable collateral. This is said especially in light of the fact that most commercial transactions having to do with money obligations exist in

[1008] See Sanusi Lamido Sanusi, *Nigeria Central Bank goes after the Unbanked,* available at <http://afrikandevelopment.net/nigeria-central-bank-goes-after-the-unbanked-p380-148.htm> (last visited on January 23, 2015).

[1009] See generally – section 9-327 UCC, for rules of perfecting security interests in deposit accounts. Also, see its Official Comments 2-5 for brilliant explanations.

[1010] See section 2.4.4., for details on how deposit account is perfected by control. For the sake of consumer debtors, the Nigerian lawmakers may have to decide whether deposit account for consumers should qualify as collateral at this stage, given that abuse of consumer debtors might be high in the absence of a good regulatory body.

[1011] See sections 84 and 85 of Nigerian Evidence Act 2011 which repealed the old section 93 of the 1945 Evidence Act. Sections 84 and 85, outline the procedures that must be followed before an electronic evidence can be admitted by a court.

[1012] Anchoring very much on section 93 of the 1945 Evidence Act, the Nigerian Supreme Court vehemently opposed the admissibility of electronic evidence in the following cases: *Esso West Africa Inc. v. T. Oyegbola* (1969) 1 NMLR 194, *Yesufu v. A.C.B.* (1976) 4 SC, *Oguma Associated Companies (Nig.) Ltd v. I.B.W.A Limited* (1988) 1 NSCC 395. However, all of those lines of cases have now been rendered impotent by the 2011 Evidence Act. For a historical analysis of courts' attitude towards electronic evidence in Nigeria, see Oserogho & Associates, *Admissibility of Electronic Evidence – Nigeria* (2012). Available at http://www.hg.org/article.asp?id=26980 (last visited on April 1, 2015).

the electronic form, and should therefore be eligible to serve as collateral to meet the commercial realities of this century.

The 12th Recommendation:

3.12. Some technical issues connected with the anticipated PPSL

3.12.1. Overview

Through a comparative analysis of Article 9 and OPPSA, the author foresees two key technical as well as problematic issues that will arise while designing the Nigerian PPSL. The first technical issue is very important and relates to what identification details of the debtor should be on the security agreement as well as the financing statement, and what identification document of the debtor must contain such details. This was a big problem in the United States until sometime in 2010 when some amendments[1013] in that regard were made in Article 9[1014] – and Nigeria could therefore tap from the amendments in designing its PPSL.

The Canadians (Ontario) for the purpose of entering into security agreement and filing financing statements,[1015] have not really specified what identification document of the debtor must be used. The second technical issue the author deems important to discuss considering the level of information technology in Nigeria is compensation of errors to anyone relying on the internet

[1013] See section 2.8.1 above for more details on the 2010 amendments of Article 9 UCC.
[1014] For an interesting discussion on the 2010 amendments of UCC Article 9, see Edwin E. Smith & Bingham McCutchen, *A Summary Of The 2010 Amendments to the Official Text of Article 9 of the Uniform Commercial Code* COMMERCIAL LAW NEWSLETTER, (2010), p.4. Available at https://apps.americanbar.org/buslaw/blt/content/2011/01/0004a.pdf (last visited on November 14, 2014).
[1015] See the appendix for the cost of filing and searching financing statements in a select number of jurisdictions.

registry's information. This is not an issue in the US because no compensation for error is provided in Article 9. It is however a big issue in Ontario as the registry could pay up to one million Canadian dollars[1016] to anyone who relied on the erroneous information, arising due to the registry system's malfunction.

Beside these two technical issues, which the author thinks deserve decent attention, any other technical issue in both Article 9 and OPPSA have been left out because they do not matter so much to the Nigerian context, and hence do not merit discussion. The chosen technical issues are discussed below.

3.12.2. Issues concerning debtor's identity on a security agreement and filed financing statement

A very vital question which lawmakers would have to contend with when designing the anticipated PPSL is how the name of the debtor should appear on a filed financing statement, so as to enable searchers know what exactly to input into the registry's database. This is a serious question because many Nigerians (as also in other parts of the world) do not have a single name – thus, they could be known for one name in their families while called another amongst their friends or in official settings. This variety of names could give legitimate concerns to a secured party who wants to conclude a security agreement with a debtor, as to what name of the debtor should be on the security agreement/filed financing statement. The essence of this is to ensure that the secured

[1016] See section 44(20) OPPSA.

party does not use a less official name of the debtor which might not be used by searchers while trying to locate the financing statement in the registry.[1017]

It could happen that upon searching the registry, a searcher that used a more official name of the debtor but could not find anything in the registry, goes ahead to advance credits with respect to an already encumbered asset, but with the misled belief that he is first ranking. This kind of situation could nearly always result to a loss of priority against a secured creditor who used a less official name but unaware that the debtor has an official name. Thus, a court faced with a priority dispute anchoring on official versus unofficial name of a debtor would most likely hold that official names command more weight than their unofficial counterpart, at least in contractual transactions. Losing priority as well as financial investments on this technical point could diminish confidence in the anticipated PPSL. The question then would be, what is, or how could the official name of a debtor be known so as to forestall the tons of litigations that would likely spring from any uncertainty in this regard?

Another way to ask the question is what identification document in Nigeria should be used as benchmark, so that the debtor's personal data on it are used for the purposes of entering into security agreements as well as filing financing statements? OPPSA does not help much in this regard being that it stipulated that the name of the debtor on the filed financing statement should be his first given name and surname.[1018] It does not state the document in which this name must be found. The OPPSA position would not be so helpful to Nigeria because a debtor could have

[1017] See subsections 2.8.1 and 2.8.2 above for statutory and judicial authorities regarding debtor's name from the US and Ontario perspectives. LoPuck et al, captured the difficulty which bedeviled Americans vis-à-vis debtor's name prior to the 2010 amendments on Article 9. Generally, see Lynn M. LoPuck et al, *Optimizing English and American Security Interests*, 88 NOTRE DAME LAW REVIEW, 1785 (2013), esp. at p.1797. The paper is also available at http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1140&context=ndlr (last visited on April 4, 2015).
[1018] See section 16(1) OPPSA Regulations.

multiple names or even multiple signatures and use them in various security agreements. Therefore, insisting that both the debtor's name and signature tally with a named official document, is the starting point to preventing the confusion that might arise in Nigeria if the issue of debtor's name and signature is not well addressed in the PPSL, *ab initio*.

Article 9 has tried to solve this problem in its 2010 amendments by proposing that the debtor's name on the filed financing statement should tally with that on his driver's license or where the debtor does not drive, his name under the law. The US recent approach is better being that it gives a secured party and registry searchers the document to look out for when either concluding a security agreement or searching the registry.[1019]

As already hinted at, the OPPSA's position is unhelpful to Nigeria in this regard. However, the US approach is not totally suitable for Nigeria for the following reasons. First, the population of those who drive cars in Nigeria is too negligible compared to the overall population – a huge size of the population would be deprived from entering into security agreements if debtor's name as in his/her driver's license is sought to be used in filing financing statements. Second, unlike the Article 9's 2010 amendments which talk about debtor's "name under state law" as a desirable

[1019] According to Hodnefield, issues surrounding debtor's name gained the highest attention and proved to be one of the lapses of the 1999 revised version of Article 9. The debtor's name palaver resulted to the 2010 amendments of Article 9. Nigeria could exploit the main lesson behind the 2010 amendments, which tell the importance of specifying what document must contain debtor's name for the purposes of security agreements/financing statements. For further expositions on debtor's name change under the 2010 amendments of UCC Article 9, see The Uniform Law Commission's detailed summary at http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%209%20Amendments%20 (last visited on January 22, 2015); A brilliant summary of the 2010 amendments to Article 9 could be found in – R. Hakes and S. Sepinuck, *The Uniform Commercial Code Survey: Introduction*, 65 THE BUSINESS LAWYER, 1205 (2010). Furthermore, see Edwin E. Smith, "A Summary of the Provisions of Article 9 of the Uniform Commercial Code", in ASSET BASED FINANCING IN TODAY'S ECONOMY (Practicing Law Inst., Commercial Law & Practice Course Handbook Series No. 28870, 2011), pp.27-28; as well as, Harry C. Sigman, *Improvements (?) to the UCC Article 9 Filing System*, 46 GONZAGA LAW REVIEW, 457 (2011), p.459. Available also at https://www.law.gonzaga.edu/law-review/2011/05/31/improvements-to-the-ucc-article-9-filing-system/ (last visited on April 2, 2015).

alternative to his name on a driver's license, in Nigeria there is nothing like such designation as ("name under state law"), because a lot of Nigerian citizens are not officially recorded in any identification database whether managed by states or the federal government.

What the author would rather suggest to the Nigerian lawmakers in designing the anticipated PPSL, is to state that the debtor's name as in his/her national e-passport or residence permit (in the case of foreigners) be used both in security agreements and financing statements. The reasons for this are the following: First, a Nigerian passport is the highest official document of the country, and its contents – especially the name, date of birth and signature of the debtor would be very much reliable compared to any other identification document in the country. Second, it would encourage those Nigerians who have not obtained their e-passports to do so, so as to facilitate the gathering of individuals' data in the country for other gainful purposes rooted in statistics. Third, the core requirement for the obtainment of a national passport is to prove that one is Nigerian, by providing certain named documents.[1020] This is easier to obtain compared to a driver's license which requires one to learn to drive before it is issued – not every Nigerian is interested in learning to drive for reasons best known to them, and should not be forced in any way to do so as a precondition for entering into a security agreement. A corollary to the foregoing is also that the date of birth of the debtor as in his/her national passport be required when filing a financing statement. This should be so, so that a search in the registry using the debtor's name and date of birth as in the passport would exactly reveal the relevant financing statement.

[1020] They include Local Government letter of identification, birth certificate / age declaration, 2 recent color passport photographs, Guarantor's form sworn to before a commissioner of Oaths / Magistrate / High Court Judge, Parents' letter of consent for minors under 16 years, Marriage certificate where applicable, and a Police report in case of lost passport. For further details, see https://portal.immigration.gov.ng/pages/passportguidelines (last visited on March 13, 2015).

With respect to incorporated debtors, the recommendation is different because they are not issued with passports. However, they are issued with certificates of incorporation by the Corporate Affairs Commission in Nigeria. Thus, their names as in their certificates of incorporation should be used in concluding a security agreement as well as filing financing statements in the registry. Being that names submitted for incorporation are checked if they tally or closely resemble preexisting corporate names, it is almost certain that using debtor's incorporated name would yield maximum certainty when searched.

It is submitted that if it is not expressly provided as to the document that should bear the debtor's name for the purpose of entering into a security agreement and filing a financing statement so as to provide certainty, it would lead to situations where innocent secured creditors or potential ones, eventually lose their priority because they used another version of the debtor's name different from what other registry searchers used. This kind of gap could be intentionally abused by debtors, being that they could use different names for different secured creditors with respect to the same collateral – then let the different creditors to figure out the mess in court.[1021] This could lead to business chaos, uncertainty, and distrust of the system by lenders, and might eventually defeat the purpose of the anticipated PPSL. The best way to solve this in the author's opinion is to state that the name of the debtor as in the national passport/residence permit, or certificate of incorporation is the only recognized name for secured transactions purposes, so that those who use any other

[1021] It took Americans about fifty years to finally resolve the obstacle posed by the use of debtor's multiple names by different secured creditors, vis-à-vis filed financing statements. The solution came with the 2010 amendments of UCC Article 9, which specified the sources from where a debtor's name must be derived. As this solution does not facially seem extraordinary, notwithstanding that it took more than fifty years to come by, it is very likely that emerging systems (e.g, Nigeria) will accord it light appreciation when drafting their own secured transactions law from the lens of Article 9. The author strongly advises Nigerian lawmakers to ensure from the onset that a document is named in the PPSL (national passport preferably) as the only document that will contain a reliable name of the debtor with respect to entering into security agreements as well as filing financing statements in the registry.

name contained in a different document other than the national passport or certificate of incorporation as the case may be would do so at their own risk.[1022]

When all this is put in place, then it would become reasonable to adopt the Ontario's position of zero tolerance as evidenced by *Clinton's Flowers* and *Fairbanx Corporation* cases,[1023] where the omission of 's' in "Clinton" or the addition of 'h' in "Tecnology", was deemed to be a seriously misleading error and therefore cannot exonerate the party that made the error. Currently, the Article 9 position would hold that the degree of error made in *Clinton's Flowers* and *Fairbanx Corporation* cases is not enough to seriously mislead[1024] – a position that protects a secured creditor who had made errors in filing, more than a searcher of the registry. Also in its hasty protection of the secured creditor, Article 9 seems to forget the fact that a searcher of registry could eventually become a secured creditor and might thereafter face priority struggles – having checked with the debtor's correct name but unknown to him that a prior security interest already exists on a slightly different name of the debtor with respect to the asset offered as collateral. Again, this could foment a huge suspicion in potential lenders' mind, if the negligence of the first secured creditor is allowed to result to the loss of foreseen priority statuses of subsequent secured creditors who based decisions on information found in the registry, without any form of remedy for them. Nigeria should therefore adopt the zero tolerance approach to mistakes especially if the exact data for filing and searching are provided in the anticipated PPSL to warn anyone entering into a secured transaction, the various consequences of noncompliance.

[1022] This opinion is made given the fact that the Nigerian e-passport document cannot be forged unlike any other identity document in the country. That said, the Nigerian immigration in charge of national passports data could share their database with the PPSL registry – to enable the secured party or registry searchers ensure from the beginning the real identity of the debtor before parting with their funds.

[1023] Respectively (1991) 2 P.P.S.A.C. (2d) 139 (Ont. Ct. Gen. Div.), 2010 ONCA 385 (Ont. C.A.).

[1024] See section 9-506 (c) UCC.

Lastly, it is also recommended that in the event the debtor's name changes, like when his/her national passport expires – usually after every five years and requires renewal, or s/he changes name due to marriage, or in the case of an incorporated entity that changes its name, the debtor should have the duty to inform its secured creditors. Then secured creditors should have fifteen days to correct the filed financing statement to reflect the debtor's new name. During this fifteen days period, the secured party should continue to enjoy his/her usual priority status including in goods acquired during the grace period. But if s/he fails to file a correction statement regarding the debtor's name change, s/he should lose priority after the lapse of fifteen days – and his/her priority loss should relate back to the original date of the debtor's name change.[1025] This is in line with OPPSA and Article 9 positions except that while OPPSA gives the secured party thirty days of grace period[1026] to file a correction statement regarding the debtor's name change, Article 9 gives four months to do so.[1027]

[1025] There ought to be a balance of interests concerning debtor's name change as it affects existing secured creditors and potential ones. Thus, it is suggested that the debtor should be given the duty to inform its secured creditors immediately after name change – by announcing such on the national newspaper as well as sending them notification emails. This would serve as sufficient notice to secured creditors, to enable them to quickly file correction statements that reflect the name change instead of giving them the burden of learning such change solely on their own as done in US and Canada. The debtor could be made to be liable in damages for losses arising from failure to make public announcement cum sending email notifications about his name change. This way, the extent to which potential secured creditors searching the file will be misled within the grace period will be reduced. *Au contraire*, under Article 9 and OPPSA, the situation is different, because following debtor's name change, the secured party is expected to "mysteriously" know about the change and consequently a file correction statement or lose priority within the grace period. This means, that the secured party is given the implied duty of visiting the registry at least every 30 days (in the case of OPPSA) or four months in the case of Article 9 to doublecheck if debtor's detail is still current. The author submits that owing to this long grace period coupled with no duty on the debtor to inform existing secured creditors about his name change, the repressiveness of such regime on potential secured creditors is vividly incontrovertible. Nigeria should therefore take a different path that balances interests of existing and potential secured creditors as well as good faith buyers.

[1026] See section 48(4) OPPSA.

[1027] See section 9-507 (c) UCC. See also section 2.4.7 above for the analysis on the definition of 'month' in Nigeria and why "four months" as used in Article 9 would be colossal at the moment if such method of drafting is imitated in Nigeria.

The author is of the opinion that thirty days as well as four months are too long a time, being that the length of such period is capable of misleading a lot of potential secured creditors who search the registry with the debtor's new name during the thirty or four months period – only to eventually realize that a prior secured party is still enjoying priority using the debtor's old name. It is vitally important that those who rely on current information found in the registry are not treated unfavorably so that that the registry does not lose its integrity and primary essence.

3.12.3. Issues concerning compensation for registry errors

OPPSA provides that a person who relies on the registrar's certificate could be able to seek compensation from the Assurance Funds if it could be proved that the erroneous content relied upon occurred as a result of the malfunction of Ontario's registry system.[1028]Where the error contained in the issued registrar's certificate is made by a registry official, the Ontario courts have held that such would not be sufficient to entitle the person who relied on the certificate to his detriment a compensation from the funds. For instance, in the Clinton's Flowers case,[1029] the secured party filer correctly filled in the debtor's name (Clinton's Flowers Ltd), but when the registry officials were imputing the details into the registry's system, they omitted the "'s" from Clinton's. The court held, that the alleged error was not a system error, but a human one. This means that only an error occasioned by a system's malfunction could entitle the filer a compensation from the Assurance Funds.

