Access to Credit and Personal Property Security Law Reform in Africa

Examining the Legal Framework in Sierra Leone with Comparative Perspectives from England and the United States

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Abstract

Personal property security law (PPSL) reform is underpinned by the robust claim that the unrestricted use of personal property as security for credit expands access to finance, and the expanded access to credit finance correspondingly stimulates economic growth. Access to finance is evaluated as a measure of obtaining credit with ease, cost-efficiency and transparency, especially in the taking and realization of the security interest in a collateral. Ideally, security interests in personal property ought to be created and enforced with maximum flexibility, predictability and optimal cost, devoid of delays and redundant formalities. In addition, there must exist appropriate risk mitigation and public notice safeguards for all the relevant parties, including other creditors, whether secured or unsecured, and interested third parties including the good faith purchaser. Accordingly, this research examines the continuing PPSL reforms in the Africa, with Sierra Leone as the case study. It evaluates the reformed legal framework, inclusive of the new Sierra Leone Borrowers and Lenders Act 2014 (BLA), in determining whether it supports the economic function of facilitating expanded access to credit finance.

Prior to the enactment of the BLA, the fragmented, limiting and obsolete nature of the PPSL framework made the cost of credit prohibitively high, particularly so for small and mid-scale enterprises (SMEs). The BLA adopts the functional approach to personal property security with the aim of stimulating economic growth by expanding the collateral range and improving the public notice regime. This research, however, asserts that the BLA substantial deviates from the paradigm functional and unitary model, and is fraught with 'legal inefficiency', thereby leading to a defective framework. The analyses are focused on the substantial deviations: First, the Central Bank's extended regulatory supervision and intrusion in the market, the restrictive definition of lenders and the economic implications of a banking oligopoly in the secured credit market. Second, the retention of old English law corporate charges, the floating security dilemma, and the place of the purchase money security interest (PMSI) in the new framework. Third, the existences and impact of the two parallel systems for secured credit in Sierra Leone, legal parallelism in the two-tier framework, one for banking and other licensed financial institutions and the other for non-banking creditors within the same legal order.

The substantial deviations notwithstanding, this research further claims that the BLA also affords the opportunity for the use of hitherto new security devices which will support the economic function of facilitating access to credit, including; optimizing agricultural finance given the agrarian nature of the economy in Sierra Leone; receivables and inventory financing for SMEs growth; and title financing, owing to its economic advantages especially for consumer finance and unique treatment in insolvency. The research proposes a rethink of the reform in Sierra Leone with comparative perspectives from the England and the United States. Article 9 of the Uniform Commercial Code in the US is considered to be the paradigm functional framework, whilst English law forms the basis of the pre-reform PPSL formal approach to personal property security in Sierra Leone. This comparative approach is also suggestive of reshaping the reform in Sierra Leone through the theoretical lens of the law and development movement and legal transplant theory, given the influence of the international financial institutions (IFIs) in the global law reform movement. The reform in Sierra Leone presents a substantive case to evaluate the merits (or otherwise) of the law reformist agenda of the IFIs within the field of secured transactions law.

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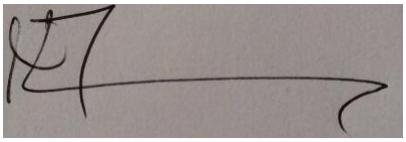
Originality Certification

I hereby certify to the best of my knowledge, information and belief that the content of this dissertation is my own work and does not contain materials previously written and/or published by another person, except where so acknowledged herein in the acknowledgement, footnotes and bibliography. I further certify that this dissertation has not been submitted for any degree or other purposes or contains material accepted for any other degree in any other institution.



…….
Michael Imran Kanu

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To Professor Tibor Tajti - 'a fisher of men',
my wife Rita and to the blessed memory of my Parents

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List of Abbreviations

ASG	Agriculture Research Group -US
BLA	Borrowers and Lenders Act 2014
B&L Act	Borrowers and Lenders Act 2009 - Ghana
BSL	Bank of Sierra Leone
CAC	Corporate Affairs Commission
Cap.	Chapter
CBs	Community Banks
CEE	Central and Eastern Europe
EBRD	European Bank for Reconstruction and Development
EC	European Community
EEC	European Economic Community
EU	European Union
ECJ	European Court of Justice
ECOA	Equal Credit Opportunity Act - US
FSAs	Financial Service Associations
FCS	Farm Credit System
GAFSP	Global Agriculture and Food Security Programme
GDP	Gross Domestic Product
GoSL	Government of Sierra Leone
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFIs	International Financial Institutions
MSMEs	Micro Small and Mid-Scale Enterprises
NPLs	Non-Performing Loans
OFSA	Other Financial Services Act 2001
OHADA	Organization for the Harmonization of Business Law in Africa
PMSI	Purchase Money Security Interest
PPSA	Personal Property Security Act
PPSL	Personal Property Security Law

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RFCIP	Rural Finance and Community Improvement Project
SME	Small and Mid-Scale Enterprises
U.C.C.	Uniform Commercial Code -US
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
US$	United States Dollars

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Introduction

> *It is tempting for lawmakers contemplating a reform of their secured transactions law, and the international organizations and consultants advising thereon, to copy into their legal system an existing legal framework of a chosen jurisdiction. […] This is usually done because the promoters of the reform perceive the model system as reflective of an economical model (and sometimes social and cultural values as well) that they associate with the result that they intend to achieve. Such an approach would be a serious error and could lead to the failure of the reform if it does not integrate in the existing legal framework and the societal values and idiosyncrasies of the enacting country.*[1]

Personal property security law[2] (hereinafter: "**PPSL"**) reform is driven by the important nexus between economic development and the efficiency of a country's PPSL framework.[3] The PPSL reform movement started to gain international prominence and momentum coincidentally at the time when the ideological contention between capitalism and communism was at an end. The International Bank for Reconstruction and Development Group (hereinafter: the "World Bank") began its focus on secured transactions law reforms in the early 1990s,[4] at a similar period when the European Bank for Reconstruction and Development[5] (hereinafter: "EBRD") was already engaged in the process and had issued its draft model law as a way to help the post-communist

[1] George Affaki, 'Increasing Access to Credit: Reforming Secured Transactions Laws' (2010) International Trade Centre: Technical paper 14.

[2] PPSL is also referred to as 'secured transactions law' mainly from United States influenced literature and has other variations inclusive of 'collateral law', 'security interest law', 'security law' depending on the jurisdiction. Most common law countries influenced by English law use PPSL and this is the case in Sierra Leone. However, given the comparative nature of this research, there will be terminological interchange with use of secured transactions law for references to the US and the international framework. See Tibor Tajti, *Comparative Secured Transactions Law* (Akadémiai Kiadó 2002) 19.

[3] For the recent literature on the nexus between access to credit, economic development and the effectiveness of a PPSL framework, see the 'Introduction' to Louise Gullifer and N Orkun Akseli (eds), *Secured Transactions Law Reform Principles, Policies and Practice* (Hart Publishing Limited 2016); also see Rainer Haselmann, Katharina Pistor and Vikrant Vig, 'How Law Affects Lending' (2009) 23 The Review of Financial Studies 549; Affaki (n 1).

[4] The World Bank and the International Finance Corporation were mandated by the Group of 22 'to help reduce the incidence of financial crises by assisting in the reform of laws governing bankruptcy secured transactions' Heywood W Fleisig, Mehnaz Safavian and Nuria de la Peña, *Reforming Collateral Laws to Expand Access to Finance* (World Bank, 2006) xi; today the 'Getting Credit' and 'Closing a Business' or 'Resolving Insolvency' indicators form part of the indices used by the World Banks to measure the ease of doing business under the Doing Business Initiative. See Caralee McLiesh and Simeon Djankov, *Doing Business in 2004: Understanding Regulation* (World Bank and Oxford University Press 2003).

[5] The EBRD in line with its 'economic objective […] encourages countries to modernise their collateral laws and offers assistance at all stages of the reform process'; European Bank for Reconstruction and Development, 'EBRD's Legal Reform Access to Finance and Secured Transactions' <http://www.ebrd.com/what-we-do/legal-reform/access-to-finance/transactions.html> accessed 26 March 2018.

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countries of CEE transition into market based economies.[6] At the national level, the United States (hereinafter: the "US") was the first to reform and modernize its secured transactions law in the 1950s, said process led to its unitary and all-encompassing conception of a security interest, bringing under the scope of Article 9 of the Uniform Commercial Code (hereinafter: "**U.C.C.**"): All transactions with the economic function of securing personal property as security for credit, the 'substance over form philosophy' (hereinafter: the "**Unitary Model**").[7] The international reform movement became sustained over time and reform projects sprang up worldwide, from Central and Eastern Europe (hereinafter: the "CEE Region") Latin America and Southeast Asia.[8] Africa, it is argued, is now belatedly joining the international reform movement.[9]

[6] Fleisig, Safavian and Peña (n 4) xi.

[7] Michael G Bridge and others, 'Formalism, Functionalism, and Understanding the Law of Secured Transactions' (1998–1999) 44 McGill Law Journal 567, 572. The completion year of the reform in the US is taken to be 1950. Gilmore, who was one of the main proponents of the U.C.C. Article 9 record that state of great instability that bedevilled the U.S. personal property security law 'between the 1850 to 1950' before the reform; Grant Gilmore, *Security Interests in Personal Property* (Lawbook Exchange, 1999) ix, 288–289.

[8] Marek Dubovec and Benjamin Osei-Tutu, 'Reforming Secured Transactions Laws in Africa: The First African Collateral Registry in Ghana' [2013] Uniform Commercial Code Law Journal 77, 79. The sustained international effort is mostly aimed at legal harmonization, manifested in model laws, legislative guides and international conventions. See for example the United Nations Commission on International Trade Law, *UNCITRAL Model Law on Secured Transactions* (2016); see Gerard McCormack, *Secured Credit and the Harmonisation of Law: The UNCITRAL Experience* (Edward Elgar 2011); Royston Miles Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment : Official Commentary* (Rome : International Institute for the Unification of Private Law (UNIDROIT), 2013); see Jan-Hendrik Rover, 'The EBRD's Model Law on Secured Transactions and Its Implications for an UNCITRAL Model Law on Secured Transactions' (2010) 15 Unif. L. Rev. 479, 482; The Model Inter-American Law on Secured Transactions (Model Law), approved by the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) on February 8, 2002. In Europe, the European Union commissioned a team of highly respected scholars to develop what is now known as the Draft Common Frame of Reference (DCFR), which represents an endeavor to harmonize commercial law in Europe inter alia the law relating to security rights in movable assets; Christian von Bar and Eric M Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford University Press, 2010 2010) bk IX; for aspects of Asian reforms, see Mark Williams, Haitian Lu and CA Ong, *Secured Finance Law in China and Hong Kong* (Cambridge University Press 2010).

[9] Dubovec and Osei-Tutu (n 8) 79. In West and Central Africa (the Francophone countries), L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) translated to mean 'The Organization for the Harmonization of Business Law in Africa', <http://www.ohada.com/accueil.html> seeks to harmonize the business laws of its Member States, among which is the OHADA Uniform Act on law covering securities (guarantees and collateral); Tochi Obinna Nwogu, *Secured Transactions Laws of Nigeria and Cameroon through the Lens of Article 9 of the Uniform Commercial Code of the United States of America* (CEU, Budapest College, 2011) 8; so far, Ghana, Liberia, Malawi, Sierra Leone and Nigeria have undertaken some measure of legal reforms relating to secured transactions; for the reform in Ghana, see Dubovec and Osei-Tutu (n 8) 79; for Liberia, see The Commercial Code: Chapter 5; for Malawi see Marek Dubovec and Cyprian Kambili, *A Guide to the Personal Property Security Act: The Case of Malawi* (PULP 2015); for Sierra Leone see Borrowers and Lenders Act, 2014; for Nigeria, see Central Bank

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PPSL reform, as aforesaid, is premised on the established claim that the unrestricted use of personal property as security[10] for credit,[11] expands access to finance and contributes to economic growth.[12] Economic growth is, inter alia, enhanced through the expanded access to credit finance made possible in large measure by an efficient PPSL framework, which allows for simplicity in the creation, and use of an extensive range of personal property as security for credit, for full value; and for such security to be taken and realized easily, cheaply and transparently.[13] The ease of using personal property as collateral for credit in a simple, cost effective framework is key for credit

of Nigeria - (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) (Regulations, No. 1, 2015).

[10] The contextual use of the word 'security' in this thesis connotes the conferment of certain contractual rights in personal property on a secured lender. 'Security' or 'securities' under the common law may mean different things depending on the context, however the use herein will be limited to the rights and privileges conferred on the secured creditor against the debtor and third parties in relation to the personal property. For detailed discussion on concept and varying meanings of a 'security interest', see Gilmore, *Security Interests in Personal Property* (n 7) 333–366; for a deep conceptual debate on the meaning and nature of 'security' under the English common law see also David E Allan, 'Security: Some Mysteries, Myths, & (and) Monstrosities' [1989] Monash University Law Review 337; Roy Goode, 'Security: A Pragmatic Conceptualist's Response' [1989] Monash University Law Review 361; Sarah Worthington, *Personal Property Law: Text and Materials* (Hart Publishing Limited 2000) 93–98.

[11] Credit in the most simplistic of meanings connotes the 'ability to borrow money; the faith […] to pay debts' Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (West, 2009) 424.; In the legal context, it means the 'deferment of payment for goods or services rendered at once or the straight lending of money', Geoffrey Crowther and others, 'Consumer Credit: Report of the Committee' (1971) 1, para 1.1.2. Credit has been described as 'the lifeblood of modern industrialized economy […and] fundamental to trade, commerce […] whether secured or unsecured'', 'Kenneth Cork, 'Insolvency Law and Practice: Report of the Review Committee' (1982) 10, para 10; a discussion on the justification for credit is, however, outside the scope of this research since this research is premised on the established empirical claim that 'credit is good'. The idea is that security exists because of credit. The basic proposition is that "[A] certain and predictable secured financing legal system will increase the credit amount that may be lent, lessen the cost of borrowing and enable loans to be made with a longer maturity. It should also help to build and develop a domestic economy by enabling private enterprise to develop and expand, increase markets and increase employment" Alejandro Alvarez de la Campa, 'Increasing Access to Credit through Reforming Secured Transactions in the MENA Region' xv; see Gilmore, *Security Interests in Personal Property* (n 7) 213; Tajti, *Comparative Secured Transactions Law* (n 2) 62.

[12] Gullifer and Akseli (n 3) 1; Nuria de la Pena, 'Reforming the Legal Framework for Security Interests in Mobile Property A New International Regimen Governing the Taking of Security in High-Value Mobile Assets' (1999) 4 Uniform Law Review 347, 347; see Haselmann, Pistor and Vig (n 3); Affaki (n 1); and the seminal work of de Soto, Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000).

[13] See the 'Principles for an Efficient Secured Transactions Law', Affaki (n 1) 14–16; also see European Bank for Reconstruction and Development, 'The EBRD Core Principles for a Secured Transactions Law' <http://www.ebrd.com/cs/Satellite?c=Content&cid=1395238688303&d=Mobile&pagename=EBRD%2FContent%2FContentLayout>; Gullifer offered the following view: 'It is not difficult to work out why having an efficient secured transactions law increases access to credit. A creditor is more likely to want to lend to a business or an individual if it can be sure of being repaid, and being able to take an effective security interest in an asset, which can be protected against other claimants to that asset and enforced easily and quickly, is bound to reassure a creditor that it is likely to be repaid, even if the borrower becomes insolvent' Gullifer and Akseli (n 3) 1.

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facilitation as well as economic growth.[14] In the ideal case, security interest ought to be created and enforced with "the maximum of flexibility and certainty and the minimum cost, delay and formality consistent with appropriate safeguards for the debtor's unsecured creditors and others dealing with the debtor".[15]

African States are joining the secured transactions law reform bandwagon mostly on account of the claim to improve access to credit finance.[16] Sierra Leone, being one of the latest African countries to join the PPSL reform movement, undertook legal reforms of its PPSL framework with the enactment of the Borrowers and Lenders Act 2014 (hereinafter: the "**BLA"**) acknowledging the need to provide a simple, transparent and basic legal framework for the use of personal property as security for credit.[17] The objective of this research, therefore, is to examine the PPSL reform in Sierra Leone, being partly representative of the reforming Africa countries, to determine whether the reformed framework supports the economic function of facilitating expanded access to credit finance.[18] Prior to the enactment of the BLA, this research avers that the PPSL framework in Sierra Leone was complex, fragmented, compartmentalised, restrictive and

[14] Dahan and Simpson refer to the criteria for the maximization of economic benefit, i.e., simplicity, speed, cost, certainty and fit-to-context as the 'legal efficiency' of secured transactions. Frederique Dahan and John Simpson, 'Legal Efficiency for Secured Transactions Reform: Bridging the Gap Between Economic Analysis and Legal Reasoning' (2008) 27 Penn St. Int'l L. Rev. 623, 634–638; The International Finance Corporation links accessing credit to 'economic growth' and also as 'the engine for private sector development', International Finance Corporation, 'Secured Transactions Systems and Collateral Registries' (2010) 6; see Frederique Dahan and John Simpson, *Secured Transactions Reform and Access to Credit* (Cheltenham, Edward Elgar 2008).

[15] Richard Calnan, 'What Is Wrong with the Law of Security?', *John de Lacy (ed) The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge 2009) 162.

[16] See fn. 9 above, and also see itemization of the reform in Africa in Asress Adimi Gikay, 'Rethinking Ethiopian Secured Transactions Law through Comparative Perspective: Lessons from the Uniform Commercial Code of the US' (2017) 11 Mizan Law Review 153, 154–55.

[17] Borrowers and Lenders Act, (n 9), see preamble.

[18] Recall Ghana and Nigeria do have legislations similar to the BLA in Sierra Leone, but Malawi opted for the UNCITRAL Model law. See Dubovec and Kambili (n 9); Marek Dubovec and Cyprian Kambili, 'Using the UNCITRAL Legislative Guide as a Tool for a Secured Transactions Reform in Sub-Saharan Africa: The Case of Malawi' [2013] Arizona Journal of International and Comparative Law 163; Borrowers & Lenders Act 2009 (Act No 773); see Dubovec and Osei-Tutu (n 8); Central Bank of Nigeria - (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) (Regulations, No. 1, 2015) (n 9); see Williams C Iheme and Sanford U Mba, 'Towards Reforming Nigeria's Secured Transactions Law: The Central Bank of Nigeria's Attempt through the Back Door' (2017) 61 Journal of African Law 131; Gikay (n 16) 154–155.

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obsolete.[19] These cumulatively made the cost of credit prohibitively high, particularly so for small and mid-scale enterprises (SMEs), the majority of business enterprises in Sierra Leone.[20] With the BLA adopting the Unitary Model, the essence of this research is to determine whether the reformed framework measures up to its economic objectives, and embedded with the core principles of cost efficient, simplicity, transparency and modernity in modern secured transactions law regimes. Ultimately, the findings and recommendations will have a broader appeal to other reforming countries in Africa bracket.

0.1. Background to the PPSL Reform in Sierra Leone and the Access to Credit Context

Sierra Leone's economic development has been strangled by political instabilities and economic shocks since its independence in 1961. In the 1990s, the country suffered a brutal and debilitating civil war which destroyed all fabric of its society, especially its economy.[21] In 2014, Sierra Leone's economy suffered two major shocks, and this was just after a decade of stability, legal and political reforms, and economic recovery since the civil war in 2002.[22] It first suffered a severe economic setback when it was struck by an Ebola epidemic in May 2014.[23] Curtailing and

[19] A similar argument was made by Calnan in his description of the state of English law on secured credit, Calnan, 'What Is Wrong with the Law of Security?' (n 15); and this rigid compartmentalization, fragmentation and incoherent have been reported on by successive studies of the English system. See Crowther and others (n 11) 175–181, especially para 4.2.1; Aubrey L Diamond, 'A Review of Security Interests in Property' (1989) 31–33, para 8.2.1-8.2.11; Law Commission, *Bills of Sale: A Consultation Paper* (Law Com CP 225 2015) 7–8, paras 1.30-1.40; Law Commission, *Bills of Sale* (Law Com No 369 2016) 7–9, paras 1.35-1.48.

[20] See the World Bank Group, 'Enterprise Surveys - Sierra Leone Country Profile 2009' (2010).

[21] For a detailed account of the civil war, it causes and effect, see Sierra Leone and Truth and Reconciliation Commission, *Witness to truth final report of the truth and reconciliation commission* (Graphic Packaging 2004).

[22] See International Monetary Fund, 'IMF Executive Board Concludes 2016 Article IV Consultation for Sierra Leone' *Press Release No. 16/327* (8 July 2016) <https://www.imf.org/en/News/Articles/2016/07/11/15/35/PR16327-Sierra-Leone-IMF-Executive-Board-Concludes-2016-Article-IV-Consultation> accessed 19 January 2017; World Bank Group, 'Country Data Report for Sierra Leone, 1996-2014' (2015) <http://documents.worldbank.org/curated/en/779451467996699335/Country-data-report-for-Sierra-Leone-1996-2014> accessed 26 March 2018.

[23] International Monetary Fund (n 22); also see World Bank Group (n 22); and on the initial update on the impact of the Ebola economy in Sierra Leone, see The World Bank, 'Update on the Economic Impact of the 2014 Ebola Epidemic on Liberia, Sierra Leone, and Guinea' (2014) <http://documents.worldbank.org/curated/en/577631468167373122/Update-on-the-economic-impact-of-the-2014-Ebola-epidemic-on-Liberia-Sierra-Leone-and-Guinea> accessed 26 March 2018.

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preventing the spread of Ebola meant affected areas had to be quarantined, a public health emergency declared, and these measures constrained economic activities, thereafter the country's economic outcome deteriorated abruptly, and economic growth 'declined dramatically from 20.7 percent in 2013, to 4.6 percent in 2014, and further to -21.1 percent in 2015'.[24] The public health led economic decline coincided with the second shock, the downturn of commodity prices in the global market which adversely affected the two major iron ore mining companies, the country's biggest revenue sources.[25] These challenges exposed the undiversified, but once rapidly growing economy, which was then left bereft of the support of a robust SME support base.

Incredibly, it was during the Ebola epidemic that the Bank of Sierra Leone (hereinafter: the "**Central Bank**"),[26] with financial support from the International Finance Corporation (hereafter: the 'IFC') and with external legal expertise, was actively engaged in the formulation, drafting and eventual enactment of the BLA.[27] The sponsors of the BLA propagated it to be the panacea to the problems of the prior-PPSL framework, being a fragmented and compartmentalized system, i.e. its legal sources found in statutes, case law, common law and rules of equity; which is very rigid and restrictive in the limited number of security devices, namely chattel mortgage, pledge, fixed and floating charge and consensual lien, available for the parties to secure personal property.[28] Not

[24] International Monetary Fund (n 22); Bank of Sierra Leone, 'Annual Report and Statement of Accounts for Year Ended 31st December 2015' 1–3 <https://www.bsl.gov.sl/BSL%20ANNUAL%20REPORT%20-%202015%20pdf.pdf>.

[25] "The advent of the Ebola virus in May 2014 and the subsequent acceleration of the outbreak in late July has put immeasurable strain on government and society more broadly, and is putting the solid achievements of the last twelve years at risk […]Although the economic effects of the Ebola epidemic are still unfolding it is evident that a sharp slowdown in economic activity is underway in 2014 that has already seen recent annual GDP growth projections made in June, revised from 11.3 percent to 4.0 percent […]"; The World Bank, 'Sierra Leone - Emergency Economic and Fiscal Support Operation Project' (2014) <http://documents.worldbank.org/curated/en/983051468094462978/Sierra-Leone-Emergency-Economic-and-Fiscal-Support-Operation-Project> accessed 26 March 2018, paras 1.2, 2.1 and 2.5; see also International Monetary Fund (n 22).

[26] The Bank of Sierra Leone is the country's Central Bank, acting as banker for the Government and regulator of the banking and financial sector. See Bank of Sierra Leone Act 2011, s 4.

[27] See the Bank of Sierra Leone, 'Sierra Leone Collateral Registry' (*About the Registry*, 2016) <https://www.slcr.gov.sl/Home/About> accessed 26 March 2018.

[28] See 2.3.1. herein.

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only was the cost of credit prohibitively high, averaging 21%,[29] lending interest rates accounting for an average 19% to an all-time high of 27% from 2000 to 2014,[30] but the credit market was also characterized by low volumes of credit and high default rates evidenced by the persistent high levels of non-performing loans (hereinafter: '**NPLs**').[31] The legal problems and uncertainties shrouding the use of personal property as collateral forced banks and financial institutions to rely primarily on real property mortgages, shutting business with no access to real property out of the credit market, especially SMEs.[32]

The data we get from the high levels of NPLs is the best available resource to measure the state of the credit market in Sierra Leone, obviously dominated by commercial banks and licensed financial institutions.[33] In December 2015, the Central Bank estimated the stock of NPLs to average 31.73%, but this was followed by a reduction of the average to 22.65% in December 2016.[34] The Governor of the Central Bank noted that the reduction in the stock of NPLs was attributed to loan write-off policy pushed through by the Central Bank under the NPLs

[29] Kaifala Marah, 'Bank of Sierra Leone Governor's Annual Dinner Speech 2017' (2017) 10. The Governor of the Central Bank Annual Dinner Speech is the most authoritative policy statement on the state of affairs of the monetary, financial and banking sectors in Sierra Leone.

[30] Lending rates on overdraft facility slightly declined from the range of 19.46 - 25.68 in July 2014 to 19.46 - 25.32 in August 2014, Bank of Sierra Leone, 'Sierra Leone: Monthly Economic Review August 2014' (2014) 16 <http://www.bsl.gov.sl/pdf/MER_Aug_2014.pdf>; the "benchmark interest rate in Sierra Leone was last recorded at 13 percent. Interest Rate in Sierra Leone averaged 19.56 percent from 2000 until 2018, reaching an all time high of 27 percent in October of 2000 and a record low of 9.50 percent in March of 2015", 'Sierra Leone Interest Rate 2000-2018' (*Trading Economics*, 2018) <https://tradingeconomics.com/sierra-leone/interest-rate> accessed 26 March 2018.

[31] Marah (n 29) 9–10; Momodu L Kargbo, 'Bank of Sierra Leone Governor's Business Lunch' (2015) 6, 9, 10–11; Patrick S Conteh, 'Bank of Sierra Leone Governor's Annual Dinner 2018: Promoting Inclusive Growth Through Financial Inclusion' (2018) 13–14; also see Eric Osei-Assibey and Baimba Augustine Bockarie, 'Bank Risks, Capital and Loan Supply: Evidence from Sierra Leone' [2013] Journal of Financial Economic Policy 256.

[32] The state of the law on land tenure and real property mortgages is not in an ideal state either, notwithstanding the reform relating to the Home Mortgage Financing. The dual land tenure system in Sierra Leone, and communal nature of land ownership outside of the Western Area inhibit the unfettered commercial use of land in the Provinces. Also, the system of registration of title to instrument and not registration of title to land in the Western Area means ownership contestation is high, increasing the risk and cost of transactions. For more on this, see Ade Renner-Thomas, *Land Tenure in Sierra Leone: The Law, Dualism and the Making of a Land Policy* (AuthorHouse 2010); *C J Seymour-Wilson v Musa Abess* [1981] Supreme Court S.C. CIV APP 5/1979, SLSC; Home Mortgage Finance Act 2009.

[33] See 3.2.1 and 4.1.2 herein.

[34] Marah (n 29) 9–10.

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restructuring and recoveries drive.[35] The high levels of NPLs, which is the product of an inefficient credit system, accounts for the low level of credit available for business firms, averaged at 5%, and further low level of contribution of the credit market to the national Gross Domestic Product (GDP), also averaged at 5%.[36] The Central Bank also took the view that the high rate of NPLs posed a major challenge to the banking sector, putting deposits at risk, and potentially creating major intolerable difficulties for financial stability.[37] Addressing the high rates of NPLs became both an access to finance issue and a concern for financial and economic stability.[38] There was, therefore, a clear need to address the problem of access to credit and review the legal and regulatory framework for secured credit, including the use of personal property as collateral.

0.2 The Central Problem – PPSL Reforms and the Substantial Deviations in the BLA

The BLA was enacted at the height of the Ebola epidemic with no concerted engagement of the relevant local stakeholders outside of the banking sector, including the legal community. There is no publicly available study of the PPSL framework before the 2014 reform which specifically identified the problems of the pre-reform system, and the nature of the reform needed to resolve the problems unlike other jurisdictions.[39] The significant study of note is the 1971

[35] ibid 10.
[36] ibid.
[37] Kargbo (n 31) 9–10; see Eric Osei-Assibey and Baimba Augustine Bockarie (n 31).
[38] As noted by the then Central Bank Governor, "It […was] incumbent that collective actions be taken to identify and resolve the bottlenecks in accessing finance particularly long-term finance in addition to strengthening the prudential guidelines in line with best practice". Kargbo (n 31) 9; Conteh (n 31) 13–14.
[39] For example, in the US, the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 1944 started the wholesale review of the law regulating commercial transactions which culminated into the UCC, part of which is Article 9; Richard F Duncan, William H Lyons and Catherine Lee Wilson, *The Law and Practice of Secured Transactions : Working with Article 9* (New York, NY : Law Journal Press, 2011), paras 1-5; In New Zealand its study of the credit system dates back to 1965 'When the Legal Research Foundation a study, completed in 1970' recommended reforms along the lines of UCC Article 9. See Anthony Duggan and Michael Gedye, 'Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change' (2008) 27 Penn St. Int'l L. Rev. 655; Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths 2012); Even in England, studies of the legal framework led to piecemeal reforms, see Crowther and others (n 11); 'White Paper Crowther Committee Report on Consumer Credit' (1973); Diamond (n 19); Cork (n 11); The Law Commission, 'Company Security Interests: A Consultative Report' (2004) Consultation Paper No 176; Law Commission, *Bills of Sale* (n 19); see John De Lacy, *The Reform of UK Personal Property Security Law: Comparative Perspectives* (New York: Routledge, 2009) 43, 47, 63 and 344.

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'Report of the Working Party on Capital Availability and Sierra Leonean Entrepreneurship' (hereinafter: The 'Cox-George Report'),[40] which detailed the inability of commercial banks to supply credit to the extent demanded on the one hand, and the banks contending that there was a lack of 'bankable projects' and collateral security on the other.[41] Notwithstanding this contention, the Cox-George Report on the supply of credit is dated and could not have served as the informed basis for the 2014 reform. Significantly, the Cox-George Report did not address the legal problems since it was mainly an economic study. In 2015, immediately after reform, the Central Bank identified the lack of trust, borrowers' malpractices (fraudulent loans) as some of the main reasons for the high rates of NPLs,[42] but a study on NPLs completed in 2017 has not been made public.[43] In fact only banking executives will benefit from the circulation of its economic outcomes as indicated by the Central Bank's Governor.[44]

The absence of a prior study of the PPSL framework before the BLA enactment has led to both a minimalist approach in the reform, i.e. reform intended to deal with the banks' related NPLs problem, and path dependency, wherein solutions offered in other countries are hastily applied without due consideration for local context.[45] The BLA's path dependency meant it unwittingly moved the PPSL framework towards the functional approach in the Unitary Model. However, the central claim herein is that the BLA substantially deviates from the modern secured transactions

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[40] Working Party on Capital Availability and Sierra Leonean Entrepreneurship / under the chairmanship of N. A. Cox-George, *Report of the Working Party on Capital Availability and Sierra Leonean Entrepreneurship* (Bank of Sierra Leone 1971).
[41] ibid 11–12, 17–20.
[42] Kargbo (n 31) 9–10.
[43] Marah (n 29) 20.
[44] ibid.
[45] Incredibly, the BLA led reform was both minimalist and path dependent. The BLA is limited in scope, i.e., its application limited to banks and other licensed financial institutions in Sierra Leone (minimalist), Borrowers and Lenders Act, (n 9), s 1. It is also path dependent in its almost wholesale copy of a similar but 'flawed' statute in Ghana, which had to be further reformed; Borrowers & Lenders Act (n 18); for detailed analysis of the flaws in the Ghanaian legislation, see Dubovec and Osei-Tutu (n 8); both legislations are inspired by the IFC secured transactions law toolkit, see International Finance Corporation (n 14).

law regimes, and the prevalent functionalism as typified by the Unitary Model. The fundamental argument is that the BLA is a defective legal transplant of a flawed model, 'IFC Toolkit' on secured transactions law, which has led to a flawed PPSL reform in Sierra Leone.[46] The BLA, although appearing to have adopted the Unitary Model, retains attributes of the English law formalism, which distinguishes the grant of security from reservation of title and calibrated along the continuum of property rights.[47]

Goode puts forward the argument of the fundamental divide between the functional and formal approaches in the conception of security interest in personal property.[48] Bridge et al. further argue that the difference between the two approaches is not only in the form of the security interest transactions, but in the location of title.[49] Whilst formalism is tied to the abstract construction of the place of title to property, in the conception of security interest in the functional approach, the fascination on the locational of title in the collateral as the determinant for the grant of security is rejected.[50] However, Bridge et al., in examining the U.C.C. Article 9 and its treatment of the tethering problems in distinguishing a security interest from 'true' leases, consignments, simple bailment and trusts, argue that the use of formal modes in resolving the problems is inescapable.[51] In agreeing with the fundamental divide argument, and despite the claim of reliance for formalist modes in resolving problems in the functionalist systems, this research further argues that the

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[46] See fn. 43.
[47] Royston Miles Goode, *Goode on Legal Problems of Credit and Security* (Louise Gullifer ed, Fourth Edition, Sweet & Maxwell 2008) 3–4. The calibrated property right continuum for 'security' included the reversed title by an unpaid seller, chattel mortgage, fixed and equitable charge, listed in the sense of proprietary strength in enforcement Bridge and others (n 7) 572-573.
[48] Goode views the divide between the functional approach and the formal approach as 'the most fundamental divide in the concept of security'. In explaining the concept of security, Goode noted that the 'formal approach is one which sharply distinguishes the grant of security from the retention of title […]'. Goode, *Goode on Legal Problems of Credit and Security* (n 47) 3–4.
[49] Bridge and others (n 7) 573.
[50] ibid 573–574.
[51] ibid 662.

essential elements of both approaches to PPSL are incompatible and cannot coexist efficiently, even within a parallel system.[52] At the conceptual level, a definitive approach needs to be adopted, and in the modern regimes the Unitary Model is the most appropriate guide.

The functional approach is conceptualized and embodied in the Unitary Model, i.e., U.C.C. Article 9, seen as 'a beacon for law reformers worldwide'.[53] The substratum of the Unitary Model is its 'building blocks' identified by Tajti as follows: First, the unitary and comprehensive conception of a security interest; second, registration and other perfection methods to tackle the 'secret lien' problem; third, the clear and systematic principles governing the priority system; fourth, the floating lien concept; and fifth, the enforcement system prioritizing the non-judicial enforcement scheme.[54] These characteristic pillars of the Unitary Model may be rationalized differently by different scholars,[55] but notwithstanding the rationalization/description, any deviation from the integral 'building blocks' of the Unitary Model, especially one with vestiges of the formal approach, is inherently conflicting and leads to inefficient PPSL framework.

[52] Countries whose PPSL frameworks were influenced by the formal approach, for example, the Canadian Province of Ontario, New Zealand and Australia, in undertaking PPSL reforms abandoned the formal approach for the functionality of the Unitary Model, including the reconceptualization of the floating charge, a very useful business security device within the formal approach. Jacob S Ziegel and David L Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis* (Butterworths Canada 2000) 49,127-128; see Ontario Personal Property Security Act, R.S.O. 1990, c. P.10, s 2.1.1 ; also see Hugh Beale, 'The Exportability of North American Chattel Security Regimes: The Fate of the English Law Commission's Proposals' [2006] Canadian Business Law Journal 178; Hugh Beale, 'An Outline of a Typical PPSA Scheme', *Secured Transactions Law Reform* (Hart Publishing Limited 2016); also see Hugh Beale and others, *The Law of Security and Title-Based Financing* (OUP Oxford 2012).
[53] McCormack, *Secured Credit and the Harmonisation of Law* (n 8) 80; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 3–4.
[54] Tajti also added the connection of PPSL and other fields of law, especially bankruptcy law and consumer protection; Tajti, *Comparative Secured Transactions Law* (n 2) 141, 392–397.
[55] Beale summarized the typical features of the personal property security acts (PPSA) schemes which followed closely the Unitary Model as follows: Creation by attachment and unitary notion of security interest, notice filing as the principal method for perfection, priority rules and the first to file general rule, no separate concept of floating charge, full set of remedies including self-help for enforcement. See Beale, 'An Outline of a Typical PPSA Scheme' (n 52); Ziegel thematised the Unitary Model on the basis of 'integration', 'rationalization' and 'modernization' of chattel security law. Jacob S Ziegel, 'Canadian Perspectives on How Far Is Article 9 Exportable' [1996] Canadian Business Law Journal 226, 226, 246–248.

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The Secured Transactions Law Reform Project, housed by Oxford University's Faculty of Law, was the first to argue that the BLA deviates from the modern secured transactions law regimes.[56] In this regard, the Project identified the limitation in the application of the BLA to banks and licensed financial institutions defined as 'lenders', and the unique credit market supervisory powers given to the Central Bank as examples of the deviations.[57] This research further identifies as unusual features the retention of the fixed and floating charge in the BLA, and the non-repeal of the existing/prior law on personal property security (hereinafter: the '**prior-PPSL**' or '**pre-BLA law**'), thereby introducing a parallel system, a seemingly unitary and functional system for banking and licensed financial institutions, as opposed to the retention of the prior-PPSL for non-bank creditors. Consideration has been given to the argument that the unusual features are idiosyncratic and necessary, therefore, providing justification to claim and herald a new hybrid approach to modern secured transactions law.[58] However, this research argues that there exists no economic utility, no legal or idiosyncratic justification for the unusual features in the BLA and they are consequently substantial deviations from the modern regimes governing secured transactions law and the paradigm Unitary Model. A conspectus of each of the substantial deviations follows below.

0.2.1 The Central Bank's Supervisory Powers and the Bank-Centered Credit Market

The reform leading to the enactment of the BLA in Sierra Leone, as aforesaid, was promoted by the Central Bank, and it did carve out a significant role for itself since it viewed the

[56] The Secured Transactions Law Reform Project had previously argued that 'the Sierra Leone legislation does deviate from modern secured transactions regimes in a number of respects. For instance, the scope of application is limited to "lenders", defined as commercial banks or other financial institutions licensed by the Bank of Sierra Leone, and the legislation includes a Chapter that regulates the supervisory and enforcement powers of the Bank of Sierra Leone'. Secured Transactions Law Reform Project, 'Sierra Leone' <https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/africa/sierra-leone/> accessed 28 June 2017; it followed similar argument relating to the 2008 B & L Act in Ghana; see Dubovec and Osei-Tutu (n 8).

[57] See Secured Transactions Law Reform Project (n 56), Sierra Leone.

[58] See 3.1 herein for arguments on the new and hybrid.

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BLA as part of the solution to resolve the NPLs problem.[59] For instance, the Central Bank is mandated to host the registry for the registration of security interests as a unit in the Bank (hereinafter: the '**Collateral Registry**'),[60] and more significantly, the Central Bank is authorized to 'promote the development of a fair, transparent, competitive and accessible credit market […and to] monitor the credit market' in Sierra Leone.[61] The Bank is also bound by statute to detect and prevent prohibited conducts in the BLA, receive complaints, conduct investigations and engage in credit literacy programs for public benefit.[62] This deep intrusion by a regulator is without doubt unusual whether viewed from the perspective of the Unitary Model, the personal property security acts (PPSAs) schemes, or even in the English formal system. The legal and cost implications incidental to the Central Bank's duties to monitor the credit market, receive and investigate complaints raise fundamental public interest issues relative to the effective use of public resources and overregulation. This research finds this approach to be a paternalistic regulatory scheme, which is economically unjustified, practically unenforceable, highly cost intensive, superfluous and redundant.[63]

Further, the BLA introduces the unusual feature of limiting the definition to a 'lender' to mean a commercial bank or a licensed financial institution in Sierra Leone,[64] thereby restricting the scope of the statute.[65] The restrictive scope solidifies a bank-led system in Sierra Leone, which occasions a banking concentrated credit market with the effect of strengthening the extant banking oligopoly. From the access to finance perspective, the banking concentration limits access to credit

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[59] Bank of Sierra Leone, 'Annual Report and Statement of Accounts for Year Ended 31st December 2013' 4 <http://www.bsl.gov.sl/pdf/Annual_Report_%202013.pdf>; see Kargbo (n 31); Marah (n 29); Conteh (n 31).
[60] Borrowers and Lenders Act, (n 9), ss 15 and 1.
[61] ibid, s 4 (1) (a) and (b).
[62] ibid, s 4 (1) (a) to (k) inclusive.
[63] See 4.1, especially 4.1.1 herein.
[64] Borrowers and Lenders Act, (n 9), s 1.
[65] See 3.2.1 herein.

and reinforces the existing widespread informal credit schemes, thereby adversely impacting on economic growth.[66] Banks and other licensed financial institutions already control 75% of the financial sector in Sierra Leone,[67] but with less than 10% of financial service (including lending) access point in terms of bank branches and per 100,000 adults, a ratio of 1 access point to every 1,686 of the 3.8 million economically active population.[68] In terms of credit, although 60% of SMEs in Sierra Leone operate accounts with formal institutions, less than 20% have access or have outstanding loans or lines of credit.[69] With about 87% of the population faced with total financial exclusion,[70] limiting the scope of the BLA does not represent the best policy choice. The restricted scope will all but lead to the strengthening of the formal banking oligopoly on the one hand, and the reinforcement of the informal market and shadow banking on the other hand. Indeed, the Central Bank is mandated by statute to promote a fair and efficient market, and in regulatory theory this is ideal to fill gaps in the market to promote the public interest. However, the restrictive approach is evidently market capture by the banking sector.[71]

0.2.2 The Floating Security Dilemma - Retention of the Floating Charges, the Unitary Model's Floating Lien and the PMSI

One marked difference between the Unitary Model and formal approach is the nature and characteristic elements of obtaining security interest over circulating assets. When the argument

[66] See 4.1.2 herein.
[67] Eric Osei-Assibey and Baimba Augustine Bockarie (n 31) 258.
[68] See sub-rubrics 'Comparing Access Points' and 'Access to Financial Services and Products' Bank of Sierra Leone, 'National Strategy for Financial Inclusion 2017-2020' (2016) 13–14, paras 3.4 and 4.1.
[69] ibid 12.
[70] In the year ending 2016, "Sierra Leone has 14 commercial banks, 17 community banks that are supervised by the BSL-regulated Apex Bank, 13 (2 licensed and 11 registered) microfinance institutions (MFIs), three mobile money operators, and 59 financial services association (FSA) who together serve 486,556 clients across the country. This represents only 12.64% of the economically active population of 3.8 million people". ibid 9, 14; see Joe Abass Bangura, 'Saving Money, Saving Lives: A Case Study on the Benefits of Digitizing Payments to Ebola Response Workers in Sierra Leone' (2016) <https://btca-prod.s3.amazonaws.com/documents/186/english_attachments/BTCA-Ebola-Case-Study.pdf?1502739794>.
[71] See 4.1.2 herein for the detailed argument.

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of the incompatibility of the two approaches is made, part of that argument is hinged on how the continuing lien in the Unitary Model, referred to as the 'floating lien' is conceptualized as opposed to the equitable floating charge in the formal system.[72] The BLA, although moving towards the approach taken in the Unitary Model, obtusely retains the English law security devices including the fixed and floating charge.[73] The equitable floating charge has proven to be a very useful device for business lending; however, it is fraught with significant limitations.[74] First, only incorporated entities can utilize it under Sierra Leone law; and second, the equitable charge does not attach until crystallization, thereby affecting priorities.[75] The floating security dilemma is resolved in the Unitary Model through the introduction the floating lien concept, and the use of the purchase money security interest (hereinafter: the '**PMSI**') to negate a floating security monopoly.[76] However, the BLA has failed to conceptualize the 'continuing lien', thereby deepening the floating security dilemma, wherein an equitable security device has been imported into the legal definition of security interest. This dilemma is, however, resolvable within the context of BLA by leaning on the models adopted by the Canadian Province of Ontario, New Zealand and Australia PPSAs, in the recharacterization of the equitable floating charge as a legal security interest.[77]

[72] See 4.2 herein.
[73] Borrowers and Lenders Act, (n 9), s 1.
[74] See Louise Gullifer and Jennifer Payne, 'The Characterization of Fixed and Floating Charges', *Company Charges: Spectrum and Beyond* (OUP Oxford 2006); Roy Goode, 'The Case for the Abolition of the Floating Charge', *Company Charges: Spectrum and Beyond* (OUP Oxford 2006); R Goode, 'The Exodus of the Floating Charge' [1996] Corporate and Commercial Law: Modern Developments (London: Lloyd's of London Press, 1996); Robert R Pennington, 'The Genesis of the Floating Charge' [1960] The Modern Law Review 630; See the following a detailed discussion on the problems associated with the floating charge; Joshua Getzler and Jennifer Payne, *Company Charges: Spectrum and Beyond* (Oxford University Press 2006).
[75] See 2.3.1.3 and 4.2 herein.
[76] See 4.2 herein.
[77] See New Zealand's Personal Property Securities Act 1999, s 40 (4); also see Michael Gedye, 'The New Zealand Perspective', *Secured Transactions Law Reform: Principles, Policies and Practice* (1st edn, Hart Publishing Limited 2016) 119, and the New Zealand Law Commission Report No. 8, (1989) 80 ; In the Australian PPSA the terminology floating charge is deemed as the PPSA's security interest over circulating assets, Personal Property Securities Act 2009, s 339; also see 'Australian Secured Transactions Law Reform', , *Secured Transactions Law Reform: Principles, Policies and Practice* (1st edn, Hart Publishing Limited 2016) 175–178.

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0.2.3 The Two-Tier PPSL Framework in Sierra Leone – the Advent of Legal Parallelism

The third, and, perhaps, most significant deviation in the 2014 reform is the retention of the Pre-BLA law, which is independent and parallel to the BLA. The BLA did not repeal the prior-PPSL, a failure which has led to the existence of a two-tier system for chattel security in Sierra Leone. This deviates from other modern secured transactions law regimes, most especially the Unitary Model. The drafters of the Unitary Model were sensitive to this 'legal parallelism' problem, and in the 1962 U.C.C. Article 9 the drafters noted that it was a comprehensive scheme aimed at regulating security interest in personal property, and that it supersedes existing law dealing with the extant security devices.[78] Further, the drafters advised that adoption of the U.C.C. Article 9 must correspond with the repeal of the existing statutes regulating personal property security interest, and for the statues on sales to be refined.[79] The failure to repeal the prior-PPSL in the enactment of the BLA has led to a substantive problem (a two-tier system) theorised as legal parallelism.[80] Lenders bound by both systems are compelled to comply with legal provisions in both systems, e.g., compliance with the first to perfect rule in the BLA and first to create rule in the prior-PPSL, to ensure priority of their security interests. With the two systems substantially different and conceptually incompatible, lending will attract further transaction costs and over-collateralisation.[81] However, it is argued that the treatment of the BLA as *lex specialis* in line with the Cape Town Convention on International Interests in Mobile Equipment[82] offers a short-term panacea to the legal parallelism problem.[83]

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[78] See Comments to § 9-101 of 0790 [US] Uniform Commercial Code - Secured Transactions 1962 601, 601.
[79] See Notes to § 9-102 of ibid 604.
[80] See 1.4 herein for more on the concept of legal parallelism.
[81] See 4.3 herein.
[82] UNIDROIT, 'Convention on International Interests in Mobile Equipment, 2001' <http://www.unidroit.org/instruments/security-interests/cape-town-convention> accessed 17 August 2017.
[83] See 4.3.2 herein.

0.3 About the Literature - Situating the BLA's Substantial Deviations in the Discourse

The literature on secured transactions law is enormous and unceasingly growing, and this is based on the economic importance and topicality of the subject.[84] It makes no sense to dedicate 'acres of papers and streams of ink' to repeat the existing discourse. The purport of this section, therefore, is to give a selective snapshot of the dominant literature critical for this research, and its geographical spread in order to situate the contribution of this work. The literature, without doubt, is primarily dominated by scholars from the matured and developed economies, including the US and Canada, Europe (covering England and the EBRD reforms in the CEE Region) and most recently New Zealand and Australia.[85] There are also notable contributions to the secured transactions law reform discourse from Latin America,[86] the OHADA countries in parts of West and Central Africa,[87] the international financial institutions (led by the World Bank Group) and other international organizations.[88]

Modern secured transactions law evolution is traceable to North America, specifically in the US, where Gilmore's *Security Interests in Personal Property*[89] presents an evergreen historical

[84] Notwithstanding the enormous and growing state of the literature on secured transactions law, there are two contrary trends that should be mentioned. There is the 'known known' in consumer finance and the spread of credit cards, which is pushing secured lending to the corner in some market segments; and the 'unknown unknown' relating to blockchain technology, its disintermediation method and impact on secured lending. This review will, however, focus on traditional discourse relating to secured lending.

[85] See Tajti, *Comparative Secured Transactions Law* (n 2) 24–26; in Continuant Europe the DCFR, which promotes a common standard in Europe, is a forerunner of the future of secured credit law in the EU. See Bar and Clive (n 8) bk IX.

[86] Most of the recent literature is underpinned by the seminal works of De Soto; see De Soto (n 12); Hernando De Soto, *The Other Path: The Economic Answer to Terrorism* (Basic Books 2002), and the recent focus is on the Model Inter-American Law on Secured Transactions (Model Law), approved by the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) on February 8, 2002.

[87] On OHADA harmonization objective including on security interest, see Renaud Beauchard and Mahutodji Jimmy Vital Kodo, *Can OHADA Increase Legal Certainty in Africa?* (World Bank 2011); Claire Moore Dickerson, 'Harmonizing Business Laws in Africa: OHADA Calls the Tune' (2005) 44 Colum. J. Transnat'l L. 17; Renaud Beauchard, 'OHADA Nears the Twenty-Year Mark: An Assessment' (World Bank 2012); Babatunde Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?' (2009) 42 Comparative and International Law Journal of Southern Africa 309; Nwogu (n 9).

[88] See notes 4, 5 and 8 above on the international movement to reform secure transactions law, the mandate given to the World Bank Group, and the work of international organizations on the subject.

[89] Gilmore, *Security Interests in Personal Property* (n 7).

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account of the conception and development of the U.C.C. Article 9. Gilmore's work is most authoritative on the pre-U.C.C. law relative to the independent security devices and the process leading to the Unitary Model. It is simply the 'Mecca' for scholars in the field, and a must read. It significantly outlines the rationale for the comprehensive treatment of security interest in the U.C.C. Article 9, which is a useful resource for any reforming country. Due to the fact that it is dated, Gilmore's classic must be read together with White and Summers' contemporary *Uniform Commercial Code,*[90] and the authoritative *Uniform Commercial Code, Official Text and Comments* by the American Law Institute and National Conference of Commissioners on Uniform State Laws.[91] The downside of the US literature is its predominant focus on US law and the lack of comparative perspectives. After the modernization in the US, the Canadian Provinces were the first to adopt the Unitary Model, and this was followed by contributions from scholars examining the various Provincial reforms and PPSAs.[92] Scholars focusing on the various PPSAs in Canada led the comparative secured transactions law movement, inquiring into the exportability of the Unitary Model, but mainly doing so on a cross-Atlantic basis involving the US, Canada and England.[93]

In England, the home of the common law and seat of formalism, the present-day literature increasingly covers the PPSL reform debate and the perceived City of London's opposition to a

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[90] James J White and Robert S Summers, *Uniform Commercial Code* (Sixth Edition, West 2012); also see James J White and Robert S Summers, *Handbook of the Law under the Uniform Commercial Code* (1988).
[91] *Uniform Commercial Code 2009-2010: Official Text and Comments* (West, 2009).
[92] The Provinces of Ontario and Saskatchewan were the first to jump on the U.C.C. Article 9 bandwagon. See Personal Property Security Act, R.S.O. 1990, c. P.10 (n 52); Ziegel and Denomme (n 52); Richard H McLaren and Katherine De Jong, *Secured Transactions in Personal Property in Canada* (Carswell 1989); Jacob S Ziegel, Benjamin Geva and Ronald CC Cuming, *Commercial and Consumer Transactions: Cases, Text and Materials* (Emond Montgomery, 1995).
[93] See Jacob S Ziegel, 'Canadian Perspectives on Chattel Security Law Reform in the United Kingdom' [1995] Cambridge Law Journal 430; Ziegel, 'Canadian Perspectives on How Far Is Article 9 Exportable' (n 55); Jacob Ziegel, 'The Travails of English Chattel Security Law Reform-a Transatlantic View' (2006) 1 Lloyd's Mar. & Com. L.Q. 110; see Bridge and others (n 7).

comprehensive reform in the form of the Unitary Model.[94] Firstly, it must be noted that the Law Reform Commission Reports provide solid accounts of the history and development of the English PPSL.[95] The said reports on English PPSL specifically recommended reforms in the shape of adopting the Unitary Model, since the formal approach is viewed as 'incoherent and inefficient, as well as regulating transactions according to their form and not their substance'.[96] The recommendation forms the foundation for the present discourse in England espousing on problems associated with credit and security, debating the ongoing development of the English law and the piecemeal reforms.[97] English law scholars predominantly underscore the utility in adopting elements of the Unitary Model, and this should put to an end the conceptual competition between the functional and formal approach, especially for reforming countries whose prior system was built on the English law approach.

[94] In the City of London Law Society Discussion Draft on its Secured Transactions Code and Commentary the City of London noted that the 'purpose of the Code is to create a new law of secured transactions, based on the existing law but simplifying and modernising it', and therefore, not a move towards the Unitary Model. Financial Law Committee, 'Secured Transactions Code and Commentary: City of London Law Society Discussion Draft' (2016) 5; Bridge and others (n 7) 648, 633–648; see also Gerard McCormack, 'Pressure by the Paradigm. The Law Commission and Company Security Interests', *The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge 2009).

[95] Crowther and others (n 11) pt IV, 154-181, paras 4.1.1-4.2.17; Diamond (n 19) ch 5, 16-19, paras 5.1-5.24; see also The Law Commission (n 39); 'Company Security Interests' (2005) Law Com No 296; Law Commission, *Bills of Sale* (n 19); Law Commission, *Bills of Sale* (n 19).

[96] The Secured Transactions Project details the long drawn out debate on English PPSL reform and also captures some of the piecemeal reforms; Secured Transactions Law Reform Project, 'History of Reform' <https://securedtransactionslawreformproject.org/reform-in-the-uk/history-of-reform/> accessed 29 March 2018; Crowther and others (n 11) 20–22, paras 1.3.7-1.3.21; Diamond (n 19) 35–42, paras 9.1.1-9.9.1; on notice filing debate, see The Law Commission (n 39); 'Company Security Interests' (n 95).

[97] See the authoritative Goode, *Goode on Legal Problems of Credit and Security* (n 47); also see selective contributions on De Lacy, *The Reform of UK Personal Property Security Law* (n 39); Beale and others (n 52); Richard Calnan, *Taking Security: Law and Practice* (Jordans Pub 2006); William James Gough, *Company Charges*. (Second Edition, University of Cambridge 1996); Getzler and Payne (n 74); Gerard McCormack, *Reservation of Title* (Sweet & Maxwell 1995); Fidelis Oditah, *Legal Aspects of Receivables Financing* (Sweet & Maxwell 1991); Louise Gullifer, 'The Law Commission's Proposals: A Critique' (2004) 15 Eur. Bus. L. Rev. 811; Gerard McCormack, 'The Law Commission Consultative Report on Company Security Interests: An Irreverent Riposte' (2005) 68 Modern Law Review 286; Calnan, 'What Is Wrong with the Law of Security?' (n 15); Goode, 'The Case for the Abolition of the Floating Charge' (n 74); Gullifer and Payne (n 74).

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The outright abandonment of the English law formal approach for the Unitary Model is exemplified by the New Zealand[98] and Australia[99] reforms.[100] The discourse in New Zealand and Australia has moved from consideration of moving towards the Unitary Model in their respective reforms to dealing with the challenges of implementing the PPSAs relative to the concept of path dependency, i.e., the tendency to rely on the prior and known system on the one hand, and the need to also juxtapose interpretations by the courts of the borrowed system on the new system on the other.[101] The discourse in New Zealand has progressed to the point of refinement, pedantic legal analysis but no longer the questioning of the rationale for the PPSA reform.[102] On this point of refinement, Australia wisely provided for periodic review of its PPSA law.[103] The 'Final Report' of the maiden review considered amongst other things "the effect of the reforms introduced by the [PPSA…]; the level of awareness and understanding of the Act; the incidence and causes of non-compliance with the Act; opportunities for minimizing regulatory and administrative burdens including cost; and opportunities for further efficiencies".[104] The discourse on PPSL reforms from New Zealand and Australia ought to have guided countries from similar common law legal families, like Ghana and Sierra Leone, but no such comparative lessons were borrowed.

[98] See Mike Gedye, Ronald CC Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers 2002); Linda Widdup, *Personal Property Securities Act: A Conceptual Approach* (LexisNexis NZ 2013); Mike Gedye, 'A Distant Export: The New Zealand Experience with a North American Style Personal Property Security Regime' (2006) 43 Canadian Business Law Journal 208; Mike Gedye, 'The Development of New Zealand's Secured Transactions Jurisprudence' (2011) 34 UNSWLJ 696.

[99] See Duggan and Brown (n 39).

[100] See Duggan and Gedye (n 39); also see Beale, 'An Outline of a Typical PPSA Scheme' (n 52).

[101] Widdup in the second edition of her book had to introduce Canadian cases to show how the courts have interpreted the PPSAs of Canadian Provinces to help deal with legal questions in New Zealand; see Widdup (n 98).

[102] See Gedye, 'The New Zealand Perspective' (n 77); Gedye, 'The Development of New Zealand's Secured Transactions Jurisprudence' (n 98); Duggan and Gedye (n 39).

[103] Personal Property Securities Act 2009 (n 77), s 343.

[104] Bruce Whittaker, 'Review of the Personal Property Securities Act 2009: Final Report' (2015) viii <https://www.ag.gov.au/Consultations/Documents/PPSReview/ReviewofthePersonalPropertySecuritiesAct2009FinalReport.pdf>; see David Carter and Elena Klishkovska, 'Final Report on Review of PPSA Released' (2015) 67 Governance Directions 245.

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In addition to drawing lessons from countries within a similar legal family, there is a rich body of literature from emerging economies, model law from international organizations for prospective reforming states to consider.[105] Outside of the comparative work done on exportability of the Unitary Model and the reforms in Canada, New Zealand and Australia, including the reform debate in England, Tajti's *Comparative Secured Transactions Law*[106] presents an idiosyncratic examination of the Hungarian reform efforts with comparative insights from the Unitary Model, Canada, England and the German *numerus clausus in rem* rights-based system.[107] Whilst the common law and civil law comparative nexus was evident in Tajti's contribution, what is more significant for this research are his 'building blocks' of the U.C.C. Article proposal.[108] Tajti's proposal structures the U.C.C. Article 9 on the basis of the 'building blocks', which introduces substantive indicators detailing the main features of the US law; thereby concretizing Ziegel's abstraction of the Unitary Model on the themes of 'integration, rationalization and modernization'.[109] Tajti's 'building blocks' are substantively mirrored by the outline of the PPSA schemes,[110] and to a large extent the UNCITRAL Model Law.[111]

In Africa, and particularly outside of the OHADA region, there exists a conspicuous gap in the region-specific literature relative to the reform of modern secured transactions law. There

[105] Malawi, for example, adopted the UNCITRAL Model Law in its PPSL reform. See Dubovec and Kambili (n 9); Dubovec and Kambili (n 18); United Nations Commission on International Trade Law (n 8); McCormack, *Secured Credit and the Harmonisation of Law* (n 8); UNIDROIT (n 82); Spiros V Bazinas, 'UNCITRAL Draft Legislative Guide on Secured Transactions' [2005] Uniform Law Review 141; Roy Goode, 'The Cape Town Convention on International Interests in Mobile Equipment: A Driving Force for International Asset-Based Financing' (2002) 7 Uniform Law Review 3.

[106] Tajti, *Comparative Secured Transactions Law* (n 2); for a global comparative outlook, see Philip Wood, *Comparative Law of Security Interests and Title Finance* (Sweet & Maxwell 2007); Paul Ali, *The Law of Secured Finance: An International Survey of Security Interests over Personal Property* (OUP Oxford 2002).

[107] For discussions on Germany and Hungary, see Tajti, *Comparative Secured Transactions Law* (n 2) 261–292 and 293-315 respectively.

[108] ibid 141, 392–397.

[109] Ziegel, 'Canadian Perspectives on How Far Is Article 9 Exportable' (n 55) 246–247.

[110] Beale, 'An Outline of a Typical PPSA Scheme' (n 52); see Beale, 'Exportability of North American Chattel Security Regimes' (n 52); Gullifer and Akseli (n 3); Beale and others (n 52).

[111] See United Nations Commission on International Trade Law (n 8).

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are, however, creeping contributions with respect to the call for reforms,[112] and critical analysis of reform projects on the aegis of the global reform movement.[113] Malawi, being one of the LDCs,[114] reformed its PPSL framework and opted for the UNCITRAL Model Law,[115] a largely compromised international instrument influenced by the Unitary Model, and Continental Europe's fascination for security interest assignment.[116] Although the adoption of the UNCITRAL Model Law offers a break from the prior law, the challenge is mostly in its transition and application in the local context, a process made difficult by the lack of case law interpretation of the mixed perspective consolidated in the international instrument.[117] However, before the Malawian reform, Ghana was credited as potentially the first African country to 'have established a modern and efficient legal framework for security interest in personal property'.[118] Dubovec and Osei-Tutu were the first to address the issue of the flawed reform and deviations in the Ghanaian Borrowers and Lenders Act 2009.[119] They argue that the legislation did not follow a methodical approach where local context is regarded;[120] and that the legislation did not measure up to international standards and hence a partial secured transactions law.[121] Their contribution was the first to fully tackle the issue of reformed PPSL frameworks deviating from the schemes in the modern regimes

[112] On calls for PPSL reform in Nigeria and the OHADA security interest regime in Cameroun, see Chima Williams Iheme, *Towards Reforming the Legal Framework for Secured Transactions in Nigeria: Perspectives from the United States and Canada* (Springer 2016); Nwogu (n 9); on the present Nigerian PPSL, see Imran O Smith, *Nigerian Law of Secured Credit* (Ecowatch 2001).
[113] See Dubovec and Osei-Tutu (n 8); Dubovec and Kambili (n 18); Dubovec and Kambili (n 9); Iheme and Mba (n 18).
[114] See UNCTAD, 'UN Recognition of Least Developed Countries (LDC)' (2016) <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-recognition-of-LDCs.aspx> accessed 26 March 2018.
[115] See Dubovec and Kambili (n 9); Dubovec and Kambili (n 18); Gullifer and Akseli (n 3).
[116] Ulrich Drobnig and Ole Böger, *Proprietary Security in Movable Assets* (Sellier European Law Publishers 2015) 211; see McCormack, *Secured Credit and the Harmonisation of Law* (n 8).
[117] See the Chapter 8 of Dubovec and Kambili (n 9) 159 et. seq., on 'Transitional Matters and Applicable Laws'.
[118] See abstract to Dubovec and Osei-Tutu (n 8).
[119] Borrowers & Lenders Act (n 18); see Dubovec and Osei-Tutu (n 8).
[120] Dubovec and Osei-Tutu (n 8) 79.
[121] ibid 79, 105–106.

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for secured transactions law.[122] The flawed or defective reform argument is also an issue in the Nigeria 2015 piecemeal reform.[123]

This research furthers the discourse on the flawed reform in Sierra Leone, and does so from a conceptual basis, i.e. pitting functionalism against formalism, and in the substantive consideration of the fundamental flaws described as substantial deviations in the BLA. On the conceptual level, this thesis disagrees with the concluding argument by Bridge et al. in their claim that 'functionalism is in fact not the answer, not even part of the answer, to the reform of the law of secured transactions. [And that] Functionalism is, at best, the question';[124] and avers that from the economic utility and access to credit perspectives, functionalism is the contemporary answer to PPSL reform since formalism has proven to be inadequate. On the substantive level, this research pushes the discourse on the 'substantial deviation' from the cursory identification and fleeting engagement in the existing literature, especially on the regulatory intervention,[125] and further considers the floating security dilemma, the influence of the law and development movement in modern PPSL reforms, the defective legal transplantation and the unique legal parallelism problem in the two-tier system in Sierra Leone. The advent of this new PPSL parallel framework is, without doubt, a new phenomenon in the modern secured transactions law discourse.

0.4 A Note on the Research Methodology

This research is a desk review and it employs primarily the comparative law method[126] as the most appropriate methodology to evaluate the reform in Sierra Leone. The research also

[122] See 3.1 herein.
[123] See Central Bank of Nigeria - (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) (Regulations, No. 1, 2015) (n 9); Iheme and Mba (n 18).
[124] Bridge and others (n 7) 577.
[125] See Dubovec and Osei-Tutu (n 8); Secured Transactions Law Reform Project (n 56); Iheme and Mba (n 18).
[126] Comparative Law method is defined as the 'study of the principles of legal science by the comparison of various systems of law'. Garner and Black (n 11); see Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford University Press, USA 1992); Edward J Eberle, 'The Methodology of Comparative Law' (2011) 16 Roger Williams University Law Review 51.

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employs, as additional methodologies, the doctrinal law analysis[127] to establish the current, accurate and complete statement of the law on PPSL in Sierra Leone;[128] and aspects of regulatory theory within the economic analysis of law school[129] to resolve the substantial deviation dealing with the deep regulatory intervention by the Central Bank in the secured credit market. The choice of the comparative law methodology is justified by both practical and academic reasons. From a practical viewpoint, the research commenced just months after the enactment of the BLA, and therefore, there is neither enough time nor available data to engage in empirical studies to investigate or otherwise determine the success or failure of the reform in Sierra Leone.[130] From the scholastic lens, the choice of the comparative law method is justified from the perspective of providing the platform for evaluating the reform in Sierra Leone from the conceptual level, since the method offers the scope to examine the fundamental divide in the conception of security in modern secured transactions law from the lead functionalist and formalist jurisdictions.

The comparative law methodology adopted herein operates at two levels: Firstly, the conceptual level dealing with the concepts and notions embodying the functional and formal theoretical approaches to modern secured transactions law; and secondly, it considers the

[127] See Terry Hutchinson, 'Doctrinal Research, Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013).

[128] Gullifer in describing the complexity involved in understanding the English law on taking security stated that to 'understand it properly, one needs to be a historian, not just of the law, but of the economic imperative which has shaped a particular country'. Gullifer and Akseli (n 3) 1. In using the doctrinal law analysis, the tendency to cover the historical development of the law will be needed in Sierra Leone to arrive at the accurate and complete statement of the law, an exercise which will be undertaken in Chapter 1, especially relating to the Pre-BLA law.

[129] See Richard A Posner, 'Theories of Economic Regulation' [1974] The Bell Journal of Economics and Management Science 335; William D Berry, 'Theories of Regulatory Impact: The Roles of the Regulator, the Regulated, and the Public' (1982) 1 Review of Policy Research 436; Thoralf Dassler, 'Combining Theories of Regulation – Proposing a Framework for Analysing Regulatory Systems Worldwide' (2006) 14 Utilities Policy 31; Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business 2014); Alan Schwartz, 'The Law and Economics Approach', *Universal economics: Assessing the achievements of the economic approach* (Paragon House Publishers 1992).

[130] The Comparative Method also posed some challenges, albeit scalable. Whilst it was easy to access English and US literature, accessing literature from Sierra Leone, especially case law was difficult. The absence of law reports in Sierra Leone since 1985 made accessing case law burdensome and laborious. Since most of the pre-BLA law is common law, getting cases through the unpublished/unreported compilation by the Judiciary was the only means to arrive at the complete, current and accurate statement of the law, done through case by case study.

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functional utility level, i.e., examining the economic and pragmatic function of the two competing conceptual notions of a security interest.[131] This is said to be both the epistemological and evaluative functions of comparative law, i.e., to understand a law and determine the better law respectively.[132] Since the object of the comparative law method herein is to address the structural flaws in the BLA and the attendant parallel PPSL system in Sierra Leone, the comparative scope covers both internal subject matter context (the subject specific models), and interdisciplinary look at economic analysis of law, as aforesaid, on regulatory theory in competition law.[133] This comparative approach takes into consideration the political, cultural and social factors that may affect secured credit in the recipient jurisdiction, and those that have moulded the legal frameworks in the model jurisdictions.[134] The contextualization of the Unitary Model's 'building blocks' to fit local nuances in Sierra Leone is, therefore, crucial in the use of the functional use of comparative law as the method to evaluate the reform.

0.5 The Comparative Jurisdictions – Why the United States and England?

The comparative law method presupposes comparing the law(s) of other jurisdiction(s), i.e., foreign law(s), to understand the law of the jurisdiction that is the focus of a study,[135] herein Sierra Leone, and that of the US and England as the foreign comparators. The US and England are chosen on the basis of both jurisdictions being the ideological home of the functional and formal

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[131] On the functional method of comparative law, see John C Reitz, 'How to Do Comparative Law' 46 American Journal of Comparative Law 617; Ralf Michaels, 'The Functional Method of Comparative Law' [2006] The Oxford Handbook of Comparative Law 339.
[132] Michaels (n 131) 364–365, 373–376.
[133] See 4.1 herein.
[134] The comparative Law method often involves some level of commitment to interdisciplinary study and further includes all legal formant in the society, including the political and social features, which influences the shape of the law. Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Studies 232, 328; see Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' [1991] The American Journal of Comparative Law 1; Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' [1991] The American Journal of Comparative Law 343; Eberle (n 126).
[135] Eberle (n 126) 52.

approaches to modern secured transactions law respectively.[136] As such, both jurisdictions provide the theoretical and substantive features to facilitate conceptual and functional comparative study in evaluating and understanding the PPSL reformed framework in Sierra Leone. Since this research claims that the reform in Sierra Leone is defective, owing to the manifestation of the substantial deviations, policy and legal recommendations put forward to remedy the flaws have been based on the functional comparative law method. As the product of evaluating the reform in Sierra Leone and discourse on the substantial deviations, the said recommendations for further reform follow the basic ideological and characteristic elements of the Unitary Model. This suggests an affirmative answer to the critical question on the exportability of the Unitary Model.[137] Further consideration and quick reference to the PPSA reforms in the Canadian Province of Ontario, New Zealand and Australia, referred to herein as the 'Other Jurisdictions', is made with regards to their nuanced treatment of elements of the Unitary Model to fit local context. One such issue is the reconceptualization of the floating charge to the continuing (floating) lien.[138]

0.5.1 The United States and the Unitary Model's Functionalism

This study fundamentally proposes a rethink of the 2014 reform in Sierra Leone through the 'building blocks' of the Unitary Model, i.e., the U.C.C. Article 9. This comparative methodology is suggestive of transplanting the fundamental elements and/or the basic ideology of

[136] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 3–4; Bridge and others (n 7).

[137] Comparative law presupposes legal transplantation and the exportability of the superior law as one of the benefits of the comparative studies. Exportability in the lens of legal transplants, is a historical practice of moving 'a rule or a system of law from one country to another or from one people to another'. Article 9 of the U.C.C. is 'tried and tested' regime, and the key structural features and elements it must be assumed serve as a model to other jurisdictions for transplantation to take place. The Unitary Model 9 is said to be saleable (exportable) to other jurisdictions, and there are examples inclusive of the Canadian Province of Ontario, New Zealand, Australia where such exportations have been successful. As Ziegel puts it, '[S]o far as common law […] is concerned, the basic themes of Article 9 - integration, rationalization and modernization of chattel security law - have found a fertile soil' in reforming countries. Ziegel, 'Canadian Perspectives on How Far Is Article 9 Exportable' (n 55) 227, 246–247; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974) 21; Beale, 'Exportability of North American Chattel Security Regimes' (n 52) 178; Drobnig and Böger (n 116) 213; see Gedye, 'Distant Export' (n 98).

[138] See 4.2 herein.

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the Unitary Model, a 'tried and tested' regime.[139] The choice of the US is certainly based on the almost unanimous academic view that the Unitary Model is the most superior approach to the use of personal property as security for credit in the modern era.[140] The view by scholars is supported by the economic success of the Unitary Model.[141] On this basis, the Unitary Model, as aforesaid, influenced and was used as the model for reformed jurisdictions in various Canadian Provinces,[142] New Zealand and Australia. The Unitary Model also directly or indirectly influenced the secured transactions law reforms in the CEE region, from Albania through Lithuania;[143] and Malawi and Liberia in Africa, the new reform frontier.[144] The substantial scrutiny of the Unitary Model by the US courts has further offered well-developed case-law to support in-depth intellectual inquiry and examination of the fundamental features. The choice of US is, therefore, justified by not only the almost unanimous academic consensus, but also because of the unrivalled opportunity its jurisprudence affords for a comparative study and understanding, as opposed to using the UNCITRAL Model Law or the IFC Toolkit with limited or no case law.

0.5.2 The English PPSL's Formalism, and Nexus to Sierra Leone's Prior-PPSL Law

[139] Importing elements from Article 9 of the UCC does not suggest a cut and paste approach. The debate on the exportability of the UCC Article 9 has moved from a wholesale adoption or 'cut and paste' approach. The focus will be on understanding the rationale behind the provisions in the US law and making suggestion for Sierra Leone with necessary adjustments to local nuances.

[140] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 3; McCormack, *Secured Credit and the Harmonisation of Law* (n 8) 80, 101; Ziegel and Denomme (n 52) IXV; Howard Ruda, 'Article 9 Works--How Come' (1994–1995) 28 Loyola of Los Angeles Law Review 309, 309; but Bridge et al. felt the Article 9's appeal is not universal, citing amongst other things the English law resistance to adopt the Unitary Model, concluding that 'functionalism is in fact not the answer, not even part of the answer, to the reform of the law of secured transactions. Functionalism is, at best, the question'. Bridge and others (n 7) 571, 577; and McCormack is weary of the global urge to reform local law in tune to paradigm, herein the Unitary Model, even if the local law may not need fixing/reforming; see McCormack, 'Pressure by the Paradigm. The Law Commission and Company Security Interests' (n 94).

[141] Robert E Scott, 'The Politics of Article 9' (1994) 80 Virginia Law Review 1783, 1785; Ruda (n 140) 309; Bridge and others (n 7) 569–570.

[142] Ontario (R.S.O. 1990, c. P-10); Manitoba (R.S.M. 1987, c. P-35, replaced by S.M. 1993, c. 14; Saskatchewan [S.S. 1993, c. P-6.2]; Yukon Territory [R.S.Y. 1986, c. 130]; Alberta [S.A. 1988, c. P- 4.05]; British Columbia [R.S.B.C. 1996, c. 359]; New Brunswick [S.N.B. 1993, c. P-7.1]; Nova Scotia [S.N.S. 1995-96, c. 13]; Prince Edward Island [S.P.E.I. 1997, c. 33]; and Newfoundland [S.N. 1998, c. P-7.1. Bridge and others (n 7) 569, see fn. 4.

[143] For an examination of the refrom in Lithuania, see Tibor Tajti, *Security Rights and the European Insolvency Regulation* (Gerard McCormack and Reinhard Bork eds, Cambridge: Intersentia, 2017).

[144] Wood (n 106) 503, 511–512, 785.

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The rationale for the use of English law as one of the comparative jurisdictions is grounded on two significant factors: First, English law, as aforesaid, is the ideological home of the formal approach to modern secured transactions law, and therefore, employed as the conceptual and substantive comparative counterpart to the Unitary Model's functionalism. Second, the use of English law is further linked to its wholesale adoption in Sierra Leone, thereby being the root of the Prior-PPSL Law in Sierra Leone, cementing formalism in the framework before the 2014 BLA enactment.[145] Recall that English law formalism is said to be fraught with doctrinal rigours which have delineated its conceptual inefficiencies wrapped around its inherent complexity, compartmentalization, and restrictiveness.[146]

Notwithstanding the conceptual limitations associated with English PPSL formalism, there is resistance to reform in line with the Unitary Model's functionalism, and the resistance to such fundamental reform in England is partly attributable to the economic success of its system, honed by high levels of specialization (both legal and non-legal).[147] Therefore, the conceptual criticism of the English PPSL framework must not be mistaken to equate to economic inefficiency, in view of the 'legal efficiency' and 'economic maximization' arguments relied on by other reformers.[148] Rather the English framework is illustrative of the importance of the fit-to-context criterion in the

[145] On the nexus claim, it must be noted that the legal system in Sierra Leone is rooted in English law since the colonization of Britain of the former. Sierra Leone, albeit a pluralistic legal system, fuses customary law and English law, known as general law. English jurists argue generally that the doctrine of reception dictates that English colonialism inherently and automatically includes application of English law. The declaration of Sierra Leone as a crown colony in 1808 meant English law applied from thereon. In 1857 however, an ordinance formally confirmed the application of English law, that is, the common law and principles of equity, statutory law in force in England applied to the Colony of Sierra Leone. The Courts Acts of 1965 brought the reception date of English law forward to 1880 in Sierra Leone. The reception clause therein which subsist to date, is the fulcrum for applying English law in the present PPSL framework. This invariable leads to the second point, which is the adoption of the formalism being part of the received law package from England. See William Blackstone, *Commentary on the Laws of England* (1765); Renner-Thomas (n 32) ch 30, 27 et seq. Courts Act 1965, s 74; and Ordinance No. 96 of 1857.

[146] See Calnan, 'What Is Wrong with the Law of Security?' (n 15); and also see the impetus and calls for reforms in the Law Commission Reprots; De Lacy, *The Reform of UK Personal Property Security Law* (n 39).

[147] See McCormack, 'Pressure by the Paradigm. The Law Commission and Company Security Interests' (n 94); Bridge and others (n 7).

[148] See Dahan and Simpson, 'Legal Efficiency for Secured Transactions Reform' (n 14).

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substantive structuring of a PPSL framework notwithstanding the theoretical underpinnings. This, however, is not the case for countries which adopted the English law formalism, with little or no specialization or local content or fit-to-context refinement, as in the case of Sierra Leone. The economic efficiency within the formal approach may be unique only for the English system. Essentially, English law provides the sound basis to engage in the conceptual debate between formalism and functionalism in the context of PPSL reforms, especially for countries like Sierra Leone whose legal system is rooted in English law but reforming its PPSL framework towards the Unitary Model.

0.6 The Dissertation Road Map

This research is divided into two main parts, and further sub-divided into seven chapters exclusive of this introduction and the conclusion. **Part I** contains Chapters One to Four and mostly addresses the research problem, that is, the access to credit predicament in Sierra Leone and the substantial deviations in its BLA. **Chapter One** presents the theoretical framework of the research, and it addresses the three main theoretical constructs underpinning the research, i.e., the law and development, legal transplants theory and legal parallelism. The chapter answers the critical question of whether legal transplant theory provides the framework to support a defective legal reform influenced by a global reformist agenda underpinned by the law and development movement. **Chapter Two** presents a doctrinal and evaluative account of the Prior-PPSL and highlights its formalistic roots, its extant problems of compartmentalization, complexity, restrictiveness, opacity and nexus to the access to credit problem that instigated the reform in 2014.

Chapter Three presents a detailed analytical overview of the BLA, mainly outlining the theoretical movement towards functionalism. It is a systematic examination of the structure of the BLA based on the 'building blocks' of the Unitary Model. It also identifies the features in the BLA

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not usually found in the Unitary Model nor the PPSA schemes (the '**unusual features**'), and also highlights the three main substantial deviations. The chapter situates the BLA within the PPSL framework in Sierra Leone, following a robust claim that the BLA is indeed a secured transactions law. **Chapter Four** addresses the thesis statement that the BLA substantially deviates from the Unitary Model's framework, and the deviations do not only have the propensity to limit access to credit finance, but unwittingly, the two-tier system has occasioned a dysfunctional parallel system for secured transactions in Sierra Leone. The chapter concludes with a proposal for the BLA to be construed as *lex specialis* thereby resolving the legal parallelism problem, at least in the short-term.

Part II, being the positive side of the Janus coin, explores the opportunities to expand access to credit finance associated with the functional philosophy introduced by the BLA. **Chapter Five** looks at the prospect to enhance agricultural financing in Sierra Leone given the economic importance of the sector in Sierra Leone. Over half of the GDP in Sierra Leone is based on agriculture,[149] and this economic significance leads to the examination of the new framework on the prospect of improving agricultural financing on the basis of paternalism and/or special treatment. **Chapter Six** similarly looks at how the BLA functionalism provides the basis to optimize inventory and receivable financing. This is significant for the development and growth of SMEs in Sierra Leone, the majority of business firms in Sierra Leone. With inventory and receivables being the most valuable forms of security available for SMEs, the less formalist approach ushers in a lease of life for credit finance starved firms. **Chapter Seven** covers title financing or reservation of title, a notion that is at the heart of the conceptual differences between the Unitary Model and English law. As the strict distinction between the reservation of title for

[149] See 5.1 herein.

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sale or for credit in the Prior-PPSL law has been abandoned for the all-encompassing conception of security in the BLA, this chapters looks at the prospect to stimulate growth in consumer credit lending.

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Chapter One

1. The Theoretical Framework of the Dissertation

This Chapter identifies and unpacks the two main theoretical constructs which underpinned the 2014 PPSL reform in Sierra Leone, and further examines a third theoretical notion which emerged as a result of the flaws in the said reform process. The Chapter pinpoints law and development theory as the underlying theoretical concept that shaped the PPSL reform in Sierra Leone, and legal transplant theory is proposed as the abstract vehicle to understand the reason why the reform process was flawed. And as such, a level of engagement with the theories is imperative in order to investigate the relationship between the said PPSL reform and the emergence of the substantial deviations in the BLA on the one hand; and the advent of legal parallelism as a product of the two-tier PPSL framework on the other hand. The impetus for a theoretical discourse is hinged on the inclusion of the unusual features in the BLA, referred to as the substantial deviations,[150] and the need to properly unearth and appreciate the process that gave rise to their incorporation into the BLA. Consequently, the theoretical discourse aids the process of discovery with respect to the abstract influencers of the reform in Sierra Leone, the implementation process and practices revolving around the said theoretical constructs, including the conduct of internal and external sponsors of the reform process.

The basic premise of this theoretical framework is that law and development and legal transplant theories are the fundamental concepts that underpin and enable the global reform agenda for modern secured transactions law, providing the platform to bridge the mandate given to the World Bank Group, including the work of other IFIs,[151] and the robust hypothesis that links law reform to economic development, i.e., law reform acting as a means to achieve economic

[150] See 0.2 and Chapter 4 herein for discussions on the substantial deviations.
[151] See Introduction, fn. 4; also see de la Pena (n 12).

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development. To develop this basic premise, this Chapter outlines the main principles linking law to economic development, the criticisms associated with the claim, and further proposes that legal transplant theory as the conceptual answer to the criticisms associated with the law and development claim, and its principal function, which is the transfer/borrowing of laws from developed to developing economies. The ultimate aim is to root law and development claim in the historical commonality of the transfer of laws from one society to another. The objective is not so much about testing the robustness of the theories as the motive is to create a path to resolve the flaws in the reform process in Sierra Leone.

1.1 Law and Development Movement and the Global Law Reform Agenda

Law within the lens of a reformist or in the comparative law context is binary. It is on the one hand, a measure of identity, encompassing the norms, practices and system of rules of a particular society; and on the other hand, it represents the norms, practices, system of rules adopted from one society to another even without conscious efforts. The former has been described as the 'law of the people (*Volksrecht*) […embodying] the spirit of the people (*Volksgeist*)',[152] and the latter is known as legal transplant or law developed by means of transferred norms.[153] Whilst the practice of receiving system of rules, norms, legal traditions and conventions of another society has been commonplace in human history, the legal transplant concept was only coined in the 1970s.[154] However, from time immemorial, there are accounts of the transfers of laws or system of rules from one society to another, whether on the basis military conquest, colonisation and other non-voluntary transplantation.[155] In the modern era, the practice of voluntary transfer of laws from

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[152] Watson (n 137) 21.
[153] ibid.
[154] Watson (n 137).
[155] Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 The American Journal of Comparative Law 163, 165–166; see Watson (n 137).

one society to another follows the perception that the received law is superior and/or promotes development.[156]

The embodiment of the law, especially within the lens of legal reformist school, has moved beyond the notion of a shared consciousness of the people, particularly in business law and the proper functioning of the market. Watson, for example, argues for the most part that "most of the private law of all the modern legal systems of the Western world [and some] non-Western countries […were derived] from either the Roman Civil Law or English Common Law".[157] People's law is strangely not just the embodiment of the spirit of the people, but also a blend of rules from varying traditions, jurisdictions and systems. Legal transplant theory, therefore, appears to provide a lifeline for the transfer of rules from one country to another, irrespective of the underlying rationale.[158]

In modern secured transactions law, the underlying rationale for reform is the acceptance of the claim establishing the nexus between an effective and efficient legal framework that supports increased lending, i.e., expanded access to credit finance, and its stimulation of economic growth.[159] This 'legal efficiency' hypothesis in secured transactions law resonates with the core principle of the law and development movement, i.e., law reform seen as a means to promote economic development.[160] The law and development movement recognized the impact of

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[156] See Watson (n 137); Kenneth W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press 2007); Kevin Davis and Michael Trebilcock, 'The Relationship between Law and Development: Optimists versus Skeptics' (2008) 56 American Journal of Comparative Law 895; Berkowitz, Pistor and Richard (n 155).
[157] Watson (n 137) 22.
[158] The enduring contention in this field is the disagreement between Watson and Legrand on ease or impossibility of legal transplant respectively. See Watson (n 137); Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European and Comparative Law 111.
[159] See Introduction, fn. 13 and 14. Also see Dahan and Simpson, 'Legal Efficiency for Secured Transactions Reform' (n 14).
[160] Elliot M Burg, 'Law and Development: A Review of the Literature & a Critique of" Scholars in Self-Estrangement"' [1977] The American Journal of Comparative Law 492, 513; see Davis and Trebilcock (n 155).

industrialisation on economic development in the West, and the need for developing countries to leapfrog the stages of development through the adoption of 'modern law' from the developed countries, mainly the United States.[161] Modern law, which regulates the developed market economies, is viewed as a means to economic development; and to a select school it was considered as development itself.[162] Therefore, law and development scholars argue that the enactment and enforcement of certain laws, especially for the proper functioning of the market, leads to social ordering and serves as a means to achieve societal developmental goals.[163] It is this rational that drives/influences secured transactions law reform worldwide.

1.1.1 What is Law and Development Theory?

Law and development theory is rooted in the contemporary ideological claim that "Modern societies achieve order primarily through law, that is, through a system of rules. Since it posits that modern society cannot exist without such rules, the core conception argues that modernization or development necessarily entails the institutionalization of such social control".[164] The main gist is the instrumentality of law to development, known as 'liberal legalism'.[165] The intellectual origins of the theory is based on the 'idea of progress, law reform, law and society, social engineering through law, [and] foreign assistance'.[166] The stages of progression of the theory have been

[161] David M Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 The Yale Law Journal 1, 5; see Davis and Trebilcock (n 155); Anthony Carty, *Law and Development* (Dartmouth 1992); Dam (n 155).
[162] Brian Z Tamanaha and others, *The Lessons of Law-and-Development Studies* (JSTOR 1995) 471–473.
[163] Trubek, 'Toward a Social Theory of Law' (n 160) 5.
[164] ibid; Tamanaha and others (n 161) 471–473.
[165] David M Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' [1974] Wis. L. Rev. 1062; See also Elliot M Burg, 'Law and Development: A Review of the Literature & a Critique of Scholars in Self-Estrangement' [1977] The American Journal of Comparative Law 492, 513.
[166] John Henry Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement' [1977] The American Journal of Comparative Law 457, 461. Trubek and Santos presented a cross continental analysis of the new chapter in the idea of the role of law to economic development. The book traced the shift in paradigm noting Kennedy's 'Three Globalizations of Law and Legal Thought: 1850-2000', Newton's 'The Dialectics of Law and Development', and Santos' 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development'. This so called 'third moment' in law and development theory features

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channelled through the themes of law seen as "an instrument to be used by developmental states to foster change[;] Law […being] a barrier to economic development[; and how] law should be a framework to facilitate private decision-making".[167]

The discourse supporting the instrumentality of the law to development is dominated by scholars in the US, the birthplace of the law and development movement; although their ideas are traceable to earlier European scholarship.[168] Law and development's 'liberal legalism', as aforesaid, is woven on modernization thought, as modernization theory is seen as its forerunner, since 'law and development' has adapted the tenets of the modernization theory.[169] Modernization theory refers to the political development movement by American political scientist, economist and sociologists theorising development as evolutionary and can be achieved in phases, through a process called structural functionalism.[170] The main idea is that 'a free market system, [with] liberal democratic political institutions, and the rule of law' will be created inevitably by the adoption of the modernization process from the West.[171]

prominently the systematized endeavours by IFIs to use legal reforms as part of financing conditions. Trubek and Santos argued on the importance placed on 'the rule of law', as it became elevated not 'only as a tool of development policy, but as an objective for development policy in its own right'. David M Trubek and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006); also see Duncan Kennedy, *Three Globalizations of Law and Legal Thought* (2005); Scott Newton, 'The Dialectics of Law and Development'; the use of law and development by the World Bank demonstrates its centrality globally and perhaps 'part of conventional wisdom in development theory'. Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' [2012] The new law and economic development: A critical appraisal 253, 253.

[167] David M Trubek, 'Law and Development in the Twenty-First Century' in Pejovic McAlinn (ed), *Law and Development in Asia* (Routledge 2011) 3.

[168] The idea of linking the use of law, the reform of laws and/or transfer of laws for economic development has been linked to scholarship of European scholars like Weber, Maine, Montesquieu. Davis and Trebilcock (n 155) 8; See also David M Trubek, 'Max Weber on Law and the Rise of Capitalism' [1972] Wis. L. Rev. 720; Martin Albrow, 'Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law' (1975) 2 British journal of Law and Society 14; Sally Ewing, 'Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law' [1987] Law and Society Review 487.

[169] Tamanaha and others (n 161) 471–473.

[170] The stages are rationalization, nation building, democratization and mobilization. ibid.

[171] ibid.

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Serious scholarly scrutiny and criticism, on the basis of ethnocentrism and naivety, led to the decline of the modernization theory.[172] As a check on the 'liberal legalism' view, Davis and Trebilcock recently outlined the reflective 'insensitivity to the ambiguities surrounding the relationship between legal reform and development'.[173] They reckoned that in the absence of pertinent empirical evidence, caution must be exercised in substantial investment and importance placed on legal reforms as a means to development. Although they expressed optimism in the prospective effect of legal reforms, the inconclusive nature of the existing literature seems to question the very optimism that law (through legal reforms) could be a means to development.[174] This skeptic argument calls for revisiting the unreserved exportation of laws from the developed world to the developing world, since the advocacy for legal reforms often is unaccompanied by quantitative cost analysis and local receptivity and compatibility considerations.[175]

Notwithstanding the seeming economic appeal of the theory, it is significant to point out that its discourse has only attracted a low level of academic interest, as compared to the voluminous research in development assistance work, and quantitative comparative economic development studies.[176] In addition to the low curiosity on its theory, law and development is fraught with the scathing criticisms which surfaced around the same time the movement started in the 1950s.[177] Half a century after its conception as an instrument to promote development or as development

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[172] ibid.
[173] This was in response to the optimism expressed in the publications of 21st century authors; Davis and Trebilcock (n 155); Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Brookings Institution Press 2010); Trubek and Santos (n 165); Dam (n 155).
[174] Davis and Trebilcock (n 155).
[175] ibid.
[176] Merryman, for example, classified the existing literatures based on three benchmarks: "(1) Whether their principal thrust is in the direction of action or of inquiry; (2) […or] they express theoretical interests; and (3) […or] they employ quantitative approach to the description and discussion of reality." He noted that most of the literature is on action and inquiry with low contribution to theory. Merryman (n 165) 473, see also 473-475.
[177] See Trubek and Galanter (n 164).

itself, the theory continues to tread on a tenuous theoretical foundation,[178] hence the continuing objection to it.[179] The contestation over the weak theoretical underpinning is, however, overshadowed by the seemingly active propagation of the elements of the law and development theory, via a policy of judicial and legal reforms, by governments and IFIs in the CEE Region, Latin America and Africa.[180]

In response to the global law reform agenda, scholars in Latin America, Asia and Africa have also weighed in, mostly critical of the suggestion that economic development in the developing countries could be fast-tracked by the borrowing of laws from the developed countries, an idea deemed to be inherently biased, naive and ethnocentric.[181] The criticisms have led to the twenty-first century law and development scholars to either engage in self-examination, self-criticism of the underlying principles of the theory or investigating the practical application of law and development principles as part of the global law reform agenda.[182] The tendency, however, is that the legal changes often leads to empty or 'phantom' legislations, with an identifiable gap between the blackletter law and its proper implementation or enforcement.[183] This opens up the space for legal transplant theory, i.e., the process of receiving legal institutions with respect to the transplanted law, and adapting it to local conditions to be more determinative in any reform

[178] Davis and Trebilcock (n 155) 26; Tamanaha and others (n 161) 471.
[179] See Trubek and Galanter (n 164).
[180] David M Trubek and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006); The Law, Justice & Development project of the World Bank Group 'Law Justice and Development Home' <https://www.worldbank.org/en/topic/lawjusticeanddevelopment> accessed 1 September 2016.
[181] Tamanaha, in a review of existing literature, argues d that the internal crisis was down to firstly the demise of the modernization and dependency theories. The second reason was predicated on the ethnocentric charge and self-questioning of the Western, mostly American, values during the Vietnam War years. His review was part of a broader crisis discourse in postmodernism and critical legal studies. Tamanaha offered no solution to the crisis but argued inter alia modern law may be essential but not sufficient for economic development, and once law provides the minimum protections, its relevance to economic development diminishes. Tamanaha and others (n 161) 483–488.
[182] Tamanaha aptly described the state of play as the condemnation of the condemn: 'Law-and-development scholars who condemned…they condemned'. ibid 482; Burg (n 160) 514–515; see Merryman (n 166); Santos (n 166); Kevin E Davis, 'Legal Indicators: The Power of Quantitative Measures of Law' (2014) 10 Annual Review of Law and Social Science 37; Amartya Sen, *Development as Freedom* (Oxford Paperbacks 2001).
[183] Burg (n 159) 511.

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process.[184] The transplantation process has a strong but indirect effect on economic development owing to its impact with respect to the concerns for legality, and acceptance by the receiving society.

1.1.2 The Instrumentality of Law to Economic Development and Underlying Theories

Recall the main gist of law and development theory is the establishment of a free market economic system, reinforced by liberal democratic political institutions, and the rule of law channelled to developing countries through the adoption of modern law from the West through a modernization process.[185] The acceptance of this idea has led to the notable promotion of legal reforms by means of development assistance in the developing world.[186] This sub-section in a bit more extensively examines the main notions that underpin law and development theory. Law and development in its formulation and propagation has been influenced by ideas from the economic, political, social and legal disciplines.[187] The social theories were quite dominant in the formation of the original idea, that is, legal culture and social engineering.[188] The theories that influenced law and development are said to be either implicit or unwritten, and this is due to the non-systematization and fragmentation of the legal scholarship.[189] This notwithstanding, the two main theories, which dominated the field, and gave rise the law and development movement are the modernization and dependency theories.

1.1.2.1 The Modernization Theory

Modernization theory is essentially the seed out of which sprouted the political development movement, and from Parson's structural functionalism, the theory holds that

[184] Berkowitz, Pistor and Richard (n 154) 165, 166–167, 168 and 192.
[185] Tamanaha and others (n 161) 471–473.
[186] See Santos (n 165).
[187] See Merryman (n 165).
[188] See ibid.
[189] Trubek, 'Toward a Social Theory of Law' (n 160) 3.

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economic progress is inevitable, but it can only be achieved structurally, and in stages.[190] It has been argued that modernization conveys a sense of functional structures, and network of institutions required to move from a traditional society to industrialization.[191] The process however covers industrialization and commercialization.[192] Modernization in fact 'represented the analytical framework for liberal policymaking because of the logical and systemic principles contained in liberalism'.[193] The central theme of modernization theory, which persisted at the time, implicitly conveyed the notion that development is attainable by adopting the political, social and cultural institutions of a society driven by functionalism.[194] Functionalism entails the "the assumption […of] the principle of rational self-interest as a positive or social individualism; separation between private and public property, the idea of pluralism as economic, social, and political competition […] and, above all, freedom of choice".[195]

Rostow identified the five stages of economic growth beyond the first stage of the traditional society that characterized the modernization theory.[196] The next four stages include 'the preconditions period, the take-off, maturity and the period of diffusion on a mass basis of durable consumers' goods and services'.[197] The convention path is for the traditional society to progress systematically through the five stages to the point of attainment of economic growth, development and freedom of choice. However, for a leapfrog approach to economic development, developing countries must adopt the functional structures, bypassing the systematic progression.[198] The law

[190] Tamanaha and others (n 161) 471.
[191] David Ernest Apter, *Rethinking Development: Modernization, Dependency, and Postmodern Politics* (Sage Publications, 1987) 16.
[192] ibid 89.
[193] ibid 23.
[194] See Apter (n 190).
[195] ibid 23–24.
[196] See Walt Whitman Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press, 1990).
[197] ibid 3–4; Davis and Trebilcock (n 155) 8–9.
[198] Tamanaha and others (n 161) 471–473; Davis and Trebilcock (n 155).

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and development movement wholly adopted the structural functionalism idea and the suggestion on the transfer of modern laws.[199] The 'modern law' concept in law and development is, therefore, a restatement of the modernization theory. Modern law becomes a *sine qua non* for the march towards an industrialized economy for developing countries.[200] Thus, a modern society that has adopted market economic system is required to adapt to norms that conform to the uniform and universal application of rules to ensure predictability in the market.[201]

1.1.2.2 Dependency Theory

Dependency theory developed in response to the notion of the centrality of modern law to economic development. Dependency theory propositioned by Latin American development scholars mainly countered the modernization claim.[202] To the dependency theorists, economic growth in the developed world has not translated to the same economic development in developing countries, and this is blamed on the international/global capitalist system, which is deemed to be exploitative.[203] Western accretion and retention of wealth is at the expense of the developing countries. The status quo is preserved through the connivance of the developing countries' ruling elites, thus leaving the masses (mostly rural population) poor and improvised.[204] "Historical research demonstrates that contemporary underdevelopment is in large part the historical product of past and continuing economic and other relations between the satellite underdeveloped and the now developed metropolitan countries. Furthermore, these relations are an essential part of the

[199] See discussion on the dependency theory.
[200] Trubek, 'Toward a Social Theory of Law' (n 160) 5–7.
[201] As modern law is seen 'as essential to the creation and maintenance of markets. The emphasis here is on modern law's predictability as a set of universal rules uniformly applied. As a result of such preditability, modern law encourages men to engage in new forms of economic activity and guarantees that the fruits of this activity will be protected.' ibid 6–7.
[202] Tamanaha and others (n 161) 476–477.
[203] ibid 477.
[204] ibid; see also David F Greenberg, 'Law and Development in Light of Dependency Theory' (1980) 3 Research in Law and Sociology 129.

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capitalist system on a world scale as a whole".[205] This argument is comprehensive in its integration of the social, economic and political components, effective and undeniable persuasive.[206]

In rebuffing the modernization theory transfer of modern law claim, the practical economic realities have impugned the modernization argument and its potency in stimulating economic growth.[207] In Latin America, for example, the political and economic development of the region diverged sharply from that of the US and Europe, making legal reform or changes an implausible critical variable in development.[208] If economic activities are based on modern law reforms, then it should be seen that the claim is inapplicable to Latin America and the Southeast Asian Tigers, given their economies growth in non-liberal political and institutional settings.[209] The dependency theory refutes modernization claim of the need to adopt modern law, and see the theory as a Western philosophical ruse aimed at keeping the flow of resources flow the developing counties, referred to as the 'periphery' to the developed 'core' wealthy countries, all at the expense of the countries in the periphery.[210]

Dependency theory, however, is not shielded from criticisms in spite of its evocative and effective central argument. Much as dependency theory contended the modernization theory on the points of the gap between theory and practice, it failed to account for the unpretentious industrial development that has occurred in developing countries on the account of the liberal modernization and structural functionalism.[211] Further the hard-line radical dependency theorists

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[205] Andre Gunder Frank, 'The Development of Underdevelopment,' in James D Cockcroft, *Dependence and Underdevelopment: Latin America's Political Economy, by James D. Cockcroft, André Gunder Frank [and] Dale L. Johnson* (Garden City, Anchor Books 1972) 3.
[206] Tamanaha and others (n 161) 477.
[207] Greenberg (n 204) 130.
[208] ibid 133.
[209] ibid.
[210] See Apter (n 191); Tamanaha and others (n 162); Greenberg (n 204); Francis G Snyder, 'Law and Development in the Light of Dependency Theory' [1980] Law and Society Review 723.
[211] Tamanaha and others (n 161) 478.

have failed to provide a viable alternative to the modern economic system.[212] Dependency theory also ignored or failed to account for the corrosive factors like ethnicity and clan rivalry, the impact of religion in determining the cause of the 'underdevelopment' claim.[213] Although dependency theory accorded insignificant attention to law, it was useful to the law and development movement as it provided the first opportunity to question the nexus between law and development.[214]

1.1.2.3 The Relationship between Law and Development Theory

In examining the two dominant but diverging theories above that have shaped the law and development discourse, one significant anchor point remains the absence of economic data to challenge the nexus claim between law and development. On the contrary, modern secured transactions law reform, for example, has been backed by economic studies connecting the effectiveness of a legal framework to the expansion of lending and consequent economic growth.[215] The underlying criticisms of law and development, as we will examine below, reflect more on the process of undertaking the legal changes, and the lack of deference to local content. In this context, it become more appropriate to narrow law and development idea of law to mean the formal legal institutions,[216] shedding the general perception of law to include legal culture, social values, embodying the concept of law and society.[217] This line of thought makes the notion of law in law

[212] Apter (n 190) 25–27.
[213] Tamanaha and others (n 161) 478.
[214] ibid 479; Carty (n 160).
[215] Dahan and Simpson, *Secured Transactions Reform and Access to Credit* (n 14); Haselmann, Pistor and Vig (n 3); Berkowitz, Pistor and Richard (n 155); also see Homer Kripke, 'Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact' (1985) 133 University of Pennsylvania Law Review 929.
[216] Burg (n 159) 502.
[217] Lawrence M Friedman, 'On Legal Development' (1969) 24 Rutgers L. Rev. 11, 53 and 57. The meaning of law in the context of law and development theory may be seen as an instrument of state coercive power, via sanctions; or in the sense of legal institutions and the legal profession. Robert B Seidman, 'Law and Development: A General Model' (1972) 6 Law & Society Review 311, 316; Burg (n 160) 501. It is observed that the exclusion of cultural and social variables excludes customary law within the formal legal system, owing to its perceived friction with economic activities. Thus, upon the adoption of market-based economy, modern law, which is 'a system of rules; […] a form of purposive human action; and […] simultaneously part of, yet autonomous from, the nation-state', through contracts and private property right protection will stimulate economic growth. Robert B Seidman, 'Law and Economic

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and development theory less prone to criticisms on account of cultural, social and economic variables of the receiving countries.

On the other side of the law and development coin is the equally elusive concept of development.[218] Without doubt, the conventional approach to edifying the concept of development is the economic approach, wherein development is taken to mean economic growth.[219] There is, however, another school of thought, which views development from a more social perspective, covering questions of human rights, governance, social justice and wealth distribution.[220] This difference in conception determines the nature/form of development advocated for and promoted. Further, and to an extent, the 'differences in objectives explain the difference in the types of legal reforms' favoured.[221] The differences in approach notwithstanding, the contributors from both sides embedded the idea of progressive social or economic mobility, i.e., liberal leaning or Western oriented modernization approach.[222] In this sense, law and development therefore represents the theory of transferring liberal and market economic institutions and values of the developed world to the developing world based on the perceived needs of developing countries. The modernization influenced conception of development points at economic growth, and as a means to enhance choices and individual freedoms. This has been further developed by law and development enthusiast to deem law as development itself.[223] This view holds that the freedom (inclusive of

Development in Independent, English-Speaking, Sub-Saharan Africa' [1966] Wis. L. Rev. 999, 1044–1045; Trubek, 'Toward a Social Theory of Law' (n 161) 4, 7.

[218] "If 'development' is a vague and general term, 'law' is scarcely more precise". Burg (n 159) 504.

[219] Davis and Trebilcock (n 11) 7; also see Dam (n 37).

[220] Davis and Trebilcock (n 155) 7; See also contributions to Carothers (n 172); Trubek and Santos (n 165).

[221] For example, Dam emphasized 'corporate law, commercial law, property rights and the financial sector, while contributors to the Trubek and Santos collection, including most notably Kerry Rittich, focus on the regulatory and redistributive functions of the state'; Davis and Trebilcock (n 155) 7–8.

