

**FIXED AND FLOATING CHARGES IN ENGLAND AND THE GAMBIA
AND
THE LIMITS OF PROTECTION THEY PROVIDE TO CREDITORS**

BY

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AUTHOR'S DECLARATION

I, the undersigned, **Saikou Lamin Jobarteh**, candidate for the LLM degree in **Global Business Law and Regulation** declare herewith that the present Thesis titled “*Fixed and Floating Charges in England and The Gambia and the Limits of Protection They Provide to Creditors*” is exclusively my own work, based on my research and only such external information as properly credited in notes and bibliography. I declare that no unidentified and illegitimate use was made of the work of others, and no part of the Thesis infringes on any person's or institution's copyright. I also declare that no part of the Thesis has been submitted in this form to any other institution of higher education for an academic degree.

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Abstract

This Thesis presents a comparative legal analysis of fixed and floating charges as instruments of secured credit in England and The Gambia, with a focus on their effectiveness in protecting creditor interests and facilitating access to finance, particularly for small and medium-sized enterprises (SMEs). Anchored in the shared common law heritage of both jurisdictions, the study explores the historical and contemporary legal frameworks governing these security devices, including the Companies Act and Insolvency Act of both jurisdictions, and, notably for The Gambia, the Security Interest in Movable Property Act (SIMPA) of 2014.

Through comprehensive and comparative legal analysis, the Thesis examines the creation, registration, perfection, priority, and enforcement of fixed and floating charges. It highlights divergences in implementation and accessibility notably, the underutilization of SIMPA in The Gambia and its restricted scope, particularly the exclusion of key financial instruments such as securities and to some extent, intellectual property. These limitations, until the passing of the Capital Market and Securities Act of The Gambia in 2023, hinder the development of a strong capital market and constrain credit expansion, particularly for SMEs.

The analysis finds that, while English law provides a mature and coherent framework supported by rich case law, The Gambia's framework, though inspired by international best practices such as the UNCITRAL Model Law and Article 9 of the Uniform Commercial Code of the United States, suffers from legal fragmentation, weak enforcement mechanisms, and limited public awareness. The Thesis further examines the insolvency regimes of both jurisdictions and their treatment of secured creditors.

The study concludes with targeted reform proposals for The Gambia, including the consolidation of laws, expansion of SIMPA's scope, and or the development of sector-specific rules for excluded asset types. Drawing lessons from England and other common law jurisdictions, the Thesis advocates for a more integrated and accessible secured transactions regime that balances creditor protection with economic growth imperatives.

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Table of Contents

Author's Declaration	i
Copyright	ii
Abstract	iii
Acknowledgements	iv
Table of Contents	v
List of Abbreviations	vi
Introduction	1
1.1 Why This Topic?	1
1.2 Jurisdictions within the Purview of the Thesis	2
1.3 Research and Methodology Issues	2
1.4 Roadmap to the Thesis	3
Chapter 1: Overview of The Legal Framework of Fixed and Floating Charges in England and The Gambia	5
1.5 The English Legal Framework of Fixed and Floating Charges	6
1.6 Understanding the Definition and Concept of Fixed and Floating Charges under English Law	8
1.7 The Gambian Legal Framework and History of Fixed and Floating Charges	10
1.8 Understanding the Definition and Concept of Fixed and Floating Charges under The Gambian Law	13
Chapter 2: Comparative Analysis – Creation and Registration of Charges	16
2.1 English Companies Act vs. The Gambia's SIMPA	17
2.2 The UNCITRAL Influence and Extent of Application of the English Companies Act and The Gambia's SIMPA	18
2.3 Perfection Methods: English Law and The Gambian Law	22
Chapter 3: Priority, Control Rights and Enforcement of Security Interests – Similarities and Differences	24
3.1 The Insolvency Regimes of England and The Gambia	26
Chapter 4: Fixed and Floating Charge Separation – Advocating a Monistic Approach to Secured Transactions in The Gambia	30
4.1 Conceptual Foundations of the Monistic Approach	31
4.2 Historical origins and critique of the Fixed and Floating charge Separation	