In the US, this is not the case, because Article 9 does not provide for assurance funds in compensation for either human or system errors made on the financing statement, which a registry

[1028] See section 44 OPPSA.
[1029]*Bank of Nova Scotia v. Clinton's Flowers and Gifts Ltd* (1991) 2 P.P.S.A.C. (2d) 139 (Ont. Ct. Gen. Div.).

searcher relies upon to his detriment. The question then is what Nigeria should do in this regard – should it create assurance funds to compensate registry searchers who rely on the contents of a certificate issued by the registrar to their detriments or not? The author strongly suggests that Nigeria's internet registry for publicizing security interests in personal property (yet to be in place) would most likely fare better if no assurance funds is created to compensate for errors by registry systems due to the following reasons. First, being that the registry is expected to generate its own funds to take care of its activities, creating compensation funds for system errors might indirectly result to high filing fees charged by the registry– because the high probability of errors would likely be factored into the filing fees. If filing fees are high as a result of this, many people would be discouraged to use the registry to check or file financing statements to publicize their security interests in collateral – a situation that would threaten the rationale of its establishment.

Second, given that Nigeria is still developing – technical know-how, power supply and kindred infrastructures required for an efficient function of the registry are still a big challenge. Developing sufficient efficiency in the registry would certainly be evolutional, and during this process of gradual development which would certainly be characterized by many trial and error experiments, it would be inappropriate to place big burdens on registries to pay compensations arising from computer-system errors. Computer system errors are likely going to be more frequent in Nigeria than in Ontario, and the Nigerian registry if asked to pay compensations for errors every now and then, would reach a point where they cannot pay – or pay, but make filing fees unreasonably high in order to remain operative.

Third, given the high level of corruption in Nigeria at the moment,[1030] the author envisages that in the absence of a strict regulation, creating assurance funds might be negatively exploited by a few insiders of the registry who are in charge of system operations. They could collude with their friends to request for registrar's certificates while at the same time tamper with the registry system to malfunction and produce erroneous results, with hope of sharing the loot in the event their friends successfully claim the compensation funds – this would pose a great threat to the sustainability of the registry system.

On the basis of the foregoing, the Nigerian lawmakers should not create assurance funds at the infant stage of the registry as that could easily crush them out of existence. It would make sense to say that later on in the future, when some of the above challenges have been well addressed, lawmakers could amend the PPSL to include compensation funds if at all it would be necessary – this approach is recommended given that no reform is one-time, but should rather be in constant revisions as the Nigerian society evolves.

[1030] Nigeria ranks 136th out of 175 countries in the corruption index. See <http://www.transparency.org/country#NGA> (last visited on January 23, 2015). Corruption is a major factor that frustrates law/policy reforms in Nigeria, and any reform proposer ought to carefully identify possible loops that could be easily exploited and provide measures on how to close them.

Chapter Four
Secured Transactions: Intersections with Bankruptcy and Consumer Protection Laws

Chapter Summary

This chapter discusses two main issues – first, the interface between secured transactions law and bankruptcy law, and the problematic issues arising from their intersections. In essence, it analyzes the effects of bankruptcy petition of a debtor on the security interests of secured creditors vis-à-vis the debtor's property, including issues of hierarchy between secured creditors and other creditors. While the US and Canada have more developed and harmonious regimes between their secured transactions and bankruptcy laws, Nigeria does not yet have that – its secured transactions law is both outdated and compartmentalized, and is not in harmony with the bankruptcy statutes – this poses a number of problems, including those already solved by the US *Butner* principle, the lack of which could eventually stifle credit lending in Nigeria. Thus, in arguing that Nigeria's secured transactions legal framework and bankruptcy laws be harmonized, the chapter utilizes the US Bankruptcy Code 1978, and the Canadian Bankruptcy and Insolvency Act 1985, as benchmark laws, sources of inspiration, and tools for analysis.

Second, this chapter also discusses the relationship between secured transactions law and consumer protection – the need to properly checkmate secured creditors from overreaching themselves – to prevent them from resorting to unfair credit terms or disposing debtors' collateral in non-commercially reasonable manner. The chapter argues in essence that it will not be enough to introduce a modern secured transactions law – instead an ideal secured transactions law should also contain provisions which bear in mind the usual inequality in bargaining positions between secured creditors and debtors in consumer financing – especially in the Nigerian context where the existing insufficient remedies are of *ex post* rather than *ex ante* nature. This chapter challenges all this, and above all seeks to provide a healthy balance between consumer financial lenders and consumer debtors by proposing that the enactment of sector-specific consumer protection laws is highly crucial if consumer debtors must be adequately protected Nigeria vis-à-vis the anticipated PPSL.

4.1. Introduction: Why a discussion on secured transactions and bankruptcy interface?

Based on the previous chapters, the reader might have assumed that perfecting a security interest in a debtor's personal property guarantees the secured party a total rest of mind even in the former's bankruptcy. This chapter is meant to relax that assumption by examining the linkages between bankruptcy and secured transactions law as well as how the issue of consumer protection is implicated. There is already a massive body of literature on the relationship between bankruptcy and secured transactions law[1031] – thus, the intention of this chapter is not to retell the stories which the existing literature already contains, but instead to review a series of issues which arise from the uncertain correlations between both areas of law – using the US[1032] and Canadian[1033] bankruptcy statutes as benchmark. However, notwithstanding this caveat, it is still highly necessary to adeptly demonstrate how bankruptcy of a debtor triggers a sharp turn of events in the narrative of secured transactions law. Thus, bankruptcy remains a litmus test – being that the

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[1031]For a good overview, see GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, chapter 45. Also see generally – Steven L. Harris & Charles W. Mooney, Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 AMERICAN BANKRUPTCY INSTITUTE LAW REVIEW, 85 (2001); and see George J. Wallace, *The Intersection of Bankruptcy and Revised Article 9*, 34 UNIFORM COMMERCIAL CODE LAW JOURNAL, 44 (2001), David MacLachlan, *The Impact of Bankruptcy on Secured Transactions*, 60 COLUMBIA LAW REVIEW, 593 (1960), esp. at p.608.

[1032] In US, bankruptcy law is federal law, with the applicable statute being the Bankruptcy Reform Act of 1978, 11 U.S.C, which replaced the Bankruptcy Act of 1898. The 1978 statute is referred to as Bankruptcy Code (BC), which in 2005, was amended. The amendment is known as Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCA). It is important to note that the Bankruptcy Code is supplemented by the Bankruptcy Rules which govern procedural issues in US bankruptcy courts.

[1033] According to the Canadian Constitution (Constitution Act, 1867-82) section 91(2), the federal government has exclusive power to enact bankruptcy and insolvency laws. Canada has two separate regimes that govern the reorganization of insolvent businesses, namely the Companies' Creditors Arrangement Act (CCAA) 1933 which was enacted during the Great Depression era to help large companies with outstanding bonds which did not have provisions for amendment of contractual terms during the issuer's financial difficulties. Considering the space at the author's disposal, CCAA will not feature in the analysis of this chapter – mainly because it deals exclusively with corporations with debts of at least five million CA dollars, and therefore offer lessons that are not of general application to all incorporated companies. Instead, in this chapter, the author will use the other bankruptcy statute in Canada as benchmark – that is, the Bankruptcy and Insolvency Act (BIA) 1985, with latest amendment in 2015, which deals with both individual and corporate bankruptcies – in fact, it is the equivalent of the US bankruptcy code.

strength of a security interest is tested upon the financial collapse of the debtor.[1034] In fact, as Miller and Bienenstock paradoxically put it three decades ago – "there are no winners in bankruptcy, only survivors".[1035] In view of this background, it becomes incontrovertible that no attorney can afford to effectively advise on secured transaction issues without possessing adequate knowledge of bankruptcy law and how security interests are treated upon bankruptcy.[1036]

Secured transactions law leans heavily on the principles of contract[1037] – hence, it is to a large extent, private in outlook. This means that the relationship between a secured party and debtor is mainly private, including the former's enforcement mechanisms – for instance, he is allowed per the rights under a security agreement to seize the debtor's collateral and sell, in order to recover his money.[1038] Similarly, a secured party's priority status vis-à-vis other secured creditors that have security interests in personal property of the debtor is usually clear and incontrovertible from the perspective of secured transactions law until debtor's bankruptcy.[1039]

[1034] Ulrich Drobnig, *Basic Issues of European Rules on Security in Movables*, in JOHN DE LACY (ed), THE REFORM OF UK PERSONAL PROPERTY SECURITY LAW: COMPARATIVE PERSPECTIVES (Routledge-Cavendish, 2010) 449.

[1035] See Miller and Bienenstock, *Bankruptcy Restructuring Promises Few Reforms*, LEGAL TIMES, 43 (July 30, 1984), cited in RICHARD F. DUNCAN, et al, THE LAW AND PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9 (Law Journal Press, New York, USA, 1987), p.7.01 [2].

[1036] See WILLIAM D. WARREN & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY (New York, Foundation Press, 7th edition, 2007), p.492 – "…lawyers planning secured transactions must know how to structure those transactions so that they will stand up in bankruptcy."

[1037] See section 9-203 (b) UCC, and section 11(a) OPPSA.

[1038] See section 9-609 UCC, and section 63 OPPSA.

[1039] A more brilliant explanation could be found in Robert Orr & Kenneth Klee, *Secured Creditors Under the New Bankruptcy Code*, 11 *UNIFORM COMMERCIAL CODE LAW JOURNAL*, 312 (1979), p.315. See also GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, p.1288.

Upon a debtor's filing of bankruptcy petition, everything slips off from the control of secured creditors into the hands of the bankruptcy trustee,[1040] who majorly plays the role of devil's advocate in favor of debtor's estate versus the secured claims[1041] of creditors – being that available funds for distribution depends largely on how many claims against the debtor's estate he (the bankruptcy trustee) is able to defeat.[1042] In achieving this, the trustee is strongly armed by the fact that in US and Canada for instance, bankruptcy is a federal law[1043] while secured transactions law is within the state[1044] or provincial[1045] competence – meaning that as the *Butner* principle entails, "property interests are created and defined by state law and 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."[1046]

Similarly, being that bankruptcy law is a federal legislation, it is usually characterized with national policies which of course supersede the rights of a party under a security agreement. For instance, one of the policy considerations in the US and Canadian bankruptcy regimes is the

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[1040] See section 71 Canada's BIA, and chapter 7 Bankruptcy Code. However, this is different in Nigeria where the private receivership system is still in force – the floating chargee (secured creditor) could appoint a receiver to take over the management of debtor's business.

[1041] For a discussion of valuation of creditors' secured claims, see generally, John B. Butler, *Valuation of Secured Claims Under 11 U.S.C. 506(a),* 89 COMMERCIAL LAW JOURNAL, 342 (1984), Keith Sharfman, *Valuation Averaging: A New Procedure for Resolving Valuation Disputes,* 88 MINNESOTA LAW REVIEW, 357-358 (2003); available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=494383 (last visited on April 28, 2015).

[1042] Section 547 BC seeks to stock up debtor's estate with more assets by choking secured creditors to vomit preferential transfers which they received shortly (up to 2 years in some cases) before bankruptcy. Similarly, under section 554(a) BC, a bankruptcy trustee could "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate". Similarly, see sections 95–98 BIA.

[1043] See article 1, section 8 of the US Constitution which gives Congress the exclusive power to enact bankruptcy legislations. See also the Canadian Constitution (Constitution Act, 1867-82) section 91(2).

[1044]In US, the implication of article 1, section 8 of the US constitution is that whatever is not within Congressional Power to legislate on, is legislated upon by the state governments – and this includes secured transactions law.

[1045] See section 92 of the Canadian Constitution (Constitution Act, 1867-82) for the full list of areas which provincial governments have right to legislate on – this includes secured transactions law as well.

[1046] See *Butner v. United States***,** 440 U.S. 48 (1979), p. 55.

concept of 'fresh start'[1047] – a debtor who has met the necessary preconditions, could be allowed to start afresh in exchange with forfeiting its non-exempt pre-petition property. The essence of this policy reasoning is to ensure that risk-taking, a sufficient dose of which is very much needed for economic growth is not grossly suppressed by disallowing the debtor a second chance to jumpstart its business.[1048] In like manner, a business debtor could apply for reorganization of his business – what forcefully makes secured creditors come to a compromise. The policy reasoning behind this, stems from the fact that businesses are more desired alive than liquidated[1049] – even when this might be against the contractual rights of secured creditors – it is believed that keeping businesses alive implies a sizeable reduction in unemployment rate, with all the positively linked economic and social effects. It is also on the premise of policy considerations that preference transfers made by a debtor to a secured creditor are voided[1050] by the bankruptcy trustee, regardless of the existence of such right under contract.[1051]

Notwithstanding that bankruptcy law has generated intensive debates[1052] over decades which naturally should have been sufficient to lighten up all dim corners, yet, one area still appears abstruse – especially for Nigeria, given the lack of a detailed bankruptcy-secured transactions legal

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[1047] See sections 524-525 BC, and also see section 172 BIA. For more information, see the seminal article – Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law,* HARVARD LAW REVIEW, Vol. 98, No. 7 (1985), pp. 1393-1448. Available also at http://www.jstor.org/stable/1340952 (last visited on April 28, 2015).
[1048] Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law, Ibid* at 1398.
[1049] See Brian A. Blum, *The Goals and Process of Reorganizing Small Businesses in Bankruptcy,* 4 JOURNAL OF SMALL AND EMERGING BUSINESS LAW, 181 (2000), pp. 181-182.
[1050] See Thomas H. Jackson, *Avoiding Powers in Bankruptcy,* 36 STANFORD LAW REVIEW, 725 (1984), p.728.
[1051] See sections 95-98 BIA, and section 547 BC. For a brilliant insight on the preferential transfer concept, see Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VANDERBILT LAW REVIEW, 713 (1985). See also Michael Bloom, Richard Gorelick, and Heather MacKenzie, *Exceptions to Bankruptcy Preferences: Countryman Updated,* 47 BUSINESS LAWYER, 529 (1992) (this article revisits the arguments in Countryman as well as gives updates which were missing in Countryman's seminal article). For a brilliant review of the historical development of preferential transfers, see Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference,* 39 STANFORD LAW REVIEW, 3 (1986).
[1052] See generally, William Henning, *An Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications*, 63 NORTH CAROLINA LAW REVIEW, 257 (1985), pp. 259-260.

framework. Thus, the way priorities are exactly determined amongst a debtor's secured creditors who have security interests arising from real and personal property collateral of the debtor is still statutorily recondite. In the US for instance, this has been settled by the *Butner* principle which states that security interest rights established in state law will not be thwarted in bankruptcy unless a federal interest requires a different result. The uncertainty, that is, whether state property rights should remain intact in bankruptcy, which plagued the US bankruptcy regime about four decades ago but was eventually settled in *Butner*, is still very much present in Nigeria. Thus, there is no equivalent of *Butner* in the bankruptcy or insolvency statutes of Nigeria which expressly states whether property rights would continue to be guided by the law that created them in the context of bankruptcy. In the absence of a *Butner* equivalent, it therefore would hardly be an exaggeration of fear to worry in the context of Nigeria, how the assemblage of secured claims stemming from the real and personal property of the debtor could be prioritized. This chapter amongst other things, will examine how the confluence of secured claims arising from these categories of property are determined, what problematic issues arise therefrom, and how these issues could be adequately resolved.[1053] The discussion here will serve basically as a melting pot of lessons from which recommendations would be made to Nigeria with respect to how it can handle similar issues when the anticipated PPSL comes on board.

[1053] In reacting to a similar conundrum in Canada – that is, the occasional uncertainties that arise due to the confluence of security interests from different sources of rights, a Canadian scholar in 2011 said with respect to title retention devices that ''[t]he simplest solution to this problem is for Canadian Parliament to amend the definition of secured creditor in the Income Tax Act and in the federal insolvency statutes to ensure that they cover title retention devices. The federal insolvency statutes should no longer rely upon an obsolete conception of security that has been abandoned by all the common law provinces and territories. The definition would need to dovetail with that used in the PPSA so as to ensure that it covers any interest that in substance secures payment or performance of an obligation, including a security lease or security consignment.'' See Roderick J. Wood, *The Structure of Secured Priorities in Insolvency Law*, 27 BANKING & FIN. LAW REVIEW, 25 (2011), p.33.

Lastly, the author would like to remind the reader that bankruptcy and secured transactions law have dissimilar terminologies – which if not briefly explained here, especially the key ones, might pose outright hindrance to the understanding of this chapter. For example, Article 9 and the Ontario PPSA use the terms "secured creditor"[1054] and "unsecured creditor"[1055] – yet, in bankruptcy statutes of US and Canada, a secured party changes to "holder of secured claim",[1056] which basically is the holder of right to payment regardless of where the right stems from.[1057] This functions in a way that differs from secured transactions law perspective where security interests in personal property and fixtures of a debtor (consensual liens) are what are exclusively considered, as opposed to secured claims which comprise both consensual liens as well as those arising by operation of law.[1058] Similarly, in bankruptcy what is required of a creditor is to establish

[1054]Black's Law Dictionary (9th edition), p.425 – defines it as "a creditor who has the right, on the debtor's default, to proceed against collateral and apply it to the payment of the debt." see also the definition given in Section 9-102(73) UCC – "(A) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding; (B) a person that holds an agricultural lien; (C) a consignor; (D) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold; (E) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for".

[1055] "A creditor who upon giving credit, takes no rights against specific property of the debtor" – Black's Law Dictionary (9th edition), p.425

[1056] "A claim held by a creditor who has a lien or a right of setoff against the debtor's property" – *Ibid* at p.282. For a penetrating study on the priority of 'secured claims' in bankruptcy – see generally, Lucian A. Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE LAW JOURNAL, 857 (1996). Available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/224.pdf (last visited on May 2, 2015). For a rejoinder of this article, see Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy,* 47, DUKE LAW JOURNAL, 425 (1997). Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2452&context=faculty_scholarship (last visited on May 2, 2015).

[1057] According to section 101 BC, the term "lien" means "charge against or interest in property to secure payment of a debt or performance of an obligation".