[222] Seidman, 'Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa' (n 216) 1018 In examining the de facto claims of English speaking sub-Saharan African societies, Seidman argued: "Africans demand better education, better health standards, better roads, water, and electricity, better houses, more and better food and clothing, automobiles and bicycles, radios and television. And they demand them now. In short, Africans demand development."

[223] See Tamanaha and others (n 161); Sen (n 181).

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freedom from torture and inhuman treatment, freedom of expression, speech, assembly etc.) is the end in itself.[224] As economic growth and wealth building is personally desirable, to attain more freedom, freedom becomes the end itself.[225] The relationship between law and development becomes a quest for fundamental freedoms achieved through economic growth. This heavy slant on liberal ideas and institutions was met with criticisms discussed below.

1.1.3 The Enduring Criticisms of Law and Development Theory

So far it has been established that the modernization idea, which influenced the law and development movement, was rigorously criticised on the basis of its ethnocentrism and naivety. With modernization theory being the forerunner of the law and development theory, it must have been logical to predict a similar fate for the successor theory. Trubek and Galanter are credit with signalling the crisis in law and development movement, and this was even before the theory gained significant roots.[226] The crisis suggestion was grounded on two fundamental objections: First, the absence of robust and undisputable proof establishing the nexus between law, legal reforms in the form of adopting liberal institutions, and development. Second, the enduring ethnocentric and naivety criticisms associated with the idea of undertaking legal reforms based on the transfer of laws from developed countries, especially the United Sates, to the developing world as a prerequisite for economic growth.

The first major criticism as aforesaid decries the linkage of legal reforms to economic development. Is there a real nexus between law (including the need for legal reforms) and development? Trubek and Galanter started questioning law and development scholars' moral

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[224] See Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing 2009) 4–5.
[225] Sen (n 181) 14.
[226] Trubek and Galanter (n 164); Davis and Trebilcock (n 155) 28; Tamanaha and others (n 161); Burg (n 159) 512.

attitude to the core principles in their line of research.[227] Law and development movement started as paid for research by the US Government and notable private institutions, the Ford Foundation being the most prominent then, all heavily involved in foreign assistance in the developing world in the 1960s.[228] When the scholars began to divorce themselves from the funders and their 'development activities', they subjected the field to greater scrutiny, as it ought to have been.[229] The central claim of law and development, i.e., the instrumentality of the law to development was questioned on the basis of lacking evidence to support changes in the legal landscape and their bearing to economic growth.[230] What the reforms led to was the enactment of phantom/empty legislations that produced the converse effect in some instances. The modern law became a conduit for the broadening of wealth and social inequalities, restricted political participation, individual freedoms and entrenched poverty.[231]

The minimal relevance of law to development was amplified by the lack of enthusiasm to separate or deal with the multifaceted nature of the law. Law and development in adopting the modernization thought seemed to have advanced a universal diagnosis and solution to the problem of underdevelopment.[232] However, law and development scholars failed to distinguished between law reforms creating the necessary economic impact in the face of other variables like access and

[227] See Trubek and Galanter (n 164).
[228] ibid 1063, 1065.
[229] The doubts were created by the examination of the work of the agencies involved in development assistance, and the question over whether the assistance was contributing to development within the framework of freedoms, social equality economic growth. Trubek and Galanter called this 'self-estrangement'; ibid 1063–1064.
[230] Trubek and Galanter (n 16) 1080–1081. The doubts were not only related to the developing world but also those that concerned the legal system in the United States, where structural and systemic discrimination against certain groups were being questioned.
[231] Steiner argued: 'The influence of the law upon any socio-economic goals industrialization, regional development, income redistribution-may be modest in comparison with other factors. The goals themselves rest upon a base of social values and political expectations to which the legal system may have a marginal relevance. The realization of those goals may depend upon economic conditions or predictions, the availability of technology or of managerial skills, and a willingness to depart from traditional paths.' Henry J Steiner, 'Legal Education and Socio-Economic Change: Brazilian Perspectives' (1971) 19 The American Journal of Comparative Law 39.
[232] Trubek and Galanter (n 164) 1099.

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level of resources, cultural and political values systems.[233] Unfortunately, 'legal variables cannot be isolated in the same way that economic phenomena can – that is, law is not a discipline comparable to economic or political science'.[234] Perhaps an alternative model wherein development is seen as influencing law instead of law influencing development was needed. This line of reasoning suggests that the concentration on the instrumentality of law ignored the influence of development on law and society.[235] This model is based on Burg's approach, wherein development influences law, and it is referred to as the reciprocal model.[236] The proponents often rely on the development in South East Asia, where 'liberal legalism' did not feature during the rapid economic development as examples of lacking influence of law on development.[237]

It should be recalled that the second stage after the acceptance of the law and development nexus is the transfer of Western legal institutions to developing countries. This second limb was met with enduring ethnocentric and naivety charges.[238] The absence of deference and acknowledgment of local social, political and cultural context made no allowance for internalization and subsequent acceptance by receiving community of Western norms.[239] The idea that Western norms were indispensable and highly desirable without further considerations was riddled with naivety and ethnocentrism. The development needs of developing countries were

[233] Burg (n 159) 505.
[234] ibid; citing Meagher and Smith, Law and the Development Practitioner (1974) 99.
[235] See ibid 516–517.
[236] ibid.
[237] The governing systems in that region could hardly be fitted into the strict liberal market norms operating in the United States or other developed countries, that is, fundamental freedoms, individual choices, protection of private property interests, hence law and development theory cannot account for the economic development of the region. See Meredith Woo-Cumings, *The Developmental State* (Cornell University Press 1999); Chalmers Johnson, *Miti and the Japanese Miracle: The Growth of Industrial Policy: 1925-1975* (Stanford University Press 1982).
[238] Trubek and Galanter (n 164) 1080.
[239] The prevailing view at the time was underscored by a former Supreme Court Justice who made the following appeal: "These newly developing nations need our help-not only our money and machines and food, but also the great capital of knowledge accumulated by our professions [...] the young nations need teachers from the West by the hundreds and thousands-law teachers, professors of government, research assistants. We must not miss out on this opportunity for service-for participation in the long creative period ahead of legal development in over half the world". William O Douglas, 'Lawyers of the Peace Corps' (1962) 48 ABAJ 909, 909 & 910.

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mistaken for a need to imitate the systems of the West, including the legal system. In addition, there was also some measure of hypocrisy as Western agents (corporations) in their engagement in developing countries acted contrary to principles that form the bedrock of liberal legalism.[240] These arguments were compelling in ingraining the emotional guilt in the aftermath of the period of global imperialism by Western States.

The naivety and ethnocentric claims struck a nerve, but it appears to be less useful in advancing counter ideas for development. Tamanaha and other capture the state of ideological paralysis and argues that ethnocentrism 'is a charge easily leveled, difficult to defend against, and malleable enough to support almost any claim'.[241] Therefore, instead of engaging in any indulge plea to stop the use of the powerful rhetorical weapon, reformists are reinforced by the insights that we are firstly prone to see things within our own perspectives (shaped by ethnicity, cultural, class etc., and 'there are no ultimate standards or foundations from which to determine the superiority of one perspective-based view over another'.[242] In such a dire state, law and development scholars opted to abandon the theoretical debate and ventured into the study of development work or engagement in developmental assistance, i.e., law and development in practice.

What we get from the discussion so far is a gloomy representation of the underlying ideas sustaining the global law reform movement, including in the area of secured transactions law. As aforesaid, the legal efficiency claim in modern secured transactions may have addressed the contestation over the instrumentality of law to economic development. The purport of the discussion, therefore, has not been to merely paint a gloomy picture of the reformist movement,

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[240] Greenberg (n 204) 136.
[241] Tamanaha and others (n 161) 483.
[242] ibid.

and the activities of external promoters of legislative changes in the developing world. The effect rather has been the beneficial unearthing of the ideas that influence the reform movement, the causes of flawed reform processes as in the case in Sierra Leone's BLA, and the need to search for workable solutions. In the following sub-section, legal transplant theory is presented as the theoretical framework to demonstrate the historical claim that legal norms in societies are often borrowed and through a process of internalization the borrowed norms are eventual accepted and become the law of the people.

1.2 Legal Transplant Theory – Asserting the Historicity of the Transfer of Laws

The crucial question law and development had sought to answer was whether legal reforms, through the exportation of 'modern law' from the West, could lead to economic development in the developing world. In fact, it was not so much a question but rather a claim by law and development theorists. The central claim of the theory, therefore, is based on the transfer of modern laws from the developed world to developing countries to foster economic development. The correlation of law to development is underpinned by this transfer function. As shown above, some of the leading scholars in the field have stoutly criticized this claim to the extent of pronouncing an internal or self-proclaimed crisis. The crisis and criticisms notwithstanding, the transfer of laws from one society to another has become commonplace, based on its historicity, i.e., its historical authenticity. [243] This is more evident in commercial, private or mercantile law. Once laws are transferred or transplanted from the donor society, the key task is to ensure local assimilation, and

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[243] Watson quoted Cohen in stating: 'And if the diversity of theories of contract is startling, one may find equal cause for wonder and reflection in the fact that thinkers and societies that are poles apart geographically, economically, and culturally, so often agree on specific rules of contract law'. Watson (n 137) 22.

hence indigenization overtime. The process of acceptance and assimilation eventually will dispel all notions of the laws being foreign and hence not risk rejection.[244]

Watson coined the terminology 'legal transplant' in the 1970s, [245] but even before that, Roscoe Pound had written about the 'history of a system of law [which] is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law'.[246] The historical authenticity of legal transplant is traceable and supported, for instant, by the similarities in substance and formulation of the Laws of Eshnunna (1700 B.C.) about a goring ox, to a similar law in the Babylonian Code of Hammurabi (1600 B.C.), and then in book of Exodus centuries after the Code of Hammurabi.[247] The claims of borrowing from other societies continued from the highly contested Roman study of the Laws of Solon in Athens,[248] to the involuntary transplantation during imperialism, which saw huge sways of imposition of the

[244] ibid 27 Watson viewed "A successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused".

[245] Watson (n 137) Watson has written extensively on the theory of legal transplants, mostly looking at the influence of Roman law on Continental Europe. He remains one of the most influential jurists in this field.

[246] ibid 22.

[247] ibid 22–23. One of the Eshnunna law provides: "If an ox (was) a gorer and the ward (authorities) have had it made known to its owner, but he did not guard his ox and it gored a man and caused him to die, the owner of the ox shall weigh out 2/3 of a mina of silver. If it gored a slave and caused him to die, he shall weigh out 14 shekels of silver". The Babylonian Code of Hummurabi stated: "If a man's ox (was) a gorer and the ward (authorities) have had made known to him that (it was) a gorer, but he did not screen it horns, (or) did not tie up his ox and that ox gored a son of a man and caused him to die, he shall give 1/2 a mina of silver. If (the victim was) a slave of a man, he shall give 1/3 of a mina of silver". Exodus 21. 28-32 states: "If an ox gore a man or a woman, he died, the ox shall surely be stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit. But if the ox a gorer from before times, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death. If there be laid on him a sum of money, then he shall give for the ransom of his life whatsoever is laid upon him. Whether he gored a son, or have gored a daughter, according to this rule shall it be done to him. If the ox gore a slave or a slave-woman: he shall give to his master thirty shekels of silver and the ox shall be stoned". Watson argues the fanatic 'Volksgeist' will rather spot the differences in the three provisions of law and make a claim out of same. The similarities time and regions apart cannot be denied.

[248] ibid 25.

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three leading legal families of Roman law, Anglo-Saxon common law and Germanic and French civilian systems globally.[249]

Legal transplants theory has been sparingly referred to in the law and development theory literature.[250] Perhaps the transfer of modern law function in law and development is so connected to legal transplant that any expressed linkage may be deem superfluous. As a consolation, the term legal transplant, as aforesaid, was only coined in the 1970. Watson's idea of lawmaking which is heavily linked to historical transfer argument has found support in the literature. Ewald for example argued that Watson's proposition of a theory of legal change explains the growth of law primarily based on legal transplantation of rules.[251] He further argued that the theory is of immense importance to the relationship between law and society.[252] Obviously, Watson's proposition challenges traditional theories of law, including law being the embodiment of the spirit of the people or law as a product/conditioned by society.[253] Although Watson's proposition can easily accommodate law and development theory for example, he acknowledged that building this theory of borrowing was enormously complex.[254] To deal with the complexity, much emphasis was placed on tracing the history of transfer of laws from one society to another. For example, he devoted time to trace the influence of Roman law in Egypt up to 30 B.C., citing the vast changes that

[249] English law for example applied the doctrines of terra nullius and reception: Wherein the latter meant English law applied wherever the colonialists were; and the former dealt with the principle of the application of English law to desert and uncultivated land upon colonialization. See Blackstone (n 145).
[250] One of the papers that devoted attention to addressing legal transplants within the context of development is Berkowitz, Pistor and Richard (n 154); see also Burg (n 159)505-503 the Ethiopian Civil Code being a product of French jurist who essentially mimicked the French Civil Code; Tamanaha and others (n 161)474.
[251] William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' [1995] The American Journal of Comparative Law 489, 489.
[252] ibid 490.
[253] ibid 493. Montesquieu, once wrote: '[The political and civil laws of each nation] should be so closely tailored to the people for whom they are made, that it would be pure chance [un grand hazard] if the laws of one nation could meet the needs of another […]' Ewald citing Charles de Secondat Montesquieu, 'De l'esprit des lois', book I, ch. 3 (Des lois positives) (1748). Although proposing different subtext of legal theories, Savigny, Hegel, Marx, Jhering and Pound have all expressed similar ideas of law and society. That is, law being the product of a particular society. .
[254] Alan Watson, 'Aspects of Reception of Law' (1996) 44 Am. J. comP. l. 335, 335.

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occurred subsequently in a bid to support both the historicity of legal transplants and assimilation of the borrowed law.[255]

In the process of legal transplantation, determining the source to borrow is crucial. Whilst involuntary legal transplants through colonization for example makes this a moot point, solicited transplantation places premium on the source of the borrowed law. Authority, which can be equated to mean respect for a particular law or system, is an important element that enables transplantation in this regard. Authority in this sense means the characteristic elements that make the donor law 'superior' and acceptable.[256] In Christendom for example, the authority of the Ten Commandment given to Moses at Mount Sanai went unchallenged, based on the notion of faith and omnipotence of Jehovah.[257] Laws for domestic sovereigns are generally accepted, based on the consensus on where the lawmaking sovereignty lies. What makes a transferred law acceptable in a recipient country is its reputation, i.e., its efficiency and enforceability, and the authority of the lawmaker.[258] Authority of the donor's law plays a central role in transplantation, as it makes little sense to transplant a weak or ineffective law or legal system. In modern secured transactions law, the widespread adoption of the underlying philosophy and 'building blocks' of the Unitary Model is an attestation of its superiority.

In addition to propounding the historical authenticity of legal transplant, Watson made general reflections on the core of his proposition, highlighted as follows:[259] First, he claimed the commonality of legal transplantation in human history as well as contemporary time. Second, he argued, legal transplant is the utmost fruitful basis for development. Legal change or reform

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[255] Watson (n 137) 31.
[256] ibid.
[257] Moses, 'The Book of Exodus', *The Holy Bible* ch 20.
[258] Watson (n 137) 89–90.
[259] ibid 95.

whether specific or comprehensive mostly transpire through borrowing. Third, law largely is engrained in human history, and legal transplant can be socially easy. Watson core proposition continued with a fifth element, which is the influence on voluntary transplantation by factors including economic conditions. Sixth, foreign law can influence the most difficult of private law issues.[260] Whilst points one to three may draw less criticisms, point four dealing with social ease of legal transplantation has proven to be controversial and has led to stout resistance, especially from Legrand's legal transplant impossibility claim.[261]

Whilst the legal transplants impossibility claim will soon be examined, it is important to note that Watson's further reflection that 'reception is possible and still easy when the receiving society is much less advanced materially and culturally',[262] appears to converge with the view of modernization theorists. This view easily attracted ethnocentric labelling,[263] although Watson pivoted, and further argued that legal transplant is receivable based on extreme practical utility, chance, and the need for authority.[264] The extreme practical utility and need for legal authority are more persuasive indicators to influence the acceptance of borrowed law, thereby making redundant any reference to material and cultural simplicity. For example, it is legal efficiency that drives modern secured transactions law reform, and the voluntary transplantation of the Unitary Model, and not just sophistication or otherwise of the reforming countries.[265]

Watson views have not gone unchallenged. A sort of disquiet has been expressed over legal transplants as a theory, or as the main explanation for legal reforms. If anything, legal reforms

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[260] ibid 97–98.
[261] Legrand (n 158); Legrand (n 134).
[262] Watson (n 137) 99.
[263] Legrand (n 158) 122; Ewald (n 251) 508.
[264] For further discussion on the four aspects, see Watson (n 254) 335–350.
[265] See for example, McCormack, *Secured Credit and the Harmonisation of Law* (n 8); Beale, 'Exportability of North American Chattel Security Regimes' (n 52); Gedye, 'Distant Export' (n 98).

must be endogenous, and legal transplant as presently construed is impossible.[266] Legal transplant is not considered to be a theory on the basis that legal transplants does not fit into the law and society mirror effect.[267] Abel, for example, argues that Watson wants to use history to replace all values in law-making, ignoring or abandoning the cultural relativism in the law of the people assertion.[268] In examining the intrusion of the civil law based good faith principle in British unfair consumer contract terms, (owing to the European Union Regulation) Teubner, for example, argues that legal transplants metaphor is misleading, as the dichotomy between acceptances or rejection is false and that 'legal irritant' best describes the theory.[269]

Legrand in leading the impossibility claim argues that transplanting implied displacement, and if this is the case, what then is being displaced?[270] He argues that legal transplant theorists have formal rules or legal system in mind, in their understanding of law or legal; hence, 'the moving of a rule […] from one country to another, or from one people to another' holds.[271] This movement of law from one society to another challenges the previous theories of the correlation of law to society as aforementioned. The main claim by Legrand is that law in a society cannot change autonomously from the variables of the social, historical and cultural context.[272] Legrand in disagreeing with Watson questioned whether law is transportable across juridical jurisdictions autonomously without the historical, epistemological or cultural encumbrances. His claim was effectively 'legal transplants are impossible'.[273] The impossibility claim is hinged on the contextual

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[266] Esin Örücü, 'Law as Transposition' (2002) 51 International and Comparative Law Quarterly 205, 205.
[267] Ewald (n 251) 506–507 Abel argues that a theory which contends a positive relationship between law and society is not reflected in legal transplant.
[268] ibid.
[269] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 The Modern Law Review 11, 12.
[270] Legrand (n 158) 111.
[271] ibid 112 citing; Watson (n 1) 21.
[272] Legrand (n 158) 112.
[273] ibid 114.

meaning of a rule, which functions on the assumption of the interpreter's knowledge and condition based on her history and culture.[274]

In taking the legal transplant impossibility claim a step further, the argument it seems is suggesting that as a law traverse borders, the original rule changes owing to the new assumptions of the interpreter influenced by epistemological and cultural variables.[275] Therefore, if legal transplant is impossible, *a fortiori*, law and development transfer of modern law is also impossible. In this context, legal transplant is only possible when the rule and the cultural subtext are transferred from one country to another. However, this does not make legal transplant impossible, as it is also illustrative of the process of internalization of the social, historical and cultural variables, which will eventually lead to acceptance of the borrowed law. The main difference between Watson and Legrand rests on the understanding of the meaning of law within the context of borrowing. If viewed from the extremes of the legal transplants debate continuum, the opposing propositions will certainly be deemed to be problematic. There is sense in linking lawmaking with the historical authenticity of the transfer of norms from one society to another. However, it should not be seen to be as easy as Watson previously suggests.

The moderate view now being suggested is that legal transplants can be made possible with deference to the receiver's social, epistemological and cultural interpretation in the process of transplantation. Sacco supports this view by arguing that borrowing and imitation is the central issue informing changes in legal formants, i.e., the sources of law.[276] In essence, legal transplant may have diverged from other grand theories within the cultural relativist lens, but its historicity

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[274] ibid.
[275] "Accordingly, a crucial element of the ruleness of the rule - its meaning - does not survive the journey from one legal system to another. In the words of Eva Hoffman, '[y]ou can't transport human meanings whole from one culture to another anymore than you can transliterate a text'." ibid 117 [citation omitted].
[276] Outside of the modernization paradigm, Sacco referenced Somali's adoption of the Egyptian Civil Code as an example to support the point on the legal transplant shaping the legal formant source of law. Sacco, 'Legal Formants' (n 134) 396; Sacco, 'Legal Formants' (n 134) 343, 394.

cannot be denied. Watson's study in this regard must be seen as robust and compelling, although not absolute. Mindful of the weakness of any claim of absoluteness of legal transplant, contemporary scholars have shifted the discourse to the appropriateness of the terminology. Örücü, for example, suggests a change of terminology to legal 'transposition, [277] a change that seem to add nothing new as transposition fundamentally agrees to the commonality of the transfer of laws from one society to another, often in hope of a better system.[278]

So far, we have journeyed through theories, concepts and debates with a singular overriding theme, i.e., the transfer of laws from one society to another, a notion that is rooted in history as affirmed in Watson's legal transplant. Indeed, the motivations for the transfer of laws varies, but the recent upsurge of legal changes/reforms is predicated on the desire to foster development. Law and development underpinned by modernization thought tapped into the transfer function aimed at transferring 'modern law' in developed states, especially the US, to developing/peripheral states in order to leapfrog the stages of development. The seeming disregard for local context, social, epistemological and cultural variables illustrate in the abstract why the law and development transfer of law paradigm is fraught with flaws and criticisms. It is also demonstrative of either the absence of any prescriptive rules guiding the transfer of laws from one society to another or the disregard of the rules where they exist. With legal transplant emphasising practical utility and authority as the basis for transplantation, the following sub-section outlines a substantive examination of the secured transactions law reform prescriptive guide as influenced by the modernization claim.

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[277] He drew this balance by arguing for a reconsideration of legal transplants between the two extremes represented by Watson and Legrand. Örücü (n 266) 205, 206.
[278] ibid 205.

1.3 Secured Transactions Law Reform within the Law & Development Context – the Legal Transplant Prescriptive Rules

Indeed, the prevailing thematic focus in law and development has diverted from justifying or defending the underlying claim, i.e., the idea that legal reforms through the adoption of modern laws from the West promote economic development, to seeking for the most appropriate mode for legal reform. Actually, a significant 'portion of the debate [now] is about how to pursue legal reforms, rather than whether pursuing legal reform is likely to do any good'.[279] Obviously this is very convenient for the mainstream scholarship to circumvent the criticisms that have constrained law and development theory. The adoption of liberal market economic principles does have its clingy demerits. However, since the supremacy of the market system appears to be unmatched, the discourse has moved onto the most appropriate form of legal reforms. It is now an issue of what particular sets of reform prescriptive standards, strategies, methods, models or the competence of the external sponsors/consultants involve in the legal reform process, and not the emphasis on whether law is connected to development.[280]

In one line of argument, Davis and Trebilcock contend that the law and development skepticism is fuelled by the approach to specific set of reforms and measuring the rate of economic or other developmental progress based on their achievement.[281] This all but neglects the fundamental functionality of law to development question.

> [M]any of the contributors to the Trubek and Santos volume worry about whether current reform projects are likely, other than indirectly, to achieve social justice. In the Carothers volume, Kleinfeld criticizes rule-of-law projects for treating legal reforms as ends rather than means; Golub criticizes programs for failing to focus on the objective of poverty alleviation and over-estimating the importance of the legal profession and state actors; and

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[279] Davis and Trebilcock (n 155) 28.
[280] See Gullifer and Akseli (n 3), where the contemporary principles, rules and practices on modern secured transactions law reform where discussed within jurisdictional confines.
[281] Davis and Trebilcock (n 155) 28.

> Mednicoff criticizes US rule of law programs in the Arab world for focusing on judicial reform rather than civic and professional education.[282]

The focus on these themes is the new law and development, and it is ideologically inadequate to justify legal reforms within the prism of law and development theory. How the themes of the new law and development necessitate and justify expending scarce resources on projects dealing with social justice, poverty alleviation, strengthening of legal practice has been reduced to political choice rather than sound reasoning. When the World Bank Group abandoned structural adjustment programs for the quantitative measuring of economic growth, its place premium on promoting legal reforms by the promise of higher ranking of countries.[283] The concomitant effect of this approach is sadly the promotion of rapid and constant legislative changes, often enabling 'phantom legislating', where governments measured their delivery on economic promises by referencing favourable ranking in various statistical surveys.[284] Therefore, favourable rankings become the objective and justification for reforms rather than the impact on the local economy. Law is no longer a means to development but a demonstration of development itself.

In dealing with the new law and development diversion, Davis and Trebilcock noted the second critical point connected to the implementation of legal reforms.[285] This is the abandonment

[282] ibid 28–29 Footnotes omitted.
[283] See Claude Menard and Bertrand du Marais, 'Can We Rank Legal Systems According to Their Economy Efficiency Law & the New Institutional Economics' (2008) 26 Washington University Journal of Law and Policy 55; Santos (n 166); Davis and Trebilcock (n 156).
[284] For example, see 'Sierra Leone Web - President Ernest Bai Koroma - Speech to Open Parliament, 8 October 2010' paras 7–8 <http://www.sierra-leone.org/Speeches/koroma-100810.html> accessed 23 April 2018, where Former President Koroma stated: "We have, as a people made enormous progress that is lauded all over the world. The Global Peace Index now ranks Sierra Leone as one of the most peaceful countries in the world; the Mo Ibrahim Index records that we are one of the five crisis affected countries that have made a significant leap forward in democratic governance; the recent IMF review shows improvement in public finances, a growth rate twice the average growth rate of Sub Saharan Africa, and higher growth rates this year. We have also made steady progress in our rankings on Doing Business, Corruption Perception and Democracy". The then President of Sierra Leone extols legislative reforms as indicators of development; and the reaction of the Government of Sierra Leone to international indicators has been legal reform and more reforms followed by snail-paced implementation. With minimal local participation, often it takes years for the problems associated with the new legislations, for e.g., conflict with other statutes, to be discovered leading to more legislative changes. This paradigm leaves the legal framework in constant state of flux.
[285] See Davis and Trebilcock (n 155).

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of local laws, snobbery of local conditions and reliance on foreign knowledge and competences.[286] The criticism of the extreme externally crafted legal instruments does have vestiges of ethnocentrism and naivety. In this regard, Santos is very critical of the activities of the World Bank.[287] He argues that inherent ideological differences and internal struggle for power accountability and purposeful reflection on impact of reform projects; and ideological differences tend to promote a certain type of reforms, whilst local connivance by consultants and activist is made possible due to conflicting interests.[288] No doubt the use of external experts is necessary and expedient where local expertise is limited, and legal transplant can accommodate exogenous nudging, prompting, with essential deference to local context. Assessing the local conditions and drawing a balance between local inputs and external pointers to aid acceptance of a reforming law is seemingly the objective of the reform prescriptive rules.

In modern secured transactions law reform, soft prescriptive standards or models on how to implement reforms are springing up in the literature. A sort of implementation methodology has been developed through the convergence of shared experiences and practices, against the backdrop of a relative complex and jurisdiction specific legal and economic concerns in the reform process.[289] The reform implementation methodology deems as critical, local ownership of the reform and implementation process as 'experience has shown that the most successful reforms are those which are clearly owned and actively led and promoted by the local stakeholders'.[290] The initial political and policy state is to make a persuasive case for reform, which requires as assessment study. An assessment study must cover economic indicators and importantly a legal

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[286] ibid 29.
[287] Santos (n 165) 290, 279; Davis and Trebilcock (n 155) 29.
[288] Santos (n 165) 29, 297.
[289] Affaki (n 1) 17.
[290] ibid.

diagnostic examination of the existing framework.[291] Persuading the stakeholders with the studies, the drafting of the new law and public education and training form the main nucleus of the reform implementation methodology.[292]

In mostly institutional led or associated research, i.e., EBRD, the Word Bank Group, scholars and consultants are continuously sharing experiences and practices, thereby providing insights on how to export the Unitary Model influenced principles for efficient secured transactions law.[293] The EBRD account on how to undertake secured transactions law reform process is perhaps the most instructive.

> As far as the preparation of legal reform is concerned, the EBRD's Secured Transactions Project distinguishes (1) consensus building, (2) the creation of commitment in the reform country, (3) drafting of legislative texts and (4) adoption of the draft legislative acts. The implementation stage of the reform process again comprises 4 steps: (1) ensuring the practical operation of the law, (2) ensuring acceptance of the law, (3) ensuring application of the law by the courts and (4) monitoring the practical reform results.[294]

The identifiable and noteworthy step is consensus building, which presupposes prior engagement of the potential interested parties, from the government, banks and other financial institutions, the legal community and businesses.

In a World Bank related study, [295] the authors reflected on their experiences in secured transactions reforms and made suggestions on the implementation strategies that will lead to a successful reform, with consequent expansion of access to credit. Fleisig et. al., duly propose that the right place to start in advocating for comprehensive reforms, as inherently suggested, is a diagnostic study that will cover initial legal assessment, empirical research and analysis of data. This can be followed with drafting a bill, which must note the conclusions in the diagnostics and

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[291] ibid 17–18, 19.
[292] ibid 17–31.
[293] See Fleisig, Safavian and Peña (n 4); International Finance Corporation (n 14); Affaki (n 1); Rover (n 8).
[294] Rover (n 8) 489.
[295] Fleisig, Safavian and Peña (n 4).

feedback from empirical research. The timing of the draft is relevant, so too the composition of the drafting committee. Public mobilization and awareness raising is essential, and often the vital piece to determine successful in the reform puzzle.[296] In all of the implementation process external support and expertise is noted,[297] but however, deemphasized in deference to local ownership, more so during the vital initial legal assessment.

The IFC in a similar reform implementation prescriptive guide/toolkit identified consensus building, client/local inputs, analysis and mapping of the existing legal framework, designing the registry, training and public awareness as key components.[298] The consensus building process calls for the identification of the local champion, who is the driver of the reform process and should have a 'conceptual understanding of secured transactions and its potential benefits' in addition to financial resources and political clout.[299] Secondly, the stakeholder groups, including the financial, legal and business communities, should be identified and be involved not only for consensus building but also for training and public education.[300] What follows should be a local driven process especially in analyzing and mapping out the exiting framework for use of personal property as security for credit, in order to properly fit the new system with ideal technical and perhaps financial support from external sponsors. This aspect is mostly lacking, especially in Sierra Leone, where the participants in the pre and immediate-post BLA enactment process in 2014 were only the Bank of Sierra Leone, the local champion, IFC and its foreign expert. Thus, in building the new legal framework, the existing framework was not clearly mapped out leading to the upspring of the substantial deviations. With IFC putting out research on implementation process best

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[296] ibid 61–84.
[297] On role of the foreign lawyer for example, see ibid 64.
[298] International Finance Corporation (n 14) ch 4 on 'Implementation'.
[299] ibid 29.
[300] ibid 30–31, 89.

practices on the one hand and leading the external sponsorship of the reform in Sierra Leone with scintilla local input on the other, serious doubt surfaces on the sincerity of purpose and adherence to the implementation guides in the literature.

How and why such the simple reform implementation methodological prescriptions are not followed in practice may be one main reason why reforms fail, and new systems rejected. The problem in reform implementation is identifiable in the failure to balance foreign inputs and local conditions, expertise, 'values, history, culture and institutional traditions'. [301] Even though there is no assessment study, *travaux préparatoires* to robustly validate this position in the Sierra Leone i.e., the absence of foreign and local balance, the repeated engagement of a foreign consultant who drafted the 2016 Collateral Registry Regulations[302] even after the initial non-consultation in the enactment of the BLA and the emergence of the substantial deviations is indicative of a set practice. What the study of law and development theory has done in this context is to explain the philosophy behind this seeming set practice. It answers the question of why the BLA ended up with the substantial deviations. And in the succeeding sub-section, the discussion on legal parallelism elucidates on the new frontier in modern secured transactions law, i.e., the existence of parallel systems for the use of personal property as security for credit within the same jurisdiction. The creation of the parallel system is as a direct result of the absence of a considered local consultation, consensus building and initial diagnostic study of the legal framework.

1.4 Legal Parallelism – the Two-Tier PPSL Framework in Sierra Leone

The impetus to explore the theoretical construct of legal parallelism is driven by the uncharacteristic emergence of parallel legal systems for the grant of a security interest in personal property, referred to as the 'two-tier PPSL framework in Sierra Leone'; one for banks and financial

[301] Davis and Trebilcock (n 155) 30.
[302] See Borrowers and Lenders (Collateral Registry) Regulations 2016.

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institutions as contained in the BLA, and the other for other creditors operating on the existing pre-BLA law. Since the state of the two-tier PPSL framework in Sierra Leone is quite unusual from other modern secured transactions systems, it is important that clarifications be made with respect to the meaning of legal parallelism and the basis for the legal parallelism argument herein. For example, legal parallelism has to be distinguished from, for example, legal pluralism which denotes the presence of more than one legal order in one social field, i.e., juridical jurisdiction.[303] Legal parallelism is still a nascent concept in legal studies, a sort of an appendage to the legal pluralism discourse, itself distinguishable from legal centralism which posits that 'law is and should be the law of a state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'.[304]

Parallelism is in fact borrowed from the field of philosophy, and 'implies a relation between two classes of objects that are distinct from each other'.[305] Taken from a neutral perspective, it may be questioned 'whether things that are parallel to each other are also distinct from each other'.[306] This is significant for the purposes of the two-tier PPSL framework in Sierra Leone wherein the two systems are parallel and distinct in terms of conceptual approaches, i.e., the BLA's functionalism and the pre-BLA law formalism. However, both systems are not entirely disconnected from each other. In extending contemporary insights from psychology and game

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[303] "Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. 'Legal pluralism' refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping 'semi-autonomous social fields' [a] situation of legal pluralism [...] is one in which law and legal institution are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all multifarious social fields present, activities which may support, complement, ignore or frustrate one another". John Griffiths, 'What Is Legal Pluralism?' (1986) 18 The journal of legal pluralism and unofficial law 1, 1, 38–39. For example, Sierra Leone's legal system is said to be pluralistic because it combines English adopted general and common law, customary law and aspects of Islamic law, three different legal orders.
[304] ibid 3.
[305] Yitzhak Y Melamed, 'Spinoza's Metaphysics: Substance and Thought' [2013] Oxford University Press 6 <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195394054.001.0001/acprof-9780195394054> accessed 9 December 2017.
[306] ibid.

theory, Kar's dissertation on 'Legal Parallelism' affirms the existence of deep structural parallels between law and morality, and that the psychological state to respond to moral and legal practices are nevertheless distinct.[307] In noting the distinction between law and morality in the literature,[308] he argues that the striking similarities between the two reveals deep structural parallels on account of the broad natural function they share.[309]

Kar labels his descriptive thesis as 'legal parallelism' and sees it as an opening for the 'understanding of legal legitimacy that [is] distinct from moral legitimacy, and for the view that legal validity entails neither moral nor legal legitimacy'.[310] The objective of Kar's study and descriptive claim relate to the scope provided for the understanding of the "distinctions between legal and moral duties that are sincerely accepted and to develop a clear account of the distinction between moral and legal norm acceptance".[311] Clearly, the intention herein is not to engage in the law and morality distinction debate, but rather to highlight what Kar's claim has helped to achieve, i.e., the abstract connection of two objects with striking resemblances but with a notable distinction defined/labelled as legal parallelism. This explains the abstract meaning of legal parallelism and it is evident in the two-tier PPSL framework in Sierra Leone, wherein the extant striking similarities between the BLA and pre-BLA law include the legal permissibility to take security over personal property by agreement, existence of a system of perfection including registration, priority rules

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[307] Kar claimed that the "Extensions of contemporary insights from evolutionary psychology and game theory suggest that we employ a particular kind of psychological state---an 'obligatum'---to identify and respond to obligations. This explains why law and morality share a number of deep structural parallels. Both purport to provide us with reasons to act; that are exclusionary; agent-centered; have general application; and are sensitive to certain standard excuses. Both are bound up with reactive attitudes; and share a special terminology that is essentially contestable and supervenes on natural facts […] The obligata that give life to our moral and legal practices are nevertheless distinct". Robin Bradley Kar, 'Legal Parallelism: How to Understand the Relationships and Distinctions Between Law and Morality, as Well as Their Respective Authorities' (University of Michigan 2004) IV, 5.
[308] Kar citing Dworkin and Raz ibid 61–64; see Ronald Dworkin, *Taking Rights Seriously*, vol 136 (Harvard University Press 1978); Joseph Raz, 'Authority, Law and Morality' (1985) 68 The Monist 295.
[309] Kar (n 307) 64.
[310] ibid, fn. 90.
[311] ibid 113.

and judicial and non-judicial enforcement. The notable distinction, however, is the difference in conceptual approaches.

So far, the abstract foundation for the label 'legal parallelism' has been laid, and next step is to investigate the substantive use or connotations in the very thin existing literature. The connotations or references to legal parallelism have mostly been adverse. Mofokeng in considering the right to freedom of religion in South Africa argues that legal pluralism seems to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom', whilst legal parallelism does not as the law operates in parallel structures.[312] A study of the Romanian law on legislative interventions (in the form of modification, suspension, abrogation, republishing) after the promulgation of a statute is justifiable on account of the removal of conflicting provisions, discrepancies and parallelism.[313] The existence of parallel structures is seen as adverse and the ultimate task is for the legal parallelism to be abrogated, i.e., removed.[314]

Since parallelism, as understood in the context of two related but distinct objects, is a possibility, notwithstanding its rarity, attention must be turned to notable cases that have offered some interpretative view on the question of parallel institutional competences in the former European Community (hereinafter: EC) now European Union (hereinafter: EU).[315] The cases will help cement the understanding of legal parallelism in the substantive sense, although they are far

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[312] Lesala L Mofokeng, 'The Right to Freedom of Religion: An Apparently Misunderstood Aspect of Legal Diversity in South Africa' (2007) 11 Law, Democracy & Development 121, 122, 130.
[313] Mihai Grigore and others, 'Legislative Events. Abrogation and Derogation' [2015] Law Study 524, 524–525.
[314] ibid 525.
[315] See *Commission of the European Communities v Council of the European Communities European Agreement on Road Transport (AETR Case)* [1971] ECJ Case 22-70, European Court Reports 00263; *Cornelis Kramer and others* [1976] ECJ Joined cases 3, 4 and 6-76., European Court Reports 01279; *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* (1993) 1 European Court Reports 01061; *Opinion given pursuant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels'* [1977] ECJ Opinion 1/76, European Court Reports 00741; also see Tom Delreux, 'The European Union in International Environmental Negotiations: A Legal Perspective on the Internal Decision-Making Process' (2006) 6 International Environmental Agreements: Politics, Law and Economics 231.

removed from secured transactions law. The EC derived its competences from member states attribution,[316] and this can be expressed or implied.[317] The implied powers or competences are developed through the doctrine of parallelism given the need to connect the implied and expressed powers of the EC.[318] The EC before 1985 became a party to agreements dealing with the international environment without expressed powers and did so on the basis of implied powers.[319]

In the first case on the issues of extension of powers implicitly, the European Court of Justice (hereinafter: ECJ) in *Case 22/70 (AETR)* had to consider and decide on who had competence to negotiate and sign an international agreement on road transport between the member states and the European Commission.[320] On the basis of the need to maintain the realization of the common policy in the EC, the ECJ sided with the Commission and ruled that EC states were no longer allowed to conclude agreements with third states where the internal policy and measures of the EC will be affected.[321] The *AETR* decision gave rise to the doctrine of parallelism in the EC, with the internal and external competences connected to the achievement of the objectives of the EC.[322] The *AETR* decision to extend implicit competences to the transport agreement where the EC objective of common internal policy was at stake was confirmed in *Kramer Case*.[323] Notwithstanding the substantive issues to resolve, the EC cases substantially have

[316] Delreux (n 315) 233.
[317] ibid 234.
[318] ibid.
[319] ibid.
[320] *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport (AETR Case)* (n 315); Delreux (n 315) 234.
[321] *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport (AETR Case)* (n 315), paras 17, 31; Delreux (n 315) 234.
[322] "Following the 'in foro interno, in foro externo' principle, conducting external policy does not have to be based on explicit provisions in the Treaty and that external policy can also arise from internal measures". Delreux (n 315) 235; see Alberta Sbragia, 'Institution-Building from below and above: The European Community in Global Environmental Politics' in W Sandholz and A Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford University Press 1998).
[323] *Cornelis Kramer and others* (n 315); Delreux (n 315) 235; subsequent opinions in *Opinion given pursuant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels'* (n 315); and *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention*

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kept pace with the idea of parallelism, which is the connection of two parallel structures, i.e. exercise of external and internal powers, with striking similarities but with notable distinction.

In now considering the legal parallelism argument in this dissertation, consideration has to be first given to the original centralist conception of law, which calls for a unified hierarchical ordering of the normative framework.[324] This means the law is uniform and the hierarchical layers do not derogate from this uniformity. For example, under the Pre-BLA law, the PPSL contained rules on legal and equitable security interests, with the legal interests enjoying superiority with respect to priority.[325] This formation or application of the law is hierarchical and not pluralistic since there is no reference to a different legal order.[326] The legal parallelism idea, therefore, builds on the combination of legal orders in legal pluralism, albeit at the hierarchical level within one legal order, maintaining the connection between similar but conspicuously distinct parallel legal structures. In the two-tier PPSL framework in Sierra Leone, the existences of the two competing conceptual approaches to secured transactions law is easily discernible. This distinction maintains the parallelism, and the further limitation of the application of the BLA to banks and other financial institutions cements this view.[327] Understanding this notion is, therefore, crucial in understanding the two-tier PPSL framework in Sierra Leone and the argument on the adverse effect of the legal parallelism herein.

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Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work (n 315) further confirmed that external competences can be exercised on the basis of internal competence, and this may be so where the internal competence has not been exercised before, and the exercise of external competence is in pursuit of an EC objective.

[324] See Griffiths (n 303) 3–4.

[325] See Chapter Two, 2.3.1 on the nature of security interests.

[326] See Griffiths' definition of 'legal pluralism' in Griffiths (n 303) 38.

[327] Borrowers and Lenders Act, (n 9), s 1.

1.5 Conclusion

In summarizing the arguments in this first chapter, three significant points have to be noted, all geared towards providing the theoretical planform to situate the substantive law arguments and claims in the succeeding chapters. The first point is the illustration of the idea that modern law is deemed to be instrumental to development, and this is wrapped in the hypothesis that developing countries can leapfrog the stages of development by adopting laws from mainly the US and other developed states. Since the transfer function in law and development theory is highly contested, the second point of the historical authenticity of the transfer of laws from one society to another provides a lifeline to the practice of legal transplant and exportability of a paradigm law as done in the modern secured transactions law reform. The lesson to be learnt is clearly the need to fully utilize the reform implementation methodology, the prescriptive guides developed out of experience, mostly calling for local ownership of the reform process. Where this is not followed, we get to the third point, wherein flaws emerge in the reform process as evident in the two-tier PPSL framework in Sierra Leone, which may require abrogation or further legislative consideration. The rest of the chapters in this Part of the dissertation will provide doctrinal and comparative analysis of the law on the use of personal property as security for credit, pre and post reform, building on this theoretical framework.

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Chapter Two

> *A system for taking security, at least over some kinds of assets, has existed in most countries for many years. Over that period, the law is likely to have been developed in piecemeal way, either through case law or legislative intervention, or a mixture of both. The resulting law, which is often complex, fragmented and inconsistent, is heavily path dependent. To understand it properly, one needs to be a historian, not just of the law, but of the economic imperatives which have shaped a particular country.*[328]

2. A Conspectus of the PPSL Framework in Sierra Leone Prior to the 2014 BLA

This chapter performs two main functions: Firstly, it offers a critical analysis of the development and state of the prior-PPSL in Sierra Leone before the enactment of the BLA; and secondly, it acts as the legal diagnostic or assessment study of the said prior-PPSL proving needed legal analysis to justify the 2014 reform, albeit *ex ante*. The chapter commences with a brief exposé of the legal system in Sierra Leone and its nexus to English law. This is significant since understanding the nature of the legal framework in Sierra Leone, its connection to English law and the English conceptual approach to personal property security is crucial in situating the pre-BLA framework in Sierra Leone. The examination of the prior-PPSL is done through the analytical frame of the 'building blocks' of the Unitary Model, covering the creation, perfection, priorities rules and enforcement of security interests in Sierra Leone. The objective of the chapter to give a doctrinal analytical account of the pre-BLA framework, and also uncover the problems associated with it and its limiting effect on access to credit finance.

2.1. The Legal System in Sierra Leone, Legal Pluralism and the Court System

Sierra Leone has a pluralistic legal system, which is essentially a product of the fusion of its customary rules, including Islamic law, the laws imposed by Britain during colonial rule, and subsequently adopted. The legal system indeed is a product of the historical, political, cultural and

[328] Gullifer and Akseli (n 3) 1.

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social developments in Sierra Leone, pre-colonial and post-colonial.[329] The Constitution of Sierra Leone 1991 (hereinafter: the '**Constitution'**) states that the laws of Sierra Leone shall comprise the Constitution, laws made by Parliament as authorized by the Constitution, subsidiary legislation authorized by the constitution, the existing law and common law.[330] Whilst the reference to the Constitution and laws made by Parliament, for example the BLA 2014, and possible subsidiary legislations[331] present no difficult; the reference to the 'existing law' and 'common law' requires further elaboration. The existing law refers to the 'written and unwritten laws of Sierra Leone' that existed prior to the enactment and full operation of the Constitution.[332] This appears to make it straight forward although the 'unwritten' bit reflects allowance for the common law (which includes customary law).

The common law in Sierra Leone refers to 'the rules of law generally known as the common law, […] doctrines of equity, and rules of customary law including those determined by the Superior Court of Judicature',[333] and this varies from the English concept of common law since it includes customary law.[334] The Courts Act of 1965, which is an existing law in the frame of the Constitution, provides further elaboration. It provides that 'the doctrine of equity, and the statutes of general application in force in England on the 1st day of January, 1880, shall be in force in Sierra Leone'.[335] This is referred to as the first reception clause in Sierra Leone, often found in all the

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[329] For more discussion on this point, See Renner-Thomas (n 32) ch The Legal System and Sources of Land Law in Sierra Leone.
[330] Constitution of Sierra Leone, 1991 s 170(1).
[331] Borrowers and Lenders Act, (n 9), s 54 for examples empowers the Governor of the Central Bank of Sierra Leone to make regulations under the Act to give effect to its provisions by means of statutory instruments.
[332] Constitution of Sierra Leone, 1991 (n 330).
[333] "The Judicature shall consist of the Supreme Court of Sierra Leone, the Court of Appeal and the High Court of Justice which shall be the superior courts of record of Sierra Leone and which shall constitute one Superior Court of Judicature, […]". ibid 170(2), s 120 (4).
[334] For discussion on the English common law, see Sir Matthew Hale, *The History of the Common Law of England* (E and R Nutt and R Gosling 1739).
[335] Courts Act 1965 (n 145).

other West African former British colonies.[336] The common law as foresaid mentioned includes customary law.[337] What we have here is not one uniform embodiment of customary rules, but rather recognition of the customary rules of various chiefdoms (local political divisions in the provinces) within Sierra Leone collectively referred to as customary law, which include Islamic law.[338]

Conclusively, the English law adoption section in the Courts Act of 1965 and the Constitution recognition of existing law imply the application of the English common law (including equity) in Sierra Leone, and together with customary law constitute the common law of Sierra Leone.[339] It follows from the above analysis that the pluralistic legal system in Sierra Leone can broadly be classified as the general law[340] and the customary Law (of Sierra Leone). The general law as we will eventually see in the next section, covers the Constitution, statutory law, received or adopted English statutes, English common law and equity.[341] The customary law, which applies in the Provinces, refers to the various local rules applicable to specific chiefdoms including Islamic law limited to marriage, divorce and succession.[342] The operation of the two

[336] Renner-Thomas (n 32) 26.
[337] Constitution of Sierra Leone, 1991 (n 330) Section 170(3) states 'the expression "customary law" means the rules of law which by custom are applicable to particular communities in Sierra Leone'; Local Courts Act 2011 s 1 defines customary law to mean 'any rule other than a rule of general law, having the force of law in any Chiefdom of the provinces whereby rights and correlative duties are acquired or imposed in conformity with natural justice and equity and not incompatible, either directly or indirectly, with any enactment applying to the provinces, and includes any amendment of customary law made in accordance with the provisions of any enactment'.
[338] In so far as Islamic law is concerned, its relevance to legal system is limited to family law and succession. Although Islamic law affects property (including personal property), its influences is limited to devolution as the general law or customary law will apply when secured transactions are envisaged. See Henry M Joko Smart, 'Place of Islamic Law within the Framework of the Sierra Leone Legal System' [1980] African Law Studies 87. Note, however, that Jalloh had argued that Islam and kinship underpinned informal credit in Sierra Leone, and if this is the case, then its connection to customary law can hardly be untangled. See Alusine Jalloh, 'Informal Credit and Politics in Sierra Leone' [2003] African Economic History 91, 96.
[339] Constitution of Sierra Leone, 1991 (n 330), s 170 (1); Courts Act 1965 (n 145), s 74; also see Imperial Statute Act, Cap 18 of the Laws of Sierra Leone 1960.
[340] Joko Smart (n 338) 100 (n1) Smart noted that the Local Courts Act, 1963 introduced the term 'general law' to define or categorizes the common law, equity and enactments in Sierra Leone to distinguishable from customary law. The definition was followed through in the Interpretation Act; see Interpretation Act, 1971, s 4.
[341] Interpretation Act, 1971 (n 340), s 4.
[342] Local Courts Act 2011 (n 337), s 1; see Joko Smart (n 338).

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main legal structures affects how for example property is owned, conveyed and property rights enforced in the various courts.

Since judicial enforcement is envisaged in secured transactions, then it is important to briefly outline the Court system in Sierra Leone. Despite the pluralistic nature of the legal system, a singular integrated court system exists as established by the Constitution. The courts are broadly divided in Courts of Superior Judicature (the Supreme Court, Appeals Court and High Court and inferior courts.[343] The Courts Act of 1965 established the Magistrates Court (the primary inferior court) in the 16 political districts, for adjudication declared judicial districts and in the Western Area.[344] Further, Local Courts are established in all chiefdoms of Sierra Leone, representing the base of the judicial pyramid. [345]

With respect to jurisdictions of the courts to deal with questions of enforcement of security interests, the High Court, being the lowest of the three courts of superior judicature, has original jurisdiction to hear disputes and grant remedies with respect to matters where the quantum in issue exceeds Five Million Leones.[346] Ordinarily, an appeal on the final judgment will lie as of right to the Court of Appeal, and ultimately to the Supreme Court on questions of law and facts.[347] The Courts of Superior Judicature will apply the general law in matters arising from the High Court,

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[343] See s 120 of Constitution of Sierra Leone, 1991 (n 330) The Constitution in s 120 (1) vests the Judicial power of Sierra Leone in the Judiciary and in sub-section 2, the Constitution states that the Judiciary shall have jurisdiction in all matters civil and criminal. Sub-section 4 states 'The Judicature shall consist of the Supreme Court of Sierra Leone, the Court of Appeal and the High Court of Justice which shall be the superior courts of record of Sierra Leone and which shall constitute one Superior Court of Judicature, and such other inferior and traditional courts as Parliament may by law establish'.

[344] Courts Act 1965 (n 145), ss 3 and 4.

[345] Local Courts Act 2011 (n 337), s 2.

[346] Constitution of Sierra Leone, 1991 (n 330), s 132(1); Courts Act 1965 (n 145), s 18(1), (2) and (3)(b); Courts (Amendment) Act, 2006, s 7(1); Le 5,000,000.00 is approximately the equivalent of USD 700.00 'Bank of Sierra Leone Foreign Exchange Rates' <https://www.bsl.gov.sl/> accessed 9 November 2016.

[347] Constitution of Sierra Leone, 1991 (n 330) s 129(1) read together with; Courts Act 1965 (n 145) s 56; and Constitution of Sierra Leone, 1991 (n 330) s 123(1)(a).

and will only apply customary law on appellate issue from inferior courts.[348] The jurisdiction of Magistrate's Courts in dealing with original matters affecting security interests are limited to dispute with monetary value not exceeding the said Five Million Leones threshold.[349] Magistrates Courts can also hear appellate matters on general law and customary law (District Court of Appeal) from the Local Courts affecting security interests.[350] The Local Courts jurisdiction on security interests is based on both general law limited to civil disputes not exceeding One Million Leones[351] and seemingly unlimited application of customary law.[352] The Local Courts (and other courts) in applying customary are compelled or limited not to apply customary rules that are not repugnant to natural justice, equity, good conscience and the general law.[353] Further, when there is a lacuna in the customary law, the general law will apply.[354]

The discourse on the courts' jurisdiction and distinction between general law and customary law will become relevant when issues of cost and duration of enforcement will be considered. There are further implications for consumer financing, which may include small amounts in the domain of the inferior courts. More generally, outlining the legal system and court system especially with customary law will prove to be useful in looking at informal credit in Sierra Leone.[355] For example with a weakened judicial system in most of the provinces in Sierra Leone,[356] the BLA does not compel court proceedings to enforce a security interest rights. Whilst this may

[348] See s39(1) of the Local Courts Act 2011 (n 337) An appeal from the Local Courts lies in the District Appeal Court, which is consist of the Magistrate in the District sitting with 2 Assessors. See s40(1); and further appeal from the District Appeal Court lies in the Local Appeals Division of the High Court, wherein a Judge sits with 2 Assessors as stated in section 41 thereof.
[349] Courts (Amendment) Act, 2006 (n 346) s 7.
[350] Local Courts Act 2011 (n 337), s 39.
[351] 'Bank of Sierra Leone Foreign Exchange Rates' (n 346) the equivalent of approximately USD 140.
[352] Local Courts Act 2011 (n 337), s 15(1), (3)(a) and (b).
[353] Courts Act 1965 (n 145) s 76.
[354] Local Courts Act 2011 (n 337), s 15(5).
[355] Informal credit herein means cash and non-cash obligation outside the formal banking system, including the rental / rotational credit system called 'esusu'; see Jalloh (n 338) 91.
[356] See Niobe Thompson and Mohamed Pa-Momo Fofanah, *In Pursuit of Justice: A Report on the Judiciary in Sierra Leone* (2002) mainly due to the effects of the civil war fought from1990 to 2002.

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lean towards the notion of self-help enforcement, a further interpretation of using alternative non-judicial or quasi-judicial means, i.e., through the customary leadership is a possibility.[357] This is, however, outside the scope of this present study and will not be explored.

2.2. The General Law and Nexus to English Law

The historical development of the general law in Sierra Leone follows the political development, from the initial acquisition of a sizable territory by the Sierra Leone Company, which is now a portion of the heart of the capital Freetown. In providing the earliest recorded contact with English law, the Sierra Leone Company chartered by Westminster in England authorized the Directors to make law from 1791 to 1821, in what eventually became part of the British Colony, and such laws not to be repugnant to English law.[358] Historically, English jurists had argued that the doctrine of reception dictates that English colonialism inherently and automatically includes application of English law.[359] Therefore, the declaration of Sierra Leone as a crown colony in 1808 meant English law applied from thereon. In 1857 however, an ordinance formally confirmed the direct application of English law, that is, the common law and principles of equity, statutory law in force in England applied to the Colony of Sierra Leone.[360]

The Courts Acts of 1965 brought the reception date of English law forward to 1880 in Sierra Leone.[361] The reception clause therein which subsist to date, is the fulcrum for applying English law in the pre-BLA framework. In addition to the reception clause in the Courts Act of 1965, subsequent English legal provisions have been specifically adopted.[362] In the Provinces, then declared a British Protectorate, English law coexisted with the customary (native law). The Order-

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[357] Borrowers and Lenders Act, (n 9), s 41. Enforcement under the BLA will be covered in the Third Chapter.
[358] See Charter of Incorporation of the Sierra Leone Company, 31 Geo. III, C. 55; Renner-Thomas (n 32) 27.
[359] William Blackstone, *Commentaries on the Laws of England (1765-1769).*
[360] See Ordinance No. 96 of 1857; Renner-Thomas (n 32) 27.
[361] Courts Act 1965 (n 145), s 74.
[362] See Imperial Statute Act, Cap 18 of the Laws of Sierra Leone 1960 (n 339).

in-Council of 1895, made under the Foreign Jurisdiction Act of 1890 allowed for the colonial legislative authority in the Colony of Sierra Leone to exercise authority over the adjacent territories;[363] and the Protectorate Ordinance of 1896 led to the establishment of the first customary court system coexisting with the general law court system.[364] Further, specific statutes outside the reception date of January 1880 were adopted in the Imperial Statutes (Law of Property) Adoption Act, Cap. 18.[365] Also, some local enactments adapt or are almost *ipsissima verba* English legislations like the Limitation Act of 1965, and to some extent as recent as the Companies Act of 2009. Finally, the courts in Sierra Leone rely heavily on English case law as seemingly more than persuasive influence (more than it ought to) in determining issues/disputes. The practice of referencing English law is reinforced by the lack of local case reports, as the last law report published only included selected cases from 1974 to 1985.[366]

The implication of tracing the application of the general law to English law is simple but significant. Through the various stages of reception of English law, the English PPSL became applicable to Sierra Leone and had consequently infused the formal approach in its framework. Evidently, the discussions on the problems of associated with the English PPSL and reforms debate largely reflected the position in Sierra Leone up to December 2014. In fact, the problems are direr in Sierra Leone since reforms subsequent to the reception date and lapse in individual statutory adoption largely pinned the applicable PPSL in Sierra Leone to the 1880s English statutes. In the following sub-sections, a more detailed analysis of the prior-PPSL will be done with the objective

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[363] Foreign Jurisdiction Act 1890 (c. 37), ss 1 and 2; Renner-Thomas (n 32) 28.
[364] Protectorate Ordinance of No. 20, 1896; Renner-Thomas (n 32) 28.
[365] Imperial Statute Act, Cap 18 of the Laws of Sierra Leone 1960 (n 339); Renner-Thomas (n 32) 39 which adopted inter alia the English Conveyancing and Law of Property Act 1881, the Trustee Act 1888 for example.
[366] See Anthony P Kinnear (ed), *Sierra Leone Bar Association Law Reports [1974-82]*, vol 1 (Sierra Leone Bar Association 2007).

of uncovering the problems that were associated with the legal framework that led to the reform in 2014.

2.3. The prior-PPSL Framework in Sierra Leone

Personal property law, i.e., law that concerns all property other than land, in Sierra Leone has changed little from English law since independence.[367] The simplest way to describe personal property (personalty) is to divide the concept into categories like choses in possession, dealing with tangibles, corporeal, and movable things/chattel; and choses in action, covering intangibles, incorporeal and immovable chattel. Choses in action represent a sort of residual category to tangible chattels, which for this purposes includes receivables (pure intangibles) and shares (documentary intangibles).[368] In *Colonial Bank v Whinney*,[369] a case decided under the Bankruptcy Act 1883 (not generally nor specifically adopted in Sierra Leone), the House of Lords per Blackburn J. drew the distinction between personal property (in the case concerning shares) which can be physically seized and other kinds which could not be physically seized. Hence shares much like debt were choses in action.

In examining the notion of personal property under customary law, one critical issue to examine is the question of whether customary law in Sierra Leone recognizes the dichotomy between real and personal property, and further between tangible and intangible property. The existing literature does not appear to suggest classification of property in terms of the real or personal property on one hand, and further between choses in action and choses in possession in

[367] The literature on this area of law remains scanty and reliance is mostly on English literature. For more see MG Bridge, *Personal Property Law* (London : Blackstone Press, c1993, 1996); Michael G Bridge and others, *The Law of Personal Property* (Sweet & Maxwell 2013); Duncan Sheehan, *The Principles of Personal Property Law* (Oxford : Hart, 2011); FH Lawson and Bernard Rudden, *The Law of Property* (Oxford : Oxford University Press, 2002 2002) The treatment of leasehold interests in land as personalty is historical and mostly based on the fact that leases are finite and initially not recoverable by real action before the action for ejectment was introduced.
[368] Bridge, *Personal Property Law* (n 367) 2–4; Lawson and Rudden (n 367) 20; Sheehan (n 367) 2–3 Note that the connotation to movable and immovable is not the equivalent of the Roman law classification of property.
[369] *Colonial Bank v Whinney; HL 1886* 1 1 App Cas 426 (House of Lords).

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personalty. References to general law classification is found in statute law dealing with property under customary law custodianship, for example leasehold in the Provinces under the Provinces Land Act, Cap 112.[370] Customary law, however, addresses property interests in terms of ownership (individual holdings versus communal holdings, chiefdom trusteeship[371]), possession, control, supervision and management.[372] Whilst this form of classification will be of relevance subsequently, it must be noted that reference to personal property and its classification carries the same sense under general law and customary law, except otherwise represented herein.

2.3.1 Framework for the Creation of Security Interests

In the Introduction to this research, the nature of credit, security and the purpose of security were examined. It is acknowledged that consensual security could be created for the two broad classifications of properties under the general law, that is, real and personal properties; and created for inter alia coercion, insolvency, execution or diligence with regards non-performance or non-compliance with a debt obligation.[373] A 'security interest'[374] is used under English law to cover interest in or relating personal property, and in this context, it means the use of corporeal/tangibles

[370] Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 1927 s 4.
[371] See preamble Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 (n 370) which vests land in the provinces in the Chiefdom Council for and on behalf of the people of the specific chiefdoms.
[372] Renner-Thomas (n 32) 142; Kwamena Bentsi-Enchill, 'Do African Systems of Land Tenure Require a Special Terminology?' (1965) 9 Journal of African Law 114, 119.
[373] See for example Diamond (n 19) 9–10; Royston Miles Goode, *Legal Problems of Credit and Security* (Sweet & Maxwell, 2003) 1–3; Lawson and Rudden (n 367) 188.
[374] 'Security interest' in secured transactions law refers to 'a property interest created by agreement […] to secure performance of an obligation (esp. repayment of a debt)'. Garner and Black (n 11) 1387; Goode defines security interest within the English common law context as 'a right given to one party or by a third party' with the following characteristics: a right in an asset given by a debtor to a creditor, but not by reservation of title or an outright transfer, to secure an obligation but; and for a fixed security, the restriction on the debtor not to freely disposed of the encumbered asset. Goode, *Legal Problems of Credit and Security* (n 373); The Borrowers and Lenders Act 2014 (which we shall turn to in chapter 2) defines security interest to include a list of security devices like chattel mortgage, fixed and floating charges or any consensual encumbrance Borrowers and Lenders Act, (n 9); The UCC § 1-201 (35) broadly defines security interest to mean 'an interest in personal property or fixtures which secures payment or performance of an obligation. […]' White and Summers, *Uniform Commercial Code* (n 90); Gilmore, *Security Interests in Personal Property* (n 7) Gilmore devoted time to the question of what a security interest is. In referencing to the basic definition in the first sentence of; Uniform Commercial Code 2010, § 1-201 (35) noted that there may be many kinds of interests that may fall outside the Code. This goes more to the scope of Article 9 of the UCC.

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and incorporeal/intangible chattel as follows: First, the interest in security devices described as a mortgage, charge (fixed and floating), pledge or lien (consensual), where holder of proprietary interest in property creates a right to look into the said property, that is, an interest in the said property in favour of a creditor to secure the performance of a debt obligation. The second refers to where title or right to the property is retained by the creditor to secure a debt obligation for example a hire purchase (in the English context referred to as "quasi-security interest").[375] This *sensu stricto* dichotomy exists in the English as much as in the pre-BLA law in Sierra Leone, typifying the formal approach. As much as possible this part of the research adopts this dichotomy in examining the pre-BLA framework, i.e., the examination of the formal approach in Sierra Leone as it existed within the referenced period.

In examining the framework for the creation of a security interest, some distinctions have to be made. Creating a security interest in the sense other than title retention or quasi security interest is based on a closed system of consensual security devices; as afore-listed, the mortgage, pledge, charge and lien; referred to as the forms of consensual security interests for both Sierra Leone and England.[376] This is different from other forms of quasi security interests, which may include 'reservation of title under a contract of sale, the contractual set-off and the imposition of restrictions on the withdrawal of a cash deposit'.[377] A further complexity to add in the mix is the distinction between a legal and equitable security interest on personal property, which in this

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[375] Diamond (n 19) 10; The Crowther Report refers to the distinction between lender credit and vendor credit in confirmation of the different treatment under English law Crowther and others (n 11); Goode used this distinction between the grant of security excluding retention of title to differentiate between the formal approach and the functional approach, which includes retained title credit transactions. Goode, *Legal Problems of Credit and Security* (n 373) 3–4.

[376] Crowther and others (n 11) 10; Goode, *Legal Problems of Credit and Security* (n 373) 31 This common law conception of security interests was later consolidated in in recent English statues: the Insolvency Act 1986, ss 248 (b) (i) and 425 (4); the Companies Act 1989 s 93; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 4.

[377] Goode, *Legal Problems of Credit and Security* (n 373) 3.

context mostly affects priority as against subsequent security interests on the same underlying asset.[378] Finally, it is important to mention a further English law nuance, which is consumer credit financing rules, brought about after the recommendations of the Crowther Consumer Credit Report.[379] These new additions post the general reception date of 1st January 1880 for English law in Sierra Leone were, however, not adopted and not-applicable in the pre-BLA law in Sierra Leone.

2.3.1.1. Pledge of Chattel

The pledge, the use of which has been overtaken by the mortgage and charge within the formal finance sector in Sierra Leone, is a good security device to start with since it characterized the earlier rule forbidding the non-exclusive possession and conveyancing, i.e., the separation of ownership and possession. The evolution of English law security interests follows its socio-economic development; and when Britain was agrarian, in the pre-industrial period, the pledge and the barter were the oldest recognized forms of property transactions. In those instances, possession and title (ownership) were almost inseparable.[380] Development in commercial activities (the free exchange of goods and services) and the common law saw the separation of tile and possession to property. The development of rules to deal with the ostensible ownership problem the separation creates for example defined the development of English law on security interests.[381] In the customary law sense in Sierra Leone, apart from the usual approximation to English law concepts,

[378] A security interest may be legal or equitable, mostly hinged on the question of formalities. Goode states that there are six reasons why a security interest may be considered equitable: "(a) it relates to future property; (b) there is no transfer or agreement for transfer at all, merely a charge; (c) there is no present transfer, merely an agreement for transfer or a declaration of trust by the debtor; (d) the transfer is not made in accordance with the formal requirements for the transfer of legal title; (e) the transfer is made not to the creditor but to a third party as trustee for the creditor; or (f) the transferor's title to the asset is equitable, not legal". The priority importance it must be said is really an issue of historical importance since register is now required even for equitable security interest. ibid 8.

[379] See the Crowther and others (n 11) some of the recommendation therein led to the White Paper on "Reform of the Law on Consumer Credit" (Cmnd. 5427); and subsequent enactment of the Consumer Credit Act 1974'. This Act is not applicable in Sierra Leone, and therefore, this distinction will not be of serious significance in this part of the research; Diamond (n 19) 5.

[380] De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 8–9.

[381] *Twyne's Case* (1601) 3 Coke 80; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 9.

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this non-separation of title and possession had little relevance, hence the approximation of all customary security interests to a pledge.[382]

The pledge is a common law security device created by the actual or constructive delivery of an asset to the creditor (or a third party acting for or on behalf of the creditor), as security for a loan. The debtor in a pledge transaction is known the pledgor, who retains ownership of the assets, and the creditor is the pledgee, who enjoys a special/limited legal interest in the asset.[383] In *Donald v Suckling*,[384] the court examined the nature of a pledge, where the rights of the pledgee to the asset is not merely to detain same, but include use of the asset without impairment and with the attendant risk. The pledgee could sub-pledge on same or lesser conditions as her interest and to sell the asset in event of a default by the pledgor.[385] What this means is that the pledgee, who requires the use of the asset mostly in business credit transactions, is deprived of the use of the asset, making the possessory nature of a pledge not commercially viable. A pledge depends on possession and thus the underlying asset must be capable of being possessed, whether actual or constructive. Thus, goods[386] and documentary intangibles[387] now form the subject matter of a pledge. Although the class of what could be deemed as documentary intangible is not closed, the following represent

[382] See Renner-Thomas in the description of customary pledge of land for example Renner-Thomas (n 32) 223; In Nigeria, a similar approximation to the pledge is connoted by Nwogu and Iheme Nwogu (n 9) 42; Iheme (n 112) 33.
[383] Goode, *Legal Problems of Credit and Security* (n 373) 31; Crowther and others (n 11) 156.
[384] *Donald v Suckling* (1866) 1 QB 585 (QB).
[385] *In the Matter of the Cargo ex Odessa & Steamship Woolston v The High Court of Justice Probate, Divorce and Admiralty Divisions (in Prize) [1915] UKPC 53 (11 November 1915)*; Goode, *Legal Problems of Credit and Security* (n 373) 31.
[386] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 s 62 (1) defines goods to include 'all chattels personal other than things in action and money [...] The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale'.
[387] Factors Act 1889, s 1. Although Factors Act, 1889 does not apply in Sierra Leone, the preceding Amendment Act of 1877 does. Section 1 (4) of the 1889 defines 'document of title' to include 'bill of lading, dock warrant, warehouse-keepers's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented'. By section 3, the pledge of document of title is deemed to be a pledge of goods; see Crowther and others (n 11) 156; Outside the Factors Acts (the 1989 was is not applicable in Sierra Leone), the Companies Act 2009, which follows subsequent English law allows for the pledge of companies' document of title a pledge of security, by reading sections 1 and 142. Companies Act 2009.

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what could constitute documentary intangibles: Bills of lading, negotiable instruments and securities, including shares bearer bonds, and debenture certificates. [388]

The first statutory intervention to address security interests directly in England was the Act Against Brokers 1604,[389] focused on pledge/pawn of goods; as the Fraudulent Conveyances Act 1571[390] before it addressed the non-possessory assignment problem associated with the ostensible ownership at the stage of bankruptcy.[391] The Act Against Brokers 1604 and subsequently the Pawnbrokers Acts[392] regulated pledges and pawn-broking, especially fencing off property acquired illegally (stolen).[393] Although these legislations are antiquated and some repealed in England, some have been adopted by the reception clause in Sierra Leone and still have the force of law. In *Tommy Caulker v Lamin Turay*,[394] the High Court in Sierra Leone had to determine a claim of detention (tort of detinue) of a motor vehicle surrendered to the defendant to plaintiff for a loan. The court in relying on the English case of *Donald v Suckling*,[395] held that the transaction was a pledge, and with the expiration of the date to redeem the pledge, the plaintiff had the special right to sell the vehicle.[396]

[388] See Goode, *Legal Problems of Credit and Security* (n 373) 31–32; historically, pledge of land was possible see AWB Simpson, *A History of the Land Law.* (Clarendon Press 1986) and this agrees with the idea of pledges under customary law; Factors Act 1889 (n 387).
[389] Act Against Brokers c. 21 1604 (1 Jac1).
[390] Fraudulent Conveyances Act 1571.
[391] The Fraudulent Conveyances Act prohibited the transfer of property with the intention to 'delay, hinder, or defraud creditors and others'. Such a transfer will be void. ibid 1 and 2; The *Twyne's Case* (n 381) interpreted this to mean exclusive possession in the transferee. The Bankruptcy Act 1623 was mostly concerned with or used to avoid assignments in bankruptcy. De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 10–15.
[392] Pawnbrokers Act 1872 The first of the Acts was passed in 1757 and amended several times including the 1872 amendment, which is the last of the applicable Acts in Sierra Leone.
[393] Crowther and others (n 11) 36 and 163–4 In para 2.1.17, the Committee wrote that the enactment of the pawnbroking statutes were 'to prevent pawnbrokers fraudulently selling pledges and acting as receivers of stolen goods and secondly regulate, in relation to the small sums on loan, the rates of interest charged by pawnbrokers'. The principal requirements were/are licensing, maintaining records, keeping with formalities, charge for profit, redemption and sale of pledges, and prohibition on sale of unfinished goods or materials for example.
[394] *Caulker v Turay* [2009] unreported 12 (SL High Court).
[395] *Donald v Suckling* (n 384).
[396] *Caulker v Turay* (n 394) 12–13.

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In the informal sector in Sierra Leone, the pledge is the device of choice for micro small and mid-scale enterprises (MSME), SME and general consumer financing. Use of pledges or pawn-broking, albeit informal, is a key economic activity and the preserve of the unemployed youthful population in Freetown.[397] Thus, the use of pledges and regulating the security interest connected industry becomes a livelihood issue as well. However, security transactions in this informal system stifles growth in the formal sector, transactions limited to mostly small amounts, and operating in the informal section means little regulation even in the existence of inherited laws from England. Under the customary law, the pledge remains the equivalent English law derived security interest. This certainly equates to the agrarian/pre-industrial practices.

2.3.1.2. Chattel Mortgage

A mortgage denotes the transfer of an interest, including ownership, of an asset/chattel[398] as security for an obligation, with the express or implied intention of retransfer at the performance or discharge of the obligation.[399] Importantly, a mortgage inherently requires the separation of ownership and possession. The fraudulent conveyance rule, which clogged ownership and possession, became an anathema to the commercial needs of an industrialized British (English) society. Like water cutting through rock, the significant development in non-possessory security interests covering chattel occurred with the passage of the Bills of Sale Act, 1854 in England.[400]

[397] Market overt were pledges and pawns are the usual means to access finance are located at the Rawdon Street – Lightfoot Boston Street intersection known as 'Swiezzy'; Percival Street and Lightfoot Boston Street intersection, known as 'Belgium'; Magazine Cut off Fourah Bay Road and Lumley in the West of Freetown.

[398] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960, s 4 defines 'personal chattels' to mean 'goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate [...]'. Further exclusions include any land, buildings growing crops on land, shares or interest in stock, chose in action, stock or produce forming part of land.

[399] Goode, *Legal Problems of Credit and Security* (n 373) 35.

[400] Wilde B, in *Allsopp v Day* (1861) 7 Hurl & N 457 referred to a bill of sale as an 'instrument by which property passes. In this case, the transfer of personal property from one person to another; and there are two types: The 'Absolute Bill' and the 'Security Bill'. Aubrey L Diamond, 'Hire-Purchase Agreements as Bills of Sale' [1960] Modern Law Review 399. Herein we are concerned with the security bill of sale; 'bills of sale as security for loans [...] is a document by which the property in goods is transferred from one person to another, the grantor of the bill remaining in possession. It is thus in effect a non-possessory chattel mortgage'. Crowther and others (n 11) 37.

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The Bills of Sale Act was passed with the primary intention to stop debtors (individuals) of putting up an appearance of false wealth, when in fact the possessed property is encumbered by a security interest. This was achieved through the legal provision for the 'avoidance of unregistered bill of sale in certain cases'.[401] This legislation introduced the universal registration of personal property (excluding intangibles) used as non-possessory security, thereby providing public notice.[402] Although the common law rule found in *Twyne's case* was not repealed, in effect it became nugatory.[403]

In English law context, a security bill of sale is effectively a chattel mortgage.[404] A legal chattel mortgage may be created orally,[405] however, if it is made by an individual and in writing, it must be by way of deed.[406] Whilst the major role of the 1854 Bills of Sale Act was to work through the fraudulent conveyance problem, the statue was not without fault. The subsequent amendments in 1866, 1878, 1882 *et. seq*. in England shifted from not only protecting lenders against the ostensible ownership problem (secret transfer), but to dealing with (lessening) the rigidity of the formalities in favour of the borrowers respectively. In *Manchester, Sheffield and Lincolnshire Railway v. North Central Wagon Co*., the House of Lords recognized that the ultimate

[401] The original Bills of Sale Act, 1854 and the subsequent amendment Act; Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398) applies in Sierra Leone. See Preamble and s 8; See also chapter on 'The evolution and regulation of security interests over personal property' De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 15.

[402] Bills of Sale Act, 1854 (n 401) ss 3 and 4. Note that the Bankruptcy Act 1914, s 43; replaced by the Insolvency Act 1986, s 344 does not apply to Sierra Leone and hence the assignment of existing and future book debt by a business person exception was to applicable to Sierra Leone.

[403] De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 15.

[404] Crowther and others (n 11) 164.

[405] *Newlove v Shrewsbury* (1888) 21 QBD 41; Goode, *Legal Problems of Credit and Security* (n 373) 9; a chattel mortgage made orally need not be registered under the Bills of Sale Acts Crowther and others (n 11) 156.

[406] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398) s 4(1); In *Read v Joannon* (1890) 25 QBD 300 later confirmed by the Court of Appeal in; *Re Standard Manufacturing Co* (1891) 1 Ch 627 (Court of Appeal) the Bills of Sale Acts 1878 and 1882 do not affect the debentures (any charge) of companies. For companies, since a mortgage is also considered as a charge, this aspect will be covered under the rubric of charges subsequently. See also Goode, *Legal Problems of Credit and Security* (n 373) 9.

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objective is to protect innocent parties.[407] The 1878 and 1882 Acts were adopted in Sierra Leone, as stated in Cap 241.[408]

In the regime under the Bills of Sale Acts 1878 and 1882, as applicable in Sierra Leone under Cap 241, personal chattel mortgage created by individuals and unincorporated bodies must comply with its strict provisions on formalities therein.[409] The formalities[410] apply when the transaction is above the equivalent of 30 British Pounds Sterling,[411] and include the need for the bill of sale to be attested by a solicitor, who is not a party to the transaction. The bill of sale must be registered within 7 days of execution,[412] and must be in the form prescribed by the Act.[413] There should be a schedule of the personal property covered by the security interest under the bill to ensure it is not void against third parties.[414] Finally, the bill should be renewed every 5 years.[415] With the focus on the form, rather than the transaction, bills of sale represent 'instruments of securitisation'.[416] It must be noted that whilst these formalities refer to personal chattel as defined in the Bills of Sale Act 1878, and excluding chose in action, that is intangibles inter alia a debt, a

[407] *Manchester Sheffield and Lincolnshire Railway Co v North Central Wagon Co* (1888) 13 App Cas 554 (House of Lords) 559 a 'case of considerable nicety, and one of those painful cases in which as between two innocent persons, a loss having been sustained, [and] the Court had to decide upon whom 'Between equal equities the law will prevail, […]'; With the bills of sale being used to exploit needy borrowers, the 1882 Amendment was passed to protect creditors and safeguard against exploitation of borrowers; Crowther and others (n 11) 37.

[408] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 30 states: 'Unless the context otherwise requires, any reference in any legislation to the Bills of Sale Acts, 1878 and 1882, or to either of them shall be deemed to include a reference' to Cap 241.

[409] Reference is made to individuals since Companies Act 2009 applies to company charges. The rule affecting individuals have direct relevance to MSMEs, and SMEs since the prevalent business form (sole proprietorships) does not recognize this separation of legal and personalities. See Companies Act 2009 (n 387) s 142.

[410] Crowther and others (n 11) 164, 179.

[411] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 27.

[412] ibid ss 8 and 10.

[413] ibid s 9.

[414] ibid s 4.

[415] ibid s 10.

[416] Duncan Sheehan, 'The Abolition of Bills of Sale in Consumer Lending' [2010] Law Quartely Review 356, 359.

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life policy, a right under a bill of exchange or contract, it does not prevent an individual from doing so. It follows that in such a case, the registration requirements will not apply.[417]

In *Thomas v. Kelly and Baker*, a case decided a decade after the enactment of the 1878 Bills of Sale Act, Lord Macnaghten said 'the more […he had] occasion to study the Act the more convinced […he was] that it is beset with difficulties which can only be removed by legislation'.[418] Diamond in 1974 argued that the Bills of Sale Acts in England failed in all their intended goals and had the effect of 'removing the mortgage of goods out of the realm of responsible, respectable financial business'.[419] The Law Commission Report on 'Bills of Sale', referred to the Victorian era 1878 and 1882 statutes as plagued by five key defects: "[First] they are unduly complex; [second] they require highly technical documentation; [third] the registration regime is in need of modernisation; [fourth] they offer little protection to borrowers; and [fifth] they offer no protection to purchasers".[420]

The position in Sierra Leone, expectedly, is no different from the English status quo, and in fact is far worse given the lack of further development in the law. There are two major rippling consequences of the derived English law defects: First, the crippling formalities largely led non-incorporated businesses to ignore the formal sector as a source for credit capital finance or even operational finance leading to the growth of the informal sector. Second, the high illiteracy in Sierra Leone[421] means engaging in such complex transactions in terms of the formalities in a

[417] Crowther and others (n 11) 157.
[418] *Thomas v Kelly* (1888) 13 App Cas 506, 517.
[419] De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 18; referencing Aubrey Diamond in Sauvelplanne (ed.), Security over Corporeal Moveables (1974), p.34; Several English personal property security jurists/authors have criticised the Bills of Sale Acts Louise Gullifer and Sophia Hurst, 'The Bills of Sale Acts: Ripe for Reform? (2013) 11 JIBFL 685'; Bridge and others (n 367); Sheehan (n 416) 356; Graham S McBain, 'Repealing the Bills of Sale Acts' [2011] Journal of Business Law 475, 476–477; The Law Commission's reports also contain similar criticisms: Crowther and others (n 11) para 4.2.11; Diamond (n 19) para 18.1.8.
[420] Law Commission, *Bills of Sale* (n 19) 12 para 2.11.
[421] The UNDP office in Sierra Leone estimates that adult literacy is at 41%. UNDP Sierra Leone, 'About Sierra Leone' (2015) <http://www.sl.undp.org/content/sierraleone/en/home/countryinfo.html> accessed 25 April 2018.

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sustained fashion is mission impossible. The formalities have been choking off the possibility of using the Bills of Sale Act, Cap 241 to secure chattel of non-corporate entities, and further limiting the significance of its including public notice utility. Overall the rigid nature of the Cap 241 has limited or deprived SMEs from accessing vital credit capital. Finally, it must be noted that the Bills of Sale amending statutes of 1890 and 1891 clarified transactions covering hypothecation, charges and trusts, but these amending statutes were adopted, so the law as far as Sierra Leone is concerned remains unclear with respect to hypothecations, charges and trusts.[422]

2.3.1.3. Company Charges

The existing law on corporate charges in Sierra Leone follows the English law, whether through the inherited or received laws, or through borrowing from English legislations in the 1960s and in the 2009 reform in Sierra Leone. Similar to the regulation of security interests in personal chattel by individuals and unincorporated bodies, regulation of company' charges do have a long history in England, traceable to their development in equity and the enactment of the Companies (Clauses) Act in 1854.[423] Given the relative development of the Sierra Leone law in this area however, it will make much sense to examine the framework of company charges without discussing the development in England. However, where necessary, points of departure between the two legal systems will be noted. However, given the high persuasive treatment of English case law in the courts in Sierra Leone, the points of departure will be minimal. The emphasis herein will be placed on outlining the framework for creating company charges, characterization and nature of the fixed and floating charges.

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[422] Crowther and others (n 11) 37, 164.
[423] See Gough (n 97); De Lacy, *The Reform of UK Personal Property Security Law* (n 39). 'The evolution and regulation of security interests over personal property'; from p.20; Pennington (n 74).

Company security in the broader context in Sierra Leone includes a debenture, a debt instrument, which among other things refers to a security constituting a charge on the assets of a company.[424] A charge represents 'an agreement between creditor and debtor by which a particular asset or class of assets are appropriated to the satisfaction of the debt, so that the creditor is entitled to look to the asset and its proceeds to discharge the indebtedness'.[425] There is no transfer of ownership or possession, as only an encumbrance is created. The Companies Act 2009 allows companies to exercise both borrowing powers and charging powers, in that, a company may borrow and thereby secured the obligation by mortgaging or charging its undertaking and property.[426] Further, the secured debenture 'may be secured by a fixed charge on certain of the company's property or a floating charge over the whole or a specified part of the company's undertaking and assets, or by both a fixed charge on certain property and floating charge'.[427]

The 2009 Companies Act defines a floating charge as:

> […An] equitable charge over the whole or a specified part of the company's undertakings and "assets", including cash and uncalled capital of the company both present and future, but the charge shall not preclude the company from dealing with such assets until– (a) the security becomes enforceable and the holder thereof, pursuant to a power in that behalf in the debenture or the deed securing the debenture appoints a receiver or manager or enters into possession of the assets; (b) the court appoints a receiver or manager of the assets on the application of the holder; or (c) the company goes into liquidation. (2) On the happening of any of the events mentioned in subsection (1), the charge shall be deemed to crystallise and to become a fixed equitable charge on such of the company's assets as are subject to the charge.[428]

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[424] Companies Act 2009 (n 387), s 1. A "debenture" is defined to include 'debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not'; and by s 170 (10) a charge includes a mortgage for the purposes of registration.
[425] Goode, *Legal Problems of Credit and Security* (n 373) 36; See Crowther and others (n 11) para 4.1.7 p. 155; *National Provincial and Union Bank of England v Charnley* KB 431, 449 per Atkin L.J.
[426] Companies Act 2009 (n 387) ss 142 and 145.
[427] ibid s 145 (2).
[428] ibid s 150 (1) and (2).

The definition above conforms to the characteristic elements of a floating charge, which are the float over present and future property, the possibility of reassignment of the property and crystallisation triggered by an event of default.[429]

The Companies Act 2009 does not clarify the distinction between a fixed and floating charge, notwithstanding the marginal note referring to the meaning of the fixed and floating charge.[430] The section only referred to a crystallised floating charge as fixed equitable charge. Surely, a fixed charge means much more than the reference to a crystallised floating charge. Two analytical approaches may be of benefit to deal with the seeming neglect or refusal to state an express statutory definition: First, to clarify the characterization or distinction issue, reference has to be made to the exiting case law. Second, the utilization of the interpretative linguistic canons, *expressio unius est exclusio alterius*,[431] signifying the expression of what constitutes floating charge in the Companies Act 2009, impliedly excludes what is deemed as a fixed charge. This also signifies that the court with respect to the floating charge cannot revert to the common law to characterize a security of that nature.[432]

To clarify the true meaning of the codification of the characterization of the fixed and floating charges in the Companies Act 2009, reference has to be made to English law as applicable to Sierra Leone. Based on English case law, Gullifer and Payne argue that the fixed and floating charges are inherently different creatures.[433] In *Illingworth v Houldsworth*, Lord Macnaghten referred to a fixed charge as a present proprietary interest in a secured 'ascertained and definite

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[429] Gough (n 97) 85.
[430] Companies Act 2009 (n 387), 150; and in the Interpretation Act, 1971 (n 340), s 9(1), marginal notes form part of a statute, but not part of a section of the enactment. However, they aid interpretation. See FAR Bennion, *Rules of Interpretation* (Oxford University Press 2009); and *R v Schildkamp* [1971] AC 1, 10.
[431] Bennion (n 430) 201.
[432] Bennion (n 430), see 'expressum facit cessare taciturn'; *Whiteman v Sadler* [1910] AC 514, 527.
[433] Gullifer and Payne (n 74) 57.

property or property capable of being ascertained and defined'.[434] The certainty embedded in the ascertainment of the definite or defined property immunes the fixed charge from the characterization problem.

On the other side is the floating charge, which, as a business lending device, has been described as 'equity's most brilliant creations'.[435] It has a long history in English law, its nature and characteristics moulded by the courts since *Holroyd v. Marshall* by the House of Lords in 1862.[436] However, it took a century and half later for the courts to come to a reasonable characterization of the floating charge. In *National Westminster Bank Plc. v. Spectrum Plus Ltd*, (the *Spectrum case*),[437] the House of Lords sought to clarify the characterization and nature of a floating charge. In the said *Spectrum case*, the House of Lords rightly took note of the existing case law and described the essential characteristic of a floating charge as distinguishable from a fixed charge as, "the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime, the chargor is left free to use the charged asset and to remove it from the security".[438] The floating charge, however, creates an immediate but unattached security interest.[439]

Notwithstanding the decision in *Spectrum*, uncertainty continues to plague the distinction between a fixed or floating charge. The main issue now is one of control, which depends on the factual circumstances, even if the parties agreed on standard terms.[440] Although the main analysis relevant to the debate on either retaining or abolishing the fixed and floating charges dichotomy

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[434] *Illingworth v Houldsworth* [1904] AC 355 (House of Lords) 358; see Gullifer and Payne (n 74) 55.
[435] Goode, 'The Case for the Abolition of the Floating Charge' (n 74) 11.
[436] *Holroyd v Marshall* (1862) 10 HL Cas 191 (House of Lords). Also see; *Re Panama, New Zealand and Australia Royal Mail Co* (1870) 5 Ch App 318; *Illingworth v. Houldsworth* (n 434); Gough (n 97) 85–87; Goode, *Legal Problems of Credit and Security* (n 373) 111–117.
[437] *National Westminster Bank plc v Spectrum Plus Limited & Others* [2005] UKHL 41 (UKHL).
[438] ibid 111 per Lord Scott of Foscote.
[439] *National Westminster Bank plc v. Spectrum Plus Limited & Others* (n 437).
[440] Gullifer and Payne (n 74) 51–52.

will be made in the second chapter, it is important to highlight the significance of this distinction in terms of making access to credit cheaper, simpler and transparent. It has been argued that the *Spectrum case* is a good example of standard term clause dispute that went all the way to the House of Lords, costing money and time not only for the case but also for other transactions.[441] The main legal arguments centred on characterization, i.e., whether the charge created was a fixed or floating,[442] with implications on validity of subsequent dealings with the charged property or priority to be accorded at insolvency.[443] Further, characterization affects circularity and re-ordering of priorities especially where subordination may have taken place.[444] In connecting these issues to Sierra Leone, it must be noted that even before the 2014 BLA reform, the codification under the Companies Act in 2009 did not address some of the problems that plague the characterization of fixed and floating charges, and therefore, the incorporation of the fixed and floating charge in the BLA incidentally allowed the characterization problem to pass through.

2.3.1.4. Consensual Lien

The consensual lien represents the last security interest devices recognised by English and Sierra Leone law. It is often discussed in limited circumstances, perhaps owing to its limited use or circumstances in which recourse to it may arise. Grose, J., in *Hammonds v. Barclay* in 1801 defined lien '[…as] a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied'.[445] If possessory, it confers a

[441] ibid 52; In 2006, Goode gave a summary of the corporate floating charges burden even after 135 years' time frame to work it out: 'Yet in the past five years alone there have been 15 High Court decisions on floating charges of which six went to the Court of Appeal and three to the House of Lords - 24 decisions and 48 judgments in all, which together must have involved millions of pounds in legal costs'. Goode (n 229) 21.
[442] Goode, 'The Case for the Abolition of the Floating Charge' (n 74) 21.
[443] Gullifer and Payne (n 74) 53–55; Crowther and others (n 11) 198 para 5.5.8.
[444] Goode, 'The Case for the Abolition of the Floating Charge' (n 74) 14.
[445] Lancelot Edey Hall, 'Possessory Liens in English Law' (LLD, University of London 1917) 1–2; the known categories of lien under English law include: Statutory, common (legal), equitable, maritime and contractual Hardinge Stanley Giffard Halsbury and others, *Halsbury's Laws of England*, vol 28 (4th (reissue), LexisNexis Butterworth 2004) para 720; Gough (n 97) 497–9; McBain (n 419) 487–489.

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right to detain property until a debt owed to the detainee is paid. It can also be created by contract, but the passive right of retention is devoid of the right of sale. [446] Lord Diplock LJ in *Tappenden v Artus* recognized the use of lien as one of the earliest form of self-help, and opined that if, 'pursuant to the contract, the artificer does his work, he is entitled to retain possession of the goods so long as his charges, […] agreed in advance […], are satisfied'. [447]

A contractual/consensual lien is a possessory security interest just like a pledge. However, it is distinguishable from a pledge because the detained property was not surrendered for the purpose of constituting a security interest. In *Re Cosslett (Contractors) Ltd*, Millet LJ., drew the distinction between a pledge and a contractual lien on the basis of a pledged property being delivered as security interest for a debt obligation, whilst the contractual lien is held over following delivery for another purpose. The importance of the distinction between the two possessory security devices rests on the application of onerous laws on pledges, not applicable to contractual lien transactions. In Sierra Leone, although *Re Cosslett* case was decided in 1998, it embodies a common law principle that will be of significant persuasive influence before the courts. The law in this area may not advance as much as in the other three recognized devices. The major factor associated with the lien will remain to be dealing with competing interests, i.e., priorities.

2.3.1.5 The Exclusion of Reservation of Title Transactions – 'Quasi-Security Interests'

Having highlighted some of the significant points relative to the recognized security devices under Sierra Leone law, which are essentially adopted English law security devices, few words ought to be devoted to the reason for the exclusion of reservation of title transactions following the strict doctrinal distinction between lender's credit and vendor's credit. This

[446] Goode, *Legal Problems of Credit and Security* (n 373) 34.
[447] *Tappenden v Artus* (1964) 2 QB 185 (Court of Appeal).

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separation and it effects will be further examined in the Chapter 7.[448] However, in order to have a complete picture of the prior-PPSL framework at this stage, a brief note is needed on the exclusion of reservation of title transactions from other security interest transactions despite their economic equivalence. The Crowther Committee distinguished the two transactions as 'lender credit' and 'vendor credit', the former being 'transactions whose legal form is that of a loan of money'; and the later 'other transactions that are not legally loans, but contracts for the sale or hire of goods'.[449]

The Crowther Committee viewed reservation of title financing and straight lending as one and the same. To the Committee, it was rather a question of the transfer of purchasing power as it was 'of the highest importance to recognize that they are, in fact, two aspects of the same thing'.[450] Although the Diamond Report incorporated retained title clauses or transactions within the conception of security interests,[451] the rejection of the Diamond Report means that the distinction still holds in English law.[452] The transplant effect meant that the reception of English law in Sierra Leone included these nuanced and often economically unjustifiable doctrinal provisions. One peculiarity, however, in terms of regulation of typical 'vendor credit' in Sierra Leone is its incorporation of some of the well-known reservation of title transactions in the definition of 'financial activity' in the Other Financial Service Act, 2001, thereby restricting the provision of such services to banks and licensed financial institutions.[453]

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[448] See 7.1 herein.
[449] Crowther and others (n 11) 13 para 1.2.2.
[450] ibid 1 para 1.1.2.
[451] Diamond (n 19) 10 para 3.4 (ii). Note that the Diamond Report was rejected by the UK Government.
[452] See 'Company Security Interests' (n 95) 18 paras 1.60 - 1.66.
[453] Other Financial Services Act, 2011 2001 (No 7 of 2001), ss 2, 3, and 8. Financial activity is defined to include leasing, hire-purchase and financial intermediation. The effect of this restriction and the overall implication of the distinction between lending credit and vendor credit will be examined in Chapters 3 and 7.

2.3.2 Attachment of Security Interests

Before discussing the legal regime for perfection of security interests and the priorities in the pre-BLA law, the issue of attachment will be examined. Although the terms itself is derived from US secured transactions law literature, Goode underscores the importance of understanding attachment as a prerequisite to deal with priorities, as he argues that the concept although straightforward, inherently retains some subtleties.[454] Attachment basically means or represents that a security interest is created and effective between a creditor and debtor or more accurately it means the security interest fastens on the collateral giving the creditor rights in the said collateral against the debtor.[455] The implication of attachment is the fastening of the *in rem* rights of the creditor against the debtor.[456] This *in rem* right is only valid against third parties after a further step perfecting the security interest is undertaken.[457]

Attachment, which creates an *in rem* right against the debtor, is distinguishable from perfection, which requires a further step by the creditor. This could be possession of the property being the subject matter of the security interest, registration, notice or attornment.[458] Under English law, which is reflective of the law in Sierra Leone, consensual security interest is deemed to have attached in a collateral when the following conditions are fulfilled.

> (1) There must be an agreement for security conforming to statutory formalities; (2) The asset to be given in security must be identifiable; (3) The debtor must have an interest in the assets or a power to give it in security; (4) There must be some current obligation of debtor to creditor which the asset is designed to secure; (5) Any contractual conditions for attachment must have been fulfilled; (6) In case of a pledge, actual or constructive possession must be given to the creditor.[459]

[454] Goode, *Legal Problems of Credit and Security* (n 373) 59, para 2-01.
[455] ibid, para 2-01.
[456] General in rem rights/interests connote proprietary rights/interests, and usually considered as a right actionable against third parties. In the case of attachment, until perfection is done, the right is only actionable against the debtor ibid para 2-02.
[457] ibid para 2-02.
[458] ibid para 2-02; attornment refers to third party agreeing to transfer to the creditor the property upon the fulfillment of a condition. See Para 2-10.
[459] ibid 60 para 2-03.

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The first requirement denotes the consensual nature of creating security interest in personal property. There must be an agreement, however, where statute or the common law specifies formalities, then, the formalities must be complied with. The Bills of Sale Act Cap 241, for example, becomes of relevance with respect to chattel mortgage and the formalities to be complied with for the transaction to be considered valid or the security interest to attach.[460] This is even the case in pledges and contractual lien, where actual or constructive possession is of further relevance. Goode argues that if an agreement is not valid and neither enforceable then the security interest cannot attach.[461] The second requirement, which appears obvious, is the need to identifiable nature of the security interest, whether in tangibles, intangibles or fungibles after appropriation.[462] Precise identification of the asset is not a requirement when the agreement is made, but the asset must be identifiable as being subject of the security agreement, as in book debts (existing and future)[463] or all asset charge.[464]

[460] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398) s 8, which stipulates that unregistered bill of sale (in the required form - see s12) 'shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattel comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment [...]'.

[461] Goode, *Legal Problems of Credit and Security* (n 373) 62 para 2-04.

[462] ibid paras 2-05 to 2-06.

[463] 'It was admitted by the learned counsel for the respondent, that a trader may assign his future book debts in a specified business. Why should the line be drawn there? Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy? The limit proposed is purely arbitrary, and I think meaningless and unreasonable.' *Tailby v Official Receiver* (1888) 13 App Cas 523 (House of Lords) per Lord MacNaghten.

[464] *Re Kelcey* (1899) 2 Ch 530; Goode, *Legal Problems of Credit and Security* (n 373) 64, 117–118 para 2-06. Note that a corporate floating charge, given that there is no unincorporated entity or individual floating charge in Sierra Leone, floats on the undertaking as 'an interest in a fund of assets' until crystallisation when it attaches to the specific assets of the company. The date of attachment then reverts to the date of the agreement. Para 4-09; See Companies Act 2009 (n 387) s 150 (2).

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The third requirement for attachment rested on the *nemo dat quod non habet* rule, i.e., the debtor must have an interest or power in the property to dispose.[465] There are limited exceptions to this rule, for example the Factors Act 1889.[466] The effect of the *nemo dat* rule is that the debtor cannot grant an interest greater than the one held in the property.[467] The fourth requirement deals with the subsistence of current obligations, although security may be given for a past advance, and security interest attached on the execution of the agreement. The fifth requirement is based on contract law, in that the conditions in the parties' agreement must be met before the attachment of the security interest.[468] The sixth requirement relates to possessory security interest (pledge, contractual lien) wherein delivery of possession, actual or constructive, is the characteristic action for attachment to be deemed effective. A delivery of documentary title is also sufficient.[469]

There seem to be no reported case specifically analysing the conditions for attachment of a security interest in Sierra Leone. This may be as a result of framing of the statements of claims or questions for courts' determination. In *Tommy Caulker v Lamin Turay*,[470] the court in refusing the tortious claim of detinue held that there was compelling evidence, oral as well as the loan agreement showing that the surrender of the motor vehicle was as a security for loan, hence a pledge. On the issue of framing the issue in dispute, Edward J. opined that the "issue then is not whether […the debtor was] forced to enter into the agreement or whether the loan agreement was voluntarily entered into; you are bound".[471] But what if the contractual conditions for the use of

[465] See Louise Gullifer, 'Exception to the Nemo Dat Rule in Relation to Goods and the Law Commission's Proposals in the Consultative Report', *Personal Property Security Law Reform in the UK: Comparative Perspectives* (Routledge 2009).
[466] Factors Act 1889 (n 387) ss 2 (1), 8 and 9; but this specific statute is not applicable to Sierra Leone.
[467] Goode, *Legal Problems of Credit and Security* (n 373) 640–65 para 207.
[468] ibid 65–66 paras 2-08 to 2-09.
[469] ibid 66 para 2-10. Goode even argued that in England, as opposed to the US, a possessory security can attach constructively when a debtor in possession by a declaration that goods are held for the creditor, referring to inter alia Martin v Reid (1862) 11 C.B.N.S. 730.
[470] *Caulker v Turay* (n 394) [9 and 12], per Justice D.B. Edwards.
[471] *Caulker v Turay* (n 394) para 12.

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the motor vehicle were not complied with? The reasoning of the judge within the framework of consensual security interest is faulty, as the first step ought to have been consideration of the consensual nature of transaction and how the security interest attaches.

2.3.3 Perfection of Security Interests – Registration and Other Perfection Methods

The next step in the process of effectively using personal property as security for credit relates to the perfection of an attached security interest. The importance of perfection is primarily to give notice to third parties, thereby dealing with the ostensible ownership problem.[472] Perfection also confers priority of the perfected security interest against third parties, including the liquidator or other creditors.[473] The modes of perfection include actual or constructive possession, registration, notice to fund holder or account debtor, where asset/interest is in a fund or debt. [474] The effect of perfection is very much dependent on the mode of perfection. Perfection does not mean automatic priority of the security interest, as the rules of priority, which will be cover in the next section, dictate order of priorities. In the following sub-sections, the various methods of perfection know in Sierra Leone law are examined.

2.3.3.1 Registration of Security Interests

Registration or filing is the most known form of perfection and will be the first to be examine. Two regimes operate for the registration of security interests, one for individuals and unincorporated entities (hereinafter: "non-corporate security interests"), and the other for companies (hereinafter: "corporate security interests"). The General Registration Act, Cap 255 of the Laws of Sierra Leone established the office the Registrar General, and consolidated all existing

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[472] Goode, *Legal Problems of Credit and Security* (n 373) 77, para 2-16.
[473] ibid 73 para 2-16.
[474] Goode argues that there are no fewer than 6 perfection methods under English law. In addition to the three listed in the main text, perfection can be done by attachment (usually for possessory security interest – pledges), novation through registration of mortgagee in cases of mortgages of securities, debt or fund and attornment by a fund holder in security over fund. ibid 73–74 para 2-17.

registers in Sierra Leone.[475] This included the registry under the repealed Companies Act, Cap 249 of the Laws of Sierra Leone, which designated the Registrar General as the Registrar of Companies,[476] but excludes the registry for the Bills of Sale Act, Cap 241 which is still kept by the Master of the High Court,[477] and the newly separated corporate registry kept at the Corporate Affairs Commission (hereinafter the "**CAC**") under the Companies Act 2009.[478]

The General Registration Act, Cap 255 is supplemented by the Registration of Instruments Act, Cap 256,[479] which consolidated the law on registration of instruments. Although this law unsurprisingly leans heavily on registration of land conveyances and instruments, it also covers deeds and contracts required to be registered.[480] With the Registrar General's office being the general registry designated by law, the office is duty bound to register instruments (in this case a security agreement) at the request of any party in a book(s) kept specially for that purpose, for example, a commercial pledge, whether possessory or constructive.[481] In the context of chattel mortgages, the registration requirements for non-corporate security interests under the Bills of Sale

[475] 'The Registrar General's office shall be the General Registry for, and depository of, all registers, instruments and records and copies thereof as are directed by any […Act], now or hereafter in force, to be delivered to, and deposited with, the Registrar General, or to be registered at his office'. General Registration Act, Cap 255 of the Laws of Sierra Leone 1960 s 5 (1).

[476] See Companies Act, Cap 249 of the Laws of Sierra Leone 1960; Other registers dealing with specialized personal property includes: Merchant Shipping Act 2003 s 9 for ships and interests in ships; Patents and Industrial Design Act 2012 s 66 register for patents and industrial designs; Copyright Act 2011 s 49 for registration of copyright works; Trade Marks Act, Cap. 244 of the Laws of Sierra Leone 1960 for registration of marks; with all three intellectual properties registries administered by the Registrar General; the Aviation Act 2008 ss 30 and 31 for registration of aircrafts and interests in aircrafts; Road Transport Authority Act 1996 (as amended by Sierra Leone Road Safety Authority Act 2016 s 2 (3) for registration of motor vehicles; Mines and Minerals Act 2009 s 39 and 40 (a) dealing with registration of mineral rights, defined as: 'Mineral right means a right to explore for or to mine minerals by holding a valid reconnaissance licence, exploration licence, artisanal mining licence, small-scale mining licence, or large-scale mining licence, as the context requires', s1.

[477] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 12.

[478] Companies Act 2009 (n 387), ss 8, 9, 171 (1), (3) and 179 (1).

[479] Registration of Instruments Act, Cap 256 of the Laws of Sierra Leone 1960.

[480] The meaning of 'Conveyance shall include assignment, appointment, lease, settlement and other assurance and covenant to surrender made by deed in a sale, mortgage, demise, or settlement of any land or any other dealing with or for any land'; and 'Instrument shall mean any […State] grant, deed, contract, will, or memorial hereby authorized to be registered'. ibid 2.