.....	32
4.3 Merits of the UCC Article 9 and UNCITRAL Model Law Approach	
.....	35
4.4 The Gambia’s Partial Movement Toward Monism and Missed Opportunities	
.....	35
4.5 Legislative and Policy Recommendations	36
4.6 Conclusion	37
Bibliography	38

List of Abbreviations

AC	Appeal Cases (UK Law Reports)
Act	Legislation/Statute
Art.	Article
CEU	Central European University
CIO	Charitable Incorporated Organization
CLLS	City of London Law Society
EU	European Union
GDP	Gross Domestic Product
GIEPA	Gambia Investment & Export Promotion Agency
LII	Legal Information Institute
Ltd	Limited (Company)
para.	Paragraph
Plc	Public Limited Company
PPSA	Personal Property Security Act (Canada)
SEC	Securities and Exchange Commission (US)
SIMPA	Security Interest in Movable Property Act (The Gambia)
SMEs	Small and Medium-sized Enterprises
UCC	Uniform Commercial Code (United States)
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
URC	Unique Reference Code
US	United States

Introduction

1.1 Why this Topic?

The Gambia's economy, which mainly consists of tourism, trade, transportation, and communications sectors, contributes up to 65% of GDP. Agriculture, a vital economic pillar, accounts for approximately 30% of GDP, employing nearly half the workforce and serving as the backbone for rural livelihoods¹. The Gambia's economy is relatively small and predominantly made up of small and medium-sized businesses (SMEs), which often face numerous challenges in accessing credit. In this context, security devices such as fixed and floating charges are seen as suitable collateral instruments that business entities can leverage to access credit, by creating a charge over the assets and inventories of their businesses. Naturally, companies and individuals operating these businesses in the different sectors of the economy require access to credit to diversify and expand their business activities and operations.

However, SMEs in The Gambia face numerous challenges, the most significant of which is the traditional lending practices that relies heavily on immovable (landed) property as collateral. Under this system, only large businesses with such property can easily access credit. The Gambia's booming yet fragile thriving SMEs risk going out of business, while many potential entrants find it difficult to access the market. Consequently, the Government of The Gambia responded to solving this problem by enacting the *Security in Interest in Movable Property Act 2014 (SIMPA)* with the view to making access to credit for SMEs a reality. The promulgation of the said Act is consistent with the World Bank's model legal framework and intended to improve The Gambia's ranking in the "*Getting Credit*" indicator of the World Bank's Doing

¹ -Golden Shovel Agency www.goldenshovelagency.com, 'The Gambia Country Profile' <<https://www.giepa.gm/invest-in-gambia/country-profile/>> accessed 18 January 2025.

Business report the effect and impact of which is highlighted in the subsequent Chapters of the Thesis. The need to protect creditors while making access to credit for SMEs achievable is a crucial matter in the capital market dynamics. Therefore, the competing rights of companies accessing credit and the need to safeguard the interest of creditors for the repayment of their investment assumes a central role in the SIMPA.

1.2 Jurisdictions within the Purview of the Thesis

The Gambia's Companies Act of 2013 which defines the concept of fixed and floating charges is modelled after the English Companies Act. Together with the SIMPA, these statutes form the backbone of The Gambia's legal framework for securing creditors' interests in movable assets. However, the literature and case law on the subject matter particularly in The Gambia, is almost non-existent. This lack of comparative literature, judicial precedents, and clear legislative interpretations presents significant research problems and challenges in analysing The Gambian context. In contrast, English law provides a rich body of legislation and case law on fixed and floating charges, making England an ideal comparator jurisdiction.

1.3 Research and Methodology Issues

The study focuses on analysing legal frameworks, case law, and scholarly debates surrounding fixed and floating charges. In The Gambia, the enforcement of such charges has historically been problematic, especially prior to the enactment of the SIMPA. Part of this Thesis interrogates the improvements that have been made in enforcement mechanisms since then. Due to the scarcity of Gambian legal literature on the topic, this Thesis employs a doctrinal legal methodology, comparing statutory provisions, available case law, and academic commentary from both jurisdictions. It also draws on comparative analysis from other common

law jurisdictions, including the United States, where relevant, due to the shared heritage in English common law and equitable principles.