[1058]See section 506(a)(1) BC which defines 'secured claim' quite broadly to cover claims secured by any lien on property, not just those created consensually as done in UCC Article 9 and OPPSA. For more insight about secured claims, see generally – John B. Butler, *Valuation of Secured Claims Under 11 U.S.C. 506(a),* 89 COMMERCIAL LAW JOURNAL, 342 (1984), and Lucian A. Bebchuk & Jesse M. Fried, *A New Approach to Valuing Secured Claims in Bankruptcy*, 114 HARVARD LAW REVIEW, 386 (2001).

prepetition debt against the debtor by filing "proof of claim"[1059] – such that where the creditor is unsecured, he acquires an "allowed unsecured claim"[1060] from the debtor's "estate"[1061], while a secured creditor will have an "allowed secured claim".[1062] It is important that these key terms and others, be borne in mind throughout the chapter.

4.2. Bankruptcy law at a glance: A comparative analysis of the US, Canadian, and Nigerian regimes

It could concisely be stated that bankruptcy law tackles the financial issues of persons via two major streams – namely, liquidation or reorganization. In this subsection, the author tries to point out that the method of liquidation or reorganization of debtors in any legal regime tells to what degree the rights of secured creditors are hampered or protected upon the debtor's bankruptcy

[1059] A combined reading of sections 501 & 502 BC, shows that a proof of claim is a form creditor's file with the court to substantiate their claims in bankruptcy. When a debtor files for bankruptcy, all creditors listed in his schedules receive notice of his case via the bankruptcy trustee as well as a deadline within which to file their proofs of claim (called the claims bar date). For most creditors, the deadline is 90 days after the initial creditors' meeting (for government entities it is 180 days). If a creditor fails to file a proof of claim, it stands a chance of not getting paid from the debtor's estate. This means that only those creditors who filed proof of claim against a debtor's estate will be considered for payment.

[1060] "An unsecured creditor that establishes a prepetition debt of the debtor will have an allowed unsecured claim in bankruptcy". See RICHARD F. DUNCAN et al, THE LAW AND PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9 (New York, Law Journal Press, 2012), p.7.01[1].

[1061] See section 541 BC – which states that bankruptcy petition creates an estate on the debtor's assets – meaning all legal and equitable property of the bankrupt except the non-exempt property form part of the created estate. For the list of non-exempt property, see section 522(d) BC.

[1062] As opposed to 'allowed unsecured claim', [a] creditor with a valid security interest will be deemed to hold an "allowed secured claim". In line with section 506 BC, the creditor holds a secured claim in bankruptcy to the extent of the value of the collateral, the claim will be bifurcated into secured and unsecured components. For example, if debtor borrows $100,000 from bank and the obligation is secured by collateral valued at $60,000, then the creditor will have an "allowed secured claim" of $60,000 and an "allowed unsecured claim" of $40,000" – see RICHARD F. DUNCAN et al, THE LAW AND PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9 (Law Journal Press, New York, 2012), p.7.01[1].

– this surely determines how much secured lenders are willing to lend credits. In all three jurisdictions under analysis, liquidation entails the appointment of a trustee, who liquidates the debtor's assets and distributes the proceeds to its creditors following priority rules –or in the case of an individual debtor in the US, only the non-exempt assets are sold.[1063] On the contrary, reorganization entails the provision of a framework in which the debtor continues with its business operation while simultaneously negotiating with its secured creditors on a viable plan towards settling their claims.[1064]

The inevitable feature of compromise which underscores reorganization plans, usually boils down to the secured creditors' acceptance of issued debts instruments, or the conversion of debentures or bonds, into equities (shares). It is crucial to point out however, that in the US for instance, the filing of a reorganization plan under chapter 11 can only be sustained if it sufficiently promises viability, enough to systematically repay secured creditors – otherwise, the plan would be converted to liquidation.[1065] Suffice it to mention that the key feature of chapter 11 is the arrangement which retains the incumbent management, known as the debtor in possession (DIP) to manage the business affairs instead of appointing a trustee – provided the former carries out the fiduciary duties similar to those of a trustee.[1066]

[1063]See KENNETH CLARKSON et al, BUSINESS LAW, TEXTS AND CASES (Thomson, 9th edition, 2003),p.618.
[1064] See STUART GILSON, CREATING VALUE THROUGH CORPORATE RESTRUCTURING: CASE STUDIES IN BANKRUPTCIES, BUYOUTS AND BREAKUPS (New York, John Wiley & Sons Inc., 2001), p.23.
[1065] The US Bankruptcy Code provides for the conversion of a failed reorganization plan to liquidation. See section 1112(a) BC.
[1066] See sections 1101(1) – 1107 BC. In line with the Bankruptcy Rules 9001(5), this chapter will refer to the term "management", unless otherwise stated, as the company's officers and directors of the debtor company. See Barry L. Zaretsky, *Trustees and Examiners in Chapter 11,* 44 SOUTH CAROLINA LAW REVIEW, 907 (1993), p.908, footnote 1.

It is incontrovertible that the main rationale behind chapter 11's DIP, lies on the intention to exploit the existing management's familiarity with the business operations, to see how the business could be rescued from its financial quagmire if excused some obligations through a reorganization plan.[1067] Notwithstanding this rationale, a contrary voice continues to echo loudly – thus, a glance at the existing literature reveals that many scholars have been advancing arguments for the abolition[1068] of the DIP concept under the US chapter 11; given the fact that allowing the existing management to continue with the firm's business affairs, simply implies a disregard of what actually led to its financial ailment – which is probably "business mismanagement" by the debtor. Furthermore, the DIP might intentionally abuse his new position at the detriment of secured creditors through fraudulent transfers of assets beyond reach, before finally crashing up the business. To prevent the DIP's possible abuse of position, a presumably disinterested officer (a

[1067] The following authorities endorse this view as being a core reason why chapter 11 kind of reorganization appears to be the leading reorganization model. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 81 YALE LAW JOURNAL, 663 (1974), Ralph K. Winter, Jr, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 JOURNAL OF LEGAL STUDIES, 251 (1977), FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Cambridge, Mass., Harvard Univ. Press, 1991),pp.222-227, Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law,* 105 HARVARD LAW REVIEW, 1435 (1992).

[1068] The following writers have argued for the abolition of chapter 11 DIP. For example, see THOMAS H. JACKSON, THE LOGICS AND LIMITS OF BANKRUPTCY LAW (Cambridge Mass., Harvard University Press, 1986), p.223 (where he called for the abolition of chapter 11), Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 JOURNAL OF LEGAL STUDIES, 127 (1986), p.128 (where he said that "[t]he entire law of corporate reorganizations is hard to justify under any set of facts and virtually impossible when the debtor is a publicly held corporation"), Barry E. Adler, *Bankruptcy and Risk Allocation,* 77 CORNELL LAW REVIEW, 439 (1992), p.489, where he said that "Congress should repeal bankruptcy's reorganization provisions". Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE LAW JOURNAL, 1043 (1992), where he generally argued that chapter 11 exists solely to serve the interest of management to the detriment of all secured creditors. See also Stephen J Lubben, *The Direct Costs of Corporate Reorganization* 74 American Bankruptcy Law Journal 509 (2000) (where the author tried to show that the cost involved in corporate reorganization could eventually outweigh the pursued gain).

trustee) ought to be appointed to manage the firm's business as is the practice in Canada and Nigeria.[1069]

The Nigerian Bankruptcy Act[1070] which borrowed extensively from its English counterpart applies exclusively to individual debtors[1071] – and knows nothing about "fresh start" which is an inherent feature of the US chapter 7.[1072] Furthermore, the Nigerian Company and Allied Matters Act (CAMA) offers provisions under which a company witnessing financial difficulties can rearrange[1073] – it is closely related to the US chapter 11 but hardly the equivalent.[1074] Suffice it to

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[1069] See the Winding Up provisions (Part XV) in Nigeria's Company and Allied Matters Act, 2004. Currently Nigeria has no equivalence of chapter 11 reorganization procedure. Although recently, the Nigeria's Insolvency Act 2014 (which is currently a bill of law before the Nigerian National Assembly). In truth, this bill is almost a total transplant of the English Insolvency Act, 1986, where Schedule B1, section 10 requires the appointment of an administrator for reorganizing an English form under the administration procedure.

[1070] The Act is available at http://www.nigeria-law.org/BankruptcyAct.htm (last visited on April 30, 2015). Note that this Act will be repealed if the Nigerian Insolvency Act 2014, which is currently a bill before the National Assembly (Federal Parliament) becomes law. See section 512 of the Insolvency Act, (Bill) 2014.

[1071] It is apropos to settle a terminology conundrum vis-à-vis 'bankruptcy' and 'insolvency'. In the US, the term "bankruptcy law" applies both to natural and artificial debtors. While in Nigeria just like the English Bankruptcy Act 1914, "bankruptcy law" applies only to natural debtors, while "insolvency law" applies to both personal and corporate debtors.

[1072] Precisely, see section 727 US Bankruptcy Code. However, the English Insolvency Act 1986 provides for discharge of a bankrupt following certain conditions. See sections 278-282 thereof. The Act is available at http://www.legislation.gov.uk/ukpga/1986/45/pdfs/ukpga_19860045_en.pdf (last visited on October 31, 2015).

[1073] See Part XVI of Companies and Allied Matters Act, 2004 available at http://www.nigeria-law.org/CompaniesAndAlliedMattersActPartXV-XVII.htm#Arrangement%20and%20Compromise (last visited on April 30, 2015). Note that section 511 of the Insolvency Act 2014 (a bill before the National Assembly in Nigeria), the Companies and Allied Matters Act will be subservient to the Insolvency Act 2014, and shall be void to the extent of its inconsistency with the latter.

[1074] The Nigerian scheme of arrangement is an agreement between the debtor-company and its secured creditors under which the creditors agree to forfeit all or some of their claims against the debtor-company. Also, creditors' debts could be rescheduled – they could convert debentures to equities, in order to enable the company have lighter burden, and be able to drive itself out of financial crisis, using the same management. Whereas in chapter 11 reorganization, the DIP does not need to agree beforehand with secured creditors regarding his bankruptcy filing, instead he is at liberty to file for bankruptcy, with the natural result of automatic stay. Then in line with section 1123(a) (5) (I), (J) Bankruptcy Code, the DIP, pursuant to the filing, could formulate plans on how to pay creditors which could be accepted or where not accepted, the bankruptcy court could cram down on holding out creditors after due consideration of the plan – see section 1129(b)(2)(A)(i)(II) BC.

For a comparative study of reorganization models, see the following – Gabriel Moss, *Rescue or Liquidation? Comparison of Trends in National Law – England,* 23 BROOKLYN JOURNAL OF INT'L LAW, 115 (1997) (where the author explains the reform of the English Insolvency Act, 1986), Patrick Shea & Kaori Miyake, *Insolvency-Related Reorganization Procedures in Japan: The Four Cornerstones,* 14 UCLA PACIFIC BASIN LAW JOURNAL, 243 (1996) (where the authors describe the various reorganization procedures for firms in Japan), Christopher G. Paulus, *Germany: Lessons to Learn from the Implementation of a New Insolvency Code,* 17 say that under CAMA, an insolvent company has no option which equates to chapter 11 reorganization, but could be liquidated by an appointed trustee under the winding up provisions of CAMA if arrangement and compromise fail.[1075] Having offered a little background of bankruptcy in the three systems under analysis, the chapter will next examine some of the problematic issues it has diagnosed from the intersection of bankruptcy and secured transactions – and the first is what should be done with the concept of private receivership in the light of Nigeria's secured transactions law reform.

4.2.1. Should the system of private receivers/managers be abolished in Nigeria as in the US?

When dealing generally with receivership, there is often a tangential point with business rescue – that is, the idea of keeping businesses as going concerns instead of liquidating them. In principle, as would later be embellished here, a private receiver or manager is appointed by a floating chargee to keep the debtor's failing business as a going concern. With respect to business rescue, the author does not believe that each of the models already stated above, whether the US

CONNECTICUT JOURNAL OF INT'L LAW, 89 (2001), Manfred Balz, *Market Conformity of Insolvency Proceedings: Policy Issues of the German Insolvency Law*, 23 BROOKLYN JOURNAL OF INT'L LAW, 167 (1997). However, note that the last amendment of the German Insolvency law was in 2011 – For details of the amendments, see Frank Heerstrassen, *Germany Modernizes Insolvency Laws*, TERRALEX PRACTICE GROUPS, (2012), available at http://www.terralex.org/publication/pf7dfa93fb0/germany-modernizes-insolvency-laws (last visited on April 30, 2015).

For the Canadian experience, see Jacob S. Ziegel, *The Modernization of Canada's Bankruptcy Law in Comparative Context*, 33 TEXAS INT'L LAW JOURNAL, 1 (1998) (where the learned author describes the Canadian reform contained in the Bankruptcy and Insolvency Act and its amendments in the 90's. However, note that the latest amendment of the Act was in January 2015.).

[1075] The winding up provisions are contained in sections 401-491 of the Nigerian Company and Allied Matters Act, 2004. These provisions will cease to exist when the Insolvency Act, 2014 (currently a bill) comes on board because section 512(2) thereof, expressly deletes sections 387-536 of CAMA 2004.

DIP model, or the compulsory appointment of trustee, has the best solution for Nigeria – rather, a mixture of both models will very well complement with the anticipated PPSL. This view anchors on the fact that Nigeria has corporations whose structures mirror the Berle and Means model[1076] of corporate governance – that is, the controlling management is separated from the owners who are diversely located and majorly interested in the rise of dividends, but not so keen on how the company is run.[1077] In view of this category of firms which exists in Nigeria, the author argues that it would make good sense to allow a firm's management to also remain in operation even on the face of a floating chargee's crystallization.[1078]

Building on the above, it is further submitted that instead of ousting the debtor with an appointed trustee, a hybrid, that is, a combination of the DIP model and an appointed trustee to manage a firm's business during insolvency will yield more desirable result for Nigeria. This proposal mirrors the fact that Nigeria has many small and medium sized companies where ownership and management are invariably the same. It is argued that such category of companies might fare badly solely with the DIP model during their insolvency period given that intentional abuse by the DIP is highly imminent in the absence of adequate checks and balances.[1079] Thus,

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[1076]See generally – ADOLF A BERLE & GARDINER C MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY **(**New Brunswick, New Jersey: Transaction Publishers, 1991).

[1077] *Ibid* at chapter 1, esp. pp. 5-7.

[1078] Skeel has argued, using Germany and Japan as case studies, that where management is displaced in reorganization (the Nigerian equivalent of receivership), managers of firms will have very low incentives in "crying out" in time. See David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy,* 51 VANDERBILT LAW REVIEW, 1325 (1998), p.1343. However, note that the German Insolvency Act was amended in 2012 –and it now has the debtor-in-possession reorganization model. In the UK, in pursuit of the rescue culture of businesses, the Enterprise Act 2002, has whittled the traditional powers of a floating chargee in appointing a private receiver – and replaced it with a more favorable kind – the administration system. In the author's view, the UK administration system or the US chapter 11 DIP model are both good and comparable models Nigeria should look towards.

[1079] Baird and Rasmussen also share this view in their article. See Douglas G. Baird and Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VIRGINIA LAW REVIEW, 921 (2001), pp. 922-925. Available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2039&context=journal_articles (last visited on April 30, 2015).

where the DIP and an appointed trustee are allowed to manage a distressed firm, the appointed trustee provides unbiased monitoring – the lack of which was probably the reason for the debtor's insolvency, while the latter utilizes his knowledge of the business to drive it out of the financial quagmire.

It is important to note that in the US, the liquidation or reorganization of a debtor triggers automatic stay,[1080] which is designed to stop any individual enforcement of pre-bankruptcy claims against the debtor's estate – given that the bankruptcy trustee, or the DIP in conjunction with the court and creditors are given the mantle to arrive at a favorable result for all relevant stakeholders.

Now, returning to the ultimate question of this section – should the system of private receivers practiced currently in Nigeria be abolished as done already in the US? The answer is pretty self-evident and should be in the affirmative because the anticipated secured transactions law would automatically sound a death knell on the floating charge device which gives rise to private receivership, by introducing its kin called the "floating lien".[1081] Furthermore, another reason it should be abolished is that, private receivers, appointed usually by a holder of a floating charge, apart from being a mere hand of the floating chargee, could easily abuse their position – this is done in many instances by having a new company created, to which all assets of the company subject of the floating charge are transferred to the new one created by the private receiver. The issue of abuse usually comes when conditional buyers (those with retention of title) transactions against the original company with equity interests are ousted and deprived of the property to which their equity interests have been accruing on. Thus, as Professor McCormack

[1080] See section 362 BC. For insights on the US automatic stay vis-à-vis secured creditors, see generally – Raymond T. Nimmer, *Secured Creditors and the Automatic Stay: Variable Bargain Models of Fairness,* 68 MINNESOTA LAW REVIEW, 1 (1983), esp. pp. 1-8.

[1081]On floating lien, see section 3.5 in chapter three, above.

humorously puts it, this situation "[l]eaves the conditional buyers basically with empty shells from which all the crabmeat has been skillfully extracted".[1082]Another issue that deserves a thoughtful answer vis-à-vis the anticipated PPSL is the concept of automatic stay, of which the next section deals with.