[481] General Registration Act, Cap 255 of the Laws of Sierra Leone (n 475) s 5 (1); Registration of Instruments Act, Cap 256 of the Laws of Sierra Leone (n 479) s 21.

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Act, Cap 241 does not fit into this general provision since the specific registry at the Master's Office in the High Court was not consolidated under the Cap 255 provision. This, however, signifies the fragmented state of the registries dealing with security interests in Sierra Leone.

The case is much different for corporate security interests, in so far as the registration process is concerned. The Corporate Affairs Commission houses a public registry for companies and administered by a new Registrar.[482] With respect to registration of charges, the Companies Act 2009 requires that:

> 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 evidenced or by a copy verified in the prescribed manner have been or are delivered to or received by the Commission for registration in the manner required by this Act within 21 days after the date of its creation […][483]

So, a company charges for which the registration requirement is extended to includes:

> (a) A charge for the purpose of securing any issue of debentures; (b) a charge on uncalled share capital of the company; (c) a charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale; (d) a charge on land, where situate, or any interest in it, but not including a charge for rent or other periodical sum issuing out of land; (e) a charge on book debts of the company; (f) a floating charge on the undertaking or property of the company; (g) a charge on calls made but not paid; (h) a charge on a ship or aircraft or any share in a ship; (i) a charge on goodwill, on a patent or a licence under a copyright.[484]

What is registrable is the prescribed particulars of the charge created, the instrument (trust deed or debenture) as well.[485] By all means, this is still transaction filing, however, Form 170 containing the prescription for the particulars provide for quick information on the type of charge (fixed or floating) and whether there is a negative pledge.[486] The 21 days window for registration

[482] Companies Act 2009 (n 387) ss 8, 9, 171 (1), (3) and 179 (1).
[483] ibid s 170 (1).
[484] ibid s 170 (2).
[485] ibid s 170 (1); Companies Regulations 2015 reg 20 (1).
[486] Negative pledges clauses are usually incorporated in a security agreement for a floating charge to enhance it against any subsequent security interest for priority purposes. It essentially or usually prohibits further charge agreements that are ranked equally or having priority over the existing charge. A more detailed look at charges will be done in chapter 2. See *Brunto v Electrical Engineering Corporation* (1892) 1 Ch 434; PL Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 2012) paras 32–22.

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is for charges created in Sierra Leone, as 90 days allowance is given for charges created outside Sierra Leone, with indication of acceptance by the Commission of late registration if ordered by the High Court.[487] The consequence of non-registration is avoidance by a liquidator and any creditor of the company. Interestingly, the duty to register a charge is on the debtor company, and not the creditor, but the creditor can still file and recover the filing fees.[488] Therefore, the creditor must be alert and be prepared to, either stipulate filing and condition precedent/subsequent in the credit agreement or opt to do the registration of the charge once created.

Notwithstanding the fact that the Companies Act in Sierra Leone was enacted in 2009, it appears to follow the scheme of the repealed English Companies Act 1985. There is, however, a notable clarification in the Sierra Leone Act, in that, the constructive notice rule, relative to the corporate register, the particulars of charges and other registrable documents is expressly abolished.[489] This rule had created a nuanced problem under the corresponding English legislation.[490] However, with minor contextual changes in the Companies Act 2009 *ipsissima verba* listed the registrable charges, which was in fact a mere consolidation of the company charge security interests from 1900 to 1985 in England.[491] This English Companies Act 1985 scheme was adopted in Sierra Leone despite the criticisms from academics, the Law Commission's report on

[487] Companies Act 2009 (n 387) s 170(1), (3); Companies Regulations (n 485) reg 20 Form 170.
[488] Companies Act 2009 (n 387), s 172 (1) and (2). Thus, the presumption that anyone dealing with the company is taken to be aware of every document file is no longer applicable; John De Lacy, 'Constructive Notice and Company Charge Registration' [2001] Conveyancer and Property Lawyer 122 de Lacy argues that the avoidance provision and sanction impose a potent method to ensure registration of charges compliance in a similar scheme in the English Companies Act 1985; N. C. Browne-Marke JA (as he was then) referred to Snell's Principle of Equity and stated: 'Constructive notice has been said to be in its nature no more than evidence of notice […] There are two main heads of constructive notice, namely: (i) those where the purchaser had actual notice that the property was in some way encumbered […] and (ii) those where the purchaser has, whether deliberately or carelessly, abstained from making those inquiries that a prudent purchaser would have made'' '*Elizabeth Ahmed v Memuna Bah* [2010] SLCA 09 [38].
[489] Companies Act 2009 (n 387) s 55; See De Lacy, 'Constructive Notice and Company Charge Registration' (n 488) for a critical analysis of the issue of constructive notice and company charge registration in England under the 1985 Companies Act.
[490] See De Lacy, 'Constructive Notice and Company Charge Registration' (n 488).
[491] De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 27–28.

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Company Security Interests, and the subsequent Companies Act 2006 enactment.[492] As we know, this is not to say the present English law system is perfect, in fact academics bemoan the retreat in the Law Commission's report on *Company Security Interests* in view of the consultative papers in 2002 and 2004, mostly backing away from UCC Article 9 notice filing system.[493]

The company charges registration statutory scheme gives some useful insight into the theory of legal transplants. Whilst the abolition of the constructive notice rule shows how legal transplantation can be effectively done, i.e., the shedding/rejection of the adverse elements of a received law, the manner in which it was done in Sierra Leone, however, exposes the dangers when the transplantation is not thought through and perhaps rushed, with little local inputs. The 1985 Companies Act scheme had its limitations, which were quite apparent from the existing literature. Apart of the wholesale adoption of the problematic/incomplete 1985 scheme, the Sierra Leone 2009 Act did not take advantage of the *Slavenburg's Bank v. Intercontinental Natural Resources Ltd. and Others* case for foreign companies' charges registration.[494] With heavy reliance on foreign direct investment, one would have thought a provision for foreign companies to register charges would have been necessary.[495]

2.3.3.2 Notice as a Perfection Method

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[492] Some of the known problems attributed to the 1985 English Companies Act included: The limitations of the 21 day time limit for registration and additional cost for court orders for the extension of time; the limitation on the list of registrable charges, priorities rules being complex and cumbersome, the inclusion of the bills of sale scheme, with obvious limitations like the exclusion of factor's debts, exclusion of retention of title devices. 'Company Security Interests' (n 95) x–xiv; See also McCormack, 'Pressure by the Paradigm. The Law Commission and Company Security Interests' (n 94); G McCormack, 'Priority of Charges and Registration' [1994] Journal of Business Law 587.
[493] See McCormack, 'Pressure by the Paradigm. The Law Commission and Company Security Interests' (n 94).
[494] *Slavenburg's Bank NV v Intercontinental Natural Resources* (1980) 1 WLR 1076 (Queen's Bench Division) which dealt with the registration of charges by a foreign company.
[495] Note that a trust deed is registrable as the instrument together with the prescribed particulars of charge, therefore an executed trust deed following the practice in the City of London following the Slavenburg case can be successfully carried out. Companies Act 2009 (n 387) s 170 (1); Companies Regulations (n 485) reg 20 (1) (b).

Perfection by notice developed in cases where security interest (assignment or charge) is in a debt or fund. The notice should be given to the account debtor, in this case, the debtor's debtor. Notification is important in this regard to ensure payment is made to the creditor, and new equities do not emerge in relation to the debtor. Further, notice prevent further modification of the contractual relationship between the assignor and debtor.[496] Importantly notice secures the priority under the rule in *Dearle v. Hall*.[497] The case established the common law priority rule, which dictates that where the equities are equal, the first to give notice to the owner or trustee have priority over the other. This case and rule will be examined in the priority section below.

2.3.3.3 Possession as Perfection

The adage, possession is nine-tenths of the law,[498] could prove quite useful in dealing with possessory security interests. As aforementioned, a pledge is perfected at attachment without need for further action, since the delivery of the pledged asset leads to possession by the creditor.[499] Perfection by possession works for a pledge, and also for contractual lien, which is not registrable as the Bills of Sales Act, Cap 241 do not cover lien.[500] Possession in certain respect is the strongest form of protection for a creditor, but usually not helpful for business, since the debtor is deprived of the use of encumbered assets. The informal sector in Sierra Leone tends to use this as a form of protection than the other methods of perfection.

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[496] Goode, *Legal Problems of Credit and Security* (n 373) 74, 102 paras 2-17, 3-32; See also *Brice v Bannister* (1878) 3 QBD 569; *Roxburghe v Cox* (1881) 17 Ch D 520.
[497] *Dearle v Hall* (1828) 3 Russ 1.
[498] See *C. J. Seymour-Wilson v. Musa Abess* (n 32); Joseph William Singer, 'Nine-Tenths of the Law: Title, Possession & (and) Sacred Obligations' (2005–2006) 38 Connecticut Law Review 605; Kathy Ainsley, 'Possession Is Nine-Tenths of the Law' (2005) 2 Indigenous Peoples' JL Culture & Resistance 102.
[499] Goode, *Legal Problems of Credit and Security* (n 373) 74, 76 paras 2-18, 2-20.
[500] See Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398); for a similar position in England, see McBain (n 419) 6; and Bills of Sale Act (1878) Amendment Act 1882.

2.3.4 Priority Rules between Competing Security Interests

The priority rules governing security interests is one main cause of the complex nature of the English property security law. The priority rules consist of a complex combination of common law rules, including equity, statutory provisions, woven with main rules and numerous exceptions which appears to be a labyrinth even for the expert lawyer. This to a large extent is the state of the law in Sierra Leone, having adopted the English personal property priority rules, since priority upon registration was only limited to deeds, contracts or conveyances affecting land.[501] The general law, which includes received English law, then becomes the residual framework for the determination of priority of competing security interests in personal property.

Millet J. in *Macmillan Inc. v. Bishopsgate Investment Trust Plc.* (No.3)[502] adeptly gave a useful summary of the English priority rules. He said to understand English priority rules, the distinction has to be made between legal and equitable interests. For competing legal interests, the basic rule is that ranking is based on the time of creation of the interests. For competing equitable interests, although special rules may intervene, the basic rule is that 'where the equities are equal, the first in time prevails'.[503] Millet J then proceeded to talk about the absence of notice and its relevance. Where there are two competing equities, the absence of notice even when value is given is irrelevant as the first in time prevails. A subsequently created interest in equity ranks lower in priority to a legal interest. Where the equitable interest was created first, and the second being legal, the legal interest can only gain priority if the purchaser was bona fide for value without notice, whether actual or constructive.[504]

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[501] Registration of Instruments Act, Cap 256 of the Laws of Sierra Leone (n 479), s 4 states that: 'Every deed, contract, or conveyance, executed [...] so far as regards any land to be thereby affected, shall take effect, as against other deeds affecting the same land, from the date of its registration'. See also *C. J. Seymour-Wilson v. Musa Abess* (n 32).
[502] *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* (1995) 1 WLR 978 (Chancery Division) 999.
[503] ibid 999–1000.
[504] ibid 1000; see also *Pilcher v Rawlins* 7 Ch App 259 (LR).

The basic rule of priorities as summarized above is the first in time, in terms of creation. This is the *nemo dat quod non habet* rule, which means one transfers only the title she possesses and nothing better.[505] The formulation on non-transferability of a better title than one possesses is commonly used in dealing with competing interests in goods and the other formulation when dealing with equitable interests and interests in land.[506] There are common law rules and statutory exception to the basic rule.[507] The common law exceptions include '(1) actual or apparent (ostensible) authority, (2) apparent ownership, (3) postponement of equitable interest to subsequent legal interest, [and the] (4) successive assignments of choses in action'.[508]

The further rules governing priorities include the legislative exceptions. The Bills of Sale Act, Cap 241 is one statutory intervention and provides that where 'two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels'.[509] This also means the common law rules apply to personal chattel security interests not governed by the Bills of Sale Act, Cap 241. For English corporate security interests, the priority rules are to the effect that "Fixed legal charges which are registered within 21 days of creation rank with one another according to the time of creation and fixed legal charges created before a floating charge crystallises have priority over the floating charge".[510] The rules as aforesaid are a complicated mishmash, drawing distinction between legal and equitable charges with the issue of notice also of relevance.

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[505] See Gullifer (n 465).
[506] Goode, *Legal Problems of Credit and Security* (n 373) 157 para 5-04.
[507] See Gullifer (n 465) 188.
[508] Goode, *Legal Problems of Credit and Security* (n 373) 158–159 paras 5-05, 5-05, 5-07, 5-08.
[509] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398),s 8.
[510] Diamond (n 19) 124 para 24.2.3; McCormack, 'Priority of Charges and Registration' (n 492) 587.

The Companies Act 2009 in Sierra Leone has abolished the constructive notice rules on charges, as notices need to only be actual.[511] However, since the philosophy underpinning public registration is to provide notice to the public, the abolition does not affect the disclosure functionality. It, however, makes clear the conferral of priority rules. Although registration of charges under the Companies Act 2009 is not a perfection requirement, failure to register within 21 days for security interests created in Sierra Leone, and time not extended the High Court renders the security charge void as against the liquidator and any other creditor of the company.[512] Although focus is still on date of creation for priority, attention should be given to registration, which in essence provides public notice. It must be noted that based on the principles of freedom of contract, priorities may be altered by agreement.[513] One of the significant specialized statutory interventions in Sierra Leone applies to the priorities of competing ship mortgages wherein, the first in time, in order of registration gets priority over the latter one.[514]

One of the most significant exceptions to the basic first in time of creation common law rule of priorities, in terms of effect, is the rule in *Dearle v. Hall* that governs successive assignments whether in debt, funds or other chose in action.[515] The principle and relevant facts are summarized as follows:

> A person having a beneficial interest in a sum of money, invested in the names of trustees, assigns it for valuable consideration to A., but no notice of the assignment is given to the trustees; afterwards, the same person proposes to sell his interest to *B.* , and *B.*, having made inquiry of the trustees as to the nature of the vendor's title, and the amount of his interest, and receiving no intimation of the existence of any prior incumbrance, completes the purchase, and gives the trustees notice: *B.* has a better equity than A. to the possession of the fund, and the assignment to *B.*, though posterior in date, is to be preferred to the assignment to *A.* It is of no importance in the question as

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[511] Companies Act 2009 (n 387) s 55.
[512] ibid s 170 (1); see McCormack, 'Priority of Charges and Registration' (n 492) 587–591 which outlines the priority of charges under the 1985 English Companies Act.
[513] Goode, *Legal Problems of Credit and Security* (n 373) 171 para 5-32.
[514] Merchant Shipping Act (n 476) s 62.
[515] *Dearle v. Hall* (n 497); Goode, *Legal Problems of Credit and Security* (n 373) 159 para 5-08.

> to the priority of title acquired under the assignments, whether the interest of the vendor be vested or contingent, present or reversionary.[516]

The exception here to the first in time rule is the first to give notice to the trustee, fund holder when dealing with equal competing equity interests. This rule continues to impact non-registrable charges on receivables, as the legal or equitable nature of the interest is of little relevance in effect, hence the need for notification.[517] Notice it was adjudge would "prevent the assignor from making further fraudulent assignments and thereby [mislead] third parties who would be unable to verify […] the title of the assignor prior to dealing".[518]

This section of the chapter is not an attempt to exhaustively deal with all the rules on priority, as such an exercise could be the scope of a whole research by itself. The purport is to present an idea of the complexity that surrounds the priority issue, which in normal business transaction parties would hardly contemplate. Calnan in questioning what seem to be wrong with the English law of security argues that the state of the priority rules is intractable and complex; but despite the complexity he further argues that the rules appear to work in practice, and might in fact need only minor reforms.[519] The Crowther Committee, however, described the priority framework as absent of 'any rational policy in relation to third party rights', such unfair and irrational rules and the 'gravest weakness' in the existing framework.[520] This state of the rules inhibits the ease of

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[516] *Dearle v. Hall* (n 497) 475.
[517] John De Lacy, 'Reflections on the Ambit of the Rule in Dearle v. Hall and the Priority of Personal Property Assignments - Part One' (1999) 28 Anglo-American Law Review 197, 87–88 Note that the rule does not apply to the transfer of shares, chattel and interest in land in Sierra Leone.
[518] De Lacy, 'Reflections on the Ambit of the Rule in Dearle v. Hall and the Priority of Personal Property Assignments - Part One' (n 517) 92.
[519] Calnan, 'What Is Wrong with the Law of Security?' (n 15) 172–173 He reached this conclusion by examining the main rule, and the 6 main exceptions, namely: The bona fide purchaser rule, the rule in Dearle v. Hall, registration, equal equities, tacking further advances and priority of floating charges.
[520] Crowther and others (n 11) 177 para 4.2.8.

reconciling competing interests in security interests, thus unnecessarily complex.[521] The Crowther Committee's view resonates with the state of the priority rules in Sierra Leone.

2.3.5 Enforcement of Security Interests

One of the reasons for taking security for credit is to ensure full realisation of the debt owed upon the default of the debtor, and also to maintain ranking or priority in the debtor's insolvency. Taking security in a collateral is not an end in itself, but the means to the end. The other rules aforementioned discussed are aimed at ensuring priority of the security interest created as against third parties, including the liquidator/bankruptcy trustee and other creditors.[522] Enforcement of security interest which is either through the courts (judicial) or outside of the court proceedings (non-judicial/self-help) can be by an action based on the payment covenants, repossession of the collateral, sale, foreclosure, and/or appointment of a receiver/receiver-manager by contract or statute. The method of enforcement largely depends on the nature of the security interest. There is also the added twist of enforcing a security interest during the insolvency of the debtor.[523] Except where the rules are mandatory, the enforcement of a security interest is dependent on the agreement of the parties.

2.3.5.1 Enforcement of Security Interests outside Insolvency[524]

Enforcement of security interests as aforesaid depends on the nature of the security interest. When dealing with a pledge, it has been noted herein that during the term of the security agreement, the secured creditor's right in the pledge property includes the right to retain possession, and inter alia, to make use of the assets without impairment. Upon default by the debtor, the pledged asset

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[521] Diamond (n 19) 32 para 8.2.10; Gullifer and Akseli (n 3) 293.
[522] Diamond (n 19) 9 para 3.3; Calnan, 'What Is Wrong with the Law of Security?' (n 15) 183.
[523] Michael Elland-Goldsmith, 'Real Security over Personal Property in English Law' (1995) 2 International Business Law Journal 145, 160; Calnan, 'What Is Wrong with the Law of Security?' (n 15) 183.
[524] In English law insolvency is only attributed to companies, whilst bankruptcy refers to individuals. The insolvency usage herein refers to both insolvency and bankruptcy.

may be sold.[525] In *the Odessa* case, the court had this to say: 'the pledgee can sell the pledge without first having recourse to a court of law for authority to so do'.[526] This is a special right in the property. As part of the possessory security interest family, a contractual lien only gives a passive right of retention but no right of sale. Sale as enforcement can be added by agreement, and that will not transform the security interest into an equitable charge. [527] Contractual lien is seen as the earlier forms of self-help, that is, satisfaction of a debt outside of a court.[528]

In enforcing mortgages, it must be noted that by its nature it involves the transfer of either proprietary or a lesser interest as security for credit, albeit without delivery of possession. Generally, a legal mortgage usually contains the power to take possession of the encumbered property, foreclosure powers, by eliminating the equity of redemption.[529] Under the common law, the "mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right".[530] This is based on the transfer of ownership concept in mortgages. For chattel mortgages in Sierra Leone the secured creditor possesses the right/power of sale in and out of court, by auction or private contract, or foreclosure at the auction; and appoint a receiver.[531] These powers could be varied or extended by a mortgage deed.[532] In *Sierra Leone Commercial Bank Limited v. Mohamed*

[525] See *Donald v Suckling* (n 384).
[526] *In the Matter of the Cargo ex Odessa & Steamship Woolston v The High Court of Justice Probate, Divorce and Admiralty Divisions (in Prize) [1915] UKPC 53 (11 November 1915)* (n 385)153.
[527] Goode, *Legal Problems of Credit and Security* (n 373) 34; *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109.
[528] *Tappenden v Artus* (n 447).
[529] Calnan, 'What Is Wrong with the Law of Security?' (n 15) 184; 'Foreclosure is the termination by court order of the right to redeem. It effect is to vest the mortgaged property in the mortgagee absolutely free from the equity of redemption. Foreclosure also extinguishes the residue of the debt, for by obtaining foreclosure the mortgagee is deemed to have elected to take the property in satisfaction'. Royston Miles Goode, *Commercial Law* (Third Edition, LexisNexis UK, 2004) 692.
[530] *Four Maids Ltd v Dudley Marshall (Properties) Ltd* Ch 317, 320 per Harman J; see also Law Commission, *Bills of Sale* (n 19) 33, fn. 53.
[531] See *Sierra Leone Commercial Bank Limited v Mohamed B Sow T/A Pelly Enterprises* [2014] SLHC (High Court).
[532] Conveyancing and Law of Property Act 1881 s 19 as s 20 regulates how a sale should be carried out; see *Re Morritt* (1886) 18 QBD 222 per Lopes LJ at pp. 241-242; *National Mercantile Bank Ltd v Hampson* (1880) 5 QBD 177.

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Sow, Solomon JA, opined that the 'right to foreclosure exist in case of a legal mortgage and hence the remedy on such a charge, is foreclosure, whether the charge relate to land or to personal estate'.[533] The Bills of Sale Act, Cap 241 maintains, however, that between seizure and sale 'the lender may only seize the secured goods for a specified reason; and it must wait five days before selling them'.[534]

With respect to 'special mortgages' under the Home Mortgage Finance Act 2009,[535] non-payment of an instalment or performance of an obligation within 14 days, a notice urging immediate steps to remedy default must be sent. If no payment is made until the proceeding month's instalment is due, then a demand note for the total amount must be sent to the mortgagor.[536] The mortgagor is deemed to be in default after receipt of the notice and demand note, there is a failure to make payment or a satisfactory arrangement until the third instalment becomes due.[537] Remedies available to the mortgagee includes realisation of the mortgaged security,[538] by appointment of a receiver/receiver-agent with or without the involvement of the High Court, take possession of the mortgaged property through an *ex-parte* application to the High Court, judicial or non-judicial sale of the mortgaged property whether by public auction or private contract.[539] It

[533] *Sierra Leone Commercial Bank Limited v. Mohamed B. Sow T/A Pelly Enterprises* (n 531) 3.
[534] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 24; see Law Commission, *Bills of Sale* (n 19) 32–33, paras 3.55, 3.57; section 7 of the 1882 Act however allows seizure of secured goods only when the following conditions are met: '(1) is in default in the repayment of the loan amount; (2) defaults in the performance of any agreement contained in the security bill for the maintenance of the secured goods; (3) becomes bankrupt; or (4) fraudulently removes or allows to be removed the secured goods from the premises'.
[535] Special mortgages refers to land mortgagaes which may combine mortgage of personal property under the land specific Home Mortgage Finance Act (n 32).
[536] ibid s 9 (1) and (2).
[537] ibid s 9 (5).
[538] ibid s 10 (b).
[539] ibid, s 11 91], (2] and (4] wherein sub-section 4 clearly states that the receiver is the agent of the mortgagee in the sense of liability; s 12 (1] and (2]; s 13 (1], (2] and (3]. The remedial actions appear to not to have consecutive hierarchy and could be applied with cumulative effect. s 11 (7] states: 'For the removal of doubt, the fact that a Mortgagee has taken possession of the mortgaged property shall not prevent him from appointing a receiver under this section in respect of that property'. Al least the appointment of receiver and taking possession do have expressed cumulative effect. .

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could be seen that this Act has benefit from a scheme of balancing the competing interest of the parties by allowing for efficient self-help enforcement with scope for judicial review for the borrower's protection. Unfortunately, only banks could make use of these mechanisms.

Charges, the product of the equitable jurisdiction of the English courts generally rely on judicial enforcement, wherein the secured creditor has to apply to court for an order of sale of the charged property or appoint a receiver, although a receiver can be appointed based on contract.[540] The charge does not include the right to foreclose or take automatic possession.[541] There can however be a contractual right to take possession.[542] Under the Companies Act 2009, the secured creditor, described as debenture holder, is entitled to enforce security following failure to pay an instalment within a month of it becoming due, of failure to perform the obligations contained in the security agreement (debenture), and event of default stated therein, or when the debtor company is wound up.[543] For floating charge holders, the Act appears to have codified a default negative pledge scheme with implied terms providing for the realisation of the security upon the occurrence of the following:

> (a) any creditor of the company issues a process of execution against any of its assets or commences proceedings for winding up of the company by order of any court; (b) the company ceases to pay its debts as they fall due; (c) the company ceases to carry on business; (d) the company suffers, after the issue of debentures of the class concerned, losses or diminution in the value of its assets which in the aggregate amount to more than one-half of the total amount owing in respect of debentures of the class held by the debenture holder who seeks to enforce his security and debentures whose holder ranks before him for payment of principal or interest; or (e) any circumstances occur which entitles a debenture holder who ranks for payment of principal or interest in priority to the debentures secured by the general floating charges to realise his security.[544]

The above provision is clearly not a prohibition to take further security, but clearly works for enforcement triggering event of default. The remedies available includes the appointment of a

[540] See Companies Act 2009 (n 387), ss 152, 332 and 333.
[541] Calnan, 'What Is Wrong with the Law of Security?' (n 15) 184.
[542] See *Garfitt v Allen* (1887) 37 Ch D 48.
[543] Companies Act 2009 (n 387) s 180 (1).
[544] ibid s 180 (2).

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receiver, contractually out of court or by court order; and through the conditions of the charge enforce by foreclosure action, or bring a representative action against the company debtor, and winding up proceedings, with the representative action or winding up needing the first approval of the High Court.[545] Theses statutory remedies could be supplemented by contract, but they cannot be excluded nor limited by the parties.[546] The powers of a receiver include taking possession of the charged asset, sale, to provide a further security interest, and/or enter into a settlement, compromise or arrangement with a view of sale.[547]

The Sierra Leone security interest enforcement provisions appears to give a lot of allowance for freedom of contract, especially with self-help, with limited statutory intervention. In all this, it is necessary to say a few words on the duties of secured creditors and receiver in enforcement. Although there is a small minority with the view that the duties of the secured creditor/receiver are very limited, the prevailing suggestion though case law suggests the existence of significant duties owed to the debtor and other unsecured creditors.[548] In the applicable English case of *Farrar v Farrars Ltd*, the court had to determine the issue whether the sale by the mortgagees in possession ought to be set aside due to conflict of interest and inadequacy of the price, in view of the duties of the mortgagee owed to the mortgagor.[549] In *Da Rocha-Afodu v Mortgage Express Ltd*, one of the relatively recent English cases, the courts seem to have the view

[545] ibid ss 152; 181 (1), (2) and (4).
[546] ibid s 181 (5) and (6).
[547] ibid s 181 (3).
[548] Relating to the prevailing view, see *Farrar v Farrars Ltd* (1888) 40 ChD 395; on the minority view, see *Kennedy v De Trafford* (1896) 1 Ch 762; see generally *Medforth v Blake* [2000] Ch 86; Calnan, 'What Is Wrong with the Law of Security?' (n 15)185.
[549] The Court of Appeal held "[1] (affirming the decision of Chitty, J.), that the sale could not be set aside on the simple ground that F. was a shareholder in the company, for that a sale by a person to a corporation of which he is a member is not either in form or substance, a sale by him to himself along with other people. But, held, [2] that there was such a conflict of interest and duty in F., of which the company had notice, as to throw upon them the burden of upholding the sale: [3] Held, that the company had discharged themselves of this burden by shewing that F. had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale" *Farrar v. Farrars Ltd* (n 548)395.

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that "where a mortgage gives the lender the right (following due notice) to remove and store or to dispose of any chattels left on the property after a re-possession, the lender has no duty to organise storage and then give a further notice before disposal".[550]

In the older cases, the principles concerning the duties of the secured creditor/receiver remains in Sierra Leone acting in good faith, taking reasonable care to obtain an adequate price.[551] In *Bundu v. Kamara,*[552] the Supreme Court had to determine the extent of the continuing duties of the mortgagee, or secured creditor, with respect to the sale of the mortgagor's (debtor) equity of redemption in the mortgaged property. In the case, the mortgagee bank and Sheriff of the High Court occasioned a sale of the equity of redemption without the participation of the mortgagor. The court held that the seizure and sale of the mortgaged property should be set aside as the debtor's right to redeem the mortgage had not been extinguished.[553]

2.3.5.2 Enforcement of Security Interests within Insolvency

In the immediate preceding section, the enforcement of a security interest in a collateral outside of insolvency was examined. In some cases, the secured creditor may be faced with an insolvent debtor, necessitating enforcement of the security interest in the debtor's insolvency. One of the fundamental questions for consideration is whether the right of the secured creditor in a collateral is guaranteed in the debtor's insolvency or the lender's entitlement is limited to the realisation of the value only. Based on the common law, the rights of the secured creditor are not limited in or by insolvency proceedings. In *Re David Lloyd and Co.,*[554] the English Court of Appeal had to consider the exercise of its discretionary powers to allow an action for foreclosure to be

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[550] *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454 (Court of Appeal) 454.
[551] See for example, the Home Mortgage Finance Act (n 32) s 14 (3) which stipulates 85% of the appraised market value as the minimum sales limit for a mortgage property; see also *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295.
[552] *Alie Bundu v Grant Sallu Bundu Kamara* [1977] Supreme Court Civ. App. 2/76, SLSC 1.
[553] ibid 15 per C. A. Harding JSC.
[554] *In re David Lloyd & Co Lloyd v David Lloyd & Co* (1877) 6 Ch D 339 (Court of Appeal).

sustain by the secured creditor, simultaneously with winding-up proceedings. In ensuring protection of the secured creditor and the debtor company, Romilly, M.R., said "that the proper relief could be given at once in the winding-up. It is in truth only the surplus value of the [mortgaged property] after paying the mortgage debt which is the property of the company".[555]This right by the secured creditor offered the option to enforce the security without reference to the liquidation. The qualification to this right brought in by the administration procedure under the Insolvency Act 1986 in England[556] is not applicable to Sierra Leone.

For non-corporate security interest, statutory law in Sierra Leone has intervened to ensure the secured creditor is allowed to realise or deal with the security in the bankruptcy of the debtor in the same manner as she would have outside of bankruptcy.[557] Before the intervention of the Bankruptcy Act 2009, the previous statutory interventions, adopted from England, leaned heavily on addressing the ostensible ownership problem, i.e., the secret transfer of possession to occasion fraud.[558] The ostensible ownership problem was the basis for the statutory intervention and was in the form of the Statute of Fraudulent Conveyance 1571, Bankruptcy Act 1623, and the reputable ownership rule in relation to non-corporate security interest, which applied to the detriment of a non-possessory 'secured' creditor at the time.[559] The Bankruptcy 1623 in applying the reputable ownership doctrine provided for the goods and chattels within the possession of the bankrupt to be added to the bankruptcy estate.[560] The Bills of Sale Act, Cap 241, however, with the registration

[555] ibid 342 Jessel, M.R., further opined that "In bankruptcy you would have the right to enforce your security by foreclosure, and now, by virtue of sect. 10 of the Judicature Act, 1875, the law as to secured creditors is the same in winding-up as in bankruptcy. The Companies Act, so far as it is inconsistent with the law of bankruptcy, is repealed. […] Now, as a rule, a mortgagee has a right to realize his security, and of course, as incidental to that, a right to bring an action for foreclosure. Those who say that he should be restrained from bringing or proceeding with such an action must either shew some special ground for restraining him, or must say". 342-344.
[556] Insolvency Act 1986, sch. B1, para 43; Calnan, 'What Is Wrong with the Law of Security?' (n 15) 185–186.
[557] Bankruptcy Act 2009, s 11 (2).
[558] See *Twyne's Case* (n 381).
[559] De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 13-15.
[560] Bankruptcy Act 1623 (21 Jac 1) s 11.

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requirement render the rule non-applicable to registered security bills of sale.[561] The Bankruptcy Act 2009 now generally permits the secured creditor with non-corporate security interest in collateral to realise or deal with the secured asset, as would be the case outside of bankruptcy.[562]

For corporate security interest, the secured creditor of a company is in an enviable position in not only enjoying priority over unsecured claims, but also enjoys the right to realise security as well before the residue, if any, could go to the estate. The purport of registering a charge under the Companies Act 2009 is partly to regulate corporate insolvency, in order to ensure that the security on the company's property is not void against the liquidator and any other creditor.[563] However, there is no express provision in the Companies Act 2009 which directly authorizes the secured creditor to look to the security and realise the said security independent of the insolvency of the corporate borrower. Despite the lack of an express provision, two arguments support the view that the secured creditor is permitted to deal with the security in the insolvency of the debtor company independent of the actions of the liquidator or receiver. First, the Companies Act 2009 incorporates by reference the rights of the secured creditor applicable in the Bankruptcy Act 2009.[564] This means the Bankruptcy Act provision for the exercise of pre-insolvency rights in the property by a secured creditor continues in the insolvency of the debtor.[565] Second, it is suggested that the right of secured creditor passes through in the borrower's insolvency on the basis of contract law and adopted persuasive case law from England.[566] Contract law rewards a secured creditor for prudence and foresight in obtaining security in the property of the borrower, and the Cork Committee argued

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[561] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), ss 7 and 20.
[562] Bankruptcy Act 2009 (n 557), s 11 (2).
[563] Companies Act 2009 (n 387), s 170 (1).
[564] ibid, s 437.
[565] Bankruptcy Act 2009 (n 557), s 11 (2).
[566] Cork (n 11) 335, para 1478, 1481.

that such a right/rewards cannot be curtailed without eroding the freedom of parties to contract.[567] In *Salomon v. Salomon,*[568] Lord Macnaghten opined that 'Every creditor is entitled to get and hold the best security the law allows him to take'.[569] The entitlement was, therefore, given effect to by the then House of Lords in the *Salomon* case.

The said *Salomon* case completed the protection of the creditor with security interest once the statutory requirement, in this case being registration of the security interest, is satisfied. Registration was a legislative intervention to ensure there was no abuse by means of contract, secret liens and even in curtailing the effectiveness of certain kind of security in insolvency.[570] Wherein a creditor having proprietary right in an asset is said to be as exception to the *pari passu* rule in corporate insolvency.[571] The reputable ownership rule did not apply to companies, but the impact of insolvency on enforcing security interests includes the possibility of avoidance of the security interest,[572] and the loss of priority or preference of the floating charge through the preferential payment of taxes, levies, social security contribution and limited wages.[573] These are the attendant corporate insolvency limitations a secured creditor, especially a creditor holding floating charge, ought to be mindful of.

[567] ibid, para 1481.
[568] *Salomon v Salomon & Co,* [1897] AC 22, applicable in Sierra Leone.
[569] ibid 52.
[570] Cork (n 11) 335, para 1482.
[571] The pari passu general principle treats all creditors as equals. This is however not the case for secured creditors, who by reason of the proprietary rights in the secured property enjoy priority and preference Richard Calnan, *Proprietary Rights and Insolvency* (Oxford University Press 2010) 3, 18, paras 1.01, 1.61-1.75; Davies and Worthington (n 486) 1285, paras 33-32, 33-33; Royston Miles Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell 1997) 6, 271, paras 1-07, 8-49 ; Andrew R Keay and Peter Walton, *Insolvency Law : Corporate and Personal* (Bristol : Jordans, c2008) 485–487, paras 31.1, 31.2 and 31.3.
[572] Companies Act 2009 (n 387) s 439; the fraudulent preference rule; s 444 powers to set aside charges considered to be undervalue; s 450 (1) a floating charge created within 6 months of the insolvency will be deemed invalid unless the solvency of the company at the time of creation is proven. Only the sum advanced and interest will be payable; s 446 security interest created by closely connected persons could be set aside; s 452 restrictions of the creditor's right to attach or execute; see Goode, *Legal Problems of Credit and Security* (n 373) 193 para 5-65 et. seq.
[573] Companies Act 2009 (n 387) ss 154 (1) and 438.

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By the general assessment, the enforcement of security interest is the least problematic within the frame of the 'building blocks' in dealing with credit security. However, complexity could be gleaned mainly because the whole system is compartmentalized, with need for specialized knowledge to navigate the various rules. The enforcement framework affords parties the liberty to reach prior agreement on the secured creditor's enforcement rights in their security agreements. Failure to reach a prior agreement leads to the application of default rules. Generally, it is best for the parties to agree on the enforcement rules, especially for commercial credit transactions since the default rules have proven to be complex, confusing, antiquated, and in need of reform.[574] For example, the mortgage foreclosure rules are unnecessary lengthy and impracticable for modern commercial transactions. In *Sierra Leone Commercial Bank v. Sow*, the court disinclined to order a sale of the security, therein a real property, and in fact restructured the credit facility giving the debtor an additional 24 months to pay the due sum on equal monthly instalment relying on the equity of redemption principle.[575] There seem to be a judicial drive to restructure debts before the grant of a relief for repossession or sale. Also, self-help is not robustly regulated leading parties to opt for judicial enforcement.[576] The absence of self-help regulation extends to the informal sector, where disputes often lead to protracted litigations.[577]

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[574] Calnan, 'What Is Wrong with the Law of Security?' (n 15) 184.
[575] *Sierra Leone Commercial Bank Limited v. Mohamed B. Sow T/A Pelly Enterprises* (n 327)3-7; this case listed several cases adopting the same line of reasoning *SLCB v. Mohamed Hijazie & Ors*, *ICB v. Percy Waters Bright* (2013), *FIB v. Primer Investment (SL) Limited* (2013), the plaintiffs being banks seeking to enforce mortgage deeds. Perhaps the fact that these mortgages related to real property swayed the court towards this strong urge to maintain the equity of redemption principles. The downside of protracted litigation also becomes apparent; the *Alie Bundu v Grant Sallu Bundu Kamara* (n 345) case lasted 7 years in court, in all three levels in the courts of superior judicature, only for the sale to be set aside.
[576] Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th Edition, Penguin Books 2009) 690-693.
[577] Jalloh (n 338) 95.

2.4 Conclusion

In modern secured transactions law discourse, one prevalent theme and line of argument relative to the state of the English law is the seeming pressure to reform in line with the conception of security interest in the Unitary Model.[578] With English law forming the foundation and structure of the Pre-BLA law in Sierra Leone, this growing urge and the sheer state of the compartmentalization, legal complexity and obsoleteness warranted the reform in 2014. The prior-PPSL framework, which was not repealed, remains to be too intractable and difficult to understand, even for expert lawyers. In practice, it combines with the economic risk factors to sustain the high interest rates and credit transaction costs, thereby reducing confidence in the formal credit sector dominated by banks. Further, the rigid formalities offer no incentive for businesses to migrate from the informal sector to the formal sector in search for credit capital or other forms of financing. This reinforces the informal sector, thereby deepening the culture to conduct business transactions outside of the formal sector.[579] With the secured transactions reform movement gaining momentum in Africa, the stage was set for legal reform in Sierra Leone given the legal context and economic imperative. What was lacking before and even after the reform is the legal diagnostic or assessment study identifying the legal impediments and providing the necessary context for the framing of the reforming law. The failure/neglect to undertake such a study is partly responsible for flawed reform validated by the enactment of the BLA with the aforementioned substantial deviations.

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[578] See McCormack, 'Pressure by the Paradigm. The Law Commission and Company Security Interests' (n 94).
[579] Working Party on Capital Availability and Sierra Leonean Entrepreneurship, *Report of the Working Party on Capital Availability and Sierra Leonean Entrepreneurship* (s n 1971) 14–22.

Chapter Three

3. The PPSL Reform in Sierra Leone and the Borrowers and Lenders Act 2014

In the previous chapter, the pre-BLA law was examined to the extent of outlining its structure, complexity and the problems associated with using personal property as security for credit. In this chapter, the focus shifts to the BLA, and its enactment in 2014 serving as the main instrument of the PPSL reform in Sierra Leone. The main objective of the chapter is to give a critical overview of the BLA using the 'building blocks' of the Unitary Model as the analytical frame in outlining the content of the legislation and its importation of a new conceptual approach. As most of the terminologies used in the BLA are new and/or foreign in the legal system in Sierra Leone, the definition of key terms and concepts is an imperative and hence carried out at the outset. Given the general nature of this chapter, the task of investigating the three main 'unusual features', referred to as substantial deviations in the BLA, will be done in the succeeding chapter. This chapter provides the needed platform to elucidate on the key features of the new legislation, commencing with the argument supporting the claim that BLA is a secured transactions law. This argument refutes previous claims of the legislation being part of the prudential and regulatory rules for banks.

3.1 Is the BLA a Secured Transactions Law? The Path Dependency Problem

It is more than just curiosity to question the status of the BLA. The BLA contains unusual features identifiable in the formal as well as the functional approaches to secured transactions law. Bridge *et. al.*, argue that 'a central issue in the law of security over movable property is the recognition of, and the regulatory implications of recognizing, a secured transaction'.[580] Therefore, before considering any argument on whether the BLA represents a third or hybrid approach, its

[580] Bridge and others (n 7) 567.

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status as a secured transactions law must be established. Significantly, this research argues that the BLA is a secured transactions law, but one that comingles the incompatible formal and functional approaches. However, if the BLA is not considered to be a secured transactions law, then could it be classed as part of the body of regulatory and prudential norms governing banking in Sierra Leone? Further, is it a sector-specific secured transactions law? The case for such an alternate conclusion could be gleaned from the restriction of the BLA's application to only banking and other financial institutions, licensed by the Central Bank of Sierra Leone.[581]

The legal nature of secured transactions law is not usually inquired into, and often assumes a secondary role in the scholarship.[582] By its function, however, secured transactions law governs the concept of security interest, which is 'the grant of a right in an asset which the grantor owns or which [s]he has an interest'.[583] Various jurisdictions have their conceptions of 'rights in an asset', as in ownership and possession, and this is one fundamental point which gives rise to the differences in approaches.[584] The fundamental difference between the formal approach and functional approach rests on the nature of proprietary interest in the asset, and the right of the person to deal with the property. In the formal approach, this translates to the separation of lender credit from trade credit (retention of title, where the debtor has no prior interest in the property); and in the functional system, the elevation of substance over form, wherein the location of title in

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[581] Borrowers and Lenders Act, (n 9), s 1; see definition of lender.
[582] Ali (n 106) 15, para 2.02.
[583] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 3, para 1-04; Gilmore, *Security Interests in Personal Property* (n 7) 334, see Chapter 11 for detailed discussion.
[584] Goode and Gullifer referred to the fundamental divide as between the formal approach and that of the functional approach; Goode, *Goode on Legal Problems of Credit and Security* (n 483) 3–4, paras 1-03, 1-04; the numerus clausus (closed list) system of most civil law countries represents the other main approach, mainly characterised by 'security transfer' or retention of title with no requirement for public notice (registration), and it is typified by the German Civil Code (BGB) basic rule, 'numerus clausus der Sachenreche' (numerus clausus in rem rights); Tajti, *Comparative Secured Transactions Law* (n 1) pt 3.II, 261, 265.

the collateral is not the determinant factor.[585] This conceptual distinction notwithstanding, a modern secured transactions law contemplates a legal framework that recognizes a consensual transaction, regardless of its form or pragmatism, that creates a security interest in personal property; and provides for registration or other forms of perfection, regulating priorities between competing interests, and enforcement upon default.[586] The conceptual framing is mainly reflective of the unitary and functional U.C.C. Article 9 paradigm.

Dubovec and Osei-Tutu similarly grappled with the question of whether the Ghanaian Borrowers and Lenders Act 2008 (hereinafter: '**B&L Act**') is a secured transactions law.[587] The BLA is largely a copy of the B&L Act, with provisions on supervisory powers and priority rules for competing security interests added in the latter legislation.[588] The B&L Act, Dubovec and Osei-Tutu argue, is uncharacteristic of a modern secured transactions law for the following reasons: "First, it includes extensive coverage of i) regulatory matters such as the supervisory and enforcement role of the Bank of Ghana, and ii) borrowers' rights as they pertain to discrimination or confidentiality, and disclosure of information".[589] In their view, modern secured transactions law addresses the questions of the rights of borrowers, lenders, and third parties including purchasers and lien creditors.[590] The thrust of their conclusion is that the B&L Act mainly dealt with regulatory matters, and not so much with the commercial rights and obligations of lenders and borrowers.[591] Consequently, the Ghanaian legislation fell short of the international standards

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[585] Uniform Commercial Code (n 374), § 9-109 (a) (1); White and Summers, *Uniform Commercial Code* (n 90) 2–3, 10; Goode, 'Security' (n 10) 362; Bridge and others (n 7) 572; Michael Bridge, 'The Quistclose Trust in a World of Secured Transactions' (1992) 12 Oxford Journal of Legal Studies 333, 334–342; Worthington (n 10) 17–8, 93–4.
[586] See Uniform Commercial Code (n 374) especially, § 9-109; World Bank, *Doing Business 2017: Equal Opportunity for All* (The World Bank 2016) 54.
[587] Dubovec and Osei-Tutu (n 8) 105–6.
[588] See Borrowers & Lenders Act (n 18) of Ghana; Borrowers and Lenders Act, (n 9).
[589] Dubovec and Osei-Tutu (n 8) 105. These features are also found in the BLA, ss 4, 32 and 35.
[590] ibid.
[591] ibid 105–106.

with reference to its failure to address the perfection of security interests and rules of priorities between competing secured creditors.[592] They concluded that the Ghanaian B&L Act characterised a hybrid approach, placed between a regulatory law and secured transactions legislation.[593] It has to be noted, however, that Ghana is reportedly in the process of amending the B&L Act, and this is in recognition of the flaws in the legislation.[594]

Similarly in Nigeria, i.e., the Central Bank of Nigeria (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) Regulations 2015 (hereinafter: the '**Nigerian Regulation**'), a B&L Act akin regulation, begs the question of whether it is a secured transactions law.[595] The Nigerian Regulation provides for a regulatory framework to allow '(a) accessing credit secured with movable property; (b) creation and perfection of security interests; (c) realization of security interests in movables'.[596] It also establishes the Nigerian Collateral Registry,[597] similar to the legislations in Ghana and Sierra Leone. Through the use of the Unitary Model's 'building blocks', it is being argued that the Nigerian Regulation contains serious defects, specifically the omission of 'value' in the provision dealing with the creation of an enforceable security interest, the co-existence of the floating charge and the unitary floating lien, and the one-legged self-help repossession remedy.[598] Although the Nigerian Regulation is seen as the first step to a comprehensive reform in Nigeria, it, however, fails to resolve the existing

[592] ibid 80. Dubovec and Osei-Tutu repeatedly referred to 'the international standards' in their assessment of the Ghanaian 2008 B&L Act. In their view, the 2007 UNCITRAL Legislative Guide on Secured Transactions (the UNCITRAL Legislative Guide) and the 2010 International Finance Corporation (IFC) Secured Transactions Systems and Collateral Registries Toolkit (the IFC Toolkit) represented the international standards.
[593] ibid 105–6.
[594] 'Ghana to Amend Borrowers and Lenders Act' *Ghana Business News* (Ghana, 8 May 2013) <https://www.ghanabusinessnews.com/2013/05/08/ghana-to-amend-gaps-in-borrowers-and-lenders-act/> accessed 2 June 2017.
[595] See Central Bank of Nigeria - (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) (Regulations, No. 1, 2015) (n 9); Iheme and Mba (n 18).
[596] Central Bank of Nigeria— (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) (Regulations, No. 1, 2015) (n 14), s 1 (1).
[597] ibid, s 1 (2).
[598] Iheme and Mba (n 18) 131, 140–152.

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problems with secured credit.[599] The expressed limitation of the scope to banks and financial institutions, the subsidiary nature of the Nigerian Regulation and ownership of the reform process by the Nigerian Central Bank add credence to the view that the said regulation is seen as part of the banking prudential/regulatory norms or at least a sector specific secured transactions law.

In coming back to the BLA in Sierra Leone, its preamble curiously outlines its objective, which is to "provide the legal framework for credit agreements, to improve standards of disclosure of information in credit agreements, to prohibit certain practices, to promote a consistency in the enforcement of credit agreements […]".[600] The BLA generally provides for supervision/regulatory oversight by the Central Bank of Sierra Leone of the secured credit market. This is one of the reasons why Dubovec and Osei-Tutu's argues that the Ghana B&L Act is a 'hybrid' legislation.[601] Their hybrid contemplated is different from the contemplation in this dissertation. Generally, the claim that secured transactions law itself is regulatory intrusion in the credit market is accepted in this dissertation, and therefore, regulation by itself is not so unique. What is unique is the level of regulatory intrusion. For the purposes of clarity, the hybrid discussion herein rests on the competing conceptual approaches to secured transactions law, i.e., between formalism and functionalism, and not in frame of banking regulatory norms versus secured transactions law.

The BLA crucially also provides for the creation and effectiveness of security interests. It imposes an obligation for the registration of security interests and establishes the collateral registry. The BLA further covers priority rules for competing secured claims, the rights and obligations of parties, purchasers and lien holders, and finally enforcement of security interests

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[599] ibid 152–3.
[600] Borrowers and Lenders Act, (n 9), preamble. The curiosity stems from the indirect reference to security interest in movable property, (see s 1 –definition of credit agreement), and inclusion of matters generally not included in a typical secured transactions law.
[601] Dubovec and Osei-Tutu (n 8) 105–6.

upon default of the borrower.[602] Without making a judgment on the effectiveness of the BLA at this point, a prima facie conclusion can be reached to the effect that the legislation as described above fits within the four walls of a secured transactions law, notwithstanding its unique features. Whilst the answer to the central question of substantial deviation or idiosyncratic features will be considered subsequently, the answer to the question of whether the BLA is a secured transactions law can only be in the affirmative. The reason why it is considered a secured transactions law rests on its coverage of the 'building blocks' of a secured credit law, notwithstanding the perceived deviations. Indeed, the BLA largely copied the B&L Act, as envisaged by Dubovec and Osei-Tutu.[603] This pacesetting role which has been largely flawed at the conceptual level, has created a path dependency problem. That is, the subsequent legislations (the BLA and the Regulation) have inadvertently copied some of the defects in the B&L Act. As Ghana contemplates a second wave of reform, it is safe to argue that the imitations must also be reviewed.

3.2 The BLA: A Critical Overview

This sub-section is set out to define and explain the main concepts, functions and key features of the BLA.[604] The aim is to situate the BLA in the overall PPSL framework in Sierra Leone given the importation of a new conceptual approach and terms. At the outset, it must be said that the BLA is neither a repealing legislation nor one that consolidates the law on personal property security in Sierra Leone. It in fact add a new parallel structure to the already

[602] See Borrowers and Lenders Act, (n 9).
[603] Dubovec and Osei-Tutu (n 8) 121.
[604] Reference to Borrowers and Lenders Act, (n 9), includes; Borrowers and Lenders (Collateral Registry) Regulations (n 302). The BLA is divided into 8 parts, (I-VIII). Part I, which deals with the preliminaries provides for the interpretation/definition for key terms, scope of the Act (its application and non-application). Part II looks at the supervision and the enforcement of such supervision (oversight) by the Central Bank. Part III addresses the effectiveness of security interests. The third part provides for the creation and registration of security interest and establishment of the collateral registry amongst other things. Part IV provides the general priority rules, which are scanty and inadequate. Part V deals with priority relating to transfer of money. Part VI deals with rights and obligations of borrowers, and information disclosure. Part VII addresses enforcement, and the final Part VIII is the miscellaneous sections. The 2016 Regulations provide further supplemental provisions within the BLA framework.

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compartmentalized framework. The BLA was enacted based on the need to improve access to credit finance, and to address the high levels of NPLs.[605] Outside the economic risk factors, the NPL debacle is a product of an inflexible legal framework, heavy on formalities, compartmentalized and lacking in transparency. The BLA seeks to resolve the problems associated with secured credit through the following: First, expanding the range of assets to be used as collateral in secured credit transactions;[606] and second, establishing a collateral registry, for the registration of the expanded range of security interests in personal property.[607] Since the BLA is an additional layer in the PPSL framework, the focus of this overview will be on the new/foreign terms and features which have been imported, and how they co-exist with the elements of the pre-BLA law.

3.2.1 Definition of Key Terms and Concepts in the BLA

The use and understanding of terminologies is of critical importance in secured transactions law, especially in view of legal transplantation occasioned by legal reforms. Gilmore noted that the terminologies in Article 9 may be unfamiliar to the ears of non-experts, since the choice of its vocabulary was new and deliberate.[608] Watson's argument, which is accepted herein, is that the proper acceptance of transplanted concepts or terms gravely depends not only on understanding the new concepts or terms, but also in ensuring that no inherent conflict exists in relation to the prior law.[609] If this happens, it becomes imperative for the conflict(s) to be resolved preferably by legislative action or ongoing judicial interpretation. The BLA indeed introduces new concepts and

[605] See Introduction, 0.1 herein.
[606] The cautionary word 'attempt' is used because if the pragmatic nature of the formal approach as argued by McCormack is considered, then the problem with the existing law is not really the limitation on the range of assets that could be used as collateral, but rather the rules that limit non-incorporated entities on use of specific security devices. For example, the restriction on natural persons in employing the floating charge. See Gerard McCormack, *Secured Credit under English and American Law* (Cambridge University Press 2004) 1.
[607] Borrowers and Lenders Act, (n 9), s 15; Borrowers and Lenders (Collateral Registry) Regulations (n 302), s (2) 1.
[608] Gilmore, *Security Interests in Personal Property* (n 7) 301–302.
[609] See Watson (n 137).

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terms, and the task herein is to examine the concepts and terms and see how they co-exist with the pre-BLA reconcile ones. The terms in the BLA to be examined includes 'borrower', 'credit agreement', 'collateral', 'lender', 'property', 'purchase money security interest' (hereinafter: **PMSI**), and 'security interest'.[610] These terms carry different meaning within the Unitary Model conceptual and must not be confused with their normal usage necessitating special attention.

A 'borrower' is defined in the BLA means "a person who is a party to a credit agreement and who has concluded a credit agreement with a lender and provided some property as collateral to secure obligations specified in the credit agreement, and includes - (i) a person who buys goods on credit; (ii) a person who receives services on credit; and (iii) a financial lessee".[611] The definition of a borrower in the BLA reveals three important factors: First, a borrower has to be a party to a credit agreement concluded with a lender. Second, a borrower is the provider of the collateral; and third, a borrower can also be a purchaser of goods on credit, i.e., is, party to a trade credit transaction. Significantly, the definition anticipates removal of the formal dichotomy between lenders' credit and trade credit, leading to the conclusion that the functional definition appears to have been adopted.

When the definition of 'borrower' is scrutinised through the lens of Unitary Model,[612] a substantial deficiency is immediately ascertainable. The US equivalent is the 'debtor'[613] and the definition contemplates an 'obligor'.[614] In this sense, the debtor need not be the provider of

[610] See interpretation section, Borrowers and Lenders Act, (n 9), s 1.
[611] Borrowers and Lenders Act, (n 9), s 1. Note the BLA does not define goods, and so the common law or other relevant statutory provisions will have to apply. See; Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 62 (1).
[612] Reference to Article 9 herein means the Uniform Commercial Code (U.C.C.) - Article 9 - Secured Transactions (2010) unless otherwise stated. See Uniform Commercial Code - Article 9 - Secured Transactions (2010) 2010.
[613] Debtor means: "(A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor; (B) a seller of accounts, chattel paper, payment intangibles, or promissory notes; or (C) a consignee". ibid, § 9-102 (a) (28).
[614] Obligor means "a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the

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property/collateral as in the BLA definition *ex facie*. In the drafting of the initial Article 9, a policy decision was taken to drop the use of the term 'borrower' for the neutral 'debtor' term.[615] The definition in the initial Article 9[616] clearly pointed out that the debtor may not own or have right in the collateral, and in that case be an 'obligor'. Thus, a collateral may be provided by a third party.[617] Although the provision of collateral (X) by B to secure the obligation of A is common, such a third party secured obligation would have to be inputted by the courts under the BLA. The converse interpretation would mean the BLA only recognises the privity between a borrower and lender with respect to proprietary interest in a collateral.

The party on the other side of the secured credit transaction as contemplated by the BLA is the 'lender'.[618] A 'lender' is restricted to a commercial bank or other financial institution licensed by the Bank of Sierra Leone. The implications of restricting the definition of lender to just commercial banks and financial institutions will be examined subsequently.[619] The restrictions form part of the substantial deviation from the Unitary Model dealing with the bank-based approach leading to the credit market banking oligopoly.[620] This reinforces the bank-based system, which translates into banks consolidating their already high market share in the finance and credit

collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit". ibid, § 9-102 (a) (59).

[615] Gilmore, *Security Interests in Personal Property* (n 7) 302–305.

[616] 'Debtor means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral [...] When the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires', Uniform Commercial Code (n 374), § 9-105 (1) (d).

[617] Gilmore, *Security Interests in Personal Property* (n 7) 302–305.

[618] Lender means "a commercial bank or other financial institution licensed by the Bank of Sierra Leone and who, as part of business enters into a credit agreement by advancing loans and other credit facilities including – (i) micro credit facilities; (i) selling goods on credit; (ii) providing services on credit; and (iii) a financial lessor". Borrowers and Lenders Act, (n 9), s 1.

[619] See 4.1.2 herein.

[620] ibid.

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market, which was at 75% in 2009.[621] The partial equivalent of 'lender' in Unitary Model is the 'secured party'.[622] There are two ideas which have evolved overtime in the definition of 'secured party' that are noteworthy: First, the initial Article 9[623] referred to a lender and seller (incorporating lender and trade credit) in its definition. Second, the inclusion of a holder of agricultural lien, consignor, and holder of investment securities, as these transactions were incorporated by Unitary Model to solidify the functionality of the law. Whilst the BLA limits the definition of a 'lender', the Unitary Model represent a 'living law' amendable to periodic revisions and changes to ensure that its functionality is maintained.

The definitions of a 'credit agreement'[624] and a 'security interest'[625] arm the argument that the BLA conceptually adopts the functional approach. In the definition of 'credit agreement', reference to credit facility and credit transactions may relate to mere linguistic differences. However, the use of credit guarantee may pose a nuanced challenge. Guarantee in credit finance is a term of art, classed as personal right (*in personam)* and not an *in rem* right.[626] Some English

[621] 'Sierra Leone Financial Sector Development Plan' (2009) x; Eric Osei-Assibey and Baimba Augustine Bockarie (n 31) 258.

[622] Secured party means: "(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; or (F) a person that holds a security interest arising under Section 2-401, 2-505, 2-711(3), 2A-508(5), 4-210, or 5-118". Uniform Commercial Code (n 374), § 9-102 (a) (73).

[623] Secured party means 'a lender, seller or other person in whose favor there is a security interest […]'; ibid (1951), § 9-105 (1) (i).

[624] A credit agreement means "an agreement in the nature of a credit facility, a credit transaction, a secured credit guarantee, any combination of these or any other agreement that relates to a transaction, regardless of its form that creates a security interest in movable property to secure all types of obligations, present or future, determined or determinable". Borrowers and Lenders Act, (n 9), s 1.

[625] A security interest includes "fixed and floating charge, chattel mortgage, lien, pledge, outright or security assignment of receivables, reservation of title, finance lease, trust, or any other encumbrance of any nature created by an agreement other than liens arising by operation of law". ibid, s 1.

[626] Note the reference to real and personal rights, and not property. Royston Miles Goode and Louise Gullifer, *Goode on Legal Problems of Credit and Security* (Fourth Edition, Sweet & Maxwell 2008) 5–6, para 1-06; Diamond (n 29) 3, para 3.1; the basic distinction between *in rem* and *in personam* rights is simple, and that is, *in rem* proprietary right deals with the relationship between a person and a thing (property), whilst *in personam* deals with the person. The relationship between a person and a thing (proprietary rights) could be based on ownership, possession, and various

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authors connect guarantees and indemnities as additional or ancillary securities in the formal system.[627] The linguistic and/or the formal connotation notwithstanding, a credit agreement must relate to a transaction that creates a security interest in a movable property. The revised Article 9 equivalent definition is the 'security agreement', which simply refers to 'an agreement that creates or provides for a security interest'.[628] The 'security agreement' evidences the 'security interest',[629] and is distinguishable from the 'financing statement',[630] which is the record of the perfected security interest.[631]

The definition of 'security interest'[632] in the U.C.C. is to be found in Article 1, and not specifically within Article 9, because of its relevance to other substantive Articles in the Code.[633] Article 9 "security interest floats, unmoored, […and] any particular transaction [that] creates 'an interest…which secures…an obligation' is a question for judicial determination".[634] The approach adopted does not primarily list the independent devices as in the BLA, but rather a policy approach that enables the application of Article 9 security interest to any transaction, 'regardless of its form',

security interests; Sarah Worthington, *Personal Property Law: Text and Materials* (Hart Publishing Limited 2000) 17–18.

[627] Crowther and others (n 11) 25, 299, paras 1.3.42; 6.9.1-6.9.3; see Winnibald E Moojen, *Bank Security and Other Credit Enhancement Methods: A Practical Guide on Security Devices Available to Banks in Thirty Countries throughout the World* (Kluwer 1995) ch England.

[628] Uniform Commercial Code (n 374), § 9-102 (a) (74). There is no change from the initial definition in § 9-105 (1) (h) (1951); Gilmore, *Security Interests in Personal Property* (n 7) 345.

[629] Gilmore, *Security Interests in Personal Property* (n 7) 346.

[630] Financing statement means 'a record or records composed of an initial financing statement and any filed record relating to the initial financing statement', Uniform Commercial Code (n 374), § 9-102 (a) (39).

[631] Gilmore, *Security Interests in Personal Property* (n 7) 347.

[632] § 1-201 (b) (35) refers to security interest as 'an interest in personal property or fixtures which secures payment or performance of an obligation. […it] includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. […and] does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 2-401 is limited in effect to a reservation of a "security interest". Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to Section 1-203'. Uniform Commercial Code - Article 9 - Secured Transactions (2010) (n 38).

[633] Gilmore, *Security Interests in Personal Property* (n 7) 331.

[634] ibid 335.

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that has an economic characteristic of securing payment for performance of an obligation.[635] This was quite revolutionary at the time. The mind-set of formalism may be seen in the BLA's definition, which merely lists the known independent devices with an omnibus clause for those not listed. So, for example, field warehousing even though not listed may be deemed as a security device under the omnibus clause, which includes in the definition 'any other encumbrance of any nature created by an agreement other than liens arising by operation of law'.[636]

When the mere listing of security devices is adopted, as in the BLA's definition of security interest, there is the danger of the devices retaining their inherent pre-BLA characteristics. The BLA definition is not an abolition.[637] The fixed and floating charge for example as a security device passes through with all its attendant problems, covering its limited use, characterization and monopoly. These problems become profound, when the consequences of the conspicuous non-mention of after-acquired property in the BLA is considered, and potential floating security conflict.[638] This floating security dilemma will be addressed subsequently.[639]

The BLA defines 'collateral' as 'movable property that is subject to a security interest'.[640] This is one classic example where a new term, movable, is introduced in the legal system with looming problematic consequences. The first significant omission the failure to define movable property in the BLA. This is crucial since the PPSL in Sierra Leone is essentially inherited English law, and in the English common law family, personal property is classified as chattel real and personal chattel.[641] Since the focus is on chattels personal, it is useful to note that the class is further

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[635] White and Summers, *Uniform Commercial Code* (n 90) 11.
[636] Borrowers and Lenders Act, (n 9), s 1.
[637] On abolishment, see Gilmore, *Security Interests in Personal Property* (n 7) 297–301.
[638] See Uniform Commercial Code (n 485), § 9-204 for creation of security interests in after-acquired property and future advances; Tajti, *Comparative Secured Transactions Law* (n 1) 178.
[639] See 4.2 herein.
[640] Borrowers and Lenders Act, (n 9), s 1.
[641] Michael Bridge, *Personal Property Law* (Paul Craig ed, Fourth, OUP Oxford 2015) 12.

divided into *choses* in action (tangibles) and *choses* in possession (intangibles).[642] Therefore, the movable description has no place in the property classification. The movable and immovable classification is based on Roman law applied in the civil law systems.[643] On the basis of German civil law, for example, Tajti has argued that this basic categorization of property in civil law is different from the common law approach, and in German law 'intangibles are separate from movables'.[644] In particular, the civil law category of 'movables' is not equal to the common law 'personal property'; though this depends also on the jurisdiction which the author is examining.[645]

Closely connected to the definition of collateral in the BLA is that of 'property', which is defined to include 'movable property and *choses* in action'.[646] Here the conflation and confusion continue.[647] The definition it seems was meant to clarify that movables include intangibles, but the *ex facie* effect is a confused juxtaposition of common law and civil law terminologies. The Article 9 definition of 'collateral', on the other hand, navigates clear of classification mishaps by reference to property (without more) in the basic definition.[648] By the importation of the term movable in the definitions of 'collateral' and 'property' in the BLA, the courts will not only be obligated to import its legal formants,[649] but also parties will be faced with the fact that this new term does not

[642] See *T Choithram & Sons v P Choithram & Sons* 1964–66 ALR SL 253 (Supreme Court); Bridge, *Personal Property Law* (n 641) 10–19; Worthington (n 10) 4–5.
[643] Bridge, *Personal Property Law* (n 641) 20.
[644] Tajti, *Comparative Secured Transactions Law* (n 2) 58.
[645] Some German authors simply presume that 'movables' encompass everything, others not. The term 'moveable' in English obviously cannot extend to intangibles. ibid.
[646] Borrowers and Lenders Act, (n 9), s 1.
[647] The civil law based movable terminology appears to have been adopted from the United Nations Commission on International Trade Law, *Legislative Guide on Secured Transaction.* (United Nations 2010) 455 et. seq, which became apparent in the; United Nations Commission on International Trade Law (n 8) art. 2 (u), which defines 'movable asset' as 'a tangible or intangible asset, other than immovable property'.
[648] Collateral is defined as "the property subject to a security interest or agricultural lien. The term includes: (A) proceeds to which a security interest attaches; (B) accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and (C) goods that are the subject of a consignment". Uniform Commercial Code (n 374), § 9-102 (a) (12).
[649] See Sacco, 'Legal Formants' (n 134); Sacco, 'Legal Formants' (n 134).

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correspond squarely to the common law known classification.[650] Two challenges arise from the BLA importation: First, the courts have to approximate and fit the definition of movables within the existing law; second, the courts have to address the interplay between the BLA definition and secured credit framework outside of the BLA. Failing which, secured credit practice might be fundamentally altered if no amendment is undertaken.

The final term to consider is the definition of 'PMSI',[651] a term borrowed from the Unitary Model, examined on the basis of the challenges it poses in the PPSL framework. English law, which is largely pre-BLA law in Sierra Leone, did not recognize the priority of PMSI until the intervention of the courts.[652] As such, PMSI super-priority over competing security interests is recognized 'where […the PMSI] attaches at the very moment of the debtor's acquisition of the asset by virtue of a pre-acquisition agreement for the security'.[653] The recognition of PMSI by the English courts is based on the *scintilla temporis* (a moment in time) principle, i.e., a notional gap between the debtor becoming the unencumbered owner of the asset, and the lender creating the charge. Whilst this issue will be explored subsequently,[654] it is sufficient to note that the English conception of the PMSI was developed unsatisfactorily by case law,[655] was not part of the inherited or received English laws in Sierra Leone. Consequently, the introduction of PMSI is a novelty,

[650] Bridge, *Personal Property Law* (n 641) 20.
[651] PMSI means - "(a) a security interest in collateral retained by a seller that secures the obligation to pay any unpaid portion of the purchase price of the collateral; (b) a security interest taken by a person who gives value for the purpose of enabling a debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights; or (c) an interest of a financial lessor; but does not include a transaction of sale and lease back to the seller". Borrowers and Lenders Act, (n 9), s 1; see Uniform Commercial Code (n 374), § 9-103.
[652] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 214–217.
[653] ibid 214, 214–217; see Gordon Goldberg, 'Vivit Ac Vivat Scintilla Temporis' (1992) 108 Law Quartely Review 380; R Gregory, 'Romalpa Clauses as Unregistered Charges–A Fundamental Shift?' 106 LQR 551; Diamond (n 19) 88, paras 11.7.5, 11.7.7, 17.7.
[654] See 4.2.2 herein.
[655] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 213, para 5-62; the leading cases in England on PMSI concern claims of interests in land *In re Connolly Brothers Ltd (No 2)* (1912) 2 25 (Ch); *Abbey National Building Society v Cann* (1991) 1 AC 56 (House of Lords); *Security Trust Company v The Royal Bank of Canada (Bahamas)* [1975] UKPC 23 (PC); however the court in *State Securities plc v Liquidity* EWHC 2644 (Chancery) appears to suggest that the principle applies to personal property interests as well.

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and the major objective herein is to consider the BLA's PMSI will coexist with the pre-BLA floating charge supremacy.

3.2.2 The 'Building Blocks' of the BLA Unpacked

In this section, the BLA will be examined using the 'building blocks' of Unitary Model as the analytical lens. As noted in the Introduction, Tajti introduced the 'building blocks' analytical framework in his comparative study of secured transactions law and reforms in Continental Europe, England and North America.[656] The notion of the 'building blocks' was also referred to by Gilmore in his comprehensive and acclaimed examination of Article 9's functional approach to secured transactions.[657] The analytical framework covers the creation and effectiveness of security interests, perfection of security interests, regulating priorities between competing interests, default and enforcement. Tajti added the floating lien prong as part of the 'building blocks' of Article 9.[658] The BLA is also structured along similar lines, and therefore it is reasonable to follow this model. The discussions will, however, start with a look at the scope of the new legislation.

3.2.2.1 The Scope of the BLA – the Path Dependency Problem

Setting out the limits of the BLA is one way to identify its approach to secured credit transactions. The scope addresses both conceptual issues, i.e., adoption of the functional approach, and public policy considerations affecting exclusions. For example, the scope of Unitary Model[659] has changed overtime in order to address both conceptual and policy considerations. The recent inclusion of agricultural liens within the scope of Unitary Model, for the purpose of perfection and

[656] Tajti, *Comparative Secured Transactions Law* (n 2) 141, 392–397.
[657] See Gilmore, *Security Interests in Personal Property* (n 7).
[658] Tajti, *Comparative Secured Transactions Law* (n 1) 141, 400, see Appendix 8. Tajti (n 5) 141, 400, see Appendix 8.
[659] Article 9 generally applies to "(1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract; (2) an agricultural lien; (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes; (4) a consignment; (5) a security interest arising under Section 2-401, 2-505, 2-711(3), or 2A-508(5), as provided in Section 9-110; and (6) a security interest arising under Section 4-210 or 5-118", Uniform Commercial Code (n 374), § 9-109 (a).

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priority, was aimed at stemming the super-priority of common law lienholders operating outside Article 9 through the state law overrides.[660] Policy reasons also influenced the inclusion of consignments, covering actual secured transactions labelled as consignments and true commercial consignments in the revised Article 9.[661] The provision on the scope of the BLA is divided into two main segments: First, it looks at where it is applicable; and second, it lists transactions where the creation of a security interest operates outside its provisions.[662]

The applicability of the BLA covers issues appertaining to subject matter, territoriality and nature of proprietary rights. The BLA applies to security interests in movable property created under a credit agreement, regardless of the form/nomenclature of the secured obligation;[663] tangible property located in Sierra Leone with *in rem* effect on third parties;[664] intangibles, if the borrower 'is [in, or] located in Sierra Leone';[665] deposit account if the bank or financial institution maintains the deposit in Sierra Leone;[666] and the proceeds of the original collateral.[667] The BLA also applies in enforcing security interests in tangible property, if the enforcement takes place in Sierra Leone and the borrower is located in Sierra Leone.[668] On the other side of the coin, the BLA does not

[660] ibid, §§ 9-322; 9-333; *Re Printz* (2012) 478 BR 876 (Bankr Court); *Gangloff Industries v Generic Financing* (2009) 907 NE 2d 1059 (Court of Appeals); White and Summers, *Uniform Commercial Code* (n 90) 74; Scott J Burnham, 'Agricultural Liens under Revised Article 9' (2002) 63 Mont. L. Rev. 91, 155.

[661] Uniform Commercial Code (n 374), §§ 9-109 (a); 9-102 (a) (20). In pre-1999 Article 9 Code law, the rights of consignees and creditors was found in Article 2 (§ 2-326), and the consignor's right was subordinated to that of the consignee's creditor unless the consignee is 'generally known to be dealing in goods of another' or complies with relevant sign law or file Article 9 financing statement; *In re Arthur A Everts Co* (1984) 35 BR 706 (Bankr Court); White and Summers, *Uniform Commercial Code* (n 90) 40–45.

[662] Borrowers and Lenders Act, (n 9), ss 2 and 3.

[663] The Borrowers and Lenders Act, (n 30), s 2(1) (a) (i).

[664] ibid, s 2(1) (a) (ii).

[665] ibid, s 2 (a) (iii). One of the key questions will be whether being located in Sierra Leone have the same effect as being resident in Sierra Leone for natural persons? Note a person as referred to in the definition of borrower includes 'an individual, a company, a partnership, an association and any other group of persons acting in concert, whether incorporated or not'; see s 1.

[666] ibid, s 2 (a) (iv).

[667] ibid s, 2 (a) (vi).

[668] ibid, s 2 (1) (b) (i) and (ii). As a cautionary note on the use of terminologies, various terms dealing with classification of personal property have been inconsistently and interchangeable employed. In the interpretation section, 'movables' and 'choses in action' were used; whilst in the section dealing with application of the BLA, 'movables', 'tangibles'

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apply to security interests in ships, aircrafts, payment rights in financial contracts, assignment of wages, pension and health benefits under social security law, annuity contracts, life insurance policies, or non-commercial transfer of rights to damages in tort.[669] This does not appear to be irregular within the Article 9 lens. Article 9 is similarly clipped by statutory exclusions or pre-emptions. Article 9 is pre-empted by Federal statute, regulation, or treaty, and not applicable to a fixed list of transactions.[670] Security interests in ships and aircrafts, which are excluded in the BLA, are actually pre-empted by Federal law in the US.[671]

As part of the applicable scope of the BLA, certain consensual agreements creating security interests are treated as voidable. The BLA empowers the court to invalidate credit agreements where the parties are not transacting at arm's length, and intend to defraud third parties, including; shareholders' loan or credit agreement entered into by a borrower corporate entity and a lender with significant shareholding, a loan to a shareholder or controlling shareholder, credit agreement between 'familial relationship' or any other arrangement held in law not to be at arm's length.[672] This is clearly a limitation on the parties' freedom to contract within the context of commercial shareholders loan or credit accessed through family members. The intent is clearly to address

(choses in possession) and 'intangibles' are employed. This may be attributed to inconsistency in the drafting, it may however have the effect of obfuscating clarity and simplicity, key goals in secured transactions reforms.

[669] ibid, s 3 (1) (a) (b) (c) (d) & (e).

[670] Uniform Commercial Code (n 374), § 9-109 (c) and (d). Examples include: "[…] (4) a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose; (5) an assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only; (6) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract; (7) an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a pre-existing indebtedness; […] (12) an assignment of a claim arising in tort, other than a commercial tort claim, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds".

[671] Ship Mortgage Act 1920; *Aero Support Systems, Inc v Fdic* (1989) 726 F Supp 651 (Dist Court), where the court held that aircraft filing governed by federal law are subject only to the requirements imposed by the federal government; White and Summers, *Uniform Commercial Code* (n 90) 86. Note that the BLA exclusion does not apply to motor vehicle as in the pre-emption in Revised Interstate Commerce Act 1978 recording of security interests in certain motor vehicles.

[672] Borrowers and Lenders Act, (n 9), 2 (2) (a) (b) (c) and (d).

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fraudulent transactions, and the wording is copied from the Ghana B&L Act.[673] However, due regard is not given to propensity of limiting access to credit from two vital sources in Sierra Leone, i.e., from family and shareholders. For SMEs and small companies, family and shareholders are important sources of capital and operational finance.[674] Therefore, the limit impose on the basis of apparent preferential or fraudulent transactions is excessive and may deter family and shareholders from extending credit finance since the potential for invalidation is substantial.

In the US, fraudulent secured credit transactions are addressed in two key ways. First, the use of fraudulent conveyance law to reach such transactions including between a debtor and relative.[675] Second, whilst the freedom of parties to contract and 'a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors', there is a general restrictions, including a rule of law violations.[676] These two methods, for example, can cover the possible fraudulent transactions the BLA seeks to prevent without limiting lending from family and shareholders. Generally, the prohibition of fraudulent conveyance is not new in Sierra Leone. The Fraudulent Conveyances Act 1571,[677] which provides for the invalidation of transactions by insolvents or bankrupts is part of the inherited law. Further, the Companies Act 2009 also adopts this approach in dealing with the avoidance of fraudulent

[673] ibid, s 1 (4); Marek Dubovec and Benjamin Osei-Tutu, 'Reforming Secured Transactions Laws in Africa: The First African Collateral Registry in Ghana' [2013] Uniform Commercial Code Law Journal 77, 107 Marek and Benjamin argued that since family is usually the initial source to access capital, this limitation will adversely affect SME's access to family loans.

[674] See Jalloh (n 338); and on company self-financing, including through shareholders, see Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40) 15, 21–22.

[675] See § 548 U.S. Code: Title 11 - Bankruptcy; in fraudulent conveyance cases, the trustee or anyone challenging the transfer must establish either '(1) that it was done with "actual intent" to hinder, delay or defraud a creditor, or (2) that it was done without the debtor's receiving 'reasonably equivalent value', *re Jacobson* (1985) 48 BR 497 (Bankr Court); White and Summers, *Uniform Commercial Code* (n 90) 306–7.

[676] Uniform Commercial Code (n 374), § 9-201 (a) & (d); 9-201 (1951); Gilmore, *Security Interests in Personal Property* (n 7) 297; the rule of law violation is an ipso facto rule, wherein any violation of other law constitutes a violation of Article 9; *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), § 9-201, Official Comment 3.

[677] See Fraudulent Conveyances Act 1571 (n 390).

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preferences.[678] However, both provisions apply to bankruptcies or winding-up of a company. Therefore, a pre-bankruptcy invalidation provision is missing in Sierra Leone. It is this lacuna the BLA may be unwittingly attempting to address, even though it clearly a path dependent adoption from the B&L Act in Ghana.[679] Nevertheless, *ex facie*, the BLA's fraudulent transfer invalidation provision restricts access to credit capital from the two most likely sources in Sierra Leone through the heighten likelihood of invalidation.

3.2.2.2 Creation and Effectiveness of Security Interests

A security interest is created by agreement; and under the BLA, the credit agreement creating a security interest must be in writing or be electronically evidenced.[680] The writing or electronic evidence requirements include the US imported 'composite document rule', wherein records of writings or electronic evidence, taken together, may establish the parties' intent to create a security interest.[681] Generally, non-payment of stamp duty or other taxes does not invalidate a credit agreement.[682] However, the collateral must be specifically described in the credit agreement,[683] with exceptions to generic descriptions as in 'all inventory' or 'all movable property' of the borrower.[684] An effective security interest is automatically extended to identifiable proceeds even if the credit agreement does not contain a description of the proceeds.[685] Once the consensual

[678] Companies Act 2009 (n 387), ss 439, 444.
[679] Borrowers & Lenders Act (n 18), s 1 (4); Dubovec and Osei-Tutu (n 8) 107.
[680] Borrowers and Lenders Act, (n 9), s 9 (1) states: "A credit agreement shall be executed in writing or electronically, and it may consist of one or more writings or electronic records that, taken together, establish the intent of the parties to create a security interest in some property".
[681] ibid, s 9 (1); In *Matter of Bollinger Corp* (1980) 614 F 2d 924 (Court of Appeals, 3rd Circuit) the US Court of Appeals (Third Circuit) had to decide whether a secured claim against a debtor could be sustained when no formal security agreement was signed, but various documents executed in connection with the loan could evince an intent to create a security interest. The court held in the affirmative as the basic requirements were met; William D Warren and Steven D Walt, *Secured Transactions in Personal Property* (New York : Foundation Press Thomson/West, 2007) 23.
[682] Borrowers and Lenders Act, (n 9), s 9 (2).
[683] ibid, s 11 (1).
[684] ibid, s 11 (2).
[685] ibid, s 11 (3).

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agreement creating a security interest is reached by a borrower and lender, and the executed agreement complies with the stated rules, then the agreement will be effective between the parties.

The BLA appears to have strived for simplicity, as it only focuses on the execution of a credit agreement. However, the pursuit of a simple approach may have the effect of exposing the parties to a litigation flood. Historically, litigation blighted the attachment provision in Article 9.[686] However, with the benefit of hindsight, lessons ought to have been learnt from the US cases. The BLA execution of credit agreement deviates from the Article 9 attachment format, including complete silence on possessory security interests.[687] The effects of such a deviation will also be enquired into with the aim of bringing out any potential limitations. In the context of the existing law in Sierra Leone, the BLA provision will also be in view of possible challenges parties may face.

There is the requirement for the credit agreement to, inter alia, be in writing or electronically executed in the BLA. This is not strange, especially from the existing law

[686] Recent examples of Uniform Commercial Code (n 374), § 9-203 cases include; *In re Burival* (2010) 72 UCC 2d 742 (Bankr Court Neb), the bankruptcy court held that the security interest was invalid as the creditor cannot unilaterally create such an interest against the debtor; In *re Renshaw* (2009) 68 UCC 2d 730 (Bankr) the court held that a security interest did not attach since a security agreement was neither executed, nor authenticated; *In re Duckworth* (2014) 776 F 3d 453 (Court of Appeals, 7th Circuit) the court held that although Article 9 does not regulate a description of the value, typically a loan in a security agreement, value must be given by the creditor; In *re Bynum* (2012) 68 Collier Bankr Cas 2d (MB) 328 the bankruptcy court held that a security agreement must contain a description of the collateral; In *BMW Financial Services, Na, Llc v Rio Grande Valley Motors, Inc* [2012] Dist Court Civil Action No. M-11-292 it was held that the description 'general intangibles' included a car dealer's franchise right; but in *Sanders v Comerica Bank, Inc* (2008) 274 SW 3d 861 (Court of Appeals, 2nd Dist) the generic description of 'general intangibles' was held not to be sufficient to extend to equipment without particularity; and finally in *Bancorpsouth Bank v 51 Concrete, Llc & Thompson Machinery Commerce Corporation* [2012] Court of Appeals No. W2011-00505-COA-R3-CV. the court held that a debtor's discharge in bankruptcy did not extinguished the secured creditor's right to file an action for the proceeds of the collateral.

[687] See Uniform Commercial Code (n 374), § 9-203 (b) (3) (B); which deals with non-certificated security and possession. The BLA's section 9 is completely silent on this issue, and the implications will be looked at, when considering § 9-313 which deals with possession by or delivery to secured party to perfects security interest without filing.

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perspective,[688] or from the Article 9 perceptive.[689] The problem rests with the evidential rules of admitting electronic evidence in court in Sierra Leone. In *Millicent Lewis Ojumu and Others v. the General Legal Council and Another*, [690] the Court of Appeal addressed the issue of whether internet/electronic evidence, i.e., internet printouts, clippings were admissible in a civil case. The court opined that the electronic evidence might be admissible under the Evidence Documentary Act Cap 26 of the Laws of Sierra Leone as being statements. However, the court noted the absence of a direct law on the issue in Sierra Leone. A leaf could have been borrowed from the Anti-Corruption Act 2008, which resolved this issue of electronic evidence by extending the definition of document to include electronic materials.[691] In the present state, this uncertainty may prove to be a challenge in judicial enforcement of electronically executed credit agreements.

On the deviation from Article 9, it must be noted that the US law expressly spells out the steps to be fulfilled for a security interest to be attached, perfect and be enforceable.[692] On the other hand, the BLA appears to mostly rely on contract law by merely stipulating the form, i.e., the execution of the credit agreement. Ignoring the systematic approach in the BLA led to the failure to specify the need for a creditor to give 'value'; [693] and referencing the definition of 'value' in terms of what constitutes a credit agreement. This means the parties will have to rely on the limiting

[688] Statute of Frauds 1677, s 4; also, a bill of sale could be created orally, however, the prevalent practice has been for a bill to be in writing or evidenced in writing, given the registration requirement. Further the oral permissibility does not apply to companies' charges Bills of Sale Act 1878, s 4(1); see also *Newlove v Shrewsbury* (1888) 21 QBD 41; *Read v Joannon* (1890) 25 QBD 300; *Re Standard Manufacturing Co* (1891) 1 Ch 627 (Court of Appeal).
[689] Uniform Commercial Code (n 374), § 9-203.
[690] *Millicent Lewis Ojumu and Others v The General Legal Council and Another* [2017] Civ/App 46/2012 (SLCA) 14.
[691] Anti-Corruption Act, 2008., s 1.
[692] Uniform Commercial Code (n 374), § 9-203, which stipulates the following: (1) creditor has given value; (2) the debtor has rights in the collateral (3) existences of an authenticated a security agreement; (4) the collateral is sufficiently described in the security agreement; (5) the collateral is not a certificated security in registered form and the collateral is in the possession of, or has been delivered to the secured party or if collateral is a deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, the secured party has control; White and Summers, *Uniform Commercial Code* (n 90) 122.
[693] Value in the BLA refers to "consideration that is sufficient to support a simple contract, and includes an antecedent debt or liability, and a binding commitment to provide future value", Borrowers and Lenders Act, (n 9), s 1.

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and precarious consideration principles to establish the existence of a consensual and enforceable credit agreement.[694] In Article 9, the definition of value "includes not only the traditional 'any consideration sufficient to support a simple contract' but also antecedent debt (or 'pre-existing claim') and 'a binding commitment to extend credit or for the extension of immediately available credit'.[695] This meant the limitations posed by the common law consideration principles were made redundant. Therefore, unless the consideration debacle is addressed, the potency of the BLA will be seriously constrained.

3.2.2.3 Registration or Notice Filing as the Main Method of Perfection in the BLA

One of the main functions of modern secured transactions law is to ensure the public is notified of the existence of the grant of a security interest in a collateral. This is done by registration of the security interest in Sierra Leone or, for example, notice filing in the US.[696] The BLA imposes an obligation on the lender to register a security interest with the Collateral Registry, so as to gain

[694] In *Decore Furniture Company and Another v Union Trust Bank Limited* (2009) C.C. 534/07 SLHC 6, the High Court (Sierra Leone) had to consider the question of whether an agreement existed between a creditor bank and debtor who claimed it existed to the extent that the bank by conduct agreed to accept a lesser sum (principal owed) in lieu of a greater sum (principal and interest owing). The debtor's case/argument was based on the principles in Pinnel's case ([1558] ER Rep 612). The court had to rely on the case of Foakes v. Beer ([1884] UKHL 1, 109) which held "among other things that payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt unless there is some benefit to the creditor added so that there is an accord and satisfaction". The court found no such accord. The BLA recognizes this extended meaning of 'value' in its definition, but unfortunately failed to import it in the section dealing with creation and effectiveness of security interests; Williams and Mba in assessing the Nigerian (Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria) Regulations, No 1 of 2015, argued that the non-mention of 'value' was a defect in the Regulation. Their argument is based on the large number of cases addressing the absence of value proceeding from a secured party. See Iheme and Mba (n 18) 140–142; I, however, see this issue as one that limits the nature of the value, as consideration within the common law principles excludes antecedent debt or liability (past consideration), *Roscorla v Thomas* (1842) 3 QB 234; existing duty, *Eastwood v Kenyon* (1840) 11 A & E 438; *Stilk v Myrick* (1809) 2 Camp 317; *Hartley v Ponsonby* (1857) 7 E & B 872; except where the promises (credit agreement) is under seal, see Stephen A Smith and PS Atiyah, *Atiyah's Introduction to the Law of Contract* (OUP Oxford 2006). The common law doctrine of consideration is highly litigious and limiting, and a proper transplant of the Article systematic approach would have avoided this disastrous floodgate.

[695] Gilmore, *Security Interests in Personal Property* (n 7) 352.

[696] Uniform Commercial Code (n 374), § 9-502; McCormack, *Secured Credit under English and American Law* (n 606) 103.

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effectiveness against third parties.[697] However, the borrower or the court order (for judgment creditor's lien) must authorize the registration for it to be effective, and the borrower must do so in writing. [698] The effectiveness of a registered security interest continues until it lapses (effluxion of time) or discharged by the performance of all obligations in the credit agreement.[699] The effectiveness of a registered security interest is extended automatically to the proceeds of the collateral.[700] This automatic extension of the effectiveness of the security interest to the proceeds is limited to the value of the security, and the security interest in the original collateral must have been registered containing a description of the original collateral.[701] The proceeds must then be of a kind within the description of the original collateral, or be cash proceeds.[702] Where these two conditions are not met, i.e., the proceeds not contemplated in the description of the original collateral and proceeds not being cash proceeds, the lender has a window of 10 days, from the date the proceeds arose, to render the security interest in the proceeds effective against third parties by registration.[703]

[697] Borrowers and Lenders Act, (n 9), ss 10 (1) & (2); 12; Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg 5 (1).
[698] Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg 10 (1) & (2), although the existence of the authorization is not required to be in evidence for the purposes of registration. Note that the credit agreement is deemed to be sufficient evidence of the borrower's authorization; see Borrowers and Lenders Act, (n 9), s 31.
[699] Borrowers and Lenders Act, (n 9), s 13; and see section 20 for the discharge of a security interest after the satisfaction of a secured obligation within 15 days; Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg 8 (1) states that the period of effectiveness can be indicated in the registration form; and by reg 8 (2) - (4), such a period may be extended by amendment without loss of effectiveness. By reg. 18, only a lender is authorized to register a discharge of the registration of a security interest, and by reg. 20 (2) the lender is compelled to register a discharge within 15 days of the borrower extinguishing the security interest by performance of all obligations under the credit agreement.
[700] Borrowers and Lenders Act, (n 9), s 14 (5); proceeds refer to the "identifiable or traceable property received as a result of sale or other disposition, collection, lease or license of collateral, including proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of collateral", s 1.
[701] ibid, s 14 (2) and (3).
[702] ibid, s 14 (3). In s 1, 'cash proceeds' is defined to include 'money, cheques and deposit accounts'.
[703] ibid, s 14 (4) and (5).

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In addition, PMSI in non-inventory[704] collateral or and its proceeds are also registrable within 10 days after the day the borrower secures possession of the collateral.[705] PMSI in inventory and its proceeds are registrable with additional need for the lender, the non-purchase money lender, to receive notification of the borrower's possession of the collateral in order for the PMSI in inventory to be effective against third parties.[706] To effect the registration of security interests, the BLA establishes the Collateral Registry, which is mandated to register all security interests created in movable property and judgment liens.[707] The records of the Collateral Registry are public, in the sense that intending parties can access the records through search request to the Collateral Registry in the prescribed form and payment of the prescribed ten thousand Leone search fee.[708] The registrar is mandated to prepare and keep an index of registered security interest, and issue a certificate of registration.[709]

The new registration system under the BLA contains some distinctive rules on amendments, post-registration changes, transfer of collateral, *de minimis* defects and misleading filing rules, and the Registry's discretion to refuse registration of security interests, which ought to be explained. A registered security interest can be either voluntarily or compulsory amended.[710] A voluntary amendment covers the addition of new collateral, a new borrower, or modification of

[704] Inventory refers to 'goods that are - (a) held by a person for sale or lease; (b) to be provided under a contract for service; (c) raw materials or work in progress; or (d0 materials used or consumed in a business'. ibid, s 1.
[705] ibid, s 25 (1).
[706] ibid, s 25 (1).
[707] ibid, 15 (1) and (3); the Collateral Registry, as a unit or department within the Bank of Sierra Leone, adds to the exiting registries referred to in 2.3.3.1 herein; Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg 2 (1) & (2). The cost of the initial registration of a security interest is Le 50,000.00 (fifty thousand Leone), an equivalent of U$D 6.00 (six United States Dollars). See the Schedule to the Regulations.
[708] Borrowers and Lenders Act, (n 9), s 15 (3). The Le 10,000.00 (ten thousand Leone) search fee is the equivalent of U$D 1.30 (one United States dollars thirty cents); and the interested party may request for the issuance of a search certificate and printed search result for an additional fee of Le 10,000.00 (ten thousand Leone). See Borrowers and Lenders (Collateral Registry) Regulations (n 302), regs. 6 and 7 and the Schedule thereto.
[709] Borrowers and Lenders Act, (n 9), s 16 (4) and (6). The certificate can be used as evidence of registration in any court proceedings, and a printed search result shall also be issued in the form of a certificate; s 16(5); see Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg. 5.
[710] Borrowers and Lenders Act, (n 9), ss 19 and 20.

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the maximum amount secured, and the amendment relating to the three categories takes effect from the date the amendment is registered.[711] It implies that the effectiveness and priority of a security interest voluntarily amended by the addition of collateral, borrower or a new maximum amount from the date of the amendment. Only a lender identified in a registered form of a security interest is authorized to register an amendment, and this includes a lender identified in a previous amendment form.[712]

For compulsory amendment or registration of satisfaction of secured obligations, the obligation is also on lenders to register an amendment within 15 working days, after receipt of a written demand by the borrower.[713]The borrower is entitled to demand a compulsory amendment or registration of satisfaction of the secured obligation when all the obligations secured by the credit agreement are satisfied, or when there is either a revision of credit agreement or collateral.[714] The courts may order registration of satisfaction of an obligation or amendment upon request by the person demanding the lender to do so, and if the lender fails to comply within 15 days.[715] When a borrower changes identity, the lender has up to 60 days thereafter to register the change to retain effectiveness and priority. Otherwise, the competing security interest registered before the

[711] ibid, s 19 (1). Note that section 19 (2) which states 'Unless a registration modifies the maximum amount secured by the security interest, it may relate to one or more credit agreements that cover the collateral described in the registration'.
[712] Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg. 15 (1), (2) and (3).
[713] Borrowers and Lenders Act, (n 9), s 20 (1).
[714] ibid, s 20; '(2) A borrower may give a written demand to a lender to amend or discharge the registration if -(a) all of the obligations under the credit agreement to which the registration relates have been performed and there is no commitment to make future advances; (b) the lender has agreed to release part of the collateral described in the registration; (c) the collateral described in the registration includes an item or kind of property that is not collateral under a credit agreement between the lender and borrower; (d) no credit agreement exists between the parties; and (e) the security interest has been extinguished in accordance with this Act'; The Borrowers and Lenders (Collateral Registry) Regulations (n 30), regs 15 - 17. Under reg 10 (3) the registration of an amendment that adds collateral which increases the maximum amount secured must be authorized by the borrower.
[715] Borrowers and Lenders Act, (n 9), s 20 (3).

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amendment is filed gains priority relating to the specifics of the amendment. Similarly, a post-registration transfer of collateral may be registered disclosing the transfer.[716]

Another important registration issue to consider is the *de minimis* treatment of defects, irregularities, omissions or errors. An error in the identity of the borrower or serial number of a collateral, if required, renders the registration ineffective.[717] However, the presence of defects, irregularities, omissions or errors in the required information for registration other than the borrower's identity, are deemed to be insufficient to render the registration ineffectiveness unless they are misleading.[718] Although misleading is not defined by the BLA, the Regulation alludes to a defect or otherwise that would mislead a searcher.[719] This provision is similar to that of the defective and seriously misleading provision in Article 9,[720] and the academic view is that although Article 9 leaves room for seriously misleading financing statement to be deemed ineffective, the courts will find it difficult to reach such a conclusion, where the filing requirements under Part 5 are met.[721] In the US case of *Hill v. Farmers & Merchants Bank of Waterloo*,[722] the court held that the security was effective (perfected) and opined that the bank's search request to hold otherwise was too narrow, where the search key word used was only the debtor's familiar name but the financing statement was filed with the debtor's complete name.

The BLA gives the registry the discretion to refuse registration of a security interest if the submission is not in the prescribed form or the prescribed fees not paid.[723] The discretion is mainly

[716] Borrowers and Lenders (Collateral Registry) Regulations (n 302) regs 22, 23 (2) & (3). Note an amendment with a transferred collateral must contain the description of the collateral.
[717] Borrowers and Lenders Act, (n 9), 17 (3) (a) & (b); if there are more than 2 borrowers, the ineffectiveness will only relate to the wrongly identified borrower, and the same applies to different collateral Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg 21 (2) & (4).
[718] Borrowers and Lenders Act, (n 9), s 17 (2).
[719] Borrowers and Lenders (Collateral Registry) Regulations (n 302) reg 21 (3).
[720] Uniform Commercial Code (n 374), § 9-506 (a).
[721] White and Summers, *Uniform Commercial Code* (n 90) 219–220.
[722] *Hill v Farmers & Merchants Bank of Waterloo* (1994) 641 So 2d 788 (Supreme Court).
[723] Borrowers and Lenders Act, (n 9), 18 (1) & (2).

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exercised by the administrators of the Collateral Registry, as it cannot conduct scrutiny of the content of forms or search nor make changes to a registration form or search request.[724] Given the limitation on scrutiny, the ambit for potential abuse of discretion is very limited. On the whole, it is noted that the Regulations has attempted to salvage some of the ambiguous provision in the BLA on registration. This has helped in providing some measure of clarity with respect to information required for registration, duration of registration, amendments of security interests and transfer of collateral.

Finally, one of the new features in the BLA is the adoption of the **notice filing system**[725] in lieu of transaction filing.[726] This is gleaned from the requirements to register security interests, i.e., the obligation on lenders to only submit the registration form containing information on the identities of the borrower and lender, the maximum amount secured, and a description of the collateral.[727] This is clearly an import from the Unitary Model, since transaction filing was adopted from English law, and still in use in the parallel pre-BLA law.[728] Although a credit agreement must be concluded between the lender and borrower containing the description of the collateral,[729] all that is required to be submitted to the Collateral Registry is the designated registration form.[730] The

[724] Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg 2 (2) (a).
[725] Official Comment to Uniform Commercial Code - Article 9 - Secured Transactions (2010) (n 38), § 9-502, refers to notice filing system as one wherein the security agreement itself need not be filed, but a simple record providing limited information.
[726] Transaction filing refers to a system wherein the instrument creating the security interest and the particulars are delivered to the relevant registry. See McCormack, *Secured Credit under English and American Law* (n 606) 130.
[727] Borrowers and Lenders Act, (n 9), s 16 (1) and (2); reg 11 (2) of the regulations have these further requirements in addition to the BLA: an indication of whether the registration relates to a judgment creditor, or a prior security interest under the BLA's transition period, the period of effectiveness of the security interest and any other required information by the Registrar; Borrowers and Lenders (Collateral Registry) Regulations (n 302).
[728] See Uniform Commercial Code (n 374), § 9-502; McCormack, *Secured Credit under English and American Law* (n 606) 103.
[729] Borrowers and Lenders Act, (n 9), s 11.
[730] Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg 5 (2).

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evidence of the registration is a certificate issued by the Registrar.[731] The registration form by description is largely the equivalent of the 'financing statement' in the Unitary Model.[732]

The purport of the notice filing system is to provide sufficient information to show the encumbrance of collateral, thereby providing sufficient public notice for an interested lender to conduct further inquiry to ascertain the details. The essence of notice filing is to fundamentally establish effectiveness against third parties (priority), and as aforementioned to provide sufficient information for a searcher about security interests in a collateral.[733] Although the objective here is not to discuss the merits or otherwise of notice filing over transaction filing, it has to be noted that scholars have argued that notice filing enjoys some commercial utility and certainty more than transactions based filing.[734] Chief amongst the advantages[735] of the notice filing system includes its simplicity, convenience, flexibility, and the possibility to use the financing statement (registration form) to cover situations not contemplated by the parties in the credit agreement, including future advances, after-acquired properties.[736]

The adoption of the notice filing system means the two competing registration systems operate in parallel in Sierra Leone. Notice filing may prove to be beneficial in the long term,

[731] ibid, reg 5 (5).
[732] See Borrowers and Lenders Act, (n 9), s 16; Uniform Commercial Code (n 374), § 9-502.
[733] Uniform Commercial Code (n 374), § 9-502; see Official Comments to § 9-502, *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91); Warren and Walt (n 681) 53; McCormack, *Secured Credit under English and American Law* (n 606) 130.
[734] See Gilmore (n 35) ch 15, 466-480; see some of the scholarly contributions on the issue under English law: McCormack, *Secured Credit under English and American Law* (n 33) 129; Gerard McCormack, 'Pressure by the Paradigm. The Law Commission and Company Security Interests', *The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge 2009); Gerard McCormack, 'The Law Commission Consultative Report on Company Security Interests: An Irreverent Riposte' (2005) 68 Modern Law Review 286; Louise Gullifer, 'The Law Commission's Proposals: A Critique' (2004) 15 Eur. Bus. L. Rev. 811.
[735] For a detailed comparative discussion on notice filing and transaction filing, see McCormack, *Secured Credit under English and American Law* (n 606) ch 5, 129-161; also see B Dugan, 'PPSA-the Price of Certainty' [2000] New Zealand Law Journal 241 wherein the PPSA notice filing scheme in New Zealand is criticised in terms of its failure to lower cost and over-heightened relevance given that the prior scheme provide the same level of credit information.
[736] Gerard McCormack, 'Rewriting the English Law of Personal Property Securities and Article 9 of the US Uniform Commercial Code' (2003) 24 Company Lawyer 69, 71–72; Warren and Walt (n 681) 54; on flexibility of notice filing, it is argued that the need to refile on each series of transactions in financial transactions involving inventory, accounts and chattel paper is obviated as opposed to the transaction based system.

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however, the existence of the two filing systems, one under the BLA and the other (transaction) filing in the pre-BLA law adds to the extant complexity and obfuscation clouding the PPSL framework in Sierra Leone. For example, a borrower under the BLA, being an incorporated entity using its asset as collateral, is compelled to file a debenture or the particulars (transaction filing) under the Companies Act 2009, failing which, the charge created becomes unenforceable against other creditors, the receiver or the liquidator not considered as lenders in the BLA.[737] Also, the directors may be fined if they opt not to file at the Corporate Affairs Commission as required by the Companies Act 2009.[738] Therefore, the double registration regime for a corporate borrower appears impossible to bypass. This is also the case for an unincorporated borrower, given the need to comply with the registration requirement under the Bills of Sale Act, Cap 241 for the validity of chattel mortgages and also the BLA registration requirement for effectiveness against third parties.

3.2.2.4 The BLA and the Other Methods of Perfection – Is Registration the King?

Perfection, with respect to the other methods of perfection, is being discussed separately from registration because they are not synonymous. Registration is a perfection method, in fact the most dominant method in modern secured transactions law, but certainly not the only perfection method. Indeed, perfection is an important block of the Unitary Model's 'building blocks', as it determines effectiveness of a security interest against third parties including the liquidator/bankruptcy trustee. Under the BLA a lender is obligated to register a security interest with the Collateral Registry in order to render it effective against third parties. Therefore, the basic rule to achieve effectiveness of a security interest against third parties is perfection by

[737] Companies Act 2009 (n 387), s 170 (1).
[738] ibid, s 172 (3).

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registration.[739] This is certainly a simple 'one rule fit all' approach to perfection, even where possession or where the nature of the security interest may necessitate another perfection method, for example notification, it is done in combination with registration.[740]

The effectiveness of the security interest is extended to the proceeds but limited to the value of the collateral at the date of disposition of the collateral that gave rise to the proceeds. The extension of third party effectiveness in proceeds is temporarily for 10 days, until registration of the proceeds or possession is taken thereof.[741] This provision calls for active policing, i.e., monitoring of the collateral by the lender. Perfection of PMSI in inventory and non-inventory appears to have adopted composite methods. PMSI in collateral and its proceeds in non-inventory is made effective against third parties by registration within 10 days of the borrower obtaining possession of the collateral.[742] On the other hand, a PMSI in inventory or its proceeds is made effective by registration and notification of the lender at the time the borrower obtains possession of the collateral.[743] Whilst the underlying method of perfection is registration, i.e., notice filing, notification is added as a combine method of perfection for the PMSI to gain effectiveness.