1.4. Roadmap to the Thesis

The Thesis introduces the concepts of fixed and floating charges including their definition and theoretical underpinnings under English common law and The Gambian Law. The body of the Thesis is divided into several thematic Chapters:

The First of these examines the statutory and common law framework governing fixed and floating charges in England and The Gambia. It explores key legislative instruments such as the Companies Acts and the Insolvency Acts of both jurisdictions including the SIMPA of The Gambia.

The Second Chapter shifts focus to the creation and registration of charges in England and The Gambia Particular emphasis is placed on the Companies Act and Insolvency Act of both jurisdictions and the Security Interest in Movable Property Act of The Gambia, assessing how these statutes address the creation, registration, and enforcement of security interests.

The Third Chapter examines the priority, control rights, and enforcement mechanisms of security interests in both The Gambia and England, highlighting the practical and legal challenges that arise within the said jurisdictions.

The Fourth Chapter presents legislative and policy reform proposals for The Gambia, advocating for a monistic approach to secured transaction, with the aim of modernizing and improving the legal regime governing fixed and floating charges. Drawing from comparative

insights, particularly from England and other common law jurisdictions, it advocates for a more integrated, efficient, and accessible secured transactions framework. The Chapter also calls for the harmonization of the Companies Act of 2013, the SIMPA, and the recently enacted Capital Market and Securities Act of 2023, particularly in relation to secured transactions.

Chapter 1: Overview of the Legal Framework and History of Fixed and Floating Charges in England and The Gambia

This Chapter of the Thesis focuses on the legal framework of fixed and floating charges including definitions, legal effect and their historical relevance as obtained in England and The Gambia. The creation of charges, registration, priority and control rights is addressed in the subsequent Chapters of the Thesis. England and The Gambia have strong historic ties by virtue of their past colonial history and their membership to the Commonwealth of nations, an organization that maintain ties of friendship and practical cooperation with the United Kingdom and other member countries. The Commonwealth is a free association of sovereign states that acknowledges the British monarch as the symbolic head of the organization. The point of Commonwealth countries is to promote peace, prosperity, and the common good². They work together on shared goals and values, while also respecting and celebrating their individual identities and independence. The Commonwealth provides opportunities for collaboration and cooperation among member countries in various areas such as small business development, legislation, election monitoring, and human rights³. It is as a result of this historical ties that The Gambia almost always models its laws from an English common law perspective just like other former British colonies like Ghana, Nigeria and South Africa. Therefore, while The Gambia's legal framework on fixed and floating charges is largely inspired by English common law, some divergences exist in statutory scope, practical implementation, and institutional enforcement.

² Yvette Horn, 'Do Countries Benefit from Being in the Commonwealth?' (*Geographic FAQ Hub: Answers to Your Global Questions*, 8 July 2024) <<https://www.ncesc.com/geographic-faq/do-countries-benefit-from-being-in-the-commonwealth/>> accessed 31 March 2025.

³ *ibid.*

1.5 The English Legal Framework of Fixed and Floating Charges

According to Gerard McCormack, “the present law on security interests in England is contained in a multitude of sources. [...]. [T]here are four types of security right known to English law: mortgages, charges (fixed and floating), pledges and liens.⁴” There is no comprehensive statutory definition of fixed and floating charges by the English legal regime including the Companies Act of 2006 and the Insolvency Act of 1986. This is perhaps due to the abundance of definition of the terms already provided by case law and since the definitions provided by case law are not in themselves problematic, they are still crucial in the dispensation of justice in England. It is important to note that the English legal system is founded on customs and practices of legal principles and equitable maxims and largely unwritten. “...In England and Wales, the old division between common law and equity, parallel systems administered in separate courts before 1876, still looms large in the field of security law. [...]”⁵ The English common law system is hinged on court-based precedents where courts make judicial pronouncements which then becomes law and enjoy the rule of stare decisis where decisions of superior courts become binding on subordinate courts. The legal framework regulating fixed and floating charges in England include:

The Companies Act of 2006 which was later amended in April 2013 to introduce provisions 859A – 859Q. The amendment of the English Companies Act of 2006 was meant to “streamline procedures and reduce costs for those putting information on the public record, in particular by enabling electronic filing, reduce uncertainty as to what charges must be registered, ..., improve the quality of information about security given by companies and improve access to the instruments creating companies’ charges⁶.”