4.2.2. Should 'automatic stay' be introduced in Nigeria with the proposed PPSL?

As the name implies, the stay is automatic[1083] and does not need to be specially asked from court, but originates automatically pursuant to a bankruptcy petition filing, in order to stop secured creditors from racing to grab debtor's assets for individual satisfaction. Regrettably, automatic stay is currently non-existent in Nigeria. Given that floating charge is non-existent in the US, one might argue that its lack is largely responsible for why bankruptcy petition filings under chapters 7 and 11 are usually undertaken by debtors.[1084] Filings under these two chapters usually take secured creditors by surprise, thereby triggering the antic rush to grab assets – but only to realize that a 'portcullis' has been drawn against the debtor's assets via automatic stay. In this circumstance, the existence of automatic stay makes good sense to bar secured creditors from individually enforcing

[1082]See GERARD McCORMACK, RESERVATION OF TITLE, (London, Sweet & Maxwell, 2nd edition, 1995), p.4.
[1083]See section 362 US bankruptcy code. Professor Scott J. Davido captures automatic stay quite elegantly being that "on the commencement of a bankruptcy case, the filing or continuation of actions and proceedings against a debtor and its property outside the bankruptcy court relating to prepetition claims or events, whether commenced by secured or unsecured creditors, are immediately enjoined. The automatic stay stops almost all litigation, collection efforts, lien enforcement actions, and all foreclosure-related actions. The scope of the automatic stay is extremely broad; it applies to virtually every type of action, whether formal or informal, against a debtor or property of the debtor. The stay is designed to provide a debtor with a breathing spell from its creditors and immediate relief from the financial pressures that necessitated the bankruptcy filing. Accordingly, on filing, a debtor has the opportunity to address business problems and formulate a plan of reorganization to satisfy the claims of its creditors." see Scott J. Davido, *Making Sense of US Bankruptcy Law,* 3(12) INT'L COMPANY & COMMERCIAL LAW REVIEW, 406-413 (1992), at p. 408.
[1084] Even where the bankruptcy petition for a debtor's liquidation was involuntary – that is, it was initiated by his secured creditors, automatic stay would still remain applicable against them.

their claims against the debtor's estate[1085] in order to allow the bankruptcy trustee distribute them in a justifiable manner.

However, in Nigeria, floating charge is still very much in existence and a holder of it could upon its crystallization take control of debtor's assets through the appointment of a receiver and manager.[1086] In principle, a private receiver or manager in strict obedience to its statutory duty of taking over the management of debtor's business, and managing it for the benefit of his appointor and other stake holders,[1087] would end up preserving the company as a going concern. It might then be lightly said that the floating chargee's appointment of a private receiver or manager tends to achieve the same purpose of automatic stay in the final analysis – that is, the maintenance of debtor's business as a going concern with the utmost purpose to manage it well and pay off secured creditors. But this is hardly true in practice as privately appointed receivers (as already hinted at above) more or less serve the aggrandized interests of their appointors.

It should be noted however, that it is not in all situations that a floating chargee appoints a private receiver to manage the affairs of an insolvent company – in some cases especially in SMEs, a floating chargee may simply be nonexistent. Thus, as earlier hinted at, CAMA[1088] and recently the Nigerian Insolvency Bill of 2014,[1089] respectively provide for compromise and arrangement, and Company Voluntary Arrangement procedures.[1090] With these statutory provisions in place, the

[1085] This means that the self-help right contained in section 9-609 UCC is neutralized by the Bankruptcy Code, section 362 automatic stay.
[1086]See sections 367-397 Companies and Allied Matters Act, (CAMA) 2004, available at http://www.nigeria-law.org/CompaniesAndAlliedMattersAct.htm (last visited on April 30, 2015).
[1087] See section 393 CAMA 2004.
[1088] See Part XVI of Nigerian Company and Allied Matters Act, 2004.
[1089] See Part I of the Insolvency Act, 2014. (A copy of the bill is on file with the author).
[1090] For a robust explanation on Company Arrangement Procedures, see ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW (London, Sweet & Maxwell, 2nd edition, 1997), pp.270-271.

administration proceeding, which is similar but hardly the equivalent of chapter 11 was born.[1091] Under Nigeria's Insolvency Act (still a bill as at the time of writing), administration proceeding could be commenced via many streams. One way could be by filing for an administrative order with the court.[1092] Another could be the floating chargee directly appointing an administrator,[1093] or the directors of the company[1094] – of which the court will after hearing the petition, appoints the administrator who would act as a trustee-in-reorganization and work towards coming forward with a reorganization plan.[1095]

Even though the English law is not used here as a benchmark, it should be mentioned of course that the Enterprise Act 2002, has extensively modified the floating charge in England – thus, rather than the receivership appointment, an administrator is appointed to manage the debtor's business on behalf of all relevant stakeholders. As the main rationale behind this Act was to protect businesses (a more pro-debtor regime) in response to the dwindling economy of UK in the early 1990s,[1096] Nigeria is also advised to see this as a sufficient signal that the system of private receivership, which is extraordinarily pro-creditor is no longer suitable, given the lack of robust regulations in this regard, and the consequential result of debtor-abuses.

[1091] Although the Insolvency Bill 2014 which contains the Company Voluntary Arrangement procedures is yet to become law.
[1092] See section 10 Nigerian Insolvency Act, 2014 - a petition for the appointment of an administrator may be filed by a debtor corporation, its directors, or its creditor(s).
[1093] *Ibid* at section 10(1) (b).
[1094] *Ibid* at section 10(1) (c).
[1095] *Ibid* at section 11.
[1096] See Gerard McCormack, *Super-Priority New Financing and Corporate Rescue,* JOURNAL OF BUS. LAW, 701 (2007), pp. 710-703, GERARD McCORMACK, CORPORATE RESCUE LAW – AN ANGLO-AMERICAN PERSPECTIVE (Cheltenham: Edward Elgar, 2008), pp. 43-46, 53.

Now, it is important to point out that the appointment of an administrator via any of the methods pointed out above, comes with a 'moratorium'[1097] which bars any enforcement of claims against the debtor and its assets. It should be noted that the moratorium device although operates to bar the enforcement of claims against the debtor's assets is hardly equivalent to the US automatic stay, which becomes operative independent of court order.

Finally, given the fact that it is being proposed that Nigeria takes over the unitary model of secured transactions law, which bears the fundamental features of UCC Article 9 and necessitates the conversion of floating charge to floating lien, to dovetail with the right of private enforcement of security interests in personal property, the question of whether to adopt 'automatic stay' in the Nigerian bankruptcy regime becomes highly important – because, the floating lien as earlier explained in the previous chapters neither entails crystallization, nor the appointment of a receiver or manager by its holder.

In the case of Nigeria, as already stated, there is currently no automatic stay or its equivalent. Even though the upcoming Insolvency Act contains the moratorium system,[1098] it would still mean that once a debtor files for bankruptcy, nothing will stop individual race of secured creditors to grab debtor's assets per their rights to private enforcement under a security agreement, pending the successful obtainment of moratorium.[1099] This is highly worrisome given

[1097] See section 2 of the Nigerian Insolvency Act, 2014. For more insight on the concept of moratorium, see JUSTICE G. LIGHTMAN & GABRIEL S. MOSS, THE LAW OF RECEIVERS AND ADMINISTRATORS OF COMPANIES (London, Sweet & Maxwell, 3rd edition, 2000), pp. 431-432. See also David Milman, *Moratoria on Enforcement Rights: Revisiting Corporate Rescue*, CONVEYANCER AND PROPERTY LAW JOURNAL 89, (2004).
[1098] See section 2 of the Nigerian Insolvency Act, 2014 and paragraph 18 of its schedule 1.
[1099] The nature of documents and conditions that make up the requirements for obtaining a moratorium are quite complex, and many companies may not be able to get these requirements in time, to enable them apply for moratorium. This is unlike the US automatic stay, which comes automatically following the petition for bankruptcy. Paragraph 18 of Schedule 1 of the Nigerian Insolvency Act, 2014, states as follows: "[t]o obtain a moratorium the directors of a company shall file with the court- (a) a document setting out the terms of the proposed voluntary arrangement; (b) a

the fact that the requirements for obtaining a moratorium may never be met, or in time[1100] – such that a delay in gathering the moratorium requirements[1101] might be exploited by a floating chargee to appoint a receiver or manager to transfer assets out of reach. In addition, while a company is in the process of gathering the requirements for obtaining a moratorium, nothing exists to stop secured creditors from deeming themselves reasonably insecure (which arises mainly from the inserted 'insecure clauses' in their security agreements), and consequently pursuing their individual enforcement rights as contained in their security agreements.

These possibilities could mean the impossibility of achieving reorganization of businesses in Nigeria as well as losing all the benefits that are connected with business reorganization. In view of the anticipated PPSL, it is strongly proposed that automatic stay – which begins to operate as soon as a debtor files petition for bankruptcy be adopted into Nigeria's bankruptcy/insolvency law regime as opposed to the moratorium system, especially where the upcoming insolvency statute makes its obtainment quite cumbersome.[1102]

statement of the company's affairs containing— (i) such particulars of its creditors and of its debts and other liabilities and of its assets as may be prescribed, and (ii) such other information as may be prescribed; (c) a statement that the company is eligible for a moratorium; (d) a statement from the nominee that he has given his consent to act; and (e) a statement from the nominee that, in his opinion- (i) the proposed voluntary arrangement has a reasonable prospect of being approved and implemented, (ii) the company is likely to have sufficient funds available to it during the proposed moratorium to enable it to carry on its business, and (iii) meetings of the company and its creditors should summon to consider the proposed voluntary arrangement."

[1100] *Ibid*.

[1101] *Ibid.*

[1102] *Ibid.*

4.3. Avoidance powers of a bankruptcy trustee in US and Canada: Lessons for Nigeria

A discussion on the avoidance powers of a trustee is relevant for Nigeria's secured transactions law reform for two important reasons. First, the interests of unsecured creditors could only be satisfied to an appreciable extent if a bankruptcy trustee is able to void security interests of secured creditors, and gather as many assets as possible into the debtor's estate. Thus, the appreciable satisfaction of unsecured creditors would mean the viability of debt financing of Nigerian companies – creditors would continue to be more motivated to lend out credits in exchange for unsecured debt securities like debentures and bonds which are viable sources for firms to raise credits.[1103] This prospect of debt financing, it could be argued, is one of the underlying logics behind the bankruptcy trustee's 'avoidance power' in the US and Canadian bankruptcy regimes – to 'fight' and win back property into the debtor's estate.[1104]

Second, it is important to discuss trustee's avoidance powers because a trustee may have powers or duties to attach even some properly creased secured transactions. The question which then immediately arises is what kinds of security interests could be voided, and how the time of their creations could matter with respect to the commencement of a debtor's bankruptcy. For sure this further raises the issue of predictability – as secured creditors would want to always know their fate in bankruptcy through clear and easily applicable rules, rather than giving wide

[1103]Gilmore refers to a bankruptcy trustee as the champion of unsecured creditors when he said that "[I]n the trustee's role as champion of the unsecured creditors, it was not only his right but also his duty to seek to invalidate as many property claims as he could, since each defeated claim brought more assets into the estate and increased the fund for distribution". See – GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, p.1286.
[1104]*Ibid.*

discretions to a trustee, the application of which might bruise the interests of secured creditors – the resulting unpredictability could lead to apathy in lending.

The trustee's avoiding power if improperty executed, could undermine predictability. His power ordinarily plays out when rights under a security agreement are voided – thus, the Canadian BIA and the United States BC empower the trustee to set aside and recover any transfer on the basis of fraudulent transfer (even if actual fraud was absent) [1105]if an insolvent debtor transferred property to another person within ninety days or one year before becoming insolvent[1106] – in the case of insiders,[1107] without obtaining an equivalently reasonable value in exchange. This flatly negates the contractual principle of *pacta sunt servanda*,[1108] being that it is not the duty of court to evaluate whether the value paid in a contract is reasonable – "consideration need not be adequate but sufficient"[1109] is the baseline rule in common law contracts, given the fact that various genuine reasons could account for why a debtor would be willing to accept a particular price at a given moment. This is further supported by the fact that courts in common law jurisdictions are not usually in the business of imposing or evaluating the wills of parties to a contract in the absence of any vitiating elements.[1110] Closely linked to the foregoing is the total disregard of "ipso facto"

[1105] See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, p.1291. See section 96 of the Canadian Bankruptcy and Insolvency Act.

[1106] See section 95(a) of the Canadian Bankruptcy and Insolvency Act, and section 547 (A) US Bankruptcy Code.

[1107] See section 95(b) of the Canadian Bankruptcy and Insolvency Act, and section 547(b) (4) (B) US Bankruptcy Code. Furthermore, section 548(a)(1) empowers a "trustee to avoid any transfer … of an interest of the debtor in property, or any obligation … incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition".

[1108] "*Pacta sunt servanda"* is a Latin maxim that loosely translates to "agreement must be kept" – although it appears mostly in international agreements, it is also used to refer to private contracts. For a deeper explanation, see Hans Wehberg, *Pacta Sunt Servanda*, Vol. 53, No. 4, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 75(1959), 75-86.

[1109] See the locus classicus case of *Thomas v Thomas* (1842) QB, 851. For a penetrating discussion, see RICHARD STONE & JAMES DEVENNEY, THE MODERN LAW OF CONTRACT (Routlege, New York, 11th edition, 2015), p.98.

[1110] A good explanation on the factors that could vitiate a contract, see *Vitiating Factors in Contract Law — The Interaction of Theory and Practice*, 10 SINGAPORE ACADEMY OF LAW JOURNAL, (1998). Available at clauses in Canada and US[1111] where such are contained in a security agreement, by a bankruptcy trustee, who does so discretionarily to ensure that assets originally agreed to be transferred to the secured creditor upon bankruptcy are voided, and returned to the debtor's estate. The ill-fate of ipso facto clauses in bankruptcy proceedings further accentuates the linkages between secured transactions and bankruptcy law, which could alter the rights of secured creditors.

Furthermore, the flexibility of the trustee's avoidance power stretches to situations whereby he is entitled to avoid transfers made to all unsecured creditors provided he is able to find one unsecured creditor at the time of bankruptcy, against whom the debtor's transfer was voidable. This principle known as "void against one, void against all" was born in the classical case of *Moore v Bay*[1112] – and has now been codified in the US bankruptcy code.[1113] In spite of the court's cryptic opinion in Moore's case, it succeeded in creating the principle that a right that is voidable under state law is voidable in its whole under bankruptcy with all creditors sharing in the benefits accruing from the voided right.

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http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/212/1998-10%281%29-SAcLJ-001-Phang.pdf (last visited on May 1, 2015).

[1111] 'Ipso facto' clauses are provisions in security agreements that seek to modify or terminate the rights of contracting parties upon the filing of bankruptcy petition by the debtor. For instance, section 365(e) BC, renders ipso facto clauses in executory contracts unenforceable subject to some exceptions. Section 541(c) (1)(B) Bankruptcy Code, renders unenforceable ipso facto clauses if they would cause forfeitures of property that otherwise would have entered the bankruptcy estate. Section 363(l) BC, renders unenforceable ipso facto clauses if they would hamper the trustee's ability to sell, lease, or use property of the estate. See Black's Law Dictionary (9th edition), p.905, and Emil A. Kleinhaus & Peter B. Zuckerman, *The Enforceability of Ipso Facto Clauses in Financing Agreements: American Airlines and Beyond*, Vol. 23, No. 2, NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE, 193 (2014), p.194. Available at http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23283.14.pdf (last visited on May 1, 2015).

[1112] 284 U.S. 4 (1931).

[1113] See section 544(b) US Bankruptcy Code. For more information on *Moore v Bay*, see – David G. Carlson, *Bankruptcy's Organizing Principle*, 26 FLORIDA STATE UNIVERSITY LAW REVIEW, 549 (1999), p.579. Available at http://diginole.lib.fsu.edu/cgi/viewcontent.cgi?article=1377&context=fsulr (last visited on May 1, 2015). Also, see generally – John C. McCoid, II, *Moore v. Bay: An Exercise in Choice of Law,* ANNUAL SURVEY OF BANKRUPTCY LAW, 157 (1990).

Nigeria's Bankruptcy Act 1990, applies solely to the liquidation of individual debtors, although with an avoidance power given to an appointed trustee to avoid preferential transfers made within three months[1114] of filing for bankruptcy. This is similar to the US and Canadian regimes to some extent except that it did not provide stricter measures for insider transfer.[1115] However, neither the receiver nor manager appointed by a floating chargee under the Nigerian Companies and Allied Matters Act (CAMA)[1116] nor the appointed administrator under the Insolvency bill of 2014[1117] is provided powers similar to the ones provided a bankruptcy trustee under the Canadian BIA and US Bankruptcy Code. Given that the anticipated Nigerian PPSL will foreseeably be a federal law, equal in status with CAMA and the extant Insolvency bill, it would be brilliant to ponder to what extent the rights accruing from the anticipated PPSL would be varied by these bankruptcy statutes.

In conclusion, the author proposes that the emergence of the anticipated PPSL should result to concomitant amendments of the Nigerian bankruptcy statutes – to amongst other things, create a system that is partially similar to the US chapter 7, where an appointed trustee's duty is basically twofold – that is, either to hand over the collateral to the secured creditor following his right under state law or any other legislation giving rise to the security interest so that he could enforce it – or sell the collateral himself first, collect the money, deduct what can be deducted and then transfer

[1114] See section 46 of the Nigerian Bankruptcy Act. Available at http://www.nigeria-law.org/BankruptcyAct.htm (last visited on May 1, 2015).

[1115]Under the US Bankruptcy Code, and the Canadian Bankruptcy and Insolvency Act, 'insider transfers' which the bankruptcy trustee has power to avoid could relate back up to 12 months from the date of the bankruptcy petition. See section 95(b) of the Canadian Bankruptcy and Insolvency Act, and section 547(b) (4) (B) US Bankruptcy Code.

[1116] For powers of a receiver/manager in Nigeria, see section 393 of Companies and Allied Matters Act, 2004. Available at http://www.nigeria-law.org/CompaniesAndAlliedMattersAct.htm (last visited on May 1, 2015).