As notice filing has been adopted in the BLA, it is important to examine how this method has been elevated to more than just being the norm for perfecting security interests. The provision for effectiveness against third parties in BLA leans heavily on registration and this may constrain effectiveness of security interest where other perfection methods are best suited. Within the lens of the Unitary Model, it is noted that filing a financing statement by a mile is the perfection method

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[739] Borrowers and Lenders Act, (n 9), s 10 (1) & (2).
[740] ibid, ss 21 and 25.
[741] ibid, s 14 (1) - (5); the BLA scheme on perfection of security interests in proceeds and the continuation of such perfection appears to follow in some extent the provisions in the Uniform Commercial Code (n 374), §§ 9-310 (9), 9-315 (c) and (d) dealing with perfection of security interest in proceeds and continuation.
[742] Borrowers and Lenders Act, (n 9), s 25 (1).
[743] ibid, s 25 (2).

of choice.[744] However, Article 9 methods of perfection range from automatic perfection upon attachment,[745] possession, control,[746] compliance with other laws and to filing a financing statement.[747] Revealing the reasons for the adoption of the other perfection methods in Article 9 will demonstrate the inhibited comprehensiveness of the BLA. Gilmore noted that the term perfection was borrowed from the Federal Bankruptcy Act on voidable preferences, and mainly to ensure that security interests perfected under Article 9 are good against the debtor's trustee in bankruptcy.[748] He, however, argues that "[P]erfection does not necessarily mean that the interest is good 'against the world'- that is, against all types of subsequently accruing claims", although it may be good against all types of competing claims.[749]

Perfection, therefore, refers to 'a limited, and not necessarily to an absolute, validity against third parties'.[750] Perfection generally requires a further step after the security interest has been attached, and this may include obtaining possession for possessory security interests; as the codification of common law devices does not necessarily impose a perfection requirement like filing.[751] The comprehensiveness of Article 9, therefore, necessitated that perfection in the form of control is added to the other known methods, i.e., possession and filing of a financing statement.[752]

[744] White and Summers, *Uniform Commercial Code* (n 90) 184.
[745] Attachment in the Unitary Model signifies the existence of a security interest between the secured party and the debtor, identified to a specific collateral and the secured party can enforce the security against the debtor but not against third parties, except where perfection is automatic on attachment. See Uniform Commercial Code (n 374), § 9-203 (a) and (b).
[746] The statutory definition of control is found in inter alia in §§ 9-104, 9-105, 9-107, ibid. Generally, as a perfection method, it means the secured party has taken all steps necessary for disposition of the collateral without need for further action by the debtor.
[747] ibid, §§ 9-308 through 9-316; Gilmore, *Security Interests in Personal Property* (n 7) 435–437; White and Summers, *Uniform Commercial Code* (n 90) 149–150; Warren and Walt (n 681) 51–53.
[748] Gilmore, *Security Interests in Personal Property* (n 7) 435; U.S. Bankruptcy Code (n 675), § 544 (a); see section 60.
[749] Gilmore, *Security Interests in Personal Property* (n 7) 436. Gilmore referred to a buyer of inventory taking free of the secured party, and a holder in due course or good faith purchaser without notice of encumbered negotiable or quasi-negotiable instruments or documents as examples where effectiveness against third parties may be lost.
[750] ibid.
[751] ibid 436–437.
[752] Uniform Commercial Code (n 374), § 9-310 (a).

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Pragmatism and pressure from securities intermediaries influenced the inclusion of control[753] as a perfection method.[754] Therefore, in addition to filing a financing statement, further perfection methods, obviate the need to file a financing statement based on commercial necessity and the policy of comprehensiveness in Article 9.[755]

Pursuant to the Unitary Model's comprehensiveness philosophy, additional or alternative methods have either been introduced or new transactions added to the perfection scheme. For example, the 2010 revision of Article 9 incorporates agricultural liens in its perfection and priority scheme.[756] Further, there is no filing requirement for security interests that perfect upon attachment, i.e., automatic perfection.[757] In addition, security interests created in property subject to a statute, regulation, or treaty other than Article 9 may do away with perfection by filing.[758] In the same light, when a security interest in goods is in the possession of a bailee, and the bailee issues a non-negotiable document covering the goods, perfection is achieved by the issuance of a document in the name of the secured party, or the bailee receives notification of the secured party's

[753] ibid, §§ 9-310 (8), 9-314.
[754] See Article 8, ibid; McCormack, *Secured Credit under English and American Law* (n 606) 78; see also Jeanne L Schroeder, 'Is Article 8 Finally Ready This Time: The Radical Reform of Secured Lending on Wall Street' (1994) 1994 Columbia Business Law Review 291, 399.
[755] Uniform Commercial Code (n 374), § 9-310 (b).
[756] ibid, § 9-308(d), (e), (f), or (g).
[757] ibid, § 9-309 dealing with security interest perfected upon attachment. For example: "(1) a purchase-money security interest in consumer goods, except as otherwise provided in Section 9-311(b) with respect to consumer goods that are subject to a statute or treaty described in Section 9-311(a); (2) an assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles; […]".
[758] ibid, § 9-311 perfection of security interests in property subject to certain statutes, regulations, and treaties, for example security interests in motor vehicles or copyright; see Ronald J Mann, 'Secured Credit and Software Financing' (1999–2000) 85 Cornell Law Review 134 on copyrights and general software financing and filing; for example in perfecting motor vehicles, the Supreme Court of Kansas in *Bank v Parish* (2014) 317 P 3d 750 (Supreme Court) concluded that the Court of Appeals panel correctly considered and applied perfection and priority rules under the Kansas U.C.C., in which the purchaser did not take free and clear of the bank's security interest after a lienholder statement had been filed with the Kansas Department of Revenue, Division of Vehicles, which issued a certificate of registration.

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interest.[759] In addition, perfection is complete when a collateral and certificated security are delivered and in the secured party's possession.[760]

The methods of perfection underlining the ideals of comprehensiveness and commercial necessity in Article 9 may have exposed the restrictive approach taken in the BLA. However, can the BLA in this regard be said to be defective? As the discussion on priorities will soon show, the BLA had to revert to the issue of possession, to address priorities between competing security interest, and this reference to possession has basically incorporated the common law rules on possession within the BLA.[761] Codification or mere statutory incorporation of security devices as done in BLA does not strip the devices of their common law attributes. The common law rules inherent in the pre-BLA devices may affect the ultimate goal of lenders achieving priority by mere registration, especially against third parties. Registration may be 'king', but certainly room has to be created for other methods of perfection. This is referred to as the 'perfection hierarchy', wherein in given transactions one method will be better than others, but then further categorization will allow for assigning priority between methods and classes even within the same method.[762] It follows that the BLA may have to be revised to respond to such flexibility when the need arises.

3.2.2.5 Priorities between Competing Security Interests

The essence of taking security is to achieve priority over unsecured creditors,[763] subsequent secured creditors over the same collateral and non-consensual lien creditors – including the bankruptcy trustee that, at least in US bankruptcy law, becomes a hypothetical lien creditor upon

[759] Uniform Commercial Code (n 374), §§ 9-310 (4), 9-312 (1) or (2).
[760] ibid, §§ 9-310 (6) & (7), 9-313.
[761] Borrowers and Lenders Act, (n 9), 21.
[762] Randal C Picker, 'Perfection Hierarchies and Nontemporal Priority Rules Symposium on Revised UCC Article 9' (1998–2000) 74 Chicago-Kent Law Review 1157, 1158.
[763] In *Wachovia Bank Nat Ass'n v Encap Golf Holdings* (2010) 690 F Supp 2d 311 (Dist Court) the court affirmed the rule that even an unperfected security interest enjoys priority over unsecured creditors over the secured collateral; see White and Summers, *Uniform Commercial Code* (n 90) 322–3.

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appointment.[764] Priority is directly linked to perfection of a security interest.[765] In the BLA priority of a security interest as a general rule is extended to the proceeds from the original collateral.[766] The BLA in adopting the basic rule based on the hierarchy of perfection provides that "Priority between security interests in the same between collateral shall be determined by the order of possession of that collateral or registration of the security interests whichever occurred earlier".[767] This is simply the '**first to perfect, i.e. possess or file**' rule. In the US, although the rules on priorities is the most complex part of Article 9,[768] a basic rule acts the foundation for the additional rules, and it incorporates both the filing of a financing statement and possession and outlined in the principle of 'the first to file or perfect wins'.[769]

The 'first in time, first in right' basic rule in the US was considered in *Re Lombardo's Ravioli Kitchen, Inc.*,[770] where the US Bankruptcy Court in determining priority between two competing interests concluded that the secured creditor who first filed the financing statement had priority notwithstanding the time the connected loan advances was made. Knowledge or notice is not an issue, as the aim for predictability/certainty means the first to register wins. The justification

[764] Lien creditor refers to: '(A) a creditor that has acquired a lien on the property involved by attachment, levy, or the like; (B) an assignee for benefit of creditors from the time of assignment; (C) a trustee in bankruptcy from the date of the filing of the petition; or (D) a receiver in equity from the time of appointment'; Uniform Commercial Code (n 374), § 9-102 (a) (52). The equivalent of the liquidator in Sierra Leone.
[765] See Gilmore, *Security Interests in Personal Property* (n 7) 653 et. seq., for a detailed look at the rules of priority within the comprehensive approach under Article 9, although Gilmore's analysis is based on the initial Article.
[766] Borrowers and Lenders Act, (n 9), s 22.
[767] ibid s, 21.
[768] Tajti argues that the complexity is a result of the need to account for the comprehensiveness objective of Article 9, and also accounting for the varying attributes of the available collateral. This argument is justified by the specificity of the additional rules linked to the distinct features of the collateral type envisaged. Tajti, *Comparative Secured Transactions Law* (n 1) 165; confirmed that each rule on priorities is based on policy and reason; White and Summers (n 289) 321. Tajti argues that the complexity is a result of the need to account for the comprehensiveness objective of Article 9, and also accounting for the varying attributes of the available collateral. This argument is justified by the specificity of the additional rules linked to the distinct features of the collateral type envisaged. Tajti (n 5) 165; confirmed that each rule on priorities is based on policy and reason; White and Summers (n 6) 321.
[769] Uniform Commercial Code (n 374), § 9-322 (a) for the general priority rules; Picker (n 762) 1157; White and Summers, *Uniform Commercial Code* (n 90) 323–330, see '2013-2014 Pocket Part', 76.
[770] *In Re Lombardo's Ravioli Kitchen, Inc* [2009] Bankr Court Case No. 08-20774 (ASD), Adv. Pro. No. 08-2057, Re: DOC. I.D. No. 1.

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as scholars argue is for the attainment of certainty, and this need for predictability justification has been upheld by the courts even in the face of hardship.[771]

In addition to the 'first to perfect or first to possess' basic rule, the BLA provides for additional or special rules as exceptions to the basic rule. These special rules and limitations to the basic priority rule include the PMSI 'super-priority',[772] priority of future advances,[773] priority affecting accessions and commingled goods,[774] changes covering amendments,[775] the transfer of collateral,[776] transferees of money,[777] buyers/lessee,[778] and non-consensual possessory lien.[779] In the discussion below, each rule will be briefly examined, using the law and practices of Unitary Model to test their effectiveness. Additionally, the operation of other registries[780] and how the conflict between registries may be resolved will be examined, and finally subordinate priorities[781] including the concomitant circular priority problem will be looked at.

In the BLA, the process to attain priority of a PMSI against competing non-PMSI in the same collateral depends on whether the collateral is inventory or non-inventory.[782] For the PMSI in non-inventory, the status of 'super-priority' over competing non-PMSI security interest is attained upon registration of the PMSI within 10 days of the borrower obtaining possession of the collateral.[783] For PMSI in inventory, the PMSI must be registered and the non-PMSI lender

[771] White and Summers (n 289) 325; Tajti, *Comparative Secured Transactions Law* (n 1) 165 see note 561; *Chicago District of Carpenters Pension Fund v Tessio Construction Co,* (2003) 51 UCC2d 268.
[772] Borrowers and Lenders Act, (n 9), s 25.
[773] ibid, s 24.
[774] ibid, s 26.
[775] ibid, s 19 (1).
[776] ibid, s 27.
[777] ibid, s 28.
[778] ibid, s 29.
[779] ibid, s 30.
[780] Relevant to this issue are ss 38 (7) and 51 of ibid.
[781] ibid, s 23.
[782] ibid, s 25 (1) and (2).
[783] ibid, s 25 (1).

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notified.[784] This PMSI super-priority is a special status phrased as '**the second in time, but first in right**' rule.[785] For a security interest to be considered as a PMSI,[786] the following basic scheme must be evident: First, the PMSI creditor has to give value for the borrower's acquisition of completely new assets; and second, the value provided must only be used to acquire the new assets.[787] The rationale is mainly to cut off a senior secured creditor's monopoly in long-term security interests and after-acquired, thereby providing room for financing acquisition of new assets free of any prior encumbrance.[788] In the US, as Mr. Justice Bradley famously said in *United States v. New Orleans Railroad* the "laws [on PMSI] are intended for the protection of subsequent, not prior, purchaser and creditors".[789] Without this protection, there will be little incentive for further financing without the insurance of a higher or even prohibitive cost basis, where the first secured creditor is unwilling to provide more financing. The super-priority of PMSI is also justified on the basis of the benefit of specialized knowledge the PMSI financier has in the specific collateral, which could be beneficial to the debtor and other creditors.[790] The introduction of the PMSI was the most innovative step in Article 9, since the failure of the Article to destroy the

[784] ibid, s 25 (2).
[785] Uniform Commercial Code (n 374), § 9-324; White and Summers, *Uniform Commercial Code* (n 90) 81, '2013-2014 Pocket Part'; Picker (n 762) 1160.
[786] Borrowers and Lenders Act, (n 9), s 1. Also see not 67 herein.
[787] *DeKalb Bank v Purdy* (1990) 562 NE 2d 1223 (Ill: Appellate Court); *Valley Bank v Estate of Rainsdon* (1990) 793 P 2d 1257 (Court of Appeals); Iheme (n 112) 136.
[788] For an account on the origin and rationale for PMSI, see Gilmore, *Security Interests in Personal Property* (n 7) 743 et. seq.; Grant Gilmore, 'The Purchase Money Priority' [1963] Harvard Law Review 1333; Russell A Hakes, 'According Purchase Money Status Proper Priority' (1993) 72 Or. L. Rev. 323; White and Summers, *Uniform Commercial Code* (n 90) 331; Kanda and Levmore even provided a law and economics justification, in the sense that the special priority is less threatening to previous creditors in ways general creditors might; see Hideki Kanda and Saul Levmore, 'Explaining Creditor Priorities' (1994) 80 Virginia Law Review 2103; for arguments against super-priority of PMSI, see Alan Schwartz, 'A Theory of Loan Priorities' (1989) 18 The Journal of Legal Studies 209.
[789] *United States v New Orleans R Co* (1871) 79 US 362 (Supreme Court) 364–5; Gilmore, *Security Interests in Personal Property* (n 7) 744–5; under the pre-code US law, the way to beat prior encumbrances was by engaging in title financing; Gilmore, 'The Purchase Money Priority' (n 788) 1337.
[790] McCormack, *Secured Credit under English and American Law* (n 606) 85; see Alan Schwartz, 'The Continuing Puzzle of Secured Debt' (1984) 37 Vanderbilt Law Review 1051.

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character of independent devices and non-distinction of title and credit financing meant the old system of protection was ineffective.[791]

The Unitary Model's PMSI priority rules have evolved to fit the US credit market. PMSI 'super-priority' inter alia covers collateral non-inventory, inventory, crops – agricultural lien,[792] and consumer goods.[793] Generally, the PMSI secured creditor in collateral other than inventory has up to 20 days to perfect after the debtor obtains possession.[794] The biggest litigious issues under the rule include the failure to perfect within time, the definition of the various types and scope of PMSIs.[795] For PMSI in inventory to be perfected, the debtor's must have received (be in possession) of the collateral, and an authenticated notification with description of the inventory sent to the holder of competing security interests.[796] The specificity and elaborate nature of the rule has more to do with the commercial practice in the United States,[797] and so the provision under the BLA appears to be adequate, i.e., the requirement for registration and notification to the lender, save for the inadequate description of the lender, which ought to read as the lender with competing security interests.[798]

[791] Gilmore, 'The Purchase Money Priority' (n 788) 1337–8.
[792] Uniform Commercial Code (n 374), §§ 9-102 (a) (44), 9-102 (a) (5), 9-322 (g). See the chapter on 'Agricultural Financing' herein for discussion on agricultural liens and priority.
[793] ibid, § 9-309 (1); White and Summers, *Uniform Commercial Code* (n 90) 151.
[794] Uniform Commercial Code (n 374), § 9-324 (a).
[795] *In re Southeastern Materials, Inc* (2012) 467 BR 337 (Bankr Court), a perfected purchase money creditor lost preference for failure to file a financing statement within 20 days of debtor's possession of collateral; whilst *In Re Marble Cliff Crossing Apartments, Llc* [2012] Bankr Court Case No. 11-61545, a perfection by filing on a security interest within 20 days of debtor's possession earned a PMSI status; see White and Summers, *Uniform Commercial Code* (n 90) 335.
[796] Uniform Commercial Code (n 374), § 9-324 (b).
[797] White and Summers, *Uniform Commercial Code* (n 90) 335.
[798] Based on the drafting of the BLA provision, it makes little sense for the lender, who is required to register the PMSI in inventory with the Registry, to be notified, and competing lenders are not. This leaves room for an unscrupulous debtor to take advantage of the ignorance or lack of vigilance of original inventory financier. It follows that 'a lender with a competing security interest' is clearer and straightforward. See Borrowers and Lenders Act, (n 9), s 25 (2); White and Summers, *Uniform Commercial Code* (n 90) 335–6; *In re Sports Publ'g, Inc,* 72 UCC2d 383, the creditor failed to obtain PMSI lender status as the authenticated notification requirement in § 9-324 was not met; in *First Financial Bank v Ge Commercial Distribution Finance Corp* [2012] Dist Court Case No. 1:11-cv-339-HJW, however, the holder of competing security interest was given authenticated notification and the description therein, 'all of the below described inventory' was held to be sufficient; *In Re Leading Edge Pork, Llc* [2010] Bankr Court 09–82789,

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The other rules on priority in the BLA include priority of security interests in accession[799] and commingled[800] goods, which usually resolves the conflict between a party who claims the accession and the other who claims the goods to which the accession is attached. By way of example to distinguish accession from commingled goods, consider the installation of "a new generator on an automobile engine [which] is clearly attaching an 'accession'; and putting one's harvested corn crop into a grain elevator is obviously 'commingled' goods".[801] A perfected security interest in goods before accession has priority over a competing claim to the goods as an accession.[802] It is typical for a person claiming accession to be a purchase-money seller, and hence the PMSI special rules may apply.[803] A security interest in goods that is perfected before it subsequently loses its identify on becoming part of a product or mass, i.e., commingled, continues in the product or mass.[804] If more than one security interest is made effective before they are commingled, then they rank equally in proportion of the value of the goods at the time of commingling.[805]

The continuation of priority on future advances in a security interest is recognized in the BLA.[806] Future advances are essentially an extension of credit in the future to a maximum amount as secured by the registered security interest. The definition of a credit agreement in the BLA covers an agreement that creates a security interest on all types of obligations, including future

Adv. No. 09-8100, the notification did not state that the purchase money lender intended to acquire PMSI and failed to identify the borrower and hence failed.

[799] The BLA does not define accession. However in the Uniform Commercial Code (n 374), § 9-102 (a) (1) accession is defined as 'goods that are physically united with other goods in such a manner that the identity of the original goods is not lost'.

[800] See ibid, § 9-336 (a) commingled goods is defined as 'goods that are physically united with other goods in such a manner that their identity is lost in a product or mass'.

[801] White and Summers, *Uniform Commercial Code* (n 90) 352.

[802] Borrowers and Lenders Act, (n 9), s 26 (1); see Uniform Commercial Code (n 374), § 9-335.

[803] See Uniform Commercial Code (n 374), § 9-324; Borrowers and Lenders Act, (n 9), s 25; White and Summers, *Uniform Commercial Code* (n 90) 352.

[804] Borrowers and Lenders Act, (n 9), s 26 (2); see Uniform Commercial Code (n 374), § 9-336 (b).

[805] Borrowers and Lenders Act, (n 9), s 26 (3).

[806] ibid, s 24.

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obligations.[807] In this regard, it is clear that future advances which equate to periodic draws to be made on an underlying credit line are permitted.[808] However, unlike Article 9,[809] there is no express mention of after-acquired property or the continuation of priority with respect to after-acquired property in the BLA. After-acquired is usually the other side of future obligations, and the omission seems to have shut the door on extending priority to future property without reverting to the floating charge and its already discussed attendant priority concerns.[810]

The BLA also makes allowance for priority of amendment to registration of security interests. Although voluntary amendment of a registration allows for the addition of collateral, borrower and maximum amount, this must not be mistaken for after-acquired property of future advances. The effectiveness of the amendment and priority accorded only relates to the added collateral, the borrower and maximum amount from the date the amendment was registered.[811] Similarly, the BLA permits assignment or transfer of the rights of the borrower in a collateral notwithstanding any agreement to the contrary, even if such an assignment or transfer is considered to be a default in the credit agreement. Any such transfer of a perfected security interest by the borrower is deemed to have priority over any other security interests granted by the transferee.[812]

Further to the special rules, there are limitations to the general 'first to perfect' rule. These limitations include the priority of transferees of money, non-consensual possessory lien, judgment

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[807] ibid, s 1; definition of credit agreement.
[808] White and Summers, *Uniform Commercial Code* (n 90) 328.
[809] Uniform Commercial Code (n 374), § 9-204 for creation of security interests in after-acquired property and future advances; § 9-322 for priority rule; see Example 4 to Official Comment 5 of § 9-322; *In re Tulsa Indus Facilities, Inc* (1995) 186 BR 517 (Bankr Court) the Bankruptcy Court concluded that a 'properly perfected security interest covering future advances can be assigned - assignee stands in assignor's priority position as perfected secured creditor'; White and Summers, *Uniform Commercial Code* (n 90) 327.
[810] By way of contrast, the PPSAs of other commonwealth countries that adopted the Article 9 system do have expressed provisions for after-acquired property in their legislations; See New Zealand Personal Property Securities Act 1999 (n 77), s 44; the Ontario Personal Property Security Act, R.S.O. 1990, c. P.10 (n 52), s 12 (1); Ziegel and Denomme (n 52) 132.
[811] Borrowers and Lenders Act, (n 9), s 19.
[812] ibid, s 27 (1) & (2).

lien and buyers/lessee.[813] As a general rule, a 'buyer or lessee of a movable property collateral who acquires it for value, shall take the collateral free from a security interest that has not been made effective against third parties'.[814] This rule in the BLA only affects the borrower and lender when the security interest has attached but not perfected, and there is no knowledge requirement. There is a variation in the Article 9 rule, where the buyer who gives value and receives delivery of the collateral must be without actual knowledge of the security interest or agricultural lien before it is perfected. In *Bank of Dawson v Worth Gin Co, Inc,* the Court of Appeals of Georgia in resolving the competing claims of a bank and a purchasing company concluded that the purchasing company had actual knowledge based on the fact that the farmer informed the president of a purchasing company, who endorsed the check as payable to the farmer-seller and bank. [815]

As an addition to the exception to the basic priority rule, a buyer or lessee of goods in the ordinary course of business of a seller/lessor takes free of a security interest created by the seller/lessor, unless the buyer/lessee knew the sale/lease was transacting in breach of a credit agreement which created the security interest.[816] The BLA unfortunately does not also define what 'buyer/lessee in ordinary course of business' means.[817] Nevertheless, the BLA rule is similar to the

[813] See ibid, ss 28, 29, 30 & 31.
[814] ibid, s 29 (1).
[815] Uniform Commercial Code (n 374), § 9-317(b), for definition of knowledge, see § 1-201 (25); *Bank of Dawson v Worth Gin Co, Inc* (2008) 671 SE 2d 279 (Court of Appeals).
[816] Borrowers and Lenders Act, (n 9), s 29 (2); see the equivalent rule in the Uniform Commercial Code (n 374), § 9-320 (a), with exception to possessory security interest, "a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence". Further, note that for policy reasons Article 9 extends the buyer of goods exception to consumer buyers of consumer goods, §§ 9-307 (2), 9-320 (b), and purchasers of farm products, § 9-320 (a).
[817] See Uniform Commercial Code (n 374), § 1-201 (9); a buyer in the ordinary course of business means "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. [...] A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. […] 'Buyer in ordinary course of business' does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt".

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conditions set in the U.C.C. Articles 1 and 9 for the buyer in the ordinary course of business to take free of a prior security interest.[818] There are, however, two key variations in the BLA from the U.C.C. provisions. Firstly, the BLA includes a lessee in the ordinary course of business to 'the purchaser for value' exception without distinguishing between a true lease from a disguised lease.[819] Secondly, the BLA knowledge requirement requires further clarification with respect to whether knowledge should be actual, constructive, or both. In this case, there will be a temptation to revert to pre-BLA law on the issue, with the attendant risk of using pre-BLA conceptions and rationale to address BLA problems. Eventually, the predictability of the BLA will be at risk.

The absence of the needed clarifications on the buyer/lessee in the ordinary course of business exception exposes the BLA and the parties to litigation flood, costs and the need of years of court interpretation to arrive at a definitive statement of the law. Further, the inclusion of lessees to 'buyers in the ordinary course of business' priority exception appears to take leases out of the scope of the BLA, at least for priority purposes, without much deference to the problem of a credit agreement creating a security interest labelled as a lease. The definition of security interest in the BLA anticipates leases, including a financial lease as a security device.[820] However, if a lessee in the ordinary course of business takes free of any prior encumbrance, this may tempt lenders to circumvent the registration requirements in the BLA. [821] A lessor under the common law is deemed not to have parted with the title to the goods and hence is fully protected, even against a bankruptcy

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[818] White and Summers, *Uniform Commercial Code* (n 90) 358–362.
[819] The Ontario PPSA, s 28 (2) includes lessees in this same exception provision. However, the PPSA scope provision (s 2) is fraught with litigation on the issue of what is a true and disguised lease. It seems the problem may only be shifted or limited with proper definition as discussed below. See Ziegel and Denomme (n 52) 57–63, 236.
[820] Borrowers and Lenders Act, (n 9), s 1.
[821] See Uniform Commercial Code (n 374), §§ 9-109; 1-201 (37); 2A-103 (1) (g); Gilmore, *Security Interests in Personal Property* (n 7) 75–81. Gilmore suggested that 'nothing is easier than to dress up a purchase money security transaction in language of a lease, in which the seller becomes lessor, buyer becomes lessee and the payment to be made on the purchase price become rent', 76; White and Summers, *Uniform Commercial Code* (n 90) 16–40.

trustee.[822] The combination is tempting enough for unscrupulous lenders to engage in disguised lease transactions masking a credit agreement creating a security interest in goods as a true lease.[823]

Another exception to the 'first in time, first in right' priority rule is the right of transferee of money to take money free from security interest, except where the borrower and the transferee collude to violate the rights of the lender.[824] Similarly, a creditor takes free of security interest payment of a debt obligation, even if the creditor had knowledge of the security interest at the time of payment.[825] Furthermore, a purchaser of intangibles, i.e., negotiable instruments, document of title, chattel paper or security certificates, enjoys priority over third parties if the purchaser gives value, and obtains possession without knowledge (at the time of the acquisition) that the purchase was in breach of a credit agreement and the secured obligation therein.[826] In most of these instances, the competing claim is from a creditor holding a floating security interest.[827]

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[822] Gilmore, *Security Interests in Personal Property* (n 7) 76; Charles W Jr Mooney, 'The Mystery and Myth of Ostensible Ownership and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases' (1987–1988) 39 Alabama Law Review 683, 690.

[823] See Uniform Commercial Code (n 6), § 1-203 distinguishes between a lease and a security interest; in a true lease, the lessor has both 'entrepreneurial stake' and the 'reversionary' interest, White, Summers and Hillman (n 6) 20; Gilmore (n 4) 77; In *Brenner Financial, Inc, v Cinemacar Leasing* [2001] UCC Rep Serv 2d 440 (NJ Super Ct App Div), the court concluded as a matter of law, and without need to consider further factors, that a lease which prohibits the lessee from premature termination and containing an option to buy goods at the end of the lease for no additional or nominal consideration not a true lease; *In re Uni Imaging Holdings, Llc* (2010) 423 BR 406 (Bankr Court), a debtor failed to show that an agreement with a finance creditor was a lease wherein the debtor had no express right to terminate the lease, nor was the debtor able to show that the consideration was not nominal or the creditor's reversionary interest insignificant; *In re Purdy* (2013) 490 BR 530 (Bankr Court), a lease for dairy cows was no lease but a disguised security interest. The lease term (50 months) exceeded the economic life span of the cows; *In Re Lichtin/Wade, Llc* [2012] Bankr Court Case No. 12-00845-8-RDD, a 'finance lease' for the purchase of two generators wherein the debtor faced all the economic risks, that is, maintaining insurance, payment of taxes, liable for loss or damage and nominal consideration of $1 was a disguised security interest; for more critical views, see Mooney (n 223); Amelia H. Boss, 'Panacea Or Nightmare - Leases in Article 2' (1984) 64 Boston University Law Review 39; 'Disengaging Sales Law from the Sale Construct: A Proposal to Extend the Scope of Article 2 of the UCC' (1982) 96 Harvard Law Review 470; John D Ayer, 'Further Thoughts on Lease and Sale Symposium on Bankruptcy' (1983) 1983 Arizona State Law Journal 341; John D. Ayer, 'On the Vacuity of the Sale/Lease Distinction' (1982) 68 Iowa Law Review 667.

[824] Borrowers and Lenders Act, (n 9), s 28 (1).

[825] ibid, s 28 (2).

[826] ibid, s 28 (3) (a) through (c).

[827] Uniform Commercial Code (n 374), § 9-330, priority of purchaser of chattel paper or instrument; *BancorpSouth Bank v Hazelwood Logistics Center* (2013) 706 F 3d 888 (Court of Appeals, 8th Circuit); *Aetna Finance Co v Hendrickson* (1988) 526 NE 2d 1222 (Court of Appeals, 3rd Dist); For further discussions on Article 9's practice on this point, see White and Summers, *Uniform Commercial Code* (n 90) 377–388.

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The BLA extends the coverage of the priority rules to non-consensual possessory lien and judgment lien.[828] The purpose is to establish the priority rules between security interests and non-consensual or judgment liens. Possessory lien in movable property arising by operation of law, i.e., lien given by the provider of materials or service for movable property (mechanics lien) that is encumbered by a security interest, enjoys priority over the security interest on the following conditions: (a) the materials/service was provided in the ordinary course of business; (b) lien did not arise under a statute that deprives it of priority; and (c) the provider of the materials/service at the time had no knowledge of a credit agreement relating to goods prohibiting the borrower from creating a lien.[829] The third knowledge requirement is interesting not only in relation to actual and constructive knowledge, but also in the sense that for the priority of lien to be defeated, a lender can insist on placing a simple indication (signage) of the security interest, i.e., notice to the public. In relation to judgment liens, the judgment creditor obtains priority in a collateral against unperfected security interests in the same at the time of the execution of the judgment.[830]

The BLA priority rules accommodate the possibility of subordination of priority. A lender may subordinate their priority by agreement to other lenders, provided the agreement does not adversely affect the rights of a non-party to the agreement.[831] The BLA provision appears to be similar and much clearer to the Article 9 provisions which do not preclude subordination either.[832]

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[828] Borrowers and Lenders Act, (n 9), ss 30 and 31.
[829] ibid, s 30 (a), (b) & (c); see the equivalent provision in Uniform Commercial Code (n 374), § 9-333 on priority of certain liens arising by operation of law. Note that there is no knowledge requirement in the Article 9 provision; for more analysis on non-consensual liens, see Gilmore, *Security Interests in Personal Property* (n 7) ch 33; Roderick J Wood and Michael I Wylie, 'Non-Consensual Security Interests in Personal Property' (1992) 30 Alberta Law Review 1055, although the article was focused on the Alberta Personal Property Security Act 1988, s 29.
[830] Borrowers and Lenders Act, (n 9), s 31 (1) & (2). Time of execution means time of seizure of the movable property, time of service of the judicial order on the person holding movable property for or on behalf of a borrower, or registration of the judgment lien at the Registry.
[831] ibid, s 23 (1) & (2).
[832] Article 9 'does not preclude subordination by agreement by a person entitled to priority', Uniform Commercial Code (n 374), § 9-339.

In the absence of a clear provision on after-acquired property in the BLA, subordination agreements may be one way to deal with the monopoly of a secured creditor, if the PMSI special rule is not employed. Gilmore suggests that the 'establishment of a priority, by means of a subordination agreement, is itself a sort of security arrangement',[833] although not a security interest. The view of subordination agreements being a means to establish priority was rejected based on the then bankruptcy statutory ordering of priorities. However, the safe procedure in the context of the subordinator's bankruptcy is for the senior lender to file a financing statement.[834] So it may not be totally unnecessary for the lender under the BLA to register a subordination agreement even though the BLA does not require it.

One of the effects of the convoluted priority rules, and the possibility to subordinate priority, is the potential emergence of the problem of circularity in the BLA. The BLA priority rules are not unique in embedding the improbable but omnipresent circular priority problem, often found in consolidated PPSL statutes. A circular priority problem may arise where the borrower's (X) funds for distribution between competing claims are inadequate, and the priority ranking leads to a chain which moves from a senior creditor (A) to a junior creditors (B) and (C), and then back to the senior creditor (A).[835] There could be variants of the circularity, and Gilmore noted that whilst Article 9 ignores this problem altogether, varying all-purpose theoretical solutions that have been put forward by scholars are too complex and often ignored by judges.[836]

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[833] Gilmore, *Security Interests in Personal Property* (n 7) 985.
[834] Bankruptcy Act, ss 64 & 65 (a); ibid 985–998; for detailed discussions on subordinated agreements; see ibid 37; Dee Martin Calligar, 'Subordination Agreements' (1961) 70 The Yale Law Journal 376; Peter F Coogan, Homer Kripke and Fredric Weiss, 'The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements' (1965) 79 Harvard Law Review 229; Dee Martin Calligar, 'Purposes and Uses of Subordination Agreements' (1967–1968) 23 Business Lawyer (ABA) 33.
[835] Gilmore, *Security Interests in Personal Property* (n 289) 1020; Tajti, *Comparative Secured Transactions Law* (n 1) 48. Gilmore (n 4) 1020; Tajti (n 5) 48.
[836] "A judge who finds himself face to face with a circular priority system typically reacts in the manner of a bull who has been goaded by the picadors: he paws the ground and roars with rage. The spectator can only sympathize with the judge and bull." Gilmore, *Security Interests in Personal Property* (n 7) 1020–1.

Circularity indeed may arise from subordination, although this may not be 'true circularity', and three solutions have been advanced to address this problem. In the first proposal, where creditors A, B and C with competing claims against X occurs (scenario above), C (in a subordination agreement) is paid to the amount of A's claim, since B was junior to A. B is then paid the amount less of A's claim. Then A receives the fund less of B's claim. In the second scenario, the circularity may occur after the failure to file by A, B files but with knowledge of A's interest, and C files without knowledge of B's interest. Herein A's failure to file is penalized, B's filing ensures priority over C. In the third scenario, the circularity is caused by statute or judicial decision, without fault by any party. The judicial practice has been to break up the circularity and realign the order of priorities.[837] The problem of circularity may occur under the BLA, and even more, when the pre-BLA registration requirements and priority rules are also affected. Although the solutions are not included in the legislation, the above suggestions provide guidance on how to respond to a possible circularity problem. [838]

3.2.2.6 Default and Enforcement of Security Interests in the BLA

The enforcement of a security interest under the BLA is conditioned on the borrower's default, i.e., the failure to make payment when due as agreed, or breaching the terms of the credit agreement.[839] When there is the failure to repay, or the credit agreement is breached by the borrower otherwise, the lender is mandated to give notice of default to the borrower, which said notice must be in writing, requesting the borrower to pay within the timeframe indicated in the

[837] ibid 1021–2, 1025.
[838] For detailed discussion on circularity in the PPSA system of ordering priorities, see Gilmore, *Security Interests in Personal Property* (n 289), ch 39; Tajti, *Comparative Secured Transactions Law* (n 1) 48–9; Ziegel and Denomme (n 692) 264–8.
[839] This is a functional definition, and as Gilmore said of Article 9, 'default is, within reason, [...] whatever the security agreement says it is', Gilmore, *Security Interests in Personal Property* (n 7) 1193; White and Summers add, unless the doctrine of unconscionability and good faith apply, default is essentially what the agreement says it is, White and Summers, *Uniform Commercial Code* (n 90) 405.

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notice.[840] If the borrower fails to either make payment or make satisfactory arrangement within 30 days, or within the time indicated in the notice, the lender is then entitled to enforce on the collateral, employing the enforcement remedies in the BLA.[841] This pre-enforcement notification mechanism distinguishes the BLA from the Unitary Model.

A. Enforcement Options and Available Remedies

The enforcement remedies available to a lender upon a borrower's default appear to operate as alternative and not concurrently remedies. The lender may either sue the borrower in court to perform the terms of the credit agreement;[842] or the lender may realise the security interest in the collateral.[843] The option to sue a borrower for breach of the credit agreement is often the characteristic route, which opens up the opportunity to pursue pre-judgement remedies, including injunctions and interim preservation orders, and all the properties of the borrower.[844] This, however, subjects the process of enforcement to delays and high costs associated with civil litigation generally. The World Bank in 2014 estimated that it takes 515 days, costs 39.5% of the

[840] Borrowers and Lenders Act, (n 9), s 39 (1). The default notice may be delivered by '(a) hand; (b) courier service; (c) registered mail; or (d) other means agreed upon by the lender and the borrower in the credit agreement'. The effective date of delivery, if by (a) by hand is the date it is received by or on behalf of the borrower; or if (b) by courier service or registered mail, the day it is officially recorded as delivered by return receipt or its equivalent; or if (c) by other means, then on the day as contained in the credit agreement, s 39 (2) & (3); the notice of default gives an opportunity for the borrower to pay the amount due. The provision is silent on whether the default triggers acceleration of the whole loan amount, and hence acceleration is left to the remits of the credit agreement; and also the section is silent on the aspect of remedying a contravention of the credit agreement not relating to payment. Second, a notice of this sort takes away any surprise element useful for self-help repossession, and preservation of the collateral from unscrupulous disposition. Cătălin Gabriel Stănescu, *Self-Help, Private Debt Collection and the Concomitant Risks: A Comparative Law Analysis* (Springer 2015) 43–4 Cătălin argued that the European Draft Common Frame of Reference (DCFR) provision on self-help (with Chapter 7 of Book IX - proprietary security in movable assets dedicated to default and enforcement) was a missed opportunity because inter alia there is need for borrower's consent and creditors must send notification to consumers at least 10 days of their intention to repossess the collateral.

[841] Borrowers and Lenders Act, (n 9), s 39 (4).

[842] ibid, s 40 (a). Law suit opens the potential to rely on other civil remedies, including injunctions (interim, interlocutory or permanent), preservation orders, specific performance, rescission, damages etc., and enforce the judgment by any writ of execution; under Article 9, § 9-601 (e) priority in relation to the collateral is maintained as perfected, Uniform Commercial Code (n 374); Warren and Walt (n 681) 267.

[843] Borrowers and Lenders Act, (n 9), s 40 (b); in Uniform Commercial Code (n 374), § 9-601 (c) the rights after default are cumulative and may be exercised simultaneously; see Comment 3 to § 9-601, *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91) 1044.

[844] High Court Rules 2007 (Constitutional Instrument), or 35; Warren and Walt (n 681) 267.

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value claimed, and requires 39 procedural steps to enforce a commercial claim through judicial action in Sierra Leone.[845]

Enforcement action against the borrower is not appealing to creditors given the aforementioned delays, costs and inefficiency. Naturally, creditors would try to enforce on the security interest, and the BLA has to some extent enabled this form of enforcement. In enforcement action relating to the realisation of a security interest under the BLA, a lender with the right to possession may enforce without recourse to court (self-help).[846] Similarly lenders may apply collateral in satisfaction of an obligation, i.e. they may collect and apply receivables, security, money or negotiable instrument to satisfy debt.[847] There is no indication of the need to resort to court or to employ a bailiff from the court or independent agent in the application of collateral to satisfy the debt obligation. In fact, where it is not otherwise agreed, the lender 'may notify the account debtor and collect payment even prior to default', the key ingredient here being notification of the account debtor.[848] Further, a lender may dispose of the collateral by sale,[849] or retain the collateral (strict foreclosure),[850] or appoint a receiver or manager to enforce on the security interest.[851]

[845] World Bank, *Doing Business 2015: Going Beyond Efficiency* (The World Bank 2014) 71; in 2016, The World Bank further estimated that the time has been reduced by 2.5 months dues to the establishment of a specialized commercial court, World Bank, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* (The World Bank 2015) 92; Gilmore argued that the "simplest thing for the secured creditor to do is to ignore the fact that he holds security and proceed, like any creditor, on the underlying debt: sue it to judgment, take out execution and have a levy made on the judgment debtor's assets, followed by a sheriff's sale. When he elects to exercise his rights against the collateral, he will avoid the possibility of much argument and confusion". Gilmore, *Security Interests in Personal Property* (n 7) 1201, 1202 However, he further said a lender who is willing to abide by the law's delay may see the possibility of the debtor's economic retrogression and repayment becoming progressively less satisfactory.
[846] Borrowers and Lenders Act, (n 9), s 41.
[847] ibid, s 42.
[848] ibid, s 42 (2).
[849] ibid, s 43.
[850] ibid, s 47.
[851] ibid, s 50.

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B. Rights to Repossession and Non-Judicial Enforcement - Self-Help

When it comes to the right to repossession and non-judicial enforcement in the BLA, a lender may realise the security interest by repossession and sale of the collateral (self-help).[852] A lender with a right of repossession under a credit agreement is not compelled to initiate court proceedings to enforce the right.[853] However, a lender unable 'to enforce a right of possession in a peaceable manner, […] may use the services of the police or bailiffs to evict the borrower pursuant to a warrant issued by a Court'.[854] This provision for non-judicial repossession in the BLA is, however, standing on rickety legs. First, it references a standard of 'peaceable manner' without further defining the standard. Second, it alludes to eviction which signifies contemplation of real property possession and not personal property. Third, through the mandatory pre-enforcement notification requirement, the surprise element in non-judicial enforcement is taken away in the BLA.

In the circumstances where the element of surprise has diminished, the interpretation to be given to 'peaceable manner' becomes very relevant. In the US, the breadth of uncertainty and liability associated with the self-help repossession 'breach of peace' standards have arguably limited its use by secured parties.[855] The rigmarole of judicial action can only be avoided when self-help is carried out within the breach of peace standards.[856] Therefore, if the 'breach of peace'

[852] ibid, s 41 (1) and (2).
[853] ibid, s 41 (1).
[854] ibid, s 41 (1) and (2). The meaning/interpretation of 'to evict the borrower pursuant to a warrant issued by a Court' by use of the services of the police or bailiffs will be more much relevance, as the literal interpretation seems to suggest an eviction/expulsion in terms of dealing with real property mortgages or leaseholds, as opposed to repossession of a collateral; see Uniform Commercial Code (n 374), § 9-609 dealing with a secured party's right to take possession after default.
[855] Uniform Commercial Code (n 374), § 9-609 (b); Warren and Walt (n 681) 270.
[856] The 'breach of peace' standard has been subjected to a myriad of judicial interpretations. Courts often enquire into two matters: First, whether the creditor entered the debtor premises; second, whether the debtor or agent/privy consented to the entry and repossession. These two factors may be tempered by the type of premises entered, *Chapa v Traciers & Associates* (2008) 267 SW 3d 386 (Court of Appeals); in *Stone Machinery Co v Kessler* (1970) 463 P 2d 651 (Court of Appeals, 3rd Div) the assistance by law enforcement officer in self-help repossession was held to be 'constructive force, intimidation, and oppression constituting a breach of peace'; in *Walker v Walthall* (1978) 588 P

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uncertainty bedevils the 'peaceable manner 'standards in the BLA, then self-help repossession will only be as good as the paper it is written on. Nevertheless, repossession may be pursued through judicial action.[857] This can be a straightforward process and may prove to be prudent. However, the secured party has to consider issues of judicial costs, attorney fees and possible competing creditor's joinder in any judicial action for repossession.[858]

C. Application of Collateral in Satisfaction of Obligation

A lender with priority is also given the right to 'collect and apply an account receivable, security, money or a negotiable instrument taken as collateral' in satisfaction of a secured obligation upon the borrower's default,[859] and this can be done without resorting to judicial action. Furthermore, a lender upon notification to the account debtor may collect payment prior to default unless the parties agree otherwise.[860] This collection right of lenders in the BLA is similar to the secured party's enforcement rights by collection in Article 9.[861] In Article 9, two major issues have

2d 863 (Court of Appeals, 1st Div, Dept C), just the mere presence of an officer of the law was a breach of peace; in terms of liability, breach of peace violation may lead to inter alia a claim in tort, *General Finance Corp v Smith* (1987) 505 So 2d 1045 (Supreme Court); a claim in tort with punitive damages, *Big Three Motors, Inc v Rutherford* (1983) 432 So 2d 483 (Supreme Court); or criminal penalties, as in Md.Ann.Code Art. 27 § 243 (1998); see White and Summers, *Uniform Commercial Code* (n 90) 413, 443–450.

[857] Borrowers and Lenders Act, (n 9), s 41 (2).

[858] In *Cla-Mil E v Medallion Corp* (2006) 846 NE 2d 431 (Court of Appeals) the New York Court of Appeals had to consider the question 'whether Medallion's court-ordered use of the marshal, rather than self-help, insulates it from Cla-Mil's claim'. The court held it does. See similar analysis of repossession through judicial action under Article 9, White and Summers, *Uniform Commercial Code* (n 90) 450.

[859] Borrowers and Lenders Act, (n 9), s 42 (1); the BLA, however, does not define 'account', but the Uniform Commercial Code (n 374), § 9-102 (a) (2) defines account to include inter alia "a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, […but] does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card".

[860] Borrowers and Lenders Act, (n 9), s 42 (2); the BLA does not define 'account debtor', in Uniform Commercial Code (n 374), § 9-102 (3) an account debtor means "a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper". The obligations relating to negotiable instrument are excluded because Article 3 is the governing provision; see Official Comment 5.h. to § 9-102 (3) *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91).

[861] Uniform Commercial Code (n 374), §§ 9-607, 9-608; see *Agri-Best Holdings v Atlanta Cattle Exchange* (2011) 812 F Supp 2d 898 (Dist Court); *Jd Factors Llc v Freightco Llc* [2009] Dist Court Cause No. 1:09-CV-00095.

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bedevilled creditors' collection right. Secured creditors have faced disputes on the question of when the collection right arises, and when opposing claims of the account debtor be interposed to prevent the secured party from collecting a full amount.[862] Although the BLA does not address the latter issue, its provision is clear on the permissibility of the lender to collect prior to default if no contrary agreement exist with the account debtor, and the said account debtor is notified before collection.

D. Disposition of the Collateral

Once a lender has repossessed the collateral, the next step is the disposition of the collateral, i.e., the sale of the collateral to satisfy the debt obligation. A lender is permitted to sell the collateral by auction, public tender, private sale or by any other method as agreed.[863] A lender, at least 10 working days before the sale, must send a notice of intention to sell collateral to the borrower, a person who has a registered the required registration form with respect to the same collateral and is effective before the lender's repossession, or any person who has given notice of claim in the collateral.[864] The notice requirement is inapplicable if the collateral may perish within 10 working days of repossession, or the lender reasonably believes the collateral will decline substantially in value if not disposed of immediately. In addition, the lender may immediately dispose of the collateral if the cost of care and storage are disproportionately large in relation to its value, or the collateral is inventory, or all interested parties in receipt of notice give consent for immediate sale, or a court so orders for the notice requirement not to be complied with.[865]

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[862] White and Summers, *Uniform Commercial Code* (n 90) 417, 416–421; for non-notification lending, see *Surety Savings & Loan Co v Kanzig* (1978) 53 Ohio St 2d 108 (Supreme Court).
[863] Borrowers and Lenders Act, (n 9), s 43 (1).
[864] ibid, s 43 (2) (a), (b) and (c) respectively.
[865] ibid, s 43 (3) (a) though (f) respectively.

A sale of collateral extinguishes all security interests in the collateral and proceeds including subordinated security interests.[866] Once a sale is conducted, the interested parties entitled to the notice of intention of sale must be given a written statement of account within 10 working days on: "(a) the amount of the gross proceeds of sale; (b) the amount of the costs and expenses of the sale; and (c) the balance owing by the lender to the borrower or by the borrower to the lender, as the case may be".[867] Upon completion of the sale, the lender must firstly apply the net proceeds to the reasonable costs and expenses of the sale incurred by the lender, and reasonable legal expenses as provided for in the credit agreement. Subsequently the lender should apply the net proceeds to satisfying the debt or any other secured obligation.[868] The lender is mandated to apply the surplus of a sale to persons with subordinated interests, anyone who has given the lender notice of a claim, and the borrower. If there is a conflict as to who is entitled to receive distribution of the net proceeds, and the order of payment, the lender is required to pay the surplus into court.[869]

E. Retention of Collateral - Strict Foreclosure

A lender with priority may also decide to retain the collateral in satisfaction of the secured obligation upon the default of the borrower, a practice known as strict foreclosure in the US.[870] The interested parties to be informed upon sale of a collateral ought to be given notice of intention to pursue strict foreclosure, and any objective received within 10 working days of the strict foreclosure notice will operate as a mandate to sell rather than the lender retaining the collateral.[871] If there is no notice of objection after 10 days, it will be deemed that the lender has elected to retain

[866] ibid, s 44.
[867] ibid, s 45 (a), (b) and (c).
[868] ibid, s 46 (1).
[869] ibid, s 46 (2) (a), (b), (c) and (3). It is assumed that the court upon receipt of surplus will determine who is entitled and the order of priority.
[870] ibid, s 47 (1); see US legal provisions in Uniform Commercial Code (n 374), §§ 9-620, 9-621, 9-622; *Leroy Inc v Cafritz Harbour Group* (1995) 660 A 2d 908 (Court of Appeals); White and Summers, *Uniform Commercial Code* (n 90) 452.
[871] Borrowers and Lenders Act, (n 9), s 47 (2) and (3).

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the collateral in satisfaction of the secured obligation. Consequently, the lender may hold or dispose of the collateral free from all rights and interests from people entitled to receive, and in receipt of notice of strict foreclosure.[872] Ultimately, all subordinate security interests to that of the lender in the retained collateral are extinguished upon the lender's election to strictly foreclose.[873] However, it must be noted that in a sale or retention of a collateral, at any time before the sale or retention, a person entitled to receive notice may settle the debt and redeem the collateral.[874]

The BLA indeed has provided the rudimentary framework for disposition of collateral to satisfy a secured debt obligation. However, it is conspicuously silent and perhaps inadequate with reference to rules that regulate sale, including the rule on commercial reasonability, and right to deficiency often associated with Article 9 or the PPSA scheme.[875] One way to look at the absence of a right to deficiency, for example, is to say the BLA has avoided the deluge of cases on deficiency judgment found in Article 9. However, the absence of a commercial reasonable safe harbour, i.e., disposition in a usual or recognizable market practice to deter improper sale will bedevil foreclosures by sale under the BLA.[876] Further, the absence of partial satisfaction in strict foreclosure may prove to be a problem, especially if the value of the collateral proves to be

[872] ibid, s 48 (1). Note that in this section, the period is 10 days, inconsistent with the 10 working days in s 47 (3), and s 43 (2). The retention operates as full satisfaction, as opposed to; Uniform Commercial Code (n 374), § 9-620 (a) where retention can be in full or partial satisfaction of the obligation.

[873] Borrowers and Lenders Act, (n 9), s 48 (2).

[874] The person must tender principal amount, the interest accrued, based on prior borrower and the lender agreement any fee for the prepayment of an obligation, other fees payable by the borrower to the lender up to the date for settlement, and an equal or reasonable expense for seizure, repossession, holding (storage), repairs, processing and preparing the collateral for sale, if already incurred and any other reasonable expenses incurred by the secured party; ibid, s 49 (1) (a) through (f). Under s 49 (2) and (3) a borrower has priority to redeem collateral, and upon settlement of the debt, the borrower can redeem collateral, and lender is obligated to release the security interest and discharge the relevant registration ; see Uniform Commercial Code (n 6), § 9-623 on the right to redeem collateral in the US; White and Summers argue that redemption is unimportant given that is it 'short lived and it requires a large payment', owing to the acceleration of the debt; White, Summers and Hillman (n 6) 399.

[875] See Uniform Commercial Code (n 374), §§ 9-610, 9-627.

[876] ibid, § 9-627 (b); what is commercially reasonable is a question of fact, and burden is on the creditor *Bank of America, NA v Sea-Ya Enterprises, LLC* (2012) 872 F Supp 2d 359 (Dist Court); *Textron Financial Corp v Lentine Marine Inc* (2009) 630 F Supp 2d 1352 (Dist Court).

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inadequate.[877] The full strict foreclosure provision, as contained in the BLA, is borrower friendly, and hence may be less appealing to creditors.

F. Enforcement through a Receiver or Manager in the BLA

Finally in relation to enforcement remedies, the BLA has retained the practice of appointing a 'receiver' or 'manager' (hereinafter: 'receivership'), a relic of the floating charge enforcement.[878] Gilmore had curiously bemoaned the infrequent use of receivership in the US although such a method of enforcement used to be useful for bankruptcy reorganization.[879] Strangely, all security interests inclusive of a charge created under the BLA may be enforced, upon default of a borrower, through receivership.[880] This is indeed an interesting choice to include receivership in the BLA's enforcement repertoire, and may be a sweetener option for banks, given the private control of receivership. A receiver or manager can be appointed directly by the lender.[881] However, a manager with powers to '(i) take possession of and protect the property, (ii) collect the rents and profits derived from the property, and (iii) enforce the security interest on behalf of the lender' must be appointed by the court.[882] The lender is obligated to notify the registrar of the Collateral Registry of the appointment of a receiver or manager.[883]

Since receivership is deemphasized in the US and in the enforcement of security interest in Article 9,[884] it will be difficult to ascertain the benefits of retaining this form of enforcement

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[877] Gilmore traced the full satisfaction with no provision for deficiency judgment to the common law real property mortgage rule on foreclosures, where the mortgage treated as a conveyance is restricted to the value of the security. The idea was to avoid the problem of valuing the land, and as a panacea, substitution was used. Gilmore, *Security Interests in Personal Property* (n 7) 1184–1190, esp. 1185–6.
[878] See McCormack, *Secured Credit under English and American Law* (n 606) 49.
[879] Gilmore, *Security Interests in Personal Property* (n 7) 1211–2, note that Gilmore was referring to real estate mortgages, and how the enforcement doctrines affected the enforcement methods under Article 9.
[880] Borrowers and Lenders Act, (n 9), s 50.
[881] ibid, s 50 (1) (a).
[882] ibid, s 50 (1) (b).
[883] ibid, s 50 (2).
[884] Gilmore, *Security Interests in Personal Property* (n 7) 364–365.

without recourse to a system where the method is employed. This is where the provisions of the Ontario PPSA will be useful.[885] In Canada and other Anglo-common law jurisdictions, there is a long history between a corporate debenture secured by a fixed and floating charge and the appointment of a receiver or manager.[886] The private appointment of a receiver/manager has been said to be easier, quicker and cheaper in enforcement of corporate security interests.[887] It is fair to say in Sierra Leone as in Canada, it is common practice for credit agreements to provide for private or court appointed receiver/manager. In Canada, it was a surprise for the old Ontario PPSA to have omitted receivership, an omission attributed to the influence from Article 9.[888] Nevertheless, the rectification and subsequent inclusion in the revised Ontario PPSA was made based on the decision in *Cantamar Holdings Ltd. v. Tru-View Aluminium Products*,[889] were Callaghan J. held that the Ontario court retained the power to appoint a receiver in a matter relating to the old PPSA.[890] The situation in Sierra Leone is analogous to the Ontario reform PPSA, given the commercial practice and the use of receivership in the Companies Act 2009. Therefore, the decision to retain receivership in the BLA appears justifiable.

The application of all the enforcement procedures to receivership is expressed in the BLA.[891] However, there are no provisions to regulate the conduct of the receiver/manager. Once a

[885] Personal Property Security Act, R.S.O. 1990, c. P.10 (n 52), s 60.
[886] Ziegel and Denomme (n 213) 494–5; *In re The Manchester & Milford Ry Co* (1880) 14 Ch D 674 (CA) 653 the court offered the English Court of Appeal gave a distinction between a receiver and manager as: "A receiver is […] a person who receives rents or other income paying ascertained outgoings, but who does not, if I may say so, manage the property in the sense of buying or selling or anything of that kind. We were most familiar with the distinction in the case of a partnership. If a receiver was appointed of partnership assets, the trade stopped immediately. He collected all the debts, sold the stock-in-trade and other assets, and then under the order of the Court the debts of the concern were liquidated, and the balance divided. If it was desired to continue the trade at all, it was necessary to appoint a manager, or a receiver and manager as it was generally called. He could buy and sell and carry on the trade".
[887] Goode, *Principles of Corporate Insolvency Law* (n 571) ch IX; Ziegel and Denomme (n 52).
[888] Ziegel and Denomme (n 52) 496.
[889] *Cantamar Holdings Ltd v Tru-View Aluminium Products* (1979) 23 Or 2d 572.
[890] Scholars and the Minister's Advisory Committee largely supported the court's view, Ziegel and Denomme (n 52) 496–7.
[891] Ziegel and Denomme hold similar view in relation to the PPSA s 60, and Part V, default - rights and remedies, ibid 497.

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receiver or manager has been appointed, it becomes apparent that the provisions of the Companies Act 2009 will be relied on. Unfortunately, the Companies Act 2009 conflicts with the BLA on registration, and priority of security interests or charges. Therefore, how the BLA's receivership will coexist with the enforcement of company charges outside the remits of the BLA will be critical. This issue of conflation between the BLA and pre-BLA regimes rests on the substantial deviations versus the idiosyncratic features argument to be examined subsequently. Given that a lender as contemplated by the BLA will in most circumstance be a corporate entity,[892] resolving this conflict becomes an absolute imperative.

3.3 Conclusion

In using the 'building blocks' of the Unitary Model and its case law, this chapter has set out the broad contours of the BLA. The objective at the start of the chapter was to outline the content of the legislation and its importation of a new conceptual approach, i.e., the function approach to secured transactions law, including the new terminologies. The question of whether the BLA is a secured transactions law has been answered in the affirmative, deviating from the previous claims of the borrowed B&L Act in Ghana being part of the banking sector regulatory and prudential norms. This chapter has also provided the solid foundation for the analysis of the 'unusual features' in the BLA referred to as substantial deviations in the immediate succeeding chapter. Therefore, when the substantial deviations are scrutinized, the content and context will be easily comprehended. It would have been a much difficult task to critique a law without firstly outlining what the law is. This chapter has, therefore, undertaken the role of 'John the Baptist' in preparing the way for the 'Messiah'.

[892] Note that a lender refers to a bank or other financial institutions. A bank is defined as 'a body corporate licensed by the Central Bank in accordance with this Act to carry on banking business', Banking Act, 2011, s 3; whilst a financial institution covers a company, a society under the Co-operative Society Act 1977, and a statutory body, Other Financial Services Act, 2011 (n 453), s 5.

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Chapter Four

4. The BLA under the Microscope – 'the Substantial Deviations'

In the previous chapter, the BLA was examined using the 'building blocks' of the Unitary Model as the analytical framework. This chapter builds on the analysis in the previous chapter and addresses the claim relating to the incorporation of the three-main 'unusual features' in the BLA described as substantial deviations from modern secured transactions law frameworks.[893] The deviations are characterized by the following: First, the prominent role of the Bank of Sierra Leone (hereinafter: **The Central Bank**), its intrusive powers of oversight and supervision of the credit market. Also, the limited application of the BLA to only banks and other licensed financial institutions, and given their existing dominance in the credit market, this restrictive scope of the BLA will further lead to a banking oligopoly.[894] Second, the floating security dilemma occasioned by the conflation of two incompatible approaches in the BLA on the one hand, and the maintenance of the floating charge and attendant characterization problem in both systems on the other. Third, the emergence of a two-tier system of secured credit operating as parallel structures in one legal order/system. The analysis of the three main deviations herein supports the claim that the 'unusual features' are deviations which will eventually prove to be problematic. In deeming the substantial deviations as flaws, it is argued herein that whilst interpreting the BLA as *lex specialis* will provide the 'fire brigade' solution, i.e., offer a quick-fix, the ultimate panacea rests with comprehensive reform of the whole PPSL framework.

4.1 The Central Bank Regulation of the Secured Credit Market and the Banking Oligopoly - 'Is Less More?'

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[893] See the Introduction herein, [page xx], Secured Transactions Law Reform Project (n 56); also see Dubovec and Osei-Tutu (n 8).
[894] As noted in the introduction, banks and other licensed financial institutions already control 75% of the financial sector in Sierra Leone. Eric Osei-Assibey and Baimba Augustine Bockarie (n 31) 258.

The BLA curiously provides for an unusual, hardly seen intrusive oversight and supervisory role of the Central Bank over the credit market in Sierra Leone. This regulatory intervention is followed by limiting the BLA's application to only banks and other financial institutions licensed by the Central Bank to provide credit facilities. The combination of the two cements the regulatory reach of the Central Bank and banking oligopoly as far as the secured credit market is concerned. Regulation of financial institutions is in the DNA of the Central Bank,[895] therefore, as part of addressing the problem of high levels of NPLs in the credit market, and credit malpractices by financial institutions and borrowers, the Central Bank viewed supervisory intervention as the magic bullet.[896] However, this paternalistic approach taken by the Central Bank is unjustifiable, difficult to enforce given the cost implications, superfluous and totally redundant.[897]

4.1.1 The Central Bank's Supervisory and Enforcement Powers

The policy position adopted in the BLA to address the low access to credit finance and high levels of NPLs is to accord the Central Bank unprecedented supervisory and enforcement powers in the secured credit market.[898] In the performance of its supervisory and enforcement functions under the BLA, the Central Bank is authorised to:

> (a) Promote the development of a fair, transparent, competitive and accessible credit market throughout Sierra Leone; (b) *monitor the credit market throughout Sierra Leone in order to detect and prevent any conduct prohibited by […the BLA]*; (c) receive complaints in writing about alleged contraventions of […the BLA]; (d) *conduct investigations in order to ensure compliance with […the BLA]; (e) take such enforcement measures in accordance with section 46 of the Banking Act, 2011 (Act No. 14 of 2011) as may be appropriate*; (f) promote public awareness on matters relating to the credit market throughout Sierra Leone; (g) design and disseminate information, for the purposes of public education, on matters relating to the credit market throughout Sierra Leone; (h) establish standards for protection of the rights of borrowers and lenders under […the BLA]; (i)

[895] Bank of Sierra Leone Act (n 26), s 7 (h) list as part of the objectives and functions of the Central Bank the authority to 'license, register, regulate and supervise financial institutions' in Sierra Leone.
[896] Kargbo (n 31) 10–11.
[897] Generally, on poor reform practices and effects of piecemeal reforms limited to banks only relating to access to credit and secured lending, see de la Pena (n 12) 350–355.
[898] See Borrowers and Lenders Act, (n 9).

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> report to the Minister annually on the volume and cost of different types of credit products, market practices relating to those products, and their implications for borrowers' choice and competition in the credit market throughout Sierra Leone; (j) advise the Minister on matters of national policy related to the credit market in Sierra Leone; (k) adopt any other measures necessary for the promotion and development of the credit market in Sierra Leone.[899]

The BLA further grants the Central Bank police powers of investigation and search of premises correlated with a duty to submit annual reports cataloguing violations of the BLA, remedial actions taken, the types of credit product and reform proposals.[900] Curiously, the BLA directs the Central Bank to take into consideration international best practices in credit and financing in performing the functions.[901]

The inclusion of the Central Bank's oversight and policing powers of the secured lending market is foreign to the prevailing argument that secured transactions law addresses the rights of borrowers, lenders, and third parties including purchasers and lien-creditors.[902] This means secured transactions law is commercial in nature and has at its core the rights/interests relating to a collateral. Although the practice of limiting reforms of secured transactions law to only banks is not new, no other secured transactions law incorporates this level of regulatory intervention aside from similar legislations in Ghana and Nigeria, victims of the path dependency trap.[903] This notwithstanding, if the basic idea and existence of secured transactions law is rooted on regulatory/legal intervention in the secured credit market, then the issue of deviating from the norm

[899] Borrowers and Lenders Act, (n 9), 4 (1). (Emphasis mine).
[900] ibid, ss 5, 7 & 8 respectively.
[901] 'In the performance of its functions [...], the Bank shall take cognizance of international best practice in the field of credit and financing'. ibid, s 4 (2). The vagueness of this reference will only add to the complexity and obfuscation that may arise from interplay of the Central Bank's role and that of the will of parties (party autonomy). As we will later discover in this chapter, there is no similar international best practice on such regulatory intervention in the credit market to draw lessons from.
[902] Dubovec and Osei-Tutu (n 8) 105.
[903] On the practice of limiting secured transactions reforms to benefit only banks, see Heywood W Fleisig and Nuria de la Pena, 'Peru: How Problems in the Framework for Secured Transactions Limit Access to Credit' (1997) 3 NAFTA: Law and Business Review of the Americas 33; de la Pena (n 12) 355; on the deep level of regulatory intervention, see Dubovec and Osei-Tutu (n 8) 105; see also Beale, 'An Outline of a Typical PPSA Scheme' (n 52), where Beale described the typical structure of the PPSA statutes in Canada, New Zealand and Australia; Beale and others (n 52) paras 23.81-23.142.

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will arise not by the mere inclusion of the regulatory powers, but rather on the implication of the unprecedented level of intrusion as contained in the BLA. In other words, the claim of substantial deviation can only be made if the high level of regulation and oversight is justifiable. Fundamentally, the high level of regulation must make both economic and legal sense.[904]

In the absence of a market failure or negative externalities, any restriction or intervention in relation to the freedom of the parties to contract in a market is deemed as inefficient and unnecessary.[905] Conversely, there is justification for regulatory/legal intervention in the market, if there is systemic market failure or the marketplace is uncompetitive.[906] In the eyes of the Central Bank, the regulatory intervention as contained in the BLA is justifiable in the context of preventing secured credit fraud/malpractice and promoting a competitive and accessible credit market.[907] However, the same objectives, i.e., building a fair, transparent, competitive and accessible credit market can be achieved without such a high level of regulatory intervention. This is the case because the market can effectively police itself, and the necessary protection is available for market based remedial actions. Economic regulation can be justified on the basis of 'public interest', i.e., to rectify market inefficiency (or inequity); or otherwise be deemed as 'capture' by an industrial

[904] So what justifies regulatory intervention of this nature? In answering this question, one must examine the notion of 'regulatory theory'. "Regulatory theory is an approach used in determining regulatory outcomes […] To achieve these outcomes, regulatory intervention and governance is used by government agencies through legislations to maintain control over the markets to be regulated […] It is also used to explain government regulation of an economic activity […] One of the objectives of modern regulatory mechanisms is to prevent abuses, protect consumers and promote public interest". Olivia Anku-Tsede, 'Microfinance Intermediation: Regulation of Financial NGOs in Ghana' (2014) 56 International Journal of Law and Management 274, 276–277; see Posner, 'Theories of Economic Regulation' (n 129); Berry (n 129); Dassler (n 129).

[905] Eric L Talley, 'Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule' (1994) 46 Stanford Law Review 1195, 1195; Marshall E Tracht, 'Renegotiation and Secured Credit: Explaining the Equity of Redemption' (1999) 52 Vanderbilt Law Review 599, 613.

[906] Posner, *Economic Analysis of Law* (n 129) pt III; Schwartz, 'The Law and Economics Approach' (n 129) 231; Tracht (n 905) 613.

[907] Kargbo (n 31) 10, 11 & 16; this type of policy view and consequent regulation is generally described as economic regulation, following a pattern of governmental intervention in the market. Economic regulation in the classic sense has been rationalized by two main theories, i.e. 'public interest theory', wherein the goal is to respond to the public demands to correct inefficient or inequitable market practices; and the 'capture theory' based on demands from interest groups. See Posner, 'Theories of Economic Regulation' (n 129) 335–336; George J Stigler, 'The Theory of Economic Regulation' (1971) 2 The Bell Journal of Economics and Management Science 3.

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interest group promoting private benefits.[908] The Central Bank's intervention is anticipatory and may be argued to be in the public interest. Unfortunately, its present framing within the context of the banking dominance gives the outlook of industrial capture. In fact, this sort of regulation imposed in a concentrated banking market in Sierra Leone (where the entrenchment of a market oligopoly is high) generates substantial external costs on the one hand, and the benefits (profits) for the banks on the other, thereby reducing the possibility of rectifying the failings in the market.[909]

The central tasks of the "theory of economic regulation are to explain who will receive the benefits or burdens of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources".[910] What this means in secured transactions law depends on whether a system or particular law is deemed to be borrower or creditor friendly, and the strength of the industry bucking the system. The economic regulation theory in secured transactions law is traceable to the early intervention in the *Twyne's Case*,[911] aimed at addressing the market failure caused by the ostensible ownership problem. In modern secured transactions law, intervention on the part of the state is most pronounced in the ordering of creditors' priorities, and consumer protection.[912] In this sense, 'as a rule, regulation is acquired by […an] industry and is designed and

[908] Posner, 'Theories of Economic Regulation' (n 129) 336, 345; Stigler (n 907) 3.
[909] Posner, 'Theories of Economic Regulation' (n 129) 336, 338.
[910] Stigler (n 907) 3.
[911] See *Twyne's Case* (n 381); Douglas Baird, 'Filing and the Problem of Ostensible Ownership' (1983) 53 Legal Stud 72427853.
[912] A lot of work has been done on this point, especially from scholars in the United States, critiquing the justification of priority and distribution schemes in secured lending. What can be deduced from the debate is the dominant view that the legal regulatory regime is designed to minimize inefficiencies in the secured credit market. See Thomas H Jackson and Anthony T Kronman, 'Secured Financing and Priorities among Creditors' [1979] The Yale Law Journal 1143; Homer Kripke, 'Consumer Credit Regulation: A Creditor-Oriented Viewpoint' (1968) 68 Columbia Law Review 445; Alan Schwartz, 'Security Interests and Bankruptcy Priorities: A Review of Current Theories' (1981) 10 The Journal of Legal Studies 1; James J White, 'Efficiency Justifications for Personal Property Security' (1984) 37 Vanderbilt Law Review 473; Kripke, 'Law and Economics' (n 215); Schwartz, 'The Continuing Puzzle of Secured Debt' (n 790); Robert E Scott, 'A Relational Theory of Secured Financing' (1986) 86 Columbia Law Review 901; Scott (n 141); Lynn M LoPucki, 'The Unsecured Creditor's Bargain' (1994) 80 Virginia Law Review 1887; Ronald J Mann, 'Explaining the Pattern of Secured Credit' (1997) 110 Harvard Law Review 625; Ronald J Mann, 'The Role of Secured Credit in Small-Business Lending' (1997–1998) 86 Georgetown Law Journal 1.

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operated primarily for its benefit'.[913] This explains, at least in theory, the rationale for regulating the secured credit market, in the way the Central Bank has done in Sierra Leone. What it does not fully account for is the extent of the regulatory intrusion.

The core of the BLA's regulatory intervention is the Central Bank's duty to monitor the credit market, detect, prevent prohibited conducts, conduct investigations and take enforcement action. In terms of costs and logistics, this could prove to be a poisoned chalice, since any dereliction of duty will build a culture of oversight unenforceability. Without even considering the logistical problems, operational resources, staffing (expertise and costs), it is still important to notionally present a justification for such high level of regulation in the BLA. It could be argued that since the banks and financial institutions, licensed by the Central Bank, are already under its supervision, then the extension of its oversight functions under the BLA will not impose huge additional costs.[914] Additionally, a public interest argument could be made in favour of this level of regulation, i.e., the need to protect small businesses (MSMEs, SMEs) and consumer borrowers given bargaining imbalance and lacking sophistication. In both cases, the supportive view is that the deep level of regulation will accrue benefit to the public, a seeming persuasive but intrinsically weak argument.

The argument relating to the cost of regulation is linked to the banking oligopoly issues and will be discussed subsequently.[915] In terms of the public interest limb, protecting and

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[913] Stigler (n 907) 3.

[914] Note, however, that banks and financial institutions already have reporting obligations, and this monitoring aspect could just be additional footnote/column to the periodic returns to be submitted to the Central Bank. Banking Act, 2011 (n 892), 42; Other Financial Services Act, 2011 (n 453), s 29; conversely, the need to be licensed in order to reduce the cost of monitoring supports the view that the industry is indirectly controlling market entry to its benefit, Stigler (n 907) 5.

[915] See 4.1.2 herein. Cost accrues to the regulator and the regulated institutions and should be viewed in context of both the financial burden and harmful effects on others. See RH Coase, 'The Problem of Social Cost' (2013) 56 The Journal of Law and Economics 837; Posner, *Economic Analysis of Law* (n 129); Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (OUP Oxford 2012).

promoting the public interest in finance is most prominent in specific sectors, for example, consumer finance and the capital market in the US. The fringe credit industry[916] and consumer lending could be two significant areas to test the public interest justification and see how the approach to public interest protection fits within the BLA discourse. In looking at the fringe credit industry in the US at the time of the deregulation of interest rates occasioned by the Supreme Court's decision in *Marquette National Bank v. First of Omaha Service Corp*,[917] it was argued that the "high rates charged by fringe creditors are the result of market failure, not informed bargaining between rational actors. Inadequate disclosure and limited financial education prevent consumers from understanding the full cost and risk of the loans they take out, leading to poor resource allocation".[918] In this scenario, where negative externalities impose costs on the society, regulatory intervention was a justifiable intrusion to protect society.[919]

One of the main reasons for regulatory oversight in the financial sector is to protect consumers,[920] and the need to have informed bargaining balance between a lender and borrower because of the information asymmetry, a principle that is deep-seated in consumer credit financing. In Article 9 for example, the bifurcation of post-default rights of a consumer as opposed to a commercial debtor on the basis of the unequal bargaining power is evident.[921] The substratum of

[916] The 'credit fringe industry' refers to credit market in which the banks are not interested in, whether because of loan size, high risk or profitability. For example, payday loans, rent-to-own etc. Lynn Drysdale and Kathleen E Keest, 'The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System And Its Challenge to Current Thinking about the Role of Usury Laws in Today's Society Focus Edition: The Usury Law Debate' (1999–2000) 51 South Carolina Law Review 589, 591; Diane Hellwig, 'Exposing the Loadsharks in Sheep's Clothing: Why Re-Regulating the Consumer Credit Market Makes Economic Sense Note' (2004–2005) 80 Notre Dame Law Review 1567, 1567, 1569; *Perez v Rent-A-Center, Inc* (2006) 892 A 2d 1255 (Supreme Court).

[917] *Marquette Nat Bank v First of Omaha Corp* (1978) 439 US 299 (Supreme Court) [301], the court decided a bank can charge higher interest rate to its out-of-state credit-card customers allowed by their home States than the rate authorizes by the State of the bank.

[918] Hellwig (n 916) 1567.

[919] The externalities included the market failure caused by information asymmetry in the parties bargaining, inadequate disclosure, limited financial education and understanding of the costs and risk involved. ibid.

[920] Olivia Anku-Tsede (n 904) 278; McLiesh and Djankov (n 4).

[921] Uniform Commercial Code (n 374), §§ 9-613, 9-616 (b), 9-620; Tracht (n 905) 604, fn. 18.

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consumer protection is to defuse the information asymmetry that tilts the bargaining power in favour of mostly lenders.[922] The paternal approach taken to correct the market flaw is enforced through a material disclosure regime.[923] The object of the principal legislation in credit finance, Consumer Credit Protection Act 1968, is 'to safeguard consumers in connection with the utilization of credit by requiring full disclosure of the terms and conditions of finance charges in credit transactions or in offers to extend credit'.[924] The major instrument of protection is full disclosure supported by unfair practices remedial action.

The consumer protection disclosure regime is wrapped around paternalism, with the overall aim of protecting the perceived weaker party. In an analogous market situation we see how the need to protect investors has led to paternalism in capital market and securities regulation.[925] The capital market serves the three basic functions of capital formation, market liquidity and risk management.[926] However, the core of securities regulation is presently aimed at preventing fraud and investor protection through material information disclosure.[927] This paternalistic approach is

[922] Tracht (n 905) 618.

[923] Disclosure removes all mysticism from the market and creates a healthier credit market. Kenneth McLean, 'The Federal Consumer Credit Protection Act' (1968) 24 The Business Lawyer 199; see John H Paer, 'Truth-in-Lending: Protection for the Consumer or for the Creditor Forum: Plaintiff's and Defendant's Perspectives on Truth-in-Lending Litigation' (1975) 24 Emory Law Journal 357; William E Boyd, 'Federal Consumer Credit Protection Act--A Consumer Perspective' (1969–1970) 45 Notre Dame Lawyer 171; Kripke, 'Consumer Credit Regulation' (n 912) 446, 455, 460, 464; for the Canadian perspective, see Jacob S Ziegel, 'Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint' (1968) 68 Columbia Law Review 488, 508.

[924] Consumer Credit Protection Act and Truth in Lending Act 1968, 146; 15 U.S. Code Chapter 41 deals with consumer credit protection and covers specific protections like subchapter 41 on consumer credit cost disclosure.

[925] Capital markets and securities regulation is an area of law that deals with transactions and other dealings with securities (a tradable financial asset), that could be debt, equity or derivatives; see Securities Act 1933, § 2 (a) (1); Securities Exchange Act 1934, § 3 (a) (10); *SEC v WJ Howey Co* (1946) 328 US 293 (Supreme Court); John C Coffee and Hillary A Sale, *Securities Regulation: Cases and Materials* (New York, NY: Foundation Press Thomson/West, 2012 2012) 246–247.

[926] Alan R Palmiter, *Securities Regulation: Examples and Explanations* (Aspen Publishers, c2005) 3; Coffee and Sale (n 925) 1–9.

[927] *SEC v. WJ Howey Co.* (n 925); George J Stigler, 'Public Regulation of the Securities Markets' (1964) 37 The Journal of Business 117, 117; Gordon Walker, 'Securities Regulation, Efficient Markets and Behavioural Finance: Reclaiming the Legal Genealogy' (2006) 36 Hong Kong Law Journal 481, 481.

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based on the historical view that securities markets affect the public interest in a special way.[928] With some exceptions,[929] public protections come in the form of disclosure of material information to the public, prohibition of manipulative practices and public/private enforcement.[930] Although the view today is that the paternalistic approach is needed more than in 1933 in the US, there is a semblance of a scaling down of the overreaching protective measures given the threat of litigation abuse. The key point remains material information disclosure and remedial enforcement measure made available privately, in addition to any conceivable collective administrative scheme to protect the public interest.

In the BLA, borrowers' protection is based on two limbs, i.e. anti-discrimination and full disclosure of terms. The BLA introduced the first statutory protection against discrimination in the secured credit market in Sierra Leone.[931] The prior constitutional provision on anti-discrimination protection is based on the state paradigm, that is, discrimination based on law or public

[928] See Coffee and Sale (n 925) 2 citing the US Congress House Report accompanying the Securities Act of 1933 (H.R.Rep. No. 85, 73d Cong., 1st Sess. 2 [1933].

[929] As federal securities law in the US does not pre-empt state law, the exceptions referred to are 'blue sky' state laws, which also require licensing of securities broker-dealers, investment advisers, imposes civil liabilities for false and misleading information, and for some states, the regulation of public offerings based on merit, going beyond material disclosures. The State of Kansas which first introduced its law in 1911 is a prominent example of a 'blue sky state'. *Hall v Geiger-Jones Co* (1917) 242 US 539 (Supreme Court); Palmiter (n 926) 34.

[930] Civil liabilities for which an aggrieved private party may commence private enforcement action includes; Securities Act (n 925), material misrepresentation or omission in connection with purchase or sale of any security relating to any "sale or offer" of securities under Rule 10b-5; False or misleading statement with respect to material fact in SEC filing, s 18(a); and manipulative practices, namely, wash sales, matched orders, false or reckless touting in trading in securities listed on stock exchange, s 9(e) respectively; Securities Exchange Act (n 925), registered offerings, untrue statement (or misleading omission) of material fact in registration statement, s 11; violation of Sect. 5: sale-offer of unregistered securities or "gun-jumping", s 12(a)(1); and sale-offer by means of prospectus or oral communication false or misleading statement, s 12(a)(2) respectively; empirical research has shown that there is negligible difference between the choices of public or private enforcement of securities law in the US. This could translate into the substitution of private for public if the BLA oversight scheme is put into context of a trade-off. See Howell E Jackson and Mark J Roe, 'Public and Private Enforcement of Securities Laws: Resource-Based Evidence' (2009) 93 Journal of Financial Economics 207.

[931] Borrowers and Lenders Act, (n 9), s 32 (1) "A lender shall not discriminate against a person on grounds against of race, gender, ethnicity, political affiliation or religion but may refuse to enter into a credit agreement with a prospective borrower on reasonable commercial grounds consistent with the lender's customary risk management and underwriting practices [...]'.

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officers/authority in the discharge of public functions.[932] Anti-discrimination protection is mostly justified on the basis of equality, specifically a substantive egalitarian based treatment.[933] Although the doctrine of freedom of contract is fully endorsed in Sierra Leone, public policy/interest allows for legal and regulatory intervention as in the present case. The rationale appears to be simple, no non-economic reason should influence the decision not to enter into a credit agreement under the BLA.[934] The economic factors are listed in the BLA as follows: "(a) The ability of a prospective borrower to meet the obligations of a proposed credit agreement; (b) the cost of a credit agreement to the borrower; (c) the terms and conditions of a credit agreement; (d) compliance by the prospective borrower with the terms of the credit agreement; (e) the exercise of any right of the lender under a credit agreement, this Act or any other law relating to credit".[935]

There exists justification for the sort of constitutional value and consumer type protection in the credit market in Sierra Leone.[936] The Cox-George Report identifies relationship lending based on mutual trust and cooperation as one of the main basis for extending credit in the formal

[932] Constitution of Sierra Leone, 1991 (n 330), s 27 (2); *Akar v Att Gen* [1968] ALR SL 274 (Supreme Court); *Att Gen v Akar* [1967] ALR SL 381 (Court of Appeal).
[933] See Elisa Holmes, 'Anti-Discrimination Rights without Equality' [2005] The Modern Law Review 175.
[934] Banks will now have to be careful in designing their credit product as the notion of equality and anti-discrimination is elusive and based on prevailing circumstances. See for example the difficulty faced by the University of Carlifornia when it policy sought to promote equality by adopting a different admission policy for minorities; *University of California Regents v Bakke* (1978) 98 S Ct 2733 (Supreme Court).
[935] Borrowers and Lenders Act, (n 9) s, 32 (1).
[936] In fact, Sierra Leone is no exception, in England, a study on ethnic discrimination in the credit market for small businesses revealed larges difference across ethnic groups, for example Blacks and Bangladeshi to Whites and Indians Paul JA Robson and others, 'Is There Ethnic Discrimination in the UK Market for Small Business Credit?' (2009) 27 International Small Business Journal 583, 583; in post-World War II United States, in the 'golden age of capitalism' when access to credit was cheap and bountiful, 'low-income African-Americans and women of all classes and races had far greater difficulty in borrowing' than middle-class white people Louis Hyman, 'Ending Discrimination, Legitimating Debt: The Political Economy of Race, Gender, and Credit Access in the 1960s and 1970s' (2011) 12 Enterprise & Society 200; discrimination, it is argued, was also prevalent in the subprime mortgage enforcement that followed the 2008 financial crisis Michael Aleo and Pablo Svirsky, 'Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims under the Fair Housing Act and the Equal Credit Opportunity Act' [2008] Boston University Public Interest Law Journal 1; women generally are the wrong end of the discrimination equation. 'When women marry they become economic nonentities in the eyes of the credit establishment' Margaret J Gates, 'Credit Discrimination Against Women: Causes and Solutions' (1974) 27 Vand. L. Rev. 409.

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sector.[937] For the informal sector, Jalloh argues that the mutual trust and cooperation value system is based on religion, kinship, ethnicity and even race.[938] Trust and relationship transactions in the business community in Sierra Leone are, therefore, built on certain commonalities between the parties or their agents, whether based on race, ethnicity, religion, or club membership. Consequently, there is a place for anti-discrimination protection in the secured credit law. However, a 'prospective borrower who alleges discrimination by a lender may make a complaint to the Bank for redress'.[939] The BLA and the Regulations are silent on the available redress. To this end, allowance must be made for a right to private action for address cases where the administrative remedies may be limited.

Concretely and as the cornerstone of borrowers' protection in the BLA, the lender is obligated to disclosure the full credit terms prior to concluding a credit agreement.[940] The pre-agreement statement that should be given to a prospective borrower must disclose "(a) the principal amount; (b) the proposed disbursement schedule of the principal debt; (c) the interest rate; (d) other credit costs; (e) the total amount involved in the proposed agreement; (f) the proposed repayment schedule; and (g) the basis of any cost that may be assessed if the borrower breaches the contract".[941] Failure to comply with this requirement may lead to administrative enforcement procedure by the Central Bank under the Banking Act 2011,[942] and additionally/alternatively a civil suit by the aggrieved borrower.[943] The protection of borrowers also applies to market solicitations and information. Bank and other financial institutions, acting as prospective lenders, are required

[937] Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40) 16.
[938] Jalloh (n 338) 96.
[939] Borrowers and Lenders Act, (n 9), s32 (2).
[940] ibid, s 36 (1).
[941] ibid.
[942] Banking Act, 2011 (n 892), 46; and punishment ranges from a written warning, fines, discipline of personnel, and reimbursement to loss of shareholding.
[943] Borrowers and Lenders Act, (n 9), s 36 (3).

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to give prospective borrowers written information on business identity and address, the nature of prospective credit agreement, interest rates and cost of credit, use of deposit or security, need for residual payment and other restrictions.[944] If the initial solicitation is made orally, then a written statement must subsequently be given.[945]

The sector specific legislations on the fringe credit industry, consumer financing and securities regulation emphases the need for material information disclosure as an adequate panacea to the information asymmetry problem. In addition, most of the protective legislations provide a right to pursue private action as a means to protect the greater public interest. The BLA interestingly provides for a robust borrowers' protection and information disclosure regime. These provisions effectively fill the regulatory gap and make redundant the extensive supervisory and enforcement powers of the Central Bank. The parties will be at liberty to bargain based on access to full credit terms/information,[946] and the ability to take remedial action without additional burden on the regulator or regulated institutions. Based on this market centred pragmatic approach, the Central Bank's regulatory intervention is consequently superfluous and unjustified. In this sense, the Central Bank's regulatory powers must be regarded as overregulation. Overregulation is as bad a no regulation, as it causes financial repression,[947] and 'heavier regulation of business activity generally brings bad outcomes'.[948]

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[944] ibid, s 37 (1).
[945] ibid, s 37 (2).
[946] For borrowers' protection and pre-agreement disclosure rights, see ibid, ss 34, 36 and 37; and for creditors', see Credit Reference Act 2011, 10. Credit Reference Bureaus established under the Act are permitted to, '(a) gather and maintain data for the formation of credit histories including available information; (b) process credit related data; and (c) deliver credit reference reports based partly or fully on information not in the public domain'.
[947] Olivia Anku-Tsede (n 904) 282.
[948] McLiesh and Djankov (n 4) 83.

4.1.2 The Banking Oligopoly and the Deepening of the Informal Credit Market

The discussion on banking oligopoly and the deepening of the informal credit market is aimed at examining the effects of the regulatory limitations on non-licensed banks and other financial institutions adopted in the BLA, including the impact of a concentrated banking market in view of the need to expand access to credit finance in Sierra Leone. As aforementioned, the application of the BLA is restricted to only banks and financial institutions licensed by the Central Bank. This is gleaned from the definition of a lender in the Act, which is limited to commercial banks and financial institutions licensed by the said Central Bank, with the authority to engage in the supply of credit facilities.[949] The banking sector, including other licensed financial institutions, already controls 75% of the financial sector in Sierra Leone.[950] The financial sector is dominated by deposit taking and loan intermediation.[951] Therefore, the combination of the banking market structure, a bank's credit market share and restrictions in the BLA support the claim of the existence or the emergence of a banking oligopoly, an inequitable credit market, and the deepening of shadow banking in relation to the informal sector in Sierra Leone.

Oligopoly means 'few sellers', and as an economic concept it is defined as "the form of imperfect competition which obtains when the sellers are few; and any one of them is of a size that

[949] "A 'lender' means a commercial bank or other financial institution licensed by the Bank of Sierra Leone and who, as part of business enters into a credit agreement by advancing loans and other credit facilities including – (a) micro credit facilities; (b) selling goods on credit; (c) providing services on credit; and (d) a financial lessor"; Borrowers and Lenders Act, (n 9), s 1; Further, a bank is defined as 'a body corporate licensed by the Central Bank in accordance with this Act to carry on banking business'; and 'banking business' means- "(a) accepting deposits from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order, or by any other means; and (b) using the funds, whether in whole or in part, to make loans or investments for the account, and at the risk of, the person doing the business". Banking Act, 2011 (n 892), ss 3, 3 (a) and (b) respectively; meanwhile, a 'licensed financial institution' is defined to mean "a financial institution holding a valid license issued by the Central Bank to carry on wholly or partly any one or more financial activities" including '(b) provision of credit services; (c) leasing (d) supplying of goods by way of hire purchase' Other Financial Services Act, 2011 (n 453), s 2.

[950] Eric Osei-Assibey and Baimba Augustine Bockarie (n 31) 258.

[951] Kargbo (n 31) 8–9; Eric Osei-Assibey and Baimba Augustine Bockarie (n 31) 257.

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an increase or decrease in their output will appreciably affect the market price".[952] When this occurs in a market, the actions of each seller cannot be independent from the other. For example, in the credit market, the increase or decrease of the interest rate can affect an oligopolistic credit market, and therefore a decrease in such a rate can threaten the market share of the others and will force them to follow suit. Therefore, each firm in an oligopoly exercises oligopolistic market power, although the concept itself deals with the horizontal market structure, and not the market behaviour of the firms. However, as with anti-competitive market behaviour, wielding oligopolistic market power is a disease in a competitive economy, an anathema to any policy that promotes economic efficiency in a market.[953]

The existence of an oligopolistic market does not equate to low profits for the firms within the concentration. In fact, the reverse is the case. Due to limited competition, and the information asymmetry that exists in favour of the oligopolistic firms, profits are usually high.[954] This correlation between an oligopolistic market and high profits has provided the basis for the argument that oligopoly prevents ruinous competition.[955] However, where the economic objective goes beyond profitability, and hinges on expanding access to credit, the pro-concentrated banking credit market argument falters. The expansion or extension of credit objective conflicts with the bottom-line profit approach banks favour. Concomitantly, the commercial banks in Sierra Leone are engaged or holding less risky government securities, instead of pursuing 'riskier' extension of loans to small businesses and consumers.[956] Therefore, an unrelenting concentrated/oligopolistic

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[952] Joseph F Brodley, 'Oligopoly Power under the Sherman and Clayton Acts--From Economic Theory to Legal Policy' (1966–1967) 19 Stanford Law Review 285, 289; Clair Wilcox, *Competition and Monopoly in American Industry* (US Government Printing Office 1940) 5.
[953] Brodley (n 952) 288–289, this means a concentrated market becomes less competitive, as the firms are largely satisfied with their market share, since such shares are not threatened by market entry by new firms.
[954] ibid 291.
[955] ibid 292.
[956] Eric Osei-Assibey and Baimba Augustine Bockarie (n 31) 257.

credit market, as in Sierra Leone, will continue to be fundamentally anti-competitive with limited access to credit finance.

Relying on economic theory of regulation, a concentration/oligopolistic market can be diluted or eliminated by easing the entry barrier for potential competitors. Sound economic theory calls for the examination of potential market competition in considering regulatory/legal intervention in a market.[957] The restriction in the BLA relating to lenders has not taken into consideration potential secured credit market competitors, including corporate or not-for profit lenders.[958] Thus, the limitation in the BLA may work to the benefit of banks and licensed financial institutions, but the imposition will increase their costs and the costs of businesses who want to enter the secured credit market[959] This status quo calls into question the trade-off between the growth of the market (credit expansion), and the stability of banks. A 'competitive system is more efficient but market power (the ability to profitability price above marginal cost) is necessary for stability'.[960] However, the optimal competitive structure for the credit market calls for unrestricted competition in lieu of a regulator's preference for stability. Competition guarantees welfare maximization by ensuring the 'greater quantity of credit is supplied at the lowest price'.[961]

[957] Brodley (n 952) 338, 354.
[958] See Olivia Anku-Tsede (n 904).
[959] ibid 281, refers to licensing costs and procedure.
[960] Carol Ann Northcott and others, *Competition in Banking: A Review of the Literature* (Bank of Canada Working Paper 2004) 2 <http://core.ac.uk/download/pdf/6253763.pdf> accessed 14 August 2017; Samuel Fosu, 'Banking Competition in Africa: Subregional Comparative Studies' (2013) 15 Emerging Markets Review 233, 234–235, central banks imposed new rules on recapitalization and increased capital base to ensure stability, which however cemented the concentrated.
[961] Banks contribute to promoting economic growth through capital accumulation based on their supply of credit. In a competitive market, the "greatest quantity of credit will be supplied at the lowest price. In contrast, market power exists where a bank can profitably charge a price above marginal cost. In this case, a bank may decrease the quantity of credit supplied and charge higher rates". This is based on the traditional industrial organizational approach to economic allocative efficiency. There is also the information asymmetry approach, which favours the bank concentration approach. In this sense, it has been claimed that a bank with market power is more willing to engage in relationship lending, which increases the supply of credit to young firms, at lower cost due to the likelihood of sharing the young firm's profit stream; Northcott and others (n 960) 2–3, 5; see Mitchell A Petersen and Raghuram G Rajan, 'The Effect of Credit Market Competition on Lending Relationships' (1995) 110 The Quarterly Journal of Economics 407.

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Empirical studies have been carried out on the economic efficiency trade-offs between banking stability (bank retaining market power and information asymmetry) as against greater credit supply occasioned by a competitive credit market. In using U.S. data, it was found that increased banking 'concentration is associated with higher loan rates', and the concomitant profitability for banks.[962] With use of a cross-country and cross-industry dataset, a test result of the average effects of banks concentration and industrial growth has shown that concentration negatively impacts on overall growth.[963] With the use of an European dataset in examining loan pricing and banking concentration, Northcott *et. al.*, found that there is less competitive pricing of loans in a concentrated market.[964] Further, in focusing on developed and developing countries, Northcott *et. al.*, also found that firms face 'higher financing obstacles in concentrated banking markets' because of the concentration of credit supply, regulatory control on market entry, ownership structure, and restrictions on banking activities.[965]

In the present frame of complex regulations affecting banks and financial institutions, the impact of a banking oligopoly on credit supply and economic growth is indeed a complicated phenomenon.[966] However, Braggion, Dwarkasing and Moore examined the impact of banking

[962] Northcott and others (n 960) 7; see Timothy H Hannan, 'Bank Commercial Loan Markets and the Role of Market Structure: Evidence from Surveys of Commercial Lending' (1991) 15 Journal of Banking & Finance 133.
[963] Northcott and others (n 960) 8; also see Nicola Cetorelli and Michele Gambera, 'Banking Market Structure, Financial Dependence and Growth: International Evidence from Industry Data' (2001) 56 The Journal of Finance 617.
[964] Northcott and others (n 960) 8; also see Sandrine Corvoisier and Reint Gropp, 'Contestability, Technology and Banking' (2009) Working paper <http://ub-madoc.bib.uni-mannheim.de/2297> accessed 14 August 2017.
[965] Northcott and others (n 960) 8; see Thorsten Beck, Vojislav Maksimovic and Asli Demirgüç-Kunt, 'Bank Competition, Financing Obstacles, and Access to Credit' <https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2996> accessed 14 August 2017; however, other studies have claimed concentration is good for relationship lending as opposed to transaction lending based on the information asymmetry approach; see Petersen and Rajan (n 961); Nicola Cetorelli and Pietro F Peretto, 'Credit Quantity and Credit Quality: Bank Competition and Capital Accumulation' (2012) 147 Journal of Economic Theory 967; Sigbjørn Atle Berg and Moshe Kim, 'Banks as Multioutput Oligopolies: An Empirical Evaluation of the Retail and Corporate Banking Markets' (1998) 30 Journal of Money, Credit and Banking 135; J Miguel Villas-Boas and Udo Schmidt-Mohr, 'Oligopoly with Asymmetric Information: Differentiation in Credit Markets' (1999) 30 The RAND Journal of Economics 375.
[966] Fabio Braggion, Narly Dwarkasing and Lyndon Moore, 'The Economic Impact of a Banking Oligopoly: Britain at the Turn of the 20th Century' 2 <https://www.rse.anu.edu.au/media/592266/Moore-Paper.pdf> accessed 14 August 2017.

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oligopoly in Britain at the turn of the 20th century,[967] and their findings show that a more concentrated banking sector is bad for borrowers and negatively impacts on the economy. Banks respond to increased concentration by holding government securities, which are less risky, and they opt for a reduced loan portfolio.[968] The focus of Braggion, Dwarkasing and Moore was on the traditional approach of examining the impact of banking concentration, specifically showing that borrowers receive smaller loans, collateral is used disproportionately, loans term are shorter and interest rates higher in high bank concentrated markets. The quality of loans indeed improves, but the improvement is only suggestive of the credit restriction and lower demand concentration occasions.[969] This banking oligopoly in 20th Century Britain is telling for Sierra Leone in two ways: First, the timeframe of the study 1885 to 1925 represents a period where the market was unregulated, reflecting a similar pre-reform environment (pre-2000s) in Sierra Leone; and second, the findings match the present practice of commercial banks, i.e. the preference for holding government securities by commercial banks in Sierra Leone.[970] With these studies, there is empirical support for the view that the consolidation of the banking oligopolistic grip of the secured credit market will reduce access to credit finance, and to a great extent the economic impact of the BLA.

One of the attendant effects of a reinforced banking oligopoly is the deepening of the '**informal credit market',** i.e., transactions not accounted for in the formal system whether for banking or tax purposes.[971] Indeed, firms in developing countries rely on banks for the supply of

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[967] ibid.
[968] ibid 24–25.
[969] ibid 4–5, 24–25.
[970] Kargbo (n 31) 8–9; Eric Osei-Assibey and Baimba Augustine Bockarie (n 31) 257.
[971] See Jalloh (n 338).

credit and capital accumulation because of the lack of robust capital and securities markets.[972] Due to the asymmetric relationship between the banks and the public, firms or borrowers, especially in Sierra Leone, look to informal credit and politics for financing.[973] In the seminal work on informality and the impact of the legal system in doing business, *de* Soto examined the time and cost of establishing a business in one of the poorest suburbs of Lima, the capital of Peru, and put forward the following strong hypothesis on why firms are obligated to depend on the informal sector:

> [Firstly, the…] poor are forced to remain within informality because the formal law is too complicated and cumbersome; [and secondly…] informality imposes a dead weight loss, hindering the 'hidden capital' of the poor to yield a proper return or to be used as collateral. With adequate property rights and a simplified formal legal system, this 'dead capital' could provide leverage, bolstering growth and development.[974]

The negative effect of informality includes stifling the development and growth of entrepreneurship at the local level, and capacity to attract foreign investment.[975]

Following from the seminal works of Coarse and *de* Soto, robust claims have been made in the credit market showing that informal credit markets are artificially created by governments' regulation on the formal credit sector.[976] Therefore, it is reasonable to suggest that informality is

[972] Tarron Khemraj, 'The Simple Analytics of Oligopoly Banking in Developing Economies' 208 <https://mpra.ub.uni-muenchen.de/22266/> accessed 15 August 2017; Kargbo (n 31) 9.
[973] Khemraj (n 972) 225; Jalloh (n 338) 93–96.
[974] De Soto (n 86), de Soto relied on Coase's research of law and legal systems on economies; see Menard and du Marais (n 283) 56.
[975] World Bank, *Doing Business in 2005: Removing Obstacles to Growth* (Washington, DC: 2005) 33; Menard and du Marais (n 283) 61–62; also see Rafael La Porta and others, 'Law and Finance' (1998) 106 Journal of political economy 1113.
[976] See some of the selected studies on the issue in developing countries include: Thomas Barnebeck Andersen and Nikolaj Malchow-Møller, 'Strategic Interaction in Undeveloped Credit Markets' (2006) 80 Journal of Development Economics 275; Clive Bell, TN Srintvasan and Christopher Udry, 'Rationing, Spillover, and Interlinking in Credit Markets: The Case of Rural Punjab' (1997) 49 Oxford Economic Papers 557; Anjini Kochar, 'Does Lack of Access to Formal Credit Constrain Agricultural Production? Evidence from the Land Tenancy Market in Rural India' (1997) 79 American Journal of Agricultural Economics 754; Sai Tang, Z Guang and Songqing Jin, 'Formal and Informal Credit Markets and Rural Credit Demand in China' [2010] Selected Paper prepared for presentation at the Agricultural & Applied Economics Association 2010 AAEA, CAES, & WAEA Joint Annual Meeting, Denver, Colorado, July 25-27, 2010.

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a direct product of stringent formal rules.[977] In the BLA, the stringent rules translate to the regulatory and capital requirements to obtain a license from the Central Bank,[978] and the further supervisory and oversight rules in the BLA, and the external/additional costs this imposes. Whilst the use of the collateral registry and the improved transparency under the BLA will reduce costs for the 14 commercial banks and other financial institutions, the barriers of entry and exclusivity will reinforce the use of an informal credit market by firms/businesses already operating within the informal sector.[979]

The Central Bank has tried to engage the informal sector by providing seed financing and flexible formalisation through an Apex Bank[980] and MFIs to boost capital allocation to MSMEs, SMEs, mostly operating in the informal sector.[981] However, the result so far has been negligible, and the impact of such a strategy will be insignificant.[982] Anku-Tsede in examining the efficiency and productivity impact of prudential regulation on financial non-government organizations (FNGO) in Ghana,[983] found that formal prudential regulation could impede efficiency and growth of microfinance credit supply. The optimal view was for an internal regulation (self-regulation) and minimum level of supervision, as not every segment in the financial sector requires prudential regulation, and there were no economic reasons that justified the extension of the prudential regulations.[984]

[977] Menard and du Marais (n 283) 62.
[978] See Banking Act, 2011 (n 889); the Other Financial Services Act, 2011 (n 453).
[979] See Jalloh (n 338).
[980] Bank of Sierra Leone, Apex Bank <http://www.bsl.gov.sl/APEX%20BANK.pdf> accessed 13th May, 2018.
[981] See Chapter Five, 3.1 on the establishment of the Apex Bank to provide supervision and technical assistance to the community banks aimed at bringing informal business activities into the formal sector. See Marah (n 29) 21.
[982] Peer Stein, Oya Pinar Ardic and Martin Hommes, 'Closing the Credit Gap for Formal and Informal Micro, Small, and Medium Enterprises' 11 <https://openknowledge.worldbank.org/handle/10986/21728> accessed 15 August 2017; See Thorsten Beck, Asli Demirgüç-Kunt and Maria Soledad Martinez Peria, 'Bank Financing for SMEs around the World: Drivers, Obstacles, Business Models, and Lending Practices' [2008] World Bank Policy Research Working Paper No. 4785 <https://ssrn.com/abstract=1312268> accessed 15 August 2017.
[983] Olivia Anku-Tsede (n 904) 274 FNGOs operate as not-for profit supply of credit services in the lower end of microfinance without previous prudential regulatory constraints.
[984] ibid 290–291.

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4.1.3 Towards an Efficient and Equitable Secured Credit Market

Regulation is always ideal when governmental/legal intervention is necessary in the public's interest to address market failures and inefficiency in the marketplace. The legal/regulatory intervention itself must not occasion corresponding hidden regulatory gaps, asymmetries or inefficiencies.[985] Under the discourse of the Central Bank's regulatory role under the BLA, it has been demonstrated previously[986] that the public interest in the secured credit market can be adequately protected and access to credit promoted by material disclosure of information, recognition of parties' autonomy and enforcement rights as contained in the BLA. The conclusive view therefore is that the deep level of regulatory intervention is burdensome, unenforceable and economically unjustifiable. It creates a regime that is superfluous, rigged with potential negative market externalities, i.e., additional transaction costs, needless monitoring and reporting costs.

The regulatory intervention in the BLA is mainly a product of industry capture by the banks, as the framework serves no purpose other than to prop up the oligopolistic powers of the banks in the credit market. The secured credit market cannot be optimal or seriously competitive with these restrictions and inefficiencies. By trying to address the problem of NPLs and other negative credit practices, the Central Bank will end up with an uncompetitive secured credit market. The loan quality will improve with the help of the Registry and its innovations in the use of information technology, and banks will record profits. However, the greater goal of expanding access to finance will be hampered.

The GoSL regulatory aim in the financial sector is to ensure economic efficiency, prevent market failure, addressing market gaps/asymmetries, protect consumers and promote the public

[985] Tracht (n 905) 613; also see Posner, *Economic Analysis of Law* (n 129).
[986] See 4.1.1 herein.

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sector.[987] The supervisory and enforcement powers of the Central Bank under the BLA does not support this aim. At present, the commercial banks and financial institutions hold 75% of the financial market share. To get into the market, potential competitors must successfully obtain a license from the Central Bank, meeting the capital requirements and complying with superfluous prudential rules. The banks' interest in government securities only goes to show how disinterested they are in supplying credit to SMEs and engage in transactional lending. The rules in the BLA make it difficult for new market entry and consequently entrench the low supply of bank credit. Less regulation in this instance can be more.[988] An efficient and equitable secured credit market that promotes the objective of expanding access to credit is only attainable when the market is made more competitive, by easing of entry barriers and unrestricted access to the Registry and dilution of the banking oligopoly.