⁴ Gerard McCormack, *The Law Commission and Company Security Interests*, in: *Lacy*, at 85.

⁵ Tajti *English Collateral Law 2024 at slide 8 referencing the Diamond Report (1989)*.

⁶ ‘Companies Act 2006 Part 25: Registration of Company Charges - Explanatory Notes for the Revised Draft Regulations’ 1.

The Insolvency Act 1986 is also another English legal instrument that touches on fixed and floating charges. The parts of the law that deals with our subject is the part relating to receivership and administration orders in respect of companies. Chapter 3 of the Thesis addresses priority issues as it relates to charges during the winding up of a company where a receiver is appointed or during insolvency where an administrator or an insolvency practitioner is appointed by the court, the company or creditors in some cases with the view to restructuring or reorganizing the company. Section 29 of the Act briefly defined floating charges as security interests over assets that change over time, and fixed charges as security interests over specific assets. Section 32 allows the court to appoint an official receiver when a CIO or company is being wound up. Section 40 of the Act states that preferential debts (such as employee wages) must be paid before floating charge holders receive their claims. Interestingly also, we have seen Section 245 of the Act provide for avoidance of Floating Charges. The essence of the provision is that Floating charges created within a specified period before insolvency may be void, unless the charge holder advanced value to the debtor at the same time or after the charge was created. However, the critics of avoidance provisions say that, ‘... *the avoidance provisions of the Insolvency Act of 1986 are long overdue for reform... there is little coherence in the working out of those policies in the legislation which remain bound by its historical antecedents.... The rules as to transactions at an undervalue and preferences are predicated on the assumption that the purpose of the legislation is not to preserve the anti-deprivation and pari passu rules as such but to avoid voluntary transfers which are not made in **good faith**.*⁷’

⁷ Goode, *Principles of Corporate Insolvency Law*, 4th edition, 2011 at Ch. 13-144 page 629.

1.6 Understanding the Definition and Concept of Fixed and Floating Charges Under English Law

There is no simple definition of fixed and floating charges as security encumbering devices. However, English bankers understand fixed and floating charges in simple terms as the fixed charge for priority, the floating charge for control.⁸ The terms are defined by practice in the nature of their characteristics just as in the US *Howey Test* case of *SEC v. W.J. Howey Co.* (1946)⁹ where the term "investment contract" was given a very practical and elastic meaning under the Securities Act of 1933. In the same manner, Romer LJ in the Court of Appeal in the *Yorkshire Wool combers Association* case [1903] 2 Ch 284, 295 stated in trying to characterize a floating charge that "I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some further step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."¹⁰

This definition of floating charge by Romer LJ in the above-named case and accurately referenced in the *National Westminster Plc.* case was not one with which everybody agrees with but it is certainly a definition that still survives today in determining what amounts to a floating charge. Lord Macnaghten in the case of *Illingworth v Houldsworth* [1904] AC 355 offered to define a floating charge by distinguishing it from a fixed charge and said the

⁸ Tajti *English Collateral Law 2024 at slide 20.*

⁹ 'SECURITIES AND EXCHANGE COMMISSION v. W. J. HOWEY CO. et Al.' (*LII / Legal Information Institute*) <<https://www.law.cornell.edu/supremecourt/text/328/293>> accessed 31 March 2025.

¹⁰ 'House of Lords - National Westminster Bank Plc (Respondents) v. Spectrum Plus Limited and Others and Others (Appellants)' 41 <<https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd050630/nat-1.htm>> accessed 31 March 2025.

following: “A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.”¹¹ The definitions provided by Romer LJ and Lord Macnaghten are not in conflict, both describe the nature and functional attributes of a floating charge.