[1117] See section 63 of the Insolvency Act, 2014 for the powers given to an administrator. Both in CAMA and Insolvency Act, the powers given to a receiver/manager and administrator, respectively, are far less potent than that of a trustee under the US Bankruptcy Code, or the Canadian BIA. In the pages below, some recommendations as to what elements of the US and Canadian bankruptcy practices will be suitable for Nigeria, will be pointed out.

the balance to the secured creditor. Lastly, is the bankruptcy trustee's right to avoid fraudulent transfers made within twelve months[1118] before a debtor's bankruptcy as well as avoid preference transfers to creditors within 90 days or one year if the creditor is an 'insider' – as such transfers heavily undermine the equality of distribution rule.[1119] However, the power of the bankruptcy trustee to do the forgoing in the author's opinion, should not culminate into the voidance of legitimately entitled rights – this is to say that the concomitant amendments to the Nigerian bankruptcy statutes vis-à-vis the anticipated PPSL should carefully consider for instance, to what extent rights embodied in ipso facto clauses in security agreements should be voided by a bankruptcy trustee.

4.4. Effects of bankruptcy on 'after-acquired property' clauses in security agreements

In both US and Canada, security interests upon bankruptcy may be altered to an extent that affects their initial outlook and potency – especially with respect to DIP financing. One of such rights whose appearance could be affected by bankruptcy proceedings is the 'after-acquired property' clause[1120] in a security agreement – a clause that remains the backbone[1121] of

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[1118] Here, the trustee could use price as an indicator – that is, where for no just reason, the debtor transferred assets at prices far lower than the market value at the time of transfer, fraud could be suspected. The Nigerian legislators could indicate a percentage value of which a sale price below it would be deemed a fraudulent transfer. That way, bankruptcy trustees will be better guided as well as have their discretions curtailed to prevent abuses.

[1119] See Vern Countryman, *The Concept of Voidable Preference in Bankruptcy,* 38 VANDELBILT LAW REVIEW, 713 (1985), p.748.

[1120] See section 9-204 UCC, and section 12 OPPSA. For definitions of 'after-acquired-property' clause, see the Black's Law Dictionary (9th edition), p.69. For a masterful discussion on the treatment of 'after-acquired-property' clause in bankruptcy, see Anthony T. Kronman, *The Treatment of Security Interests in After-Acquired Property Under the Proposed Bankruptcy Act,* 124 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 120 (1975), pp. 117-119.

[1121] This view was expatiated by Duncan – see Richard F. Duncan, *Preferential Transfers, the Floating Lien, and Section 547(c)(5) of the Bankruptcy Reform Act of 1978,* 36 ARKANSAS LAW REVIEW, 1 (1983), pp.10-33.

inventory[1122] or accounts financing.[1123] Until bankruptcy, an after-acquired property clause entitles the floating lienor to have perfected security interest in the debtor's shifting assets with a one-time perfection, and be able to lay hold of them to satisfy his claim upon the debtor's default.[1124] However, aside debtor's default, the right offered by the after-acquired clause seems weak in bankruptcy – thus, as a rule, following the filing of bankruptcy petition by a debtor, all his prepetition assets covered by security agreements of which secured creditors have security interests on, become part of the bankruptcy estate and immune from secured creditors' enforcement due to the automatic stay provision.[1125]

The foregoing notwithstanding, in the US, the interests of secured creditors generally are stronger in bankruptcy than their Canadian counterpart due to the 'adequate protection' provision

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Available also at http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1149&context=lawfacpub (last visited on May 2, 2015).

[1122] As part of the differences in terminology between secured transactions and bankruptcy law, "inventory" according to the Bankruptcy Code is defined as "personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease" – section 547(a) (1) Bankruptcy Code. The main difference between this definition and that of inventory contained in section 9-102(48) UCC is that under Article 9, farm products are not deemed to be inventory, but rather a class of good on its own.

[1123] The UCC Article 9 and Bankruptcy Code have differing terminologies vis-à-vis "receivable". Section 547(a) (3) Bankruptcy Code, defines 'receivable' as "the right to payment, whether or not such right has been earned by performance." This is broader in scope compared to that offered by section 9-102 UCC which excludes many instances. A good overview of these differences in terms could be found in Ray D. Henson, *The Uniform Commercial Code and the New Bankruptcy Act: Some Problems Areas*, 35 BUSINESS LAWYER, 83 (1979), esp. at p.97.

[1124] The Official Comment 2 to section 9-204 UCC explains it as follows: "[A] security interest arising by virtue of an after acquired property clause is no less valid than a security interest on collateral in which the debtor has rights at the time value is given. A security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party – such as a supplemental agreement covering the new collateral is required. This section adopts the principle of a 'continuing general' lien or 'floating lien'. It validates a security interest in the debtor's existing and (upon acquisition) future assets, even though the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral…"

[1125] For when 'automatic stay' arises cum its exceptions, see generally, section 362 of the US Bankruptcy Code. For its Canadian equivalent – "stay of proceedings", see section 69 of the Canadian Bankruptcy and Insolvency Act.

offered by section 361 of the US bankruptcy code.[1126] Thus, a debtor seeking post-petition credit would have to prove basically two points to the court. First, that the existing secured creditors will be 'adequately protected' regardless of their subordination. And second, that it would be near impossible for him (the debtor) to obtain post-petition credits to jumpstart his business without the court's subordination order of existing secured creditors – this is usually a herculean burden of proof. However, in Canada, there is no statutory equivalent of section 361 'adequate protection' in the two insolvency statutes,[1127] instead, the courts have relied on their equitable jurisdiction to produce a rough equivalent – what is now known as the 'balancing of prejudices' exercise.[1128] This means that in pursuance of DIP financing, the security interests of existing secured creditors could be compromised or less protected as a way to balance the debtor's need for new financing, as nearly always new financiers would not agree to be subordinated.

Viewed holistically though, especially bearing in mind some of the underlying policy reasons behind bankruptcy law, it would seem evident that the essence of failing to fully recognize a floating lienor's after-acquired property right in bankruptcy anchors on the expectation that a reorganizing debtor with enough post-petition assets would be better positioned to obtain post-petition credits from new set of creditors – which indeed is crucial in the survivability of his ailing business. Again, it should be remembered that 'secured transactions' in US and Canada is within the precincts of private law as well as governed respectively by state or provincial law, as against bankruptcy law which is within federal competence – this means that the latter's regular arm-

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[1126] For a thorough treatment of section 361 BC which gives rise to 'adequate protection' principle, see See G.F. Munitz, "Adequate Protection, the Automatic Stay, and the Use, Sale or Lease of Property" in LEWIS KRUGER, ed., *BASICS OF BANKRUPTCY AND REORGANIZATION* (New York: Practicing Law Institute, 1996) at 67.

[1127] The Bankruptcy and Insolvency Act, 1985 and the Companies' Creditors Arrangement Act, 1985.

[1128] As Parappally puts it, "…in the absence of express statutory authority, Canadian courts have invoked their "inherent jurisdiction" to create superpriority charges, giving DIP lenders a superpriority first-ranking security interest". See Justin Parappally, *Canada: corporate insolvency - debtor-in-possession financing*, JOURNAL OF INT'L & BANKING LAW REGULATION (2009), 24(10), N84-85.

twisting of the former, is geared towards ensuring that certain macro policies are not defeated by private arrangements of parties – in this case, failing to fully recognize the right in after-acquired property is undertaken, perhaps, to ensure that debtor's ailing business is successfully reorganized, thereby providing jobs and generally improving the economy.

In Nigeria, the kin but hardly the equivalent of after-acquired property clause (floating lien) is the floating charge[1129] which "floats" on debtor's present and future assets until crystallization when it fastens on them. With respect to the forgoing discussion, there is a big difference between a floating lienor in US and Canada, and his Nigerian counterpart – the floating chargee. The latter is empowered under Nigerian bankruptcy regime to appoint a receiver or manager who takes over the debtor's firm and manages same for the purpose of realizing the interest of his appointor,[1130] while a floating lienor's power practically ends as soon as bankruptcy petition is filed by the debtor –because he cannot appoint a receiver or its equivalent to manage debtor's business on his behalf. Viewed from this perspective, it could rightly be said that whereas debtor's bankruptcy enhances the potency of a floating charge, it restricts that of a floating lien.[1131]

Now, given the fact that Nigeria desires to adopt the unitary model which has floating lien as its natural content, it becomes critically important that some provisions of its bankruptcy statutes vis-à-vis the powers of a floating chargee are accordingly amended – considering that the concept of floating charge is incompatible with the unitary system of secured transactions which is being

[1129] See the previous chapters, especially chapter one of this work for a discussion on 'floating charge'.

[1130] See sections 387- 400 of Nigeria's Companies and Allied Matters Act, 2004. Available at http://www.nigeria-law.org/CompaniesAndAlliedMattersActPartXI-XIV.htm#Receivers and Managers (last visited on May 2, 2015).

[1131] The Insolvency Act, 2014 (currently a bill) before the Nigerian National Assembly, empowers an administrator following a court order to sell goods in the company's possession, which it possesses under a hire purchase agreement, if doing so would achieve the purpose of administration in respect of the company. See section 76 of the upcoming Nigerian Insolvency Act 2014.

proposed. Similarly, it should be reemphasized here that the English Enterprise Act 2002, reduced the potency of the floating charge and the reason was that the private receivers were too kin to dismember debtors at the beginning of the 1990s (economic crisis),[1132] and this stunted the growth of business rescue culture in the UK. Consequently, in close deference to the DIP model, receiver appointment was radically refurbished and replaced with the administration system – the policy aim being to centralize the system, to move from a system that was too pro-creditors to that which takes care of the interests of all relevant stakeholders,[1133] which basically was a movement towards the US solutions.

4.5. Absence of comprehensive rules of priority among secured creditors in the Nigerian bankruptcy statutes: Proposed solutions

Secured transactions mirror contractual arrangements and rights of a secured party over a debtor's collateral. The private rights of a secured party under a security agreement could be challenged upon bankruptcy (liquidation), when control of a debtor's assets is handed to the bankruptcy trustee – to administer and pay everyone with a proof of claim[1134] against the debtor's estate according to their hierarchies in bankruptcy.[1135] Even the US and Canada which have more developed bankruptcy regimes, still have some uncertainties with respect to the exact boundaries of a trustee's power and discretion vis-à-vis determining the fate of secured creditors.

[1132]See GERARD McCORMACK, CORPORATE RESCUE LAW – AN ANGLO-AMERICAN PERSPECTIVE (Cheltenham: Edward Elgar, 2008), pp. 43.
[1133] See The White Paper – *Productivity and Enterprise: Insolvency a Second Chance* (Cm 5234, London, HMSO, 2001) at para 2.5. Available at http://webarchive.nationalarchives.gov.uk/+/http:/www.insolvency.gov.uk/cwp/cm5234.pdf (last visited on March 2, 2016).
[1134] 'Proof of claim' and what it fully entails can be seen in section 50.1, of the Canadian Bankruptcy and Insolvency Act, and section 501 of the US Bankruptcy Code.
[1135]For priority of claims in the US and Canadian bankruptcy statutes, see section 321 US Bankruptcy Code, and section 60 of the Canadian Bankruptcy and Insolvency Act. For the Nigerian equivalent, see section 492 of Companies and Allied Matters Act, 2004.

The complexity here in the Nigerian context arises from the fact that in the two statutes that govern insolvency in Nigeria, there are no detailed rules that governs secured creditors' rights. This is not a problem in the US for instance because of the existence of the *Butner* principle[1136] which entails that property rights emanate from state law and unless a federal interest would be jeopardized, such property rights created under state law would be left undisturbed in bankruptcy. For example, security interests in real property mortgages and security interests in personal property in the US and Canada have different applicable rules with respect to their creation and perfections of security interests, and upon bankruptcy all security interests stemming from different property rights have to be prioritized and administered exclusively in accordance with the state law that created them. This way, a secured creditor is sure of his priority status in bankruptcy as the duty of the bankruptcy trustee is basically to hand him the collateral, or sell it, make deductions according to bankruptcy rules, and remit the balance to the secured creditor.

As the equivalent of Butner principle is currently lacking in Nigeria's insolvency regime, it is foreseen that this statutory gap will pose enormous difficulty when the anticipated PPSL comes on board, with property rights arising from it in the context of bankrupty, and could therefore becomes a source of litigations if no bespoke rules are designed. Therefore, it is important that disputes vis-à-vis the property rights of a secured creditor in the context of bankruptcy have an adequate legal framework (not conventional practices) upon which such conflicts are settled. Given that Nigeria is a federation, whereby secured transactions law is foreseen to be a federal law, while real mortgage law is governed by both federal and state laws, it is proposed that the Nigerian insolvency statutes make it explicit that property rights upon a debtor's bankruptcy will

[1136] In Butner, the US Supreme Court opined that "property interests are created and defined by state law and unless some federal interest requires a different result, there is no reason why such interests should be analysed differently simply because an interested party is involved in a bankruptcy proceeding." See *Butner v. United States*, 440 U.S. 48 (1979), p. 55.

be governed by the legislation from which it emanated, since property rights in Nigeria, unlike in the US and Canada, could arise from both federal and state laws.

4.5.1. Are security interests fully recognized in bankruptcy?

In Nigeria, the equivalent of the US and Canadian bankruptcy regimes are contained in two statutes – the Nigerian Bankruptcy Act[1137] which applies exclusively to natural debtors and recognizes security interests upon bankruptcy[1138] – provided such interests are proved; and the Companies and Allied Matters Act (CAMA) which deals with legal entities.[1139] Under CAMA, the 'Company Winding-Up' rules are very crucial with respect to determining the fate of a secured creditor's security interest upon his debtor's liquidation. According to the Winding up rules,[1140](even though this is with respect to real property), a secured creditor that is being required by a liquidator to give up a collateral for the benefit of other creditors would have to be paid his full money claim, plus a twenty percent addition. The twenty percent rule could be deemed a rough

[1137] The Act is available at http://www.nigeria-law.org/BankruptcyAct.htm (last visited on November 2, 2015).
[1138] *Ibid*, at section 36 of the Bankruptcy Act.
[1139] See section 74 of the CAMA Winding Up rules – "In a winding up by the Court, every creditor shall, subject as hereinafter provided, prove his debt, unless the judge in any particular winding up shall give directions that any creditor or class of creditors shall be admitted without proof. The proof is basically done by swearing to an affidavit which states the details of the debt.
[1140] See section 125 of the CAMA Winding Up rules which states that "the Official Receiver or Liquidator may, within thirty days after a proof or in a voluntary liquidation after a statement estimating the value of a security as aforesaid, has been used in voting at a meeting, require the creditor to give up security for the benefit of the creditors generally on payment of the value so estimated with an addition thereto of twenty per cent: Provided that where a creditor has valued his security, he may at any time before being required to give it up, correct the valuation by a new proof and deduct the new value from his debts, but in that case the said addition of twenty per cent shall not be made if the security is required to be given up". The CAMA winding up rules could be accessed here http://www.placng.org/new/laws/C20.pdf (last visited on March 3, 2016).

equivalent of the US bankruptcy code, section 361 'adequate protection', and it shows that Nigeria is overly pro-creditors – this is problematic when two issues at least are considered.

First, the extra twenty percent given to a secured creditor in respect to the proceeds from a particular collateral reduces the payment chances of junior creditors who also have proved secured claims in that asset. Second, unlike in the US where the bankruptcy trustee, according to Gilmore, is adjudged to be the champion of unsecured creditors[1141] through his voidance powers, such twenty percent rule in favor of secured creditors would end up depleting the debtor's estate – meaning the unsecured creditors would have very little or nothing of the debtor's assets to share. Evidently, this overly pro-creditor regime that could strip off the entitlements of unsecured creditors would invariably reduce the significance of corporate debt financing. Thus, companies would find it difficult to raise money in the debt market if they issue unsecured bonds and debentures – as purchasers of their bonds (unsecured creditors) would fear the unlikelihood of not being sufficiently protected upon the company's liquidation.

In the US and Canada, security interests are equally recognized in bankruptcy – and even though the trustee's avoidance powers are applicable, a holder of a well proved secured claim is entitled to 'adequate protection' even if the debtor is contemplating a new financing that requires the subordination of existing secured creditors. In the case of Canada, even though no statutory equivalent of adequate protection exists, courts have utilized their equitable jurisdiction to develop the 'balancing of prejudices' test which is basically a reflection of the US regime.[1142] The idea here is to strike a general balance to ensure that all relevant stakeholders are fairly satisfied in

[1141] See GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (Little, Brown and Co., Boston, 1965), vol. II, p.1286.
[1142] See Justin Parappally, *Canada: corporate insolvency - debtor-in-possession financing*, JOURNAL OF INT'L & BANKING LAW REGULATION (2009), 24(10), N84-85.

bankruptcy, and this indeed has been the outlook of the English Enterprise Act 2002, which has radically moved from pure pro-creditor regime, to a more balanced regime that caters for all stakeholders in the event of a debtor's bankruptcy.[1143]

With the advent of the anticipated PPSL, CAMA and its winding up rules would evidently become insufficient as their baseline logic vis-à-vis the ranking and payment of secured creditors may not be suitable where personal property is involved. This is mainly due to the lack of a registry for the registration of security interests in personal property of natural and legal entity debtors at the moment[1144] – and with the ongoing efforts[1145] to come up with a unitary system-like PPSL, it has become crystal clear that the current Bankruptcy Act and CAMA, cannot sufficiently determine the priorities among secured creditors' security interests in the personal property of a natural debtor. Similarly, another statutory gap in the Nigerian insolvency regime is the lack of a distinct formula, similar to the *Butner* principle with which priorities would be determined from an assets-pool of a debtor in bankruptcy. The author argues that the solution to this gap as already stated above is the addition of a Butner-like rule in our insolvency statutes.

[1143] See GERARD McCORMACK, CORPORATE RESCUE LAW – AN ANGLO-AMERICAN PERSPECTIVE (Cheltenham: Edward Elgar, 2008), pp. 43.