4.2 The Floating Security Dilemmas and Coexistence with the PMSI

In the previous chapters herein, the fixed and floating charge, one of the enumerated security devices in the pre-BLA PPSL framework, was critically examined. The floating charge, an equitable corporate security device which was ingeniously conceptualized by the English courts, operates as the English law (formal approach) equivalent to the general 'continuing lien', known as the 'floating lien' in the US unitary functional approach. Both the floating charge and the floating lien encumber the 'circulating assets' of a debtor, hence the reference to both as floating security devices.[989] In Chapter Two, the importance of the floating charge as a business

[987] 'Sierra Leone Financial Sector Development Plan' (n 621) 3, 5–6.
[988] de la Pena (n 12) 350.
[989] The use of the terminology 'floating security' herein loosely referred to as a security device that allows for the debtor/borrower to freely dispose of the assets free of encumbrance in the ordinary course of business, i.e. a fixed or floating device that encumbers the undertaking, including future property of the company; see *Holroyd v. Marshall* (n 436); *Re Panama, New Zealand and Australia Royal Mail Co.* (n 436); *Agnew v Inland Revenue Commissioner* [2001] BCC 252, per Lord Millet; also see Peter F Coogan and John Bok, 'The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture' (1959) 69 The Yale Law Journal 203, 251 et. seq.; McCormack, *Secured Credit under English and American Law* (n 606) 47, 108.

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lending device, its characterization problem, limitations with respect to its priority, and often monopolistic effect when used in combination with the negative pledge were critically considered.[990] Although the floating charge is recognized as a valuable business lending device, the uncertainty with respect to its characterization, in England and Sierra Leone, adversely affects priorities on the one hand; and on the other hand it confers a lending monopoly when utilized with a negative pledge by a creditor.[991] The uncertainly surrounding the floating charge, however, has influenced discussions on the need for its reconceptualization in England and possible abolition; a process which has been undertaken by Canada and New Zealand owing to the incompatibility of the floating charge and the Unitary Model.[992]

For English law, floating charge reform advocates, and reformers in the PPSA schemes, the optimal choice for an effective floating security regime is the adoption of the non-equitable

[990] When the floating charge is used with a negative pledge, it contractually binds the debtor not to create security that ranks higher or equal to the floating charge creditor without written consent, and the registration of the negative pledge under the Companies Act 2009 notice requirement to other creditors. Companies Act 2009 (n 387), ss 170 and 171; Companies Regulations (n 485), reg 20; Form 170; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 51–59, paras 1-71 to 1-78; Worthington (n 10) 122–156.

[991] The characterization uncertainty stems from the reluctance of the English courts to offer exhaustive definition in order not to curtail the effectiveness of the floating charge in the ongoing determination of the nature of property and proprietary interest; see *In re Yorkshire Woolcombers Association Ltd* (1903) 2 Ch 284, 295; per Romer LJ, "I certainly do not intend to attempt to give an exact definition of the term 'floating charge', nor am I prepared to say that there will not be a floating charge within the meaning of the Act […]"; *Illingworth v. Houldsworth* (n 434) 358, per Lord Macnaghten; also see Goode, *Commercial Law* (n 529) 676–689, although the characterization uncertainty is partially settled in Sierra Leone given the definition of a floating charge in section 150 of the Companies Act 2009, it however, also left the crucial issue of the distinction between a fixed and floating charge to the courts.

[992] The earlier reports on English personal security law reforms recommended the retention of the floating charge because of its benefits to the business community; see Crowther and others (n 11) 227, para 5.7.77; Cork (n 11) 34, para 110; Diamond (n 19) 30, 83, paras 8.1.3, 16.1 - 16.5; however, subsequent reports or consultation papers recommended that in practice the removal of "the distinction between the 'fixed' and the 'floating' charge, whilst retaining the commercial advantages of the latter"; The Law Commission (n 39) xviii, 8, 27–29, paras 1.12, 1.26, 2.56-2.60; but abolition of the distinction was abandoned due to its importance in insolvency 'Company Security Interests' (n 95) xii, 69, para 3.158; it is important to note that majority of the English scholars are, however, heavily in favour of abolishing the distinction between the fixed and floating charge without loss of its commercial viability; see Goode, 'The Exodus of the Floating Charge' (n 74), see Goode's Fullagar Memorial Lecture (1988 - reprinted), 14 Monash LR 135; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 194–205, paras 5-37 to 5-49; McCormack, 'The Law Commission Consultative Report on Company Security Interests' (n 97) 3, 108; Goode, *Commercial Law* (n 529) 686–689; for the Canada and New Zealand abolition, see Ali (n 106) 129–131, paras 4.146-4.150; on the issue of subsequent legal charges and mortgages having priority over a floating charge before crystallization; see *Wheatley v Silkstone and Haigh Moor Coal Co*, [1885] 29 715 (Ch D).

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continuing general/floating lien as conceptualized in Article 9.[993] Historically, the floating charge when used in combination with the fixed charge under English law was far more favoured, as the doctrine espoused in the *Benedict v Ratner* rule[994] negatively impacted lenders in the US, especially on inventory and receivables financing.[995] With the formulation of the floating lien under Article 9, modern secured transactions law has put an end to the characterization uncertainty associated with the floating charge. The abolition of the distinction between the fixed and floating charge, and the permissibility to encumber circulating assets by means of a fixed security provides a more suitable approach to allow the use and disposition of current assets and the addition of future property without invalidating the charge, nor adversely impacting on priority.[996]

The superiority of the floating lien since its conception in Article 9 has not been in doubt, especially for the reformed PPSA countries. The PPSA enactments, court interpretations and scholastic arguments have been made in favour of adopting the underlying rationale of the floating lien.[997] Therefore, when the issue of floating security dilemma is raised, it is done in the context of

[993] Uniform Commercial Code (n 374), §§ 9-204; 9-205; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 171–172, para 4-61; Goode, *Commercial Law* (n 529) 698.

[994] See 26 US 353 (1927), repealed by § 9-205 of the Uniform Commercial Code (n 374); *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), Official Comment 2 to § 9-205; Gilmore, *Security Interests in Personal Property* (n 7) 33–39, 358.

[995] The rule deemed as fraudulent in law the debtor right to carry on business and disposed of encumbered assets, apply the proceeds thereof without accounting for the proceeds or the creditor exercising dominion; prompting the Benedict ritual practiced mostly by receivables and inventory financiers; Gilmore, *Security Interests in Personal Property* (n 7) 252, 253, 355; Beale, 'Exportability of North American Chattel Security Regimes' (n 52) 186–7, 221; McCormack, *Secured Credit under English and American Law* (n 606) 50, in fact, the idea that a security interest will float on a debtor's present and future assets was scorned in the US; Gilmore, *Security Interests in Personal Property* (n 7) 359.

[996] See Law Commission Report on Registration of Security Interests: Company Charges and Property other than land 2002, CP 164, para 4.133; McCormack, 'The Law Commission Consultative Report on Company Security Interests' (n 97) 3; Beale, 'Exportability of North American Chattel Security Regimes' (n 52) 183, 187–8 although there was and still resistance from practitioners opposed to the extinction of the floating charge as presently conceptualized in England without much cost and loss of transactional expertise, and possible effect on insolvency and administration (corporate rescue) which relied on the distinction between the fixed and floating charge under the Enterprise Act 2002.

[997] The Court of Appeal decision in *Canadian Imperial Bank of Commerce v Otto Timm Enterprises Ltd,* (1995) 130 DLR (4th) 91, settled the issue in Ontario; Ziegel, 'Canadian Perspectives on How Far Is Article 9 Exportable' (n 55) 237, also see the Revised Ontario Code, s 2 (a) (i); Gedye, 'The New Zealand Perspective' (n 77) 118–9; however, McCormack has put forward five disadvantages associated within moving towards Article 9 floating lien, at least for English law, as follows: First, it has adverse implications for execution creditors; second, potential adverse

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flawed legal transplant, wherein the legal framework when transitioning from one approach to the other, i.e. from the formal approach to the function approach, conflates the characteristic elements in the two approaches. The floating security dilemma, therefore, refers to the retention of the fixed and floating charge distinction, the re-characterization uncertainty, which affects attachment of the floating security, and its priority whilst maintaining the creditor's monopoly.

The adoption of a system that operates on the philosophy of the floating lien addresses the problems associated with the floating charge. As aforesaid, the Canadian courts have ended the debate on the abolition of the floating charge, and in the PPSAs in New Zealand and Australia, the distinction between the fixed and floating charge has been abolished, merely leaving the floating charge terminology for vestigial use.[998] The dilemma in Sierra Leone, therefore, rests on the actual retention of the floating charge, compounded by the incomplete conceptualization of the floating lien in the BLA. The BLA does not contain the constitutive elements of the floating lien on the one hand, but on the other hand, it adopts the PMSI, whose existence under the formal approach is fraught with conceptual problems.[999] The aim of the discussion hereunder is to expose and analyse the floating security dilemma in the BLA and PPSL framework in Sierra Leone, and eventually put forward suggestions to resolve the dilemma.

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implications for preferential creditors; third, relevance of characterisation issue in some instances; fourth, transitional costs; and finally, particular difficulties with the right scheme to be adopted as envisaged by the Law Commission. McCormack, *Secured Credit under English and American Law* (n 606) 11, 112–128.

[998] See New Zealand's Personal Property Securities Act 1999 (n 77), s 40 (4); also see Gedye, 'The New Zealand Perspective' (n 77) 119, and the New Zealand Law Commission Report No. 8, (1989) 80; In the Australian PPSA the terminology floating charge is deemed as the PPSA's security interest over circulating assets, Personal Property Securities Act 2009 (n 77), s 339; also see 'Australian Secured Transactions Law Reform' (n 77) 175–178.

[999] Borrowers & Lenders Act (n 18), s 1; see definitions of refer to definition of security interest and PMSI; also see discussions on the English law PMSI and the scintilla temporis doctrine, or the use of PMSI as title financing, Beale, 'Exportability of North American Chattel Security Regimes' (n 52) 183, 185; Michael G Bridge, 'How Far Is Article 9 Exportable-The English Experience' (1996) 27 Canadian Business Law Journal 196, 205–206.

4.2.1 The Floating Lien, its Conceptualization and Application in Article 9 and the BLA

The floating lien in Unitary Model is conceptualized by construing various sections together, dealing with attachment of security interests, after-acquired property and future advances as its constitutive elements, and the abandonment of the *Benedict v Ratner* rule and its statutory policing requirement.[1000] The floating lien is validated by permissibility of the debtor to use and disposition of collateral, together with the recognition of the effectiveness of security interests in after-acquired property and future advances.[1001] A security interest in after-acquired property "is not merely an 'equitable' interest […as section 9-204] 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 the liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral".[1002] To have a complete picture of the floating lien in Article 9, reference should be made to the provisions on the automatic shifting of the security interest from the original collateral to the proceeds to be received by the debtor on disposition;[1003] and validation of future advance arrangements.[1004] In essence, the floating lien in Article 9 is conceptualised through a composite of various provisions in Article 9.[1005] The research have not found the term 'floating lien' in the text of U.C.C. Article 9, reinforcing the conceptualization of a number of provisions in the said Article 9 claim.

Under the Article 9 floating lien concept, a secured party is permitted to take a security interest over all the debtor's present and future assets. There is no additional requirement to police the assets of the debtor, although it is advisable, nor is the debtor required to account during the

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[1000] Uniform Commercial Code (n 374), § 9-205; also see §§ 9-201 and 9-204, *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), Official Comment 2.
[1001] Uniform Commercial Code (n 374), §§ 9-204, 9-205.
[1002] *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), Official Comment 2 to § 9-204.
[1003] Uniform Commercial Code (n 374), § 9-306.
[1004] ibid, § 9-204(5), including the general validation provision, § 9-201.
[1005] Scott, 'The Politics of Article 9' (n 793) 1787, fn 9; Tajti, *Comparative Secured Transactions Law* (n 1) 178.

loan period for use and disposition of the collateral.[1006] In other words, policing is not a statutory precondition for creation of a valid security interest as it used to be before the advent of the Unitary Model. Based on the 'continuing' or floating lien in Article 9 composite argument, the following provisions, i.e., the effectiveness of security interest in i) after-acquired property, ii) future advances, iii) proceeds, and iv) the abolition of the *Benedict v Ratner* rule are deemed as the constitutive elements that allow for a security interest to float on a debtors present and future property.[1007] The mainstay of the floating lien concept, therefore, is the effectiveness of a security interest in after-acquired, and the permissibility to use or dispose of the collateral without rendering the security interest either invalid or fraudulent. This allows for the shifting of collateral.[1008] In the absence of a direct statutory imposition, or modification as in the PPSAs in Ontario, New Zealand, and Australia, it becomes imperative for the constitutive elements of the floating lien to be found in the underlying statute.

Under the BLA two noteworthy issues, as aforesaid, have given rise to the floating security dilemma. First, the BLA lacks the constitutive elements to support the conception of the general continuing lien or floating lien. Second, the floating charge was not abolished, but it is merely adopted with all its attendant flaws. On the first issue of the non-existence of the floating lien, the BLA's definition of a credit agreement includes specific reference to the known security devices and an omnibus clause covering agreements creating security interest in movable property. There is no reference to after-acquired property. The BLA only refers to 'future obligations' the equivalent of Article 9's 'future advances', and no express reference to future property or after-

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[1006] Gilmore, *Security Interests in Personal Property* (n 7) 359.
[1007] Barkley Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* (Warren Gorham & Lamont 1988) 10 – 12; Tajti, *Comparative Secured Transactions Law* (n 1) 178.
[1008] Uniform Commercial Code (n 374), §§ 9-201, 9-204, 9-205; Official Comment 2 to § 9-205 *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91).

acquired property as known in the US.[1009] The specific provisions that deal with the creation of security interest only extend the effectiveness to the identifiable proceeds of the collateral,[1010] and the definition of proceeds does not include after-acquired property.[1011] Curiously, the BLA recognises the extension of a creditor's priority to future advances,[1012] but then not after-acquired property, thereby falling short of the of the freedom to use and dispose, after-acquired and future advances combination for the floating lien in Article 9.[1013] Whether it is a legislative intent or defective drafting, the conception of the floating lien cannot be justifiable or be made in the BLA.

Based on the shortcomings of the BLA in failing to provide the basis to conceptualise the floating lien, the floating charge with all its problematic antecedents has been maintained.[1014] For the purposes of nomenclature, this may not entirely be unique. Gedye argues that the New Zealand PPSA did not abolish the floating charge, but rather made away with the distinction between the fixed and floating charge.[1015] Gedye's argument makes for a good abstract debate, but with no

[1009] Borrowers and Lenders Act, (n 9), s 1; see Uniform Commercial Code (n 374), § 9-204.
[1010] Borrowers and Lenders Act, (n 9), ss 9, 10, 11(3), & 14.
[1011] 'Proceeds' is defined as the "identifiable or traceable property received as a result of sale or other disposition, collection, lease or license of collateral, including proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of collateral". ibid, s 1.
[1012] Reference to future advances is unsurprising since the common law has imposed no restrictions on future advances provision whether in commercial or non-commercial clauses, *Hopkinson v Rolt* (1861) 9 HLC 514 (HL); see the Bills of Sale, Cap 241 s 22 restriction of after-acquired property on the other hand.
[1013] Uniform Commercial Code (n 374), § 9-323; Official Comment 3 to § 9-323 (a), *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91); *Maryott v Oconto Cattle Co* (2000) 607 NW 2d 820 (Supreme Court); In looking at the after-acquired provisions in the UCC Article 9, White and Summers have persuasively argued (an argument adopted by Ziegel and Denomme on similar provision in Ontario PPSA, ss 11 [2] [a] and 12 [1]) that in trying to ascertain whether parties should specifically refer to after-acquired property in the security agreement, the two questions that must be asked are: Firstly, whether on an objective basis the description covers the after-acquired; and secondly whether on a subjective basis the parties meant to include after-acquired. The US courts have only considered using the objective test. White and Summers, *Uniform Commercial Code* (n 90) 327–328; *In re Fibre Glass Boat Corporation* (1971) 324 F Supp 1054 (Dist Court); see White and Summers, *Handbook of the Law under the Uniform Commercial Code* (n 90) 973–974; Ziegel and Denomme (n 52) 133 in Sierra Leone, the lack of express reference to after-acquired property in the BLA makes the question moot. The specificity and reasonable test, however, goes to show the important and how fatal the error is inexcusable lack of actual reference to after-acquired property in the BLA.
[1014] Borrowers and Lenders Act, (n 9), s 1.
[1015] Personal Property Securities Act 1999 (n 77), s 40 (4); see New Zealand Law Commission Report No. 8, (1989) 80; Gedye, 'The New Zealand Perspective' (n 77) 119.

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practical effect. The abolition cures the ills of the then extant floating charge, i.e., the debtor is given the right of unfettered in the use and disposition of the collateral during the tenure of the security interest, the possibility to security interest to cover present and future property, and priority is determined upon registration and not crystallization.[1016] A total abolition of the floating charge and/or re-characterization of the fixed and floating charge to reflect a fixed security on circulating assets produces the same result.

In Sierra Leone, however, the retention goes beyond mere vestigial use, and does have practical implications. First, at no point does the BLA recognise the general distinction between legal and equitable security interests that exist in the prior-PPSL, and without such recognition, how does the BLA resolve the equitable rules that affects priorities between an equitable and legal security interest; and the superiority of bona fide purchaser of value of a legal interest?[1017] This is one clear lacuna the courts will have to deal with. In addition, the incorporation of pre-existing security devices has allowed for the attendant problems of the floating charge to creep into the BLA regime.[1018] This also means the same device will operate differently under the BLA and Pre-BLA PPSL regimes. For the banks, borrowers, court and other interested parties figuring out how the conflicting issues are going to be resolved equates to lost efficiency and huge transactional costs.

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[1016] Personal Property Securities Act 1999 (n 77), s 40 (4); also see Canadian case, which resolved the Ontario Province abolition of the fixed and floating charge distinction in the PPSA. *Canadian Imperial Bank of Commerce v. Otto Timm Enterprises Ltd.*, (n 997); Ziegel and Denomme (n 52) 133.
[1017] See *Re BCCI (No 8)* [1998] AC 214, per Lord Hoffman; *Lunn v Thornton* (1845) 1 CB 379; *Tailby v Official Receiver* (n 463); McCormack, *Secured Credit under English and American Law* (n 606) 39–41.
[1018] Chief amongst the problems is the threat to the creditor's priority; see, for example, the discussion on the floating charge problems with priority in Goode, *Goode on Legal Problems of Credit and Security* (n 47) 173–227.

4.2.2 The Place of the PMSI in the BLA and General PPSL Framework

The BLA introduces the Unitary Model's concept of the PMSI,[1019] but without fully conceptualizing the floating lien, as argued above. In the absence of the floating/continuing general lien in the BLA, discussions relating to the PMSI still appear to be necessary, although the potential usefulness will be dependent on a further legislative step, either through a comprehensive reforms or amendment of the BLA. This is the case because the use of the PMSI may become too onerous for purchase money bank creditors based on the overlap in the BLA, and the registration requirements outside the BLA. Further, outside the BLA, the notion of the PMSI is not fully developed, as the place of the PMSI in the formal approach to secured transactions law is seriously doubted and unsatisfactory.[1020] Conversely, the BLA specifically introduces the PMSI in the PPSL framework in Sierra Leone, following Article 9 and the PPSA schemes.[1021] The PMSI in Article 9 is mainly used to avoid the monopoly of the continuing lien on the circulating property of the debtor, especially the after-acquired property. In one sense, the PMSI is used to curtail the monopoly of the floating lien creditor with the imposition of the purchase money creditor's priority, thereby tagged as a security interest with super-priority.[1022]

Unfortunately, in the absence of the constitutive elements of a floating lien as discussed previously, the PMSI in the BLA adds to the already existing confusion and complexity. From a favourable perspective, the introduction of the PMSI is beneficial in stopping a secured lender's monopoly, including its use as a statutory interest to avoid the clutches of the floating charge and negative pledge combination. On the other hand, it is not conceptualized satisfactorily in the pre-

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[1019] Borrowers and Lenders Act, (n 9), s 1.
[1020] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 231–271, paras 5-62 to 5-64.
[1021] Borrowers and Lenders Act, (n 9), s 1.
[1022] White and Summers, *Uniform Commercial Code* (n 90) 293; Bridge, 'How Far Is Article 9 Exportable-The English Experience' (n 999) 205–205.

BLA law, and therefore, it imposes additional obligations on the purchase money creditor to undertake double registration *ex abundanti cautela,* owing to the existence of the two-tier framework. There exists the possibility of a standoff between purchase money creditors within the BLA, and title financiers operating outside the BLA with a greater proprietary interest under the reservation of title consideration. Retained title financiers are accorded priority by the courts since they maintain ownership interest in collateral, and reservation of title is employed to bypass the monopoly of a floating charge much as the PMSI introduced in the BLA.[1023]

The definition and conceptualization of the PMSI in Article 9 and the BLA has been covered in the previous chapter.[1024] Although the PMSI affects both fixed and floating security interests, its effect is most prominent with floating security since the goods are to be purchased or acquired in the future, i.e., subsequent to an existing security interest; hence the reference to 'future goods' or 'after-acquired'.[1025] The super-priority effect of the PMSI has been justified based on its contribution to the debtor's liquidity, and the specialized knowledge the purchase money creditor often accords the debtor in dealing with specific goods.[1026] This scheme is followed through in the BLA, and therefore avoids the difficulty in adopting the concept within the formal approach under the *scintilla temporis* doctrine.[1027] Consequently, the PPSL framework is faced with the recurrent challenge of two different operations of a security device within the same framework. No attempts have been made in Sierra Leone to introduce the *scintilla temporis* doctrine under the non-BLA

[1023] I have so far not extensively discussed retained title financing since the strict dichotomy under the formal approach treats title financing (vendor finance) as separate and distinct from trade finance. However, retention of title devices can substitute for PMSI financing and the retention of title have the same effect as super-priority; McCormack, *Secured Credit under English and American Law* (n 606) 59. Title financing will be addressed in the final chapter.
[1024] See 3.2.1 herein; for a detailed discussion on the development of the PMSI, see Gilmore (n 99) ch 28, starting at 743.
[1025] ibid 777.
[1026] See Paul M Shupack, 'Defining Purchase Money Collateral' (1992) 29 Idaho Law Review 767, 767; see Schwartz, 'The Continuing Puzzle of Secured Debt' (n 20).
[1027] See Borrowers and Lenders Act, (n 6), s 1; see 3.2.1 herein.

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secured credit system. Even if such an attempt is made, it will be unsatisfactory as is the case in England. Therefore, as statutory recognition given to the negative pledge in the Companies Act 2009 reinforces the monopoly of the floating charge creditor,[1028] a potential purchase money creditor should be well aware of the risks involved.

What then is the impact of the introduction of the PMSI in the pre-BLA law, where the strict dichotomy between security interest and reservation of title transactions is subsisting.[1029] It is easy to see why a bank influenced legislation would retain the floating charge with all its problems. In *Agnew v. Commissioner of Inland Revenue*,[1030] Lord Millet recognized the effectiveness of the floating charge in securing the entire undertakings of the debtor company with the right to use and dispose of the assets a very attractive security interest for banks.[1031] The banks' interest appears to have been safeguarded with the statutory recognition of the negative pledge, and the retention of the floating charge in the BLA.[1032] The need for a commercial bank or a financial institution license augments the oligopolistic market structure, and as such makes market entry difficult. In such a market structure, avenue for further financing, especially for a distressed or cash trapped debtor, becomes very limited. For instance, the use of a floating charge and negative pledge encumbering the entire undertakings of a debtor prevents the use of its assets for

[1028] See 2.3.1.3 on company charges registration, and 2.3.5.1 and use of negative pledge.
[1029] McCormack, *Secured Credit under English and American Law* (n 606) 84–85, fn. 64 -65; Iwan Davies, 'The Trade Debtor and the Quest for Security', *Insolvency Law: Theory and Practice* (Sweet and Maxwell 1993) 55–63.
[1030] *Agnew v. Inland Revenue Commissioner* (n 989).
[1031] "The floating charge is capable of affording the creditor, by a single instrument, an effective and comprehensive security upon the entire undertaking of the debtor company and its assets from time to time, while at the same time leaving the company free to deal with its assets and pay its trade creditors in the ordinary course of business without reference to the holder of the charge. Such a form of security is particularly attractive to banks, and it rapidly acquired an importance in English commercial life which the Insolvency Law Review Committee (1982 Cmnd. 8558 at para. 1525) later considered should not be underestimated". ibid, per Lord Millet; para 8.
[1032] The floating charge, the negative pledge and priority; *G & T Earle Ltd v Hemsworth Rural District Council* 44 TLR 605, per Wright J. 'the debentures having been duly registered... the plaintiffs, like all the world, are deemed to have constructive notice of the fact that there are debentures'; the Canadian court of appeal decision in *Canadian Imperial Bank of Commerce v. Otto Timm Enterprises Ltd.,* (n 997), abolished the fixed and floating, legal and equitable distinctions; McCormack, *Secured Credit under English and American Law* (n 606) 7, 60.

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further financing, where the floating charge creditor is unwilling to extend more credit or at a reasonable rate. The debtor is usually doomed.[1033] However, in such a deadlock, title retention transactions are used in the formal approach to obtain 'vendor credit', thereby operating in a way akin to PMSI super-priority. Title retention transactions are economically and functionally equivalent to security interests, however title financing is not regarded as personal property security in the strict sense in Sierra Leone outside the BLA.[1034]

In taking the title financing pseudo-PMSI function into context, a gaping loophole has been created, caused by the strict dichotomy between trade and vendor credit. This adds further complexity to the potential use of the floating charge and the PMSI. Although the need to obtain a license from the Central Bank to engage in some retained title transactions, the extant prohibition is limited in scope. In the Other Financial Services Act 2001 (hereinafter: "**OSFA**"),[1035] the reserved 'financial activity'[1036] includes engaging in 'credit services',[1037] 'leasing',[1038] and 'hire-purchase'[1039] transactions. Unfortunately, all the known title financing transactions have not been

[1033] See page [xx] herein for argument justifying the conception and inclusion of the PMSI in Article 9 and secured credit generally; and also see Paul M Shupack, 'Defending Purchase Money Security Interests under Article 9 of the UCC from Professor Buckley' (1989) 22 Indiana Law Review 777.
[1034] See page [*insert page number*] herein; also see Goode and Gullifer (n 95) 4, para 1-04.
[1035] Other Financial Services Act, 2011 (n 453), being an 'Act to make provision for the licensing, regulation and supervision of institutions carrying on financial activities other than banking...' See preamble.
[1036] Borrowers and Lenders Act, (n 9), s 2 defines financial activity 'to mean engaging in any of the following: - (a) deposit taking; (b) provision of credit services; (c) leasing; (d) supplying of goods by way of hire-purchase; (e) factoring or debt administration; [...] (j) any other type of financial intermediation'. Financial intermediation is further defined to include 'the receipt of deposits for the purpose of lending money or discounting negotiable instruments or acquisition of assets for leasing or on hire purchase basis'.
[1037] Other Financial Services Act, 2011 (n 453), s 2 also defines credit services to include '(a) the giving of any advance, loan or any other facility, such as discounting of bills with or without security and whether in connection with the sale of goods or not whereby the person to whom the same is given has access directly or indirectly to the funds of the person giving the same; (b) the giving of a guarantee in relation to the obligations of any person; and (c) the giving of an underwriting commitment or indemnity to the effect that upon the happening of an event in relation to a person a certain sum of money would be paid or certain obligations would arise'.
[1038] ibid, s 2 defines leasing to include the 'letting or sub-letting moveable assets on hire for agricultural, industrial or commercial use, where the lessor is the owner of the property, regardless whether the letting is with or without an option to purchase the property but does not include the business of hire-purchase'.
[1039] ibid, s 2 defines hire-purchase to include 'bailment of moveable assets to another person with the understanding that the bailee becomes the absolute owner on completing the payment'.

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captured by the OSFA, notwithstanding the omnibus clause referring to 'any other type of financial intermediation'.[1040] The included title transactions are leasing and the supply of goods by hire-purchase (bailment), which only a 'licensed financial institution' can engage in.[1041] The definition of credit service does not include unspecified title financing transactions (i.e., not specifically reserved in the Act), for example, a conditional sale,[1042] and consignments, transactions which have been included in Article 9 for policy reasons.[1043] Consequently, if a non-licensed financial institution engages in transactions that could be described as a conditional sale or a consignment,[1044] then such title financing will operate with priority over security interests outside of the BLA, and the potential impact on the purchase money creditor within the BLA unknown. This weakens the position of the PMSI and adds further confusion to an already obfuscating secured credit system in Sierra Leone.

[1040] ibid, 2 (j).
[1041] ibid, s 2 defines licensed financial institution to mean 'a financial institution holding a valid license issued by the Central bank to carry on wholly or partly any one or more financial activities'.
[1042] Conditional sale is a theoretical construct wherein title is retained by the seller even without possession of the goods since the sale was not absolute, but based on the performance of a condition; see Gilmore, *Security Interests in Personal Property* (n 7) ch 3, 62 - 72.
[1043] ibid 63, 67; Tajti, *Comparative Secured Transactions Law* (n 1) 131.
[1044] Uniform Commercial Code (n 374), § 9-102 (a) (20) defines a consignment transaction to be, "regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and: (A) the merchant: (i) deals in goods of that kind under a name other than the name of the person making delivery; (ii) is not an auctioneer; and (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others; (B) with respect to each delivery, the aggregate value of the goods is $1,000 or more at the time of delivery; (C) the goods are not consumer goods immediately before delivery; and (D) the transaction does not create a security interest that secures an obligation"; "In a typical consignment an owner puts goods in the possession of a consignee with instructions to sell those goods to third parties. Normally, the consignor agrees to take the goods back if they are not sold. If the goods are sold, the consignee takes a percentage (say 20%) of the sales price and remits the proceeds. Consignments are common in the marketing of certain goods, such as diamonds and books. A typical consignment has some of the economic characteristics of a loan against inventory for the consignor's capital enables the consignee to display inventory on its sales floor and to make sales the consignee could not otherwise make. However, consignment is not exactly the same as a secured loan, for it leaves the risk of no sale on the consignor/seller not on the consignee/buyer"; White and Summers, *Uniform Commercial Code* (n 90) 1165; see Gilmore, *Security Interests in Personal Property* (n 7) 73–75; Tibor Thaythy, 'Consignments and the Draft Common Frame of Reference' (2011) 2 Legal Records / Pravni Zapisi 358.

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4.2.3 Towards Resolving the Floating Security Dilemma

Resolving the floating security dilemma presents the Russian nestling doll effect in the PPSL framework in Sierra Leone. This will be the case since a move to amend the BLA in order to fully constitute a floating lien, or the reformulation of the floating charge will lead to the existence of two forms of floating security interests. The first will be a legal floating security interest in the amended BLA; and second, and the equitable floating charge in the pre-BLA law. It goes without say that the definitive means to resolve the dilemma is by firstly amending the BLA, and secondly by considering and undertaking a comprehensive reform to address the problem of the two-tier system. The BLA amendment will have to tackle the floating charge dilemma, i.e., addressing its characterization problem, the attendant priority weakness, and it is restrictive and of limited use by only corporate entities in Sierra Leone. It then becomes imperative for the fixed and floating charge to be reformulated, and the distinction abolished as was done by the courts and eventually the PPSA statutes in the Province of Ontario, Canada and New Zealand.[1045] In this sense, there may not be a need to amend the BLA in the fashion of Article 9, wherein the constitutive elements of the floating lien will have to be introduced. The unfortunate effect of such a reformulation will, however, be the existence of two types of floating security devices in Sierra Leone. One which will still be considered an equitable security device under the Companies Act 2009 in the pre-BLA law, and the reconstituted continuing security interest under an amended BLA.

If, however, the mere reconstitution of the floating charge under the BLA leads to further confusion in the overall PPSL framework, the other option will be to amend the BLA incorporating

[1045] See *Canadian Imperial Bank of Commerce v. Otto Timm Enterprises Ltd.,* (n 997); Ziegel and Denomme (n 52) 127–130, § 11.4; Personal Property Securities Act 1999 (n 77), s 40 (4); Gedye, 'The New Zealand Perspective' (n 77) 118–119.

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all the constitutive elements of the floating lien. Based on the drafting of Article 9 and contribution by scholars, the effectiveness of a continuing lien is recognized based on the effectiveness of a security interest in; i) after-acquired property, ii) future advances, and iii) proceeds.[1046] The revised Article 9 consequently consolidated this view.[1047] The option, therefore, of amending the BLA to fit within the Article 9 scheme will be quite justifiable. The amendment will mean a new form for encumbering circulating and future property to be introduced in Sierra Leone. In a legal framework where two-tier system exists, perhaps the introduction of a completely new security device will reduce the confusion between the BLA and non-BLA regimes. This will however add to the complexity and compartmentalization. The ultimate panacea as aforesaid can only be found in a well-considered comprehensive reform.

The discussion on the floating security dilemma was followed by the attempt to place PMSI within and outside the BLA regime. The rationale for the introduction of the PMSI is well established in existing secured transactions law literature. The main argument rests on utility to minimize the adverse effects of a secured creditor's monopoly, usually a bank with a lending relationship with the borrower. However, by failing to fully constitute the floating lien in the BLA, the introduction of the PMSI becomes redundant. It will only help limit or curtail the monopoly of an aggressive lender who adopts the combined floating charge and negative pledge approach. This will be a burdensome approach, one that can be defeated by clever unrestricted retained title financing not regulated by the OFSA, or by another financial institution providing title financing outside of the BLA. Therefore, a purchase money creditor will be required to register the PMSI

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[1046] Note that the fourth requirement under Article 9 would not be necessary in Sierra Leone, as there was no such rule in Benedict v Ratner prohibition Clark (n 886) 10–12; Tajti, *Comparative Secured Transactions Law* (n 1) 178.
[1047] Uniform Commercial Code (n 374), § 9-205; *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), Official Comment 2 to § 9-205; also see §§ 9-201 and 9-204.

twice, out of an abundance of caution. In any case, the air of confusion makes a comprehensive reform an imperative.

4.3 The Two-Tier PPSL System in Sierra Leone and the Legal Parallelism Problem

The enactment of the BLA without repeal or amendment to the existing legislations and PPSL framework has led to the simultaneous existence of two systems of secured credit in Sierra Leone. It has already been argued herein that the BLA is a secured transactions law and introduces a whole system of its own, based on the unitary functional approach in Article 9. As such, an argument that the BLA is merely an industry specific legislation addressing specific issues within a singular framework, for example, consumer protection, cannot be sustained. In this respect, the BLA is not a special legislation dealing with a specific issue, for instance addressing banking NPLs. Therefore, the argument herein departs from Dubovec and Osei-Tutu's view on the Ghana B&L, seen as a hybrid legislation, being partly secured transactions law and additional regulatory legislation with respect to banking in Ghana.[1048]

The two-tier system is fundamentally and inherently conflicting, counterproductive and inefficient. The BLA forms an additional layer to the prior system, and the two systems exist exclusive of the other, and the one system precludes the other.[1049] The prior framework is based on the formal approach, which has a closed list of security devices and recognizes the strict dichotomy between trade and lenders credit.[1050] On the other hand, the BLA adopts the functional approach,

[1048] See 3.1 herein; also see Dubovec and Osei-Tutu (n 1) 106.

[1049] To a large extent, the transactions under the BLA will be governed by the said Act, since it adopts a unitary framework, from attachment and effectiveness of a security interest, perfection, priority rules and enforcement. However, because the BLA lazily adopts the fixed and floating charge, and further retains receivership, this opens up the BLA framework to the application of the Companies Act 2009; see Borrowers and Lenders Act, (n 9), s 1 definition of 'security interest'.

[1050] As a way of reminder, a 'lender credit' refers to 'transactions whose legal form is that of a loan of money, whether or not the loan is associated with a particular purchase'; and 'vendor credit' refers to 'other transactions that are not legally loans, but contracts for the sale or hire of goods, such as hire-purchase and credit sales agreements'. Crowther and others (n 11) 13, para 1.2.2.

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with the unitary notion of personal property security. The BLA also adopts the notice filing system made possible by the introduction of a Collateral Registry. Invariably, lenders and borrowers will be caught in a complex web of superfluous rules to comply with, and increased transaction costs. The cost will be passed on to the borrowers in terms of higher interest rates and shorter term loans to limit the risk of non-payment. Lenders will also be tempted to over-collateralize as part of their risk mitigation.

In the US, for example, in the 1962 version of Article 9 the 'Note' to the 'Policy and Scope' section stated that "the adoption of this Article [9] should be accompanied by the repeal of existing statutes dealing with conditional sales, trust receipts […] and generally statutes regulating security interests in personal property".[1051] The reason for the caution on the repeal of existing statutes made sense for non-expert legislators since a new approach has been adopted and existing statutes on the independent security devices will conflict with the new law. However, lawmakers are not the best legal or reform experts, and therefore, chances were not taken. A stark difference from the BLA reform in Sierra Leone, where the existing statutes were maintained without much consideration for repeal or refinements.

In the early days of the reform in the US, even when parties attempted to circumvent the applicability of Article 9 by resorting to pre-U.C.C. language, the courts interpreted the conduct as intention to create a security interest under Article 9. In the case of *Tilghman Hardware, Inc. v. Larrimore*,[1052] the court held that the use of pre-UCC language for conditional sales is demonstrative of the parties' intent to create an Article 9 security interest.[1053] The *Tilghman Hardware* case involved the credit sale of a Chesapeake Bay skipjack (a working sailboat),[1054] and

[1051] See Note to § 9-102 (2), Uniform Commercial Code (n 374) [1962]; 604.
[1052] *Tilghman Hardware, Inc v Larrimore* (1993) 628 A 2d 215 (Court of Appeals).
[1053] See the synopsis of ibid 215; White and Summers, *Uniform Commercial Code* (n 90) 10, § 30-2, fn. 2.
[1054] *Tilghman Hardware, Inc. v. Larrimore* (n 1052) 216.

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the Maryland Court of Appeal in deciding on the sole issue of 'whether the deferred portion of the purchase price was secured by a security interest […], or whether the transaction was an unsecured sale on credit' held that 'the fact that the Agreement employs language invoking concepts that are more appropriate to a pre-U.C.C. conditional contract of sale does not prevent the Agreement from creating a security interest governed by CL Title 9".[1055] Unfortunately in Sierra Leone, no such repeal was done. If anything, the BLA rather imported pre-BLA concepts, including the fixed and floating charge, blurring the lines to distinguish the two systems.

4.3.1 Spotting the Differences in the Two-Tier PPSL Framework in Sierra Leone

The discussion on the differences between the prior PPSL framework and the BLA will continue in this section. Apart from the conceptual difference in the approaches adopted by the two systems, that is, the fundamental divide between the BLA and Non-BLA systems, there are other subtle yet crucial differences which will affect the use of personal property as security for a loan. First, the two systems employ two different sets of legal concepts, terminologies in the classification of personal property as gleaned from the definition of terms, and the prior system case law.[1056] Second, there exist different rules for the creation and effectiveness of security interests under both systems, with a further introduction of a higher level of borrowers' protection in the BLA, not found in the non-BLA system. Third, the BLA system has adopted the notice filing regime, whilst the non-BLA employs transactional filing with multiple registries and registers. Fourthly, both systems operate different rules of priorities, with the BLA adopting a less complex scheme found in the PPSAs Article 9 based approach. Finally, different sets of rules govern enforcement and realization of security interest. It will be superfluous to discuss the highlighted issues since they have been previously examined. Therefore, the following section will look at

[1055] ibid 218, 219.
[1056] See 3.2.1 herein; also see Borrowers and Lenders Act, (n 9), s 1.

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how to address the conflict within the two systems and how special interpretative tools will help resolve the seeming conflict.

4.3.2 Conflict of Laws, Seeming Supremacy of the BLA, and the BLA as *Lex Specialis* - the Cape Town Convention Paradigm

The existence of the two systems is a recipe for conflict and will clearly lead to legal uncertainty. For example, banks acting as lenders are obligated to comply with the BLA registration requirement and the Companies Act 2009 to register a security interest or charge respectfully, and also contend with their different rules dealing with priority.[1057] Banks and other licensed financial institutions engaging in secured lending may either be forced to comply with both regimes to secure priority, thereby increasing transaction costs and lowering access to credit; or parties may select one of the two regimes as the applicable law to the secured transaction, essentially betting on possible loss of priority. It, therefore, becomes a choice of law issue, albeit an internal choice of law dilemma. Parties (including corporate and non-corporate firms) are essentially compelled to comply with non-BLA legislations, e.g., Companies Act 2009, Bills of Sale - Cap 241, when encumbering assets or taking security over collateral.[1058] On the other hand, the BLA framework is not compelling, i.e., non-compliance does not necessarily invalidate all the transactions, but such non-compliance deprives the security interest of effectiveness against third parties.[1059] In any case, the status quo is neither ideal nor efficient. The aim of this section therefore is to find a path for addressing the existing conflicts, and the seeming appearance of supremacy of the BLA. This will be done by looking at the conception and operation of the Cape Town Convention on International Interests in Mobile Equipment and Aircraft Protocol (the 'Cape Town

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[1057] See 2.3.1.3 herein for registration and priorities for Pre-BLA corporate charge and BLA security interest respectively.
[1058] See some of the invalidating/imperative requirements under the following: Companies Act 2009 (n 387), s 170 for example; Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), ss 7, 8 and 9.
[1059] Borrowers and Lenders Act, (n 9), s 51.

Convention'),[1060] especially the International Registry, and how it can provide the basis of justifying the special status of the BLA since the Convention operates an international registry that is parallel the national registries of member states.[1061] If the special status is accorded to the BLA, then the section will also argue for the use of *lex specialis* as an interpretative tool to limit the conflict between the BLA and non-BLA framework.

In terms of dealing with conflicts and the supremacy of the BLA, in the enforcement of a lender's rights, the BLA provides that 'where there is a conflict between […the BLA] and other law in relation to the enforcement of a lender's right, […the BLA] shall prevail.[1062] This supremacy in enforcement rights of the lender in the BLA must be read together with section 51 of the BLA which states that: "Security interest registered in another registry other than the Registry established under this Act shall not render security interest effective against third parties".[1063] What then is the effect of these provisions? On the one hand, the effect of these provisions is minimal in that 'security interest' as a term of art is found only in the BLA, hence its use and effect can only be within the remits of the BLA. If, however, the constitutive elements (devices) of the BLA's security interest are said to have been accorded priority, such an argument will be fundamentally flawed, since a lender within the BLA must ensure compliance with the non-BLA legislations. For example, a lender under the BLA cannot fully employ the fixed and floating charge without compliance with the creation and registration regime of the Companies Act 2009.

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[1060] International Institute for the Unification of Private Law (UNIDROIT), Diplomatic Conference to adopt a Mobile Equipment Convention and an Aircraft Protocol, Cape Town, South Africa, 29 October - 16 November 200 the texts of the Convention and Protocol are reproduced in this issue of Unif. L. Rev., pp. 132 and 184, respectively; UNIDROIT (n 82); Sierra Leone is a contracting party, having acceded to the Convention on the 26th July, 2016, see 'Declarations Lodged by the Republic of Sierra Leone under the Cape Town Convention at the Time of the Deposit of Its Instrument of Accession' <http://www.unidroit.org//status-2001capetown?id=2036> accessed 17 August 2017.
[1061] See below for the justification in using the Cape Town Convention as the model to resolve the legal parallelism problem in Sierra Leone.
[1062] Borrowers and Lenders Act, (n 9), s 38 (7).
[1063] ibid, s 51.

It appears that a literal interpretation of sections 38(7) and 51 of the BLA will lead to absurdity and uncertainty. This Supreme Court in Sierra Leone has offered an authoritative view on the use of the literal interpretation rule when there are conflicting statutes, and that is, the application of the plain words of the statutes, and giving effect to the intentions of Parliament if the statutory construction does not lead to absurdity.[1064] Thus, if the words of sections attributing supremacy of the BLA are applied in their simple and plain meaning,[1065] a legal and practical absurdity is apparent. A different approach then needs to be taken, otherwise the BLA will be taken to enjoy supremacy over the non-BLA framework in whole or with respect to specific provisions, which appears to be the policy intent, i.e., the credit market and the reform only contemplate banks and financial institutions as the provider of secured credit financing. However, a preference for banks only will make the conflict even more pronounced.

This sort of conflicting legal provisions is not unusual in Sierra Leone. For the supremacy of the BLA to be sustained, its proponents may call upon the doctrine of implied repeal in statutory interpretation to cover the whole Act or specific provisions which conflict with other statutes or legal provisions. The Supreme Court, as far as the implied repeal doctrine goes, accepts the view that "where two legislations conflict the legislation of a later date takes precedence, […as] a

[1064] In *PC Dr Alpha Madseray Sheriff II v Attorney-General & Ministry of Justice & 2 Others* (2012) S.C. No. 3/2011 SLSC (Supreme Court), the Supreme Court, per U.H. Tejan-Jalloh, Chief Justice, in addressing the conflicting provisions of the Chieftaincy Act 2009 and the Constitution confined itself to two rules of interpretation namely the literal and the purposive rules. "The literal rule of interpretation is to suggest the application of the basic and simple method of interpretation of a statute thereby giving legal efficacy to the statute; and in *Sussex Peerage Case* (1844) 11 Cl & Fin 1844, Tindele C.J. had this to say – "If the words of a statute are so plain and unambiguous then no more is necessary than to expound them in the sense. The words in themselves in such a case best declare the intention of the law giver"; the Supreme Court in *P.C. Dr. Alpha Madseray Sheriff II v Attorney-General & Ministry of Justice & 2 Others* continued by stating: "The Court usually takes a positive approach to the intention of the law giver. Lord Simmons in Major and St. Meltons Rural District Council 1952 A.C.189 P. 191 said: "We sit here to find the intention of Parliament and of Ministers and carry it and we do this better by filling the gaps and making sense than opening it to destructive analysis". "Coming home, the literal rule of interpretation was adopted by Livesey Luke C.J. (deceased) in Chanrat and Co. vs Palmer 1970 - 71 ALR (SL) 391 at 404" when he said: "In my judgment if the words used in a statute are Plain and unambiguous the court is bound to construe them in their ordinary sense having regard to the context".

[1065] Borrowers and Lenders Act, (n 9), ss 38 (7) and 51.

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general principle. [I]t must be noted however that this general principle is circumscribed by another principle that where as regards the opposing provisions one is general and the other specific, the specific takes precedence".[1066] The Supreme Court decision in *All Peoples Congress v. Nasmus and Others*, approved the implied repeal and replacement doctrine in Sierra Leone.[1067] However, given that the BLA piggybacks on non-BLA statues, it will be difficult to make a robust claim of an implied repeal of previous Acts, or sections in those Acts.

In *P.C. Dr. Alpha Madseray Sheriff II v Attorney-General & Ministry of Justice & 2 Others*,[1068] the Supreme Court had to consider a submission canvassed on whether a section in the Constitution by implication repealed a conflicting provision in the Provinces Act, Cap 60; i.e., section 25 (1) of the Provinces Act Cap 60 of the Laws of Sierra Leone is inconsistent with Section 72 (4) of the Constitution 1991 Act No. 6 1991, and the latter impliedly repeals the former. In the case of *All Peoples Congress v. Nasmus and Others,*[1069] the court had asked the following important question: 'Is the later act so inconsistent with or repugnant to the provisions of the earlier act that the two cannot stand together?'[1070] In *P.C. Dr. Alpha Madseray Sheriff II*, the Supreme Court, per U. H. Tejan-Jalloh C.J., was of the view that "before coming to the conclusion that the 'later act to some extent modifies something found in the earlier act' the court must be satisfied that the two

[1066] *Faiad and Faiad v Attorney General and Minister of Justice* (2010) S.C. 6/2009 SLSC (Supreme Court), per Justice Semega-Janneh, J.S.C.
[1067] *All Peoples Congress v Nasmus and Others* S.C. 4/96 SLSC (Supreme Court), "I find Mr. Serry-Kamal's argument attractive and I will agree with him that section 133 (1) of the Constitution has impliedly repealed and replaced sections 3, 4 & 5 of Cap. 23", per A. S. Timbo, J.S.C.
[1068] *P.C. Dr. Alpha Madseray Sheriff II v Attorney-General & Ministry of Justice & 2 Others* (n 1064).
[1069] *All Peoples Congress v. Nasmus and Others* (n 1067).
[1070] In ibid, per Joko-Smart JSC, approving the passage in Craies on Statutes, 7th Edition, Fifth Impression, 1985 at p. 366 thus: "Where two Act are inconsistent or repugnant, the latter will be read as having impliedly repealed the earlier. The court leans against implying repeals unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. Special Acts are not repealed by general Acts unless there is a necessary inconsistency in the two Acts standing together. Before coming to the conclusion that there is a repeal by implication the court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the latter, imply the repeal of an express prior enactment - i.e. the repeal must, if not express, flow from necessary implication".

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acts cannot be read together. Further, the court usually leans against implied repeal".[1071] The prevailing view therefore is that the courts are less receptive to employ the implied repeal doctrine.

The BLA cannot be taken to have repealed by implication conflicting laws (statute versus statute) on credit security, including the Companies Act 2009 and Bills of Sale Act, Cap 241. The very notion of security interest in the BLA relies on their conception in those statutes, and the BLA only defines security interest by incorporating the existing known security devices like the fixed and floating charges in the Companies Act 2009. Therefore, where the true conflict lies for example in section 51 of the BLA on the validity of a security interest against third parties, and on registration and priority in the Companies Act 2009 and Bills of Sale Act 1878, an implied repeal will lead to absurdity. In this instance, the approach taken in *P.C. Dr. Alpha Madseray Sheriff II* case, wherein the courts will be unwilling to invoke the repeal by implication doctrine will be

[1071] In reaching the conclusion in *P.C. Dr. Alpha Madseray Sheriff II v Attorney-General & Ministry of Justice & 2 Others* (n 158), U. H. Tejan-Jalloh C. J. said: "In dealing with this submission, I shall first go on to deal with the doctrine of the interpretation of statute generally, as far as it is germane and relevant to the submission. I shall start by referring to Maxwell on Interpretation of Statute, twelfth edition page 191 on implied repeal. It states: - 'A later statute may repeal an earlier one either expressly or by implication is not favoured by the courts. For as much […] therefore earlier and later statute can reasonably be construed in such a way that both can be given effect to, this must be done. If as with all modern statute the later act contains a list of earlier enactment which it expressly repeals an omission from a particular statute from the list will be a strong indication of an intention not to repeal the statute'. This principle is also recorded in Craies on Statute 7th edition page 366, It states: 'That where two statute or acts in question are inconsistent the latter will be read as having impliedly repeal the earlier act, unless they are plainly repugnant to each other effect cannot be given to both of them at the same time. In other words when read and interpreted together they cannot produce the same intention and result Also a special act cannot be repealed by a general act'. The proposition of law on implied repeal was laid down as far back as the 19th century in the case of Westharm Church Warden v. Fourth City of Montreal Building Society 1892 which was quoted with approval in the Supreme Court case of All Peoples Congress v. Nasmus and Others S.C. 4/96 unreported: "Is the later act so inconsistent with or repugnant to the provisions of the earlier act that the two cannot stand together?" In the Privy Council case of Canada Southern Railway Company v. International Bridge Co. 1883 A. C. 723. The Privy Council stated thus: "Where two acts of a legislature are to be read together the court must construe every part of each of them as if it has been contained in one act unless there is some manifest discrepancy making it necessary to hold that the latter act has to some extent modified something found in the earlier act". Similarly, the CJ said "It is trite that general acts or provision does not impliedly, repeal a special Act or Provision. See Craies on Interpretation of Statute, […] 366. And the case of Kutnar vs. Philips 1891 2 QBD 267 which was quoted with approval in Aberdeen Suborban Tramways Company vs Aberdeen Cooperation 1927 SC683. The converse is however true that a statute enacted on a subject containing general terms and a later statute is enacted on the same subject with restriction and condition on the general term, the later special statute is deemed to have impliedly repeal the former or general statute. Again, see Craies on the Interpretation of Statute […], 373".

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compelling if not binding. If the repeal view is upheld by the courts, then there will be a complete vacuum in the law.

Clearly, the potential to apply the implied repeal doctrine may be lukewarm, and if the courts are minded to apply the doctrine, such an application will lead to absurdity and legal uncertainty. In the middle of this interpretation quagmire, an opportunity opens for the treatment of the BLA as a special statute, *lex specialis*. The doctrine of *lex specialis derogat legi generali* has been alluded to as *obiter dicta*, and consequently approved by the Supreme Court in the following cases: *Faiad and Faiad v Attorney General and Minister of Justice;*[1072] *All Peoples Congress v. Nasmus and Others*;[1073] and in *P.C. Dr. Alpha Madseray Sheriff II v Attorney-General & Ministry of Justice & 2 Others*.[1074] The referenced cases approved the passage on *Craies on Statutes*, in that 'Special Acts are not repealed by general Acts unless there is a necessary inconsistency in the two Acts standing together'.[1075] Therefore, the idea of invoking specificity and special rules to interpret and apply the BLA will not be completely out of place.

There is a paradigm to be followed in the appeal to special status in modern secured transactions law. The Cape Town Convention and Protocols provide a system to apply a *sui generis* substantive law instrument, which is not a unification of municipal laws, but an alternative transnational framework that does not interfere with existing national security interests' provisions, but co-exist with national law.[1076] The Cape Town Convention is an ambitious and creative project within the field of private commercial law, which provides an international legal

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[1072] *Faiad and Faiad v Attorney General and Minister of Justice* (n 1066).
[1073] *All Peoples Congress v. Nasmus and Others* (n 1067).
[1074] *P.C. Dr. Alpha Madseray Sheriff II v Attorney-General & Ministry of Justice & 2 Others* (n 1064).
[1075] William Feilden Craies and SGG Edgar, *Craies on Statute Law* (Sweet & Maxwell 1985) 366.
[1076] Karl F Kreuzer, 'Jurisdiction and Choice of Law under the Cape Town Convention and the Protocols Thereto' (2013) 2 Cape Town Convention Journal 149, 149; Goode, 'The Cape Town Convention on International Interests in Mobile Equipment' (n 105) 1–15; Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment* (n 8) 16.

regime for security and related interests in aircraft objects, railway rolling stock and space assets. The key benefit of the Convention and Protocol is its utility in reducing legal uncertainty caused by differences in national laws affecting security interests in mobile equipment. Overall, the reduced uncertainty increases access to finance at reasonable cost for developing countries.[1077] Similarly, the BLA has failed to unify the internal municipal law on secured credit and, therefore, its *sui generis* or special application is an appealing prospect.

The Cape Town Convention is designed to solve the problem of "the widely differing approaches of legal systems to security and title reservation rights, engendering uncertainty among intending financiers as to the efficacy of their rights" in mobile equipment and aircrafts.[1078] One of the objectives of the Convention is the establishment of "an electronic international register for the registration of international interests which will give notice of their existence to third parties and enable the creditor to preserve its priority against subsequently registered interests and against unregistered interests and the debtor's insolvency administrator".[1079] In essence, the Cape Town Convention operates as a special supranational registration system that coexists but hovers over national security interests' frameworks, respecting and leaving intact those internal transactions and legal provisions.

One of the major components of the Cape Town Convention is the International Registry,[1080] and the system of registration of international interests, and of prospective

[1077] See Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment* (n 8) 1, 13–18, for more discussion of the history and objectives of the Convention "A new international regimen governing the taking of security in high value mobile assets: the legal and economic implications", Unif. L. Rev., 1999-2, a special issue devoted to the projected Convention and Protocols; also see the following; Roy Goode, 'Transcending the Boundaries of Earth and Space: The Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment International Activities: Unidroit' (1998) 3 Uniform Law Review 52.

[1078] Goode, 'The Cape Town Convention on International Interests in Mobile Equipment' (n 105) 1, 3.

[1079] ibid.

[1080] UNIDROIT (n 82), art 1 (p) defines the International registry as 'the international registration facilities established for the purposes of this Convention or the Protocol'; see ch IV, arts 15 and 16; Goode, *Convention on International*

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international interests, registrable non-consensual rights or interests and notices of national interests.[1081] This is separate from the national/municipal law that governs dealing with security interests in personal property in each contracting state. By the structuring of the Cape Town Convention, it creates *sui generis* 'international security interests',[1082] separate, distinct and independent of security devices under national law, referred to applicable law in the Convention.[1083] The municipal law is only "applicable by virtue of the rules of private international law in the forum state"—i.e., the choice-of-law rules of the forum state.[1084] Applicable law is deferred to on matters including the contractual authority of the debtor, contractual defences, tortious liabilities, authority of agents and officers.[1085] Thus, although the Cape Town Convention piggybacks on applicable law on general matters, it operates a *sui generis* international security interests regime which hovers over national systems. Crucially both the international and national security interests' registries operate without friction in the Convention member states.

In the case of *Ireland Ltd. & Ors. V. Directorate General of Civil Aviation & Anr.*,[1086] the High Court of Delhi, India noted that the "Convention while protecting the interest of the creditors seeks to give due deference to the National Legal Regime, i.e., the Municipal Law of the Contracting State. Therefore, logically and, quite clearly, the Convention does not affect National Legal Regimes which concern and are relatable to criminal conduct and tortious liability".[1087]

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Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment (n 8) 77–87, paras 2.117 - 2.138.

[1081] UNIDROIT (n 82), arts 18 to 20; Goode, 'The Cape Town Convention on International Interests in Mobile Equipment' (n 105) 1–3; see Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment* (n 8) 38, paras 2.41 - 2.42.

[1082] UNIDROIT (n 82), art 2 (1).

[1083] ibid, art 5 (3).

[1084] ibid, art 5 (3).

[1085] See Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment* (n 8).

[1086] *Awas 39423 Ireland Ltd & Ors vs Directorate General of Civil Aviation & Anr - 19 March, 2015*.

[1087] ibid 21, para 15.1; per Rajiv Shakdher, J.

Courts of contracting states are encouraged to interpret the Convention in a way to ensure its uniformity, certainty and predictability,[1088] and the court when addressing the main issue of de-registration and re-possession of an aircraft object opined that it "cannot interdict the process of de-registration on the nebulous ground of equity as it would be contrary to the provisions of the Convention and Protocol, to which, India is a party", in view of the uniformity, certainty and predictability obligation.[1089] The view of the Indian Court reflects the mainstream view, i.e., deference by national courts objective of the international system. It further supports the claim that the Cape Town Convention floats over the national systems even though it coexists with them by utilizing national applicable law chosen by parties.

The proposal on dealing with the BLA, therefore, is to adopt a similar approach to allow for the BLA to co-exist with prior law; and since there is no express legislative framework to adopt such a proposal, the court can revert to the statutory interpretation rules. The argument therefore is that a literal application of the supremacy sections in the BLA will lead to conflict, absurdity and uncertainty with economic consequences. Since the BLA applies only to banks and financial institutions, the parameters exist for the legislation to be treated *lex specialis*, leading to the use of a special interpretative tool. Where for example there is need to revert to non-BLA law, as in the adoption of fixed and floating charges, then, the *sui generis* nature (i.e., international character) of the Cape Town Convention and applicable law interrelation can be used.[1090] This also means the court can revert to non-BLA, as the applicable law, for more general matters. Admittedly, this may not be the ultimate solution and may not absolve the two-tier system of continuing conflicts and legal uncertainty in the short term. However, the PPSL framework may continue to be less

[1088] UNIDROIT (n 82), art 5(1).
[1089] *Awas 39423 Ireland Ltd. & Ors. vs Directorate General of Civil Aviation & Anr - 19 March, 2015* (n 1086), para 25.3.
[1090] UNIDROIT (n 82), art 5 (3).

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predictable, complex, compartmentalized and opaque. Thus, the proposal to deem the BLA *lex specialis* will only be a quick fix in anticipation of a comprehensive reform.

4.4 Conclusion

The case for a comprehensive reform is compelling and seems inevitable if the economic objectives of the BLA are to be met. Herein, I have argued that the unique features in the BLA, namely the high level of regulatory intervention and consolidation of the banking oligopoly, the floating security dilemma and existence of a two-tier system of secured credit is inefficient and defective. The secured transactions framework therefore is fraught with legal uncertainty and set to occasion high cost to access credit finance. The reform process itself was fundamentally flawed, and the bank-based approach unworkable. As argued herein, a short-term placebo or 'fire-brigade' option (quick-fix solution) will be to apply the BLA as a *lex specialis* until it is replaced by a more comprehensive law. It has been shown that adopting the functional approach within a unitary system is the approach of choice suitable to open up access to credit finance for all.

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Chapter Five

5. Agriculture Credit Finance in Sierra Leone – Opportunities for Growth Post Reform

Agriculture credit finance is vital in enhancing agricultural productivity, that is, ensuring farmers get the farm equipment, farm materials like fertilizers, seeds, investments in breeding, feeds etc., needed to boost their yields.[1091] Agriculture credit finance is not a mainstream secured transactions law topic, as consensual security in agricultural produce and materials could be taken in the same way as in other security interests. This notwithstanding, countries recognize the importance of agriculture in their economies and often enact special legislations to deal with agricultural credit,[1092] or have unique provisions relating to agriculture in their secured transactions laws.[1093] Outside the interventions bordering on providing the conducive legal framework, governments' engagement in agriculture credit finance is often synonymous to special funding schemes in which lending capital is ring fenced and loaned to farmers on absolutely no or low interest rates.[1094] Most of the schemes have proven to be unsustainable, as the key drive should be mainstreaming agriculture credit finance, i.e., connecting it to the main financing systems, whilst making available special protective provisions and incentives to attract more financiers, creditors in the sector.

With this in mind, this chapter looks at agricultural credit finance as one of the three areas with growth potentials in expanding access to finance following the enactment of the BLA in Sierra

[1091] See World Bank, 'Scaling up Access to Finance for Agricultural SMEs Policy Review and Recommendations' (2011) 71320 <http://documents.worldbank.org/curated/en/2011/10/16528471/scaling-up-access-finance-agricultural-smes-policy-review-recommendations> accessed 5 February 2016.

[1092] See specific credit financing legislations in England, i.e., the Agricultural Credit Act 1923; Agricultural Credit Act 1928 and 1932; and in the US, the 'Provisions of the Agricultural Credit Act of 1923' (1923) 2 Congressional Digest 215.

[1093] See Uniform Commercial Code (n 374), and in dealing with the applicability of Article 9 to agricultural lien, and priority to in crop security interest, for example, § 9–334 (i).

[1094] Nicholas Budd, 'Untying the Gordian Knot: Farmers, Banks, Insurers, Warehouse Receipts, Commodity Exchanges, Collateral Managers and Access to Credit' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Research Handbooks in Financial Law 2015) ch 167.

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Leone. This chapter firstly highlights the economic importance of agriculture in Sierra Leone, and secondly probes how the adoption of functionalism in the BLA will enhance access to agriculture credit finance. The chapter traces the history of agricultural financing in Sierra Leone, its legal development which is linked to English law, and then proceeds to assess the opportunities in the new law with respect to widening the scope of utilizing present and future agricultural assets for secured credit financing. This chapter further examines the various agriculture financing security devices, including chattel mortgages, charges and where applicable pledge of crops, livestock and farm machinery, collectively referred to as farm assets or property. It assesses their viability and adaptability to the unique settings in Sierra Leone drawing insights from the US and England.

5.1 Agriculture and the Sierra Leone Economy

Agriculture, including fisheries and forestry, overtime has been the principal economic activity in Sierra Leone, engaging the majority of the citizenry as their source of livelihood, and the mainstay of the national economy.[1095] Agriculture accounts for more than half of the country's gross domestic product (GDP).[1096] Despite growth in other industries, (mainly mining and mineral extraction, services including banking, small-scale manufacturing), agriculture and growth in its connected industries (hereinafter: "agro-businesses") offer the best prospect of ushering in economic prosperity and the country's ultimate graduation from being a least developed country) to a middle income economy.[1097]

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[1095] 'The Agenda for Prosperity - Sierra Leone's Third Generation Poverty Reduction Strategy Paper (2013 – 2018)' 31.

[1096] The statistics on contribution of the agriculture industry is mixed but largely reflects as the leading contributor to Sierra Leone's GDP. See 'CIA: The World Factbook: Sierra Leone' (2014) 52 CIA World Fact Book 660; 'The Agenda for Prosperity - Sierra Leone's Third Generation Poverty Reduction Strategy Paper (2013 – 2018)' (n 6) 31; 'National Sustainable Agriculture Development Plan 2010-2030- Sierra Leone's Comprehensive African Agriculture Development Programme' 10; 'Sierra Leone Country Strategic Opportunities Programme' 2.

[1097] See 'The Agenda for Prosperity - Sierra Leone's Third Generation Poverty Reduction Strategy Paper (2013 – 2018)' (n 1095).

The main form of engagement in the agriculture and agro-business industry is subsistence farming.[1098] This has led to a gamut of policy considerations by successive governments to transform the sector from smallholdings to commercialized farming, and thereby channel national economic growth and development. A quick examination of the policy considerations and projects will be carried out bearing in mind that in governance, the political and socio-economic policy considerations directly influence the legislative process and legal framework. This focus on policy is mainly to bring out the economic justification for agricultural financing following the 2014 PPSL reform in Sierra Leone.

Increasing agricultural productivity with value addition has been a key object of the Government of Sierra Leone (hereinafter: "**GoSL**") since 2012. In the 'Agenda for Prosperity',[1099] details of the pillars and the steps needed to be taken in order to attain a middle-income status were identified.[1100] The GoSL's vision of attaining the said middle income status by 2035 is supported by the strategy and policy to:

> Build a stable economy, founded on private sector-led growth, and to diversify activity across several competitive sectors, [...]. The longer term economic growth target is for annual GNI per capita growth of 4.8%, that is annual growth in total GNI of 6.7% […] Diversified economic growth will require greatly strengthened infrastructure […] *Transformation of agriculture will combine smallholder commercialisation with larger-scale agro-based production*.[1101]

The move from traditional subsistence agriculture, with non-existent agro-businesses for value addition, to an efficient and commercialized system requires technical knowhow, mechanization and most importantly financing. It is recognized that there is an access to credit challenge in the

[1098] See Joachim Bald and Peter Schröder, 'Agricultural Finance in Sierra Leone: Product Innovation and Financial Access – Agricultural Value Chains – Cassava, Rice, Poultry and Cocoa' (2012).
[1099] 'The Agenda for Prosperity - Sierra Leone's Third Generation Poverty Reduction Strategy Paper (2013 – 2018)' (n 1095).
[1100] The Agenda for Prosperity Pillars include: Diversified Economic Growth; Managing Natural Resources; Accelerating Human Development; International Competitiveness; Labour and Employment; Social Protection; Governance and Public Sector Reform and Gender and Women's Empowerment ibid xiv–xvi.
[1101] ibid xiii. [Emphasis mine]. Note that GNI means 'Gross National Income'.

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sector,[1102] and several 'baby-step' projects have been undertaken to alleviate the financing constraint.[1103] Considering the state of affairs in 2016, clearly the constraint is still evident, and this chapter looks at viable options with respect to the PPSL framework's contribution towards increasing access to credit finance in the sector.

With respect to agriculture financing schemes outside the PPSL framework in Sierra Leone, it must be underscored that series of projects directed towards commercializing agriculture and agro-businesses have been undertaken. Further, it is noted that amidst the prevalent subsistence agricultural engagement, the private sector, led by foreign investment, invested heavily in agriculture, especially in cash crop, i.e., oil palm, sugar cane, rubber and cocoa, production and export from 2008 until the economic slowdown in 2014.[1104] These companies backed with

[1102] Beatrice Chaytor, 'The Commercialisation of Agriculture in Sierra Leone: Options for the Legal and Regulatory Framework' 19 <http://www.fao.org/docs/up/easypol/forum/31/31_The_Commercialisation_of_Agriculture_in_Sierra_Leone_final._1doc%201%20.docx> accessed 27 January 2016.

[1103] The Government of Sierra Leone supported by IFAD [International Fund for Agricultural Development] 'over 50 Financial Services Associations (FSAs) have been established in rural areas to increase farmers' access to credit'. ibid 31.

[1104] For instances 'the Addax Bioenergy Project, a €400 million investment in a "greenfield" project in Sierra Leone. It concerns the development of a 10,000 ha sugar cane plantation, a fermenter and distillery for ethanol, a biomass power plant, and the related infrastructure'. Ron Bisset and Paul Driver, 'Addax BioEnergy SL (ABSL)- 2013 Annual Independent Public Environment & Social Monitoring Reports' (1 July 2014) 3 <http://www.addaxbioenergy.com/en/the-makeni-project/monitoring-reports.php> accessed 5 February 2016 For instances 'the Addax Bioenergy Project, a €400 million investment in a "greenfield" project in Sierra Leone. It concerns the development of a 10,000 ha sugar cane plantation, a fermenter and distillery for ethanol, a biomass power plant, and the related infrastructure.'; EJOLT, 'Socfin Agricultural Company Sierra Leone Ltd Oil Palm Plantation in Malen Chiefdom, Pujehun District, Sierra Leone' (*Environmental Justice Atlas*, 24 June 2014) <http://ejatlas.org/conflict/socfin-agricultural-company-sierra-leone-ltd-oil-palm-plantation-in-malen-chiefdom-pujeun-district-sierra-leone> accessed 5 February 2016 Also another company Socfin SL in 2011 'obtained a lease of 50 years for 6500 ha of fertile land in Malen chiefdom, Pujehun district, south Sierra Leone. The company, a member of the massive French group Bolloré, intended to develop the land for oil palm and rubber plantations.' The Socfin investment however got embroiled in a massive land grabbing accusation and social upheaval attracting initial international condemnation and negative reporting. In a criminal case that followed, the local political leadership were charged to court and found guilty of various criminal offences committed against the Company. ; 'Goldtree | 100% Pure Unrefined Palm Oil for That Home Cooked Taste' <http://www.goldtreeholdings.com/> accessed 5 February 2016. Another recent trend is the African private equity firm (Phatisa) investment in Goldtree (SL) Limited which engages in the industrial scale production of palm oil from its oil palm agricultural plantation. ; 'SIVA Group | Home' <http://www.sivagroup.in/home.aspx> accessed 5 February 2016 Biopalm Energy, owned by parent company SIVA Group based in Singapore, is also seeking 80,000 ha in Sierra Leone agricultural investment. ; 'BIO-UNITED LTD – SIERRA LEONE - Bio-United-Case-Study-Final.pdf' <http://r4d.dfid.gov.uk/PDF/Outputs/AECS/Bio-United-case-study-Final.pdf> accessed 5 February 2016 Finally in this short survey of examples is Bio-United investment of about

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international finance faced similar financing difficulties during the course of their operations, albeit on a different scale. Their financing needs, however, appear to be beyond the Government's schemes targeting the subsistence farmers. Therefore, there will be the need to also look at how they can sustain their activities and contribute to economic growth.

The schemes or projects being implemented to achieve a viable, diverse and profitmaking agriculture sector include the Rural Finance and Community Improvement Project (hereinafter: "RFCIP") and the Smallholder Commercialization Programme Global Agriculture and Food Security Programme (hereinafter: "GAFSP").[1105] Note that there are other different projects dealing with technical and sector specific issues. [1106] The focus of this section of this dissertation, however, will be on those projects with access to finance implications. It is recognized that the quality of the other projects in increasing viability and productivity will also help reduce risks associated with agriculture credit and thereby help bring down the cost of financing. For example, the construction of irrigation channels although not directly relating to accessing finance could, however, lower the risk of using crop yields as security for a loan, given the shift from reliance on rainfall to a more efficient irrigation system.

The RFCIP, a pilot scheme in 4 of the 16 administrative districts in Sierra Leone, is one of the access to finance specific projects, supported by the International Fund for Agricultural Development (hereinafter: "IFAD").[1107] The Central Bank of Sierra Leone had supervisory

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USD 2.4 Million in promoting smallholder farmers in developing quality cocoa beans for export to the principal buyer Barry Callebaut, mainly in the most remote and underdeveloped Kailahun District.

[1105] Ministry of Agriculture, Forestry and Food Security, Sierra Leone, 'Projects Under the Ministry of Agriculture' <www.maffs.gov.sl/projects> accessed 18 January 2016.

[1106] The projects include the Agriculture Sector Rehabilitation Project, Agriculture for Development (A4D), Climate Change, Biodiversity Conservation Project, Linking Farmers to Market, Rural and Private Sector Development Project (RPSDP), and the West Africa Agricultural Productivity Project (WAAPP). ibid.

[1107] See Ministry of Agriculture, Forestry and Food Security, Sierra Leone, 'Rural Finance and Community Improvement Project (RFCIP)' <http://maffs.gov.sl/projects/rural-finance-and-community-improvement-project-rfcip> accessed 18 January 2016.

responsibility over the Community Banks (hereinafter: "CBs") and the Financial Services Associations (hereinafter: "FSAs") with respect to the financial regulatory aspects. As per the applicable laws,[1108] the Central Bank is mandated to have such regulatory control, and hence even in agricultural financing we see the deepening of the culture of the bank-led system. With US$ 10 million spent as the grant amount and the project completed in 2014, the Ministry of Agriculture claims that the project's overall outcome was exceptional, with a possibility of US$ 2.15 million additional financing approved.[1109] However, the jury is still out on the concrete impact of the projects on farmers and their access to finance. Within the mind-set of building the financing infrastructure, the completion of the project saw the transformation of the Technical Assistance Agency into the Apex Bank of the 7 CBs that were established, a further 6 CBs in distress were restructured, and 36 FSAs created.[1110]

The closely linked GAFSP project under its 'Access to Finance' ambit was utilized to support the RFCIP, thereby leading to the formation of 15 additional FSAs and 4 more CBs. At the completion of the RFCIP there exist a total of 51 FSAs and 17 CBs.[1111]Although it may be too early to properly examine the success of the aforementioned projects, it is clearly seen that the progress trumpeted by the Ministry is structural, i.e., the establishment of CBs and FSAs to be supported by the Apex Bank. It is worthy to note that given the initial or existing low transaction volume and amounts, (primary borrowers being subsistent farmers), the FSAs and CBs were rightly created to fill the gap which the commercial banks were not incentivized enough to cover. With RFCIP II being conceived and implementation on the way, the actual measure of any success must include not only the structural expansions (the establishment of the FSAs and CBs) on a

[1108] See Banking Act, 2011 (n 892); Other Financial Services Act, 2011 (n 453).
[1109] Ministry of Agriculture, Forestry and Food Security, Sierra Leone (n 1107).
[1110] ibid.
[1111] ibid.

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national level; but more so in the utilization of the credit, and the extended growth of the sector, thereby allowing farmers to utilize present and future farm assets as security for credit.

In spite of the access to finance schemes and projects, the challenges in the agriculture sector are numerous, including the lack of finance and financial services in the main production areas, i.e., in the Provinces.[1112] In the context of the legal framework, the pre-BLA law seriously inhibited the use crops, livestock, future crop or livestock, farming tools/machinery as security for credit due excess formalities, rigidity and compartmentalization of the law. Even if the legal framework before 2014 had allowed for the use of crops and agricultural equipment as security for credit, the formalities and risk of invalidation served as disincentive for the banks, the dominant players in the financing sector. There are, for example, limited banking and financial institutions available in the rural areas to undertake agricultural lending; there is no public or private warehousing system to fill the middle ground if farm products were to be used as security for credit; no processing facilities to ensure value addition and yield preservation; lacking infrastructure to promote physical accessibility to farms and marketing.[1113]

5.2. History and Legal Development of Agricultural Financing in Sierra Leone

With the nexus between the Sierra Leone legal system and English law already established,[1114] it follows that its legal development relative agriculture credit finance must be similarly to English law owing to the colonial history. Therefore, it makes sense to start with the pre-independence analysis, which covers applicable English historical legal landscape. Post-independence, this sub-section proceeds to consider the general law and also customarily law, and

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[1112] 'The Agenda for Prosperity - Sierra Leone's Third Generation Poverty Reduction Strategy Paper (2013 – 2018)' (n 1095) 31.
[1113] See Bank of Sierra Leone, 'National Strategy for Financial Inclusion 2017-2020' (n 68); Bald and Schröder (n 1098).
[1114] See 2.2 herein, and Blackstone (n 359).

how its development has affected agricultural credit financing.[1115] Since the bulk of activities relating to agriculture and agro-businesses take place in the Province, where customary law is applicable to property law except where excluded, the seamless interface between the general law and customary law is important for creating of a pro-financing legal framework.

5.2.1. Historical Development of the English Legal Landscape for Agricultural Financing

At the risk of not repeating the story of Sierra Leone's adoption of English law, it must be noted that prior to 1st January 1880,[1116] there were inadequacies in the legal framework dealing with advancing credit for agricultural purposes in England and neither in Sierra Leone. This significantly meant that no specific law relating to agricultural credit was adopted in Sierra Leone until the introduction of functionalism in the BLA. Indeed, agricultural credit financing may have been possible under the pre-BLA law, but less efficiency given the further steps taken in England to enact sector specific laws since the 1st January 1880, the general cut-off date for the general adoption of English laws in Sierra Leone. In England, after 1880, the Agricultural Credit Act was passed in 1923 to enhance the facilitation, advancement and funding by means of credit for specific agricultural activities considered as improvements on agricultural lands.

As a key provision in that in the Agricultural Credit Act 1923, the responsible government minister was given the prerogative to determine the interest rates payable on an agricultural charge.[1117] Further, the Agricultural Credit Acts of 1928 and 1932 famously allowed for an agricultural charge to operate as a fixed and floating charge, as would charges created by

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[1115] See the Local Courts Act 2011 (n 337); and the Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 (n 370), for exception to property right in the Provinces.
[1116] See Courts Act 1965 (n 145) The section basically provides that 'the statutes of general application in force in England on the 1st day of January, 1880, in Sierra Leone unless expressly excluded by the Constitution and any other enactment'.
[1117] Agricultural Credit Act 1923 (n 1092). See Preamble and s3. The Minister of Agriculture, Fisheries and Food as the nomenclature was at the time.

companies in a debenture.[1118] The idea of using 'farming stock and other agricultural assets' as security to enhance access to credit was ingrained in the 1928 Act.[1119] Whilst the specifics of the Agricultural Credit Acts will not be examined in detail, as well as further agriculture credit laws,[1120] suffice to say that the Acts provided for an advance credit security framework for fixed and floating charges to be taken by a non-corporate farmer in livestock, plants and other intangible rights, whether present and future in recognition of the need to expand access to finance in England. Unfortunately, these provisions and the aforementioned Agriculture Credit Acts are not applicable in Sierra Leone due to their post 1880 enactment dates, and their non-adoption under the Imperial Statute Act, Cap 18.[1121] Without doubt, those statutory provisions would have greatly enhanced the agriculture credit framework in Sierra Leone, addressing some of the formality challenges and doctrinal/definition conundrum found in the Pre-BLA law. Their inapplicability placed the state of the law prior to the enactment of the BLA in Sierra Leone in a less desirable state.

5.2.2. The Customary Law and Agricultural Financing

Customary law[1122] forms part of the pluralistic legal system in Sierra Leone, and it applies mainly in the Provinces, covering 14 of the 16 administrative and political districts.[1123] About 90% of arable land mass in Sierra Leone (850,000 hectares)[1124] utilized for agricultural productivity is

[1118] Agricultural Credit Act 1928 and 1932 (n 1092). See s5, s6 and s7.
[1119] ibid 5(1).the agricultural charge (fixed or floating) as an "instrument in writing to create in favour of a bank […] on all or any of the farming stock and other agricultural assets […] as security sums advanced or to be advanced […]"
[1120] Agricultural Credit Act 1923 (n 1092); Agricultural Credit Act 1928 and 1932 (n 1092) Horticultural Produce (Sales on Commission) Act 1926; Agricultural Mortgage Corporation Act 1956 etc.
[1121] See Imperial Statute Act, Cap 18 of the Laws of Sierra Leone 1960.
[1122] See 'The Local Courts Act, 2011' s 1 <http://www.sierra-leone.org/Laws/2011-10.pdf> accessed 27 January 2016. Customary law is defined to mean 'any rule other than a rule of general law, having the force of law in any Chiefdom of the provinces whereby rights and correlative duties are acquired or imposed in conformity with natural justice and equity and not incompatible, either directly or indirectly, with any enactment applying to the provinces, [...]'.
[1123] See 2.1 herein, and Joko Smart (n 338).
[1124] Beatrice Chaytor, 'The Commercialisation of Agriculture in Sierra Leone: Options for the Legal and Regulatory Framework' 36 <http://www.fao.org/docs/up/easypol/forum/31/31_The_Commercialisation_of_Agriculture_in_Sierra_Leone_final._1doc%201%20.docx> accessed 27 January 2016.

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governed in large part by customary law, including its statutory codification.[1125] Since agricultural productivity is connected to land, it is prudent to briefly highlight the legal regime governing land ownership, i.e., access to land, and how it affects the use of agricultural assets or other personalty connected thereto as security for credit.

Customary law allows for the use of land for agricultural purposes by natives based on family heritage and communal distribution. Ownership is not absolute and hence the land is not easily transferable. Although accessing land for a native may be relatively easier, the communal tenure, governed by customary law makes it unattractive and prone to financing risk. Using the land as security may require consent from the landowner or landowning family (usually represented by the family head),[1126] the consent of the chiefdom (tribal) heads, the political and administrative heads and Magistrate of the district.[1127] These formalities increase the chances of a security interest being declared void or voidable for uncertainty or formality. Risk averse banks and financial institutions consequently shy away from lending to persons or entities farming on land interests based on customary law.

For non-natives,[1128] which could include Sierra Leoneans born outside the relevant specific chiefdom, access is gained through the Paramount Chiefs and the family heads whose lands are affected. The non-native acquires a customary law interest that best equates to a license under the general law. A licensee's interest in land in this sense is tenuous. The barriers identified for natives also apply to non-natives. This makes the use of the land and the agricultural products thereon unattractive for commercial lending as well. Often the usual practice in order to access finance at

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[1125] See the Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 (n 370).
[1126] With polygamous families this may not be an easy task to undertake and usually increase costs.
[1127] See Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 (n 370).
[1128] Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 (n 29) "non - native means any person who is not entitled by customary law rights in land in a Province".

the local level is the creation of customary 'land mortgage' with the authorization of the family head, and tribal leaders, being custodians of the land.[1129]

Moving on to the applicable statutory law, the Provinces Lands Act, Cap 122 governs commercial land acquisition in the Provinces. In large part, it codifies some of the customary practices and inter alia limits the nature of land holdings by non-natives in the Provinces.[1130] The Act vests the land in the hands of the tribal authorities.[1131] The Provinces Land Act, whilst governing the use of land in the Provinces also incidentally regulates leasing, the assignability of interests relating to the land, and remainder issues covering the economic trees, fixtures, and rent. All these issues have implications on personal property security interests. Thus, the Provinces Land Act has made the use of provincial lands and other agricultural assets amendable to financing and credit security especially for international and highly capitalized companies, but not for SMEs and MSMEs.

The most valuable security interest in provincial land for a non-native, which may include all unnatural persons, is the leasehold interest in land considered a personalty. This is legally for a tenancy term not more than 50 years and a second or further term not more than 21 years.[1132] Any tenancy more than 3 years has to be made by agreement under seal,[1133] and the agreement is heavily regulated by legal formalities[1134] that will render it voidable in cases of non-compliance. These

[1129] For in depth discussion on land tenure and ownership, see Ade Renner-Thomas, *Land Tenure in Sierra Leone: The Law, Dualism and the Making of a Land Policy* (AuthorHouse 2010).
[1130] Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 (n 370), s 4. 'No non-native shall acquire a greater interest in land in the Protectorate than a tenancy for a term of fifty years; but nothing in this shall greater section prevent the insertion in any lease of a clause providing for the renewal of such lease, for a second or further terms not exceeding twenty-one years'.
[1131] Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 (n 370) Preamble.
[1132] ibid, s 4.
[1133] This means an agreement more than three years must be by deed. ibid, s 6.
[1134] ibid, s 9. "Every deed creating a tenancy of land shall be voidable by either party, unless it — (a) Is executed in the presence of two witnesses by the lessor before the District Commissioner of the district in which the land is situated; and is executed, in the presence of two witnesses, by the lessee or his attorney or his agent before a Magistrate; and (b)Has endorsed upon it certificates of execution in their presence signed respectively by the District Commissioner and the Magistrate before whom it was executed; and (c) Provides that the lessee shall not sublet or

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formalities do not only threaten the validity of the estate interest that may be used as a security for credit, they also increase the cost of transactions in terms of ensuring legal compliance.

A significant aspect of the Provincial Land Act, Cap 122 is the possibility to remove fixtures and buildings on the tenement at the expiration of the tenancy. This makes all additions and improvement on the land transferable and suitable for commercial lending since they can be severed from the interest in land and the leasehold.[1135] This includes economic trees, defined to 'include all trees, shrubs and plants which are grown or cultivated for their intrinsic value', with an option of purchase at a fair market value by the tribal authorities.[1136] Rent could also be an important factor not only from the lessors' perspective, but from a lender, who based on agreement of the relevant parties, may benefit from as assignable leasehold interest and hence use or classify the rent as receivables.[1137] The rent on provincial leases are however subject to revision by the chief administrators of the districts on rolling 7 years basis.[1138] This external intervention in rent revision may however affect the risk assessment by any lender considering the prospect of providing credit based on an assignable rent as security.

The conclusion one may reach is clearly the permissibility of the Provinces Land Act, Cap 122 to use leasehold interests, fixtures, buildings and economic crops as security for credit. However, the formalities required increase transaction costs and legal risk, i.e., compliance and

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assign his interest thereunder except with the consent of the Chiefdom Council with the approval in writing of the District Commissioner, provided that such consent shall not be unreasonably withheld; and (d)Contains stipulations with regard to all the matters set out in rule 3 to the schedule to this Act". Rule 3 of the Schedule to the Act provides that "Every lease required by this Act to be by deed shall state — (a) The rent; (b) The term; (c) The purpose for which the land is to be used; (d) Whether the interest is assignable; (e) Where buildings of permanent construction are to be erected, the rights of the parties to and in respect of such buildings at the expiration or determination of the lease; (f) In cases where the lease is for a longer period than seven years, that the rent is subject to revision every seven years by the District Commissioner subject to right of appeal to the Provincial Commissioner."

[1135] ibid, ss 11 and 12.

[1136] ibid, ss 11 and 12.

[1137] See ibid rule 3 of the Schedule.

[1138] ibid, s 5.

validity. In practice, big companies and multinationals often scale the costs challenges, both legal and financial, with relative ease and utilize the assets for agriculture credit finance. For SMEs, MSMEs, the cost and risk are too high for participation and hence confirms the assessment made by GoSL thus: "Access to rural and agricultural finance has proven to be a challenge for various reasons including high cost, perceived limited market potential, limited know-how in terms of agricultural finance, [and] limited access to long-term finance, [...]."[1139] On the whole, the land tenure system, whether under customary law or the general law, seriously impedes use of land and other forms of derivative estate interest as security for credit financing.[1140] If the legal impediments associated with land ownership and formalities are not successfully scaled, then the financial burden in the form of punitive interest rates and cost of transaction will shut out small farmers and even lenders from operating in the sector. Therefore, legal reform that considers reducing the formal requirements, fixing or adjusting interest rates, special protective measures and incentives offer realistic prospect to scale up agriculture credit finance.

5.2.3. Pre-BLA Framework for Agriculture Security Interest

The legal landscape before the enactment of the BLA had no special provisions for security interests for agricultural lending. As discussed above, the customary law adversely affects land accessibility and use as collateral for credit financing. The impact on agriculture was even more drastic since it applies to all the arable land suitable for agricultural productivity. The pre-BLA law only recognises the adopted English panoply of security devices, i.e., the chattel mortgage, fixed and floating charges, pledge and consensual lien; and the possibility of using quasi-security interests as retention of title transactions.[1141] Security interest created in personal property must

[1139] Beatrice Chaytor, 'The Commercialisation of Agriculture in Sierra Leone: Options for the Legal and Regulatory Framework' (n 1102) 19.
[1140] Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40) 21.
[1141] See Chapter 7 for discussion on retention of title transactions.

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fall within this closed list of security devices under the general law. Customary law only permits the use of a pledge as the security device for personal property lending. In the following subsections, the framework for the use of crops, livestock, farm equipment, feed and fertilizers as security for credit in the pre-BLA will be examined. The objective is not only to outline the law but also to provide the legal diagnostics with respect to problems identifiable in the pre-BLA agriculture lending, serving as the basis to assess the impact of the BLA relative to agriculture financing.

The assessment of the legal framework for agriculture lending before the enactment of the BLA is compelled by the claim of its inability to enhance agricultural financing. The sub-section demonstrates the continued application of old and fragmented law received from England, even after England had reformed various aspects of the law on use of personal property as security for credit, whether in the Agricultural Credit Acts or the Bills of Sale Acts 1878 and 1882.[1142] In Sierra Leone, the Bills of Sale Act, Cap 241 continues to be the pivotal legislation for non-corporate security interest in agriculture despite its rigidity and complexity.[1143]As far back as 1928 and 1932, the English legislators, recognizing the importance of agriculture and the need to exempted farmers' credit from the limitations of the Bills of Sale Acts 1978 and 1882 on after-acquired property, enacted the Agriculture Credit Acts 1928 and 1932 permitting non-corporate entities to grant a floating charge over farm assets.[1144] The state of the Pre-BLA law as unpacked hereunder lends support to the claim that the framework for agriculture lending in Sierra Leone is formalistic, complex, cumbersome and inequitable.

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[1142] See Law Commission, *Bills of Sale* (n 19); Law Commission, *Bills of Sale* (n 19); McBain (n 419); Gullifer and Hurst (n 419).
[1143] Crowther and others (n 11) 176–177.
[1144] Agricultural Credit Act 1928 and 1932 (n 2) s 8 and 5 respectively.

5.2.3.1 Crops as Security for Credit

Crops are deemed goods, especially when grown as industrial plants or deemed as things attached to or forming part of land.[1145] It follows that economic trees as defined by the Provinces Land Act, Cap 112 also fall within the definition notwithstanding the reference therein to fixture.[1146] However, this categorization as goods mostly relates to sales transactions,[1147] which *sensu stricto* is distinct from credit transactions in Sierra Leone.[1148] Personal chattel comes up as the most appropriate terminology especially upon severance of crops from land.[1149] Treating crops and other natural produces as distinguishable from land has had a long history of case law.[1150] Without need to retell the historical account, it is sufficient to note that the law now recognizes crops as chattel that is severable and distinguishable from the land they are grown on.[1151]

Classifying crops as personal chattel signifies that the use of crops as security for credit is governed by the general law regulating personal chattel security. Using crops as security for credit

[1145] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386). In older legislations, tangibles (corporeals) includes 'goods, wares and merchandise' in the Statute of Frauds 1677 s 17. What is industrial scale is not defined, but it represents crop production as distinct from corps growing naturally. See discussion on *fructus industriales*: Henry Wade Rogers, 'Law in Relation to Crops--Fructus Industriales' [1882] Southern Law Review New Series 326.

[1146] Provinces Lands Act, Cap 122 of the Laws of Sierra Leone 1960 (n 370).

[1147] The definition is found in the Sale of Goods Act, set out to govern sale transactions. See Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386); Bridge, *Personal Property Law* (n 641) 13.

[1148] See Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386); See also the dictum of Winn LJ in *Kingsley v Sterling Industrial Securities Ltd* (1967) 2 747 (QB) 780; PS Atiyah, *The Sale of Goods* (Pitman, 1990) 5, 18–20.

[1149] 'The expression "personal chattels" shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, […] nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale'. Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398).

[1150] See Rogers (n 47) and, the initial classic case on the issue; *Evans v Roberts* (1826) 5 Barnewall Cresswell 829 wherein the court held as follows: 'A verbal agreement made on the 25th of September for the sale of a then growing crop of potatoes, is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them within the forth section of the Statute of Frauds, but a sale of goods, wares, and merchandise within the seventeenth section'.

[1151] Bridge, *Personal Property Law* (n 641) 13.

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has to be within the restricted list of devices, i.e., a chattel mortgage, charge, pledge or lien. This makes the Bills of Sale Act, Cap 241 and Companies Act 2009 the applicable general law statutes for crop credit security, in addition to the common law and customary law applicable in the Provinces in Sierra Leone. The Bills of Sale Act, Cap 241 applies to non-corporate crop chattel mortgage, and provides for notice of the security interest created to be given for it to be valid.[1152] The Companies Act 2009 governs the creation of charges by incorporated entities and also provides for registration as the perfection method for corporate charges.[1153] The distinctions and degree of specificity demanded validate the labelling of the law as compartmentalization and complex, requiring expertise to navigate the rules in order to conclude a valid transaction.

Crops that are growing on land can validly be used as security for credit as a chattel mortgage. It basically contemplates the assignment of the crop from the borrower to the lender as a security for credit, following from the basic definition of assigning property by mortgagor to a mortgagee as security to repay a loan or to perform a consensual obligation.[1154] Given the low level of usage of crop chattel mortgage in Sierra Leone, no contentious legal issues have been decided by the courts as opposed to the legal question surrounding the use of chattel mortgage over future crops in England[1155] and the US.[1156] As exciting as a discussion on chattel mortgage on future crops

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[1152] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 7; Crowther and others (n 11) 164.
[1153] Companies Act 2009 (n 387), s 120.
[1154] *Keith v Burrows* (1877) 1 CPD 722; Bridge (n 49) 149.
[1155] *Holroyd v Marshall* (1861) 11 ER 999 (HL). In England, this case started the string of case law that eventually led to the ingraining of the floating charge. The House of Lords held as valid in equity a mortgage on future personal chattel, against the express prohibition under the common law of a chattel mortgage over future property. Bridge (n 49) 151.
[1156] *Adair v Bank of America Nat Trust & Sav Assn* (1938) 303 US 350 (Supreme Court); See L W., 'Chattel Mortgages on Crops' (1924) 10 Virginia Law Review 393 The pre-coded law in the US is replete with case law on the question of mortgage on future crop, since the formation of the judicial view that crop mortgage was valid at the time the seed is planted in the soil. ; Vernon X Miller, 'Chattel Mortgages: After-Acquired Property: Crop Mortgages' (1935) 19 Marquette Law Review 257.

may sound, bordering on the doctrine of possession and after-acquired property, it so far has no practical significance in Sierra Leone.

Crop charges, on the other hand, developed out of the restrictions of the common law on chattel mortgages, including the possession requirement, and the need for conveyance for any future or newly acquired personalty.[1157] Prior to the House of Lords case in *Holroyd v Marshall,*[1158] the court in *Lunn v Thornton* had continued the line of thought that "[a] grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein".[1159] The charge is an encumbrance on the personal chattel, which includes a floating charge where an immediate equitable interest is created until crystallization. With the non-applicability of the English Agricultural Credit Act 1928 in Sierra Leone, non-corporate farmers cannot grant a floating charge over circulating farming assets, including crops. It means that the limitations in the Bills of Sale Act, Cap 241 with respect to the prohibition on after-acquired security applies to individuals or unincorporated entities.[1160] It is, therefore, the case that corporate entities could create charges over crops, a device that was utilized by agricultural corporate entities in borrowing from banks. This disparity exemplifies an inequitable legal framework adversely affecting the expansion of agriculture credit finance.

Having considered crop mortgage and charges in the pre-BLA law, the next security interest in line is the common law pledge. A pledge entails the transfer of the security from the pledgor (borrower) to the pledgee (lender) during the subsistence of the credit. A pledge can

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[1157] See *Twyne's Case* (1601) 3 Coke 80 where the issues of fraudulent transaction holding emanated relating to non-possessory security, and; *Mace v Cammel* [1831] Lofft 782, 783 where the court held and confirmed that 'at common law a secret transfer [...] was always a badge of fraud'.
[1158] *Holroyd v Marshall* (n 1155).
[1159] *Lunn v Thornton* (1845) 1 CB 379.
[1160] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 22; Crowther and others (n 11) 155–156.

invariably equate to pawnbroking, which is the advances of small amounts of credit, whilst the pawnor (borrower) gives up the assets (pawn) to the pawnee (lender) for the duration of the credit.[1161] The English law adopted by Sierra Leone recognizes the special interest of the lender in the pledge, which is transferable, including sale upon the borrower's default to repay.[1162] The retention of the pledge by the pledgee under the general law, however, makes its use of pledge very unattractive, especially for corps which is growing on land under the general law.

Under customary law, the use of possessory pledges is not uncommon transactions involving interest in land and personalty. The range of properties subject to customary law pledge include farmland and crops. This is mainly due to the informalities in customary law, trust in tribal leaders, who invariably act as witnesses and moral guarantors.[1163] The involvement of tribal authorities ensure enforcement is relatively straightforward under customary law. The situation in Sierra Leone is however dissimilar to non-possessory customary pledges, for example, in Nigeria, under the Igbo customary law.[1164] The customary law in Sierra Leone appears not to have dispensed with the need for possession in line with the general law pledge.[1165] Thus, whilst the possibility of the existence of the secret lien in the customary pledges is limited, the impracticability for the continuation of agricultural activities due to the loss of the land or interest in land, makes the customary pledge unsuitable for agricultural credit financing for the borrower.

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[1161] Bridge, *Personal Property Law* (n 367) 146–147.
[1162] The following cases were decided on these issues: *Carter v Wake* (1877) 4 Ch D 605 (Ch D); *Sewell v Burdick (The Zoe)* (1884) 10 App Cas. 74 (House of Lords); *Donald v Suckling* (1865) 1 QB 585 (LR); *Hardwick Ex p Hubbard, Re* (1886) 17 QBD 690 (LR QBD).
[1163] See Local Courts Act 2011 s 15, 30 and 31. Local courts have jurisdiction 'to hear and determine all civil cases governed by customary law, including cases between Paramount Chiefs or Chiefdom Councils involving a question of title to land', debt disputes below Le 1 million, lease for not more than 5 years under section 15 of the Act. Their judgment can be enforced under section 30, and receiver-manager can be appointed for the preservation of property during trial under section 31.
[1164] Nwogu (n 9) 51.
[1165] Renner-Thomas (n 32) 223–226.

5.2.3.2 Livestock as Security for Credit

The term personal chattel as defined by the Bills of Sale Act, Cap 241 does not expressly enlist livestock unlike growing crop.[1166] However, livestock easily fall within the omnibus category of articles capable of being assigned and delivered. It is, therefore, claimed that growing crop is expressly mentioned to avoid any interpretation of it being affixed to land, which is not the case with livestock. This view has neither been contested nor challenged notwithstanding the paucity of literature on the issue.[1167] In New Zealand case of *Attorney-General v. Hill & Halls Ltd*,[1168] for example, the nature and proprietary interest in sheep's wool was equated to growing crop attached to land under its Bills of Sale law. Thus, apart from distinguishing livestock from crops, the law governing the use of livestock as security for credit appears to be similar in most respects. And since the Bills of Sale Act, Cap 241 is more concerned with the proper description of the property and the transaction documents instead of the nature of the security,[1169] the argument that the underlying principles for crop security interest apply *mutatis mutandis* to livestock is robust. This means a security interest can be granted in livestock as the case for crop security interests, albeit with restrictive formalities.

5.2.3.3 Farm Equipment, Feed and Fertilizers as Security for Credit

Farm equipment, ranging from the simplest farm tools to sophisticated machinery are prime farm assets and could be used as collateral for credit whether as a chattel mortgage, a charge or pledge (constructive) in the Pre-BLA law. Following from the general definition of personal chattel in the Bills of Sale Act, Cap 241,[1170] there is specific provision for 'trade machinery'

[1166] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 3.
[1167] See the English Agricultural Credit Act 1928 and 1932 (n 2) s 5(7), which although not applicable to Sierra Leone defines 'Farming stock' to included 'livestock, including poultry and bees, and the produce and progeny'.
[1168] *Attorney-General v Hill & Halls Ltd* (1923) 32 CLR 112.
[1169] Bills of Sale Act 1878 (n 51) s 4; *Ramsay v Margrett* (1894) 2 QB 18 (Court of Appeal).
[1170] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 3.

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attached to a factory or workshop,[1171] which may be located in a farm for example. Thus, under the framework before 2014, a legal chattel mortgage could be created under the Bills of Sale, with its attendant legal formalities.[1172] The Companies Act 2009 regulates company charges over farm tools and equipment,[1173] whilst the common law regulates pledges, and constructive pledge being most suitable for farm machinery.

The framework for the use of feed and fertilizers follows the above analysis for crops. Feed for animals (livestock), whether identified in cultivation for that purposes or harvested, fall within the definition in the Bills of Sale Act, Cap 241;[1174] therefore, when used as security for credit, the same rules governing chattel mortgages apply. It moves from being natural plants and becomes *fructus industriales.*[1175] The same argument follows for fertilizers, which fall within the definition of goods, hence the general rule will also apply. In practice, when farmers apply for credit, farm assets are lumped together either in a chattel mortgage, or a debenture containing a legal and equitable chattel mortgage, fixed and floating charge and perhaps pledge where so desirable. Although the parties may tend to look at the assets of the farmer as one big collection, the transaction document must attend to the specific requirements for each class of farm asset to ensure validity and priority. This by itself is not a problem, especially where a skilled attorney is involved in the transaction.

5.3 Agricultural Financing in the US – Useful Lessons for Sierra Leone

The legal framework governing the grant of security interest in farm assets in agriculture credit financing in the US draws from real estate law, the Unitary Model, state law mostly for non-

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[1171] ibid, s 4.
[1172] Bridge, *Personal Property Law* (n 367) 158–161.
[1173] Companies Act 2009 (n 387).
[1174] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 3.
[1175] See Rogers (n 1145).

consensual liens and some sector-specific Federal regulations.[1176] The focus herein will be mainly Unitary Model, looking at how Article 9's influence on security for credit, although the sector had been previously dominated by real estate mortgages as the main form of security.[1177] The comparative look into the US framework starts with the Pre-Code era, highlighting the major concerns, and how the subsequent adoption of Article 9 impacted on agriculture credit in the US. The objective is to outline the rationale behind the changes in the law, the underlining vital lessons to draw from the US reform process for Sierra Leone, taking into consideration the political, social, and economic circumstances incidental to US agriculture industry.

5.3.1. The US Pre U.C.C. Article 9 (Pre-Code) Agriculture Secured Financing

The objective in this sub-section is not aimed at merely exploring the antiquated system of agriculture credit finance in order to romanticise the past. Rather, the goal is to highlight the prevalent problems in the pre-Code era and how the US progressively addressed the problem in the Unitary Model. The legal framework in the majority of US states before the consolidation largely resembled the compartmentalized English PPSL framework. Therefore, only the peculiarities will be highlighted to show how the Code has resolved or attempted to resolve the pre-Code problems. The peculiar issues include the nature and classification of crops, treatment of future crops, priority conflict between land mortgage and crop mortgage, accounting for and accurate description of livestock, and public notice. These will be discussed under the various class of farm property, i.e., crops, livestock, equipment and products.

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[1176] Linda J Rusch, 'Farm Financing Under Revised Article 9' (1999) 73 The American Bankruptcy Law Journal 211, 212.
[1177] Charles Bunn, 'Financing Farmers - Existing Wisconsin Law, the Green Giant Case, and the Uniform Commercial Code' (1954) 1954 Wisconsin Law Review 357, 357.

5.3.1.1 Security Interest in Crops Pre-Code Era

The legal nature or classification of crops was chameleonic in the pre-Code era in the US, since the nature of transactions meant crops were considered as either realty or personalty.[1178] Some courts in the US then held that crops were realty when a transaction involved the transfer of land without reservations.[1179] On the other hand, other US courts held that crops were personalty, distinguishing between *fructus naturales* (natural-growing), and *fructus industriales (*industrial growing).[1180] The distinction between the two was very important as industrial-growing crops could be made subject of a chattel transaction whilst natural-growing crops could not be considered as a personalty, hence not a proper subject of a chattel transaction.[1181] The next question that followed from the distinction was the extent to which the use of industrial-growing crops could be used as security for credit in pre-Code era.

It became apparent that once crops could be subjected to chattel transactions, then such transactions could include sale and chattel mortgages for credit. In the case of *Jones v. California Growers & Shippers, Inc*.,[1182] the Supreme Court of California held that the sale of growing melons was valid. Similarly, as far back as in 1886, in *Wheeler v Becker*,[1183] an Iowa court upheld the validity of chattel mortgage on crops and even future growing crops. The sale or mortgage of crops to be grown in the future presented a major jurisprudential challenge in the pre-Code era. The existing common law rule limited sales or chattel mortgage transactions to only *choses* (things) in existence.

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[1178] I Nature, 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (1964) 4 Iowa Law Review 1269, 1269.
[1179] *Clark v Strohbeen* (1921) 181 NW 430; Nature (n 1178) 1269.
[1180] *Tolland Co v First State Bank* (1934) 35 P 2d; Nature (n 1178) 1270.
[1181] *Key v Loder* (1962) 182 A 2d 60.
[1182] *Jones v California Growers & Shippers, Inc* 182 Cal 777.
[1183] *Wheeler v Becker* (1886) 68 Iowa 723.