It is noteworthy to state that there has been a lot of opposition and activism for the eradication of the concept of floating charges. Goode in discussing the *pari passu* rule and secured creditors including floating charge said, ‘*the effects of these rights in rem is substantially to reduce the corpus of assets available for unsecured creditors. When all of these*¹² *have been satisfied, the divided produced by what is left is often pitifully small.*’¹³’ The criticisms culminated in significant law reform proposals. Notably, the *Cork Report (1982)*¹⁴, which formed the basis of the Insolvency Act 1986, criticized floating charges for undermining the principle of equitable distribution in insolvency. It recommended enhanced scrutiny and priority restructuring to protect unsecured creditors. In any event, “the revolution wrought by Article 9 was to recognize the fact that a *fixed security interest was not necessarily incompatible with a freedom on the part of the debtor to dispose of the secured property in the ordinary course of business.* This conclusion has been mirrored in Canada and in *Royal Bank of Canada v. Sparrow Electric Corp.* The Supreme Court of Canada acknowledged that for practical purposes, the distinction

¹¹ *ibid* 42.

¹² Preferential creditors including statutory obligations and wages.

¹³ Goode, *Principles of Corporate Insolvency Law*, 4th edition, 2011 at Ch. 8-04 page 239.

¹⁴ In January 1977 a wide- ranging review of insolvency law and practice was set up by the then Secretary of State for Trade and Industry, Mr Edmund Dell, under the chairmanship of Sir Kenneth Cork. Its terms of reference included consideration of “less formal procedures as alternatives to bankruptcy and company winding up proceedings in appropriate circumstances.” Its magisterial Report, published in June 1982. [House of Commons - Trade and Industry - Second Report](#).

between fixed and floating charges and between legal and equitable security interest had been swept away.¹⁵”

1.7 The Gambian Legal Framework and History of Fixed and Floating Charges

In the case of The Gambia the legal framework regulating security devices such as fixed and floating charges is predominantly statutory law. Before the coming into force of the Companies Act of 2013, there was the 1955 colonial legislation regulating matters touching on companies which was not anymore meeting the ever-growing business needs of The Gambia. It is important to note that as a former colony of Great Britain, The Gambia’s legal system and tradition was greatly influenced by English law. This influence enjoyed constitutional recognition when Section 7 (d) of the Constitution of The Gambia, 1997 stipulated in addition to the Constitution, common law and principles of equity as a source of law in The Gambia. This means that the courts in The Gambia have the latitude where appropriate to make reference to common law cases and principles of equity in the resolution of disputes. However, this authority is limited in scope by Section 3 of the Law of England (Application) Act, Vol. 1, Chapter 5:01 of the Laws of The Gambia. The Law of England (Application) Act is a colonial legislation which came into force on the 31st day of December, 1953 and was last amended in 1992 by Act No. 16 of 1992.

However, in its modernization drive, “the Government of The Gambia took the decision to reform its business registration system and all processes relating to business start-up. The objective of the reform is to establish a Single Window Business Registry¹⁶ as a One Stop Shop for all business start-up processes and thereby improve the Doing Business Environment and

¹⁵ Gerard McCormack, Secured Credit under English and American Law (Cambridge University Publ., 2004), at 75.

consequently The Gambia's rank on the World Bank Doing Business Index. Another component of the reform process is the enactment of a new Companies Act to replace the current Companies Act which came into force as far back as 1955. Thus, this Bill seeks to modernize The Gambia's Companies Act to bring it in line with the developments of the 21st century¹⁷.' The Gambia's position on the *Doing Business* Index of the World bank after it passed several key legislations in 2013 and 2014 including the companies Act, SIMPA and the Single Window Business Registration Act improved its standing on the Index in 2015 from 147 to 138 with 54.81% out of 189 countries¹⁸. The legal framework regulating fixed and floating charges in The Gambia include:

The Companies Act 2013 is the starting legislation which provides the definition of fixed and floating charges but reserved the regulation of the creation, registration, priority rights and enforcement of movable property to SIMPA.

The Security Interest in Movable Property Act¹⁹ makes provision for the creation, perfection, priority rights and enforcement of security interests in movable property. The SIMPA also makes provision for the operations of the Registry and the electronic registration System established under Section 45 of the Act. The registration system is a public database that facilitates and records the registrations of securities over movable property or collaterals created by borrowers to secure credit facilities provided by lenders²⁰.