[1144] The exception would be the various Corporate Affairs Commission registries where company charges are registered. The registries cannot be used to register security interests against the collateral of a human debtor. See registry's website at http://new.cac.gov.ng/home/part-a-registry/ (last visited on November 2, 2015).

[1145] See the ongoing project of Center for the Economic Analysis of Law (CEAL) in conjunction with the World Bank to come up with a secured transactions law for Nigeria, although the project seems to have been abandoned. http://nigeria.ceal.org/docs/ (last visited on November 2, 2015).

4.6. Secured transactions and consumer protection law interface: Introduction

Incontrovertibly, the relationship between a secured party and consumer debtor under a security agreement could be analogous to yoking a bull and a donkey to till an agricultural field.[1146] The stronger party (the secured creditor) who provides the needed funds in consumer credit contracts,[1147] usually has upper hand over the debtor, and could arm-twist him very badly. This is because most secured lenders have acquired tricks of trade owing to accumulated experiences in the lending industry – and this gives them stronger bargaining power which could be used to negatively exploit consumer-debtors who are often ill-equipped to comprehend or suitably bargain

[1146] This seems to be the philosophy behind all Consumer Legislations, being that they adopt the paternalistic role of protecting human debtors (the weaker party) from creditors who are usually stronger in bargaining positions. In US, the Federal Trade Commission (FTC) is the agency in charge of protecting consumers from creditors' abusive practices. The FTC has a bureau which is dedicated to consumers' welfare – called the Bureau of Consumer Protection, aimed at protecting consumers against deception, fraud, and unfair business practices. See https://www.ftc.gov/ (last visited on May 4, 2015). Some of the consumer protection legislations in the US are: *The Equal Credit Opportunity Act* (15 U.S.C. sections 1691 -1691f), prohibits the denial of credit to consumer on the basis of reasons not supported by law. *The Fair Credit Reporting Act* (15 U.S.C. sections 1681-1681t), gives consumers the right to know the nature of information which reporting agencies divulge to banks and other related institutions. *The Truth in Lending Act* (15 U.S.C. sections 1601 -1667e), requires creditors to disclose all information in writing which would assist a consumer in having a full picture of a particular credit transaction, prior to entering into it. *The Fair Credit Billing Act* (15 U.S.C. sections 1693-1693r), outlines procedures with which errors on credit card accounts may be resolved. *The Fair Debt Collection Practices Act* (15 U.S.C. sections 1692-1692o), prohibits abusive debt collection practices by providing stringent rules which must be followed in the collection of debts against consumers. *The Electronic Fund Transfer Act* (15 U.S.C. sections 1693-1693r) provides the rights and liabilities of parties to electronic fund transfer.
For a penetrating study of the forgoing, see DOUGLAS G. BAIRD et al, COMMERCIAL AND DEBTOR-CREDITOR LAW: SELECTED STATUTES (New York, Foundation Press, 2010), pp. 1373 – 1593; and STEVEN FINLAY, CONSUMER CREDIT FUNDAMENTALS (USA, Palgrave Macmillan, 2nd edition, 2009), pp. 93-96. In Canada, consumer protection laws are both federal and provincial, and the various Consumer Affairs Offices (equivalent of the US FTC) exist at both federal and provincial levels to address issues of abuses against consumers. For the various consumer protection laws in Ontario, which are similar to those in the US, already highlighted above, see http://www.ontario.ca/consumers/consumer-protection-laws-ontario (last visited on May 4, 2015). For a penetrating treatment of consumer protection law generally, see JOHN A. SPANOGHOLE et al, CONSUMER LAW CASES AND MATERIALS (New York, Thomson West, 3rd edition, 2007), esp. p.11.
[1147] 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". Also section 9-109(1) defines 'consumer good' as "[g]oods used or bought primarily for personal, family, or household purposes". See a similar definition of "consumer good" in section 1 OPPSA.

provisions of security agreements.[1148] Even when a consumer-debtor is knowledgeable and could understand the import of provisions in a security agreement, his dire need of credit could leave him bare, with no choice but to accept the secured creditor's conditions as they are.[1149] To reduce the potentiality of creditors' abuses and exploitations in security agreements, Article 9 and OPPSA, amongst other sector-specific consumer protection legislations, have provisions which protect debtors from abuses that arise from security agreements.[1150]

The level of protection afforded to debtors should not be mistaken to mean that secured creditors are stripped off sufficient rights that disable them from reaping their credit investments. In fact, the seeming overprotection given to consumer debtors is only indicative of the high level of powers which secured creditors have – it is even argued that Article 9 and OPPSA have revered likeness for secured creditors – being that the latter supply the needed credits which serve as raw material for robust economic growth.[1151] However, some provisions of Article 9 and OPPSA seem specially designed to neutralize to some extent, the concentration of powers that secured creditors possess – which could crush debtors' businesses if exercised unrestrained after the latter's default.[1152] The rest of this chapter will highlight some of the checkpoints which Article 9 and OPPSA have mounted to ensure that secured creditors do not 'over-speed' in the pursuit of their

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1148 See Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOYOLA CONSUMER LAW REVIEW, 44 (1998), p.46. Available at http://lawecommons.luc.edu/lclr/vol10/iss1/11 (last visited on May 4, 2015).

1149 *Ibid*, at 51.

1150 See section 9-620 (e) and (f) UCC (on the 60 percent rule). The right of debtor to redeem collateral if he tenders full payment before disposition – see section 9-623 UCC.

1151 For authorities discussing the powerfulness of a secured creditor under UCC Article 9, see generally – Julian B. McDonnell, *Is Revised Article 9 a Little Greedy?*, 104 COMMERCIAL LAW JOURNAL, 241 (1999), Lynn M. LoPucki, *The Death of Liability,* 106 YALE LAW JOURNAL, 1 (1996), p.15, Jean Wegman Bums, *New Article 9 of the UCC: The Good, the Bad, and the Ugly,* 2002 UNIVERSITY OF ILLINOIS LAW REVIEW, 29 (2002). In addition, see – *Brown v. Arkoma Coal Corp.*, 634 S.W.2d 390, at p.391 (Ark. 1982) (which held "[t]hat a party who holds a security interest can go against both the proceeds of the sale and the property.").

1152 For example, see section 9-620 (e) and (f) UCC (on the 60 percent rule). The right of debtor to redeem collateral if he tenders full payment before disposition – see section 9-623 UCC.

rights under security agreements – especially where such will hamper the debtor's personal or business wellbeing. Specifically, this section would analyze why it is apropos for lawmakers to pay serious attention to how a debtor's collateral is repossessed and disposed, as well as how the proceeds of collateral are applied – to ensure that secured creditors do not overreach themselves. It will then proffer lessons to Nigeria that could assist its secured transactions law reformers to rethink some of the existent measures in place for consumer protection, and how to add buffers to the existent structure by specifically adding some consumer protection measures in the anticipated PPSL.

4.7. Penalties for failing to hold a commercially reasonable sale

4.7.1. The rebuttable and irrebutable presumptions approaches to disposition

As part of the protective measures in favor of consumer-debtors, a secured creditor is mandated to act in good faith[1153] when dealing with issues of which Article 9 and OPPSA apply. In addition to being required to act in good faith, a secured creditor is required to also dispose debtor's collateral in a commercially reasonable manner,[1154] and could be liable to statutory

[1153]See section 1-304 UCC which imposes good faith obligation on every contract in the UCC. See the definition given in section 2-103 UCC – " "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

[1154] Although the definition of "commercial reasonableness" was not defined in the UCC Article 9, section 9-627 thereof, offers a safe harbor – meaning that a secured party who complies with the section will most likely scale the high bar of commercial reasonability test. Similarly, see section 63 OPPSA which states that disposition of collateral must be made in a commercially reasonable manner.

penalties[1155] where he fails to do so. The penalties which result from his noncompliance is usually in the form damages[1156] sought by the debtor against the secured party for losses which result from the secured party's noncompliance. However, in light of the fact that a debtor could recover damages owing to the secured party's noncompliance with foreclosure requirements, it logically follows that where a secured party followed the rules of foreclosure diligently but could not realize sufficient price from the collateral, the debtor would be liable for any deficient sum.[1157]

Additionally – noncompliance, apart from the fact that it generally exposes the secured party to damages, could serve also as a basis on which he is denied recovery of any deficient sum from the debtor.[1158] This denial could be analyzed from two main approaches. The first approach, although no longer contemporary, represents the perspectives of judges who view noncompliance with zero tolerance. That is, once it is proved that foreclosure requirements were breached, the secured party is absolutely barred from recovering any deficient sum from the debtor.[1159] The second approach is more tolerant – the rebuttable presumption rule.[1160] Here, courts presume that

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[1155]See section 9-625 (b) and (c) UCC which reads in part: "[i]f the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price."
[1156]*Ibid.*
[1157]See section 627(a) UCC. The Official Comment 2 thereof however adds that "a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable." The court in *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978) has summarized what a commercially reasonable disposition could mean as one in which the secured party "acts in good faith and in accordance with commonly accepted commercial practices which afford all parties fair treatment." For a quick overview of 'commercial reasonableness' in disposition of collateral, see John P. Mccahey, *Commercial Reasonableness in the Disposition of Collateral: Proceed With Care,* COMMERCIAL AND BUSINESS LITIGATION JOURNAL (Summer 2002). Available at http://www.hahnhessen.com/uploads/39/doc/2002_06_jpm_commercialreason.pdf (last visited on May 5, 2015).
[1158]See section 9-626(a) UCC.
[1159]With respect to consumer transactions, Article 9 is silent as to which rule to apply if deficiency or surplus is in issue. It simply left it for courts to determine based on the circumstances of each case. See section 9-626 (a) and (b) UCC. Anyway, it appears that courts will be more inclined to apply the 'absolute bar' rule in consumer goods, due to consumers' weaknesses in adequately protecting themselves.
[1160]See generally, section 9-626 UCC.

a disposition conducted pursuant to Article 9 rules is capable of yielding sufficient value to offset debts. This implies that a secured creditor is no longer entitled to any deficient sum unless he could sufficiently prove that the sold collateral in question, even if it was sold following strict observance of the rules of foreclosure, would not have still yielded sufficient sum to offset full debt.[1161] Looking at the foregoing therefore, it is self-evident that these rules have been positioned to watch against abuses from a secured party against the debtor's (especially consumer-debtor's) welfare, and Nigerian courts should when looking at issues of abuse stemming from the anticipated PPSL, have liberty to apply any of the two rules above, depending of course on the egregiousness of each case.

4.7.2. Pre-disposition notice as a protective measure

As part of the protective measure in favor of the debtor, a secured party intending to conduct sale of debtor's property is not only required to give notice, but to give one which must bear certain features so as to properly position the debtor to understand what situation he has found himself in.[1162] Although this kind of notice must be given to both consumer and commercial debtors by a secured party, it is no doubt true that the former are the utmost beneficiaries of this high level of protection which ensures that the secured party mentions in the notice, the names of debtor and secured party, the method of disposing the collateral, as well as the time and place of disposition.[1163] Where the notice is to a debtor concerning consumer good transaction, the requirements are additionally fortified to include a description of the liability of deficiency of

[1161]Section 9-626 (a) (3) UCC.
[1162]See section 9-613 UCC.
[1163]See section 9-614(1) UCC.

debtor or obligor, a telephone number which the debtor could call for the purpose of offsetting any deficient sum[1164] – as well as a telephone number with which additional information regarding the disposition may be sought.[1165]

Furthermore, considering the obvious weakness of consumer debtors, it is submitted that a court interpreting the Article 9's provision on notice will not likely excuse a secured party from any 'minor errors' which appear on a notice sent to a consumer debtor. This view is derived from the fact that with respect to notices sent to commercial debtors, minor errors are permissible provided they are not seriously misleading.[1166] Thus, the absence of "minor-errors" protections in favor of secured party who sent notices to consumer-debtors strongly demonstrates Article 9's zero tolerance for errors on notices vis-à-vis consumer debtors.

In fact, the probability of interpreting such 'minor errors' against a secured party to mean noncompliance with the foreclosure requirements is high judging from courts' antecedences – consequently, secured party's liability in damages. Considering that consumer protection issues could vary from case to case, courts are usually relied upon to do good justice based on the circumstances of each case – for instance, whereas the secured party is required to give ten days' notice to the debtor prior to disposition in non-consumer transactions, no such safe harbor time was provided with respect to consumer good transactions. This implies that courts have a much wider room of discretion in evaluating the acceptability, or rather, whether a particular length of notice (perhaps even higher than ten days) is sufficient to a consumer-debtor especially in total regard to the circumstances of the case.

[1164]*Ibid.*
[1165]*Ibid.*
[1166]See section 9-613(3) (B) UCC.

It is interesting to point out here that the notice requirement vis-à-vis disposition does not end with pre-disposition notice. Thus, further notice is required of the secured party after disposition if a consumer-debtor is liable to any deficiency or entitled to any surplus, and must be sent before or at the time the secured party makes written demand from the debtor to pay for the deficiency.[1167] Or, where the debtor requests for notice after disposition, the secured party must send it to him within fourteen days[1168] or be liable in damages[1169] – except the secured creditor had prior to the disposition waived his right to demand a deficiency in an authenticated record.[1170]

Furthermore, in view of the reality that most security agreements are boilerplates with several exemption clauses which emanate unilaterally from the desk of the secured party, and often contain covenants that are repressive on the debtor, Article 9 and OPPSA have designated certain rights of the debtor which create obligations on the secured party as non-waivable.[1171] The non-waivable rights were indeed carefully selected and a cursory look reveals that they represent some

[1167]See sections 9-616, and 9-625 (c) (2) UCC.
[1168]See section 9-616 (b) UCC.
[1169]See section 9-625(e) UCC – (up to US$500 damages could be recovered by a consumer debtor in this regard).
[1170]*Ibid.*
[1171]Section 9-602 UCC states as follows: “Except as otherwise provided in Section 9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:(1) Section 9-207(b)(4)(C), which deals with use and operation of the collateral by the secured party; (2) Section 9-210, which deals with requests for an accounting and requests concerning a list of collateral and statement of account; (3) Section 9-607(c), which deals with collection and enforcement of collateral; (4) Sections 9-608(a) and 9-615(c) to the extent that they deal with application or payment of noncash proceeds of collection, enforcement, or disposition; (5) Sections 9-608(a) and 9-615(d) to the extent that they require accounting for or payment of surplus proceeds of collateral; (6) Section 9-609 to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace; (7) Sections 9-610(b), 9-611, 9-613, and 9-614, which deal with disposition of collateral; (8) Section 9-615(f), which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor; (9) Section 9-616, which deals with explanation of the calculation of a surplus or deficiency; (10) Sections 9-620, 9-621, and 9-622, which deal with acceptance of collateral in satisfaction of obligation; (11) Section 9-623, which deals with redemption of collateral;(12) Section 9-624, which deals with permissible waivers; and (13) Sections 9-625 and 9-626, which deal with the secured party's liability for failure to comply with this article.”

of the cardinal rights that run from the formation of a security agreement to its enforcement.[1172] This would mean that even if the debtor expressly waives them, he would be deemed incompetent to have done so, thereby rendering his waiver inoperative ab initio. No doubt, these are strategic checkpoints that have been mounted to ensure that debtors, especially consumer debtors who have weak bargaining powers, do not sacrifice their basic rights under a security agreement as tradeoffs for obtaining credits from secured creditors.[1173]

Lastly, it should be noted that both Article 9 and OPPSA are well sprinkled with protective measures in favor of debtors, especially consumer debtors in security agreements, and some of these measures have already been highlighted above. It is really not necessary to address each and every measure as contained in Article 9 or OPPSA – instead it is sufficient to know that secured transactions law is, or should be inseparable with consumer protection. In addition to what have been discussed above, one more protective measure deserves to be highlighted. Namely, the compulsory disposition of consumer good where a debtor has paid up to sixty percent.[1174] Ordinarily, a secured party could propose to retain collateral in full or partial satisfaction of debts,[1175] instead of going through the hassles of disposition which often expose him to liability in damages, in the event of noncompliance.

[1172] *Ibid.*

[1173] See generally, – Marion W. Benfield Jr., *Consumer Provisions in Revised Article 9*, 74 CHICAGO-KENT LAW REVIEW, 1255 (1999). Available at: http://scholarship.kentlaw.iit.edu/cklawreview/vol74/iss3/13 (last visited on May 5, 2015).

[1174] See section 9-620 UCC and its Official Comment 11. Similarly, section 65 OPPSA states that "where a security agreement secures an indebtedness and the collateral is consumer goods and the debtor has paid at least 60 per cent of the indebtedness secured and has not signed, after default, a statement renouncing or modifying the debtor's rights under this subsection, the secured party who has taken possession of the collateral shall, within ninety days after taking possession, dispose of or contract to dispose of the collateral under section 63, and, if the secured party fails to do so, the debtor may proceed under section 67 or in an action for damages or loss sustained."

[1175] See section 9-620 UCC, and section 65(2) OPPSA.

Similarly, strict foreclosure in full satisfaction of debt could be very helpful to the debtor being that it saves him from being liable for deficiency sum if the secured party conducted the disposition in a commercially reasonable manner.[1176] However, under Article 9 and OPPSA, strict foreclosure is prohibited where the collateral is consumer good and the debtor had paid up to sixty percent of the owed amount – in which case the secured party must dispose the consumer collateral and never to retain it.[1177] The rationale for this prohibition stems from the fact that consumer debtors are often poor judges of the worth of their consumer collateral, as such property might worth far more than the outstanding forty percent.[1178] Furthermore, the secured party may not have any pressing incentive to seek high price of the collateral given the fact that he is only after forty percent of the owed sum.