With the limitation of the common law rule of chattel mortgage transactions to only things in existence, the crucial question then was whether a crop to be grown in the future could be treated as after-acquired property.[1184] The courts developed the theories of 'potential-possession' and 'equitable-lien' to avoid the restriction of the common law rule on *chose* not in existence. In the leading case of *Grantham v Hawley*,[1185] the 'potential-possession' doctrine is said to have been rooted in special ownership interest of a landowner and the potential use of the land for crop cultivation. This special interest could be sold or mortgaged.[1186] In *Rochester Distilling Co. v Rasey*,[1187] it was, however, held that potential-possession doctrine in sales was overridden by the Uniform Sales Act.[1188] Further, the equitable-lien theory was rather rested on the beneficial interest derived from mortgage or sale of the crop after it comes into existence, and thus the prior agreement reached is regarded as an executory contract. The canon of 'equity considers as done which ought to done' was the main legal justification for the equitable-lien theory.[1189] The use of both doctrines appears neither ideal nor without fault.

In practical terms, the grant of security interest in crops was mainly done through a chattel mortgage, for which the major problem especially during the 1930s was priority. Priority related litigation relating to crop mortgages as against land mortgages was rife in that era.[1190] Under the general *fructus naturales, fructus industriales* common law distinction, the mortgagor (borrower) of land in the US had the right to the produce of the land, which allowed for the mortgagor to either

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[1184] Nature (n 1178) 1271; the common law rule prohibited the transfer or encumbrance of property before it is acquired or created. David Cohen and Albert B Gerber, 'The After-Acquired Property Clause' (1939) 87 University of Pennsylvania Law Review and American Law Register 635, 635.
[1185] *Grantham v Hawley, Hobart 132* [1616] Hob 132; Nature (n 1178) 1271.
[1186] *Argues v Wasson* (1877) 51 Cal 620; Nature (n 1178) 1271.
[1187] *Rochester Distilling Co v Rasey* (1894) 142 NY 570.
[1188] Nature (n 1178) 1271.
[1189] *Hurst & McWhorter v Bell & Co* (1882) 72 Ala 336; Nature (n 1178) 1271.
[1190] Gilmore, *Security Interests in Personal Property* (n 7) 857.

sell the produce, or encumber it, i.e. use it as security for credit.[1191] In the classic English case of *Grantham v. Hawley*,[1192] the court distinguished the common law principles of the mortgagee's lien on the rents and profits in a real estate mortgages from the mortgagor's right to the produce of the land, including crops as long as there is no default on the payment of rent. In this sense, the crop mortgage and the crop mortgagee had priority in terms of a crop security interest competing against land mortgagee's right to crops growing on land.[1193] The reverse occurs once there is default in payment of the rent.

The *Grantham v. Hawley* case,[1194] although being the legal basis for the 'potential-possession' doctrine, did not serve agricultural credit well. It also recognized the need for an interest in land as a requirement to use land related chattel security interest, thereby putting in place a major stumbling block.[1195] This made farming credit especially on future crops a risky endeavor. It was mainly seen as an unsecured credit, and a way to augment the strength of the security on crops was to include additional security on livestock and equipment.[1196] The remedy in terms of future crop mortgages came as a result of purposeful governmental action at the Federal level. The Federal government pressured States to enact laws to allow federal credits on crops to cover future crops.[1197] On a whole, these problems gave rise to a legal framework that was tenuous, rooted in abstract legal doctrines, compartmentalized, complex; and hence made farm security interest transactions cumbersome and risky.

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[1191] ibid 858.
[1192] *Grantham v. Hawley*, *Hobart 132* (n 1185).
[1193] 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (1963) 49 Iowa Law Review 1269, 1271. Note that although the black letter law may have produced the similar results in Sierra Leone, the fact that farming land was mainly covered by customary law, meant that this question was not examine or has not been examined by the courts in Sierra Leone.
[1194] *Grantham v. Hawley*, *Hobart 132* (n 1185).
[1195] Gilmore, *Security Interests in Personal Property* (n 7) 859.
[1196] ibid 859–860.
[1197] ibid 860, citing Ohio Rev. Code §1319.09 (1953); Tenn. Code §64-902 (1955). The 1950s was the beginning of the Coded era on security interests in personal property.

5.3.1.2 Security Interest in Livestock Pre-Code Era

The chattel mortgage was the device of choice too for livestock as with crops in the pre-Code era.[1198] Livestock were valuable security especially for some States in the US. In the south of Wisconsin, for example, lenders unanimously preferred dairy herd to other farm assets for agricultural chattel mortgages.[1199] The lenders were of the view that with a dairy herd, assets "depreciation proceeds at a slow pace, resale value varies but little during the term of the loan, and, of course, the dairy herd [was] the primary source of farmers' income in [that] area".[1200] The early problems with livestock related to keeping count of the stock, i.e., accurate description, given the tendency for easy reproduction and multiplication. A wrong description could easily lead to the chattel mortgage being declared void for uncertainty.[1201]

In the same line of reasoning relative future crops, the misdescription of livestock bordered on the multiplication of livestock, hence the question of extending the encumbrance on the offspring became paramount. The courts may have held the view that a security interest in a single animal during gestation may cover the offspring; however, the security is valid against third parties only if the mother and calf were not separated.[1202] Continuing security interest in livestock multiplication not in gestation under a chattel mortgage was a grey area in the law, and the general prohibition against after-acquired applied.[1203] Substantially, use of livestock as security for credit fell into the same compartmentalization and complexity that plagued crop chattel mortgage.

5.3.1.3 Security Interest in Farm Produce and Equipment Pre-Code Era

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[1198] William M Goebel, 'The Uniform Commercial Code and the Farmer' (1962) 1962 University of Illinois Law Forum 374, 382.
[1199] Robert S Hunt and Glenn R Coates, 'The Impact of the Secured Transactions Article on Commercial Practices with Respect to Agricultural Financing' [1951] Law and Contemporary Problems 165, 171.
[1200] ibid.
[1201] *Fowler v Hunt* (1880) 48 Wis 345.
[1202] *Funk v Paul* (1885) 64 Wis 35.
[1203] Hunt and Coates (n 1199) 172.

The law on farm produce was largely case law, and mostly gave consideration not only to the interests of the parties to the security agreement, but also that of the third-party buyer. In *Gillilan v. Kendall & Smith*,[1204] the Nebraska Supreme Court held that grain elevator (buyer) who has no actual knowledge of a chattel mortgage purchased the corn free from the encumbrance. The court held that: "A mortgage, […] of growing grain is not notice of a mortgage on grain in a crib or bin, where it has been lawfully placed there by the mortgagee, or by the mortgagor with his consent".[1205] In *Thomas v. Prairie Home Cooperative Co*.,[1206] the same court subsequently overruled the *Gillilan* case mostly on a question of policy and formulated a new rule wherein the filing of the chattel mortgage will be deemed as constructive notice even on the proceeds of the crop.[1207] Although the Thomas case had to do with proceeds of crop mortgage,[1208] it was the view that the ruling applied to livestock as well.[1209]

Security interest over farm equipment often was included in security over the farmers' entire personalty. Farm equipment depreciate rapidly, and hence a wide-ranging mortgage on agricultural chattels was preferred by lenders. Apart from the general personal chattel, farm equipment or machinery were also subject to conditional sales transactions. The conditional sale was a pre-Code independent device which developed subsequently to chattel mortgage but with roots in common law.[1210] Conditional sales were not favored and the judicial outlawry rested on

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[1204] *Gillilan v Kendall* (1889) 26 Neb 82.
[1205] Gilmore, *Security Interests in Personal Property* (n 7) 707.
[1206] *Thomas v Prairie Home Cooperative Co* (1931) 121 Neb 603.
[1207] Gilmore, *Security Interests in Personal Property* (n 7) 708.
[1208] The rule on proceeds from inventory encumbered mainly was a duty on the debtor to either remit the funds or account to the lender. ibid 677, 714.
[1209] *Clovis National Bank v Thomas* (7876) 425 P 2d 726 (Supreme Court) In the case, although a UCC case, the application of the same pre-code era rule confirmed the application of the Thomas case holding to animals. The law on produce from agricultural security interest was seen as a special rule to the rule on inventory for example that was in existence at the time.
[1210] Gilmore, *Security Interests in Personal Property* (n 7) 62–63.

the public policy to protect the unsuspecting third party.[1211] The *Commercial Service Corp. v. L. Paulle-Midway F. & S.C. Co.*,[1212] case dealt with priority in a case dealing with the foreclosure on a chattel mortgage with restaurant equipment partly purchased under a conditional sales contract from the appellant. The main issue appealed was whether the fixture company's (the appellant) conditional sale contract was effective against the other parties to the case. The court held that a chattel mortgagee with prior actual notice interest cannot defeat the lien of the conditional seller. Therefore, a third party without notice takes free of the security interest. The contention made the loss of priority the prevalent risk associated with farm equipment security interests.

So far, the compartmentalized and complex nature of the Pre-Code framework has been underscored. Indeed, the framework was not so different from the status of the law in England and also Sierra Leone before the enactment of the BLA. However, in the US at the time, through the State governments and other agency, lots of unorthodox lending, outside the bank system, was concentrated on farm credits especially after the Great Depression.[1213] The Federal government pressured States governments to enact laws to allow federal credits in future property was one example that led to changes to agricultural credit.[1214] This form of governmental intervention, which is illustrative of the paternalism in the sector was made evident in the Unitary Model as the discussion below will demonstrate.

5.3.2. Security Interest in Agriculture Property in the Unitary Model and Impact

The main task in this section is to identify the solutions which were proffered to deal with farm credit specific problems identified in the pre-Code era. As already alluded to herein, the Unitary Model brought about significant changes in the use of personal property as security for

[1211] ibid.
[1212] *Commercial Serv Corp v L Paulle-Midway F & Sc Co* (9467) 66 NW 2d 523 (Supreme Court).
[1213] Grant Gilmore, *Security Interests in Personal Property* (The Lawbook Exchange, Ltd 1999) 858.
[1214] Gilmore, *Security Interests in Personal Property* (n 7) 825.

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credit in the US. The most significant change was the adoption of the functional approach and unitary concept of security.[1215] For example, the Unitary Model deemphasised the premium placed on the distinction between security devices and their classifications.[1216] It, however, made provision for special rules applicable to specific transactions, including farm product and inventory.[1217] Thus, the first major change to be highlighted with respect to farm credit was the consolidation of relevant definitions specific to the sector. In the general sense the crop or livestock chattel mortgage terminology gave way to the security interest.[1218] The definition of terms proceeded from the definition of collateral to goods, which includes 'unborn young of animals and growing crops'.[1219] The Code in addition classified goods to include 'farm products' and 'equipment' which can operate as the residual machinery clause.[1220] However, the goods and fixture distinction that existed pre-Code continued into the Code era. Incidentally, the wide definitional scope for 'farming product' and 'farming operation' covered all crops and livestock security interests.[1221] The terminology consolidation simplified the law, making irrelevant the various technical names that developed overtime.

Reducing the significance of the requirement to have an interest in land and the need for title to the collateral was another major impact of the Code. Previously as explained, an interest in future-growing crop could only be recognized if the mortgagor at the time had an interest in the

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[1215] See Introduction, 0.1 and 0.5.1 herein.
[1216] Uniform Commercial Code: Official Text 1962 ss 9-102(2).; William M Goebel, 'Uniform Commercial Code and the Farmer, The' [1962] U. Ill. LF 374, 381.
[1217] Uniform Commercial Code: Official Text (n 1216) For example different rules govern consumer security interests, where in s9-302(d) or s9-307, there may not be need to file financing statement to perfect the security.
[1218] ibid 9–102; 109.
[1219] ibid 9–105, 9-105(1)(f); Goebel (n 1216) 383.
[1220] Uniform Commercial Code: Official Text (n 1216) The categories are mutually exclusive, but a consumable a truck can also serve as an equipment, s9-109, comment 2; Goebel (n 1216) 383.
[1221] Uniform Commercial Code: Official Text (n 119) ss 9-109; Goebel (n 105) 383–384; Hunt and Coates (n 106) 176–177.

land the crop was to be grown, even if the interest was just merely expected.[1222] The interest in land limitation was also linked to the question of who had title to the collateral in the pre-Code era, especially for conditional sales. Whereas the place of title was sometimes of importance in the pre-Code era, the Code made it inconsequential as it mattered not whether the secured party or debtor had title.[1223] Here, we see the importance of formalism being diminished for a more pragmatic approach. Title could be held by either the secured party or the debtor farmer, as all that is required is for the debtor to have an interest in the collateral.

Once the unitary conception of security interest addressed the issue of the multiplicity of terms and definition relative to agriculture credit finance, the next concern in for pre-Code era was the insecurity in using future crops and livestock as security for credit. Under the Unitary Model however, the old legal doctrines of potential-possession and equitable-lien were made redundant, as the Article 9 extends the coverage of security interest to future farm collateral, including crops and livestock.[1224] Although this progress was made in the Code era, some vestiges of the pre-Code era law permeated into Article 9. There was no change in the law limiting the use of future crop as security, which was the requirement to cultivate the crop within one year of the execution of the security agreement, except where the future crop security interest is part of a land lease security. For livestock, the rule prohibiting the separation of the offspring and the mother was also maintained.[1225] It was suggested that paternalism, that is, the protection of the unsophisticated

[1222] *Moring v Helms* (1923) 97 So 647.
[1223] Uniform Commercial Code: Official Text (n 119) ss 9-202; 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (n 85) 1274; Goebel (n 105) 382; Bunn (n 84) 358.
[1224] Uniform Commercial Code: Official Text (n 1216) ss 9-204; 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (n 1193) 1271–1272; Frederick Davis, 'Law of Secured Transactions and Article Nine of the Uniform Commercial Code' [1961] South Dakota Law Review 173, 185–186; Goebel (n 1216) 384.
[1225] Uniform Commercial Code: Official Text (n 1216)§ 9-204(3), (4) (a); 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (n 1193) 1271–1272; Davis (n 1224) 185–186; Goebel (n 1216) 385.

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farmer was the main reason for the retention of the one-year limitation of future-crop security interest. Usually, large farmers will have land interest and hence the exception will apply. This public policy protection may also have been included to shield creditors in reducing the risk of lending on a long-term future-crop security interest.[1226]

Closely related to the future farm collateral issue was the application or supplementation of non-UCC Article 9 laws, including principles of contract. In the *Clovis National Bank* case,[1227] the court exposed the continuing difficulty in applying supplementary legal principles in secured farm credits, in a case dealing with accounting for proceeds in the sale of livestock, being subject of a consignment. The bank had extended credit to a rancher with the cattle used as security interest. However, the cattle were consigned to the defendant for sale by auction without the bank's knowledge of the consignment nor approval of sale. After the sale, the rancher failed to pay off the loan with the proceeds, prompting the action. The New Mexico Supreme Court dismissed the bank's appeal holding that the bank had waived its rights by previous conduct.[1228] Waiver was based on UCC's provision of the application of supplementary law principles to security agreements.[1229] The application of contract law principles led to a pre-Code outcome in the Code era. Hence, true functionality was hardly achieved initially.

As Gilmore noted, priority was the main pre-Code litigation issue with farm credit, and he suggested that most pre-Code statutes ignored priority issues and left the courts to resolve them.[1230] Hence giving third parties notice through perfection and priority became fundamental to Article 9

[1226] Nature (n 1178) 1275. One way to look at this paternalism in Sierra Leone for example will be protecting the large percentage of farmers who operate on a SME level and illiterate, often operating without legal advice. However, a system of opting out from this protection even without the exception relating to land interest could be provided for. These are some of the lessons and elements to be examined in the subsequent section.
[1227] *Clovis National Bank v. Thomas* (n 1209).
[1228] Thomas H Emmerson, 'Commercial Law - Uniform Commercial Code -Security Interests in Livestock: Clovis Nat'l Bank v. Thomas, 77 N.M. 554', (1968) 8 Natural Resources Journal 183, 183,184,187.
[1229] Uniform Commercial Code: Official Text (n 1216), § 1-107.
[1230] Gilmore, *Security Interests in Personal Property* (n 1213) 655, 857–858.

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and agricultural lending in particular. Perfection under the Code was mainly through the filing of a financing statement and possession.[1231] However, farm equipment with purchase price below US$ 2,500 is perfected just like consumer goods, that is, automatically without need to file a financing statement.[1232] This was certainly a protectionist (paternalistic) rule allowing a non-registrable PMSI on consumer and farm equipment of below US$ 2,500 value to enhance credit to farmers.

Before dealing with more specifics on perfection and priority, it must be noted that the Article 9 took a pragmatic view on the pre-Code tethering problem of lien passing through purchases of crops or livestock used by farmers to third parties. This was one of the litigious areas. In *Thomas v. Prairie*,[1233] the court confirmed the effective of an encumbrance on an agricultural collateral against buyers of farm products in the ordinary course of business. Gilmore was of the view that it was unwise for the modern law to so protect the farm mortgagee, and that the rule was one of special protection. [1234] The Code bowed to the pre-Code law, maintaining the special status or protection, thereby maintain the security interest encumbrance and right to the proceeds as well.[1235]

Article 9 also provided for certain exemptions to the filing requirement and hence permitted automatic perfection for certain security interests, including the PMSI in farm equipment under US$ 2,500 as previously explained.[1236] Where no such exemption exists, the farm collateral could be properly perfected by filing of the financing statement in the county where the farm is located.

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[1231] See Uniform Commercial Code: Official Text (n 1216), § 9-306 to 9-316.
[1232] ibid§ 9-307(2).
[1233] *Thomas v. Prairie Home Cooperative Co.* (n 1206).
[1234] Gilmore, *Security Interests in Personal Property* (n 1213) 713-714.
[1235] Uniform Commercial Code: Official Text (n 1216), § 9-307(1); 9-306(2); ; Gilmore, *Security Interests in Personal Property* (n 1213) 714–715.
[1236] Uniform Commercial Code: Official Text (n 1216), § 9-302. .

Also, income or proceeds from sale of farm product and after-acquired must be expressly mentioned in the security agreement if it were to apply to the collateral.[1237]

The inclusion of sufficient description of the crop or livestock was an issue of concern, with respect to future-crop or growing crop. The initial Code required a description of the real estate concerned,[1238] much in line with pre-Code law. The problem that developed from the real estate description was the question of what constituted a sufficient description.[1239] Further, given that farm security interest may be made with real estate mortgages in a single document, the Code was silent on whether filing should be made in chattel or real estate registries or both. It was however suggested that it was safer to file at the estate records for interests in future crops.[1240] However, the Code made away with courts previous pre-Code requirement for the specific statement of time for future crops to be grown.[1241]

Special rules on the attachment of security interest in future farm collateral was also an issue of note in the initial Code. For livestock, the separation of the mother and offspring discontinued as interest in future farm animals. It was argued that the adoption of the Code would settle the chaos, as the question will rest upon whether the parties agree for the security interest to attach. Thus, where increase of livestock is expressed in the security agreement, then the security interest continues in the offspring and attaches when given birth to. [1242] This similarly applied to after-acquired purchases. Ordinarily under the initial Code, security interest in crop is perfected

[1237] ibid§ 9-203(1)(b), 9-306; Goebel (n 1216) 384.
[1238] Uniform Commercial Code: Official Text (n 1216), § 9-402(1). .
[1239] 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (n 1193) 1281.
[1240] Uniform Commercial Code: Official Text (n 1216), § 2-107(3); 9-104(j) for fixtures]. The prudent thing to do, will be to file in both registires at the same time. This is directly related to the issues that will arise in Sierra Leone, where multiple registries exist. The prudent action will be to file in both registers, with the adverse increase in transaction costs. 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (n 1193] 1282–3.
[1241] *Fisher v Bank of Spanish Fork et al* (1937) 93 Utah 514.
[1242] Uniform Commercial Code: Official Text (n 1216), § 9-230(1), 9-203(2)(a); Hunt and Coates (n 1199) 172–173.

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when it attaches. However, crop must be planted or be growing before the debtor is said to have acquired the rights therein.[1243]

With the main Code provisions relating to agricultural lending discussed, it will be useful to highlight some of the ancillary additions. An interesting one is the super 'priority of a new value security interest in crops arising out of a current crop production loan'.[1244] This was to encourage further lending to a farmer in distress. Further, the Code made provision for special protection to holder of farm collateral security interests, by allowing the security interest to pass through even when the farm product is purchased by a buyer in the ordinary course of business. This ran contrary to the norm in Article 9. It also had the potential to adversely affect a farmer to farmer transactions, which was not uncommon, i.e. through the continuation of the security interest from the existing creditor. However, the special protection is subject to certain (service) liens and bailment in the ordinary course of business, thereby limiting its effectiveness.[1245] Surprisingly, there were no special rules for farm collateral default and enforcement in the Code, consequently the general enforcement scheme applied to farm credit and default. This absence of special rules for enforcement is not necessarily problematic given the separate title in the US Bankruptcy Code for debt adjustment for a farmer or fisherman.[1246] From the adoption of the first Article 9 in 1962 to the revision in 2010, a common thread in ensuring the continued special treatment of farm credit

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[1243] Uniform Commercial Code: Official Text (n 1216), § 9-204(2); 9-303.
[1244] ibid, § 9-312(2). 'A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest'. See comment 2. Goebel (n 107) 387.
[1245] Uniform Commercial Code: Official Text (n 1216), § 9-310. 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (n 1193) 1286,1289; Goebel (n 1216) 386,388; Bunn (n 1223) 362–363.
[1246] The US Bankruptcy Code, Chapter 12 basically provides debt relief to family farmers and fishermen, and so it can be argued that the special provision already exists outside the Unitary Model. See 11 U.S. [Bankruptcy] Code, §§ 1101 - 1174.

is the period review and refinement of Article 9. This is a practice which demonstrates purposefulness in the policy approach to incentivise farm credit. This aspect of incremental reforms is examined in the next sub-section.

5.3.3. Incremental Reforms - Article 9 Revisions and Incorporation of Agricultural Lien

The inclusion of agriculture specific rules in Article 9 has arguable increased the flexibility and clarity in agricultural lending. [1247] Given the sector's economic importance, the US Federal Government took purposive steps in not only changing the law, but also in pursuing policies to promote agricultural credit financing. However, from the 1560s when Article 9 was being adopted by various States, numerous revisions were made. Following years of implementation, incremental changes have been made, thereby entrenching the notion of incremental reform or refinement of the Unitary Model. The areas considered in this sub-section includes the incorporation of agricultural lien in the perfection, priority and enforcement scheme, clarification and expansion of the definition of farm products, central state filing for security interest, farm consignment, and the bankruptcy of a farmer. The rationale certainly is to ensure compatibility of the law to the policy of establishing a harmonious, simple and efficient framework for personal property security.

The first Article 9 was put forward for adoption in the 1962, and it has since been revised in 1972, 1999 and 2010 respectively.[1248] In the 2010 Revision, one of the novel steps is the incorporation of the statutory agricultural liens (security interest in farming personalty not derived from a security agreement, like an agricultural non-consensual landlord's lien).[1249] The revision especially on agricultural liens was created out of the necessity, to limit the seeming super-priority

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[1247] Bunn (n 1223) 388.
[1248] White and Summers, *Uniform Commercial Code* (n 90) 2–3.
[1249] 'Secured Transactions Overview | National Agricultural Law Center' <http://nationalaglawcenter.org/overview/secured-transactions/> accessed 6 April 2016; See also *Todsen v Runge* (1982) 318 NW 2d 88 (Supreme Court).

unwittingly bestowed on holders of statutory liens operating outside the old Article 9.[1250] It will, therefore, be useful to investigate how the US got to incorporate non-consensual liens in the Unitary Model.[1251] Further reasons for the revision of the initial Article 9 included the secret lien nature of statutory liens that was operating contrary to the objective of the Code,[1252] need for readjustment of the priority rules, especially for PMSIs, reducing the rigidity in the description of the collateral, and interplay with the bankruptcy code.

The changes in the Revised Article 9 strategically contained a clarified and expanded definition of farm products. The Agriculture Study Group (ASG) that worked on the 1999 revision initially thought about dispensing with this categorization altogether.[1253] However, the Group succumbed to policy objective of protecting farmers. In addition, aquatic goods, 'trees vines and bushes' were included in the new definition of farm product, with standing timber, however, excluded.[1254] The need for the debtor to be in possession of the farm products was dispensed with as a requirement in the farm product definition. The definition of farming operation was also extended.[1255] The effect of the change in the definition of farm product was the continuation of its

[1250] Scott J Burnham, 'Agricultural Liens Under Revised Article 9' (2002) 63 Montana Law Review 91, 155.
[1251] Uniform Commercial Code: Official Text (n 1216)§ 9-102; Gilmore, *Security Interests in Personal Property* (n 1213) 296.
[1252] Donald W Baker, 'Some Thoughts on Agricultural Liens Under the New UCC Article 9' (1999) 51 Ala. L. Rev. 1417, 14171425; Susan A Schneider, 'Statutory Agricultural Liens Under Revised Article 9 of the Uniform Commercial Code' 1 <http://www.nationalaglawcenter.org/wp-content/uploads/assets/articles/schneider_agliens.pdf> accessed 12 April 2016.
[1253] *Uniform Commercial Code 2009-2010 Ed: Official Text and Comments* (West, 2009), § 9-102 (a) (34); see Baker (n 157) 1420.
[1254] *Uniform Commercial Code 2009-2010 Ed: Official Text and Comments* (n 1253) The revised Article 9, § 9-102(a)(34) states that "goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are: (A)crops grown, growing, or to be grown, including: (i) crops produced on trees, vines, and bushes; and (ii) aquatic goods produced in aquacultural operations; (B) livestock, born or unborn, including aquatic goods produced in aquacultural operations; (C) supplies used or produced in a farming operation; (D) products of crops or livestock in their unmanufactured states." Initial Article 9, defined goods to include farm products which are "crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states, and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operation." § 9-109(3).
[1255] ibid § 9-102, comment 4.

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distinction from inventory,[1256] and therefore provided the basis for the PMSI priority in crops and livestock.[1257] It also provided the foundation for the incorporation of agricultural lien in the Revised Article 9.[1258] Functionally, it made away with the growing uncertainty that was emanating from the conflicting decisions by the varying court decisions on what constituted farm collateral.[1259]

A further change of note in the Revised Article 9 on agricultural credit relates to the requirement for centralized state filing of security interests,[1260] as opposed to county filing, i.e. filing in the county where the crop was to be grown in the old Article 9.[1261] Central filing in the office of the Secretary of State was deemed to be advantageous to creditors searching for prior security interests and in perfecting their own security interests. 'The principal advantage of state-wide filing is ease of access to the credit information which the files exist to provide',[1262] but central filing may not be so advantageous for local farmers and creditors in counties.[1263] The pragmatism of public notice was placed ahead of local convenience. Convenience, however, became a non-issue with use of information technology, mainly with the availability of internet searchable entries. Also, the need to describe the estate for the attachment and perfection of security interest in growing crops was dispensed with in the Revised Article 9.[1264]

The biggest change in the Revised Article 9 is most certainly the incorporation of agricultural liens.[1265] Agricultural lien is a term of art and the key feature is that it must be

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[1256] ibid § 9-102(48). Inventory inter alia refers to goods held for sale, and hence farm product held for sale ought to have been treated as inventory. However this was resisted and special protection of farmers preserved. .
[1257] ibid § 9-324.
[1258] Uniform Commercial Code: Official Text (n 1216) § 9-102(5). Baker (n 1252) 1427–1429.
[1259] Baker (n 1252) 1428.
[1260] *Uniform Commercial Code 2009-2010 Ed: Official Text and Comments* (n 1253), § 9-501(a).
[1261] Uniform Commercial Code: Official Text (n 1216), § 9-203(1).
[1262] *Uniform Commercial Code 2009-2010 Ed: Official Text and Comments* (n 1253), § 9-401, comment 2.
[1263] Schneider (n 1252) 4.
[1264] *Uniform Commercial Code 2009-2010 Ed: Official Text and Comments* (n 1253), § 9-203(b); 9-502(a).
[1265] ibid § 9-109.

connected to the debtor's farming operation.[1266] Agricultural liens are not security interests and they were incorporated in order to ensure their compliance with the filing, perfection and priority requirements in the Revised Article 9. Agricultural liens have to be created by statute, hence mechanics, common law and judicial liens were not incorporated.[1267] The reason for the incorporation of agricultural liens has been argued to include the traditional anathema for secret lien, giving lienholders super-priority over security interest holders.[1268]

In the agriculture industry in the US, farming is largely supported by landlord's real estate leases, services and goods from other suppliers. Usually the goods and services were provided on a credit basis, and the system had more impact on States' economies.[1269] Consequently, States enacted laws to protect those businesses and to pre-empted conflict with security interests in the initial Code in favour of the lienholders. The drafter of the Code recognized the State conditions that warranted the protection of lienors, and they were apprehensive of offsetting the political balance.[1270] The deference, however, create the undesirable secret lien situation where a secured party's interest may be subordinated to an unknown lien held by a third party. The secured parties were mostly the traditional banks, who were being disadvantaged. The revision was essentially a compromise aimed at eliminating the secret lien and to bring agricultural liens within the public notice regime in the Revised Code.

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[1266] ibid § 9-102(a) (5). 'Agricultural lien means an interest in farm products: (A) which secures payment or performance of an obligation for: (i) goods or services furnished in connection with a debtor's farming operation; or (ii) rent on real property leased by a debtor in connection with its farming operation; (B) which is created by statute in favor of a person that: (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or (ii) leased real property to a debtor in connection with the debtor's farming operation; and (C) whose effectiveness does not depend on the person's possession of the personal property.'

[1267] ibid § 9-102(5) (b); Baker (n 157) 1426, 1438-1439. Examples includes Farm Laborers' Liens, Seed or Grain Liens, Threshers' Liens and Spraying or Dusting Liens in the State of Montana; see Burnham (n 155) 103.

[1268] Uniform Commercial Code: Official Text (n 1216), § 9-310.

[1269] See Donald W Baker, 'Some Thoughts on Agricultural Liens under the New U.C.C. Article 9' (1999–2000) 51 Alabama Law Review 1417; Wyatt P Peterson, 'Revised Article 9 and Agricultural Liens: An Iowa Perspective Note' (2003) 8 Drake Journal of Agricultural Law 437.

[1270] Baker (n 1252) 1421–1425; Wyatt P Peterson, 'Revised Article 9 and Agricultural Liens: An Iowa Perspective' (2003) 8 Drake J. Agric. L. 437, 447.

Since agricultural lien was mainly incorporated into Article 9 for conformity with the Revised Code's perfection and priority scheme,[1271] it will be useful to examine how the incorporation affects the general Article 9 priority scheme. An agricultural lien that has become effective under States law is perfected under Article 9 by the filing of a financing statement.[1272] The perfection requirement could possibly occasion difficulties if the State law is not aligned to the filing scheme of Article 9. For example, in the State of Montana, the Title 71 liens require filing before the lien becomes effective, an opposite arrangement to the Revised Article 9 rules.[1273] The Revised Article 9, however, provides for States to opt-out, which could be one solution, or a repeal or amendment of the State law could be another solution.[1274] The incorporation of agricultural liens, however, fortuitously allows lienors to use the enforcement provisions in Article 9 upon a debtor's default, which was not possible before the revision.

The objective of perfecting an agricultural lien is to gain priority over other competing security interests or liens. Priority rank is generally based on time of filing, just as with security interests. The special treatment or super-priority has been removed.[1275] There is a significant exception to this general rule, which maintains the priority of a perfected agricultural lien when it conflicts with security interest, provided the creating State statute so provides.[1276] Where the State law does not provide for priority of agricultural lien, the exception will not apply. Further, agricultural lien is also limited in its application to proceeds. Unless proceeds are farm products, a lienor with a perfected agricultural lien will have no claim on the proceeds. Farm products become

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[1271] See 5.3.3 herein.
[1272] *Uniform Commercial Code 2009-2010 Ed: Official Text and Comments* (n 1253)§ 9-302; 9-308(b).
[1273] See Burnham (n 660).
[1274] Burnham (n 1250) 107–108.
[1275] *Uniform Commercial Code 2009-2010 Ed: Official Text and Comments* (n 158) § 9-322, and comment 12.
[1276] ibid§ 9-322(g).

proceeds when they are subjected to a manufacturing process.[1277] For security interests, they generally attach 'to any identifiable proceeds of collateral', except for buyers in the ordinary course of business.[1278] Farm products were excluded from this ordinary course of business exception, mainly to protect the farmers and to some extent the agricultural creditors. Therefore, a security interest on farm product or proceeds continued even when the product is transferred to a buyer in the ordinary course of business.[1279]

The coverage of the Revised Article 9 has been expanded to include consignments.[1280] A farmer who qualifies as a merchant, and who hypothetically raises livestock (non-consumer goods of monetary value above US$ 1,000) on behalf of others for sale may be engaged in consignment, provided all the other statutory requirements are met.[1281] Since a consignment is a transaction which is increasingly used in stiff economic periods, it incorporation in the Revised Article 9 is not a surprise, even though consignments were not considered primarily as security interests.[1282] The issue of concern in farm consignment will be the farmer consignee (debtor) possibility to transfer greater right to the consigned goods, which could be classified as farm product to secured party with security interests on farm products.[1283] Prior to the recent revision, the Code subordinated the rights of the consignee to the secured creditor. The Revised Article 9 now

[1277] ibid§ 9-102, comment 4.
[1278] ibid§ 9-315(a) (2). The plausible means out for agricultural lienors is the reliance of State law on rules on proceeds like the Iowa's Custom Cattle Feedlot Lien; Peterson (n 1270) 441.
[1279] Note that the federal farm product rule, 7U.S.C. s1631 from the Food Security Act 1985, has overridden this farm product continuation of the security interest to buyers in the ordinary course of business. Baker (n 1252) 1428–1429.
[1280] *Uniform Commercial Code 2009-2010 Ed : Official Text and Comments* (n 160), § 9-109(a)(4), comment 6.
[1281] ibid§ 9-102(a)(20) defines consignment to mean "a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and: (A) the merchant: (i) deals in goods of that kind under a name other than the name of the person making delivery; (ii) is not an auctioneer; and (iii) is not generally known by its creditors to be substantially engaged in selling the goods of others; (B) with respect to each delivery, the aggregate value of the goods is $1,000 or more at the time of delivery; (C) the goods are not consumer goods immediately before delivery; and (D) the transaction does not create a security interest that secures an obligation".
[1282] Rusch (n 1176) 222–223.
[1283] ibid 226.

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includes true consignments within the perfection scheme to ensure priority over later security interests or the consignee's trustee in bankruptcy.[1284]

The final issue with regards incremental refinement of Article 9 concerns the link between bankruptcy law and secured credit financing, dealing with the special treatment of farmers in Chapter 12 of the Bankruptcy Code. In 1886, the general principle that security interest 'pass through bankruptcy unaffected' was first affirmed by the Supreme Court in *Long & Wife v. Bullard*.[1285] The rights of the secured creditor as against the bankruptcy trustee's powers to avoid security interests or step in as a hypothetical lien creditor was reaffirmed in the Congressional Bankruptcy Reform Act of 1978. The right of the secured creditor is limited to the value of her interest in the debtor's collateral.[1286] The Bankruptcy law has gone through several reforms since 1978, but the interest is in Chapter 12, which provides an exceptional and simple scheme for the 'adjustment of debts of a family farmer or fisherman with regular annual income'.[1287] The main areas of interest in Revised U.C.C. Article 9 and the Bankruptcy Code Chapter 12 interchange is the determination of the estate, the validity of a security claim (whether security interest is perfected) and the value of the claim. Chapter 12 mainly allows for a simpler adjustments/reorganization for farmers, with a long period (between 3 to 5 years) repayment plans.[1288]

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[1284] White and Summers, *Uniform Commercial Code* (n 90) 40–45.
[1285] *Long and Wife v Bullard* (1886) 117 US 617 (Supreme Court); White and Summers, *Uniform Commercial Code* (n 90) 250–251.
[1286] White and Summers, *Uniform Commercial Code* (n 90) 248–251.
[1287] 11 U.S. Code § 1201 – 1231.
[1288] Rusch (n 1176) 253–259; 'Chapter 12 - Bankruptcy Basics' (*United States Courts*) <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-12-bankruptcy-basics> accessed 20 April 2016.

5.3.4. Lessons from the US Agriculture Secured Credit Reform

The whole purport of examining farm credit in the US is to outline lessons that could be drawn from Article 9 and supplemental Federal or state law for consideration in Sierra Leone. Indeed, the legislative history and agricultural credit reforms in the US have shown key points a reforming jurisdiction like Sierra Leone may borrow. The key points have been systematized into four main categories: First, the governmental special treatment policy and paternalism. Second, the utility of functionalism and unitary concept of security interest. Third, the inevitability of incremental reforms. And fourth, the need to continue external governmental policies or programs on farm credit schemes. A brief discussion of the four categories follows below.

5.3.4.1 Governmental Special Treatment and Paternalism

In reforming the law on farm credit in the US, purposeful Federal government policy and special protection for the agriculture industry is evident. The US Federal Government's recognition of the contribution of agriculture to the economy and as a way of life for the rural Americans, sought to adopt policies that will promote agricultural credit financing within Article 9. [1289] The Federal Government was instrumental in encouraging States to either enact laws or be receptive to new rules on farm credit on future crop for example, which led to rapid States law reforms.[1290] The pro-agriculture policy shaped the formulation of Article 9, especially the entrenchment of statutory special protection of farmers.[1291] This policy of paternalism permeates

[1289] Rusch (n 1176) 211.
[1290] Gilmore, *Security Interests in Personal Property* (n 1213) 860.
[1291] Specifically, the special treatment accorded to agricultural or farm credit include: First, the recognition of the need to provide protective provisions for farmers and their creditors, premised on the need for special definition of farm collateral, farm machinery and farm operations, similar to consumer transactions. This also led to the distinction between farm proceeds and general inventory, in providing for the continuation of the security interest in farm collateral even after sale to a third party. Second, the inclusion of a distinct requirement for the attachment of a security interest on future crop, i.e., the within one year of the execution of the security agreement, meant to protect both farmers and creditors. Third, the provision for automatic perfection provided as an exemption to the filing requirement for certain security interests, including the PMSI in farm equipment under US$ 2,500. Fourth, the exception to the sale of farm product and the continuation of the security interest, thereby imposing an exception to the general

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most provisions dealing with farm credit in the Code. The special protection of farm credit was largely supported by scholars and commentators.[1292] However, others have bemoaned the romantic depiction of the American farmer as poor and unsophisticated, thus providing the misleading narrative for public policy protection of the modern-day farmer, usually a sophisticated commercial corporation.[1293] This criticism, however, has not obstructed the outright protection of farmers and farm credit in Article 9, where the policy is aimed at ensuring farmers and their creditors enjoy sufficient flexibility in credit transactions whilst maintaining farming operations.

5.3.4.2 The Functional Approach and Unitary Concept of Security interest

The Unitary Model's impact on secured transactions in the US mainly rests on the adoption of the function approach as aforementioned and the unitary conception of security interest.[1294] The combination of the two ideological points has so far impacted positively on agriculture credit finance.[1295] Since the general impact of the functional approach has been previously discussed, it is only useful to note the agriculture specific issues. In pre-Code farm credits, various devices existed for agriculture related lending, with rigid formalities and technicalities, including the potential-possession and equitable-lien doctrines for use of future crops as security interests. The

exception of buyers in the ordinary course of business buying products free of existing encumbrances. This exception has been limited by the Federal Food Security Act 1985, provided its rules are complied with fully. Fifth, the incorporation of agricultural lien in Article 9, notwithstanding their non-consensual nature, simply to dispel the priority conflicts and encourage farm credits. This resolved the most litigious problem faced by traditional farm creditors (banks) as against statutory lienholders. Sixth, the special treatment of farmers in Chapter 12 of the US Bankruptcy Code is another special protection, which although outside the scope of this chapter, bears much nexus to farm credit and the policy of paternalism in the US. See Uniform Commercial Code (n 374), § 9-204(4)(a) for point 2.

[1292] Baker (n 158) 1417–1418; see also JW Looney, *Agricultural Law: A Lawyer's Guide to Representing Farm Clients* (Section of General Practice, American Bar Association 1990) 6.

[1293] Brenton C Leavitt, 'A Bank Examiner Looks at Agricultural Lending' [1963] Federal Reserve Bulletin 922, 926; 'Secured Interests in Growing and Future-Growing Crops under the Uniform Commercial Code' (n 87) 1275; see John C Miller, 'Farm Collateral under the UCC: Those Are Some Mighty Tall Silos, Ain't They Fella' (1975) 20 SDL Rev. 514, 254 which criticized the Article 9 approach to agricultural lending as naive. "The Code approaches farming as an occupation peopled by simple, unsophisticated tillers of the soil who need the mantle of protective legislation to survive'.

[1294] See Introduction, 0.1 herein.

[1295] *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), § 9-109.

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adoption of the functional approach and unitary concept of security led to a less formalistic or technical use of crops and livestock, present and future, with a revised definition of farm product which further recognizes security interests in aquaculture, trees vines and bushes.[1296] Although the 1962 Article 9 put to rest the contentions between what was natural-growing crop and industrial-growing crop, its definition of farm product was limited, since it also had a debtor's possession requirement.[1297] Further, farming operation was not defined in the 1962 Article 9.[1298] The definition of farm products was clarified and expanded in the Revised Article 9, reducing litigation risk associated with the distinction between farm products and other forms of collateral, including what constituted *fructus industriales*, and dispensing with the debtor's possession doctrine.[1299] Further, a definition for farming operation introduced, all geared towards clarifying the meaning of farm operation.[1300] When the definition clarification is viewed in the context of the special treatment accorded to farmers' credit finance, the legal paternalism deduced from the US framework becomes more pronounced.

5.3.4.3 The Inevitability of Incremental Reforms and Refinement

The US legislative process has shown that secured transactions reform is incremental and further refinements are inevitable. It should be pointed out that the revisions are prefaced by studies done by experts and institutions, harnessing specialized knowledge and practical experiences. For example, the Task Force on Agricultural Liens and its 'Final Report on Agricultural Financing' under the Unitary Model was very instrumental in designing the framework for the incorporation of statutory liens into the Revised Article 9.[1301] The notable incremental changes overtime include

[1296] ibid, § 9-109.
[1297] Uniform Commercial Code: Official Text (n 1216), § 9-109.
[1298] Goebel (n 1216) 383.
[1299] *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), § 9-102 (a) (34).
[1300] ibid, § 9-102 (a) (35).
[1301] Baker (n 1252) 1420.

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the expansion of the enabling definition for agricultural credit in the Revised Article 9 to remove formalities and enhance flexibility; and the incorporation of non-consensual statutory agricultural liens in the Revised Article 9. The rationale as explained is to minimize the priority conflict between secured parties and lienholders, and to bring agricultural liens within Article 9's perfection and priority regime. The key point to underscore is the continuous legal diagnostic studies conduct to pick out stress points in the law, and the willingness to refine Article 9 to maintain its fundamental purpose and philosophy.

5.3.4.4 Governmental Programs and External Finance & Schemes

Although Article 9 is mostly utilized by the traditional or 'institutional lenders, such as commercial banks, insurance companies, government agencies, and trade creditors',[1302] the financing of farmers in the US extends beyond the traditional limits and include government funded credit schemes, including the publicly funded Farm Service Agency (hereinafter "FSA") operating under the supervision of the US Department of Agriculture.[1303] The FSA can either provide credit for farming operations or guarantee for up to 90% loan made by a qualifying lender. The FSA uses Article 9 to perfect the security interests within its scheme. Another source of farm credit facilitated by the federal government included the Farm Credit System (hereinafter "FCS"). The FCS was created by Congressional statute in 1916 as a national system of cooperative banks and associations providing loan facilities to farmers and agricultural businesses. The objective at creation was to enlarge the pool of lenders for American agriculture and the network is now mainly self-funded.[1304] The lenders in the FCS scheme could also perfect their security interests under the

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[1302] Rusch (n 1176) 211.
[1303] 'Farm Operating Loans' (*temp_FSA_02_Landing_InteriorPages*) <http://www.fsa.usda.gov/programs-and-services/farm-loan-programs/farm-operating-loans/index> accessed 19 April 2016; Andrea Maclver, 'The U.C.C. and Perfection Issues Relating to Farm Products' Volume 35 Fall 2014 Number I 117 <http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/niulr35&section=4> accessed 12 April 2016.
[1304] Andrea Maclver, 'The U.C.C. and Perfection Issues Relating to Farm Products' (2014) 35 117, 178.

Article 9 scheme. The key lesson in this section relates to the need to open access to agricultural lending, encouraging non-traditional lenders including where necessary government participation. A credit market that is open and diverse will encourage competition and consequently lower transaction cost and interest rates.

5.4 Agriculture Credit Finance in the BLA

The discussion of the US agriculture credit finance and the alignment of the government policies and the philosophy of the Unitary Model does not necessarily warrant a replication in Sierra Leone without doing an assessment study of the legal framework and its receptivity to such multi-pronged but concerted approach. However, there is merit in measuring the suitability of the reformed law in Sierra Leone, i.e., the BLA on the sell points functionalism, paternalism, flexibility demonstrated by incremental reforms and multiple credit schemes identified in the US agriculture credit financing framework. The themes will be considered as a basis of lessons for Sierra Leone, taking into consideration of the agriculture economic imperatives highlighted above.

The BLA contains no sector-specific provision for agriculture credit, whether by way of paternalistic enhancements, special protection, clarifying definitions, or alignment with government or non-governmental concessionary credit schemes. Since there is no repeal of the pre-BLA law in Sierra Leone, agriculture financing follows the two-tier parallel systems of secured transactions in Sierra Leone, with the compartmentalization, complexity and formalities in the pre-BLA system, and functional scheme for security interest in the BLA. This status quo maintains an inequitable framework, making agriculture lending less appealing for risk averse lenders who have to deal with potential borrowers under the pre-BLA law. The position of the law in Sierra Leone is remarkably at odds with other common law countries that have adopted the Unitary Model in

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their secured transactions law reforms, including the Canadian Province of Ontario, New Zealand and Australia.

In Canada's Province of Ontario, the first common law jurisdiction to adopt the Unitary Model,[1305] its PPSA defines goods to mean "tangible personal property […] and includes fixtures, growing crops, the unborn young of animals, timber to be cut […]".[1306] The definition referring to growing crop as contained in the revised PPSA replaced the 'emblements and industrial growing crops', which was borrowed from the Sale of Goods Act.[1307] The new definition makes the PPSA applicable to all kinds of crop, and the security interest attaches upon the crop being grown, a scenario similar to the 1972 Article 9.[1308] Whilst the exclusivity of the PPSA over crops as against real estate mortgage was an arguable point, the Ontario PPSA made special provisions for priority right in growing crop, including a PMSI in crop security and proceeds,[1309] and the rationale is 'to encourage crop financing' thereby adopting a paternalistic approach to farm credit finance.[1310]

The New Zealand PPSA also contains special provision for security in crops, defined as 'a security interest in the crops while growing and afterwards when cut or separated from the soil'.[1311] This definition clarifies whatever common law distinction or ambiguity that was existing. The New Zealand PPSA further provides for different rules for 'priority of certain interests in crops'.[1312] Whilst it is noted that the New Zealand law deviates from the Unitary Models in certain

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[1305] Ziegel and Denomme (n 52) Ixv.
[1306] Personal Property Security Act, R.S.O. 1990, c. P.10 2014 s 1(1).
[1307] Ziegel and Denomme (n 52) 17.
[1308] ibid 18.
[1309] Personal Property Security Act, R.S.O. 1990, c. P.10 (n 1306) s 32.
[1310] Ziegel and Denomme (n 52) 277.
[1311] Personal Property Securities Act 1999 No 126 (as at 06 June 2015) s 51.
[1312] ibid 100.

respects,[1313] it law still considered and incorporated special provisions for agriculture related security interests.

In Australia, it is argued that the personal property security reformed framework has made it easier for agricultural businesses and farmers to use the range of farm assets, i.e., crops, livestock, machinery and products as security for credit.[1314] This is the case perhaps not only because the personal property security landscape was reformed in 2012 adopting the functional approach, but because special provisions exist for farm security in the PPSA. The PPSA defines goods to include, inter alia, crops and livestock.[1315] Crop is further defined to separate it from land and it refers to unharvested crop products and trees.[1316] Duggan and Brown argue that the aim is to 'facilitate crop security interest', and the PPSA provides for a rule to deal with competing priority claims on growing crops.[1317] Also, a separate definition of livestock covers the usual farm animals and deals with their products like wool. It further resolved the offspring dilemma in recognizing the unborn calf as personal property.[1318] The rationale is certainly to provide for special priority rules for crops and livestock in order to promote farm financing.

In the major common law jurisdictions described above, they have either dealt with clarifying the law on crop and livestock security interest, abandoning the judge-made or common law distinctions for clearer and expanded definitions or provided special priority rules to support agriculture finance. This was not the case in Sierra Leone, as no attempt was made to define goods, generally or agriculture goods in particular. This means the laborious definition in the pre-BLA

[1313] For example, the one year after execution rule for crops was not incorporated in the New Zealand PPSA. David Brown, 'The New Zealand Personal Property Securities Act 1999', *The Reform of UK Personal Property Security Law: Comparative Perspectives* (Routledge Cavendish) 348–349.
[1314] Financial Security Authority Australian Government, 'Farming and Agriculture' (19 June 2015) <https://www.ppsr.gov.au/farming-and-agriculture> accessed 25 April 2016.
[1315] Personal Property Securities Act 2009 (n 77), s 10; Duggan and Brown (n 39) 22.
[1316] Personal Property Securities Act 2009 (n 77), s 10.
[1317] Duggan and Brown (n 39) 22–23.
[1318] Personal Property Securities Act 2009 (n 77), s 84A (2); Duggan and Brown (n 39) 23.

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which distinguishes industrial crops from natural growing crops subsists, and the rigidity with respect to formalities and reliance on abstract doctrines to validate security interests in future crops or livestock. The agriculture credit framework, notwithstanding the BLA, remains complex, compartmentalized and rigid. With the importance of agriculture to the national economy, it is imperative that the legal framework responds to the economic and market trajectory. It, therefore, makes sense for serious consideration be given to the lessons from US farm credit financing as outlined above.

5.5 Conclusion

Agriculture represents the main economic activity in Sierra Leone, and aforesaid it contribution to half of the country's GDP. Whilst this is significant for the sector, it growth potential and financial security of farmers is hampered by limited access to credit. This chapter sort to address this problem by undertaking a comparative investigation of the legal framework in Sierra Leone, England and the US. Through the comparative studies, it has become increasingly lucid that a combination of paternalism, special protection and simplified law are the hallmarks needed to augment agriculture credit finance in modern secure transactions law. In the US the need to protect farmers and the rural American lifestyle continue to provide the justification for the continued paternalistic approach. In other common law jurisdictions, Canadian Province of Ontario, New Zealand and Australia, that have reformed their law in adopting the Unitary Model, the special treatment of agricultural credit is still evident in their PPSAs. Therefore, the systematized reform pointers of paternalism, special treatment, continued refinement of the law and multipronged credit schemes must be seen as reform imperative for Sierra Leone.

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Chapter Six

6. Inventory and Receivables Financing in Sierra Leone Post PPSL Reform

This Chapter builds on the claim that the PPSL reform in Sierra Leone, although fraught with substantial and minor deviations and defects, can be optimized by the enhancement of inventory and receivable financing, especially on the basis of the introduction of less formalistic restrictions for the grant of security interest in present and future trading stock, i.e., circulating/shifting assets, and pure intangibles of business firms/enterprises under the BLA. Inventory and receivable financing are examined within the prism of the secured transactions law reform and the flawed legal transplantation in Sierra Leone, with the objective of establishing the existence of a silver lining, especially for SMEs in accessing credit finance. This is the case notwithstanding the further complexity introduced by the substantial deviations in the legal framework. In relation to the economic significance, inventory and receivables financing unlock access to finance, especially operating funds, with the use of trading stock, raw materials, goods (whether processed or not), and credit sales as collateral.[1319]

The access to finance claim is argued to be of immense importance to SMEs generally characterized by insufficient assets to offer as security for credit, but with inventory and receivables as their prized business assets.[1320] The use of inventory and receivable financing is not

[1319] See Oditah (n 97); Goode, *Goode on Legal Problems of Credit and Security* (n 47) 2–3, 95, paras. 1-02, 3-01; McCormack, *Secured Credit under English and American Law* (n 606) 209.

[1320] In looking at financial inclusion in sub-Saharan Africa, the SME sector has been referred to as the 'missing middle' given their exclusion or lacking access to finance; Peter Quartey and others, 'Financing the Growth of SMEs in Africa: What Are the Constraints to SME Financing within ECOWAS?' (2017) 7 Review of Development Finance 18, 19; N Orkun Akseli, 'The United Nations Convention on the Assignment of Receivables in International Trade and Small Businesses', *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing Limited 2016) 465; Mehnaz Safavian, 'Firm-Level Evidence on Collateral and Access to Finance', *Secured Transactions Reform and Access to Credit* (Cheltenham, Edward Elgar 2008) 111; also see Allen N Berger and Gregory F Udell, 'A More Complete Conceptual Framework for SME Finance' (2006) 30 Journal of Banking and Finance 2945; Allen N Berger and Gregory F Udell, 'Small Business Credit Availability and Relationship Lending: The Importance of Bank Organisational Structure' [2002] The Economic Journal F32; Thorsten Beck and Asli Demirguc-Kunt, 'Small and Medium-Size Enterprises: Access to Finance as a Growth Constraint' (2006) 30 Journal of Banking and Finance 2931.

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new in Sierra Leone, given its adoption of English law, which historically recognizes the use of pure intangibles, especially debt/account, i.e., receivables; and general shifting tangibles in the form of goods/stock, i.e., inventory for financing.[1321] However, the use of receivables and inventory, for example, have been plagued by formalistic restrictions involved in those transactions, including accurate description and prohibition of the use of after-acquired as security in the Bills of Sale Act, Cap 241, and their security documentation, i.e., the use of chattel mortgage, security assignment and the fixed and floating charge.[1322] In addition to the formalities, the methods of securing receivables and inventory are considered to be weak in terms of ensuring priority over third parties.[1323]

The discourse on inventory and receivable financing often combines these two distinct forms of asset financing, since they are inextricably linked.[1324] Receivables usually arise from the sale of stock (inventory), and therefore, the similar scheme will be followed in this chapter. This chapter offers a comparative examination of the changes embedded in the reformed legal framework in Sierra Leone, and the economic utility of adopting a less formalistic, risk mitigating approach, which through legislative fiat, the Unitary Model, for example, has continually adopted. This chapter will drill further into the significance of the distinction between absolute and security

[1321] Goode, *Commercial Law* (n 529) 738; McCormack, *Secured Credit under English and American Law* (n 606) 209.
[1322] See limitations on specific description of personal chattels and after-acquired under Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), ss 20 and 22 respectively; In England, see the Law Commission Report on Law Commission, *Bills of Sale* (n 19) 12, which highlights the problems of the Bills of Sale Act. in *National Westminster Bank plc v. Spectrum Plus Limited & Others* (n 437), the highest court in England held that a "charge over book debts in a debenture which required the proceeds of the book debts to be paid into an account with the bank but placed no restriction on the use that could be made of the balance on the account thereafter was a floating and not a fixed charge"; thereby overruling; *Siebe Gorman & Co Ltd v Barclays Bank Ltd* (1979) 2 Lloyd's Rep 142, which had earlier ruled that there was no legal restriction to secure receivables by a fixed charge without control on proceeds; Goode, *Commercial Law* (n 529) 738, fn. 1; note that present English law allows for securing receivables either by a floating charge or an outright assignment McCormack, *Secured Credit under English and American Law* (n 606) 209.
[1323] See the partial invalidity rule established in *Twyne's Case* (n 381), wherein the debtors retention of possession and use of personal chattel as their own as a secret transfer and fraudulent.
[1324] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 96, para 3-02; Goode, *Commercial Law* (n 529) 738; see Oditah (n 97).

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transfers of receivable, and their impact on priority. Further, as part of inventory financing devices, i.e., the use of field warehousing as an alternative for its economic and creditors' policing benefits will be explored. This chapter examines the economic and legal justification for inventory and receivable financing, and their nexus to the typology of business organizations in Sierra Leone and the mismatch of debtors' assets and creditors' preference for collateral as security for credit. The bottom-line is that the legal framework must balance the two extremes of commercial realties of simplifying the law and mitigating risk.

6.1 The Economic and Legal Justifications for Inventory and Receivable Financing

The claim that receivable and inventory financing significantly facilitates business activity is the primary economic and theoretical justification for their examination as part of the reformed PPSL framework.[1325] The economic/business importance argument is premised on the use of inventory and receivable financing as flexible avenues to access finance, whether long-term capital (on a revolving basis), seasonally or temporarily, to fund business operations, and expansion without need for capital financing.[1326] Under the notion of freedom of contract, the assignability of contractual rights, prominent in inventory and receivable financing is anchored on the social and economic 'utility of permitting creditors to transfer [contractual] rights is believed to outweigh the utility of permitting obligors to forbid' transfers.[1327] In essence, the economic utility to enhance inventory and receivable financing, for example, through the mechanism of contractual assignment, is greater than prohibiting or limiting such transactions. For example, it makes sense to allow assignability of receivable than to limit such transactions.

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[1325] Albert R Koch, 'Economic Aspects of Inventory and Receivables Financing Secured Commercial Financing' (1948) 13 Law and Contemporary Problems 566, 566.
[1326] ibid; see Homer Kripke, 'Current Assets Financing as a Source of Long-Term Capital' (1951–1952) 36 Minnesota Law Review 506, especially, 514; Tajti, *Comparative Secured Transactions Law* (n 1) 96.
[1327] Gilmore, *Security Interests in Personal Property* (n 7) 212.

This economic significance of enabling inventory and receivables financing becomes much more profound when banks and other financial institutions actively provide such financing with respective minimal/commensurate risk.[1328] Risk is often minimized through relationship lending, where overtime the banks and financial institutions or other creditors develop and amass soft information on the debtor business enterprise and control of accounts.[1329] Conceptually, it is senseless for a creditor to accept goods which are circulating and being passed onto the hands of third parties as collateral; or to detrimentally rely on the fulfilment of a payment obligation by a third party. However, the practical economic values of receivable financing have diminished the theoretical reservations.[1330] Within the Unitary Model philosophy, financial transactions with the economic characteristics of PPSL financing, for example sales, are either included in the unitary concept of security interest or increasingly included in the perfection, priority and enforcement schemes of Article 9 as a way to maintain its functional purpose and risk mitigation for creditors and relevant third parties, including purchasers and unsecured creditors.[1331]

[1328] In looking at both qualitative and quantitative theory of bank lending, Koch concluded that 'it is impossible to isolate clearly the immediate economic effects of business inventory and receivables financing from the effects of other types of bank lending and investing', Koch (n 1325) 567, 569; as for relationship lending, "the financial institution relies primarily on soft information gathered through contact over time with the SME, its owner and the local community to address the opacity problem. This information is acquired in large […] through direct contact with the borrower and through observing the SME's performance on all dimensions of its banking relationship. This soft information may also include an assessment of the future prospects of the SME garnered from past communications with SME's suppliers, customers, or neighboring businesses"; Berger and Udell, 'A More Complete Conceptual Framework for SME Finance' (n 1320); Beck and Demirguc-Kunt (n 1320); Berger and Udell, 'Small Business Credit Availability and Relationship Lending' (n 1320).

[1329] Koch (n 1325) 567; Berger and Udell, 'Small Business Credit Availability and Relationship Lending' (n 1320); Berger and Udell, 'A More Complete Conceptual Framework for SME Finance' (n 1320); Beck and Demirguc-Kunt (n 1320).

[1330] Goode, *Commercial Law* (n 529) 738.

[1331] White and Summers, *Uniform Commercial Code* (n 90) 11–12, § 30-2; for the public policy argument, see Robert H Skilton, 'Tradition and Change: The Law of Mortgages on Merchandise' (1963) 1963 Wisconsin Law Review 359, 396–391; Gilmore referred to the person who 'lends money on the security of merchandise inventory or account receivables or both' as the twentieth century factor; Gilmore, *Security Interests in Personal Property* (n 7) 128; however, the distinction between the old factor and modern inventory financing in the US was brought by a decision of the New York Court of Appeal in *Irving Trust Co V B Lindner & Bro, Inc* (1934) 264 NY 165.

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The economic benefits attributable to inventory financing, for instance, stem from its ability to unlock access to funds to acquire and maintain more stock for trading.[1332] This is very useful to a dealer-purchaser, i.e., a business debtor who wants to minimize interruption to the business operations. The financier-creditor can be the manufacturer or be independent of the manufacturer, but in both scenarios inventory financing ensures steady stream of supply of trading goods and prompt satisfaction of orders, creating a revolving business paradigm.[1333] For the financier-creditor, the allure rests with the huge amounts of transaction profits this form of collateralized financing offers. The economic importance of inventory financing is also linked to its propensity to enable SME growth and trading expansion. Firstly, the opportunities in revolving and not self-liquidating inventory financing produces long-term credit capitalisation.[1334] Secondly, the practical unavailability of the other forms of conventional financing for smaller businesses.[1335] And thirdly, the flexible use of inventory financing as a short-term means for additional funds.[1336]

The economic benefits for inventory financing could also easily be attributed to receivables financing. Whilst the economic utility of receivable finance is equally pronounced, in both monetary value and social respectability,[1337] its value is more so attached to the benefits derived from its legal attributes.[1338] This is in regards to the legal permissibility to assign contractual rights relating to account receivables, which can be effectively be gleaned from the gradual evolution/recognition of the alienability of rights.[1339] The advantages of receivable financing in the

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[1332] Goode, *Commercial Law* (n 529) 739.
[1333] ibid.
[1334] Allison Dunham, 'Inventory and Accounts Receivable Financing' (1949) 62 Harvard Law Review 588, 595, 601; Robert H Greenberg, 'Inventory and Accounts Receivable Financing Chattel Security Transactions' (1956) 1956 University of Illinois Law Forum 601, 603.
[1335] Kripke, 'Current Assets Financing as a Source of Long-Term Capital' (n 1326) 507.
[1336] Greenberg (n 1334) 601, 603.
[1337] Gilmore, *Security Interests in Personal Property* (n 7) 251.
[1338] Tajti, *Comparative Secured Transactions Law* (n 1) 97.
[1339] ibid; Gilmore, *Security Interests in Personal Property* (n 289) ch 8. ibid; Gilmore (n 9) ch 8.

economic sense hinges on the huge transaction value in pure intangibles.[1340] Further, as opposed to tangibles, receivables are not susceptible to physical loss, deterioration or damage; can be stored, transferred in large volumes on a computer, just like the digitalization of the securities in the capital market.[1341] Although this substantially reduces costs, it does not eliminate all risks, including, for example, the growing phenomenon of cyber-attacks. However, these comparative advantages elevate the economic utility of receivable financing, especially when in their nature they are self-liquidating and a good source for short term financing.[1342]

The World Bank Group, which has been working on secured transactions law reforms globally, has published various studies arguing that the use of firms' assets, especially receivables and inventory, has not reached the optimal point in developing countries.[1343] World Bank studies have shown a mismatch between banks' preferences for collateral and the assets of business firms/enterprises in low and middle income countries.[1344] Banks prefer predominantly land and buildings as collateral for credit, with machinery a distant second, and followed by account receivables; whilst firms mainly have at their asset portfolios machinery, account receivables, and land and buildings in the respective order.[1345] The rationale for the restrictive bank preferences

[1340] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 95, para 3-01; Akseli (n 1320) 465.
[1341] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 97, para 3-01.
[1342] Oditah (n 97) 2; Akseli (n 1320) 465.
[1343] Safavian (n 1320) 113; Akseli (n 1320) 465; see Mehnaz Safavian, Heywoood Fleisig and Jevgenijs Steinbuks, 'Unlocking Dead Capital: How Reforming Collateral Laws Improves Access to Finance' [2006] Private Sector Development Viewpoint.
[1344] For example, see the Enterprise Survey, which "is a firm-level survey of a representative sample of an economy's private sector. The surveys cover a broad range of business environment topics including access to finance, corruption, infrastructure, crime, competition, and performance measures. Since 2002, the World Bank has collected this data from face-to-face interviews with top managers and business owners in over 155,000 companies in 148 economies" The World Bank Group, 'Enterprise Surveys - World Bank Group' (2017) <http://www.enterprisesurveys.org/about-us> accessed 8 September 2017; See Safavian, Fleisig and Steinbuks (n 1343); Safavian (n 1320) 110; Akseli (n 1320) 465.
[1345] Bank preferences in percentages are: Land and buildings (73%), machinery (18%), and account receivables (9%). Firm's asset portfolios, however, reflect machinery (44%), account receivables (34%), and land and buildings (22%). The '[D]ata are from surveys conducted in more than 60 low- and middle-income countries in 2001–05. Source: World Bank Group, Enterprise Surveys database'; Safavian, Fleisig and Steinbuks (n 1343) 2.

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relates to legal limitations on what can be used and in what form (closed-list of security devices), lacking clarity on priorities, and ease of enforcement.[1346] The mismatch therefore puts an end to the conventional wisdom that firms cannot unlock access to finance due to poor/insufficient assets. Rather what obtains is the holding of otherwise valuable assets not preferred by banks and financial institutions, thereby leading to the notion of 'dead capital'.[1347]

In turning to the country specific profile, it must be noted that two critical issues affect the use of inventory and receivables as security for credit in Sierra Leone. First, the structure of business organizations (enterprises/firms);[1348] and second, the correlated legal restrictions on the enumerated security devices, and formalities on the security documentation for stock and receivables.[1349] In profiling business enterprises/firms in Sierra Leone, the World Bank's Enterprise Survey[1350] found as follows: in 2009, over 30% of firms identified access to finance as main obstacle in the business environment.[1351] Within this bracket, 30% of the small and large firms identified access to finance as part of the top three obstacles.[1352] The World Bank's Enterprise Survey in 2009 further found that only 3.7% of firms have access to bank finance for

[1346] ibid.
[1347] Safavian (n 1320) 110, 118; see De Soto (n 12).
[1348] Business is defined as "any trade, profession, including private professional practice or vocation carried on or exercised in Sierra Leone for any period of time, whether or not carried on or exercised through a permanent establishment or an agent or otherwise". Registration of Business Act 2007 s 1. The Act does not define the term 'firm', but refers to it extensively in section 2 in the sense of businesses not operating in the ordinary name of a person in private life.
[1349] See Quartey and others (n 1320).
[1350] The Enterprise Surveys focused on the numerous aspects, whether accommodating or constraining, that determines the success of firms in the business environment in Sierra Leone. The firms covered are in the non-agricultural formal private economy, from the manufacturing sector, the services sector, and the transportation to the construction sectors. However, public utilities, government services, health care, and financial services sectors were excluded. World Bank Group (n 20) 3.
[1351] ibid 4.
[1352] The Enterprise Survey classified firms based on the number of employees, Small (1-19 employees), Medium (20-99 employees), and Large (100+ employees). 15 of small firms identified access to finance as a major obstacle, whilst over 20% of large firms were of the same view. ibid.

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investment, and a negligible 0.2% for trade credit financing for investment.[1353] However, at the same period, an encouraging 17.4% of firms had access to bank loans/line of credit with a bank.[1354]

The legal framework in Sierra Leone allows for business organization to be established on the basis of sole proprietorship, partnerships, cooperatives, incorporated companies (public and private) with attendant legal requirements and protections.[1355] Based on the Enterprise Survey, about 1.1% of business organizations are public companies, 51.1% are private companies, and 68.2% are sole proprietorships. Partnerships make up 11.2% of business firms, and the remaining 4.3% are limited partnership.[1356] Recently, over 3,000 companies, mostly private companies, have been incorporated by the CAC following its establishment under the Companies Act 2009.[1357] Some of the reasons for the reduced access to finance cannot be far from the legal limitations attributed to the legal form of business firms, and the inadequacy of the regulatory framework, which affects, for example, the financing instruments and security documentation. In the 1970s, Dixon-Fyle in examining the role of law in political and economic modernisation argued that the forms of business organisations, which were of economic significance, were either inadequately

[1353] ibid 13, the average percentages changes based on the size of firms. However, for all the firms, the biggest source of finance is from internal resources.
[1354] ibid.
[1355] See Companies Act 2009 (n 387); Cooperative Societies Act 1977; The Investment Promotion Act 2004, s 1 in defining an 'investor' referred to business organizations known in Sierra Leone, including 'any natural person or legal entity, including companies, business associations, partnerships, sole proprietorships and other organisations constituted […] to operate a business enterprise'; See Rita Kashopé Dixon-Fyle, 'Company Law and Economic Development in Sierra Leone: A Study in Conflict' (1970) 19 The International and Comparative Law Quarterly 447, 450–451.
[1356] World Bank Group (n 20) 8, 13; the percentages reflect the ration even in the 1960. In 1968, Dixon-Fyle noted that legal form of businesses in Sierra Leone as follows: Public Co. 1, Private Co. 596, Partnerships by agreement registered 126, Corporations 6 and Unit Firms 2370; Dixon-Fyle (n 1355) 450. The unit firms refers to sole proprietorships.
[1357] Awoko reported that from the total, 2,015 were new companies, 46 foreign companies, 949 existing companies and 1333 restored companies. 'From January 19 to the 31st December 2016, 1,082 local companies were incorporated, 21 foreign and 949 local companies were registered'; Zainab Joaque, 'Sierra Leone News: Corporate Affairs Incorporates over 3,000 Companies' *Awoko Newspaper* (Freetown, Sierra Leone, 29 August 2017) <http://awoko.org/2017/08/30/sierra-leone-news-corporate-affairs-incorporates-over-3000-companies/> accessed 21 September 2017; See homepage of the CAC, 'Corporate Affairs Commission Sierra Leone | Home' <http://www.cac.gov.sl/> accessed 4 May 2018.

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regulated or not regulated at all in Sierra Leone.[1358] For example, the Business Names Registration Act (Cap. 257) only allowed for registration of sole proprietorship and nothing more. No rules on governance, nor means to facilitate their financing. The 'void' or 'gap' meant the market is riddled with commercial and legal uncertainties, and there was no case law to help with judicial interpretation,[1359] hence the continued reliance on English law. Almost half a century after, nothing substantially has changed.

It follows, therefore, that even beyond the year 2000, the majority of firms are sole proprietorships, i.e., unincorporated enterprises operating in the natural name of the owners.[1360] The World Bank and CAC statistics on business enterprises confirms this status quo, although incorporation of companies is creeping upwards and growing exponentially. As such, sole proprietors have limited options to secure inventory (circulating assets) and receivables. First, sole proprietorships and other unincorporated entities cannot make use of the charge (fixed and/or floating) since only incorporated entity can do so in Sierra Leone.[1361] Second, under the Bills of Sale Act, Cap 241, a security bill of sale dealing with inventory imposes the rule that the personal chattel must be 'specifically described'.[1362] Third, in dealing with future personal property, Bills

[1358] Dixon-Fyle (n 1355) 451.
[1359] ibid.
[1360] Proprietor means "an individual carrying on a business of which he is the sole owner and includes a person in private professional practice"; Registration of Business Act (n 1348), s 1. The terminology 'sole proprietorship' "should not mislead the reader. Certainly, the sole proprietorship is a business fully owned by one person, the sole proprietor, who holds all of the business's liabilities and assets. However, although the owner operates the business in his personal capacity, many other third parties may be involved. A sole proprietorship may involve hundreds of employees and other participants under the direction of the sole proprietor". For discussion on the nature of sole proprietorships generally, see John Balouziyeh, *A Legal Guide to United States Business Organizations: The Law of Partnerships, Corporations, and Limited Liability Companies* (Springer 2013) ch 4, 29; also see Henry Hansmann and Reinier Kraakman, 'The Essential Role of Organizational Law' (2000) 110 The Yale Law Journal 387.
[1361] Companies Act 2009 (n 387), s 145; and see discussion in [chapter xx pages xx] herein.
[1362] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 21; See *Thomas v Kelly* (n 418), where the English Court of Appeal held that a security bill of sale under the 1878 and 1882 Acts was void 'on the ground that it departed from the precise legal effect of the form given in the schedule'.

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of Sale Act, Cap 241 imposes a limitation to the effect that a security bill relating to after-acquired personal property is void against third parties in Sierra Leone.[1363]

Bills of Sale Act, Cap 241 generally is beset with a lot of technical difficulties,[1364] especially with security bills of sale, and such difficulties have been recorded in a series of reviews of the mother Bills of Sale Acts 1878 and 1888 in England.[1365] With specific reference to receivable and securing such pure intangible, the assignment of book debts[1366] is considered as an absolute bill of sale, hence not a security bill but an outright sale of the book debts.[1367] Per Lord Macnaghten, "[C]hoses in action are expressly declared not to be personal chattel within the meaning of [the Bills of Sale] Acts".[1368] Therefore, in England the Insolvency Act 1986 imposes a registration obligation as "a general assignment to be registered 'as if it were' an absolute bill of sale.[1369] If not so registered, it will be ineffective against a trustee in bankruptcy, who would collect the debts and use them to satisfy the claims of the business's creditor".[1370] Outside the registration regime, difficulties arise in assigning future book debts void at law; and in *Taibly v the Official Receiver*,[1371] the House of Lord held that an equitable security bill of sale over future book debts for value

[1363] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 22 (after-acquired invalidity); see 2.3.1.2 herein relating to discussions on chattel mortgage.
[1364] Law Commission, *Bills of Sale* (n 19) 7–8, paras 1.31 to 1.35, 6.65 to 6.67.
[1365] In *Thomas v Kelly* (n 418), Lord Macnaghten famously commented on the state of the Bill of Sale Act of England 1882, as: "[It] is reasonably clear, would be to affirm a proposition to which I think few lawyers would subscribe, and which seems to be contradicted by the mass of litigation which the Act has produced and is producing every day. For my own part, the more I have occasion to study the Act the more convinced I am that it is beset with difficulties which can only be removed by legislation". Also see Law Commission, *Bills of Sale* (n 19) 4, para 1.13; Crowther and others (n 11) 179; Diamond (n 19) 92, para 18.1.8.
[1366] In theory 'book debts' mean, 'receivables'. However, receiver is a bit broader than 'book debts' but English law scholars uses the terms interchangeably "Strictly, 'book debts' does not capture all sums due to a business"; Law Commission, *Bills of Sale* (n 19) 76, fn. 8; Beale and others (n 52) 409, para 10.22.
[1367] "An assignment is not a security interest; it is an outright sale of the book debts. Though it is possible for invoice financiers to give a loan to the business and secure that loan over the business's book debts, an outright sale by way of assignment is much more common"; Law Commission, *Bills of Sale* (n 19) 79, para 6.37, fn. 14; citing; Joseph Chitty, *Chitty on Contracts: General Principles* (31st edn, Sweet & Maxwell 2012) ch 19.
[1368] *Tailby v Official Receiver* (n 463) 542; see Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 3 (b).
[1369] Insolvency Act (n 556).
[1370] Law Commission, *Bills of Sale* (n 19) 79, paras 6.37 & 6.38.
[1371] *Tailby v Official Receiver* (n 463).

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(consideration) attaches as they come into existence.[1372] In the realm of equity, notification to the financier-creditor and strict policing of the debtor becomes an imperative and a panacea,[1373] but one that is burdensome and unnecessary. The formalism and legal restrictions in themselves serve as obstacles to unlock credit finance, especially for sole proprietorships. It is therefore justifiable to not only consider legal reform, but to consider reform that addresses the economic and legal concerns/obstacles, moving towards the approach in the Unitary Model.

6.2 Inventory (Stock-in-Trade) Financing: Resurrecting the 'Dead Capital'?

The paradigm inventory financing security transaction involves the expected sale of secured goods, and the loan from the secured party is repaid from the proceeds of the sale.[1374] In essence, the debtor will have the right to use and dispose of the goods, and hold onto the proceeds in trust for the creditor, and accordingly is expected to account for them or remit/transfer proceeds to the creditor.[1375] Inventory financing has a long history in commercial engagements, and the practice mainly arose from the need of manufacturers to distribute their goods to consumers, pay employees, utilities for producing inventory and for traders to access short-term credit.[1376] The long history of inventory financing, however, has not absolve it from legal uncertainties emanating from the invalidity rule dating back to 1601.[1377] In fact the strangle hold of the invalidity rule in *Twyne's*

[1372] ibid 523, 531, especially at 543, per Lord Macnaghten; see *Carl Richard Chapman (trading as Chapman & Co Solicitors) v David Frederick Wilson, Julian Nigel Richard Pitts, LawFinance Limited* [2010] EWHC 1746 (Chancery), para 96, per Mr. Justice Vos on the contemplation of equitable rights over future property in the Bills of Sale Act 1878.
[1373] Law Commission, *Bills of Sale* (n 19) 79–80.
[1374] Gilmore, *Security Interests in Personal Property* (n 7) 677.
[1375] ibid.
[1376] Koch (n 1325) 569; for a detailed historical sketch on both sides of the Atlantic (US and England), see Skilton, 'Tradition and Change' (n 1331).
[1377] The invalidity of security interest on chattel mortgage on stock dates as far back as the *Twyne's Case* (n 381), wherein under the Statute of 13 Elizabeth on fraudulent conveyances prohibition of secret transfer, and the donee being in possession and use of the personal chattel and trade with others as fraud. The United States Supreme Court applied the English rule in *Robinson v Elliott* (1875) 89 US 513 (Supreme Court); David Cohen and Albert B Gerber, 'Mortgages of Merchandise' (1939) 39 Columbia Law Review 1338, 1338–1340; Skilton, 'Tradition and Change' (n 1331) 364–366.

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Case[1378] dragged on for centuries.[1379] In the United States (hereinafter: US), the use of merchant's or manufacturer's stock in trade (inventory) before the U.C.C. became only possible limitedly through judicial validation of the stock in trade mortgage, the trust receipt, factor's lien and field warehousing security devices.[1380] The judicial recognition was a pragmatic solution to address the fraudulent transfer or secret lien prohibition in *Twyne's Case* for commercial reasons.[1381] With still lacking judicial consensus in all states, it was apparent that practices of the merchants will continue even though the 'old fraud in law' rule remained in the books.[1382] Once the U.C.C. Article 9 put to rest the invalidity issues,[1383] through the adoption of the floating lien,[1384] the legal issue that became paramount was the all-encompassing monopoly nature of the floating lien and less on the transaction uncertainty itself.[1385]

In England, being the birthplace of the invalidity rule, the courts had equally treated a 'grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, [future property as] void',[1386] until the ingenuity of the courts intervened by the exercise of their equitable jurisdiction in *Holroyd v Marshall.*[1387] In the case, which is still good law in Sierra Leone by reason of the adoption clause,[1388] the issue of effectively creating a charge over

[1378] *Twyne's Case* (n 381).
[1379] See Skilton, 'Tradition and Change' (n 1331).
[1380] Gilmore, *Security Interests in Personal Property* (n 7) 39, 44–45; See Skilton, 'Tradition and Change' (n 1331).
[1381] The prohibition in *Twyne's Case* (n 381); was confirmed in with respect to stock in trade mortgage *Robinson v. Elliott* (n 1377) 521. However, the state laws validating stock in trade mortgages was approved by the Supreme Court in *People's Savings Bank v Bates* (1887) 120 US 556 (Supreme Court), where it held "A chattel mortgage on a stock of goods is not, a matter of law, fraudulent as to creditors, or void because the mortgagor is to remain in possession and prosecute the business in the ordinary mode". Also see, *Etheridge v Sperry* (1891) 139 US 266 (Supreme Court); Gilmore, *Security Interests in Personal Property* (n 7) 39–40, 45.
[1382] Gilmore, *Security Interests in Personal Property* (n 7) 46–47.
[1383] Uniform Commercial Code (n 374), § 1-201 (b) (35), § 9-102 (a) (48).
[1384] See ibid, §§ 9-204 and 9-204; Skilton, 'Tradition and Change' (n 1331) 422; Robert S Summers, 'Should Oregon Adopt the Uniform Commercial Code Concept of the Floating Lien' (1961–1962) 41 Oregon Law Review 182, 182–183.
[1385] Gilmore, *Security Interests in Personal Property* (n 7) 678 et seq.
[1386] *Lunn v Thornton* (n 1017).
[1387] *Holroyd v. Marshall* (n 436).
[1388] Courts Act 1965 (n 145), s 74.

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future property was settled.[1389] The legal uncertainty with respect to charges over future property, especially inventory, which is substituted, shifting or circulating, rests with whether a fixed charge can be created over such an asset.[1390] Whilst a fixed charge assures the creditor of priority, a trading debtor will be faced by intolerable administrative burden if the consent of creditor is required for any disposal of the secured trading stock in the ordinary course of business.[1391] Thus, the outcome was for the recognition of the postponement of attachment, and unfettered disposal of trading stock, a position that contrasted with US pre-U.C.C. law. Further, with respect to unincorporated entities operating under the ambit of the Bills of Sale Act (1878) Amendment Act 1882, a security bill of sale is void and only valid against the grantor, when the personal chattel is not specifically described in the bill, or if described, the grantor is not the true owner of the personal chattel at the execution of the bill.[1392] These formalistic distinctions and restrictions were inherited by Sierra Leone in adopting the Bills of Sale Act, Cap 241 of the Laws of Sierra Leone 1960.[1393]

6.2.1 The BLA and Inventory Financing in Sierra Leone: The Transplantation Defects

The historical excursion, especially the English law approach, represents the status quo in Sierra Leone before the enactment of the BLA. The prior BLA law, which still applies to creditors other than banks and other financial institutions licensed by the Bank of Sierra Leone, largely follows the English law approach as already stated. The Companies Act 2009 in Sierra Leone enables companies to secure their assets by mortgage or charge,[1394] whether by a fixed charge on

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[1389] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 124, para 4-02.
[1390] See *National Westminster Bank plc v. Spectrum Plus Limited & Others* (n 437); Goode, *Goode on Legal Problems of Credit and Security* (n 47) 124, para 4-02.
[1391] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 124–125, para 4-02.
[1392] Bills of Sale Act (1878) Amendment Act 1882 (n 500), ss 4, 5; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 124, para 4-01; see exception in the Agricultural Credit Act 1923 (n 1092), for agricultural charges by farmers.
[1393] See Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398).
[1394] Companies Act 2009 (n 387) ss 142 and 145.

certain of the company's property or a floating charge.[1395] As previously argued, the floating charge statutory definition follows the longstanding judicial interpretation, recognizing its equitable nature, and it amenability to secure the general company's undertakings both present and future, without precluding the company from dealing with such assets until crystallisation.[1396] Therefore, the fixed versus floating charge characterisation problem leading to legal uncertainty, priority only post crystallization is still evident. In addition, the legal formalities and limitations embedded in the Bills of Sale Act (1878) Amendment Act 1888 in England also apply to unincorporated entities operating under the Bill of Sale Act, Cap 241 in Sierra Leone.[1397]

In moving onto the BLA era, inventory is defined therein, as being "goods that are - (a) held by a person for sale or lease; (b) to be provided under a contract for services; (c) raw materials or work in progress; or (d) materials used or consumed in a business",[1398] and this gives the sense of the law moving towards the U.C.C. Article 9 articulation. Inventory is defined in Article 9 to also mean "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.[1399] However, as previously argued, the gravitation towards Article 9 is incomplete as the definition of security interest in the BLA imported the English common law fixed and floating charge with all the associated legal uncertainties, and not the U.C.C. Article 9's floating lien.[1400] This is the bane of the inventory financing problem under the BLA as will be unearthed below.

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[1395] ibid s 145 (2).
[1396] ibid s 150 (1) and (2).
[1397] See 5.1 above.
[1398] Borrowers and Lenders Act, (n 9), s 1.
[1399] Uniform Commercial Code (n 374), § 9-102 (a) (48).
[1400] Borrowers and Lenders Act, (n 9), s 1; see 4.2.1 herein.

The BLA in general covers inventory financing in three ways: First, in the description of collateral which permits the use of the 'all inventory' to cover the borrower's inventory;[1401] secondly, in dealing with the priority of purchase money security interest in inventory and its proceeds;[1402] and thirdly, in the disposition of collateral (inventory) after default by sale.[1403] In all this, the main question that follows from the treatment of inventory financing in the BLA is whether enough was done to enhance its usage in the reformed framework. The short answer is no. In the first place, the BLA failed to introduce any substantial change to the framework that is already based on the Companies Act 2009 and the Bills of Sale Act, Cap 241. In addition, although the BLA makes references to the use of inventory as collateral, such references are not without flaws. Crucially, the BLA rightfully allows for a general description for inventory, i.e., 'all inventory' to be valid as an exception to the general rule requiring specific description of collateral.[1404] Whilst this exception is helpful, especially for companies to create a chattel mortgage[1405] and a charge with general description of inventory, the exception, however, conflicts with the provision of the Bills of Sale Act, Cap 241 requirement for specific description for a security bill of sale dealing with inventory for non-corporate business firms.[1406] Further, with a defective definition of property,[1407] the after-acquired security bill of sale invalidity against third parties is still maintained.[1408] Although the issue of conflicting statutes may be addressed by the

[1401] ibid, s 11 (2); see 3.2.2.2 herein for discussion on the issue.
[1402] ibid, s 25 (2); see 3.2.2.5 herein for discussion on the issue.
[1403] ibid, s 43 (3) (d); see 3.2.2.6 D herein for discussion on the issue.
[1404] ibid, s 11 (1) and (2).
[1405] The BLA defines a 'lender' to include commercial banks and other financial institutions, ibid, s 1; and the eligibility requirement for a license under the Other Financial Services Act, 2011 (n 453), s 5 (b) and (c) includes a society registered under the Co-operative Societies Act 1977, and a statutory body. As such, under the Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 29, it is only not applicable to debentures issued by companies. Therefore, a licensed other financial institution which is not a company is caught by the Bill of Sale, Cap 241 requirements.
[1406] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 21; see *Thomas v Kelly* (n 418).
[1407] Borrowers and Lenders Act, (n 9), s 1; see 3.2.1 herein.
[1408] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 22 (after-acquired invalidity); see 2.3.1.2 for discussion on chattel mortgage.

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courts through the *lex specialis* argument,[1409] these uncertainties, however, ought to have been resolved by the reform.

Secondly, the BLA in one breath seems to enhance inventory financing in granting priority to a purchase money security interest (hereinafter: PMSI) in inventory and its proceeds.[1410] It introduces a scheme of registration of the PMSI in inventory to attain priority over third party non-PMSI in the same collateral. The same provision, however, imposes an additional requirement whereby the 'lender receives a notification at the time the borrower obtains possession of the collateral'.[1411] The notification appears to be a pragmatic addition to the perfection requirement for PMSI in inventory. By legislative drafting defect, it unfortunately introduces an absurdity, in that, the systematic procedure in Article 9 is botched, i.e., as to which of the lenders should receive notification.[1412] The methodical scheme in Article 9 states inter alia that; (1) the PMSI in inventory is perfected upon the debtor's receipt of possession of the inventory; and (2) an authenticated notification is sent by PMSI secured party to the holder of the conflicting security interest.[1413] This can be the only logical conclusion since the lack of clarification as to which lender notification should be sent to makes the provision in the BLA absurd.

The third and final BLA consideration of inventory financing relates to the disposition of inventory after default by sale.[1414] The only significance relates to the removal of the 10 days' notice obligation on a lender to sell collateral, in this case inventory, by auction, public tender, or private sale, as agreed by the parties in the credit agreement.[1415] This provision although appearing

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[1409] See 4.3.2 herein.
[1410] Borrowers and Lenders Act, (n 9) s 25 (2).
[1411] ibid, s 25 (2).
[1412] Uniform Commercial Code (n 374), § 9-324.
[1413] ibid, § 9-324 (b) and (c).
[1414] Borrowers and Lenders Act, (n 9), s 43 (3) (d).
[1415] ibid, s 43 (1), (2) and (3) (d).

to be useful does not significantly address the legal uncertainty problems. It only applies to the sale of collateral without the 10 days limitation. These legal limitations go beyond a question of 'splitting hair' as they accentuate the mismatch of assets of firms, especially SMEs, and what creditors accept as collateral for credit, thereby cementing the 'dead capital' notion. In order to put forward a viable framework, a comparative examination of the piecemeal changes in England and the comprehensive US approaches will have to be examined.

6.2.2 Inventory Financing: Comparative Perspectives from the England and United States

The discussion above has shown the flaws in the BLA in the use of inventory as collateral for credit in both the non-BLA and BLA frameworks. This sub-section enquires into how the English and US approaches can provide a working solution to augment inventory financing in Sierra Leone. The claim herein is simply that the English position is commercially unsatisfactory and burdensome, whilst the US approach passes the logical step of balancing commercial needs and risk mitigation. Invariably the stock-in-trade industry in England has reverted to outright assignment or use of title retention devices to lessen the weaknesses of the floating charge or administrative burden associated with a fixed charge over inventory.[1416] In the US, part of the formal requirement to cover inventory is simply the inclusion of an unequivocal expression of intent to secure after-acquired property in the security agreement, with an after-acquired property clause;[1417] and the continuation of the validity of a security interest in the proceeds,[1418] thereby simply moving security after-acquired from 'equitable' to legal security interest as a floating lien.[1419] What becomes apparent in Sierra Leone, is the defect in its transplantation, i.e., in the

[1416] See Cohen and Gerber on the need for balancing the two extremes, Cohen and Gerber (n 1377); and Summers on 'excessive debtor control', Summers (n 1384) 183.
[1417] Uniform Commercial Code (n 374), §§ 9-204; 9-205.
[1418] ibid, §§ 9-315 (c); 9-332 (b) (1); 9-324.
[1419] ibid, §§ 9-204; 9-205; Gilmore, *Security Interests in Personal Property* (n 7) 360; Skilton, 'Tradition and Change' (n 1331) 422; Summers (n 1384) 183–184.

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failure to conceptualize the floating lien in the BLA and in allowing the problems associated with the floating charge to pass onto the BLA. This combines with the limitations of the Bills of Sale Act, Cap 241 for unincorporated entities.

In England, the practice of obtaining a security interest over stock-in-trade takes the form of a charge to secure the loan or title retention (under a bailment or a floor plan).[1420] Title retention is not in the strict sense a personal property security interest under English law, but it enjoys relative strength over the floating charge for example, whilst performing the same function.[1421] The predominant question, however, in terms of inventory financing in England, is whether a fixed charge can be created on stock-in-trade. Conceptually, a fixed charge over stock-in-trade can be created, but this creates a lot of uncertainties. Simply, the fixed charge is incompatible with the idea that the charge is unfettered in the use, disposal of the secured assets in the ordinary course of business.[1422] In cases of *Re Yorkshire Woolcombers Association Ltd.*,[1423]and *National Provincial Bank of England v. United Electric Theatres Ltd.*,[1424] the courts were of the view that the existences or inference of the chargor's entitlement to deal with secured assets in the ordinary course of business as the basis to negate a fixed charge.[1425] In the said *National Provincial Bank of England v. United Electric Theatres Ltd.*,[1426] the assets in dispute were all chattels in the defendant's business premises then or thereafter (future chattels), 'a specific legal mortgage of the chattels

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[1420] Goode (n 3) 740. See discussion on the creeping in of consignment in relation to retention of title or bailment of stock. However, consignment as a security device will be explored in the chapter dealing with title financing.
[1421] ibid.
[1422] ibid 740–741.
[1423] *In re Yorkshire Woolcombers Association Ltd* (n 991).
[1424] *National Provincial Bank of England v United Electric Theatres* (1916) 1 Ch 132.
[1425] Goode, *Commercial Law* (n 529) 740–741.
[1426] *National Provincial Bank of England v. United Electric Theatres* (n 1424), 132, 141. The Chancery Court held, "that so far as both present and future chattels were concerned the mortgage was merely a floating security, so that the charge on the chattels ranked after claims for rates, which were preferential over such a floating charge under the Companies (Consolidation) Act, 1908, ss. 107, 209".

existing at the date thereof and a specific equitable mortgage of future chattels on the premises'.[1427] In essence, although the floating security is useful in securing a revolving facility to be drawn on by debtor, it relatively weakness in securing priority takes away some of its lustre.

In *Illingworth v. Houldsworth and Another*,[1428] the House of Lords affirmed the decision of the Court of Appeal in *Re Yorkshire Woolcombers Association Ltd*.[1429] The Lord Justices in examining the nature of a mortgage, assignment of present and future book debts of a company held that on true construction of the deed it was the intention of the company to carry on its business in the ordinary way and, therefore, the deed was "a floating charge", and void for want of registration.[1430] The risk of legal uncertainty therefore is twofold under English law: First, the courts' interpretation of unfettered use in the ordinary course of business imposes a strict policing requirements for a fixed charge to be inferred from the agreement of the parties. Second, the loss of preference for the inventory-financier if the charge created is deemed to be a floating charge. This is what Goode and Gullifer refer to as the theoretical affirmation for a fixed charge to be created over stock-in-trade, with a commercially impracticability.[1431] Notwithstanding the theoretical legal permissibility, the practical limitation makes the theoretical affirmation redundant. It is within this frame that assignment by sale (absolute assignment) or title retention, as restrictive or limiting as they may be, are employed by the stock-in-trade financiers in England.

In the US, a giant leap was made from the business unfriendly rule where the debtor's right to carry on business and dispose of encumbered assets was deemed as fraudulent.[1432] The dogged

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[1427] *National Provincial Bank of England v. United Electric Theatres* (n 1424), 134.
[1428] *Illingworth v. Houldsworth* (n 434).
[1429] *In re Yorkshire Woolcombers Association Ltd* (n 991).
[1430] *Illingworth v. Houldsworth* (n 434) 355–356.
[1431] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 142–143, para 4-17.
[1432] See *Robinson v. Elliott* (n 1377), and note [xx] above; for receivables, see *Benedict v Ratner* (1925) 268 US 353 (Supreme Court); Gilmore, *Security Interests in Personal Property* (n 7) 354 et. seq., para § 11.6.

controversy that plagued the effectiveness of the elements that now constitutes the floating lien, such as the after-acquired property[1433] and the validity of a security interest where the debtor is allowed to dispose the secured asset without the immediate requirement to account was cemented in the *Benedict v. Ratner*,[1434] until the rule in *Benedict v Ratner* was abandoned in the Article 9. Although the case was decided on receivables, the core issues relating to after-acquired property and unfettered disposition of secured assets apply to inventory as well. The '*Benedict* ritual' required "a great deal of control, supervision or 'policing' by the assignee over the assignor's affairs".[1435] Given the burdensome nature of the *Benedict* ritual, the US framework was deemed to be even less accommodating to that of the English law approach at the time.[1436] Even with the accommodation of after-acquired property clause and the debtor's right to dispose the secured asset in practice, inventory financing still needed the borrower's affairs to be 'policed' by the creditor. The abolition of the *Benedict v Ratner* rule,[1437] and conceptualization of the floating lien

[1433] The after-acquired property problem was twofold: First, the problem of description; and second, the intention to intention to create a lien on future acquired stock. In *Davis v Turner* (1903) 120 Fed 605, the Circuit Court of Appeals, Fourth Circuit was of the view that although a "chattel mortgage of all the goods in the store where the makers are doing business in a certain city is not void for indefiniteness of description, where it was shown that the signers were associated in mercantile business as partners, and had but one place of business, which was in such city, and that the stock of goods referred to was the one in their store at that place", description in the sense of "all the stock of goods" was insufficient. See Cohen and Gerber (n 1377) 1342, 1350.

[1434] In *Benedict v. Ratner* (n 1432) 364–365, the Supreme Court held that 'the arrangement for the unfettered use by the company of the proceeds of the accounts precluded the effective creation of a lien and rendered the original assignment fraudulent in law'. The Benedict Ritual [xx]; see Gilmore, *Security Interests in Personal Property* (n 7) ch 8, para § 11.6 for the tracing of the controversy.

[1435] Gilmore, *Security Interests in Personal Property* (n 7) 355; 'policing' as signified in the case involves, inter alia, the remittance to the assignee on daily basis whilst nothing gets into the books of the assignor, use of revolving credit, and right to examine the assignor's books *Benedict v. Ratner* (n 1432).

[1436] The ritual increased costs, and the difference in agreement and interpretation led to further uncertainties in the law, see Dunham (n 1334) 598; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 125, para 4-02.

[1437] Uniform Commercial Code (n 374), § 9-205; *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), Official Comment 2 to § 9-205.

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in Article 9[1438] finally put to rest the legal uncertainties. The debate then shifted to excessiveness in the control of debtors as a negative by-product of the floating lien.[1439]

In Article 9, the one key step necessary for the recognition of security interest in inventory is the filing of a financing statement to show intention of engaging in a future security transaction.[1440] The floating lien solution stemmed from the acceptance of the requirement for the security agreement to expressly provide for the extension of the security interest over after-acquired in an 'after-acquired property clause under state law.[1441] The "after-acquired property clause in the original security agreement is the only formal requisite, provided, of course, that the description in the security agreement and the records of the parties sufficiently identify the property which is covered".[1442] In addition, the right of disposition or exercise of dominion by the debtor in Article 9 finally nailed the *Twyne's Case* dominion rule coffin.[1443] "Benedict is dead and Ratner is King. 'Dominion' by the debtor is no longer 'inconsistent' with the nature of security" in the

[1438] Uniform Commercial Code (n 485), §§ 9-204; 9-205; 9-315 (c); 9-332 (b) (1); 9-324; in *Banner Bank v First Community Bank* (2012) 854 F Supp 2d 846 (Dist Court), the United States District Court in Montana held the validity and continuation of a security interest in the proceeds of the collateral; Gilmore, *Security Interests in Personal Property* (n 289) 359; Tajti, *Comparative Secured Transactions Law* (n 1) 141, 400; Skilton, 'Tradition and Change' (n 1214) 422.

[1439] See Peter F Coogan, 'Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien"' (1959) 72 Harvard Law Review 838, especially for the floating lien policy debate discussion. Also see Summers (n 1384).

[1440] Gilmore, *Security Interests in Personal Property* (n 7) 356.

[1441] Robert W Weeks, 'Floating Liens in Inventory Financing Chattel Security Transactions' (1956) 1956 University of Illinois Law Forum 557562; for a detailed and historical look at the 'after-acquired property clause', see Cohen and Gerber (n 1184), especially 654-658.

[1442] Gilmore, *Security Interests in Personal Property* (n 7) 357–358; see Uniform Commercial Code (n 374), §§ 9-108; 9-204; 9-205; and 9-504; White and Summers are of the view that 'all assets, including but not limited to inventory and equipment' pass muster with respect to the Article 9 sufficiency of description requirement, White and Summers, *Uniform Commercial Code* (n 90) 123; With respect to the issue of description of 'after-acquired', the *Uniform Commercial Code 2009-2010: Official Text and Comments* (n 91), Comment 3 to § 9-108, where the drafter noted as follows: 'Much litigation has arisen over whether a description in a security agreement is sufficient to include after-acquired collateral if the agreement does not explicitly so provide. This question is one of contract interpretation and is not susceptible to a statutory rule [...]. Accordingly, this section contains no reference to description of after-acquired collateral'. The courts have held that 'inventory' includes 'after-acquired property', see *In re Fibre Glass Boat Corporation* (n 1013), hence further description unnecessary.

[1443] Uniform Commercial Code (n 374), § 9-205; *Twyne's Case* (n 381).

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US.[1444] This notwithstanding, US scholars warn of potential weakness of security interests in after-acquired property against other competing interests, and the need for a prudent creditor to continue the pre-Code policing practices.[1445]

There are exceptions to the ordinary rule of securing inventory as described above in Article 9. The exceptions include the exclusion of certain types of goods, i.e., consumer goods;[1446] and commercial tort claims, (replacing 'farm products 'in the old Article 9) ;[1447] and on the question of priority, the limitation with respect to the rights of a good faith purchaser for value.[1448] The exceptions are rather pragmatic exclusions based on paternalism or commercial insignificance. For example, the consumer goods exclusion is based on the narrow sale from one amateur to another 'garage sale', which has proven to be not so significant in economic sense.[1449] Further, the priority of the good faith purchaser of inventory in the ordinary course of business for value[1450] operates, as part of the exceptions to the general rule that security interest in collateral continues even in sale or other disposition, on the basis of commercial reality.[1451]

The exceptions highlighted above were not the limitations Gilmore was warning about. Rather the warning referred to two principal issues, first, the all-encompassing nature of the floating lien covering present and future assets leaving nothing for unsecured creditors; and

[1444] Gilmore, *Security Interests in Personal Property* (n 7) 358.
[1445] ibid 358–359, 364–365.
[1446] Uniform Commercial Code (n 374), §§ 9-102 (a) 24; 9-204 (b) (1); White and Summers, *Uniform Commercial Code* (n 90) 373.
[1447] Uniform Commercial Code (n 374), §§ 9-102 (a) (13); 9-204 (b) (2); Gilmore, *Security Interests in Personal Property* (n 7) 356; White and Summers, *Uniform Commercial Code* (n 90) 5.
[1448] Uniform Commercial Code (n 374), § 9-320; Gilmore, *Security Interests in Personal Property* (n 7) 678, 693; White and Summers, *Uniform Commercial Code* (n 90) 377–378.
[1449] Uniform Commercial Code (n 374), § 9-320 (b); White and Summers, *Uniform Commercial Code* (n 90) 373–374.
[1450] See Uniform Commercial Code (n 374), §§ 1-201 (9) (for definition for 'ordinary course of business'); 9-320 (a).
[1451] ibid, § 9-315 (a); *In re Dalebout* (2011) 454 BR 158 (Bankr Court), the bankruptcy court held that a 'buyer of farm products may take free of a security interest under the Farm Security Act'. White and Summers, *Uniform Commercial Code* (n 90) 358 et. seq.

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second, the need to protect a needy borrower against herself.[1452] Although the blanket nature of the floating lien is commercially desirable, it can lead to unjust outcomes, hence the imperative for limitations to be built within the code.[1453] Article 9 balances the necessity versus unjust outcome by imposing the value requirement, in that the 'after-acquired property' is deemed to be taken for new value.[1454] Further, the introduction of the PMSI to counter the priority of the floating lien in order to secure additional financing free from existing encumbrance provided a major conduit to lessen the excessive control impact of the floating lien over inventory, whether present or to be acquired.[1455] On the basis of the above analysis, the US position on inventory financing is summarized as the pragmatic recognition of the right to secure present and after-acquired property, reducing formal rules, ensuring priority is obtained upon perfection as a legal security interest, whilst also providing a leeway to unburden the necessitous borrower who would require further finance.

6.2.3 Inventory Financing Lessons for Sierra Leone

From the analysis of the state of the law on inventory financing in Sierra Leone, i.e., covering both the BLA and non-BLA, the need for further reform becomes apparent. There is economic justification to support reform that will provide the necessary legal framework for not only SMEs but big businesses to attract financing, and for creditors to match available collateral (inventory) with the requisite risk mitigation/diversification strategies. Notwithstanding the initial flexible nature of English law in securing inventory, its lack of functionalism and complexity puts the U.S. inventory financing framework as the go to option. As shown in the legislative intent in

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[1452] Gilmore, *Security Interests in Personal Property* (n 7) 360.
[1453] ibid 361.
[1454] Uniform Commercial Code (n 374), § 9-204 (c); Coogan (n 1439) 852, 854; Gilmore, *Security Interests in Personal Property* (n 7) 362.
[1455] Coogan (n 1439) 873; Summers (n 1384); Gilmore, *Security Interests in Personal Property* (n 7), see page [xx] herein.

the BLA, the aspiration is to move towards the Article 9 articulation of security interest over inventory in Sierra Leone. However, the initial step, i.e., the piecemeal approach, has been riddled with flaws. The onus now is to ensure a proper transplantation of the missing elements in Article 9, including the full conceptualization of the floating lien, and reaching a commercial balance for policing of inventory or use of the alternative methods, to meet the idiosyncratic market features.[1456]

For emphasis, the main lesson from the U.S., being the balancing act of Article 9 between the need to expand access to finance and ensuring a just outcome, is the acceptable leading approach. It presents a simple but pragmatic framework that recognizes the right to secure present and after-acquired property with no superfluous doctrinal or formal restrictions, and with the necessary perfection framework to ensure appropriate apportioning of priorities for both the floating lien and PMSI creditors. Further, as part of the lessons for inventory financing in Sierra Leone, due consideration must be given to peculiarities like the state of the rule of law, *i.e.*, observation of due process in commercial transactions. Given the infancy of this form of financing in Sierra Leone, there is need for active policing of the borrower with dominion over the inventory collateral.[1457] In this sense, the urge to revert to pre-UCC security devices, for example, field warehousing; or connected title financing devices, for example, consignments, which are applicable due to the adoption of the functional approach becomes of great importance. These benefits of utilizing the subsisting or alternative inventory security devices or otherwise will be

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[1456] The alternatives, for example, will go beyond the suggested control techniques of distinguishing current from fixed assets, paying attention to the degree of control, control through the charge instrument and policing as specified by Goode and Gullifer. Goode, *Goode on Legal Problems of Credit and Security* (n 47) 144–151, paras 4-20 to 4-27. However, as the reader will discover below, using other security devices to ensure control may be necessary to address specific commercial practices where law may be the secondary consideration.

[1457] 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 —' (2014) 55 Acta Juridica Hungarica 185.

examined below. The purport is to demonstrate how field warehousing can be an effective financing and control device for use of inventory as security for credit.