¹⁷ 'COMPANIES ACT, 2013. This is from the explanatory memorandum to the Act provided by Hon. Mama Fatima Singhateh the Attorney General and Minister of Justice at the time.

¹⁸ World Bank, *Doing Business 2015: Going Beyond Efficiency* (The World Bank 2014) 4 <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/777141468156865874>> accessed 19 April 2025.

¹⁹ Security Interest in Movable Property Act Gazette No.15 of 16th October 2014, ISSN 0796 - 0298.

²⁰ 'Collateral Registry - Central Bank of The Gambia' <<https://www.cbg.gm/collateral-registry>> accessed 14 April 2025.

The Insolvency Act Vol. 15 Cap 94:06, Laws of The Gambia is another law dealing with security especially fixed and floating charges during Insolvency proceedings. The law regulates matters relating to companies going through insolvency proceeding or administration for purposes of reorganization and restructuring in order to place the company back to profit generating business. Section 5 of the Act restricts all person from enforcing any security against a company which the court has granted an administration order for reorganization unless discharged by the court. Section 10 (1) of the Act which provides that “the administrator of a company may dispose of or otherwise exercise his or her powers in relation to any property of the company which is subject to a security to which this section applies as if the property were not subject to the security.” This includes floating and fixed charges. Subsection 3 continued stating that “subsection (1) applies to any security which, as created, was a floating charge; and subsection (2) applies to any other security.” However, Subsection (4) provided some comfort for investors. It stated that “where a property is disposed of under subsection (1), the holder of the security has the same priority in respect of any property of the company directly or indirectly representing the property disposed of as he or she would have had in respect of the property subject to the security.”

The Mortgages Act Vol. 15 Cap 97:02, Laws of The Gambia provides rules on security interests, including fixed charges over landed property. Bills of Sale Act Vol. 14 Cap 89:02, Laws of The Gambia which governs security over movable property, similar to the UK Bills of Sale Acts of 1878 and 1882 was repealed together with the *Pawn Brokers Act Cap 91:03* by Section 100 of the SIMPA.

1.8 Understanding the Definition and Concept of Fixed and Floating Charges Under The Gambian Law

The Gambia follows the English common law system including common law and principles of equity. However, unlike what the English jurisprudence provides, there is no case law of relevance that has categorically adjudicated on matters affecting security devices such as fixed and floating charges. A legislative intervention to define the terms and provide clarity and certainty in this area was therefore necessary. However, unlike a floating charge, fixed charge was not very much elaborated on by The Gambia's Companies Act of 2013. The Companies Act, 2013 was enacted to consolidate and amend the law relating to companies. The Companies Act, 2013 also aims to improve corporate governance, simplify regulations and strengthen the interests of minority investors.

Section 181 of the Companies Act, 2013 defines fixed and floating charges. According to Section 181 (1) A floating charge is 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. (2) A floating charge does not preclude the company from dealing with the assets until - (a) the security becomes enforceable and its holder, pursuant to a power in that behalf in the debenture or the deed securing the same, 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. (3) On the happening of any of the events mentioned in sub-section (1), the charge is deemed to crystallise and to become a fixed equitable charge on such of the company's assets as are subject to the charge, and if a receiver or manager is withdrawn with the consent of the chargee, or the chargee withdraws from possession, before the charge has been fully discharge, the charge is thereupon deemed to cease to a fixed charge and again to become a floating charge.