In addition to the foregoing, the author suggests (as already stated)[1179] that a secured party who has disposed a debtor's collateral in Nigeria should be required to file an affidavit which contains the facts regarding the disposition – the fear of lying under oath and the eventual fines as a result, would make secured creditors to truly honor the commercially reasonable requirement – debtors would be the ultimate beneficiaries.

[1176]See section 9-627 (a) UCC.

[1177]See section 9-620 (e) and section 65(2) OPPSA.

[1178]See Leonard Lakin, *Default Proceedings under Article 9: Problems, Solutions, and Lessons to be Learned*, 8 AKRON LAW REVIEW, 1 (1974), p. 15. (Although based on the 1972 version of UCC Article 9, the author's arguments are still contemporary with respect to 'compulsory disposition', which was also contained in the 1972 version of Article 9).

[1179] On how the use of 'affidavit' would help to prevent debtor abuses by secured creditors, see the recommendation on the use of regulated self-help to repossess collateral in the chapter three (section 3.7.2) of this work.

4.9. Consumer protection and secured transactions in Nigeria – unorthodox combination and a path less traveled

There is obviously a big disparity between the levels of consumer protection given to US or Canadian consumers and that given to their Nigerian counterparts.[1180] The reasons for this disparity are several[1181] – but suffice it to mention that Nigeria's legal system is relatively younger and still in the experimental stage of basic regulatory issues which have long been tackled in most advanced systems. In addition, the level of economic development in US and Canada – whereby numerous goods and services are being offered for sale, the high level of investment opportunities, all add up to increase the interactions between secured creditors and debtors, and therefore the starting point for many consumer abuses versus protection issues. Regrettably, in Nigeria, there is no strong interconnection between consumer protection and the various forms of contractual relations – be it financial, or non-financial contracts. The rest of the subsections would demonstrate the acute need of transcending beyond general consumer protection, into sector-specific protection laws.

[1180] Current discussions on consumer protection in Nigeria could be seen in B.B. Kanyip, *Consumer Protection and Product Liability in Nigeria,* 1 AHMADU BELLO UNIVERSITY JOURNAL OF COMMERCIAL LAW, 1 (2001); FELICIA N. MONYE, LAW OF CONSUMER PROTECTION, (Ibadan: Spectrum Book Limited, 2003), esp. at p. 19. However, these authorities focus mainly on harmful products, like the ones that are regularly reported on the newspapers. See Egufe Yafugborhi, *NAFDAC seizes $250,000 contaminated bread improver,* VANGUARD NEW PAPER, May 29 2013, available http://www.vanguardngr.com/2013/05/nafdac-seizes-250000-contaminated-bread-improver/ (last visited on May 5, 2015). Consumer finance has so far seem to have escaped Nigerian authors' attention.

[1181]For some of these reasons, see the *"Research Report on the State of Consumer Protection In Nigeria"* (2014), p.6. Available at http://www.consumersinternational.org/media/1532727/consumer-protection-in-nigeria-research-report-eng.pdf (last visited on May 5, 2015).

4.9.1. The need for sector-specific consumer protection laws

Nigeria lacks consumer protection laws that are sector-specific, for instance in credit finance[1182] contracts, where the financial institutions are obviously stronger than consumer-debtors, contractual agreements are still basically governed by the usual rules of common law contract: unconscionable terms principle, unfair contract terms, and the principles of equity – which could only be pleaded in court by the consumer debtor after abuse has occurred, that is if he has enough resources and evidence to sue. This is the same story in other sectors which encounter two parties of unequal bargaining strengths – like in hire purchase contracts in Nigeria where the owner of a motor vehicle (or any hired object) literally enslaves the hirer with repressive contractual conditions, and no heaven falls as a result. The abused hirer is always reluctant to go to court given that usually they are impecunious, hardly knowledgeable of their rights, and even when they know their rights, do not consider the option of going to court to address the wrongs – mainly due to the high cost of attorney fees.

Looking at Nigeria's Consumer Protection Act,[1183] it is evident from the overall stated purpose of the Act that its essential focus is to protect consumers against harmful food and cosmetic products on the market.[1184] Yet, its enforcement mechanism reveals that its teeth are

[1182]The few laws that tiptoe around consumer finance in Nigeria are: the Banks and Other Financial Institutions Act, Cap. B3 LFN 2004, Economic and Financial Crimes Commission (Establishment) Act, Central Bank of Nigeria Act 2007, Nigeria Deposit Insurance Corporation Act, and Hire Purchase Act, Cap. H4 LFN 2004. These laws were obviously not designed with credit consumer-debtors in mind. Thus, none of them adequately addresses the heavy-handedness with which banks and other financial institutions treat consumer-debtors. Where a few measures are provided, they are hardly enforced by the Consumer Protection Council, whose staff sit tight in the comfort of their offices in Abuja and other main cities, without sufficiently ensuring against the rampant abuses that financial consumers face on a daily basis.

[1183]The statute is available at http://www.nigeria-law.org/ConsumerProtectionCouncilDecreeNo66Of1992.htm (last visited on May 5, 2015). (Hereafter referred to as "the Act"). Its official website is http://cpc.gov.ng/ (last visited on May 5, 2015).

[1184]According to section 2 of the Act, the functions of the Council shall be "to provide speedy redress to consumers complaints through negotiations, mediation and conciliations; 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 deciduous and cannot strongly 'bite' offenders, when it talks about negotiation, mediation and conciliation as the principal means of redressing consumers' complaints.[1185] It is submitted that the Commission's sole focus on harmful products is very insufficient because it neglects financial services which many Nigerians seeking to startup businesses engage with on a daily basis with financial institutions. Hence, the lack of adequate consumer protection in financial contracts gives banks and other financial providers the loophole and freehand to exploit financial consumers through highly abusive terms and conditions – and in light of the fact that the anticipated PPSL is consumer finance oriented, there is urgent need to strengthen the existing structure of Nigeria's consumer protection regime – again, Article 9 especially could offer inspirations in this regard in light of the discussions above.[1186]

4.9.2. The need to protect consumer-debtors against the overreaches of financial institutions

First, the anticipated PPSL should heavily be sprinkled with provisions which set out to adequately protect consumers from abuses – that way, lawyers who defend exploited consumer-debtors would have robust legal framework upon which to base their claims. Currently, this is lacking as most claims of consumer abuse are based largely on the common law unconscionable

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."

[1185]See section 2(a) of the Act.

[1186] See sections 4.7.1. and 4.7.2., above.

terms of contract, unfair contract terms, or principles of equity which provide very weak bites on abusers. When these are the only defenses available to a financial consumer, the best a court could do in cases abuse is to strike out those terms which it finds unconscionable, but hardly would go beyond that to administer punitive damages as done in the US. This is more worrisome given the fact that most times, banks employ the ablest attorneys to present wonderful arguments against impecunious debtors who do not have enough evidence of abuse or financial resources to obtain adequate legal services.

Furthermore, it is vitally important to cry out here that punitive damages is not yet popular in Nigerian contract law[1187] – award of damages is still based on what could be specifically proved – and its award against a breaching party is calculated on the basis of what could put the innocent party in a position he would have been had the breach not occurred. However, it should be recalled that unconscionable terms hardly incur damages against the stronger (breaching) party – being that it could be argued that the weaker party agreed to those terms in absence of the vitiating elements of contract,[1188] and therefore, the parties should be bound by their agreement under the freedom of contract rule.

Second, in addition to ensuring that the anticipated PPSL adequately bears features of consumer protection, it is also very due for Nigeria to enact consumer credit protection laws as in

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[1187] Punitive damages is yet to make it to the desks of Judges in Nigeria for breach of contract – see *Agbanelo v. Union Bank of Nigeria Plc.* (2000) 7 NWLR (Pt. 666) 534 at 551. Punitive or exemplary damages exists only in torts in Nigeria – see *Maritime Management Associates Inc. &Anor. v. National Maritime Authority* (2012) 18 NWLR (Pt. 1333) 506 SC at 544. This is unlike in the United States, where punitive damages are often awarded for breach of contract, as in the following cases: *Roddy v. Lexington Ins. Co.*, 2009 WL 3335363 (E.D. Tenn. 2009), *Wilson v. GMAC Financial Services Corp.*, 2009 WL 467583 (E.D. Tenn. 2009); *Woodruff v. National Life Ins. Co.*, 2008 WL 1734194 (E.D. Tenn. 2008).

[1188]The vitiating elements of contract in common law systems including Nigeria, are namely – mistake, misrepresentation, duress, undue influence, illegality, and so on. See GUENTER H. TREITEL, THE LAW OF CONTRACT (London, Sweet & Maxwell, 13th edition, 2011), pp.310–590.

US and Canada[1189] – to rescue as well as protect consumer-credit debtors from the rough phalanges of banks and other financial institutions who are currently lording it over consumers with little or no court or any agency's intervention. This non-adequate protection of consumers in credit contracts has really sent cold-shivers to the spines of potential consumer-credit debtors, who see borrowing from banks or other financial institutions as a big trap and source of prolonged unhappiness. This negatively affects willingness to borrow, and eventually the rate of doing business, which in turn impacts adversely on the economy.

So, the starting point is having a good framework that will support consumer-credit debtors' welfare – but that is hardly the end of the story because judging from the observer's stand, there is serious lack of enforcement of the little protection currently available for financial consumer debtors.[1190] Admittedly though, the reason could be that exploited consumer-credit debtors most times do not have enough money to pursue cases because they already have lost a lot from the contractual deal in question, and consequently have little or no money to spare for litigation. More so, the available defenses for consumer-debtors in financial contracts are not tight

[1189]See DOUGLAS G. BAIRD et al, COMMERCIAL AND DEBTOR-CREDITOR LAW: SELECTED STATUTES (New York, Foundation Press, 2010), pp. 1373 – 1593. For a good overview of Ontario's consumer protection laws, visit http://www.ontario.ca/consumers/consumer-protection-laws-ontario (last visited on May 5, 2015).

[1190] For instance, section 3 of the Hire Purchase Act, 1970 provides as follows: "The following provisions in an agreement shall be void, that is to say, any provision whereby an owner or a person acting on his 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; or whereby the right conferred on a hirer by this Act to determine the hire purchase agreement is excluded or restricted, or any liability in addition to the liability imposed by this Act is imposed on a hirer by reason of the termination of the hire-purchase agreement by him under this Act; or whereby a hirer, after the determination of the hire-purchase agreement or the bailment in any manner whatsoever, is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been determined by him under this Act; or whereby any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire-purchase or credit-sale agreement is treated as or deemed to be the agent of the hirer or buyer; or whereby an owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire-purchase or credit-sale agreement; or whereby a hirer or buyer is required to avail himself of the services, as insurer or repairer or in other capacity whatsoever, of a person other than a person selected by the hirer or buyer in the exercise of his unfettered discretion". Notwithstanding these measures, abuses of consumers in hire purchase agreements are rampant in Nigeria.

enough to guarantee or secure success against a giant (financial institution) whose legal department could dexterously explore delay tactics as well as appeal the case against it, up to the Supreme Court, just to ensure that the debtor is adequately frustrated along the line.

Third, in view of the forgoing, the author argues that leaving enforcement of abuses in consumer credit contracts solely in the hands of victimized consumer-debtors will be counter-productive because of the reasons that have already been given above.[1191] The way forward should be a heightened encouragement to consumer-debtors to form a formidable consumer association in Nigeria as obtainable in US and Canada.[1192] A strong consumer association with good human and financial resources could also create an impregnable legal team with which to fight cases of consumer abuses especially those perpetuated by 'giants', like banks and other financial institutions who could easily intimidate an individual consumer-debtor. The formation of strong consumer-association would serve as buffer to the existent Consumer Protection Council, whose 'bones' and 'teeth' should also be fortified to fight consumer credit abuses, including taking cases up to the Supreme Court in order to establish strong judicial precedents in favor of consumers. Perhaps in light of the fact that litigation is proverbially slow in Nigeria, it is recommended that in

[1191] For instance, notwithstanding that section 9 of the Hire Purchase Act, 1970 provided that owners under a hire purchase agreement shall not recover possession of good except via court action, self-help repossession, and in some cases beating up the hirer has been rampant because of the usual disparity in financial strength between hirers and property owners under hire purchase agreements. The Hire Purchase Act could be seen at http://www.placng.org/new/laws/H4.pdf (last visited on May 5, 2015).

[1192] The American Consumer Council (ACC) is "[a] non-profit membership organization founded in 1987 and dedicated to consumer education, advocacy and financial literacy. It supports America's economic growth by encouraging the sale and use of safe, reliable products and services to consumers. ACC achieves its mission by serving the economic interest and consumer needs of its 160,000+ members and 48 state/regional consumer council affiliates". It official website is http://www.americanconsumercouncil.org/ (last visited on May 5, 2015). In Canada, they have the Consumers' Association of Canada (CAC). "[T]he CAC founded in 1947, is an independent, national, not-for-profit, volunteer-based organization. It is the longest serving and most respected consumer organization in Canada, its mandate is to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and to work with government and industry to solve marketplace problems. Its mission statement is to represent and articulate the best interests of Canadian consumers to all levels of government and to all sectors of society by continually earning recognition as the trusted voice of the consumer on a national basis". Its website is http://www.consumer.ca/# (last visited on May 5, 2015).

order to quicken the resolution of credit consumer abuses, the Consumer Protection Council could further be empowered to act quasi-judicially in its administration by amongst other things, having the power to impose costs against any abusive financial creditor – of course, subject to judicial review.

In conclusion, the chapter posits that contrary to the norm in literature whereby secured transactions law is often discussed in isolation, the points of intersection between it and bankruptcy as well as consumer protection are so many as well as crucial to ignore. Thus, it is vitally important to discuss these intersections, as nearly always, security interest rights created in secured transactions are extensively modified upon debtor's bankruptcy. The implication of this especially for Nigeria is that a reform of its secured transactions law (currently being contemplated in the country) must invite concomitant changes in the bankruptcy statutes. Otherwise, satisfaction of several classes of secured creditors from a debtor's asset-pool would continue to be recondite, being that a system of predictability vis-a-vis property rights must first be adequately established in bankruptcy before any asset distribution could well take place.

In trying to do this, the chapter analyzes key concepts that should take the front seat in the concomitant changes in Nigeria's bankruptcy statutes – private receivership, automatic stay, the level of bankruptcy trustee's power, unification of mortgage laws, and so on. These issues although highly topical, are not of course the only issues that must be addressed, instead they are designed by the author to serve as consciousness raiser to lawmakers who have the ultimate duty to undertake a more holistic revision of the bankruptcy statutes, to synchronize them with the anticipated PPSL.

The chapter also argues that the existent legal framework on consumer protection in Nigeria is grossly insufficient to protect consumer finance debtors because it does not provide strong bite against abusive lenders, or sufficient protective measures for them. In addition to the fact that the existing remedies are weak and insufficient as argued in the chapter, they are ex post in nature – meaning that a debtor is first of all abused and exploited, then he pursues court remedy only if he has enough evidence and financial resources to sue – what evidently frustrates their ambition to seek redress. In looking for solutions, the chapter looks towards US and Canada – in the author's estimation, they seem to have more tested solutions considering their long experiments with secured transactions cum consumer protection. Thus, some of their experiences could be exploited, but of course adapted to suit Nigeria's local conditions.

Chapter Five
Conclusion: Or why there is still much work to do

5.1. What was learnt?

The central message of this thesis is that sufficient availability of credit in a country is fundamental to economic growth and development. The thesis argued that the low level of Nigeria's economic development is partly due to its obsolete laws on secured credit transactions. Apart from being obsolete, the applicable laws are also very compartmentalized with different applicable rules on the creation, perfection, priority and enforcement of security interests in personal property. This makes the rights emanating from secured transactions in Nigeria very recondite, unpredictable, and difficult to enforce.

The thesis further argued that although resuscitating Nigeria's economy, or rather, its development rests on many factors, yet a robust legal framework on secured transactions law is indispensable, and indeed a key tool towards achieving this goal. In searching for solution towards solving the problem of insufficient credit to Nigerian credit borrowers, especially the SMEs, the thesis analyzed the UCC Article 9 and OPPSA comparatively, with view to identifying some of their elements which could be adapted to suit Nigeria's local conditions.

In showing that UCC Article 9 and OPPSA contain the essential ingredients which Nigeria's secured transactions law reform needs, the thesis carefully refrained from giving the impression that solutions lie in mere direct transplants of Article 9 or OPPSA provisions. Instead, throughout the thesis, the relevant provisions of both models were carefully remolded to fit Nigeria's local realities. For example, the thesis firmly argued that 'self-help' remedy and its 'without the breach of peace' measure which Article 9 and OPPSA provide for, is grossly insufficient to protect Nigerian debtors from creditor-abuses. In fortifying this measure (without the breach of peace), and in due consideration of Nigeria's rule of law level, the thesis introduced some stringent requirements which must be met before a creditor could exercise his right to repossess by self-help.

Similarly, whereas both Article 9 and OPPSA have abolished debtor/collateral "policing" as a matter of law except agreed in a contract, this thesis adopts a contrary position, and argues – in view of Nigeria's present level of development, that policing of debtors/collateral should be as a matter of law to ensure that secured creditors – who provide credits, are able to fully leverage on their credit investments. It is therefore the position of this thesis that creditor-policing will be the right measure towards frustrating debtors' efforts geared to intentionally exploit and abuse the gaps in the Nigerian system vis-à-vis secured credit financing. These two examples, like others in the thesis, demonstrate vividly that Article 9 and OPPSA were majorly used only as raw materials and tools in fashioning the reform proposals of Nigeria's secured transactions law.