6.3 Field Warehousing – the Substitute Inventory Financing Devices of Choice in Emerging Economies

In Chapter Two, we have discovered how unhelpful the judicial approach has been in the realisation and enforcement of security interests (whether in real or personal property security).[1458] Thus, it is in the interest of the creditor to ensure the healthy status of the borrower in the life of credit line and safety of the collateral until repayment of the loan. Enforcement should be the very last option, and policing of the borrower/debtor paramount. Although the legal changes in the framework in Sierra Leone will help in making easier the realisation of security interest, for example, through enhanced self-help repossession and non-judicial sale of collateral; such changes in commercial practice or culture is built overtime. It took England and the US centuries and close to a century respectively for the dominion rule to be accepted in inventory and receivables financing initially prohibited in *Twyne's Case*.[1459] The court decision followed the commercial practice, which was built on trust overtime. This gradual process wherein possession regresses to active control, and then to the position where the debtor now exercises dominion over the collateral with passive control from the creditor is referred to as the 'rule of law' continuum herein. Where there is a high degree of trust and enforcement without unnecessary fraud, formal restrictions and judicial apathy, parties will be willing to allow the borrower/debtor to exercise a high level of dominion over the secured inventory, *vice versa*.

With respect to the use of field warehousing to secure inventory financing, Tajti, for example, refers to the rationale for either adopting or the continued use of field warehousing

[1458] See 2.3.5 herein.
[1459] See *Twyne's Case* (n 381).

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fundamentally because of its control function; a device of control that acts as "a substitute for the imperfect policing methods' in jurisdictions where this trust or commercial culture has not been built overtime.[1460] He argues that this control function makes field warehousing much more than a substitute device for the floating device, especially for emerging economies.[1461] Tajti is suggesting that the substituting devices fill the 'rule of law' gap, at least in the immediacy of legal transplantation. In addition to the chattel mortgage or charge, some of the alternative/substituting security devices for inventory financing include trust receipts, factor's lien, floor planning, and consignment.[1462] The common denominator in the use of substitutes or choice amongst them depends inter alia on retention of title, or maintaining possession or ensuring a degree of control over the borrower's exercise of dominion over collateral in the context of the cultural and practical characteristics of the specific legal framework. In Sierra Leone, the imperative for high degree of policing of the borrower exercising dominion over collateral is the main factor in considering a substitute inventory financing device, in addition to the economic imperatives (i.e. extending finance to SMEs and agro-based enterprises).[1463]

[1460] Tajti, 'The Resurrection of Field Warehousing' (n 1457) 230.
[1461] ibid.
[1462] Harold F Birnbaum, 'Form and Substance in Field Warehousing' [1948] Law and Contemporary Problems 579, 579; See Gilmore, *Security Interests in Personal Property* (n 289) 73, 86, 128, 692,, for examination of consignments, trust receipts, factor's lien and the Factor's Lien Acts on inventory respectively. Also see Tajti, *Comparative Secured Transactions Law* (n 1) 132–135, for a comparative perspective. See White and Summers (n 289) 12, § 30-2; and Charles H Oldfather, 'Floor Plan Financing under Article 9 of the Uniform Commercial Code' (1965–1966) 14 University of Kansas Law Review 571 for floor planning. For the English law perspective, see Goode, *Commercial Law* (n 442) 740. For a comparative look at consignments, see Tibor Tajti, 'Consignments and the Draft Common Frame of Reference' (2011) II Pravni Zapisi: Godina 358.
[1463] As an alternative method to finance SMEs, see 'Yale Law Journal Company' 665-667.; for an examination of the correlation between the need for active control of debtor/borrower, warehouse and agricultural financing in Sierra Leone, see Bald and Schröder (n 1098) 62–63; also see Frank Höllinger, Lamon Rutten and Krassimir Kiriakov, 'The Use of Warehouse Receipt Finance in Agriculture in Transition Countries' (2009); Daniele Giovannucci, Panos Varangis and Don Larson, 'Warehouse Receipts: Facilitating Credit and Commodity Markets' (2000) 40122 <http://documents.worldbank.org/curated/en/224521468316149887/Warehouse-receipts-facilitating-credit-and-commodity-markets> accessed 31 October 2017.

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The law reforms in post-Communist Central and Eastern European (CEE) countries provide good examples of how to address the 'rule of law' gaps by being attentive to local peculiarities. Poland, one of the foremost secured transactions reformers in the CEE,[1464] for example, enacted a pledge registration legislation that balanced the need for risk reduction via the imposition of a registration requirement for pledge transactions under the Registered Pledge Act in 1996, and at the same time enhanced flexibility by allowing the pledgor to be in possession of the collateral (as opposed to the paradigm physical holding of the pledged item by the pledgee).[1465] This example of local law sensitivity to local context allowed the pledgor to 'use the collateral in accordance with its socio-economic purposes',[1466] whilst the credit's risk is mitigated by registration, a new phenomenon at the time. In Hungary, Tajti, in proclaiming the resurrection of field warehousing as a lending device, argues that the 'differing levels of the rule of law', inter alia, act as a supporting component for its resurgence and use as a policing devices in emerging economies.[1467] The necessity for policing in inventory financing theory underpins the argument in support of using alternative means to secure inventory where such commercial practices are weak or newly introduced.[1468] This, therefore, makes field warehousing suitable for Sierra Leone, especially when the level of trust is low, and enforcement of security cumbersome.

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[1464] Poland enacted the Registered Pledge Act in 1996 in the secured transactions modernisation drive. See, Krzysztof Kazmierczyk and Filip Kijowski, 'Enforcement of Contracts in Poland' in Stefan Messmann and Tibor Tajti (eds), *The case law of Central & Eastern Europe : enforcement of contracts* (European University Press 2009) 607.
[1465] Registered Pledge Act in 1996, art. 11; see Frédérique Dahan and Gerard McCormack, 'International Influences and the Polish Law on Secured Transactions: Harmonisation, Unification or What' (2002) 7 Unif. L. Rev. ns 713; Kazmierczyk and Kijowski (n 1464) 609–612.
[1466] Registered Pledge Act in 1996, art. 11; Dahan and McCormack (n 1465).
[1467] Tajti, 'The Resurrection of Field Warehousing' (n 1457) 230.
[1468] Field warehousing as a financing device is generally viewed as a very effective policing tool to reach desired goals for creditors. Richard F Broude, 'The Emerging Pattern of Field Warehouse Litigation: Liability for Unexplained Losses and Nonexistent Goods' (1968) 47 Nebraska Law Review 3, 5; 'Yale Law Journal Company' (n 1463) 669.

6.3.1 The Characteristic Elements of Field Warehousing from a Comparative Perspective

Field Warehousing is a pre-Code independent financing device in the US that operated much more like a pledge designed for inventory financing.[1469] It is essentially a financing scheme wherein a business loan is secured by inventory which will remain on the premises of the borrower/debtor, hence the reference to 'field', but under the custody of a warehousing keeper/entity, whilst the loan is extended on the basis of the 'field warehouse receipt'[1470] issued to the borrower and presented to the creditor.[1471] The collateralised inventory is segregated from the rest of the borrower's stock, in a place which nominally is leased by the warehouse keeper or company, often demarcated with either physical barrier or signs.[1472] Doctrinally, it is a constructive pledge of goods (inventory in this case) followed by a pledge of document to the inventory; with the first step being the change of possession of the inventory to a third party, then followed by the issuance of a receipt by the third party, and pledge of the receipt by the pledgor as security for loan.[1473]

[1469] Gilmore, *Security Interests in Personal Property* (n 7) 146, ch. 'Field Warehousing'; see *Matter of Covington Grain Co, Inc* (1981) 638 F 2d 1362 (Court of Appeals, 5th Circuit) 1365; *Business Factors v Taylor-Edwards* (5155) 585 P 2d 825 (Court of Appeals, 1st Div) 828; for a detailed and comparative examination of field warehousing, see Tajti, 'The Resurrection of Field Warehousing' (n 1457); Daniel M Friedman, 'Field Warehousing' (1942) 42 Columbia Law Review 991; and 'Yale Law Journal Company' (n 1463).

[1470] Under the common law, a warehouse receipt "is a document issued by a warehouse keeper stating that the goods certified on the warehouse receipt are held in his warehouse at the disposal of the person named on the warehouse receipt (usually the borrower). The warehouse keeper holds the goods as bailee and can only deal with the goods in a manner authorised by the borrower (the bailor)"; Simon Cook and Geoffrey Wynne, 'Warehouse Receipts Past, Present and Future: Part 1' (1998) 17(1) International Banking and Financial Law 8, 8.

[1471] 'Yale Law Journal Company' (n 1463) 663–664; Koch (n 1325) 569.

[1472] 'Yale Law Journal Company' (n 1463) 663–664; Robert H Skilton, 'Field Warehousing as a Financing Device' (1961) 1961 Wisconsin Law Review 221.

[1473] Birnbaum (n 1462) 579–580; 'Yale Law Journal Company' (n 1463) 664; Skilton, 'Field Warehousing as a Financing Device' (n 1472) 226.

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Field warehousing, in the US, developed from terminal warehousing,[1474] then a commercial lending practice that operated on the basis of bailment.[1475] In terminal warehouse financing, business loans are extended on the basis of inventory deposited in terminal warehouses, with 'the warehouse receipt'[1476] as the main financing document representative of the value of deposited goods in the warehouse.[1477] Scholars have represented that the move from terminal warehouse financing to field warehousing in the US was based on comparative economic and practical advantages of the latter over the former.[1478]

Firstly, the need to move inventory from the borrower's premises to the terminal warehouse and then market increase transaction costs, covering transportation and storage costs, hence cementing the preferred economics of location augmented in favour of field warehousing.[1479] Secondly, and connected to storage, field warehousing reduces the logistic burden of dealing with inventory in bulk, and also meeting the borrower's need to frequently access the inventory.[1480] Thirdly, field warehousing leads to the emergence or growth of industry connected to secure

[1474] 'Yale Law Journal Company' (n 1463) 663; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 191; see Neil H (Neil Herman) Jacoby and others, 'Financing Inventory on Field Warehouse Receipts' <http://agris.fao.org/agris-search/search.do?recordID=US201300369952> accessed 30 October 2017.

[1475] Bailment in this sense refers to a consensual possessory transaction in which the bailor passes on possession of a chattel to the bailee. Bailment can also be fictional or involuntary (by operation of law). For example an painter handing over a painting to an auctioneer. For more on bailment, see Bridge, *Personal Property Law* (n 641) 59–68; White and Summers, *Uniform Commercial Code* (n 90) 45–50, § 30-5.

[1476] The 'warehouse receipt' not considered to be a document of title to money and therefore not an instrument; nor document of title to goods, unlike, for example, a bill of laden. Bills of Exchange, Cap 227 of the Laws of Sierra Leone; Goode, *Commercial Law* (n 529) 48, 476; it can, however, be negotiable or non-negotiable based on the general 'warehouse receipt' law. *Claydon v Bradley* (1987) 1 AllER 522 (CA); Koch (n 1325) 569; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 191–192, but they are usually non-negotiable Robert H Skilton, 'Field Warehousing as a Security Device: The Warehouseman Goes to the Storer - Part II' (1961) 1961 Wisconsin Law Review 403, 404. With not applicable statute law in Sierra Leone, reliance will have to be on the inherited common law.

[1477] Skilton, 'Field Warehousing as a Financing Device' (n 1472) 223; 'Yale Law Journal Company' (n 1463) 663, 668, 670–671.

[1478] 'Yale Law Journal Company' (n 1463) 665, 670, 679; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 191; James T McGuire, 'Impact of UCC on Field Warehousing' (1974) 6 Uniform Commercial Code Law Journal 267, 270; Skilton, 'Field Warehousing as a Financing Device' (n 1472) 223; Friedman (n 1469).

[1479] Skilton, 'Field Warehousing as a Financing Device' (n 1472) 223; 'Yale Law Journal Company' (n 1463) 665, 668; Koch (n 1325) 569–570; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 191.

[1480] Koch (n 1325) 570; 'Yale Law Journal Company' (n 1463) 668.

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lending, with the engagement warehousing enterprises by creditors, mainly banks.[1481] Fourthly, field warehousing is considered to be the device of choice in economic crises, and when borrowers are in weak financial position, creating an economically justification of its use in high risk financing niche markets even for developed countries.[1482] Aside from the economic and practical advantages, field warehousing viewed as a perfection method through possession inherently confers the advantage of establishing priority to the creditor, even in the borrower's bankruptcy. However, this was only effective in the pre-Code era.[1483]

From the English law perspective, field warehousing has always been treated as a superfluous and unnecessary financing device, and therefore, mostly ignored in the literature. Goode in examining the irrelevance and/or superfluity of field warehousing in England previously argued that the functions of the device are adequately covered by either a charge (naturally a floating charge) or title reservation through a bailment or floor plan.[1484] He suggested that 'field warehousing has never taken root in England and there is no indication that it will ever do so'.[1485] Under English law, title reservation is not considered as part of personal property security.[1486] As a result, the charge is the PPSL equivalent of field warehousing, and the question is whether the charge effectively performs the functions of the equivalent US device. From a doctrinal perspective, this may be the case. In the context of the control function, however, attention must be given to the House of Lords' decision in *Re Spectrum Plus Limited*,[1487] wherein where the parties

[1481] It must be noted, however, that outside the industrialized field warehousing scenarios, often the warehouse keepers are employees of the borrower, adopted as a measure to save costs. Koch (n 1325) 569–570; 'Yale Law Journal Company' (n 1463) 664, 678, 681; for warehousemen or employees liability issues, see Birnbaum (n 1462) 584–591.
[1482] Koch (n 1325) 570; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 190–191. In the high risk lending aspect, creditors may rely on credit information based on warehouse records to mitigate risk. 'Yale Law Journal Company' (n 1463) 679.
[1483] Broude (n 1468) 4; 'Yale Law Journal Company' (n 1463) 670.
[1484] Goode, *Commercial Law* (n 529) 741.
[1485] ibid.
[1486] See Introduction fn. 7 and 7.1 herein.
[1487] *National Westminster Bank plc v. Spectrum Plus Limited & Others* (n 437) 104.

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intend a latitude/liberty to the borrower to freely dispose of a charged asset, such a transaction is more often deemed a floating charge. Consequently, English law has automatically opted for the floating charge as the security device of choice in stock-in-trade finance.[1488] The floating charge is, however, comparatively a weaker security device, within the context of control or priority upon crystallization. This prompted Goode to further suggest that a pledge is more effective security device to use for stocking finance than a charge, especially the highly developed field warehousing in the US.[1489]

Given that field warehousing operates on the basis of a pledge, albeit with a third-party intervener, or possessory security device, there do not seem to exist any formalistic obstacles that inhibit its application in England as a matter of law. Whilst Goode was pessimistic about field warehousing gaining roots in England, it is argued that other common law countries with an analogous legal system can easily incorporate field warehousing in the list of recognized security devices.[1490] With the passage of time, the pessimistic view on field warehousing in England has undergone a complete 360 degrees change. Goode and Gullifer are now suggesting that one way to avoid the commercial impracticability of a fixed charge over stock-in-trade is a pledge through constructive deliver, done via field warehousing.[1491] The field warehousing scheme in England adopts the US framework, and they admitted that the 'different forms of warehousing arrangement

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[1488] *In re Yorkshire Woolcombers Association Ltd* (n 991), Farwell J said: 'A charge on all book debts which may now be, or at any time hereafter become charged or assigned, leaving the mortgagor or assignor free to deal with them as he pleases until the mortgagee or assignee intervenes, is not a specific charge, and cannot be. The very essence of a specific charge is that the assignee takes possession, and is the person entitled to receive the book debts at once. So long as he licenses the mortgagor to go on receiving the book debts and carry on the business, it is within the exact definition of a floating security'.

[1489] Goode, *Commercial Law* (n 529) 741.

[1490] ibid. This argument is fundamentally theoretical for now, as in practical terms, the debut of field warehousing in Canada, for example, has been described to be unsuccessful, but this due to the statutory limitations within Canadian banking law. Tajti, 'The Resurrection of Field Warehousing' (n 1457) 221–222.

[1491] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 143, 147, paras 4-17, 4-23.

[including field warehousing] provide a relatively high measure of control'.[1492] Goode and Gullifer were quick to further suggest that as opposed to American law, English law "also recognises a pledge or charge in which the debtor simply acknowledges that [s]/he holds the goods to the order of the creditor until sale and holds the proceeds of sale on trust for the creditor".[1493] Hence, the reason why field warehousing did not take root in England.

6.3.2 Field Warehousing – Bespoke 'Control' Lessons for Sierra Leone

At the inception of the U.C.C. Article 9, Gilmore remarked that "Field warehousing, […], presented itself as something old and familiar, like a well-worn pair of shoes; it was a pledge, or a sort of pledge, […]. It was nothing to get excited about; nothing for the legislatures to be concerned with".[1494] This view whilst reflective of the development of the US legal framework following the adoption of the U.C.C., pales in consideration with respect to the economic considerations and characteristic elements of field warehousing, especially its policing function, and for which legislators in developing countries are compelled to be concerned with. In Sierra Leone, for example, the mother device of field warehousing, i.e., terminal warehousing has never been a mainstream financing practice;[1495] and therefore, field warehousing can conveniently offer more than just being a security device to control the debtor exercising dominion over the secured inventory. As opposed to the 'well-worn pair of shoes' metaphor, it offers economic benefits, which are embedded in the needs of certain industries, like agriculture and for SMEs financing in

[1492] ibid 147, para 4-23.
[1493] ibid 147–147, para 4-23.
[1494] Gilmore, *Security Interests in Personal Property* (n 7) 146.
[1495] Actual use of warehouse receipt for financing has been limited. The idea of kick-starting the scheme in Sierra Leone is based on examples in Ghana and Tanzania to boost agricultural financing, and the coverage includes short-term inventory to be covered by microfinance institutions; Bald and Schröder (n 1098) 62–63; 'It has been reported that 'Warehouse Receipt System - was pilot tested by 3 [Community Banks] CBs between 2010 and 2013 in palm oil. The result was fairly good'; Better Than Cash Alliance, 'Digital Financial Services for Smallholder Farmers in Sierra Leone – What Is the Opportunity?' (Apex bank & UNCDF MM4P, 8 August 2017) 8 <http://mm4p.uncdf.org/sites/default/files/Download/presentation_1_-_apex_mm4p_0.pdf>; see Giovannucci, Varangis and Larson (n 1463).

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new market economies. These benefits therefore should count for a serious consideration of field warehousing as a financing device notwithstanding arguments of doctrinal superfluity and costs.[1496]

Accordingly, the driving force for field warehousing in emerging and new market economies is the enablement of lenders and borrowers to engage in warehouse receipt financing, in this case using inventory which are secluded but remain in the borrower's premises instead of moving goods to a warehouse. It reflects a relatively convenient and cost-effective possessory pledge form of a security with greater amount of legal protection and pragmatic control of the borrower.[1497] Field warehousing directly addresses "the most critical commercial finance issues in developing countries where perceived risk is high and both the legal structure and [financial institutions] sophistication in collateral management techniques are, for the time being, in need of substantial development".[1498] It follows that the imperative lessons for Sierra Leone with respect to the introduction of field warehousing are tied to the characteristic elements of the device.

The *sine qua non* features of field warehousing already alluded to, albeit open to debate,[1499] include its possessory or pledge-like nature, the control feature and nexus to warehouse receipt law. Firstly, by its possessory nature, one in which an independent third party is given possession of the collateral, field warehousing operates as a pledge. This also equates to perfecting the security through the exercise of possession by the warehouse keeper on behalf of the lender.[1500] Secondly,

[1496] Nicholas Budd, 'Field Warehousing: Security for Developing Countries and the New Market Economies' [1995] International Business Lawyer 120, 120; Extra transaction costs will include fees of warehouse keepers, insurance in addition to interest Skilton, 'Field Warehousing as a Financing Device' (n 1472); 'Yale Law Journal Company' (n 1463) 678; Note that Goode had previously argued that field warehousing will not take root in England since it will be superfluous to the functionality of the floating charge. Goode, *Commercial Law* (n 529) 741.
[1497] Budd (n 1496) 120–121.
[1498] ibid 121.
[1499] For more on the debate, see Tajti, 'The Resurrection of Field Warehousing' (n 1457) 206.
[1500] ibid 206–208; *Business Factors v. Taylor-Edwards* (n 1469) 1978; *Matter of Covington Grain Co., Inc.* (n 1469) 1365.

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the involvement of a third party, often independent warehouse keeper comparatively increases the degree of control over the borrower and correlatively lowers the creditor's risk. It makes for an effective policing device, albeit a relatively expensive one.[1501] It must be noted that although field warehousing is good for policing the borrower, it does not, however, totally eliminate fraud, ostensible ownership. Consequently, the continuing vigilance of creditors is still warranted.[1502] Thirdly, the conjoined relationship between the field warehousing law and the general law on warehouse receipt, which essentially deals with title/right to receipt/payment, negotiability of the said receipts in ordinary commerce and industry regulation.[1503] The third ambit alludes to the requirement for a foundation framework, a sub-stratum warehousing receipt law which must exist for field warehousing to work effectively.

One distinctive element of field warehousing in the US replete in the literature is the deference shown by the US courts to the institutional/industrial arrangements, without which, this financing device would not have survived. The US courts were willing to accept the parties' intention and field warehousing arrangements, once it is shown that the industry rules were not flagrantly disregarded.[1504] Skilton refers to the arrangements as the 'ritualism' of field

[1501] Gilmore, *Security Interests in Personal Property* (n 7) 161, § 6.3; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 147, paras 4-22 to 4-23; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 207, 209, the policing function comes with a caveat, i.e., the need for registration especially for parties who are not knowledgeable in warehouse financing; often to lower the costs, the borrowers clerk is used as the warehouse keeper, especially in non-industrial scale transactions. This form of arrangement increases the risk factor. 'Yale Law Journal Company' (n 1463) 663, 677–678; See Birnbaum (n 1462) 584–584, for rules on who may be a warehouseman.

[1502] Douglas G Baird and Thomas H Jackson, 'Possession and Ownership: An Examination of the Scope of Article 9' (1983) 35 Stanford Law Review 175, 205–206; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 207.

[1503] For the US post-Code, the U.C.C. is now the warehouse receipt framework law. Uniform Commercial Code (n 374), Article 7; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 205–206; on negotiability, note that field warehousing receipt being evidence of a security interest is usually not negotiable 'Yale Law Journal Company' (n 1463) 679; however, in recent literature arguments have been put forward for warehouse receipts, especially for agricultural goods to be made negotiable or be accompanied by promissory notes. See Budd (n 1094) 169; Frederique Dahan (ed), 'Sowing the Good Seeds: The Brazilian Experience of Agriculture Financing', *Research Handbook on Secured Financing in Commercial Transactions* (Research Handbooks in Financial Law 2015) 194.

[1504] 'Yale Law Journal Company' (n 1463) 671, 687; Birnbaum (n 1462) 585–586; Baird and Jackson (n 1502) 675; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 208.

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warehousing, wherein the "procedures are elaborate and tend to be standardized. There is ritualism in the leasing of the storage space, the sealing off of the space, the appointment of the custodian, the posting of signs, the tagging of the goods and the issuance of receipts".[1505] In *Union Trust Company v. Wilson,*[1506] often referred to as the leading field warehousing case in the US,[1507] the US Supreme Court held as valid the warehousing transaction on the principle that the transaction was a bailment on the basis of possessing the goods since goods were locked and warehouse company had legal right to the place and right of access by a lease.[1508] Justice Holmes opined that 'concrete control, the intent to exclude and the exclusion of others, with access to the place of custody as of right'.[1509] The principles in the case ran through all other field warehousing cases.[1510] The bailment and possession settled the allocation of priority to the creditor as a general rule.[1511]

[1505] Skilton, 'Field Warehousing as a Financing Device' (n 1472) 226; for the categorisation of the 'elements of form in the delivery of possession' in field warehousing, see Birnbaum (n 1462) 580.

[1506] *Union Trust Co v Wilson* (1905) 198 US 530 (Supreme Court) 534–535; the facts of the case will help with understanding the decision of the Supreme Court, and are as follows: "The bankrupt, Flanders, was a wholesale leather dealer. He walled off a part of the basement of his place of business, and let it at a nominal rent to the Security Warehousing Company. There were doors to this part, with padlocks bearing the name of the company, which were kept locked and to which the company had the only keys. The company had a key to Flanders'' front door and access to the part let to it, at all hours of day or night. No one else could get such access without breaking in. There were two signs on the outside, stating in large letters that the premises were occupied by the company as a public warehouseman. The company received leather from Flanders into this place, issuing […] certificate that it had received the same on storage subject to the order of H.L. Flanders & Co., and identifying the leather; 'said commodity to be retained on storage and delivered only upon surrender of this receipt properly endorsed and payment of all charges thereon.' To every parcel of the leather was attached a card legibly stating that it was in the possession of the Warehouse Company. The company stipulated in the receipt against liability for damage by fire, water, etc., and by a general contract with Flanders the latter assumed all risk of loss except from dishonesty of the company's servants. Flanders paid the company twenty dollars a month for the first $10,000 worth of property or less, and a dollar a month for each additional $1,000. He also paid the expenses of the company in connection with storing the goods. The certificates of the company issued as above were all endorsed by Flanders to the Union Trust Company as security for loans made by it to him in the regular course of business. If Flanders desired to remove any part of the leather he paid the necessary sum to the Trust Company, was entrusted with the receipts, got the Warehouse Company to send a man to unlock the place of enclosure and allow the removal, endorsing on the receipt the amount delivered if less than all, and then, as the case might be, returned the receipt to the Trust Company or surrendered it into the Warehousing Company's hands"." See Birnbaum (n 1462) 585.

[1507] Birnbaum (n 1462) 585.

[1508] *Union Trust Co. v. Wilson* (n 1506) 537–538.

[1509] ibid 537; Birnbaum (n 1462) 585–586.

[1510] see Birnbaum (n 1462) 586–590; *In re Rodgers* (1903) 125 F; *Heffron v Bank of America Nat Trust & Savings Ass'n* (9454) 113 F 2d 239 (Circuit Court of Appeals, 9th Circuit); *Pittman v Union Planters Nat Bank & Trust Co* (8406) 118 F 2d 211 (Circuit Court of Appeals, 6th Circuit).

[1511] 'Yale Law Journal Company' (n 1463) 687–697; however, priority dispute may arise as a result of an adverse security interest claim to the goods, or between an innocent original owner and warehouse receipt holder, and this

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In the final analysis, even in the code era, a 'security interest in field-warehoused commodities can be created and perfected under the Code through the same procedures'[1512] and complying with Article 9.

When the elements and structure of field warehousing is considered in the context of legal transplantation into Sierra Leone, the overriding question is whether Sierra Leone is prepared or ready for field warehousing. Bald and Schröder, in studying the agricultural sector in Sierra Leone, acknowledge the huge potentials in making financing work in the sector through, inter alia, the use of an efficient warehouse receipt system.[1513] Already a gap exists in terms of the inapplicability of the fixed and floating charge to unincorporated entities, even for agricultural credit. Bald and Schröder further uncovered serious practical challenges to the nascent warehouse receipt system in Sierra Leone, covering a continuum of theft, spoilage, storage, risk of forgery and fraud in controlling quality.[1514] This human agency problem in warehouse receipt financing points to issues of lacking trust and creditors' control of the borrowers, which field warehousing third party intervention will ameliorate, if not cure. These factors being present should warn parties (especially creditors) of the need for vigilance and built-in mechanism to enhance trust in the system. As lessons from US can demonstrate warehousing financing, notwithstanding the method, is susceptible to fraud, even if comparatively limited in field warehousing.[1515]

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should put lenders on notice that field-warehouse receipt may be risky. Notice filing may serve as a cure to further solidify the priority of field-warehouse lender in addition to the perfection by possession. See *First National Bank of Fleming v Petzoldt* (5867) 262 F 2d 540 (Court of Appeals, 10th Circuit); *New York Terminal Warehouse Co v Bullington* (1954) 213 F 2d 340 (Court of Appeals, 5th Circuit).

[1512] 'Yale Law Journal Company' (n 1463) 699.

[1513] Bald and Schröder (n 1098) 7–8, 54, 62–63.

[1514] ibid 62–63.

[1515] One of the major fraud cases in the US was the 'Salad Oil Scandal', which caused about USD 150 million losses in the US for top banks. On the pedigree (goodwill) of American Express Company, whose subsidiaries were the issuers of warehouse receipts based on field warehouse financing. The item meant for purchase was vegetable oil, the field warehouse company issued five warehouse receipts for the said oil, and since warehouse company was unable to prove whether the oil was in the tanks, it was held liable for the conglomerate liquid found therein mainly composed of 'acid soap stock, fish oil and water'; *Procter & Gamble v Lawrence Ware Corp* (1965) 16 NY 2d 344 (Court of Appeals) 350–351; Broude (n 1468) 3–5; Michael J Vaughn, 'Warehousing Security Transactions: Progency of

To this end, the BLA already anticipates the use of some unremunerated security devices in its definition of security interest, and its move towards adopting the functional approach in this regard.[1516] The BLA also imposes a general registration obligation even for possessory security interests.[1517] Therefore, field warehousing transactions, being covered by the omnibus definition of security interest, will have to be registered at the Collateral Registry, in line with the cautionary note by leading scholars in the field.[1518] And in drawing from the third limb of the *sine qua non* features of field warehousing in the US, i.e., the conjoined warehouse receipt law,[1519] the compatibility of the BLA and the law regulating warehouse receipts must be established. This in the case for Sierra Leone depends on the legal status of the warehouse receipt. Generally, the warehouse receipt is not considered to be a document of title under English law, therefore the holder of a warehouse receipt only has the right to possession of the goods/collateral.[1520] This position being part of the borrowed law in Sierra Leone displaces the applicability of the Bills of Exchange Act, Cap 227.[1521] This is not a problem as goods in the possession of the warehouse company[1522] means the common law bailment rules apply.[1523] Although this may provide the

Twyne's Case' (1967–1968) 20 Baylor Law Review 1, 24; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 211.

[1516] Borrowers and Lenders Act, (n 9), s 1; see 3.2.1 herein.

[1517] ibid, s 12; see 3.2.2.3 herein.

[1518] ibid, s 1; Baird and Jackson (n 1502) 205–206.

[1519] Gilmore, *Security Interests in Personal Property* (n 7) 156–159; Tajti, 'The Resurrection of Field Warehousing' (n 1457) 213, 214; Skilton, 'Field Warehousing as a Security Device' (n 1476).

[1520] Cook argues that based on English law, "warehouse receipts are not documents of title (with the exception of certain warehouse warrants which are constituted as such under Special Acts of Parliament) and, therefore, any indorsement of them is not sufficient to pass property in the stored goods. In effect, possession of a warehouse receipt gives the holder the right to possession of the goods, but in itself it does not confer possession of the goods on the holder"; Cook and Wynne (n 1470).

[1521] Bills of Exchange, Cap 227 of the Laws of Sierra Leone (n 1476).

[1522] Cook and Wynne (n 1470) 9, as opposed to a bills of lading which was a document of title, and needed to be since the parties are usually in different parts of the world.

[1523] Cook and Wynne explain how the pledge works with warehouse receipt under English Law as a "conventional [pledge] method of taking security which arises when goods (or documents of title) are delivered by one person (the pledgor) to another person (the pledgee) to be held as security for the payment of a debt; […] The delivery can be actual or constructive under English law, but in either case the property which passes to the pledgee is a right of possession with the power of sale on default, ie a bank may take possession of the goods and sell them in order to repay the loan. The 'general' property in the goods remains with the pledgor and, therefore, a pledge is usually made

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foundation for field warehousing to be introduced, it is not ideal for a robust financing and regulatory framework.[1524] Therefore, enhancement in the form of a specific warehouse receipt legislation is needed.[1525] The 'success and high professionalism of [field warehousing] industry is dependent also on the regulatory tools against the incompetence or fraud of warehouse companies'.[1526] Thus, the Siamese harmony between field warehousing and the law on warehouse receipt must be underscored.

Conclusively, the introduction of field warehousing practice must be on the basis of legal and regulatory (for warehouse entities) commercial necessity and practicability, wherein the needs for valid bailment, creditors' control of borrowers, risk mitigation and relative economic efficiency are balanced.[1527] With the improvement in the legal framework ushered in by the BLA, notwithstanding its serious flaws, field warehousing, through the third party agency, most distinctive addition will be the 'double-barrelled guaranty of the [inventory] collateral, both as policeman and assumer of risks'.[1528] In Sierra Leone, where the prevailing circumstances show problems of lacking trust and theft[1529] (the rule of law' conundrum), the assurance of an

on the express or implied understanding that the goods will be restored to the pledgor as soon as the debt is discharged". ibid 8.

[1524] The warehouse receipt financing scheme as evident in England may be burdensome. Generally, creditors will have three main concerns. Firstly, ensuring that the constructive pledges of the goods are enforceable whilst in the warehouse or field. Secondly, how to efficiently and timely enforce the pledge. Thirdly, safety and security of the goods. In England these concerns had to be addressed by (1) creditor-bank ensuring borrowers signs 'transfer orders'] directing the warehouse keeper to hold the goods in the creditor's name and order; (2] both warehouse receipt and transfer order lodged with the warehouse keeper, and then replaced by a new warehouse receipt obtained in the creditor's favour; and (3] the warehouse keeper attorns to the creditor, undertaking to hold goods on behalf of the bank. ibid 10.

[1525] For example, in Uganda, also a common law former British colony, specific legislations in the Warehouse Receipt System Act, 2006 and the Warehouse Receipt System Regulations, 2007 have been enacted reinforcing the need for warehouse receipt specific law. For more on this issue, see Philine Wehlin and Bill Garthwaite, 'Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends' (2015); Höllinger, Rutten and Kiriakov (n 1463); also see Paul Webster and Geoffrey Wynne, 'Warehouse Receipts Past, Present and Future: Part 2' (1998) 17(3) International Banking and Financial Law 27.

[1526] Tajti, 'The Resurrection of Field Warehousing' (n 1457) 212.

[1527] 'Yale Law Journal Company' (n 1463) 677–678.

[1528] ibid 708.

[1529] Bald and Schröder (n 1098) 62–63.

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independent field warehouse keeper is key. The heighten assurance in policing the borrower as provided for within the field warehousing is its main attraction, notwithstanding the addition relative cost it may impose on the parties. Indeed if 'the mountain will not go to Mohammed, Mohammed will go to the mountain';[1530] meaning, if the terminal warehouse receipt system cannot gain root owing to lacking trust, costs and control, then warehousing financing must move to the field.

6.4 Receivables Financing: Towards Unshackling the Clutches of Formalism

Account receivables, abbreviated as receivables in the literature, is a form of intangible property; which is essentially a right to payment of a sum of money, whether existing or in the future for goods or services rendered or other obligations, but a right not personified by a negotiable instrument.[1531] In simple terms, it is a right to payment obligation in debt (monetary obligation), a broader representation of book-debt as often referred to in English law.[1532] The use of receivables as collateral for credit is referred to as receivables financing.[1533] The main function is to recycle or reutilize debt, as a means to extend further finance.[1534] The literature shows that there are three dominant ways to engage in receivable financing: First, an outright assignment which discharges or reduces an existing debt obligation; second, discounting the debt; and third, a charge or assignment of the receivables by way of security.[1535] These could be broadly divided into

[1530] Skilton, 'Field Warehousing as a Financing Device' (n 1472) 223.
[1531] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 96, para 3-01; an instrument is a document of title to money, and it is considered to be negotiable when 'by statute or mercantile usage, [the instrument] may be transferred by delivery and indorsement to a bona fide purchaser for value in such circumstances that [she] takes free from defects in the title of prior parties'; Goode, *Commercial Law* (n 529) 476–477.
[1532] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 99, para 3-01; 'receivables', an American terminology is used in English law context interchangeably with 'book-debts' meaning the sums owed to a business. However, receivable is a slightly broader term, and not limited to debts in the books of a business; see Beale and others (n 52) 409, para 10.22; Law Commission, *Bills of Sale* (n 19) 76, para 6.19, fn. 8; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 109, para 3-26.
[1533] Tajti, *Comparative Secured Transactions Law* (n 1) 98.
[1534] ibid; Oditah (n 1202) 30–32.
[1535] Oditah (n 97) 32; in the Law Commission, *Bills of Sale* (n 19) xii, 79, para 6.34 'assignment' is defined as the 'transfer of a right from one person to another, such as by way of sale'.

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the sale (outright assignment, whether with or without recourse) or assignment of receivables.[1536] The major conceptual contention in this form of financing relates to old formalistic approach typified by English law which upholds this distinction between outright and security assignment of receivables on the one hand; and the functional approach which incorporates the two exemplified by the U.C.C. Article 9.[1537]

Already in this Chapter,[1538] the economic and legal justifications for examining receivables (book-debts) financing in Sierra Leone have been considered. This section further advances the hypothesis that the move towards functionalism in the BLA with respect to receivable financing unshackles the clutches of formalism, and eventually will expand access to finance, especially for SMEs. With the 2014 BLA reform, a complete 360 degrees turn has been taken with respect to the conceptual approach, in tune with the objective of freeing up business firms to use receivables as collateral for credit finance. The discussion herein therefore examines receivable financing from doctrinal and commercial practicability perspectives and does so systematically by outlining the main features of the pre-BLA (the 'prior law') which mimics the broad contours of English law (before the enactment of the Insolvency Act of 1986),[1539] within the comparative lens of the Unitary Model.

6.4.1 Receivable Financing under the Pre-BLA Framework – the Prior Law Formalism

Receivable financing in the prior law generally takes the form of a charge, whether fixed or floating; or an outright assignment and both methods are saddled by formalistic rules.[1540] In

[1536] See Goode, *Commercial Law* (n 529) 744.
[1537] Oditah (n 1202) 35; McCormack, *Secured Credit under English and American Law* (n 504) 209; Tajti, *Comparative Secured Transactions Law* (n 1) 99. The distinction is only evident in Article 9 with respect to the destination of a surplus after the assignee has been paid – Tajti 99; 9-502.
[1538] See 6.1 herein.
[1539] Insolvency Act (n 556), see section 344 on registration of assignment of receivables.
[1540] McCormack, *Secured Credit under English and American Law* (n 606) 209; see Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398); and the Companies Act 2009 (n 387).

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general, the outright assignment/sale of receivables may be by way of recourse or without recourse.[1541] This means that the agreement for sale may either make provision for the seller/trader to guarantee the purchaser in event of the debtor's default in repayment,[1542] which is sale with recourse. The other without such a guarantee is sale without recourse. A sale of receivables with recourse in economic terms cannot be distinguished from proving a loan/credit using receivables as security/collateral.[1543] In the prior law, however, the use of receivables as security for loan and the sale of receivables with recourse are treated differently.[1544] For example, the Bills of Sale Act, Cap 241 distinctions between an absolute bills of sale and security bills of sale.[1545] In this regard, assignment of receivables cannot be undertaken owing to the exclusion of choses in action in the definition of 'personal chattels' in Cap 241.[1546] Only law of equity intervened with respect to bills of sale in the House of Lords decision in *Taibly v The Official Receiver*,[1547] where it held that equitable assignment over future book debts for value attaches as they come into existence.[1548] Further, using Goode's example under the English Companies Act 1985,[1549] a charge over a company's book-debt is registrable under the Companies Act 2009,[1550] but a sale of

[1541] The outright assignment of receivables is also referred to as factoring, McCormack, *Secured Credit under English and American Law* (n 606) 209. Although the term will be mentioned infrequently, it will not be fully discussed herein given the almost non-existence of a thriving factoring industry in Sierra Leone. The English Factors Act 1889 was not adopted in Sierra Leone, and the Law of Property Act 1925, s 136 is also not applicable in Sierra Leone; and this may have been the reason why factoring has played an insignificant role in the financial sector thus far. The notion of factoring, however, will be explored in the context of sale of receivables herein; also see Gilmore, *Security Interests in Personal Property* (n 7) ch 8, from 250 on the institutionalization of account receivables financing which existed in part as factoring in the US.

[1542] Goode, *Commercial Law* (n 529) 744.

[1543] ibid, in both a sale of receivables with recourse and use of receivables as security, the seller/trader receives and has to pay or ensure the debtor pays.

[1544] See Goode, *Goode on Legal Problems of Credit and Security* (n 47) 101, para 3-09 illustrating the different treatment on registration, stamp duty and tax accounting under English law.

[1545] See Bills of Exchange, Cap 227 of the Laws of Sierra Leone (n 1476), ss 2, 20.

[1546] See Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), ss 3 and 20; an 'absolute bill of sale' is 'granted for purposes other than to secure the repayment of a loan', Law Commission, *Bills of Sale* (n 19) xii; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 111, para 3-30.

[1547] *Tailby v Official Receiver* (n 463).

[1548] ibid 523, 531; McCormack, *Secured Credit under English and American Law* (n 606) 224.

[1549] Goode, *Commercial Law* (n 529) 744, see Companies Act 1985, s 395.

[1550] Companies Act 2009 (n 387), 170.

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receivables/book-debt is not. This different legal treatment for transactions with the same economic effect is the substratum of the restrictiveness and lack of a uniform approach in the prior law's formalism.

The application of the formal rules in the concrete sense depends on the parties, whether natural or legal, incorporated or unincorporated. For natural persons and unincorporated entities, a general assignment which may include book-debts is not within the scope of the Bills of Sale Act, Cap 241 given the exclusion of choses in action in the definition of 'personal chattels' and the further prohibition on security bills with respect to after-acquired property.[1551] Therefore, only a sale[1552] of receivables can be undertaken by unincorporated entities, and this outright assignment of receivables is not considered to be a security assignment. [1553] This distinction, i.e., sales versus security assignment, is also true for companies.[1554] The chargor of receivables, has an equitable interest in them, whilst a seller does not.[1555] The use of the charge is curtailed by the inherent characterization problems associated with the floating charge. For example, enforcement of an obligation in a charge may include the appointment of a receiver,[1556] whilst a purchaser can merely proceed to collect the debt since there is no interference with any proprietary or possessory rights.[1557]

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[1551] General assignment 'the transfer of a class of rights, both present and future', Law Commission, *Bills of Sale* (n 19) xii, 19, 79; but the Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 3 does not apply to choses in action, which covers receivables; also see s 20; Law Commission, *Bills of Sale* (n 19) 24, 27, paras 3.31, 3.46 - 3.47.

[1552] As previously defined, an "assignment is not a security interest; it is an outright sale of the book debts. Though it is possible for invoice financiers to give a loan to the business and secure that loan over the business's book debts, an outright sale by way of assignment is much more common"; Law Commission, *Bills of Sale* (n 19) 79, para 6.37, fn. 14; citing; Chitty (n 1367) ch 19.

[1553] *Tailby v Official Receiver* (n 463) 542; see Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 3 (b).

[1554] See registration requirement in the Companies Act 2009 (n 387), s 170; Goode, *Commercial Law* (n 529) 744.

[1555] Goode, *Commercial Law* (n 529) 744.

[1556] Companies Act 2009 (n 387) ss 152; 181 (1), (2) and (4).

[1557] Goode, *Commercial Law* (n 529) 744.

In terms of registration and transparency, England through piecemeal reforms has seen the imposition of a registration obligation on the assignment of receivables, deemed as absolute bills, brought about by the Insolvency Act 1986 on the hand, and company registration on the other.[1558] Under the said Insolvency Act 1986, the assignment of existing and future book-debts, which includes an assignment by way of security or charge, is void or considered ineffective against a trustee in bankruptcy if not paid before a bankruptcy petition or registered under the Bills of Sale Act 1878.[1559] This in effect amended the Bills of Sale Act 1878, mainly doing away with the absolute and security bills of sale distinction after registration.[1560] This addition in the English framework is not applicable in Sierra Leone, and this means creditors' priority is still at risk necessitating the need for notification.

Receivables financing can be undertaken on the basis of notification or non-notification.[1561] When the transaction is based on notification, the debtor is notified of the assignment; and in a non-notification assignment, the debtor is not notified, and therein the assignor in practical terms collects the debt for and accountable to the assignee.[1562] Although non-notification is more risky for the creditor-financier, but commercial practicability, i.e., reluctance to disclose assignment, makes this form more dominant.[1563] However, by the equitable nature of security assignment, as aforementioned in *Taibly v The Official Receiver*,[1564] notification becomes much more than a mere transaction preference, but an issue bordering on perfection and priority in enforcement.[1565] Non-notification may render security assignment nugatory, but it may also be irrelevant, if the intention

[1558] Insolvency Act (n 556), s 344; the registration process has been described to be onerous and burdensome and must be abandoned Law Commission, *Bills of Sale* (n 19) 28, para 3.37.
[1559] Insolvency Act (n 556), s 344; see Law Commission, *Bills of Sale* (n 19) 79, paras 6.37 & 6.38.
[1560] Insolvency Act (n 556), s 344 (4).
[1561] Goode, *Commercial Law* (n 529) 745; Borrowers and Lenders Act, (n 9), s 42 (2).
[1562] Goode, *Commercial Law* (n 529) 745.
[1563] ibid 745–746; McCormack, *Secured Credit under English and American Law* (n 606) 224–225.
[1564] *Tailby v Official Receiver* (n 463).
[1565] ibid 523, 531; McCormack, *Secured Credit under English and American Law* (n 606) 224.

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of the parties is to assign book-debt.[1566] The equitable characteristic, however, imposes the obligation on financier-creditor to notify the debtor,[1567] and also strictly police the said debtor as a measure to prevent the loss of priority.[1568]

Notification for companies in Sierra Leone again opens the debate on the merits/functionality of assignment (sale) versus security charge over receivables. The prior law provides the framework for companies to encumber their assets,[1569] including receivables whether existing or future debts,[1570] within the context of the companies exercising their borrowing and charging powers.[1571] The encumbrance of a company's assets/property/undertaking may be by a fixed charge or floating charge'.[1572] With the public registry maintained by the CAC,[1573] every charge created by a company must have its prescribed particulars and the instrument registered within 21 days after the date of its creation, or be void against the liquidator and any creditor of the company.[1574] In effect, public notice[1575] and information is available for receivable financing based on a charge, and this registration displaces the rule in *Dearle v Hall*.[1576] A failure to register, however, renders the charge void against a liquidator or administrator or other creditors.[1577] These

[1566] McCormack, *Secured Credit under English and American Law* (n 606) 224.
[1567] *Tailby v Official Receiver* (n 463) 543, per Lord Watson; see *Dearle v. Hall* (n 497); De Lacy, 'Reflections on the Ambit of the Rule in Dearle v. Hall and the Priority of Personal Property Assignments - Part One' (n 517); John De Lacy, 'Reflections on the Ambit of the Rule in Dearle v. Hall and the Priority of Personal Property Assignments - Part Two' (1999) 28 Anglo-American Law Review 197; McCormack, however, argues notice to the 'debtor is not required to perfect the title of an equitable assignee' despite the judicial pronouncements, McCormack, *Secured Credit under English and American Law* (n 606) 224, fn. 60.
[1568] Law Commission, *Bills of Sale* (n 19) 79–80.
[1569] Companies Act 2009 (n 387) s 1. By s 170 (10) for the purposes of registration of charges, a charge includes a mortgage.
[1570] Goode, *Legal Problems of Credit and Security* (n 373) 36; See Crowther and others (n 11) para 4.1.7 p. 155; *National Provincial and Union Bank of England v. Charnley* (n 425) per Atkin L.J.
[1571] Companies Act 2009 (n 387) ss 142 and 145.
[1572] ibid s 145 (2).
[1573] ibid ss 8, 9, 171 (1), (3) and 179 (1).
[1574] ibid s 170 (1).
[1575] See Goode, *Goode on Legal Problems of Credit and Security* (n 47) 110, para 3-28.
[1576] *Dearle v. Hall* (n 497), second limb of the rule; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 104, para 3-13.
[1577] See Goode, *Goode on Legal Problems of Credit and Security* (n 47) 110, para 3-29.

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complex and interwoven formal rules have led to the notion that receivable financing is beset by technical difficulties.[1578]

6.4.2 Receivables Financing under the BLA: The Curative Nature of Legal Transplant?

Given that the overall objective of the PPSL reform in 2014 was to expand access to finance, it is expected that the BLA should give due consideration to receivables financing, especially because of its potential to impact SME growth.[1579] It is further expected that the 2014 reform ought to cure the technical difficulties that plague receiving financing in the pre-BLA law. Generally, the BLA adopts some terminologies prominent in the Unitary Model, which demonstrates a move towards the functional approach. It most assuredly defines a security interest to include the 'outright or security assignment of receivables',[1580] and thereby incorporating the sale of receivables and use of same as security for credit, thereby abandoning the formal distinction in its application. It further appears to have unwittingly referred to intangibles covering or alluding to receivables or book-debts, in the form of 'deposit account' is noted in the definition of 'cash proceeds'.[1581] The definition and reference is further developed in the definition of 'deposited security' to include 'a security standing to the credit of a security account which is transferable by way of book-entry in the record of depositors'.[1582]

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[1578] Law Commission, *Bills of Sale* (n 19) 7–8, paras 1.31 to 1.35, 6.65 to 6.67.
[1579] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 95, para 3-01; see Akseli (n 1320); Beck and Demirguc-Kunt (n 1320); Berger and Udell, 'Small Business Credit Availability and Relationship Lending' (n 1320); Safavian, Fleisig and Steinbuks (n 1343).
[1580] Borrowers and Lenders Act, (n 9), s 1.
[1581] ibid, s 1 defines cash proceeds to include 'money, cheques and deposit accounts'; which is almost ipsissima verba of the definition of cash proceeds in Uniform Commercial Code (n 374), § 9-102 (a) (9); and § 9-102 (a) (29) defines deposit account to mean 'a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument'. However, the relevance in the BLA is limited to the effectiveness of a right in a security interest and the proceeds against third parties; but § 9-102 (a) (2) excludes rights to payment evidenced by 'deposit account' from the definition of account; see Borrowers and Lenders Act, (n 9), s 14 (3) (ii); see White and Summers, *Uniform Commercial Code* (n 90) 79–80.
[1582] Borrowers and Lenders Act, (n 9), s 1; see Uniform Commercial Code (n 374), § 9-102 (a) (29).

Moving away from the use of terminologies and definition of terms, the incorporation of sale and security assignments of receivables within the BLA, a movement towards the Unitary Model substantively changes the nature of using debt as collateral for credit in Sierra Leone, at least for bank and other financial institutions. Through a comprehensive perusal of the BLA, the following are the main features in the changed legal landscape for receivable financing: First, the abandonment of the formal distinctions between an outright and security assignment, and the adoption of the functional approach.[1583] Second, the exclusion of outright assignment of an account receivable from a part dealing with borrower's rights, obligations and information disclosure in the BLA.[1584] And third, the lender right to apply account receivable in satisfaction of an obligation in the enforcement of the security interest.[1585] In the following sub-rubrics, each of these three major features are further examined.

6.4.2.1 Adopting the Unitary Model - Functionalism Trumps Formalism

The incorporation of the 'outright or security assignment of receivables' in the definition of security interest in the BLA demonstrates the move towards the US Unitary Model.[1586] This in effect means sale and security assignments of receivables are now subjected to the registration and perfection regime in the BLA.[1587] This is the case in the US, where the distinction has been discarded, save for who has the right to the surplus after it has been paid, wherein the sale and security assignment resurfaces.[1588] In the said Unitary Model, 'security interest' is defined to

[1583] Borrowers and Lenders Act, (n 9), s 1; see definition of 'security interest'.
[1584] ibid, s 38 (6).
[1585] ibid, s 42.
[1586] ibid, s 1.
[1587] ibid, ss 14 and 21.
[1588] Uniform Commercial Code (n 485), § 9-608 (b) 'If the underlying transaction is a sale of accounts […] the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency'; Tajti, *Comparative Secured Transactions Law* (n 1) 99.

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include 'any interest of […] buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9'.[1589] As such Article 9 applies to, inter alia, sale of account;[1590] and this was in recognition of the historic practice in the factoring industry, where factors bought accounts at a discount and in return get assigned 100% of the accounts in the 1972 version of Article 9.[1591] Thus, a purchaser of account is considered, for the most part, as secured creditor, and have to perfect by filing a financing statement.[1592] The filing of the financing statement covers both notification and non-notification transactions.[1593] Thus, as part of the hallmarks of Article 9, the formalistic distinctions in the different of securing a collateral, and transactions with same economic outcomes have been swept away.[1594] This is exactly what the BLA has done for receivable financing in the most part. The incorporation of sale of receivables in Article 9 and by extension the BLA does not extinguish the characteristic features of a sale from a security transfer. This means the incorporation of sale of account applies to perfection, priority

[1589] Uniform Commercial Code (n 374), § 1-201 (35).
[1590] ibid, § 9-109 (a) (3). 'Account' except if used as 'account for', means "a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, governmental unit of a State, or person licensed or authorized to operate the game by a State or governmental unit of a State. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card" ibid, § 9-102 (a) (2).
[1591] White and Summers, *Uniform Commercial Code* (n 90) 52, § 30-7.
[1592] ibid 54.
[1593] See Donald J Rapson, 'Receivables Financing under Revised Article 9 Uniform Commercial Code Symposium' (1999) 73 American Bankruptcy Law Journal 133; Thomas E Plank, 'Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing' (2007) 68 Ohio St. LJ 231.
[1594] McCormack, *Secured Credit under English and American Law* (n 606) 209–210.

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and enforcement.[1595] Therefore, 'the debtor/seller retains no residual ownership in the receivables once the transfer has been effected'.[1596]

6.4.2.2 Borrowers Rights, Obligations and the Exclusion of Sale Receivables

In addressing the utility of the Central Bank's supervisory powers under the BLA, I have alluded to the novel direct inclusion of the borrowers' right, obligations and disclosure of information within the BLA.[1597] The oddity or novelty of the inclusion of such provisions, I argue, will turn out to be of much utility to borrowers with weak bargaining powers. For instance, instead of leaving it to the conception of the freedom of contract and negotiability, the BLA through the rights and obligation provisions provide minimum protection for borrowers, especially wherein there is bargaining imbalance. However, the BLA excludes the application of Part VI in the BLA dealing with borrowers' rights, obligation and disclosure of information, inter alia, to the 'outright assignment of an account receivable'.[1598] The sub-section specifically states 'This Part'; and the Interpretation Act 1971, which states the rules on the construction and interpretation of statutes, provides that in "every Act, unless a contrary intention appears - Where reference is made to a Chapter, Part, section, Schedule or Form such reference shall be deemed to be a reference to a

[1595] Gilmore noted that in the history of US security law, one fact is constant, i.e., 'whenever a common law device has been covered by a statute, some form of public recordation or filing has been required as a condition of perfection of the security interest'; Gilmore, *Security Interests in Personal Property* (n 7) 274.

[1596] "The revised Article 9 makes this clear. If, however, the buyer of receivables fails to comply with the Article 9 perfection rules, then for the purpose of determining the rights of creditors and purchasers for value from the seller of the receivables, the seller is taken as having retained the rights that it sold"; McCormack, *Secured Credit under English and American Law* (n 606) 210; Uniform Commercial Code (n 374), § 9-318, (a) 'A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold'. (b) "For purposes of determining the rights of creditors of, and purchasers for value of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account or chattel paper identical to those the debtor sold". Also see § 9-207 on the exception the obligation on a secured party to 'use reasonable care in the custody and preservation of collateral in the secured party's possession' for buyer of accounts except if so agreed.

[1597] See 4.1.1 herein.

[1598] Borrowers and Lenders Act, (n 9), s 38 (6).

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Chapter, Part, section, Schedule or Form of the Act".[1599] In effect, the literal interpretation with respect to the exclusion of Part VI in the BLA will simple mean the inapplicability of the borrowers' rights and obligation to the sale of account receivables.

In discussing the priority rules between competing interests, I had briefly alluded to the retention of the characteristic of sale in the outright assignment of receivables, notwithstanding its incorporation in the BLA.[1600] This is the point the BLA is anchoring on. In this context, parties and the courts will still have to differentiate between a sale and security assignment of receivables if the rights and obligations of borrowers and duty of lenders to disclose information are at issue. What this means in the legal framework will be significant to the core idea of expanding access to finance, the protection of parties, especially the weaker parties, and transparency (information disclosure). The characteristic feature and difference between a sale and security assignment of account receivables is the 'the debtor/seller retention or otherwise of residual ownership in the receivables once the transfer has been effected; and care of the collateral.[1601] This difference should in no uncertain terms affect protections afforded to a borrower or purchaser of account receivables.

From a comparative perspective, I have previously stated that the U.C.C. Article 9 in the US retains the distinction between a sale and security assignment with respect to the debtor's right to the surplus after the debt has been paid; wherein in a sale of receivables, the debtor is not entitled to the surplus.[1602] This is a reasonable retention of the distinction as opposed to the BLA's. The fundamental reason for the inclusion of the sale of receivables in the PPSL regime is the economic

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[1599] Interpretation Act, 1971 (n 340), s 15 (b); also see preamble and s 3 (1) on the definition of 'Act' as a legislative enactment in Sierra Leone, for example, the BLA.
[1600] See 3.2.2.5.
[1601] Uniform Commercial Code (n 374), § 9-318 (a) and (b); § 9-207; McCormack, *Secured Credit under English and American Law* (n 606) 210.
[1602] Uniform Commercial Code (n 485), § 9-608 (b) 'If the underlying transaction is a sale of accounts […] the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency'; Tajti, *Comparative Secured Transactions Law* (n 1) 99.

equivalence of the two transactions, i.e., sale or security assignment. They have the same economic effect. I argue that there is a sound legal doctrine that supports the different treatment of a sale and security assignment on the issues of surplus;[1603] however, I see no basis for the complete exclusion of the whole Part VI of the BLA, including information disclosure, protection against discrimination because one is a sale transaction and the other a security assignment. The protections accorded in Part VI of the BLA are mostly pre-contractual, thus, imposing a higher duty on lenders (banks and financial institutions) to be transparent and fair. Where this lacuna has been created, lenders will most certainly prefer to engage in sale of receivables to escape the detailed statutory obligations for security assignment of receivables. One further drawback relates to the lack of a sector specific legislation for outright assignment of receivables known as factoring. Even though the BLA imposes a rule on its superiority in situations where there may be a conflict between the BLA and any other legislation in relation to the lender's right,[1604] this is not helpful when the sector/industry itself, in this case factoring, is not regulated by a sector specific legislation, with only common law contract rules as the default framework.

6.4.2.3 Account Receivables Enforcement in the BLA

The BLA grants a lender the right to collect and apply account receivables in satisfaction of an obligation in the enforcement of the security interest in the said account.[1605] In general, the outright assignment or security assignment of account receivables incorporation in the BLA means that the general rules of enforcement apply. In Chapter 3, I have discussed the enforcement scheme

[1603] A sale involves the transfer of property in the goods/chattel, the effect of which property passes as agreed by the parties. So, there is a complete transfer of property in the goods; Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), ss 1, 17. As property passes, so the risk as well at least prima facie, see s 20. Therefore, if the benefit (property) and liability (risk) have passed to the buyer, then the surplus which is part of the property must follow the sales transaction. The property interest is also referred to as ownership. So in a sale the transfer ownership takes place between the seller and buyer, Bridge, *Personal Property Law* (n 641) 154; See Goode, *Commercial Law* (n 529) 190, 577, 744.

[1604] Borrowers and Lenders Act, (n 9), s 38 (7).

[1605] ibid, s 42.

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in the BLA, which includes the rights of the account creditor.[1606] The important question, therefore, is why this separate reference to account receivable in the lenders' enforcement rights. The BLA provides that a "lender with priority over other lenders may collect and apply an account receivable, […] taken as collateral to the satisfaction of the obligation secured by the security interest if the borrower is in default. […] Unless otherwise agreed, the lender may notify the account debtor and collect payment even prior to default".[1607] Therefore, a lender with priority can enforce a debt obligation secured by account receivables without need to resort to court, and also without employing an independent or collective agent, for example, a receiver. The lender with priority can collect and apply account receivables to satisfy the debt obligation, and this can be prior to default if agreed by the parties.

This BLA additional enforcement provision for account receivables signifies the right to non-judicial enforcement (self-help), and also the option for the parties to engage in notification receivable financing.[1608] This bring about much more ease and flexibility in enforcing account receivables. Recall one of the access to finance challenges highlighted by the World Bank in 'unlocking dead capital' was the lacking ease of enforcement of a security interest in a collateral.[1609] A qualitative way to measure the ease of enforcement is to juxtapose the enforcement regime in the prior (pre-BLA) framework and the BLA enforcement of account receivables. In the prior formalistic approach,[1610] the focus is on security assignment since sale is considered to be outside of the PPSL regime. The charge on receivables for corporate entities, does not include the right to foreclose or take automatic possession,[1611] although parties can contractual agree to the

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[1606] See 3.2.2.6 herein.
[1607] Borrowers and Lenders Act, (n 9), s 42.
[1608] ibid, s 42 (2) for notification of the account debtor and collection of account receivables even before default.
[1609] Safavian, Fleisig and Steinbuks (n 1343) 2.
[1610] See 2.3.5 and 3.2.2.6 herein.
[1611] Calnan, 'What Is Wrong with the Law of Security?' (n 15) 184.

exercise of the right to take possession.[1612] In the Companies Act 2009[1613] the secured creditor may employ judicial and non-judicial enforcement methods,[1614] provided that non-judicial enforcement may be agreed to by the parties.[1615] For unincorporated entities, the equitable assignment of receivables as confirmed in *Taibly v the Official Receiver,*[1616] is subjected to the equities, i.e., subject to all rights of set-off and other defences available against the assignor, with notice to the debtor as the sole exception.[1617] This is the height of a cumbersome enforcement regime which can only be pursued judicially, illustrating a marked difference from the enforcement scheme now open to lenders taking security over account receivables in the BLA.

6.4.3 Summing-up Receivables Financing Lessons for Sierra Leone

With the framework for receivable financing examined, two significant PPSL reform related issues warrant highlighting: First, the existence of the two-tier system of securing personal property, that is the parallel PPSL regimes and the concomitant effect on receivables financing; and second, the adoption of the Unitary Model functionalism, albeit with fragmented substantive provisions. With respect to the two-tier system, I have previously argued that inadvertence in not repealing the prior law or unification of the two approaches have created parallel systems of taking security over personal property collateral.[1618] I further referred to the states of affairs as the manifestation of the doctrine of 'legal parallelism'.[1619] The arguments on how to resolve parallel/two-tier system put forward in Chapter 4 apply to receivables financing as well. In effect the problem of lacking uniformity is the direct reflection of one of the substantial/fundamental

[1612] See *Garfitt v. Allen* (n 542).
[1613] Also see Goode, *Goode on Legal Problems of Credit and Security* (n 47) 107, 3-21.
[1614] Companies Act 2009 (n 387) s 180 (1).
[1615] ibid ss 152; 181 (1), (2) and (4).
[1616] See *Tailby v Official Receiver* (n 463).
[1617] *Roxburghe v Cox* (n 496); Goode, *Goode on Legal Problems of Credit and Security* (n 47) 113, para 3-34.
[1618] See 1.4 and 4.3 herein.
[1619] ibid.

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flaws in the PPSL reform in Sierra Leone. Receivables financing within the two-tier system is a micro representation of the macro legal parallel state of the PPSL framework. As previously argued, *lex specialis* may be used as an interpretative tool to address the immediate and short term BLA versus prior law conflicts; however, only a comprehensive reform will be the ultimate panacea.

On the second issue of the fragmented substantive provisions, the best or optimistic view could be the flexibility of BLA in allowing the fundamental principles of freedom to contract and negotiability to hold sway. The parties are in the best position to incorporate sufficient protective measures in the credit agreement based on the risk assessment. This argument, however, rests on the assumption that SMEs and other borrowers can exercise equal bargaining powers and can alter often fixed banking terms. This is usually not the case, since most of the transactions are governed by standard forms. Further, the lack of developed sector specific legislations, and exclusion of the inbuilt protections for borrowers in the BLA in relation to outright assignment of receivables expose the inadequacies of the substantive law fragmentation. It is noted that fragmentation itself is not new in the literature. Gilmore picked out a similar problem in the coverage of statutes enacted to augment account receivables financing in the US following the inadequacies of the common law before the 1950s.[1620] The lesson to be learnt from the US approach is the continuing refinement of its law, paying particular attention to commercial practicability and protection of all parties, from the account-financier, account debtor to the purchaser accordingly. Indeed, the adoption of the Unitary Model's functionalism is the first significant step which must be backed by idiosyncratic refinement for optimal utility in the use of receivables as collateral for credit.

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[1620] Gilmore, *Security Interests in Personal Property* (n 7) 278.

6.5 Conclusion

The conventional wisdom in inventory and receivable financing is hinged on the hypothesis that the unrestricted and flexible use of stock-in-trade and debt as collateral for credit expand access to finance. This is represented by the metaphoric resurrection of 'dead capital', especially for SMEs. In this Chapter, I have investigated and confirmed this claim; and I have used the existing empirical studies, done by the World Bank amongst others, to show how the legal form of business enterprises and exiting formalistic rules have created limitations and narrow the scope to access credit finance. I argue that the economic utility in expanding access to credit finance through the discarding of formalistic rules far outweighs the retention of such prohibitive and limiting doctrinal rules. Formalism is manifested in the recognition of the distinction between transactions which economically are indistinguishable, for example, sale and security assignment of receivables. The reform in 2014 through the enactment of BLA has tilted the PPSL framework towards the Unitary Model and its functional approach. However, in both inventory and receivable financing, this move is hampered by firstly the substantial deviation that has created a parallel system of credit finance for banks and financial institutions on the one hand, and non-banks on the other. Secondly, the inadequacy of the substantive law provisions within the BLA has led to a state of fragmentation, opening up a legal gap which will tempt parties and the courts to revert to the formal rules for interpretation and implementation of the BLA. Although a significant move has been made in terms of the conceptual approach, only a comprehensive reform will cure the PPSL framework of both the substantial deviations, and the internal BLA fragmentation especially with respect to inventory and receivable financing.

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Chapter Seven

7. Reservation of Title Financing – the Kernel of the Conflicting Conceptual Approaches

This chapter examines the phenomenon of accessing credit finance through the use of property not previously owned by the borrower/buyer as security for credit, i.e., the borrower/buyer not previously vested with proprietary or ownership interest in the collateral. In other words, the creditor/seller reserves title in the goods whilst possession is granted to the borrower/buyer. Invariably and depending on the jurisdiction, this phenomenon is referred to as title financing, or more specifically as retained title, retention of title, reservation of title or a *Romalpa* clause in the literature.[1621] With reservation of title being at the heart of the conceptual divide between the formal and functional approaches to modern secured transactions law, it must be noted that the fundamental purport for reserving title in goods is to provide security for the creditor/seller until the purchase price is paid and other conditions are satisfied by the borrower/buyer. If the purchase price remains unpaid, the creditor/seller can assert the reserved ownership right by repossessing the goods or rely on the title claim as protection in the insolvency/bankruptcy of the debtor/buyer, thereby defeating, for example, the claim of a receiver or bankruptcy trustee within the traditional formal approach.[1622]

On account of the above, the importance of this chapter, with respect to the overall purport of this dissertation, rests on three significant factors: First, the advantage embedded in the examination of the conceptual differences in the formal and functional approaches, which reveals

[1621] The word 'reservation' originates from the Sale of Goods Act 1979, s 19 with the rubric 'reservation of a right of disposal'. The section makes provision for the seller to reserve title in goods until certain conditions are fulfilled; McCormack, *Secured Credit under English and American Law* (n 606) 164; a 'Romalpa clause' goes beyond the simple retention-of-title by the seller, as the title-retention in the goods follows through in the proceeds of sale of the goods; *Aluminium Industrie Vaassen B V v Romalpa Aluminium Ltd* (1976) 1 WLR 676; see *Clough Mill Ltd v Martin* (1984) 3 All ER 982; McCormack, *Reservation of Title* (n 97) 1; Allan (n 10); Sharon Cowan, Alistair Clark and Gordon Goldberg, 'Will English Romalpa Clauses Become Registrable Securities?' [1995] The Cambridge Law Journal 43.

[1622] *Clough Mill Ltd v. Martin* (n 1621); McCormack, *Reservation of Title* (n 97) 3.

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the theoretical underpinnings of the doctrinal dichotomy in the formal system on the one hand, and the premium on the economic rationale for the unitary approach in the functional system on the other hand. The underlying theoretical difference which hinges on whether the debtor has proprietary interest in the collateral is without doubt the fundamental issue which amplifies the legal parallelism problem in the two-tier post-reform PPSL framework in Sierra Leone. The second importance relates to the intriguing nexus between title financing and bankruptcy law, especially in view of the superior position of the seller with retained title to that of secured creditors, thereby disrupting the balance of modern secured financing policies. Third, the opportunity to expand access to consumer credit through the use of reservation of title transactions within the BLA's unitary conception of a security interest. The technique in reservation of title transactions characteristically positions it to bolster the presently weak consumer credit market in Sierra Leone, thereby providing the platform for increased access to credit finance.[1623]

The BLA introduces the unitary approach which incorporates title reservation in the conception of security interest, and this has created a parallel title reservation scheme, layering on the extant formal system adopted from English law. The legal parallelism problem, described as one of the substantial deviations, has been examined in Chapter 4. With no need to reconsider the legal parallelism problem at this stage, the consideration in this chapter will be on the opportunity for credit expansion presented by the unitary concept of security interest in the BLA. In getting to the overall credit expansion objective, this chapter firstly unpacks the conceptual debate on the two opposing approaches, and further elucidates on how the upspring of a parallel framework affects title financing within the two-tier system in Sierra Leone. It then proceeds to outline the

[1623] See author George J. Wallace, 'The Logic of Consumer Credit Reform' [1973] The Yale Law Journal 461, 477 et seq., where it was persuasively argued that consumer credit operates as a form of wealth distribution to low income people.

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pre-reform system in Sierra Leone with analysis on its utility, especially within the bank regulated secured credit market. This is followed by an examination of the US influenced unitary approach in the BLA, the treatment of title reservation considered as security interest in insolvency, and the associated effect of title reservation within the BLA on consumer credit.

7.1 Unpacking the Conceptual Debate on Title Reservation – Doctrine versus Function

The debate on the divergence between the unitary and functional approach to secured transactions incorporating title financing transactions as typified in the Unitary Model, and the formal approach which distinguishes between lenders and vender's credit in England rightfully should start with the long held English law doctrinal distinction, since it represents the earliest construction of the concept of security interest, albeit in the limited scope.[1624] The pith of the difference in approaches hinges on the pivotal question of what constitutes a security interest, i.e., whether vendor's credit reflected through reservation of title is considered as security interest.[1625] Before the adoption of the U.C.C. and its Article 9 in the 1950s, the US also grappled with the same question.[1626] An excursion in this area will certainly not lead to a consensus answer. However, embarking on such an exercise will satisfactorily reveal the doctrinal, economic and policy considerations that have influenced the conceptualization of the security interest, being an all-embracing notion in the functional approach, and a closed list of security devices in the formal system.

7.1.1 The Doctrinal Distinction between Title Reservation and Security Interest

[1624] The Crowther Committee introduced the terms 'lender credit' and 'vendor credit' to distinguish between transactions involving the loan of form as represented in the legal form, whether it is associated with a sale of goods or not, and other transactions that are not loans but contracts for the sale or hire of goods respectively. Crowther and others (n 11) 13, 154, paras 1.2.2 and 4.1.2-4.1.3.

[1625] English law recognizes the 'sharp distinction between vendor credit and lender credit […] This distinction is reflected not merely in differences of details but in the whole philosophy underlying the governing legal principles'. ibid 154, para 4.1.3.

[1626] The process commenced with the Uniform Trust Receipts Act, where US started looking towards the substance of transactions, thereby foregoing form to accomodate commercial operations; ibid 183, para 5.1.5.

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Defining or agreeing to an accepted definition of security interest has generated intense debate in the literature.[1627] Whilst consensus on the classification and definition of security interest remains elusive from a theoretical perspective, especially in England,[1628] what is conclusive is the *sensu stricto* distinction between security interest descriptively defined to include a 'pledge', 'mortgage', 'charge' and 'lien' (all establishing right over property of the debtor);[1629] and other forms of security where the location of the proprietary interest(s) is immaterial, i.e., it matters little where the grant of right or interest in property emanates.[1630] In the Scottish case of *Armour v. Thyssen Edelstahlwerke AG*,[1631] a leading case on the issue of distinguishing a security interest from reservation of title interest, the House of Lords was confronted with the question of whether the steel supplied by the appellants was encumbered by a retention-of-title clause which limited the transfer of the property in the steel until the debt owed was paid. The receiver respondent in the case argued that the transaction as contained in the relevant clause created a security interest. By unanimous decision, the House of Lords held that such a clause cannot be regarded as a security interest since no security right was created.[1632]

The leading opinion on the issue of what constitutes a security interest relative to title reservation within the formal approach is that of Lord Keith in the said case of *Armour v. Thyssen*

[1627] The debate was centred on the legal classification of 'security interest', which was covered in the Introduction and Chapter Two herein. See De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 3; Allan (n 10); Goode, 'Security' (n 10); Oditah (n 97) 4–14.

[1628] Even under statute, only the Insolvency Act 1986, ss 248 (b) (i) and 425 (4) enumerated the charge, chattel mortgage, lien as a measure to define (consensual) 'security'. This confirms the common law recognized four types of consensual security interests, as held in *Re Cosslett (Contractors) Ltd* [1998] Ch 495. See De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 3–4, 7.

[1629] 'Reservation of title to goods until payment of the price - eg by the seller under a conditional sale agreement or the owner under a hire-purchase agreement - is intended as a security device, yet it does not constitute security as a matter of law, for what is reserved is merely a right in re sua'. Goode, *Commercial Law* (n 529) 548.

[1630] De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 7; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 3–4, para 1-04; see Crowther and others (n 11) 155–157 paras 4.1.7 - 4.1.8.

[1631] *Armour v Thyssen Edelstahlwerke AG* (1991) 2 AC 339 (House of Lords).

[1632] Per Lord Keith ibid 353; see also *Manchester Sheffield and Lincolnshire Railway Co v North Central Wagon Co* (n 407) 567, per Lord Macnaghten; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 7–8.

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Edelstahlwerke AG, parts of which are reproduced hereunder due to its persuasive and elucidative character. Lord Keith said:

> I am, however, unable to regard a provision reserving title to the seller until payment of all debts due to him by the buyer as amounting to the creation by the buyer of a right of security in favour of the seller. Such a provision does in a sense give the seller security for the unpaid debts of the buyer. But it does so by way of a legitimate retention of title, not by virtue of any right over his own property conferred by the buyer. […] Where a right of security is conferred the debtor retains an ultimate right over the subject matter in question. The creditor, having realised out of that subject matter a sufficient sum to meet the debt, is obliged to account to the debtor for any surplus. Where, however, the seller of goods retains title until some condition has been satisfied, and on failure of such satisfaction repossesses them, then he is not obliged to account to the buyer for any part of the value of the goods. Where the condition is to the effect that the price of the goods shall have been paid and it has not been paid, then in the situation where the market price of the goods has risen, so that they are worth more than the contract price, the extra value belongs to the unpaid seller. That is clearly the position where the condition relates to payment of the price of the actual goods, and goes to show that the retention of title provision is not one creating a right of security forming an exception to the general rule requiring possession by the creditor. The same is true, in my opinion, where the provision covers not only the price of the very goods which are the subject of the particular contract of sale, but also debts due to the seller under other contracts.[1633]

In this regard, the characteristic elements of the debtor creating security interest in her property, or conversely the reservation of title in property forms the main basis to distinguish a security interest from a title retention transaction seen as quasi security interests. Transactions where the debtor cannot formally encumber an interest in the property are, therefore, not considered as secured transactions, thereby excluding, for example, conditional sale agreements, hire purchase agreements and leases.[1634] This distinction is based on the 'grant theory', which is preoccupied with the location of the legal title, wherein the debtor has to grant a right/interest, i.e. security interest, in her property.[1635]

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[1633] The House of Lords in this unanimous decision implied that the relevant Scottish and English laws on the issue were the same, *Armour v Thyssen Edelstahlwerke AG* (n 1631), 353; see *Bristol Airport plc v Powdrill* [1990] Ch 744, 760, per Browne-Wilkinson CV; *Clough Mill Ltd v. Martin* (n 1621); Cowan, Clark and Goldberg (n 1621) 43; also see De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 8.

[1634] De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 18; McCormack, *Secured Credit under English and American Law* (n 606) 163–164; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 3–5, para 1-04.

[1635] The Committee argued that "English law has always had a strong preoccupation with the situation of the legal title. If a person agreed to sell goods but reserve title to himself until payment, the common law regarded this as a legitimate form of agreement, since it was for the parties to the contract of sale to decide when title should pass. […the] courts and Parliament went to great pains to protect creditors from loss through secret disposition of goods under a bill of sale, reservation of title […] was not treated as a connected problem or as being in any way analogous

In distinguishing a security interest from title reservation, it appears the debate on the remits or limits of the grant theory is still subject to academic debate. Oditah once suggested that there is more to the distinction than merely the grant theory, as he argued that the test of whether a security interest is created or not, depends on whether the debtor has an equity, the equity of redemption in the property.[1636] Oditah's view is seen as an attempt to widen the grant theory on the basis of equity, which is very much disputed. De Lacy, for example, in differing from Oditah's view, argues that "there is only one proprietary interest over goods in the retention-of-title situation: that belonging to the seller who has reserved title to himself alone. The interest of the buyer is merely possessory in nature subject to whatever rights are given to him by the seller in the contract of sale/purchase".[1637] The interest in such reservation, for example in hire purchase, is the hirer's contractual right to purchase the property, far from proprietary interest in chattel, and if there is any remedy for part payment, it is personal and not *in rem*.[1638] These characteristics mean in the strict sense, reservation of title is not considered to be security interest.

Two additional theories or explanations have been put forward to rationalise the doctrinal distinction between credit secured by security interest or by way of reservation of title in English

to a chattel mortgage". Crowther and others (n 11) 154, 183, paras 4.1.3 and 5.1.3; Goode, *Goode on Legal Problems of Credit and Security* (n 47) 3–4, para 1-04; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 29.

[1636] Oditah noted that the 'test of a security interest is whether the debtor has an equity of redemption in the property, the subject-matter of the alleged security. If this be so, the question is really whether in a transaction under which an owner of property reserves title until he is paid, the buyer has an equity of redemption. It is submitted that the buyer goes indeed have an equity of redemption. Where he has paid part of the purchase price before the goods are repossessed, there are in reality two proprietary interests: the seller's interest and the buyer's. If the seller resells, he must account to the buyer for this interest. It follows that whatever the seller is liable to account to the buyer under the contract, constitutes the buyer's equity of redemption'; Oditah (n 97) 6, see fn. 5; *Wickham Holdings Ltd v Brooke House Motors Ltd* (1967) 1 WLR 295, 300, per Lord Denning MR; *Whiteley Ltd v Hilt* (1918) 2 KB 808, per Swinfen Eady MR; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 29–30; Cowan, Clark and Goldberg (n 1621).

[1637] De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 30.

[1638] *Helby v Matthews* [1895] AC 471 (House of Lords) 481, per Lord Macnaghten. "The creation of real rights as between creditor and debtor is a necessary springboard for the assertion of real rights against third parties, which certainly cannot derive from purely personal contractual rights against the debtor"; Goode, 'Security' (n 10) 363; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 31.

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law. First, the accidental evolution of the English common law though a judicial decision (accident), which is described herein as the 'accident theory'; and the second being the case law consideration and development apposite to having a methodical legal framing.[1639] In *Lee v Butler*,[1640] the Court of Appeal in England is said to have restrictively construed the section on the 'disposition by buyer obtaining possession' in the Factors Act, 1889 with huge effect on reservation of title.[1641] The English Court of Appeal was confronted by the question of validating the disposition of possession by buyer of goods, purchased through a mercantile agent, who by hire and purchase agreement from owner had consent to dispose of goods, and the buyer of goods thereof having no notice of the lien of the owner. The court held that the sale and delivery to the buyer was within the 'disposition by buyer obtaining possession' of the 1889 Factors Act 1889, and therefore, valid.[1642]

The *Lee v Butler*[1643] line of reasoning was upheld and adopted in *Newtons of Wembley Ltd. v. Williams*,[1644] a case involving a sale of a car to a third party without notice of the lien under a hire purchaser agreement, which the owner had rescinded.[1645] This continued line of reasoning

[1639] Crowther and others (n 11) 182, para 5.1.3.
[1640] *Lee v Butler* (1893) 2 QB 318 (Court of Appeal).
[1641] The relevant section states: "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner". Factors Act 1889 (n 387), s 9. This Act is not applicable in Sierra Leone. However, the provision under consideration is ipsissima verba replicated by the Sale of Goods Act 1893, hence its interpretation is highly persuasive in Sierra Leone. See Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 25(2), and s 25(3) incorporated by reference the definition of 'mercantile agent' in the Factors Act.
[1642] "L., being in possession of furniture under a hire and purchase agreement made with the plaintiff, sold and delivered the furniture, before the last payment had accrued due or been paid, to the defendant, who received it in good faith and without notice that the plaintiff had any right in respect of it: —Held, that the sale and delivery to the defendant was within the provisions of s. 9, and therefore valid". *Lee v. Butler* (n 1640) 318.
[1643] *Lee v. Butler* (n 1640).
[1644] *Newtons of Wembley Ltd v Williams* (1965) 1 QB 560.
[1645] "That nevertheless since A. had bought the car and since he had initially obtained possession of it with the plaintiff's' consent, he was to be treated by virtue of section 9 of the Factors Act, 1889, A as if he were a mercantile agent in possession of it with the plaintiffs' consent, which consent was by virtue of section 2 (2) of the Act of 1889

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opened the gap for the invention of hire-purchase as a distinctive legal transaction, since a need/gap was created.[1646] In *Helby v. Matthews*,[1647] the House of Lords in distinguishing the *Lee v. Butler* case held that the "expression in the Factors Act 1889 s. 9 'a person having agreed to buy goods' means a person who has bound himself by agreement to buy, and does not include a person who has an option to buy, the owner being bound to sell if that option is exercised".[1648] However, the Crowther Committee argued that the absence of a minimum payment clause made the court construe the agreement as a hire-purchase instead of a conditional sale.[1649] A construction of the agreement as conditional sale may have lessened the preference for hire-purchase agreements and its advantageous position in the law in terms of superiority over security interests.

The third theory or explanation hinges on the fundamental approach to adjudication under English law, i.e., case law development as opposed to a methodical legal framing. Judicial interpretation, which under English common law is an integral part of law-making (judge made law), places much more consideration on the merits of specific/particular cases before the court instead of the overarching implications.[1650] The doctrine of precedent and deference between judges often translate an enunciated principle in a leading case to be applied to later cases and extended to circumstances where the facts may not necessarily be similar.[1651] What follows is the

to be deemed to continue notwithstanding that it had been revoked by the plaintiffs' rescission of their contract". ibid 561–562.

[1646] Crowther and others (n 11) 182, para 5.1.3.

[1647] The House of Lords in *Helby v. Matthews* (n 1638) 471, held that 'the expression in the Factors Act 1889 s. 9 "a person having agreed to buy goods" means a person who has bound himself by agreement to buy, and does not include a person who has an option to buy, the owner being bound to sell if that option is exercised'.

[1648] In the case, "owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire; also that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment the piano should continue the sole property of the owner". ibid 471, 477–478; Factors Act 1889 (n 387), s 9, which deals with 'disposition by buyer obtaining possession'; see Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 25(2).

[1649] Crowther and others (n 11) 182, para 5.1.3.

[1650] ibid, para 5.1.4.

[1651] ibid, para 5.1.4.

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development and consolidation of rules, often becoming rigid rules, flowing from the original case to the mass of cases. In the process, the original rule may have been altered or reconstructed and thereby leading to the wholesale change of the principle of the law. This is the case consideration or sensitivity approach put forward by the Crowther Committee, which applies to the development of reservation of title financing under English law.[1652]

7.1.2 The Doctrinal Distinction, English Reform Discourse and the Practical Implications

The doctrinal distinction between the grant of security and retention-of-title featured prominently in the English PPSL reform discourse.[1653] In the 1971 the Crowder Committee in its report on Consumer Credit emphasised on the persuasive nature of U.C.C. Article 9, in terms of its articulation of its functionalism and its unitary concept of security interest being of 'outstanding merit'.[1654] The Crowder Report bravely suggested and recommended that it is 'in the area of security on personal property that reform of the law [in England] is most vitally needed'.[1655] The Crowder Committee argued that the "fundamental concept [articulated by Article 9] is that transactions should be regulated according to their function, not according to their form, and that an agreement which, though purporting to reserve the full title, is intended as a security agreement should be treated as such".[1656] Although this recommendation of the Crowther Committee was largely rejected by the UK Government,[1657] its recognition of the merits in Article 9's articulation of a unitary security interest was supported by later reform reports.[1658] English law has, however,

[1652] ibid 182–183, paras 5.1.4-5.1.5.
[1653] See McCormack, *Reservation of Title* (n 97) 6–7.
[1654] Crowther and others (n 11) 183, para 5.15; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 44.
[1655] Crowther and others (n 11) 196, para 5.5.1; McCormack, *Reservation of Title* (n 97) 6.
[1656] Crowther and others (n 11) 196, para 5.5.1; Cork (n 11) 365–366, paras 1620-1623.
[1657] The government at the time claimed that it had no 'sufficient evidence either of a need for such a major recasting of the law on new principles or of general support for the particular solution proposed by the Committee'; 'White Paper Crowther Committee Report on Consumer Credit' (n 39) 5427, para 14.
[1658] Diamond (n 19) 1–2, 6, 35, paras 1.7, 1.9, 2.11, 9.3.2; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 46–47.

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not moved beyond the formal or doctrinal distinction between the grant of personal property as security for credit and that of title reservation in goods.

There are practical implications for the continued recognition of the distinction between the grant of a security interest and retention of title transactions. The main pragmatic implication of the doctrinal difference is the absence of registration requirement for transactions with reservation of title clauses.[1659] The need to register the grant of a security interest in personal property is the cornerstone of the modern PPSL regimes meant to address the ostensible ownership problem through the prohibition of secret liens.[1660] Registration, of course, for security interest is fundamentally linked to the secured creditors' priority in enforcement and in the debtor's bankruptcy/insolvency; and significantly for retention-of-title, the owner and financier enjoys priority without need for registration.[1661] This difference in approach also impacts on the remedies available for secured creditor on the one hand, and seller with reservation of title on the other hand including right to repossession, and superior position of the retained title seller in the insolvency/bankruptcy of the debtor.[1662] The issue of insolvency and it nexus to retention-of-title and security interest in collateral is covered below.[1663]

7.1.3 The US Functionalism and Unitary Conception of Security Interest

Across the Atlantic from England, the US similarly contended with the question of augmenting the framework for the assignment of personal property, whether absolutely or by way

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[1659] Worthington (n 10) 157–158; see Cowan, Clark and Goldberg (n 1621).
[1660] Diamond (n 288) 9–10, paras 3.4 (ii) - 3.5; De Lacy, *The Reform of UK Personal Property Security Law* (n 291) 18; McCormack, *Reservation of Title* (n 1524) 5; Tajti, *Comparative Secured Transactions Law* (n 1) 94.
[1661] Cork (n 11) ch 37, see especially 363-365. For implication of insolvency on security interest and 'other security', see De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 37–43; Goode, 'Security' (n 10) 365; Allan (n 10) 343.
[1662] *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621), 353; Cowan, Clark and Goldberg (n 1621) 46; For a brief highlighting of the differences, see Crowther and others (n 11) 175–176, paras 4.2.2 - 4.2.5.
[1663] See 7.4 herein.

of security.[1664] Dominant in the modern secured transactions law literature in the US is the narrative on the pre-UCC security devices and the absence of statutory law addressing consensual liens in personal property in the early 1800s.[1665] The common law rules, mostly borrowed from English law, were the mainstream means of creating consensual liens, and the best way to defeat the interests of third parties was through the pledge.[1666] The pledge, which is possessory in nature was indeed a good way to defeat the 'ostensible ownership' problem. However, during US industrialisation, the demand for credit was high, and the pledge was unsuitable for creating a lien on equipment, inventory and other goods, prompting legal ingenuity initially in the form of field warehousing, then followed by leases and trusts devised by lawyers who were stretching the limits of the courts tolerance with respect to its abhorrence for the secret lien.[1667] The transactions invariably referred to as 'bailment leases', 'trust receipts' and other independent pre-Code devices with the economic characteristics of secured credit financing. The drawback, however, was the proliferation of multiple transactions and the normative framework bedevilled by the multiplicity of rules and distinctive laws for each transaction.

The solution in the US came with the consolidation of all independent pre-Code security devices on personal property in Article 9 of the UCC in the 1950s.[1668] Before the invention of Article 9, conditional sale was the established means of title retention in the US, and most states

[1664] Goode, *Commercial Law* (n 529) 584; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 43.
[1665] Gilmore, *Security Interests in Personal Property* (n 7) 24, § 2.1; see White and Summers, *Uniform Commercial Code* (n 90); Steven L Harris and Charles W Mooney, *Security Interests in Personal Property: Cases, Problems, and Materials* (Foundation Press 2006).
[1666] Gilmore, *Security Interests in Personal Property* (n 7) 24, § 2.1; See George Lee Jr Flint and Marie Juliet Alfaro, 'Secured Transactions History: The First Chattel Mortgage Acts in the Anglo-American World' (2003–2004) 30 William Mitchell Law Review 1403; for a contrary view on the historical development of secured transactions in the US, see George Lee Jr Flint, 'Secured Transactions History: The Fraudulent Myth' (1999) 29 New Mexico Law Review 363.
[1667] Gilmore, *Security Interests in Personal Property* (n 7) 24 et seq., § 2.1; see White and Summers, *Uniform Commercial Code* (n 90); Harris and Mooney (n 1665) 213–213.
[1668] Gilmore, *Security Interests in Personal Property* (n 7) 290; White and Summers, *Uniform Commercial Code* (n 90) 2; McCormack, *Secured Credit under English and American Law* (n 606) 163; De Lacy, *The Reform of UK Personal Property Security Law* (n 39) 43.

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had Conditional Sale Acts.[1669] Article 9 made all this redundant with the all-encompassing definition of security interest and its scope of application. It defines 'security interest' to include as 'an interest in personal property or fixtures which secures payment or performance of an obligation', and includes the 'retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer […] is limited in effect to a reservation of a security interest'.[1670] Article 9 'deliberately cuts loose from all anchorage in the past',[1671] and the definition of 'security interest' from the initial Article 9, and this heralded the treatment of financing devices with same economic outcomes as security interests.

The scope of Article 9 covers transactions, irrespective of their form, that creates a security interest in personal property or fixtures by agreement, and more specifically incorporates retained title transactions like consignment and security leases.[1672] The wording of the 1972 Code was even more revealing in its scope, in that, Article 9 applies to "security interests created by contract including pledge […] conditional sale, trust receipts, other lien or title retention contract and lease or consignment intended as security".[1673] The nature of reservation of title post the UCC reform was considered in *Tilghman v. Hardware, Inc. v Larrimore*,[1674] where the Maryland Court of Appeals held that an agreement for sale of vessel "with language invoking concepts more appropriate to pre-UCC conditional contract of sale does not prevent agreement from creating security interest governed by [Article 9], and …an] agreement under which seller was to deliver

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[1669] Grant Gilmore, 'The Secured Transactions Article of the Commercial Code' (1951) 16 Law and Contemp. Prob. 27, 30–31; White and Summers, *Uniform Commercial Code* (n 90) 2–3; McCormack, *Secured Credit under English and American Law* (n 606) 164.
[1670] Uniform Commercial Code (n 374), § 1-201 (35).
[1671] Gilmore, 'The Secured Transactions Article of the Commercial Code' (n 1669) 28.
[1672] Uniform Commercial Code (n 374), § 9-109 (a), (1), (4) and (5).
[1673] ibid [1972], §§ 9-102; White and Summers, *Uniform Commercial Code* (n 90) 10, fn. 2; also see *In Re Berry* (1995) 189 BR 82 (Bankr Court).
[1674] *Tilghman Hardware, Inc. v. Larrimore* (n 1052).

possession of vessel after series of deposits were paid, but was to reserve title for later transfer, created security interests under the UCC".[1675]

Notwithstanding the doctrinal or abstract principles which may have underpinned the various distinctions in security devices or transactions, the economic function was considered to be more significant for the drafters of the U.C.C. Article 9. The framers of Article 9 opted for functionality over form. This is very much the American pragmatism exhibited. In a reflective paper, Gilmore recounted that the work of the Article 9 Committee started by looking at the pre-Code security devices independently, and how the original idea to structure Article 9 was very systematic, a sort of civil law approach.[1676] However, it soon occurred to the Committee that in pursuing the systematic approach, they were able to "make [the] necessary distinctions between the unlike elements of different security transactions and at the same time to formulate a single set of rules to cover the very large area of likeness common to all such transactions".[1677] This was done even with the pains of abandoning all know terminologies and substantively, the traditional differentiation between security interest and retention-of-title transactions. A truly radical departure from prior law.[1678] England has not been successful enough to make sure radical departure; and in Sierra Leone the impact of the Unitary Model is limited by the substantial deviation relative to the two-tier PPSL framework.

7.2 Retention of Title Finance in Sierra Leone pre-2014 Reform

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[1675] ibid 218, 404–406; White and Summers, *Uniform Commercial Code* (n 90) 10, 16.
[1676] Gilmore note that the "organizing concept which underlies Article 9 is that security transactions should be differentiated with reference to the status of the person whose property secures the debt and the kind of property put up as collateral-thus: consumer goods, farm products; and property used in business enterprises, which is subdividing to whether it is intended for use in the business (equipment) or for sale (inventory) or represents the proceeds of the sale of inventory (accounts receivables, chattel paper […]". Gilmore, 'The Secured Transactions Article of the Commercial Code' [n 1669] 27.
[1677] ibid.
[1678] ibid.

Mapping out retained title financing in Sierra Leone requires tracing the evolution of such transactions under the common law, mostly regulated by the law of contract, and subsequently the Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960.[1679] Indeed, although reservation of tile serves a security purpose in the economic sense, the distinction in English law means different set of principles are employed to govern such transactions.[1680] For Sierra Leone this means reliance on received English law is inevitable.[1681] As a note of caution, it must be said that although the English law and the applicable Sierra Leone may be similar in certain respects, they are not the same or co-equal. As demonstrated throughout this dissertation, English law has made significant progress in certain areas not adopted by Sierra Leone law. Therefore reference to English law will be supported by references to case law and the statutory development in Sierra Leone mostly incorporated as part of the banking and prudential rules.[1682] In this setting, references will be made to the main reservation of title transactions, namely the conditional sale, hire-purchase agreements and leasing, i.e. operational and financial leases,[1683] as these are the most significant not only for their legal characteristics, i.e. having attributes of bailment, sale and mortgage,[1684] but also because of their potential economic impact.

The English reservation of title law was advanced mostly through case law. In considering the 'accidental theory' herein on how the distinction between security interest and retention-of-

[1679] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 19 (1).
[1680] Goode, *Commercial Law* (n 529) 691.
[1681] For discussion on the reception clauses, see page [xx] herein; and see Courts Act 1965 (n 145), s 74; Imperial Statute Act, Cap 18 of the Laws of Sierra Leone 1960 (n 339).
[1682] See the Other Financial Services Act, 2011 (n 453).
[1683] In conditional sale, the seller retains title until all conditions are complied with in the agreement, including the payment of the purchase price; as opposed to hire-purchase or lease, where there is no commitment to buy the asset but an option. *Helby v. Matthews* (n 1638); Goode, *Commercial Law* (n 529) 709–710; Tibor Tajti (Thaythy), 'Leasing in the Western Balkans and the Fall of the Austrian Hypo-Alpe-Adria Bank' (2017) 8 Pravni Zapisi: Godina 155, 189–192.
[1684] Tajti, *Comparative Secured Transactions Law* (n 1) 94; bailment is the consensual transfer of possession of a chattel by a bailor to a bailee, Bridge and others (n 282) 59–61; note however, that bailment can be fictitious or involuntary; Worthington (n 485) 77–82.

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title developed, reference was made to the decisions in the English cases of *Lee v Butler*,[1685] *Newtons of Wembley Ltd. v. Williams*,[1686] and *Helby v. Matthews*.[1687] Based on the reception clauses in Sierra Leone, these decisions do not represent the state of the Law in Sierra Leone, since the Factors Act 1898, the statute which was the object of interpretation, falls outside the first reception cut of date of August 1880; and further, was not specifically adopted in the Imperial Statute.[1688] However, it must be noted that the provision in the Factors Act 1889, is almost identical to the Sale of Goods Act 1893, Cap 225 seller or buyer in possession after sale.[1689] Without need for in depth discussion on the similarity, it is safe, therefore, to revert to cases decided under the grant theory persuasion.

In the House of Lords decision in *McEntire v. Crossley Bros. Ltd*,[1690] a case which without doubt is applicable and authoritative in Sierra Leone, the law Lords unanimously and famously upheld doctrinal rule distinguishing retained title transactions from transactions regulated by the Bills of Sale Acts 1878 and 1882, and the superiority of the claim of the retained title owner, (in this case), the lessor of the bankrupt.[1691] The basic facts were that the owners and lessors of a gas-engine agreed in writing to let the lessee for a rent paid by instalments in total of £210. It was agreed that title or property in the engine becomes the lessee's when the full payment is made. Until the payment condition is fulfilled, the lessor retains absolute ownership.[1692] Further, "it was also agreed that in case of failure to pay any of the instalments or if the lessee should become bankrupt the lessors might elect either to recover the full balance remaining due, or instead to

[1685] *Lee v. Butler* (n 1640).
[1686] *Newtons of Wembley Ltd. v. Williams* (n 1644).
[1687] *Helby v. Matthews* (n 1638).
[1688] Courts Act 1965 (n 145), s 74; Imperial Statute Act, Cap 18 of the Laws of Sierra Leone 1960 (n 339).
[1689] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 25(2); Factors Act 1889 (n 387), s 9; Crowther and others (n 11) 167, para 4.1.42, iii (b).
[1690] *McEntire v Crossley Bros Ltd* [1895] AC 457 (House of Lords).
[1691] ibid 457.
[1692] ibid.

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resume possession of the engine and sell it and, after retaining out of the purchase-money all expenses and the balance remaining due, pay the surplus (if any) to the lessee".[1693] The parties agreed that the lessor may opt to repossess the engine, and only be liable to claim for loss occasioned by the lessee's non-payment in bankruptcy when claim is proved against the estate. The lessee after making the first instalment payment became bankrupt and other instalments became due.[1694]

In simple terms, the apex court in England was faced with the priority conflict between the retained title financier and creditors of the bankrupt lessee.[1695] As argued by the creditors, the transaction was one of sale and mortgage, and should the transaction be construed as sale and chattel mortgage, then the requirements of the Bills of Sale Acts ought to have been complied with, or transaction be deemed invalid.[1696] The House of Lords, however, construed the agreement to be a sale and purchase agreement and not a sale and mortgage.[1697] Lord Herschell L.C., was of the view that the case was a very plain one, and the "agreement between the parties must be construed in pre-cisely the same way as if there had been no bankruptcy at all. Apart from any statutory provision, the assignees in bankruptcy only succeed to the rights of the bankrupt and have no higher or greater rights".[1698] Thus, when the common law rules are applied, the assignees would be in no better position. In this sense, only the bankruptcy legislation and the Bills of Sale Acts can offset the position of the retained title financier, if the property had passed to the bankrupt.[1699] And in scrutinizing the agreement, it was the expressed intention of the parties that property will

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[1693] ibid.
[1694] ibid.
[1695] ibid 460, 462.
[1696] ibid 460–461.
[1697] ibid 467.
[1698] ibid 461.
[1699] ibid 462.

not pass.[1700] The transaction was not a security within the confines of the Bills of Sale Acts 1878 and 1882, if anything, the Bills of Sale Acts needs amending.[1701] Even though "the words 'lessors' and 'hirer' are used and the word 'rent' also occurs, it is perfectly plain that the agreement is one of sale and purchase, and nothing else".[1702]

At about the same time the *Helby v. Matthews*[1703] case was decided by the House of Lords, which had to consider whether the sale of goods by 'hire-purchase' with an 'option to buy clause' was a sale within the provision of the Factors Act 1889. The House of Lords had to decide whether 'a person having agreed to buy goods', i.e., a person bound to buy includes a person with an option to buy relative to the issue of the passing of property. In determining whether a subsequent pledge of the goods (the piano) by the hirer as security for advanced sum trumped the right of the owner.[1704] The court held that by the true construction of the agreement, there was no agreement to buy since such imports a legal obligation.[1705] The significance of this case for Sierra Leone relates to the superiority of retained title as against a security interest, and the distinct treatment of the two transactions. Thus, since title was considered not to have passed owing to the lacking legal obligation to purchase, the hirer had no property interest in the piano to pass onto in the pledge. Again, in *Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd*.,[1706] where a contract for sale stated that ownership in the foil passes only when full price is paid, and buyer acts as 'fiduciary owner' in the products from the foil to be kept separately,[1707] the court held that the seller/supplier is entitled to trace the price in the sale proceeds of the unused foil ahead of creditors, both secured

[1700] ibid 465–466.
[1701] ibid 466.
[1702] ibid 467, per Lord Watson.
[1703] *Helby v. Matthews* (n 1638).
[1704] *ibid 471; Factors Act 1889 (n 387), s 9.*
[1705] *Helby v. Matthews* (n 1638) 475.
[1706] *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621).
[1707] ibid 676.

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and unsecured.[1708] The court was willing to extend the retained title financier right to the property and proceeds.

Although *Romalpa*[1709] was decided in 1976, the allusion to the Sale of Goods Act 1893 on the question of when property passes to a bona fide purchaser, on the identification of proceeds following sale of supplied property, and further reliance on the common law principles relating to bailment strongly suggests its applicability in Sierra Leone.[1710] Hence, it is common for commercial law practitioners to reference it in transactions.[1711] Further, the House of Lords in *Armour v. Thyssen Edelstahlwerke AG*,[1712] elucidated on why a seller retains title until all conditions are met by the buyer in addition to the payment of the purchase price.[1713] The House of Lords re-echoed the need to give effect to the express intention of the parties with respect to the passing of property and fulfilment of conditions, and the transaction retaining title is distinct from the buyer conferring right in her property (security interest).[1714] Although the case was decided under the Sale of Goods Act 1979, the reasoning embodies the common law distinction, and the deference given to the freedom of the parties to regulate their agreement.[1715]

Title finance transactions as deduced from the case law are regulated based on their form, i.e., conditional sale, hire-purchase, credit sale and leasing; and not on the nature of the creditor or debtor, for example charges restricted to corporate entities.[1716] Even though there are nuanced

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[1708] The Court of Appeal, per Roskill LJ upheld the decision of Mocatta J., at first instance, ibid 689–690; Worthington (n 10) 159, 163; see 7.5 below for more discussion on the conditions for the supplier's right to proceeds.
[1709] *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621).
[1710] ibid 677, 681–682, 690; Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 25.
[1711] Author worked on numerous financing transactions, including a multi-million US dollars financial lease where the legal opinion made reference to the implications of *Romalpa*.
[1712] *Armour v Thyssen Edelstahlwerke AG* (n 1631).
[1713] ibid 352–353, per Lord Keith; see Worthington (n 10) 178 et seq.
[1714] *Armour v Thyssen Edelstahlwerke AG* (n 1631) 352–352.
[1715] The notion of title reservation was in an Irish case in 1868, way before the Sale of Goods Act 1893; see *Bateman v Green and King* (1868) IR 2 Ch 607; McCormack, *Secured Credit under English and American Law* (n 606) 164.
[1716] Crowther and others (n 11) 165–166, para 4.1.40.

differences between these transactions, the English common law treats them as almost the same.[1717] Judicial decisions in Sierra Leone have not altered the title financing theoretical constructs and English case law. However, there has been one significant statutory intervention, making the sector a regulated one. The OFSA[1718] and the Sale of Goods Act 1893, Cap 225[1719] are the main statutes that regulate reservation of title financing in Sierra Leone, in addition to the borrowed common law rules. The role of the Sale of Goods Act 1893, Cap 225 is simply limited to the permissibility for seller of specific goods to reserve the right of disposal of goods until the agreed conditions are fulfilled without which property will not pass.[1720] This provision made statutory the conditional sale of goods with the reservation of title until the agreed expressed conditions of the seller are satisfied.

The OSFA on the other hand is a legislation aimed at regulating the banking and finance sector. It prohibits the carrying out of a 'financial activity' without a valid license from the Central Bank of Sierra Leone.[1721] A financial activity, inter alia, includes engaging in either the provision of credit services, leasing, and the supply of goods by way of hire-purchase.[1722] Credit services includes the 'giving of any advance, loan or any other facility […] with or without security and whether in connection with the sale of goods or not'.[1723] This definition brings within the purview of the OSFA conditional sale transactions meant to serve as a credit facility. However, aside from

[1717] ibid 166, para 4.1.41.
[1718] Other Financial Services Act, 2011 (n 453).
[1719] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386).
[1720] The section states: 'Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled'; ibid, s 19(1).
[1721] The Other Financial Services Act, 2011 (n 453), s 3(1). It is odd that liability only arises if the unlicensed person 'solicits deposits', a sort of drafting oversight that fails to impose liability for financial activities other than 'soliciting deposits; see s 3(2).
[1722] See definition of 'financial activity' ibid, s 2 (b), (c) and (d).
[1723] See definition of 'credit services' ibid, s 2 (a).