For fixed charged, there is no certain description except where Section 182 of the Act provides its priority over floating charge stating that ‘*a fixed charge on a property has priority over a floating charge affecting that property, unless the terms on which the floating charge was granted prohibited the company from granting any later charge having priority over the floating charge and the person in whose favour the later charge was granted had actual notice of that prohibition at the time when the charge was granted to him or her*’’. The underlined words are the effect of a **negative pledge clause**. This statutory position is similar to the one that obtains in England. Negative pledges can cause a floating charge to rank from its creation against (certain) competing interests not because of its characteristic that it gets a priority position, but only upon crystallization. This concretely means that “[a] party taking a subsequent fixed charge with notice of the negative pledge clause will cede priority to the floating charge, but if the fixed chargee does not have notice it will take free of, and in priority to, the floating charge.”²¹. The priority issues are addressed in Chapter 3 of the Thesis. Marenah *Esq.* in his Law School lecture notes while explaining equitable charges, stated that a fixed charged is one which attaches as soon as the charge has been created and the chargor exercises the rights to dispose of the asset charged without the chargee’s consent.²² Fixed and Floating charges were treated by Marenah under equitable principles. He mentioned that an equitable charge constitutes the right of the creditor to have a designated asset of the debtor appropriated to the discharge of the indebtedness. It does not involve the transfer either of possession or ownership and can be created either by trust or by contract. Equitable charges may be fixed or floating²³. Accordingly, fixed and floating charges do not entail a transfer of ownership rather, they create a security interest over the specified class of assets, allowing the creditor to enforce the charge for the satisfaction of the underlying debt.

²¹ Tibor Tajti, ‘THE SHORT HISTORY OF THE HUNGARIAN FLOATING SECURITY’ (2024) fn. 55 p14.

²² Chernoh Marenah, ‘Commercial Practices Lecture Notes’ (Gambia Law School, The Gambia) 68.

²³ *ibid* 67.

Chapter 2: Comparative Analysis: Creation and Registration of Charges

The creation of a security interest in an asset begins with its registration, which serves to secure the interest claimed over the asset. The act of registration is in essence meant to serve notice to the entire world or those it may concern that the asset in question has been encumbered and would ordinarily enjoy priority at the time of enforcement against other security interests that may be created on the same asset, if any. Section 859A of the amended English Companies Act 2006²⁴ governs the registration of charges. Pursuant to Subsection (6), the provision applies to a wide range of assets, including book debts, uncalled capital, ships, aircraft, intellectual property rights, and floating charges, unless explicitly excluded by other applicable law. However, in the case of The Gambia, the registration of charges is covered by Section 187 of the Companies Act of 2013²⁵ but unlike the English companies Act which covers both movable and immovable property, Subsection 4 of Section 186 of The Gambia's Companies Act limited the registration of security interest to immovable property (landed property) and ceded the responsibility of the registration of movable property to a separate Act, SIMPA²⁶, which was enacted a year after the promulgation of The Gambia's Companies Act of 2013. The Act was enacted to regulate the creation, perfection, priority and enforcement of security interests in movable property.

The creation of a security interest in England according to Section 859A (1) of the English Companies Act as amended requires that "the registrar must register the charge if, before the end of the period allowed for delivery, the company or any person interested in the charge delivers to the registrar for registration a section 859D statement of particulars." Subsection (4)²⁷ provides that "the period allowed for delivery" is 21 days beginning with the day after the

²⁴ See Section 859A of the English Companies Act of 2006.

²⁵ Section 187 of The Gambia's Companies Act of 2013.

²⁶ Section Security Interest in Movable Property Act of The Gambia.

²⁷ Of Section 859A of the English Companies Act of 2006.

date of creation of the charge, unless an order allowing an extended period is made under section 859F (3). In the case of The Gambia however, a charge over fixed and floating assets are covered by the SIMPA. Section 8 of the said Act provides that ‘*a security interest may be created to secure any type of obligation, whether present or future, determined or determinable, conditional or unconditional, **fixed or fluctuating**.*’ Therefore, in creating or reserving any interest in an asset whether fixed or floating, the parties must execute a security agreement provided that the grantor has rights over, or the power to encumber such asset.²⁸

2.1 English Companies Act vs. The Gambia’s SIMPA

From the foregoing texts of the SIMPA in the case of The Gambia and the English Companies Act of 2006 as amended, it could be noted that the two legislations have several things in common including the 21 days period for registration, which determines priority and enforceability of the charge against third parties. The difference between the two legal regimes however has to do with the fact that the English Companies Act of 2006 covers both movable and immovable property charges whereas in the case of The Gambia, two legal regimes regulate these areas with the SIMPA regulating charges relating to movable property and the companies Act of 2013 regulating matters relating to movable (landed) property. One of the major setbacks with the SIMPA is that it is not popular (compared to the companies Act 2013) and almost unknown even within legal practitioners. Some Practitioners who feel burdened to verify still tend to rely on the Bill of Exchange Act in certain financial transactions not knowing that the said Act has been repealed and no more in use. This is even more the case with non-lawyers, who could have leveraged on the Act to access credit but are unfortunately, in most cases, unaware of the Act. The Companies Act 2013 is the more prominent and popular legal tool that