Although a major portion of the thesis analyzed issues pertaining to comparative secured transactions law, with Canada (Ontario), Nigeria and US in perspective, it also addressed issues which regularly emanate without satisfactory answers, from the bankruptcy and secured transactions law interface. The analysis in this thesis showed that both areas of law are so intertwined that a reform of one naturally necessitates a reform of the other. In this case, whereas, bankruptcy and secured transactions law strive well to mutually and regularly reform each other in US and Canada, such inter-relationship is still alien to the Nigerian legal framework. The thesis therefore highlighted some concomitant needs, or rather, reform proposals in the Nigerian bankruptcy law, which must come into existence simultaneously with the anticipated secured transactions law.

In light of the fact that the anticipated secured transactions law is in the domain of credit financing, and also primarily targeted at the SMEs, the question of how to protect debtors, especially consumer-debtors from creditor-abuses becomes critically essential. Basically, the current consumer protection law in Nigeria is nothing to write home about, and this portends a bad omen on consumer-debtors if no urgent revamping is done in that regard. For solution, the thesis recommends that the anticipated secured transactions law should be heavily sprinkled with consumer protection provisions, so as to create a solid basis upon which consumers can seek meaningful court redress when their rights are abused. In addition, the thesis recommends that sector specific laws, especially with respect to credit financing, should be enacted to reinforce whatever the anticipated secured transactions law will provide.

Reinforcing consumer protection laws would be very beneficial to the Nigerian economy, being that adequate protection especially with respect to consumer-credit financing, will encourage more people to borrow money and do business, thereby creating jobs and impacting positively on the economy. This is in contradistinction with the current attitude towards borrowing from the lending institutions – many Nigerians see borrowing money from financial institutions as a financial trap and a pathway to serious unhappiness – they therefore try their best to avoid it, as existing precedents of lender-abuses are self-advising. In the end, this means fewer businesses, fewer employments, and high level of poverty in the country. The thesis is therefore saying in essence that if the above structures are put in place, the Nigerian economy will have taken giant strides towards the right direction.

5.2. Limitations and problems: cultural, political, and economic challenges to the survival of the anticipated PPSL

5.2.1. Introduction

Reforming Nigeria's secured transactions law will hardly be a panacea to its economic quagmire – it is a necessary but hardly a sufficient condition. Many other factors such as stable electricity, adequate security, and similar infrastructures need to be fixed as well in order to provide fertile soil with which credits could easily be galvanized into viable businesses. These other factors yet to be properly fixed are what the thesis refers to as 'limitations and problems' to the anticipated secured transactions law. They come in various shades – namely, infrastructural, cultural, political and economic challenges –these would be briefly addressed below.

5.2.2. The Economic challenge

Generally, the culture of starting and doing business in Nigeria is unsatisfactory and underdeveloped. And this is partly anchored on the fact that obtaining credit facilities from lending institutions is practically reserved for the rich who are better positioned to satisfy the stringent loan or sale-credit requirements, like proving a real property or a rich guarantor. Similarly, given that interest rates are usually high (not to consider that banks are regularly in the habit of increasing interest rates unilaterally during the life of a loan contract) due to their high bargaining powers, and the poor legal framework that supports them – which includes also the absence of tight regulations of the banking industry, average Nigerians who borrow from banks usually find it difficult to make profits out of it, and repay loans, thereby losing their collateral frequently to bank's foreclosure. Hence, coupled with unfavorable economy – with high cost of living, where citizens practically provide the social infrastructure and amenities they need by themselves, there exists great difficulty in personally saving up funds from meagre incomes in order to do business. Hence, the culture of start-ups is speedily vanishing from sight, and now seen rather as elitist thing.

5.2.3. The cultural challenge

Another barometer which confirms the low gauge of business culture is that even when many Nigerians bump into large sums of money, like winning lotteries, getting lump sum retirement benefits, and so on, their first instinct is not usually to start-up businesses. Thus, in place of a sharpened business culture, the culture of frivolously spending on liabilities – on things that do not yield monetary profits has become rather the norm. For instance, in addition to the big thirst of always wanting to "live large" at the expense of saving and doing business, there are two major ceremonies the Nigerian society has constructed for its youths – namely, wedding and burial ceremonies. These ceremonies are held at high esteems and designed to be tedious and expensive – the more expensive a celebrant makes it appear, the more accolades he receives – such that in the hierarchy of priorities for many Nigerian youths, doing business ranks far lower than these two events – encouraged also by the old people who generally prefer to invest in ensuring that these events are well carried out, than lay emphasis on doing business.

In fact, the author knows from the archives of personal experience that generally in Nigeria, many family relatives are more inclined to lend money to their members for the purposes of marriage and burial than starting and doing business. The author therefore strongly advises Nigerians to drastically cut down expenses on these non-profit-yielding events, and hone the culture of saving and doing business, otherwise making credits sufficiently available through secured transactions law reform, will hardly materialize into businesses and jobs – as youths may borrow basically to get married or bury their relations instead of doing business.

5.2.4. The political challenge

From the political dimension, there is lack of political will[1193] on the side of Nigerian lawmakers to perform their basic and most fundamental function of ensuring that adequate laws are in place – including to revise obsolete ones. This is hardly the case as Nigeria has an encyclopedia of obsolete laws, yet, it has the richest paid set of legislators in the world.[1194] This is highly worrisome considering the fact that enacting a new secured transactions law is not the end of the story – it requires a proactive legislature to swiftly adapt to new realities, ensure that identified gaps in the law are not exploited negatively for long time by the business community, so as to retain investors' confidence, and so on.

As a solution to this problem, the author proposes that strong gatekeeper laws which painstakingly screen and filter out incompetent candidates vying for legislative positions be put in place. This should mean that at least only those with first university degrees, amongst other things, may be eligible to contest for legislative positions as compared to the current position, whereby

[1193] 'Political Will' is a "[d]emonstrated credible intent of political actors (elected or appointed leaders, civil society watchdogs, stakeholder groups, etc.) to attack perceived causes or effects...at a systematic level." – see Sahr J Kpundeh, "Political Will in Fighting Corruption," in SAHR J. KPUNDEH & IRENE HORS (eds.), CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES (New York: UNDP, 1998), p.92. See also, Lori Ann Post et al, *Defining Political Will*, 38 POLITICS & POLICY, 653 (2010), p.676. Available also at http://www.researchgate.net/profile/Lori_Post/publication/229903315_Defining_Political_Will/links/09e415140cf60ba7f5000000.pdf (last visited on May 12, 2015).

[1194] A Nigerian lawmaker receives about 1.7 million US dollars annually. See, Denrele Animasaun, *Nigerian Lawmakers are the Highest Paid in the World*, VANGUARD NEWSPAPER, August 25, 2013. Avaialble at http://www.vanguardngr.com/2013/08/nigerian-lawmakers-are-the-highest-paid-in-the-world/ (last visited on May 30, 2015).

obtaining a high school certificate makes a candidate for a legislative position educationally qualified to run for office.[1195] This is shameful, and casts dark shadows on the path of Nigeria's overall development. In this twenty first century, only well-educated legislators may be able to competently keep up with global trends, and are better positioned to understand and adapt foreign examples to local conditions, instead of the current 'cut and paste' mentality that the Nigerian legislators regularly employ in law-making.[1196]With a vibrant and educated legislators in place, it will be easier to rectify problems and fill in gaps (in the anticipated secured transactions law or any other law for the matter), which (problems and gaps) are not currently visible in the system due to the current level of development.

Similarly, the courts, especially the Nigerian Supreme Court must be ready to research better before delivering their judgments, to ensure that previous and conflicting decisions are overruled, thereby avoiding the consequences that come from multiple positions on a single issue, from the apex court. This also means that the doctrine of implied repeal should as a matter of urgency be introduced into the Nigerian legal system with respect to statutory laws and judicial precedents to corroborate express overruling of previous/conflicting statutes and case law.

Furthermore, a casual observation reveals that banks in Nigeria are reluctant to give credit facilities to average citizens. Of course, part of the reason is due to the borrowers' frequent inability

[1195] See section 65(2), Constitution of the Federal Republic of Nigeria.

[1196] In retrospect it is easy to understand why Nigeria largely took over all Statutes in force in England on or before January 1st 1900, during the nascent period of its legal system. This was due to the reality that no one can invent a legal system overnight. However, after half a century of independence, with over 100,000 lawyers, it is shameful for the Nigerian legislators to frequently copy foreign laws almost verbatim without adapting them to fit into Nigerian realities – the incompatibility is usually tumultuous. Currently before the Nigerian Federal Parliament, (The National Assembly), is "A Bill for An Act to Consolidate the Enactments Relating to Company, Individual and Cross Border Insolvency and to Make Provisions for Business Rescue and Other Related Matters". Insolvency law is very vital and 'environmentally' sensitive, yet it breaks the author's heart to learn that the bill is merely a copy of the Insolvency Act, 1986 of England and Wales.

to repay due to many unsuitable factors – but then, banks try to cover for this high risk of lending to average citizens via high interest rates. However, the bigger part of the banks' fear comes from the fact that most individuals in Nigeria are untraceable. For instance, there is no shared identification database, where a potential borrower's credit history could be checked, to know if he is in the regular habit of default. So since banks cannot verify anyone presenting to the bank for loans, the natural thing is to suspect them, then try to cover up by demanding either a real property, a rich guarantor, or a high interest rate, which many prospective borrowers cannot afford – hardly do banks accept personal property as collateral from average Nigerians.

5.2.5. The way forward

The way forward in the author's opinion, are the following: First, the country must start to work towards establishing a national database that will capture the identity of every Nigerian as well as foreign residents, and this database must be shared amongst the relevant agencies. That way, banks could easily verify identities, know a borrower's history, and be able to easily trace him through law enforcement agencies if he suddenly disappears following a fraudulent act. Similarly, the lack of a credit reporting system whereby the history of credit-borrowings of individuals are recorded in a database to enable banks and other lenders know the credibility of a potential borrower is lacking – this creates fear and suspicion of easy default in the mind of the lender, and he might cushion this fear by charging high interest rate – which would make the borrower uncompetitive and eventually forced into bankruptcy. As done in the US, Canada, and other advanced countries, Nigeria should introduce a credit reporting system as one of the structures that would support affordable and sufficient credit in the country. The absence of these structures is in the author's opinion, one of the reasons that have deterred financial institutions from giving affordable credits.

Second, Nigeria currently has porous and unmonitored borders, showcased recently by the relative ease with which the *boko haram* insurgents moved in and out of Nigeria for a long time without much counter resistance. This means that with lack of a national database which could verify the identity of everyone present in the Nigerian territory, coupled with porous borders, non-Nigerians could illegally immigrate into Nigeria, successfully obtain credits from banks, and leave the country without anyone giving any account of them. What this means is that the new secured transactions law may not be able to achieve its potentials inasmuch as banks and other lending institutions are still engulfed by this genuine fear. The Nigerian government must recognize therefore that doing business on a scale that will address unemployment and poverty rests squarely on these factors that have so far been largely neglected, and must strive to fix them as soon as possible. This also means that a comprehensive reform instead of quick fixes that ignore several vital issues, should be the way forward.[1197] Seen in that light, it should be borne in mind that this thesis tackled only the legal framework aspect of the numerous challenges that impede starting

[1197] In 2015, the Central Bank of Nigeria promulgated a Regulation — (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) (Regulations, No. 1, 2015), that applies only to banks and other financial institutions – the essence of the Regulation which mimics the UCC Article 9 model is to provide access to credit to individuals who may use their personal property as collateral. The Regulation has many issues that compound the current compartmentalized secured transactions law in Nigeria. These issues were thoroughly examined. For details, see Williams C. Iheme & Sanford U. Mba, *Towards Reforming Nigeria's Secured Transactions Law: The Central Bank of Nigeria's Attempt through the Backdoor,* JOURNAL OF AFRICAN LAW (2016) (forthcoming).

and doing business in Nigeria. The thesis is not *"one with everything"*,[1198] and other researchers are invited to deeply look into other problematic issues. Hence, "there is still much work to do."[1199]

5.3. Predictions

In 2014, Nigeria outpaced South Africa and became the largest economy in Africa.[1200] Although still fraught with fundamental challenges as already hinted at above, its international image is increasingly gravitating towards limelight. With the 2015 presidential election which placed it on a tipping point of either becoming a failed state or a regional super power, Nigeria has chosen the latter approach, with a firmer resolve to unknot past ties with failure and systemic decadence. Positive change is occurring gradually, and this may mean restored investor-confidence in the system. Furthermore, this could mean that in addition to an increased boost in SME financing, increased foreign direct investments and all of its associated benefits may be recorded in a larger scale. As these positive changes occur to redesign the overall architecture of the

[1198] A famous joke of the last century records that a Buddhist Monk walks up to a hot dog vendor and tells him to make him "one with everything". The vendor gives him a hot dog and the Buddhist pays with a $20 bill. After a moment of waiting, the Buddhist asks "where is my change"? But the vendor smiles and says, "Ahh, change must come from within". Linked to this thesis, it's certainly not one with everything – other fundamental structures also must be fixed in order to achieve easy access to credit in Nigeria. It is however the author's hope that if the targeted audience reads this work, change might begin to occur from within.

[1199] Whenever a foreign law is sort to be adapted and internalized in a different system, the job does not usually stop at adapting and designing a suitable law, it is a huge step forward though, but other factors must also be fixed. Mary Hiscock et al, alluded to something similar when discussing the internalization of law, which Professor Tajti remarked in his article. See Tibor Tajti, *Could Continental Europe Adopt A Uniform Commercial Code Article 9-Type Secured Transactions System? The Effects of the Differing Legal Platforms*, 35 ADELAIDE LAW REVIEW, 149 (2014), p.178, quoting MARY HISCOCK AND WILLIAM VAN CAENEGEM (eds), THE INTERNATIONALISATION OF LAW (Edward Elgar, 2010), page xxv. Professor Tajti's article is available also at https://www.adelaide.edu.au/press/journals/law-review/issues/alr-vol-35-1/ch10-alr-35-1-tajti.pdf (last visited on May 12, 2015).

[1200] See the BBC News Report, available at http://www.bbc.com/news/business-26913497 (last visited on May 30, 2015).

Nigerian system, a suitable secured transactions law needs to position itself well in order to exploit and maximize benefits accruing from these changes.

Similarly, when the anticipated secured transactions law comes into force, cross-border commercial transactions may commence on a large scale between Nigeria and its neighbors who are members of the OHADA treaty. The appreciable level of similarities between Article 9 based secured transactions law and the OHADA kind, may trigger a notion of full harmonization of business laws between the French and English speaking West African countries – if not the entire Africa. A common court, with bifurcated legal systems encompassing common law and civilian legal traditions may be put in place to address legal disputes arising from cross-border commerce within the continent. This harmonization occurring in the realm of business law may necessitate harmonization in other areas that are mutually beneficial as well. This also calls for the abolition or amendment of article 42 of OHADA treaty which stipulates that French is the language of proceedings – this hinders the possibility of full adoption of the OHADA treaty in Africa, especially by the English speaking countries.[1201]

For instance, not too many Nigerians and Ghanaians speak fluent French despite the fact that these two countries are surrounded by French speaking countries, and vice versa. Due to this removable but unremoved language barrier, tourism, business, law, and labor migration between Anglophone and Francophone West African countries are very much underdeveloped and untapped – and this living in isolation mentality, and failure to intermingle have robbed incalculable fortune from these countries, leaving the West African region very poor in the final analysis. The East African countries which have *Swahili* as a common language seem to be the

[1201]See Nelson Enonchong, *The Harmonization of Business Law in Africa: is Article 42 of the OHADA Treaty a problem?*, 51 JOURNAL OF AFRICAN LAW, (2007), 95 at 97.

torch-bearers in this regard, and better positioned to leverage from the benefits that come from dismantling a language barrier .

In any case, it is the author's view that setting the plan in motion towards a harmonized business law is the starting point to achieving other beneficial harmonizations amongst the countries in Africa, because the incentive of making business profits could easily pave way to other profitable cooperations that will enhance the peoples' wellbeing. To start with, if business laws are successfully harmonized in the West African region, the notion of attempting harmonization of business laws at the continental level might begin to rage forcefully. A multilateral treaty in that regard might consequently be birthed. But as an erudite scholar elegantly puts it, "[n]o law reform could be truly successful without having the support of politicians, academics, judges, and eventually, a substantial part of the potential addresses."[1202]

[1202]See Tibor Tajti, "The Trento Project: The Way to Rediscover Each Other in Europe and Beyond", in MAURO BUSSANI & UGO MATEI (editors), OPENING UP EUROPEAN LAW, (Stampfli Publishers Ltd, 2007), p.148.

APPENDIX

<u>Cost of filing and searching financing statements/charges in a select number of jurisdictions</u>

JURISDICTION	COST OF FILING A FINANCING STATEMENT		COST OF SEARCHING THE REGISTRY	REGISTRY'S WEBSITE
AUSTRALIA	$6.80		$3.40	https://www.ppsr.gov.au/fees
NEW ZEALAND	$20		$3	http://www.ppsr.govt.nz/cms/customer-support/fees
NIGERIA[1203]	For a private company's charge ₦10,000 for every 1₦million or part thereof	For a public company's charge ₦20,000 for every 1₦million or part thereof	₦2,000 per a company's file ₦2,000 per a company's file	http://new.cac.gov.ng/home/summary-of-fees-and-forms/
ONTARIO	$8		$8	https://www.ontario.ca/page/register-security-interest-or-search-lien-access-now#section-1
SASKATCHEWAN	$10.39		$6.67	https://www.isc.ca/SPPR/Pages/PersonalPropertyFees.aspx
UNITED STATES (CALIFORNIA)	US$5		US$5	http://www.sos.ca.gov/business-programs/ucc/forms

[1203] ₦10,000 is equal to US$50. For a currency conversion, see www.xe.com. (Last visited on April 14, 2016).

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