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defining the three-main retention of title transactions (conditional sale, hire-purchase and leasing), the OSFA does little to provide guidance on how such transactions are entered into, and the rights and liabilities of parties regulated, as such is left to contract law. In essence, the OSFA licensing requirement is only a barrier of entry, limiting the use of retention of title transactions to only licensed financial institutions.[1724] Since financial institutions are required to be incorporated entities, co-operative societies and statutory bodies,[1725] the market for lenders in the formal system is further shrunk, with the eliminating of non-licensed and non-corporate entities with means to engage in retained title transactions. Whilst regulation may not be a problem in itself, the questions on barrier to entry in the market ought to be raised and addressed.

The OFSA is silent on the relevant governing rules on retention of title devices, and in the following sub-rubrics a precis on the governing regime for the three main types of retained title transactions pre-reform in 2014 is presented. The outline will be based on mainly applicable English common law since there is a dearth of case law or transaction examples in Sierra Leone for three reasons.[1726] First, the disappearance of companies supplying trade credit in Sierra Leone before the start of the civil war in 1991 for economic and management issues.[1727] Second, the breakdown of commercial activities from 1991 to 2000 as an associated effect of the civil war in Sierra Leone. Third, the post-war dominance of the credit sector by banks and licensed financial institutions following legal and regulatory reforms.

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[1724] See provision on capital and liquidity requirements, ibid, pt. III, from s 16.
[1725] ibid, ss 4(1), 5.
[1726] Perhaps hire-purchase is the only exception with decided cases shaping the jurisprudence and reflective of the high commercial activities relating to hire-purchase in the immediate post-independence era; see *Cassell v SCOA Ltd* ALR SL 404 (SC); *Jalloh v Baydoun & Abbess* ALR SL 24 (SC); *Mustapha Hassan v Gidwani* ALR SL 159 (SC); *SCOA Ltd v Cassell* ALR SL 133 (CA).
[1727] See section on the 'Supply of Capital', Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40) 14–17.

7.2.1 Conditional Sale Agreements

Conditional sale agreements are basically contracts for sale of goods, with the seller retaining the title to the property, i.e., proprietary interest, in the goods until the price is paid and performance of the obligations/conditions in the contract are complied with.[1728] Conditional sale agreements are regulated by the intention of the parties through the contract of sale, and by some measure the provisions of the Sale of Goods Act 1893, Cap 225 if the said Act is not modified by the express provisions of the contract.[1729] In conditional sales the buyer is contractually committed to buying, and therefore, is under compulsion to pay the full payment price.[1730] Under the Sale of Goods Act 1893,[1731] and based on the conditions therein, a conditional buyer can pass on a good title to a *bona fide* purchaser, albeit within the cumbersome and restrictive construction by the courts.[1732] That is, "title will not pass unless the conditional buyer sold the goods in the manner in which he would have sold them has he been carrying on the business of a mercantile agent".[1733]

As illustrated above, credit services in the OSFA are defined to include the provision of any advance, loan or facility whether connected to sale of goods or not.[1734] Therefore, where a seller opts to reserve title in goods until conditions specified in the agreement are fulfilled, such a seller must be in a possession of a valid banking or other financial service license, if such reservation is connected to any advance, loan or facility. In the pragmatic sense, this nexus to any advance, loan or facility, i.e., lending money, counts for nothing since the economic effect of reserving title in goods could be achieved without need for a separate advance, loan or facility.

[1728] Crowther and others (n 11) 172, para 4.1.55.
[1729] ibid, para 4.1.57; Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 19(1).
[1730] Crowther and others (n 11) 172, para 4.1.57; Goode, *Commercial Law* (n 529) 709–710; see *Helby v. Matthews* (n 1638).
[1731] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 25(2).
[1732] Crowther and others (n 11) 173, para 4.1.58.
[1733] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), s 25(2); Crowther and others (n 11) 172–173, para 4.1.58.
[1734] Other Financial Services Act, 2011 (n 453), s 2.

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When goods are supplied on the basis of providing capital, a seeming credit transaction could be moulded through payment of the total price (amount) by instalment at regular intervals, known as vendor's credit. It operates much like purchase money security.[1735] The separation of the loan and the sale of goods (with reservation on disposal) in the OSFA, defeats any objective that may have given rise to the regulation of conditional sale in the said OSFA, since parties can engage in vendor's credit instead of lending money.

7.2.2 Hire-purchase Agreements

The OSFA defines hire-purchase in a non-exhaustive categorization of transactions including 'bailment of moveable assets to another person with the understanding that the bailee becomes the absolute owner on completing the payment'.[1736] Hire-purchase as regulated by the common law represents a transaction wherein the hiring is backed with an option to purchase the goods, but the hirer with the right to purchase the goods is not obligated to do so.[1737] This is what distinguishes a hire-purchase from a conditional sale.[1738] Hire-purchase agreements may be of two forms, first, hire-purchase with the power of termination by the hirer before the full price is paid or due; and second, a fixed hiring with no termination powers by the hirer but with no requirement to exercise the purchase option.[1739]

As aforesaid, hire-purchase is considered to be bailment, and the principles governing bailment including the transfer of possession until the option to purchase is exercised by the hirer, equally applies to hire purchase agreements.[1740] These issues were quite contentious in the High

[1735] Goode, *Goode on Legal Problems of Credit and Security* (n 47) 4, where Goode argues that similarly Article 9 treats a conditional buyer, a lessee with an option to purchase, and a lessee in a financial lease as owners, and the seller reservation of title as a purchase-money chattel mortgage; see McCormack, *Reservation of Title* (n 97) 16.
[1736] See definition of 'hire-purchase', the Other Financial Services Act, 2011 (n 453), s 2.
[1737] Crowther and others (n 11) 167, para 4.1.43; see *S.C.O.A. Ltd. v. Cassell* (n 1726); *Jalloh v. Baydoun & Abbess* (n 1726); *Mustapha Hassan v. Gidwani* (n 1726); McCormack, *Reservation of Title* (n 97) 18.
[1738] Crowther and others (n 11) 167, para 4.1.43.
[1739] ibid, para 4.1.43.
[1740] *Ashby v Tolhurst* [1937] KB 242 (CA); Bridge, *Personal Property Law* (n 641) 61, 71; Worthington (n 10) 90.

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Court in Sierra Leone before the decline in reservation of title transactions in the early 1970s.[1741] In *Cassell v. S.C.O.A. Ltd.,* the then Supreme Court (now High Court) of Sierra Leone held that the option to purchase is not defeated by the owner's determination of the hiring.[1742] This can be contrasted with the decision of the Court of Appeal which held that even in the failure of the owner to resume possession and terminate the hire-purchase agreement after the hirer's default, the contractual right is always available.[1743] This means the right to resume possession after the hirer's default is never lost. However, in *Jalloh v. Baydoun & Abbess,* the then Supreme Court had to contend with the issue of returning goods to hirer after repairs, and it held that judgment for delivery or refund of deposit (recognition of equity in the goods) is available for the hirer.[1744] The then Supreme Court also held in *Mustapha Hassan v. Gidwani* that the hirer has a right to assign its contractual rights, but such assignment and the assignee is bound by the hire-purchase agreement.[1745] The court has further held that the hirer has a right to sell if there is no contrary provision in the agreement, and the buyer is bound by the conditions in the hire-purchase agreement.[1746] An action for trover and/or detinue is available if disposal is inconsistent with the hire-purchase agreement.[1747]

In using common law principles, English courts have also equated hire-purchase agreements with sales contracts.[1748] This further diminishes the doctrinal distinction between the

[1741] The business of supplying credit capital was not successful at the time, and the Cox-George noted the failure to inculcate advance managment techniques and proper financial surveillance as reasons why confidence and credit-worthiness was low leading to the exist of the major commercial firms engaged in trade credit supply. Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40) 15–17.
[1742] *Cassell v. S.C.O.A. Ltd.* (n 1726).
[1743] *S.C.O.A. Ltd. v. Cassell* (n 1726).
[1744] *Jalloh v. Baydoun & Abbess* (n 1726).
[1745] *Mustapha Hassan v. Gidwani* (n 1726).
[1746] ibid.
[1747] Trover and detinue are property torts, remedies found in the common law. A trover claim is made by a party who seeks to recover the value of a wrongly disposed of personal property by another person; and detinue is an action aimed at recovering personal property wrongfully interfered with. Bridge, *Personal Property Law* (n 641) 79–80; Worthington (n 10) 485–487, 490, 581, 618–619630; see *Mustapha Hassan v. Gidwani* (n 1726).
[1748] Crowther and others (n 11) 167, para 4.1.44.

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two forms of transactions with the same economic outcome. As such, the implication are that implied terms for sale including accuracy of description, fitness for purpose, quiet enjoyment and rules as to when title passes are attributed to hire-purchase in favour of the hirer.[1749] Slight variation comes in when the right of termination of the hirer is considered in the assessment of damages for owner's loss owing to the termination and in the determination of the validity of the minimum payment clause.[1750] In the extant reported case law in Sierra Leone, a claim of damages lies with the hirer for loss of the right to possession and/or the option to purchase the goods occasioned by the owner's breach of the hire-purchase agreement.[1751] In *S.C.O.A. Ltd., v Cassell*, the Court of Appeal held that the measure of damages is the amount of the deposit, and instalments paid.[1752] For the owner, the rights contain in the hire-purchase subsists and survives the hirer's default in payment until the agreement is terminated or possession of the goods is resumed.

7.2.3 Leasing and/or Financial Leasing[1753]

Leasing involves a rental contract where the lessee utilizes the personal property with no purchase option and surrenders it to the lessor at the end of the lease term.[1754] Under the common law, the parties are allowed to regulate their transactions, agree on the right of repossession, termination, with possibility of court interfering on an application for the equitable relief of

[1749] ibid, para 4.1.44.
[1750] ibid 167–168, para 4.1.44. See paras 4.1.46 -4.1.51 for discussion on minimum payment clauses and how the 'rule against penalties' was used to strike down minimum payment clauses cruelty.
[1751] *S.C.O.A. Ltd. v. Cassell* (n 1726).
[1752] ibid.
[1753] The 'and/or' has been used in the title to signify the existence of a problem in terms of what is regulated in Sierra Leone, i.e., whether it is traditional "leasing" generally, "operating leases" or "financing leases". This is a point that will be clarified within the section. As part of the adopted English law, the Crowther Committee took note of the commercial practices and refer to leasing transactions that are not a true lease but a financing transaction. 'At the commercial level, this is frequently true of another type of instrument, namely equipment lease. A transaction which is in form a lease may achieve much the same result as an outright sale, as where the lease is for the full working life of the equipment at rentals totalling a sum equivalent to what would be charged for a sale on credit. Such a transaction is regarded by the business world as a financing transaction, not a lease in the sense of a conventional hiring', Crowther and others (n 11) 186, para 5.2.7; Diamond (n 19) 38–39, para 9.7.4; on the importance of clear definition of traditional, operational or financial leases, see Tajti (Thaythy) (n 1683) 192 et seq.
[1754] Crowther and others (n 11) 173, 4.1.62; Goode, *Commercial Law* (n 529) 721.

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forfeiture.[1755] Economically, a lease resembles a sale in that a fixed term lease, with the cumulative rent totalling the sales price of the goods with interest. However, in the legal sense, a lease is not considered to be a sale, thereby eliminating the possibility of applying the Sale of Goods Act 1893, unlike a conditional sale.[1756]

Although the key elements that constitute a lease are identifiable in the definition in the OFSA, some peculiarities are easily ascertainable. In the OFSA, leasing is defined to include "letting or sub-letting moveable assets on hire for agriculture, industrial or commercial use, where the lessor is the owner of the property, regardless whether the letting is with or without an option for purchase the property but does not include the business of hire-purchase".[1757] In terms of the peculiarities, the first of not is the restricted connect to the purpose of the letting/sub-letting, i.e., for agricultural, industrial or commercial use. These terms are not defined but clearly the definition appears to exclude, for example, non-commercial leasing in the any form for consumer use. Second, ownership is a proprietary requirement, and so for assignment or sub-letting, the consent of the owner is imperative. Whilst this protects the interest of the owner/lessor, it may also affect negotiability and commercial flexibility.

The OSFA, as argued earlier, is merely a regulatory framework that imposes an entry barrier and nothing further. It does not regulate leasing beyond the imposition of a licensing requirement for lessors, and of course the associated capital requirement.[1758] Therefore, parties will have to revert to subsidiary norms and the common law for governing framework. In the 'Operating Guidelines for Financial Leasing Institutions', published by the Bank of Sierra

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[1755] Crowther and others (n 11) 173–174, para 4.1.62; Leasing is also referred to as operating lease, equipment leases, finance leases, see Diamond (n 19) 38, para 9.7.1.
[1756] Crowther and others (n 11) 174 para 4.1.63.
[1757] Other Financial Services Act, 2011 (n 453), s 2.
[1758] See ibid, ss 3, 5 and 6.

Leone,[1759] 'financial leasing' and 'leasing' are distinguished.[1760] This is perhaps to separate 'operating leases' for example dealing with equipment leasing, and 'finance lease' which is essentially a financing tool where the retention of title is merely nominal since the capital cost is amortize with the duration of the lease term.[1761] The introduction of the new definition adds little to the framework, since the Guidelines are firstly a mere soft instrument, and secondly it does not exempt leasing, i.e., non-financial leases from the banking licensing requirement. In addition to the limitations of the Guidelines, it further only addresses the regulatory and prudential requirements and unfortunately introduces a further confusion by unnecessarily distinguishing between a 'lease' in the OSFA, and a 'financial lease' in the Guidelines without more. Aside from the definition there is no clarification as to the purport of the distinction. For example, there is no separate exemption for operating lease or reprieve for financial leases beyond the additional definition.

The confusion and capital burden caused by the licensing requirements was made manifest in a transaction that involved the leasing of mining equipment to mining companies in Sierra Leone. Leasing Co. (SL) Limited intended to engage in the leasing of mining equipment to mining companies in Sierra Leone following the mining boom in 2012.[1762] The leasing transactions were intended to be pure financial leases since they were not hire-purchases since there was no option

[1759] Bank of Sierra Leone, 'Operating Guidelines for Financial Leasing Institutions' (2011) Unenacted Guidelines; a 'regulation' is defined to include 'rules and bye-laws made under the authority of any act', Interpretation Act, 1971 (n 340), s 4, and in this case, see; Other Financial Services Act, 2011 (n 453), s 53. However, the method prescribed therein is through statutory instrument. The Guideline is not a statutory instrument and hence cannot be considered to be a regulation as defined by applicable law.

[1760] 'Finance leasing' is defined to mean "a contract between two parties whereby a lessor gives the lessee possession and use of a specific asset (or portfolio of assets) in consideration for payment of rentals over a given period in which the lessor retains ownership/title with the intention to transfer ownership of the said assets to the lessee upon termination of the said finance lease", Bank of Sierra Leone, 'Operating Guidelines for Financial Leasing Institutions' (n 1759) 2, para 2.0 (b), and in para 2.0 (c) the definition 'leasing' in the OSFA is incorporated by reference.

[1761] See Goode on the distinction between operating lease and finance lease, Goode, *Commercial Law* (n 529) 721–722.

[1762] Leasing Co. (SL) Limited is not the name of the company and it has been used on the basis of client confidentiality. See licensing requirement in the Other Financial Services Act, 2011 (n 453).

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for purchase the equipment at the end of the leasing period. Leasing Co., has used the equipment as security for multi-million US dollars credit financing entered into by the parent company. The compliance question which the lawyers had to grapple with was whether Leasing Co., will be considered a financial institution since it will be carrying out a financial activity, i.e. leasing, albeit operating lease', and hence obligated to apply for license to be issued by the Central Bank.[1763] This meant Leasing Co. would be required to maintain a 'separate and unpaired minimum paid-up capital and reserves' to be prescribed by the Central Bank, and to further maintain 'a minimum capital adequacy ratio' at all times.[1764] After a long and expensive engagement, the Central Bank accepted the absurdity and waived licensing requirement for the leasing transactions to be carried out by Leasing Co. Leasing Co. was able to absolve the cost, mostly legal, to untangle itself from a needless licensing regime, but certainly not all pure leasing firms will be able to do so. The options will be either not to enter the market or do so with high costs or informally.

7.3 Title Financing under the BLA – 'the More Things Change, the More They Stay the Same'

The object of any reform in commercial law is to provide a fair and sensible solution to practical problems identifiable or foreseeable in commercial transactions.[1765] As such, the BLA must meet this general reform aspiration, and its specific object, which is to expand access to credit finance in Sierra Leone by providing the enabling legal framework. The discussions of the conceptual framework and retained title financing pre-BLA above have shown that first, the retention of the distinction between lender's credit and vendor's credit makes no economic sense; and second the use of title financing by financial and non-financial institutions have considerably

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[1763] See ibid, ss 2 and 3.
[1764] ibid, ss 16 and 17.
[1765] Crowther and others (n 11) 184, para 5.2.1.

reduced after the post-independent buoyancy in Sierra Leone.[1766] At the risk of repetition, it is asserted that regulation is not necessarily a bad thing. Leasing requires a level of regulation to allow for structure and proper capitalization in the sector. However, regulation must not put at risk ease of entry into the market, referencing the barrier to entry under the OFSA, and the ambiguities in its scope of coverage. In this section, the impact of the BLA on title financing will be assessed generally, drawing lessons from the Unitary Model, since the BLA adopts its unitary approach to reservation of title financing.

The BLA in its interpretation section instantly exhibited the break from the formal English law approach by defining 'security interest' to include 'reservation of title, financial lease, trust or any other encumbrance' created by agreement of the parties.[1767] This move towards functionality is reinforced by further definitions, with respect to a lender and borrower. A lender is defined to include a licensed commercial bank and other financial institution who as part of its business enters into credit agreement for 'selling goods on credit', 'providing services on credit' and a 'financial lessor'.[1768] A borrower, on the other hand, is defined to include a person being a party to a credit agreement with a lender, and although it presupposes such person providing 'some property as collateral to secure obligations specified in the credit agreement', includes a buyer of goods on credit, a recipient of service on credit and a financial lessee.[1769]

In the definition of 'borrower' above, a clear reference is made to the 'grant theory' on title financing, given the need for the borrower to provide property as collateral to secure the

[1766] Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40) 16–18.
[1767] Note the inclusion of 'trust', Borrowers and Lenders Act, (n 9), s 1; and further note that 'financial lease' is not defined in the BLA, therefore the courts may have to revert to existing law for definition, bringing into perspective the general definition of a lease in; the Other Financial Services Act, 2011 (n 453), s 2; and the specific definition of 'financial leasing' in the leasing guidelines; see Bank of Sierra Leone, 'Operating Guidelines for Financial Leasing Institutions' (n 1759), cl. 2.0.
[1768] See definition of 'lender' Borrowers and Lenders Act, (n 9), 2 (b), (c) and (d).
[1769] See definition of 'borrower', ibid, s 2.

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obligation.[1770] Whilst this doctrinal limitation has become vestigial, the definition of 'credit agreement' puts to bed any suggestion of the 'passing through' of the '*stricto sensu*' distinction between lender's and vendor' credit in that its scope covers 'any other agreement that relates to a transaction, regardless of its form that creates a security interest in movable property to secure all types of obligations'.[1771] The definitions above, when read together, clearly demonstrate the move towards bringing within the scope of the BLA reservation of title transactions by banks and other financial institutions in Sierra Leone, although in practical terms suppliers, sellers and manufacturers are the characteristic retained title actors. On the basis of this analysis, the BLA' regime for the creation, perfection, priority rules and enforcement of security applies to reservation of title transactions applies.[1772] What this means in practice is even more clearer when comparative insights are drawn from the development of the unitary conception of security interest in the Unitary Model.

In the UCC's Article 9, the doctrinal distinction evident in the use of independent security devices prior to the consolidation of the UCC was made redundant in the functional definition of a single 'unitary' security interest, and the preeminent theme of substance trumping form of a transaction.[1773] In the initial Article 9, the scope was expressed to apply to "to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease

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[1770] ibid, s 2.
[1771] ibid, s 2.
[1772] For a comparative look on how reservation of title works before and post Article 9 influenced reform in the Australian PPSA, see Anthony Duggan, 'Romalpa Agreements Post-PPSA' (2011) 33 Sydney Law Review 645.
[1773] Uniform Commercial Code (n 374) [1962], § 9-102; White and Summers, *Uniform Commercial Code* (n 90) 2–3, 10, §§ 30-1, 30-2; for a look at 'conditional sales' and the vendor's interest in bankruptcy, see William G Brown, 'Sections 74 and 77B of the Bankruptcy Act and the Security of a Conditional Vendor' (1935–1937) 14 Tennessee Law Review 485.

or consignment intended as security".[1774]The 1962 Article 9 'Note' to the 'Policy and Scope' section, cautioned that the "the adoption of this Article [9] should be accompanied by the repeal of existing statutes dealing with conditional sales, trust receipts […] and generally statutes regulating security interests in personal property".[1775].

The US policy to eliminate the pre-UCC concept is best elucidated in the case of *Tilghman Hardware, Inc. v. Larrimore*,[1776] where the court held that the use of pre-UCC language for conditional sales is demonstrative of the parties' intent to create an Article 9 security interest.[1777] This meant that the reservation or retention of title by a seller of goods, notwithstanding delivery or shipment, is effectively a reservation of a security interest, needing public notice through the filing of a financing statement.[1778] Conversely, in *re Wild W. World, L.L.C.*,[1779] the court held that the 'seller's voluntary surrender of possession gave buyer sufficient rights in the good to grant a security interest';[1780] and that the 'unpaid seller only retained a security interest in [the goods, i.e., the] amusement ride'.[1781] Ultimately, the courts are more interested in the economic characteristics of a reservation of title transactions and are very much alert to the policy of maintaining the wholesomeness of Article 9.

[1774] Uniform Commercial Code (n 374) [1962], § 9-102 (2). After over 40 years of the functional approach, the drafters of the 1999 version omitted what has become an obvious provision of the inclusion of reservation of title devices in the scope of Article 9; see White and Summers, *Uniform Commercial Code* (n 90) 10, § 30-2.
[1775] See Note to § 9-102 (2), Uniform Commercial Code (n 374) [1962]; 604.
[1776] *Tilghman Hardware, Inc. v. Larrimore* (n 1052).
[1777] See the synopsis of ibid 215; White and Summers, *Uniform Commercial Code* (n 90) 10, § 30-2, fn. 2.
[1778] *Tilghman Hardware, Inc. v. Larrimore* (n 1052) 221; White and Summers, *Uniform Commercial Code* (n 90) 16, § 30-2; also see Uniform Commercial Code (n 374), § 2-401; note that "when title passes to the buyer is subject to the second sentence of § 2-401 (1). The limiting operation of reservation of title found in the second sentence of § 2-401 (1) is triggered by delivery. Delivery of the goods is the key. It is only when the seller has delivered the goods to the buyer that a seller's express reservation of title is limited to retention of a security interest"; *In re Clean Burn Fuels, LLC* (2013) 492 BR 445 (Bankr Court) 459.
[1779] *re Wild World, LLC* [2008] WL 4642266 (BankrDKan).
[1780] The legal argument was based on the question of whether the debtor had interest in the Amusement Ride to which a security could attach since the seller had reserved title and therefore, its ownership interest in the Ride is superior to the bank creditor; ibid 2.
[1781] *Tilghman Hardware, Inc. v. Larrimore* (n 1052) 4; White and Summers, *Uniform Commercial Code* (n 90) 16, § 30-2, fn. 15.

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One of the main contentious issues on maintaining/enforcing the wholesomeness of Article 9 is the unending attempts by parties to exclude its application by framing their agreements in the language of some other transactions not expressly incorporated or excluded by Article 9, for example a lease. However, because the general scope includes the omnibus expression - 'this article applies to […] a transaction, regardless of its form, that creates a security interest',[1782] - it has become almost impossible for transactions with the economic characteristics of a security interest to escape the governing regime of Article 9.[1783] This does not mean parties will not try or stop trying to escape Article 9 and its perfection regime or try to argue when they realise they made a mistake of not filing. The cases on the distinction between a true lease and security lease are illustrative of the continuing attempts by parties to do so, i.e., excluded Article 9 in transactions which otherwise would have been governed by it.[1784]

In the Chapter Three of this dissertation,[1785] the security interest versus lease question was examined briefly with respect to priority conflicts. In the succeeding paragraphs, the main points on the conflict will be re-echoed not only to emphasize the main points, but to illustrate how the US courts have endeavor to look behind formalism in unearthing the true nature of the transactions. Generally, the "fecund source of disputes that the 1999 [Article 9] revision does not resolve is the question whether a particular document labelled a 'lease' is a true lease-and outside the scope of Article 9 and under Article 2A".[1786] Gilmore once wrote: that "nothing is easier than to dress up a purchase money security transaction in language of a lease, in which the seller becomes lessor, buyer becomes lessee and the payment to be made on the purchase price become rent".[1787] So the

[1782] Uniform Commercial Code (n 374), § 9-109 (a).
[1783] White and Summers, *Uniform Commercial Code* (n 90) 11, § 30-2.
[1784] On how the U.C.C. Article 9 is resolving the dilemma, and the test being used see fn. 818 herein.
[1785] See 3.2.2.5 herein
[1786] White and Summers, *Uniform Commercial Code* (n 90) 16, § 30-3.
[1787] Gilmore, *Security Interests in Personal Property* (n 7) 76.

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problem, which form the substratum of the priority conflict, is inapplicability of Article 9 to a true lease, and the superiority of the right of lessor to the leased goods, as against executing creditor or bankruptcy trustee, since the lessor's right prevails in Article 2A.[1788] This is the case even in the absence of public notice.

When the nature of a transaction reflects that of a conditional or instalment sale, then the lessor is only retaining a security interest in disguise.[1789] In *Estate of Zubicki v. Rutherford*,[1790] for example, the document evidencing a transaction described as a lease was not a lease but a security interest since the lessor did not expect the return of the property, being inventory, but to obtain an interest in the after-acquired goods.[1791] The Supreme Court of North Dakota in the case said that "the after-acquired property clauses in this agreement can only logically be construed to create a security interest. The parties' use of language ordinarily found in security agreements is a strong indication that the agreement was intended to create a security interest".[1792] The effect of such a re-characterization as a security interest means the 'lessor' must comply with the requirements of Article 9 or otherwise such a lessor will not be entitled to enforce its interest against competing claims (from purchasers from the lessee, lien creditors and bankruptcy trustee) and even the debtor.[1793]

In *re Michaels*,[1794] the court had to settle priority conflict between security interests held by a purchase money creditor and a bank being a blanket creditor in the same farm equipment,

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[1788] Uniform Commercial Code (n 374), §§ 9-109, 1-201(37), 2A-103 (1) (g); White and Summers, *Uniform Commercial Code* (n 90) 16, § 30-3.
[1789] Uniform Commercial Code (n 374), § 30-3.
[1790] *Estate of Zubicki v Rutherford* (1995) 537 NW 2d 559 (Supreme Court).
[1791] White and Summers, *Uniform Commercial Code* (n 90) 16–17§ 30-3.
[1792] *Estate of Zubicki v. Rutherford* (n 1790) 563.
[1793] Uniform Commercial Code (n 374), § 9-203; also see §§ 9-109, 1-207 (37); for purchase see 9-102, 9-317, 9-320, 9-323; for lessee see 9-317; for bankruptcy trustee see 9-317, 11 U.S.C.A. § 544; White and Summers, *Uniform Commercial Code* (n 90) 16–17, § 30-3.
[1794] *In re Michaels* (1993) 156 BR 584 (Bankr Court).

which was in the possession of a Chapter 12 bankrupt debtor.[1795] The Wisconsin Bankruptcy Court held that though "financing statements were filed covering the equipment in question, there were no written security agreements. The filing of a UCC financing statement alone does not establish a security interest, but indicates merely that the party who has filed may have a security interest in the collateral described".[1796] Once a transaction is deemed to be a security interest, then the rules on attachment and perfection apply; hence "where debtor has not signed security agreement characterized as a 'lease', filing a financing statement does not create a security interest".[1797] Outside the considerations used by the courts to determine what is a true lease,[1798] the significant factor highlighted by the case is the persistence of secured creditors claiming to be lessors in order to avoid the governance regime of Article 9, the perfection requirement and disadvantage in the debtor/lessee's bankruptcy.

What all this means for the BLA's transplantation of the US approach to reservation of title is the significant question of note. Already, it is observed that the BLA failed to repeal, even partially, the existing law on reservation of title transactions, apposite to the expressed caution in the Initial Article 9. Further, the BLA failed in properly aligning its provision on leasing to that of the existing regulatory framework in the OFSA and its Operating Guidelines on Financial Leases. These are not the most of egregious failings in the BLA, as already the two-tier system created by the reform described to be a substantial deviation has been addressed in Chapters 3 and 4. Thus, the solutions proffered to address the said deviation applies in this case. Further, a short-term interpretation panacea is proffered as follows: Firstly, the BLA is clear on its inclusion of

[1795] ibid 587,588.
[1796] ibid 594, quotation marks omitted.
[1797] *In re Michaels* (n 1794); White and Summers, *Uniform Commercial Code* (n 90) 17, § 30-3, fn. 5.
[1798] See Edwin E III Huddleson, 'Old Wine in New Bottles: UCC Articles 2A--Leases' (1987–1988) 39 Alabama Law Review 615, 625; for more details on the distinguishing factors developed by the courts in the US; see White and Summers, *Uniform Commercial Code* (n 90) 17–40, § 30-3.

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reservation of title in its conception of security interest generally, and more specifically in its incorporation of financial leases.[1799] Therefore, the *lex specialis* interpretation tool must be applied as a means to ring-fence the BLA's application to lenders as defined in the Act. Secondly, the soft instrument, i.e., the Leasing Operating Guidelines must be amended to conform with the primary legislation, which is the OFSA.[1800] Conversely, to reduce the opportunities for endless litigations, the OFSA must be amended to reflect limitation to financial leases as specifically incorporated in the BLA. In the long term a comprehensive reform is needed to align all applicable legislations.

7.4 The Insolvent Borrower and the Position of the Retained Title Creditor

Before embarking on the quest to outline the varying positions of the seller or secured creditor relative to the bankruptcy/insolvency of the buyer/debtor, as regulated under the two competing conceptual approaches on title reservation, it is best to restate the pre-insolvency positions of the seller and secured creditor respectively. Without doubt, the main purpose of reserving title in goods is to ensure that the unpaid purchase price for the goods is paid.[1801] In *Clough Mill Ltd. v. Martin*,[1802] Oliver L.J., however, opined that the fundamental purpose is to protect the seller in the buyer's insolvency.[1803] Thus, it appears the policy objective is to ensure seller's right to full payment of the sales price is not impaired before insolvency and in the insolvency of the buyer. In this sense, the position of the seller in the formal approach is strong relative to that of a secured creditor. Firstly, there is no registration requirement for the simple reservation of title agreement; and secondly, the seller can repossess the good upon default of the buyer based on the ownership interest expressed in the title reservation clause.[1804]

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[1799] Borrowers and Lenders Act, (n 9), s 2.
[1800] Bank of Sierra Leone, 'Operating Guidelines for Financial Leasing Institutions' (n 1759), cl. 2.0.
[1801] See McCormack, *Secured Credit under English and American Law* (n 606) 165–166.
[1802] *Clough Mill Ltd v. Martin* (n 1621).
[1803] ibid 122.
[1804] McCormack, *Reservation of Title* (n 97) 3.

The right of the seller to repossess the goods sold with reserved title follows through in the insolvency of the buyer where the full payment has not been made.[1805] As we will eventually discover, the seller can reclaim goods from the buyer based on the ownership retention, and the title reservation clause defeats enveloping encumbrances like the floating charge where expressed bailment or trust is established.[1806] This bailment or expressed trust are mostly employed in cases where seller seeks to go beyond the simple retention of title clauses, i.e., where goods may have been sold and the seller claiming not only the property in the goods, but also the proceeds of the resale, or the new product in admixture cases, where the goods are mixed and processed into a new product, or where the original goods have been consumed.[1807] The enlargement or extension of the simple title retention clause is where the law gets tasty owing to uncertainties, and mostly dependent on contract interpretation. On the other hand, in the unitary conception of security interest under the BLA, the advantages of the lender in reservation of title credit security transaction is neutralized relative to the other secured creditors based on the rules on attachment, perfection, and priority governing all security interests. The incorporation of reservation of title in the unitary security interest means the remedies and enforcement regime for security interests, including PMSIs are also applicable.[1808] Significantly, the unitary system dispensed with the interpretation problem and the rest of the problems associated reservation of title in the formal approach.

7.4.1 Reservation of Title and Insolvency Outside the BLA – the Formal Approach

[1805] The terms 'bankruptcy' and 'insolvency' have been used in the English law based dichotomy for individual (non-corporate) and corporate entities. Since the conflict in this area will be mostly between corporate entities with floating charges and the unpaid seller, insolvency will be key term of reference in this section. See ibid.
[1806] *Clough Mill Ltd v. Martin* (n 1621); Worthington (n 10) 163; Duggan (n 1772) 646–647.
[1807] The known types of reservation of title clause include: 'Simple' clause for just the goods delivered; 'extended' (or 'continuing') clause for extension to buyer and sub-buyer; 'tracing' (or 'prolonged') clause for claim in goods, proceeds in sale and sub-sale; and 'aggregation' (or 'enlarged') clause for processed and consumed goods. McCormack, *Reservation of Title* (n 97) 2–3.
[1808] White and Summers, *Uniform Commercial Code* (n 90) 13–15; see Duggan (n 1772).

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Following from the general preface above, a detailed elucidation on the position of the retained title seller under the formal approach will be examined. Owing to the dearth of cases in Sierra Leone on this issue, reliance unavoidably will be on applicable English case law. Where English cases are not applicable because of the non-adoption of the statute in issue or the cases decided after the 1880 general adoption date, they remain to be persuasive. It is important to recall that the legislative basis for reservation of title in sale of goods is in the Sale of Goods Act 1893, Cap 225.[1809] When title is reserved and conditions of the seller unsatisfied by the buyer, property in the goods continues to vest in the seller, and therefore, the buyer cannot create any interest in the property superior to that of the seller's. In fact, the buyer cannot create any interest except that derived from the seller under the *nemo dat quod non habet* rule.[1810] This general statement reflects the position of the law on reservation of title when simple title retention clauses are employed. However, commercial contracts often go beyond the simple clauses, with parties adding bells and whistles, and the courts through contract interpretations have developed the legal principles governing simple, extended and enlarged title reservation clauses.

The law on insolvency with respect to title reservation is fundamentally derived from the *Romalpa* case,[1811] the decisions in *Re Bond Worth Limited*,[1812] and *Borden (UK) Limited v. Scottish Timber Product Limited*,[1813] and the law further clarified in *Clough Mill Ltd v. Martin*.[1814] In the *Romalpa* case, the English Court of Appeal had to contend with a clause that reserved unused but separated and identifiable goods supplied, and 'all money clause' including the proceeds of goods

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[1809] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), ss 19 (1) and 25 (on passing of title to property).
[1810] ibid, s 21; for more discussion on the rule, see Gullifer (n 465).
[1811] *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621).
[1812] *Re Bond Worth Limited* [1980] Ch 228.
[1813] *Borden (UK) Limited v Scottish Timber Products Limited* [1981] Ch 25.
[1814] *Clough Mill Ltd v. Martin* (n 1621).

resold.[1815] In the case, the plaintiff, i.e., Aluminium Industrie Vaasen BV (AIV), a Dutch company and supplier, sold aluminium foil to Romalpa Aluminium Ltd, an English company.[1816] The contract provided for the title in the foil only to pass upon Romalpa's full payment of the purchase price and until then the products made from the foil be separately kept from other stock, thereby the buyer acting as bailee. In the course of business Romalpa had the power to sell the manufactured articles, but it does so as agents for the plaintiff.[1817] On Romalpa's insolvency, the receiver and manager wanted the aluminium to be caught by its floating charge; and AlV, however, argued that the contract being one of reserving title to the goods takes the said goods free from claims of other creditors in the liquidation.[1818]

Mocatta J., in the High Court, held that the reservation of title clause was effective, even with the extension to the proceeds (which was separated and ascertainable in terms of the products). AIV retains its title to the aluminium foil, and was also in the position to trace the price in the proceeds of sale of the finished products ahead of the other creditors.[1819] The decision was upheld by the court of appeal. The fact that the plaintiff was considered to be the owner of the remaining unsold aluminium foil, being held by the receiver, was not disputed. The receiver admitted that the plaintiff was entitled to an order for the delivery of the remaining foil.[1820] This may well be on the back of the *McEntire* case.[1821] The decision, therefore, on that aspect was based on the simple retention of title. On tracing to the proceeds, Mocatta J. had to revert to the opinion of Sir George Jessel M.R. in *Re Hallett's Estate* on fiduciary relationship; and then reasoned that

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[1815] *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621); Worthington (n 10) 178, 184.
[1816] *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621), para. D.
[1817] ibid 676, paras. D and E.
[1818] ibid, para. F.
[1819] ibid 682–683.
[1820] ibid 680.
[1821] See *McEntire v. Crossley Bros. Ltd* (n 1690).

having established the doctrine of equity on the point of fiduciaries to then proceed to the key point of pure bailment.[1822] "If the bailee sells the goods bailed, the bailor can in equity follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys".[1823]

The claim to proceeds was based on an expressed bailment, i.e., a fiduciary relationship in the goods and on the separated and identifiable proceeds as agreed by the parties. However, the impact of the *Romalpa* case is argued to be weakened by the fact that the issues of the expressed bailment and the fiduciary relationship between the supplier and buyer were conceded; and the possibility of a creation of a floating charge on the basis of product, proceeds and all monies reservation clauses was not argued.[1824] However, the Cork Committee, although avoiding putting forward a 'one size fits all' sweeping proposition contended that the case "shows clearly that it is possible for a supplier to guard against the insolvency of […her] purchaser, by creating an enforceable claim to recapture goods supplied and to be paid the proceeds of any sub-sale of them".[1825]

The issues brought out in the arguments on extended title reservation clauses were considered in the case of *Re Bond Worth,*[1826] where the property in question was not in the original form, but one that had undergone manufacturing process, thereby becoming mixed and remained in the processed state.[1827] In the case, the buyers, a carpet manufacturer corporate entity purchased from the seller synthetic fibre, which it then spun, dyed and woven into carpets.[1828] The sale in

[1822] *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621), 681-682.
[1823] ibid 681, 682; See *Re Hallett's Estate* (1880) 13 Ch D 696, 708, a leading English Court of Appeal trusts case on asset tracing applicable in Sierra Leone.
[1824] Worthington (n 10) 163.
[1825] Cork (n 11) 364, para 1611.
[1826] *Re Bond Worth Limited* (n 1812).
[1827] Cork (n 11) 364, para 1614.
[1828] *Re Bond Worth Limited* (n 1812), para C.

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1976 was conditioned by a title reservation clause, with 'equitable and beneficial ownership' to be retained until full payment of the purchase price or otherwise entitled to the resale proceeds upon sub-sale of the product.[1829] In 1977, the holding company of the buyers, and eventually the buyers were placed in receivership. The sellers without delay notified the receiver of the claim based on the reservation of title clause.[1830]

The *Re Bond Worth* facts took the tracing of retained title in product and its proceeds issue to another level, where the original property mixed or processed; and Slade J., in construing the terms of the contracts of sale and the retention of title clause held that property in the fibre passed to the buyer.[1831] On delivery, the buyers were at liberty to deal with the fibre in the ordinary course of their business.[1832] Given that the reservation of title clause contained the phrase 'equitable and beneficial ownership', a trust was not created. This meant the buyer granted 'a floating equitable charge in favour of the sellers as security for the purchase price on the raw fibre' or the proceeds on resale of the products.[1833] In essence the property passed to the buyers, there was no bailment. Further, the intention to create a floating charge by the parties was shown by the possibility of the buyers to alter the property in the ordinary course of business with no approval or knowledge of the seller.[1834] Once this determination was made, then the requirement for registration is immediately activated, and the rule deeming an unregistered charge as void against the receiver of the company is applicable.[1835] The main distinguishing factor between the *Romalpa* and *Bond Worth* cases, in one sense, was the retention of legal title in the former, and the mere 'equitable

[1829] ibid 228, paras D and E.
[1830] ibid, para F.
[1831] ibid, para G.
[1832] ibid, para G and H.
[1833] ibid, para H.
[1834] Cork (n 11) 364, para 1613.
[1835] *Re Bond Worth Limited* (n 1812); Cork (n 11) 364, para 1613; and reference was made to the 1948 Companies Act 1948, s 95 - the said Act adopted and adapted in Sierra Leone; see Companies Act, Cap 249 of the Laws of Sierra Leone (n 476).

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and beneficial title' reserved in the latter.[1836] Recall the legal and equitable title distinction still applies in Sierra Leone in the pre-BLA law.

In *Borden (UK) Limited v. Scottish Timber Products Limited*,[1837] the issue was taken further to instances where the original goods are consumed and essentially disappear.[1838] In the *Borden* case the following were the facts and issue in contention:

> The plaintiffs supplied resin to the defendants for use by them in the manufacture of chipboard, pursuant to a contract under which property in the resin was to pass when all goods supplied to the defendants by the plaintiffs had been paid for in full, it being clearly contemplated that the resin would be used in the manufacturing process before it had been paid for. The manufacturing process was such that, once mixed with certain other substances, the resin as such could no longer be recovered. Following the appointment of a receiver and manager of the defendants, the plaintiffs brought an action for the sum outstanding in respect of unpaid-for resin supplied by them, contending, inter alia, that any chipboard manufactured with such resin or any money or property representing the proceeds of sale of such chipboard was charged with the outstanding sum and, further, that any such charge was not void by reason of section 95 of the Companies Act 1948.[1839]

The Court of Appeal held that the resin cannot be traced in the end product, since during the manufacturing process, the resin has ceased to exist.[1840] Lord Bridge L.J., distinguished *Borden* from the *Romalpa* case, on the following grounds: First, no bailment of the resin arose in the contractual relationship; second, the mixture of the goods with other goods/materials produced a new substance; and third, the issue before the court was not the sale of the resin, in that there was no admission or contemplation of the defendants' right to sell the resin as what was contemplated was the liberty to use in their own process of manufacturing.[1841]

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[1836] See *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621); *Re Bond Worth Limited* (n 1812); Worthington (n 10) 169.
[1837] *Borden (UK) Limited v. Scottish Timber Products Limited* (n 1813).
[1838] Cork (n 11) 364–365, para 1616.
[1839] *Borden (UK) Limited v. Scottish Timber Products Limited* (n 1813), 25-26.
[1840] *Borden (UK) Limited v. Scottish Timber Products Limited* (n 1813), 26; Worthington (n 10) 180.
[1841] *Borden (UK) Limited v. Scottish Timber Products Limited* (n 1813), 38 and 46, Templeman L.J. added that in the case and "in the circumstances that I have described of the resin losing its identity in the chipboard, I find it impossible to hold that the resin can be traced into the chipboard, or to any other form of property into which the chipboard might at any time be converted. Accordingly, it seems to me that the doctrine of tracing is inapplicable to a case such as this".

In *Clough Mill Ltd v. Martin*, the English Court of Appeal held that the reservation of title clause was effectiveness against a floating charge that has been crystallized, thereby allowing the supplier of yarn supplied to a fabric manufacturer to be repossessed since there was no full payment.[1842] The facts in *Clough Mill's Ltd*., are not so different from *re Bond Worth* save for the key issues of the plaintiff in *Clough Mill Ltd.* reserving legal ownership, as opposed to equitable and beneficial ownership in the latter's title reservation clause; and in *Clough Mill Ltd.*, the plaintiff wanted to repossess the unused yarn as opposed to processed and consumed property.[1843] The Court of Appeal in allowing the appeal held that the first part of the title reservation clause expressly provided for the retention of the legal title to any unused yarn until full payment is made or on resale by the buyer, and since property did not pass no charge was created. The plaintiff, therefore, could recover the unused yarn on the buyer's insolvency.[1844] Robert Goff L.J said as "far as the retention of title in unused materials is concerned, [he saw…] no difficulty in distinguishing the present case from that envisaged by Slade J. Under the first sentence of the condition, the buyer does not, by way of security, *confer* on the plaintiff an interest in property defeasible upon the payment of the debt so secured".[1845] In this case, the legal title in the property was retained by the supplier.

In knotting the cases together and synthesizing the *ratio* of the courts on the position of the retained title seller in the insolvency of the buyer, the point that must be underscored is the need for reservation of title clauses to have expressed provisions for the basic/simple legal title retention until full payment or other conditions are satisfied. For extended title reservation of title clauses, the clause must expressly provide for a bailment provision in order to establish the needed

[1842] *Clough Mill Ltd v. Martin* (n 1621); Worthington (n 10) 163.
[1843] *Clough Mill Ltd v. Martin* (n 1621).
[1844] ibid 120–121, per Robert Goff LJ.
[1845] ibid 119, para D.

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fiduciary relation or for a trust to arise in dealing with proceeds from the resale of goods, or for unused goods to be separated and identifiable, or to follow through in products being admixture of the original goods or a new product, a sort of an extended title reservation clause. The combination of these essential expressed provisions secures the position of a seller with reservation of title clause and defeats the interest of all other creditors within the formal system. However, within the policy framework for public notice and transparency, this position is not ideal.

On modern secured financing policy, reservation of title poses an enduring threat given the lack of registration requirement. Title reservation without disclosure is undesirable, especially when the extended version retains superiority over secured creditors.[1846] Whilst the extension to proceeds may be second nature to the original value of the goods sold/supplied, the extension to mixed or consumed goods without disclosure affording the retained title seller superiority too difficult to accept.[1847] Registration, therefore, within the extended reservation of title clauses is desirable and, perhaps, imperative to prevent the ostensible ownership problem to self-perpetuate.[1848] This bedrock of the policy concern rests on the possibility of retained title sellers emasculating the bankrupt/insolvent estate, and this point has attracted policy debate in PPSL reform processes in common law countries.[1849] Suffice it to say the 2014 reform in Sierra Leone completely ignored the challenges posed by the existing law. Thus, the potentials for a lender to

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[1846] Crowther and others (n 11) 87, para 17.4.
[1847] Cork (n 11) 365, para 1618.
[1848] McCormack, *Reservation of Title* (n 97) 5.
[1849] The Cork Committee concluded that 'the absence of any provision requiring disclosure of reservation of title clauses is unsatisfactory and should be remedied as soon as possible'; Cork (n 11) 369, 366–369, para 1639, also see paras 1624, 1635; Crowther and others (n 11), para 5.2.19; McCormack, *Reservation of Title* (n 97) 4–5; on policy discussions, see Worthington (n 10) 190–193; William Goodhart and Gareth Jones, 'The Infiltration of Equitable Doctrine into English Commercial Law*' (1980) 43 The Modern Law Review 489; Jeremy Snead, 'Rationalising Retention of Title Clauses with Insolvency Law and Economics' (2004) 2004 UCL Jurisprudence Review 288; Mooney (n 822).

be misled by the creditworthiness of a borrower still exist due to the lack of registration for title reservation clauses.[1850]

It is noted that most of what has been said or the cases refer to corporate entities and the priority conflict relating to the floating charge. However, the principles relating to corporate entities and reservation of title, especially simple title retention clauses, apply to transactions involving individuals and other non-corporate entities with necessary modifications.[1851] It is important to point out the nuanced provision for non-corporate entities for much needed clarity. Under the Bills of Sale Act, Cap 241 no valid security bill can be created on after-acquired property.[1852] Thus, the conflict relating to floating security will not apply. Further, in *McEntire v. Crossley Bros Ltd*,[1853] it was made know that title reservation can only be assumed to occur when after transfer of ownership from seller to buyer, the buyer then transfers, by way of security, the goods to the seller. This means security transfer from the buyer follows from an initial absolute transfer from the seller.[1854]

The House of Lords in *McEntire's* case had to clarify that only a statutory provision can displace an assignee to succeed the right of the bankrupt in bankruptcy, and only the Bills of Sale Act does so if the bill is registered.[1855] This is after proof that property has passed to the bankrupt,

[1850] Tajti in dealing with the 'Fall of the Austrian Hypo-Alpe-Adria Bank', and leasing in the Western Balkans in Europe suggests the creation of a separate register for leasing contracts without subsuming them under a unitary system. The separate register addresses the need for public notice without necessarily subjecting title finance transactions to the unitary framework where there is no desire to do so. This indeed is a logical suggestion albeit at the risk of an additional registry, presumed cost of registration and more compartmentalization. See Tajti (Thaythy) (n 1683) 162, 172.

[1851] McCormack, *Reservation of Title* (n 97) 142.

[1852] Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 22.

[1853] *McEntire v. Crossley Bros. Ltd* (n 1690).

[1854] See ibid 462; McCormack, *Reservation of Title* (n 97) 146.

[1855] 'The only other statute which could give the assignees a better right under the bankruptcy is the Bills of Sale Act; and under that Act, where a bankrupt has transferred the property in his goods to another person, or given that other person rights in the nature of rights of property over them, if the goods remain in his possession and he becomes bankrupt his assignees in bankruptcy can claim the goods, disregarding all rights which he has given, unless the instrument carrying out the transaction (if it has been carried out by an instrument) has been registered as a bill of sale'. *McEntire v. Crossley Bros. Ltd* (n 1690) 462, also see 461-462, per Lord Herschell L.C.

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since in the classic conditional sale scenario the right to possession is only vested in the owner.[1856] The nuanced position of conditional sale thereby being the assignment of property interest from buyer to seller, after initial sale from seller to buyer, and the subsequent assignment registered under the Bills of Sale Act, Cap 241. For example, a bill of sale transaction to buy a vehicle can be structured as follows: Step one, the seller transfers absolutely the vehicle ownership to the borrower; and step two, the buyer then transfers vehicle back to the seller as security for loan to purchase the vehicle.[1857] This eliminates the ownership problem but then requires the registration of the interest secured.

7.4.2 Reservation of Title and Insolvency in the BLA – the 'Unitary Concept'

With the position of the seller with reserved title examined in the formal approach, it is important to show the changes ushered in by the BLA. The BLA incorporates the unitary and all-encompassing definition of security interest and this, as aforesaid, means the 'building blocks' for the creation, attachment, perfection, priority and enforcement remedies in the BLA apply to reservation of title and financial leases.[1858] Since the focus of this sub-section is on the position of the lender in the borrower's insolvency, it is important to note that the substantive provisions for default and enforcement, whether in the insolvency or otherwise, have been examined in Chapter 3.[1859] Therefore, there is no need to re-examine the provisions here. However, it is important to note one of the unique provisions in the BLA is the retention of the appointment of receiver or manager with respect to the enforcement of a security interest.[1860] This approach follows a similar provision in Canadian Province of Ontario's PPSA retention of the floating charge, albeit the old

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[1856] *McEntire v. Crossley Bros. Ltd* (n 1690) 462; McCormack, *Reservation of Title* (n 97) 146.
[1857] Law Commission, *Bills of Sale* (n 19) 17, 31, paras 2.24-2.25, 3.46-3.47.
[1858] See White and Summers, *Uniform Commercial Code* (n 90) 13–15; Duggan (n 1772).
[1859] See 3.2.2.6 herein.
[1860] Borrowers and Lenders Act, (n 9), s 50.

PPSA.[1861] The BLA is silent on how the receivership should proceeded, and therefore, the Companies Act 2009 becomes the applicable default law.[1862] However, since the potential for conflict exists based on the two separated registries and nature of public notice systems, under the Companies Act 2009 and BLA, lenders may have to register their security interests twice to prevent loss of priority in instances where the appointment of a receiver is the best means of enforcing of the floating charge security interest in the BLA.[1863]

Sierra Leone has no insolvency specific legislation, and therefore, the substantive law on corporate insolvency relevant for lenders/secured creditors are fragmentally sourced from the Companies Act 2009, the Bankruptcy Act 2009 and as argued herein, contract law, especially with respect to the rights of the secured creditor.[1864] The statutory principle relating to a secured creditor's[1865] proof of claim and distribution relative to an insolvent company's estate is to be found in the Bankruptcy Act 2009 as incorporated in the Companies Act thus:

> In the winding-up of an insolvent company incorporated in Sierra Leone the same rules shall apply and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable […] as are in force for the time being under the law of bankruptcy in Sierra Leone with respect to the estates of persons adjudged bankrupt; and all persons who in such case would be entitled to prove and receive dividends out of the assets of the company may come in under the winding-up and make such claims against the company as they respectively are entitled to by virtue of this section.[1866]

[1861] In fact, by section 152 (3) of the Companies Act 2009 (n 387), on the issue of the appointment of a receiver or manager by the court, a 'receiver or manager shall not be appointed as a means of enforcing debentures not secured by any charge'''; See *Cantamar Holdings Ltd. v. Tru-View Aluminium Products* (n 889), for the Ontario experience.
[1862] Companies Act 2009 (n 387), pt. XV, for provisions on appintment of receiver, manager; procedures for appointment; accounts, duty as to return; all relevant for the functioning of receivership envisaged by the BLA.
[1863] For registration, see ibid, s 170. The obvious case is for the appointment of a receiver or manager in enforcing a floating charge, and the duties include taking possession of and protection of the collateral and realisation of the security for the benefit of the appointor subject to the rights of prior incumbrancers; s 336(1).
[1864] On the lack of a specific corporate insolvency law, see HM Joko Smart, 'Sierra Leone', *International Encyclopedia of Comparative Law, Instalment 37* (Brill /Nijhoff 2003); Michael Kanu, '"Not Too Big to Fail"? - Towards a Corporate Rescue Culture in Sierra Leone: A Comparative Analysis' (2017) II General Legal Council (Sierra Leone) Law Journal 43; on the application of contract law, see Cork (n 11) 334–337.
[1865] Note the change in terminologies, as the Bankruptcy Act specifically refers to 'secured creditor' instead of 'lender'. It defines 'secured creditor' as 'a person holding a mortgage, charge or lien on the property of the debtor or any parts of the property which is valid against creditors as a security for debt due to him from the debtor, and includes a judgement creditor'; Bankruptcy Act 2009 (n 557), s 1.
[1866] Companies Act 2009 (n 387), s 437.

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In all such corporate winding-up, except otherwise provided in the Bankruptcy Act 2009,[1867] "all debts payable on a contingency and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company".[1868] It is noted that no specific reference is made to secured claims or distinction between secured and unsecured claims. The distinguishing factor addressing the continuing right of the secured creditor to look into the security in the event of the debtor's insolvency has been addressed in Chapter Two, wherein the provision of the Bankruptcy Act 2009 is incorporated by reference.[1869]

In England, notwithstanding the sophisticated, complex and constantly evolving nature of its corporate insolvency law, the basic proposition that the secured credit is free to take best available security and realise the security independent of the insolvency of the corporate borrower is well rooted in the law since *Salomon v. Salomon*.[1870] The prevailing ranking of claims and distribution in liquidations could be found in the Supreme Court decision in *Re Nortel GmbH*;[1871] where on the basis of exiting case law,[1872] and by reading relevant legal provisions together the Supreme Court said:

[1867] The Rules of Court Committee is mandated to make rules on the mode of proving debts, and the secured and other creditors right of proof, and in the admission or rejection of proofs. However, the Committee is yet to do so. Bankruptcy Act 2009 (n 557), s 35. See s 65 for the timeline for distribution of dividends to creditors; under the Companies Act 2009 (n 387), s 389, the court may fix time for creditors to prove their claims.
[1868] Companies Act 2009 (n 387), 436 (1); see counterpart provision in the Bankruptcy Act 2009 (n 557), s 33(3).
[1869] See Chapter Two herein, page [xx]. Also see Companies Act 2009 (n 387), s 437, which provides for the application of bankruptcy rules with regards the rights of secured creditors to apply in the winding-up of a company; and the Bankruptcy Act 2009 (n 557), s 11 (2) which states that the effect of receiving order on a debtor's petition 'does not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it' outside of the Bankruptcy Act provision; also see *Salomon v. Salomon & Co.*, (n 568).
[1870] See *Salomon v. Salomon & Co.*, (n 568), per Lord Macnaghten; Cork (n 11) 335; Goode, *Principles of Corporate Insolvency Law* (n 571).
[1871] *Re Nortel GmbH* [2013] UKSC 52 (UK Supreme Court).
[1872] For example, *Salomon v. Salomon & Co.*, (n 568).

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> In a liquidation of a company and in an administration (where there is no question of trying to save the company or its business), the effect of insolvency legislation (currently the 1986 Act and the Insolvency Rules, […], as interpreted and extended by the courts, is that the order of priority for payment out of the company's assets is, in summary terms, as follows: (1) Fixed charge creditors; (2) Expenses of the insolvency proceedings; (3) Preferential creditors; (4) Floating charge creditors; (5) Unsecured provable debts; (6) Statutory interest; (7) Non-provable liabilities; and (8) Shareholders.[1873]

Therefore, whilst unsecured debts in insolvency are payable *pari passu* to the relevant creditors,[1874] in reading both *Salomon* and *Re Nortel* cases together, the English insolvency law allows the creditors who by contract have taken security in the property of a company before insolvency, which is a specific asset and a fixed security, to take the property to satisfy the debt in spite of other subsequent interests. Recall that reservation of title operates outside this ranking system since, as analysed through the case law above, simple retention of title respects the title in the property of the seller. The ranking, however, show the placement of title reservation when considered as security interest in the unitary concept, especially in the BLA.

In the US, under its Federal Bankruptcy Code, distribution of the estate of the debtor is also based on the claim of creditors, secured and unsecured.[1875] Generally, the most significant issue is whether the claim is one allowed by the Bankruptcy Code, the claim being the amount owed at the time of the filing of the bankruptcy petition.[1876] Thus, a secured creditor's claim is deemed to be an allowable secured claim to the extent of the value of the collateral that secures it.[1877] Therefore, during the pendency of the bankruptcy, a secured creditor may, inter alia, receive

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[1873] *Re Nortel GmbH* (n 1871), para 39, per Lord Neuberger, and in agreement with him, Lord Mance, Lord Clarke and Lord Toulson; see the English Insolvency Act 1986, and, in particular, sections 107, 115, 143, 175, 176ZA, and 189 of, and paras 65 and 99 of Schedule B1 to, the 1986 Act, and rules 2.67, 2.88, 4.181 and 4.218 of the Insolvency Rules].
[1874] ibid, para 35.
[1875] See 11 U.S. [Bankruptcy] Code (n 1246), § 501 (a), (b) and (c).
[1876] ibid, § 502 (a) and (b).
[1877] Note that the debt may be oversecured in the sense that the collateral has more value than the claim, or may be undersecured, wherein the value of the debt is more than the collateral. In the case of the former, the claim will be said to be secured; but in case of the latter, the claim will be bifurcated with the portion equal to the worth of the collateral deemed as secured, and the rest as unsecured. See ibid, § 506 (a); see the chapter on 'Secured Claims' in Charles J Tabb, *Bankruptcy Law: Principles, Policies, and Practice* (Anderson Publishing 2003).

the net proceeds of the collateral after sale,[1878] or redeem the collateral from the debtor,[1879] or the collateral is surrendered to the secured creditor.[1880] In essence, a secured creditor has its entitlement to be paid out of its collateral.[1881] In *Butner v. United States*,[1882] the US Supreme Court, inter alia, had to determine the question of whether state law relating to security interest extended to rents and profits derived from the property in bankruptcy proceedings.[1883] The US apex court was of the view that security interest established in state law cannot be thwarted in bankruptcy, and therefore the bankruptcy court will grant the same protection as the state law, with the necessary statutory exceptions.[1884] This means generally state law protection of security interest will apply, and the security interest of the secured creditor is undisturbed except in special circumstances where the Federal interests are considered.[1885] Since under US law, leasing or conditional sales are treated as one type of secured transactions, they are enforced in bankruptcy as any other security interest. This means the lessor has no separation right to the asset, except if granted from the court since the basic rule relates to the lessor's entitlement to the value of the collateral.[1886]

In summing up on the effect of the reform on reservation of title, it must be noted that the incorporation of reservation of title in the unitary conceptual of security interest in the BLA essentially ushers in three key features. Firstly, it neutralizes the comparative advantage the seller

[1878] 11 U.S. [Bankruptcy] Code (n 1246), § 363.
[1879] ibid, § 722.
[1880] ibid, §§ 725, 1129 (b) (2) (A) (iii), 1225 (a) (5) (C), 1325 (a) (5) (C); see Tabb (n 1877) ch 'Secured Claims'.
[1881] 11 U.S. [Bankruptcy] Code (n 1246). The entitlement is based on the interpretation of various provisions of the Bankruptcy Code, and nature of the petition. Under Chapter 11, see § 1129 (b) (2) (A) (i) (II), for Chapter 7 cases, see § 554, where the trustee may decide not to include property encumbered by security interest in the bankruptcy estate. Further, a secured party may proceed with normal execution under Article 9 when the automatic stay is lifted, § 363 (e) (f). If, however, the trustee in bankruptcy decides to sell the property that is subject of a security interest, the interest of the secured party/secured creditor is protected by extending the entitlement to the proceeds of sale.
[1882] *Butner v United States* (1979) 440 US 48 (Supreme Court).
[1883] ibid 48–49, 54.
[1884] ibid 50, 54–55.
[1885] See 11 U.S. [Bankruptcy] Code (n 1246), §§ 101 and 501 on definition of claim (which includes secured claim) and proof of claim in bankruptcy.
[1886] See ibid, § 506 (a); Tabb (n 1877) ch 'Secured Claims'.

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in the formal approach relative to other secured creditors before and post insolvency by imposing the registration requirement for effectiveness against third parties.[1887] Secondly, the obfuscation on the treatment of proceeds and commingled goods in extended and enlarged title reservation clauses are addressed and simplified in the BLA. In the said BLA there are clear rules on priority in the proceeds of sale of collateral subject of a security interest,[1888] and further clear rules on priority of security interest in accessions and commingled goods.[1889] If the only incentive for engaging in title reservation is to avoid an overarching floating security, in the form of simple title retention, then purchasers of goods and financiers can benefit from the super-priority of PMSIs.[1890] Thirdly, the clarity and simplification ushered in by the unitary concept will help reduce litigation cost associated with the case by case contract interpretation associated with the formal approach. It also reduces the impetus for tailor-made drafting with the BLA's anticipation of all types of reservation clauses (simple, all moneys, proceeds and new products) thereby reducing transaction costs.[1891] Therefore, although the reform is plagued by the substantial deviations, no least, the legal parallelism under the two-tier system, the incorporation of reservation of title is a significant step towards abandoning the doctrinal distinction between two transactions producing the same economic effect. What is need in the near future is holistic abandonment and not just the piecemeal bank and financial institutions related transactions in the BLA.

7.5 Title Finance and Access to Consumer Credit

Retained title financing and the technique employed in such transactions makes it suitable for consumer credit transactions. Consumption credit works well with the grant of possession in

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[1887] Borrowers and Lenders Act, (n 9), s 17; also see Duggan (n 1772), for the Australian PPSA experience.
[1888] Borrowers and Lenders Act, (n 9), s 21.
[1889] ibid, s 26.
[1890] ibid, s 25.
[1891] See Duggan (n 1772).

personal property, whilst the seller retains title. Since the disappearance of commercial firms supplying trade credit in the 1970s,[1892] only one known consumer leasing company operate in the formal sector and a small number of commercial firms have entered the market.[1893]The discussion thus far, especially relating to the priority conflict evident between retained title sellers and secured lenders typifies the constant jostling between suppliers of business firms on the one hand and secured credit financiers who are mostly banks on the other hand.[1894] The discussion in this section, however, deviates from this paradigm, i.e., business framing of title financing discourse since it focuses on consumer financing.

Although title financing is significant for SME growth, for example, SMEs are considered to be important in terms of their role in building robust economies, job creation, and they should be discussed in light of how title financing technique helps with acquisition of machines and equipment necessary for production,[1895] the focus on consumer credit herein is contextual for Sierra Leone as it is argued herein that title financing offers a prospect of economic development in an otherwise underexploited nascent consumer credit market. Consumer credit, using title financing transactions, also performs a social utility function, i.e., in creating the needed access to vital livelihood consumables as an alternative to outright purchase paradigm prizing consumers out. At present, there is only one known consumer financing company operating in the capital of Sierra

[1892] Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40) 16–18.
[1893] Only the Consumer Finance Leasing Company is licensed to engage in consumer financing using leasing and other retained title transactions. Bank of Sierra Leone, 'Annual Report and Statement of Accounts for Year Ended 31st December 2015' (n 24) 47; in the considering the financial services access points, the Central Bank by its exclusion of the supply of trade or consumer credit illustrate how weak the sector has become. Reference was made to commercial banks, mobile money payment systems, micro-finance institutions, community banks and finnancial services association as the only access points. See Bank of Sierra Leone, 'National Strategy for Financial Inclusion 2017-2020' (n 68) 14.
[1894] See line of cases where the priority conflicts feature suppliers/sellers of goods and receivers appointed by lenders, *Aluminium Industrie Vaassen B. V. v. Romalpa Aluminium Ltd.* (n 1621); *Borden (UK) Limited v. Scottish Timber Products Limited* (n 1813); *Clough Mill Ltd v. Martin* (n 1621); *McEntire v. Crossley Bros. Ltd* (n 1690); *Re Bond Worth Limited* (n 1812).
[1895] For indepth analysis on leasing, as a title finance transaction, and it effect on economies in the Western Balkans including SME growth, see Tajti (Thaythy) (n 1683).

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Leone,[1896] and the potential to upscale consumer spending from outright bootstrap cash purchasing model to a mixture of spending from personal income/savings and credit is evident with a growing middle class.

Generally, consumers engage in transactions for consumption, i.e., for personal and not business purposes as with merchants or service providers.[1897] As such, consumer finance transactions involve the use of credit for purchase of personal consumables.[1898] The cornerstone of commercial law is sale of goods, and since sales attract much more interest with regards the status of one of the counterparties, i.e., interests relative to public safety, market protection from monopolisation or restricted trade practices, misleading or false advertising etc., there is high regulatory intervention to provide the needed protection for the unsuspecting or powerless public.[1899] Paternalism is the main basis for the protection of the public often categorized on the basis of being consumers, bona-fide purchasers, or seller/buyer on credit.[1900] Thus, the law on consumer financing is framed on this fundamental notion of legal paternalism, addressing concerns of protecting the unsuspecting public from trading malpractices, minimizing information asymmetry, balancing the bargaining inequality and regulating remedies for default.[1901]

[1896] The online presence of Consumer Finance and Leasing Co. (SL) Limited is a LinkedIn account, and in the said account, the company claims to be an indigenously owned and operated 'consumer finance and leasing company' licensed to operate in Sierra Leone. It intends "to contribute to the deepening of the private financial sector in the country. [It provides…] the key to an affordable but rich life for the Sierra Leonean people and enhance business growth for the SME sector in the private industries". It engages in hire purchase financing, lease financing and SME Business start-up. 'Consumer Finance and Leasing Co. SL | LinkedIn' <https://www.linkedin.com/company/consumer-finance-and-leasing-co.-sl> accessed 6 March 2018.

[1897] See Goode's description of commercial law, distinguishing it from consumer transactions Goode, *Commercial Law* (n 529) 10–11.

[1898] Credit is usually provided to individuals for business purposes also on similar terms with consumer credit, so the sharp distiction between credit to individuals for business and for the purposes for consumption must be noted. See Crowther and others (n 11) 1, para 1.1.3.

[1899] Goode, *Commercial Law* (n 529) 10.

[1900] ibid.

[1901] See the principles and policies relevant to consumer credit transaction, Crowther and others (n 11) 22, para 1.3.22, 6.1..15.

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In the context of the reform in Sierra Leone, consumer finance is viewed not only from the paternalistic perspective, but also as a business development opportunity, i.e., development and growth of a 'greenfield' consumer financing market. In this regard, it is argued that although consumer financing in Sierra Leone and under the BLA is anchor on the fundamental protection function, it also holds the potential to stimulate economic and social growth by boosting consumer spending through the expansion of credit finance.[1902] Further, it is argued herein that credit finance through the use of retention of title transaction devices offers the most promise to expand consumer financing, hence this quick glance at consumer credit financing within this chapter. The paradigm consumer transaction is based on outright cash sales,[1903] as aforementioned, and there is only one known consumer financing company in Sierra Leone. The limiting factor for a robust consumer credit market may include complexity of the pre-BLA regime, especially the Bills of Sale Act Cap 241 compliance regime, and the licensing requirement for lenders to engage in some of the reservation of title transactions from the Central Bank of Sierra Leone.

When considering the economic and social aspects of consumer credit, ideally a diverse range of statistical information is imperative. However, the greenfield nature of the consumer credit market in Sierra Leone means such diverse statistical information is unavailable. In the 'National Strategy for Financial Inclusion 2017-2020' report in Sierra Leone, the Central Bank

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[1902] An assumption has been made here with respect to how consumer spending is a driver for economic growth at the macro level in that increases in spending will decrease unemployment, and help with economic recovery under the Keynesian economic principles. At the micro level, consumer spending is illustrative of consumer confidence in a firm's performance. See John Maynard Keynes, *General Theory of Employment, Interest and Money* (Atlantic Publishers & Dist 2016); the Crowther Committee having studied the consumer credit industry in Britain in the 1960s-70s noted that 'on balance consumer credit is beneficial, since it makes a useful contribution to the living standards and the economic and social well-being of the majority of the British people'. Crowther and others (n 11) 141, para 3.7.1; opponents have argued that high consumer spending is rather the effect or consequence of economic development not the cause, see Casey B Mulligan, 'Consumer Spending and Economic Growth' *The New York Times* (31 July 2013) <//economix.blogs.nytimes.com/2013/07/31/consumer-spending-and-economic-growth/> accessed 6 March 2018.

[1903] Bank of Sierra Leone, 'National Strategy for Financial Inclusion 2017-2020' (n 68), 18.

found that the financial access points, meaning 'points of sale where people can open accounts, deposit, borrow and/or cash-out' is at the national average of 35%, and concentrated in the Western Region of Sierra Leone.[1904] The demand for financial services is high as a 'large proportion of the population transact exclusively in cash, with no safe way to save or invest money, and do not have access to credit beyond informal lenders and personal networks'.[1905] About 87% of the economically active population of Sierra Leone are served by the financial sector and are in demand for services including credit, and for those with access to financial services, they are faced with limited product choices and high fees.[1906] Critical to consumer credit is the issue of financial literacy/education. The Central Bank found that there is lack of 'financial knowledge, understanding and awareness [and this] is a significant barrier to accessing formal financial services'.[1907] Significantly, the extension of formal services does not guarantee consumer education without a purposive complementary financial literacy campaign.[1908]

On the economic and social aspects of consumer credit in England, the Crowther Committee's report, which informed the English consumer credit reform process in 1974, opted to assess the importance of consumer credit by examining the proportion of consumer credit spending.[1909] The Committee found that the impact of consumer credit on the economy pose no serious concern on economic growth, and therefore, no need to curb the development of consumer credit industry.[1910] To the Committee, consumer credit offers monetary and non-monetary

[1904] ibid 14.
[1905] ibid 18.
[1906] ibid, the active economic population is estimated at 3.5 million.
[1907] ibid 17.
[1908] ibid.
[1909] Crowther and others (n 11) 109, para 3.1.5.
[1910] The Committee considered the economic impact on four critical aspects: First, enabling consumer expenditure contributes to pressure on the national resources and makes the inflation problem intractable; second, consumer spending promotes expenditure instead of savings; third, it leads to high demands for consumables and with increase instability for industries; and fourth, the risk of economic instability due to the weight of debt. ibid 19, 123–124, 131, paras 1.3.2, 3.4.2, 3.4.25.

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advantages, contributing to better resource allocation by increasing consumer satisfaction and economic efficiency.[1911] On the social perils of consumer indebtedness, the Committee found that the percentage of consumer borrowers entangled by the problem of meeting credit obligations is very small and, therefore, there was no evidential basis for restrictive regulatory measures or intervention.[1912] As a way to guide the economic policy in shaping consumer credit law, the Committee advocated for much flexibility, i.e., freedom to develop the sector as a way to encourage competition.[1913] This must be done by minimizing the information asymmetry by increasing the amount of information to be provided for consumers, imposing mandatory disclosure requirements on the cost of credit, and credit literacy through education.[1914] This will eventually minimize the level of paternalism which, if overzealous, would limit access to credit finance.[1915] These findings certainly form a good comparative basis to assess the potential impact and framing of consumer credit financier, which will be done in the succeeding paragraphs.

Having considered the economic and social aspects of consumer credit, the objective of this section, therefore, is to juxtapose the pre-BLA and BLA title financing legal frameworks with the view of assessing how access to consumer credit could be enhanced by use of retention of title transactions. It asserts that whilst the two-tier system will fundamentally hinder the overall growth trajectory of the sector, the BLA reform has resolved two important factors for banks and licensed financial institutions that will lead to bank related consumer credit expansion. First, the

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[1911] The Committee had initially given four main motivation for individuals to use consumer credit: First, it is a great practical and convenient way to pay for goods and services; second, it bridges the gap between income and spending in intervals of receiving income; third, it enables purchases for consumption for longer periods than income receipt intervals; and fourth, it enables the purchase of real financial assets in excess of levels of savings. This confers advantages of purchasing goods and services early and cheaply, enjoy a satisfactory 'basket' of goods and services with the same income, thereby enabling consumer satisfaction. ibid 117–118, paras 3.2.1-3.2.6.
[1912] ibid 19, 137–140, paras 1.3.3, 3.6.1-3.6.15.
[1913] ibid 19, 146–150, paras 1.3.4, 3.8.1-3.8.16.
[1914] ibid 150, paras 3.8.14-3.8.15.
[1915] ibid 19, 151–153, paras 3.9.1-3.9.9.

abandonment of the doctrinal distinction and incorporation of reservation of title in the definition of security interest, which has brought much needed simplicity and clarity of the law on title reservation; including the provision of much needed self-help repossession in enforcement of security. Second, the embedded consumer protection provisions within the BLA, which has made the need for ancillary consumer protection legislations less of an imperative. On this basis, it is claimed that the use of reservation of title transactions within the reformed legal framework uniquely heralds a new dawn for consumer credit finance, albeit within the limitations of the BLA.

For much needed clarity, it must be noted that the title financing transactions being of chief interest includes conditional sales, hire-purchase and leasing (including rental agreements), usually for three to sixty months (medium term) consumer credit financing,[1916] excluding, for example, pawn-brokering and moneylenders loan on the one hand, and bank related overdraft, credit card business and lending through intermediaries.[1917] In this sense, the Pre-BLA consumer credit financing law is sourced mainly in the Bills of Sale Act, Cap 241 (in the absolute and security bill conversion as explained above), the Sale of Goods Act 1893, Cap 225 for sales with title reservation and the common law. In Chapter 2, the Bills of Sale Act Cap 241 was examined in view of its provisions for the regulation of using security bills of sale as document evidencing security in property owned by non-corporate entities. Cap 241 being adopted law,[1918] the assertion that its borrowed parent Act, i.e., the Bills of Sale Act 1882, is a consumer protection law, being an amendment passed to protect creditors and safeguard against exploitation of the weak and poor

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[1916] See ibid 14, 16, para 1.2.7.Although conditional sale agreements are used for consumer financing, the Crowther Committee found that it is often employed for sale of industrial plants and equipment; whilst hire-purchase is the transaction of choice for retailers. See para 1.2.14.
[1917] See discussion banks and consumer credit in 1970 Britain, with a legal system similar to the pre-BLA era in Sierra Leone, ibid 39–40, para 2.1.28.
[1918] See Bills of Sale, Cap 241 of the Laws of Sierra Leone 1960 (n 398), s 30 which stipulates that the reference to Bills of Sale Acts 1878 and 1882 is deemed to be Cap 241.

borrowers similarly applies to Cap 241.[1919] The protection measures introduced includes protection against excessive use of security interest, the prohibition of taking credit on after-acquired and specific description of the collateral.[1920] These protections also inhibited the growth of consumer lending given the complexities with registration associated with the Bills of Sale Act, Cap 241 conversion regime for reservation of title clauses to be effective.

Since the adoption of the referenced English statutes, the UK has undertaken studies and reforms leading to more robust consumer credit framework evident in the Consumer Credit Act 1971 and subsequently amended in 2006. Consumer credit is now a regulated industry in England, the principal object of regulation is consumer protection.[1921] The Unfair Terms in Consumer Contracts Regulations, for example, even introduces the requirement to act in good faith in consumer transactions.[1922] The Crowther Committee's report on consumer credit which herald the focus on consumer credit incidentally not only examined the state of the law, but also investigated the economic and social aspects of consumer credit, a sort of an assessment of the consumer credit industry.[1923] It is this economic and social assessment which is most significant since the Committee's findings will go a long way to support the argument herein, notwithstanding the differences in jurisdiction and time.[1924] With issues of protection and access to credit remaining constant, the Crowther Committee's conclusion that the credit consumer industry is beneficial

[1919] See section 2.3.1.2 on 'Chattel Mortgage' in Chapter 2; also see *Manchester Sheffield and Lincolnshire Railway Co v North Central Wagon Co* (n 407) 559; Crowther and others (n 11) 37, paras 2.1.21-2.1.22; Diamond (n 400) 407 et seq.

[1920] See Bills of Exchange, Cap 227 of the Laws of Sierra Leone (n 1476), ss 21, 22, 25; Diamond (n 19) 91, para 18.1.6.

[1921] Law Commission, *Bills of Sale* (n 19) 35, para 4.1; McCormack, *Reservation of Title* (n 97) 149.

[1922] Goode, *Commercial Law* (n 529) 100; for more details on English consumer sales law; see John Macleod and James Devenney, *Consumer Sales Law: The Law Relating to Consumer Sales and Financing of Goods* (Routledge 2009).

[1923] See Crowther and others (n 11) 19, 108 et seq.

[1924] Notwithstanding the marked difference in the local context for England and Sierra Leone, some of the issues raised by the Crowther Committee is still valid for Sierra Leone since the report was the main basis for the change of direction of consumer credit law in England, leaving Sierra Leone in the same stagnant state until 2014. Crowther and others (n 11).

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because of its useful contribution to 'the living standards and the economic and well-being'[1925] of individuals resonates with the objective of expanding access to credit finance in Sierra Leone.

Consumer credit has not attracted much attention since the discourse on access to credit has largely been on commercial credit in Sierra Leone.[1926] Further, save for the Bills of Sale Act, Cap 241 and the Sale of Goods Act 1893,[1927] the development of consumer protection law has been less than satisfactory. Notwithstanding this stagnation, the BLA incidentally seem to herald a new dawn for consumer credit with its integrated protective provisions.[1928] The BLA uniquely combines provisions to make effective the granting of security interests in personal property, and borrower's right and obligations on information disclosure. This is unique because the BLA frontloads borrower's rights and information disclosure within the same enactment, quite different from jurisdictions with special provisions/definition for consumer credit transactions and use of ancillary legislations.[1929] The merit of this frontloading paradigm has to be measured against the main principles of consumer credit protection, i.e., redressing bargaining inequality, credit

[1925] ibid 141, para 3.7.1.

[1926] See various reports on access to credit and financial services in Sierra Leone, Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40); World Bank Group (n 20); Bank of Sierra Leone, 'National Strategy for Financial Inclusion 2017-2020' (n 68); 'Sierra Leone Financial Sector Development Plan' (n 621); ibid; Marah (n 29); Kargbo (n 31).

[1927] Sale of Goods Act 1893, Cap 225 of the Laws of Sierra Leone 1960 (n 386), ss 13, 14 and 15.

[1928] Borrowers and Lenders Act, (n 9), ss 32-38 inclusive.

[1929] The English consumer credit is regulated via the Consumer Credit Act 1974 as amended in 2006, the Consumer Credit Directive 2008 and the Financial Conduct Authority Rules Law Commission, *Bills of Sale* (n 19) 36; in the US, there is admixture of special provisions and distinction in Article 9 relating to consumers and consumer goods and commercial credit, see Uniform Commercial Code (n 374), § 9-102 (a) (23), (24), (25) and (26) which defines consumer transaction as one "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. The term includes consumer-goods transactions"; supported by ancillary sector specific legislations including: The Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f), the Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681t), the Truth in Lending Act (15 U.S.C. §§ 1601-1667e), the Fair Credit Billing Act (15 U.S.C. §§ 1693-1693r), the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692o) and the Electronic Fund Transfer Act (15 U.S.C. §§ 1693-1693r); see Douglas G Baird, *Commercial and Debtor-Creditor Law: Selected Statutes* (Foundation Press 2010) 1373–1593.

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malpractices, and regulating remedies upon default.[1930] In the following sub-rubrics, the assessment of the BLA as against the consumer credit protection principles will be undertaken.

7.5.1 Protection of Borrowers' Credit Right in the BLA

In the ideal case, people contract on what is optional relative to their needs and wants thereby leading to a contract that is fairly framed and balanced. Parties will be aware of their contractual terms, the cost of the transaction, knowledge of available alternatives, with the absence of undue pressure, oppression, sharp practices at all time of contracting.[1931] In pragmatic terms this is not the case, as information asymmetry caused by the lack of financial literacy, inertia in terms of the absence of energy to pursue protective provisions, spending recklessness, improvidence, poverty and livelihood concerns militate against this Elysian condition, especially for consumers.[1932] In respect of the model that influenced the reform in 2014, the BLA may be seen as creditor friendly legislation,[1933] and this assessment is supported by further lender friendly legislations including credit reference access under the Credit Reference Act 2011, bolstering creditors' access to information in aid their credit worthiness assessment of prospective borrowers.[1934] The BLA provides a counterbalance with the said specific borrowers' right taking into consideration the militating factors previously highlighted on the one hand, and borrower's obligation on the other hand.[1935]

The BLA as a way of protecting borrowers imposes mandatory obligations on lenders not to penalize the borrower, detrimentally alter the terms of a credit agreement or take action to

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[1930] Crowther and others (n 11) 22, paras 1.3.22, 6.1.1-6.1.20.
[1931] ibid 231, para 6.1.1.
[1932] ibid 231–234, paras 6.1.1-6.1.13.
[1933] See Wood on the credit friendliness of the US and English frameworks, Wood (n 106).
[1934] Credit Reference Act 2011 (n 946).
[1935] Borrowers and Lenders Act, (n 9), ss 34 and 38. Note that by s 38 (6) the Part on borrower's right in the BLA does not apply to outright assignment of an account receivable and operating lease that does not secure the payment or performance of an obligation.

accelerate, enforce, suspend or terminate a credit agreement on account of borrowers exercising the cumulative rights as provided for in the statute.[1936] The borrowers' rights include protection against discrimination,[1937] right to non-disclosure of confidential borrower's information,[1938] pre-contractual disclosure of the terms of the credit agreement and market solicitation.[1939] To further consolidate these mandatory obligations on lenders, the BLA provides that a lender must not alter the terms of a credit agreement or take action to accelerate, enforce suspend or terminate a credit agreement if a provision is severed or declared unlawful.[1940] The effect of the provision is to deter unscrupulous or super-aggressive lenders from taking advantage of their bargaining powers and indirectly forcing borrowers to accept unfair practices through the imposition of penalties or taking punitive steps to deter borrowers, including consumers, from pursuing their statutory rights. For example, a borrower's claim of unlawfulness of a credit agreement due to the lack of pre-contractual disclosure must not operate as an acceleration or termination clause/event. Perhaps the only lacking areas in this protection scheme is the lack of special provision for enforcement with respect to consumer transactions. Overall the mandatory provisions on protecting borrowers' right set out the framework to provide redress for the control of credit malpractices, useful for consumer credit industry.

7.5.2 Protection against Discrimination in the BLA and the Consumer Borrower

Protection against discrimination hinges on the broader quest to expand access to credit finance and to forestall non-economic and arbitrarily reasons to limit access to finance. The BLA prohibits lenders from refusing to enter into a credit agreement with a prospective borrower on

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[1936] ibid, s 34 (1) (a), (b) and (c).
[1937] ibid, s 32; for discussion on the anti-discrimination protection see 7.5.2 below.
[1938] ibid, s 35; see 7.5.3 for discussion on confidentiality.
[1939] ibid, ss 36 and 37.
[1940] ibid, s 34 (2) (a) and (b).

non-commercial grounds with no nexus to credit risk management.[1941] This is the first statutory protection against discrimination in the secured credit market in Sierra Leone, layered above the constitutional prohibition of discrimination from the constitutional law or human rights perspectives.[1942] The economic factors to consider for credit extension include: The prospective borrower's capacity to meet contractual terms/obligations; (b) the cost to be occasioned on the borrower in the credit agreement; (c) the credit terms and conditions; (d) the prospective borrower's compliance with the terms of the credit contract; (e) lenders' exercise of right in the credit agreement, the BLA or any other relevant to credit.[1943]

Anti-discrimination protection is theoretically justified on the basis of equality, equal access, which is a substantive egalitarian notion.[1944] As we have seen in the above discussion on the ideal case of contract formation, i.e., parties ideally must act with balance and fairly in the Elysian condition when contracting. However, there exists pragmatic imbalance in bargaining powers, especially in consumer transactions, thereby giving justification for the principle of the freedom of contract to be curtailed. The anti-discrimination provision in the BLA is one such intervention, which ensures that non-economic factors, i.e., 'race, gender, ethnicity, political affiliations or religion', [1945] should not influence the decision of lenders in considering extending credit to a prospective borrower.

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[1941] ibid, s 32 (1) "A lender shall not discriminate against a person on grounds against of race, gender, ethnicity, political affiliation or religion but may refuse to enter into a credit agreement with a prospective borrower on reasonable commercial grounds consistent with the lender's customary risk management and underwriting practices [...]'.
[1942] See Constitution of Sierra Leone, 1991 (n 330), 27 (2); *Akar v. Att. Gen.* (n 932); *Att. Gen. v Akar* (n 932).
[1943] Borrowers and Lenders Act, (n 9) s, 32 (1).
[1944] See Holmes (n 933).
[1945] Borrowers and Lenders Act, (n 9), s 32 (1); Banks will now have to be careful in designing their credit product as the notion of equality and anti-discrimination is elusive and based on prevailing circumstances. See for example the difficulty faced by the University of California when it policy sought to promote equality by adopting a different admission policy for minorities; *University of California Regents v. Bakke* (n 934).

Further to the theoretical justification highlighted above, there exist cultural specific justifications for the anti-discrimination protection in the credit market in Sierra Leone.[1946] In the early 1970s, the Cox-George Committee identified relationship lending which is based on mutual trust and cooperation as one of the main bases for extending credit in the formal sector in Sierra Leone.[1947] As such, much more was required than economic factors for trust to be built between financiers and borrowers. In the informal sector, Jalloh argues that the mutual trust and cooperation value system is based on religion, kinship, ethnicity and even race.[1948] Most of the self-help credit system, '*osusu'* operate on the basis of religion, ethnicity and in the case of migrant community, race. Therefore, there is a place for anti-discrimination protection in the secured credit law, without which the discriminatory practices may easily creep into the BLA set-up, especially for consumer credit. This approach is similar to US ancillary legislation on anti-discrimination given its past struggle with slavery and ongoing minority civil rights movement. The Equal Credit Opportunity Act[1949] (hereinafter: "ECOA") prohibits discrimination against individuals in credit transactions based on sex and marital status, age, race, colour, religion and national origin.[1950]

Without doubt, the anti-discrimination will protect consumer, especially women and the rural poor challenged with access to credit. Incidentally the provision will also benefit SMEs operating as sole proprietorships where one cannot easily distinguish between the business

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[1946] In fact, Sierra Leone is no exception, in England, a study on ethnic discrimination in the credit market for small businesses revealed larges difference across ethnic groups, for example Blacks and Bangladeshi to Whites and Indians Robson and others (n 936) 583; in post-World War II United States, in the 'golden age of capitalism' when access to credit was cheap and bountiful, 'low-income African-Americans and women of all classes and races had far greater difficulty in borrowing' than middle-class white people Hyman (n 936); discrimination, it is argued, was also prevalent in the subprime mortgage enforcement that followed the 2008 financial crisis Aleo and Svirsky (n 936); women generally are the wrong end of the discrimination equation. 'When women marry they become economic nonentities in the eyes of the credit establishment' Gates (n 936).

[1947] Entrepreneurship / under the chairmanship of N. A. Cox-George (n 40) 16.

[1948] Jalloh (n 338) 96.

[1949] Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f).

[1950] Ralph J Rohner, 'Equal Credit Opportunity Act' [1979] The Business Lawyer 1423, 1423; Earl M Maltz and Fred H Miller, 'The Equal Credit Opportunity Act and Regulation B' (1978) 31 Okla. L. Rev. 1.

enterprise and the owner. Thus, if the place of the anti-discrimination protection in the BLA is incontestable, then the nest question for consider is how effect is the redress mechanism. How can borrowers enforce against discriminatory practices? The BLA provides that a 'prospective borrower who alleges discrimination by a lender may make a complaint to the Bank for redress'.[1951] The BLA and the Regulations are silent on what is the available redress. This is where the anti-discrimination scheme appears weak and may give room to arbitrariness. From a comparative look, the ECOA, and other similar consumer protection or anti-discrimination laws in the United States for example, spell out various alternatives on how an aggrieve party may pursue administrative enforcement procedures, or rely on the civil liability provisions in the legislation to commence civil actions in court.[1952] The Regulations on the ECOA further provides detailed instructions to bank on information solicitation from prospective borrowers and how to use personal information in credit decision-making to minimize civil claims.[1953] Similar measures must be incorporated in the BLA for an effective anti-discrimination framework since inertia may limit a prospective consumer to pursue an anti-discrimination claim.

7.5.3 Confidentiality, Pre-Contract Disclosure and Information Solicitation

An important aspect of consumer credit protection is financial literacy and minimizing the information asymmetry apparent between lenders and borrowers.[1954] The BLA introduces a statutory scheme to ensure there is disclosure of pre-contract information, rules on written credit

[1951] Borrowers and Lenders Act, (n 9), s32 (2).
[1952] See ibid s 36 (3) which provides for civil action for contravention of the disclosure provision.
[1953] Rohner (n 1950) 1424–1426.
[1954] Information asymmetry works both ways: "In lending, the problem of asymmetric information stems from the fact that a lender's knowledge of a borrower's likelihood to repay (their 'risk profile') is imprecise and must be inferred based upon available information. The lender cannot solely rely on information provided by the applicant but must verify the information" Michael A Turner and Robin Varghese, 'The Economic Consequences of Consumer Credit: Information Sharing: Efficiency, Inclusion, and Privacy'; and for this the Credit Reference Act 2011 (n 946) applies. For consumer, the identifiable gap caused by the information asymmetry can be resolved with prior disclosure of the terms of the credit agreement.

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market solicitation and obligation to keep borrowers' information confidential.[1955] A lender or its agent is under legal obligation not to disclosure information obtained from a borrower except where so required by law or a competent court,[1956] or with consent of the borrower.[1957] The BLA does not distinguish or clarify what type or specific information ought not to be disclosed. Already, perfection by filing means the basic details, names, amount of indebtedness and collateral encumbered are public.[1958] Also, the Bankers Book Evidence Act of 1879 provides protection of information obtained in the ordinary course of banking, as the bankers' books include 'ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank'.[1959] Disclosure can only be made when ordered by a judge.[1960] Further, the primary legislations regulating banking and other financial service mandate banks and other financial institutions to maintain customer secrecy with exception to provide authorized disclosure including a legitimate business request for a general credit rating.[1961] The BLA provision can only be seen as an additional confidential obligation on lenders.

On the second limb of disclosure, it is noted that priori disclosure of the credit terms is a key requirement in concluding a credit agreement under the BLA and a cornerstone of borrowers' protection.[1962] The pre-agreement statement that should be given to a prospective borrower must disclose "(a) the principal amount; (b) the proposed disbursement schedule of the principal debt; (c) the interest rate; (d) other credit costs; (e) the total amount involved in the proposed agreement;

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[1955] Borrowers and Lenders Act, (n 9), ss 36 and 37.
[1956] ibid, s 35.
[1957] Borrowers and Lenders (Collateral Registry) Regulations (n 302), reg 26.
[1958] Borrowers and Lenders Act, (n 9), s 16 (1) and (2); Borrowers and Lenders (Collateral Registry) Regulations (n 302), regs 5 (4), 11 (2).
[1959] Bankers' Books Evidence Act, 1879, s 9.
[1960] ibid, s 6; see also *S v Conison and Others* [2005] SLHC 2, although a criminal law case, the ruling was based on the admissibility of evidence under the Bankers Book Evidence Act 1879.
[1961] The Banking Act, 2011 (No 14 of 2011), s 44; the Other Financial Services Act, 2001 (No 7 of 2001), s 48.
[1962] Borrowers and Lenders Act, (n 9), s 36 (1).

(f) the proposed repayment schedule; and (g) the basis of any cost that may be assessed if the borrower breaches the contract".[1963] Failure to comply with this requirement may lead administrative enforcement procedure by the Central Bank under the Banking Act 2011,[1964] and additionally/alternatively a civil suit by the aggrieved borrower.[1965] The protection of borrowers also applies to market solicitations and information. Bank and other financial institutions, acting as prospective lenders are required to give a prospective borrower written information on business identity and address, the nature of the prospective credit agreement, interest rates and cost of credit, use of deposit or security, need for residual payment and other restrictions.[1966] If the initial solicitation is made orally, then a written statement must subsequently be given.[1967]

In combining the provisions for protection of the borrower's right, the pre-agreement disclosure regime and anti-discrimination prohibition, the BLA is seen to have adopted a comprehensive but integrated approach, which provides a good framework for consumer lending. In considering the fundamental principles of consumer credit being redress for bargaining balance, curtailing credit malpractices, and remedies regulation, the seemingly weakness in the BLA's approach is the last limb of remedies for default. This is significant for reservation of title transactions, where repossession preferably through non-judicial means, is the enforcement measure of choice for lenders. However, as argued above, the framers of the BLA opted to frontload the protective scheme, thereby minimizing the need for special enforcement measures. It is of further importance to note that although the BLA consolidates the confidential nature of borrowers' information, allowance is made for disclosure to aid credit rating and credit

[1963] ibid; Kripke argues that disclosure of cost is the ultimate protection panacea for consumer credit. See Kripke, 'Consumer Credit Regulation' (n 793) 456, 464.
[1964] Banking Act, 2011 (n 892), 46; and punishment ranges from a written warning, fines, discipline of personnel, and reimbursement to loss of shareholding.
[1965] Borrowers and Lenders Act, (n 9), s 36 (3).
[1966] ibid, s 37 (1).
[1967] ibid, s 37 (2).

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information.[1968] Credit information availability is seen as an important tool to eliminate information asymmetry and exclusion of certain firms from the credit market; whilst also streamlining the credit market by affecting credit cost, use of security and risk assessments.[1969]

7.6 Conclusion

This chapter adds to Chapters 5 and 6 on agriculture finance and receivables & inventory finance respectively, detailing the opportunities to expand credit finance in Sierra Leone following the 2014 BLA reform. In addition to this general theme of credit expansion, this chapter significantly addresses an issue that is the kernel of the conflicting approaches to secured transactions law from the formal or functional persuasion. Although securing credit by way of security interest or title reservation produce the same economic result, both systems treat reservation of title differently in law. In the formal system, the strict dichotomy between lenders and vendors' credit is recognized, and the absence of registration requirement for reservation of title in the goods gives the seller incontestable advantage over secured parties and other creditors. This advantage is prevalent within and outside the insolvency/bankruptcy of the debtor/buyer. However, in the modern personal property lending policy considerations, such blanket superiority without registration perpetuates the ostensible ownership problem, i.e., the secret lien, thereby undermining the overall transparency policy.

The BLA neutralizes this advantage in its adoption of the unitary conception of security interest which incorporates reservation of title and financial leases. This positively enhances the PPSL framework as its places a premium on the economic functionality, reducing the effect of the doctrinal dichotomy and the unnecessary legal complexities and additional transaction costs

[1968] Credit Reference Act 2011 (n 946), 10. Credit Reference Bureaus established under the Act are permitted to, '(a) gather and maintain data for the formation of credit histories including available information; (b) process credit related data; and (c) deliver credit reference reports based partly or fully on information not in the public domain'.
[1969] See section on 'Getting Credit: Credit Information', World Bank, *Doing Business 2017* (n 586) 58–64.

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associated with the formal system. Significantly, since reservation of title transactions, for example conditional sale, hire-purchase and leasing, are linked to the sale of goods, a simple and unified framework presents the platform to expand access to consumer credit finance. An expanded consumer credit market thrives on consumer protection to balance the bargaining inequalities, consumer financial information through disclosures and anti-discrimination, all adequately covered in the BLA. Therefore, the bank and financial institutions related to lending are set to bolster economic growth through an expanded consumer credit market. What is needed in the near future is for the whole PPSL framework to be further reformed to address the substantial deviation of the two-tier system.

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Conclusion

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold...[1970]

8. PPSL Reform in Sierra Leone - Towards Clarity, Certainty, Accessibility and Transparency

This dissertation argues that the PPSL reform in Sierra Leone follows a trend in Africa, with African countries reforming their secured transactions law following the trails of the global law reform movement. The reform in Sierra Leone also follows a new bank-based paradigm similarly adopted by Ghana and Nigeria, all three following a path set by the IFIs, the external sponsors of the reform movement led by the World Bank Group.[1971] The dissertation argues, therefore, that the reform in Sierra Leone is path dependent, and this has given rise to a framework that is unusual and unique in its own right. The characterisation of being unusual or unique is, however, not the test for legal efficiency in modern secured transactions law. Rather the test is based on the measure of the law being 'clear, certain and easily accessible'.[1972] Security interest ought to be obtained in present and future personal property in a simple, cheap and transparent manner, and the collateral realised with equal maximum ease.[1973] Transparency is enhanced through the mainstreaming of public notice with respect to the security interest created, and the assurance of the secured party enjoying priority once perfection is complete.[1974] The existence of all these factors lead to a state of legal efficiency in the law.

The major claim in modern secured transactions law is that legal efficiency leads to expanded access to credit, which consequently bolsters economic growth. Therefore, the objective

[1970] William Butler Yeats, 'The Second Coming' v 1 <http://www.potw.org/archive/potw351.html> accessed 7 May 2018.
[1971] See 0.1 herein.
[1972] Gullifer and Akseli (n 3) chs 24-'Conclusion and Recommendations', 505.
[1973] ibid 505.
[1974] ibid.

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as set out at the commencement of this research was to examine the PPSL reform in Sierra Leone to determine whether the reformed law supports the economic function of facilitating expanded access to credit finance. In pursuit of the objective, this dissertation argues that the pre-BLA law, which is pre-reform law in Sierra Leone, is complex, fragmented, compartmentalised, restrictive and obsolete. The state of the pre-BLA law made the cost of credit prohibitively high, especially for SMEs.[1975] With the 2014 enactment of the BLA, the PPSL reforming law, this dissertation further argues that the BLA law is fraught with defects, occasioned by a flawed transplantation/reform implementation process. This is characterised by the existences of the three main substantial deviations in the BLA analysed in the Chapter 4.

The reformed PPSL framework in Sierra Leone is far from being considered as clear, certain and easily accessible. This is the conclusive view that flows from the arguments in this dissertation. The pre-BLA fragmentation is continued in the reformed framework, with an additional layer of compartmentalization following the enactment of the BLA. Fragmentation and compartmentalisation leads to complexity,[1976] and the situation is made worse by the upspring of a parallel two-tier system. As a way to sum up the arguments in the dissertation, the follow questions offer good closing points: What was the impetus for the reform? What influenced the reform? How was the reform implemented and it what are the substantive issues? Is there need for a second wave of reform? These questions are answered below.

8.1 The Impetus for PPSL Reform in Sierra Leone

The impetus for the PPSL reform in Sierra Leone was clearly economic on the one hand, and legal on the other hand. The economic imperative for reform in Sierra Leone by 2014 was clearly hinged on the high cost of credit and equally high levels of NPLs. The cost of credit

[1975] See 0.1 and 0.2 herein.
[1976] Gullifer and Akseli (n 3) 507.

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averaged 21%,[1977] with lending interest rates at 19% from a high of 27% in 2000.[1978] This led to low volumes of credit and high default rates.[1979] Outside of the economic imperative, the state of the pre-BLA law remains a good reason to substantiate legal reform, although no assessment study was carried out. The point on the absence of a legal diagnostic or assessment study does not make the legal impetus less significant. The legal framework from a pure doctrinal basis contributed to the low volume of credit, the high credit risk and default rates. This argument is easily understood when put in the context of the English PPSL reform discourse. The reform discourse in England is not so much the desire for economic growth since the high level of expertise and mature state of the economy mean credit availability is not a challenge.[1980] Perhaps the economic factor may only be a question of degree leaving the practical need to address the fragmentation and complexity of the law as the main drivers for reform.[1981]

In Sierra Leone, this dissertation argues that the reform impetus is both economic, i.e., addressing the high cost of credit, the NPLs on the one hand, and the *ex post facto* review of the fragmented and complex nature of the of the pre-BLA law on the other hand. The two are heavily linked but distinguishable. With the Central Bank acting as the local champion of the reform, the reason why the focus was only on the economic issues becomes apparent. The Central bank wanted a solution to the NPLs problem and in gunning for a solution easily adopted the Ghana B&L Act without consideration of the legal issues. The point to underscore, therefore, is this failure to consider a legal diagnostic study before the reform, which would have identified the lacunae in the law, practical problems and guide in the selection of the reform path.

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[1977] See Introduction, see 0.2 herein. Also see Marah (n 29) 10.
[1978] See ibid. Also see Bank of Sierra Leone, 'Sierra Leone: Monthly Economic Review August 2014' (n 30); 'Sierra Leone Interest Rate 2000-2018' (n 30).
[1979] See Introduction, page [xx] herein. Also see Marah (n 29) 9–10; Kargbo (n 31) 6, 9, 10–11; Conteh (n 31) 13–14; Eric Osei-Assibey and Baimba Augustine Bockarie (n 31).
[1980] Gullifer and Akseli (n 3) 510–511.
[1981] ibid 511.

8.2 What Idea(s) Influenced the Reform in Sierra Leone and Local Context

This dissertation asserts that the reform in Sierra Leone bears the hallmarks of the ideological influence of the law and development theory, and its proposition on the nexus between the adoption of 'modern law' and economic development.[1982] This influence stemming from the idea that modern law is deemed to be instrumental to economic development, and that developing countries can leapfrog the stages of development by adopting laws from developed states is not necessarily a bad thing. The dissertation argues that the transfer function in law and development theory, although highly contested, is supported by the historical authenticity of legal transplant theory and the exportability of a superior law.[1983] Hence, the voluntary adoption of the Unitary Model as the paradigm for modern secured transactions law reform exemplifies how societies have borrowed and adapted the borrowed law since time immemorial.

The significant difference in the PPSL reform in Sierra Leone, however, is the failure to follow the transplantation trajectory that will lead to general accepted of the borrowed law. In modern secured transactions law, a sort of a soft reform methodology is evident in the literature as implementation prescriptive guides. We learn that irrespective of the theoretical ideas influencing the reform, little is achievable if local context is given serious consideration. This is the case in Sierra Leone, where path dependency meant little attention was paid to the prevailing local context and engagement of local stakeholders, including the legal and business communities prior to the reform. The disregard has led to an undesirable outcome in the form of a flawed reform process and defective reform legislation, i.e., the BLA.

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[1982] See 1.1 herein.
[1983] See 1.1 and 1.2 herein.

8.3 Implementation of the Reform in Sierra Leone and Parallel PPSL Systems

There is no one single methodological path to secured transactions law reform. However, there is a growing literature, especially from institutional research, with prescriptive standards on how to implement reforms.[1984] The standards referred to the legal reform methodology in this dissertation emphasis the need for a legal diagnostic study, local championing of the reform and local consultations as fundamental and mandatory to achieve success. This dissertation argues that the sponsors of the reform in Sierra Leone completely ignored the reform methodology and opted for the quick borrowing of the Ghana B&L Act, itself fraught with flaws at the time.[1985] The fact that the reform in Sierra Leone eventually introduced a parallel two-tier system for personal property security validates the need to follow the law reform methodology, even if not dogmatically. Legal diagnostic/assessment study and local consultations cannot be dispensed with, especially where the reform is influenced by external actors or ideas.

8.4 Prediction – the Need for a Second Wave of Reform

The bold perdition following the critical assessment of the PPSL reform in Sierra Leone is the inevitability of a second wave reform. This bold but expected prediction is based on the arguments in this dissertation, with respect to the flaws in the reform process and the defects in the BLA inclusive of the substantial deviation. The BLA has not been subjected to rigorous test in court yet, and the full operation of the parallel system for personal property security is also untested. Therefore, the proposal for the BLA to be considered as *lex specialis* provides a timely short term solution to address the defective framework. The ultimate remedy can only be found in a comprehensive reform that addresses the problems in the pre-BLA and BLA systems, and the unification of the parallel structures within a unitary and functional framework. The BLA has

[1984] See 1.3 herein.
[1985] See 3.1 herein.

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started the movement towards the unitary concept of security and functionality. The movement needs to be completed and for the entire framework through a second wave of reform.

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