²⁸ see Sections 1 and 2 of the Security Interest in Movable Property Act.

both legal practitioners and businessmen are aware of and familiar with. It would have been more useful to infuse the SIMPA into the companies Act for more comprehensiveness and efficiency. When the English wanted to modernize their system in 2013, they amended Part 25 of the Companies Act of 2006 and inserted provisions 859A – 859Q without introducing a standalone Act. I believe The Gambia could have adopted a similar approach rather than introducing an Act that is almost unknown.

2.2 The UNCITRAL influence and extent of application of the English Companies Act and The Gambia's SIMPA

The UNCITRAL Model Law on Secured Transactions is primarily inspired by Article 9 of the US Uniform Commercial Code. It adopts the functional approach to security interests, which means it focuses on the economic substance of transactions rather than their legal form. The Model Law also draws on elements from other systems like the Canadian PPSA, but its foundational structure especially concepts like attachment, perfection, priority, and enforcement is rooted in US UCC Article 9²⁹. On the African continent, Ghana took the lead by becoming ‘... the first African economy to establish a collateral registry, which put into operation a secured transactions law enacted in 2008. The registry was subsequently modernised with the support of the International Finance Corporation (IFC), and relaunched as a web-based system in 2012. This inspired other African economies³⁰ to consider reforming their own secured transactions frameworks and establishing modern electronic registration systems for notices of security rights.³¹’ One may ask why the need to follow the UNCITRAL model law on secured transactions. This question is answered by Gerald McCormack in his

²⁹ Roderick A Macdonald, ‘A Model Law on Secured Transactions’.

³⁰ Including other common law countries like The Gambia, Kenya, Liberia, Malawi, Nigeria, Zambia and Sierra Leone leading to the enactment of the SIMPA in the case of The Gambia as well as the security interest in movable property laws or its equivalent in the named common law jurisdictions.

³¹ [Marek Dubovec](#) and [Louise Gullifer](#), *Secured Transactions Law Reform in Africa* 2019, 1st edition Hart Publishing 2019, at page 65-90.

book *Secured Credit of the Harmonization of Law – The UNCITRAL Experience* when he said - “...UNCITRAL has advocated harmonization of the law of secured credit to make the law more liberal and facilitative of security and this in turn is seen as producing positive impacts in terms of economic growth. UNCITRAL has suggested the removal of restrictions on the taking of security and increasing the range of assets that can be used as security.³²” In UNCITRAL’s view, “the key to effectiveness of secured credit is that it allows borrowers to use the value inherent of in their assets as a means of reducing credit risk for the creditor. Risk is mitigated because loans secured by the property of a borrower give lenders recourse to the property in the event of non-payment, studies have shown that as the risk of non-payment is reduced, the availability of credit increases and the cost of credit falls. Studies have also shown that in States where lenders perceive the risks associated with transactions to be high, the cost of credit increases as lenders require increased compensation to evaluate and assume the increased risk³³.”

The English legal system though does not follow any particular model, but it has modernized its security laws by amending *Part 25 of the Companies Act of 2006* and introduced Section 859A -859Q in April 2013 at the same time when the UNCITRAL Model Law was gaining momentum. The English Companies Act applies to a host of things except for those specifically excluded in Section 859A (6) or other applicable law and so for The Gambia’s SIMPA which also applies to a host of things as outlined in Section 4 of the SIMPA. However, Section 4 (3) (a) and (b) of the SIMPA limited the application of the Act in respect of aircrafts and ships and intellectual property but more importantly, the Act in Section 4 (3) (d) excluded the application of the Act from *securities such as bonds, debentures, stocks and derivatives*.

³² Gerard McCormack *Secured Credit and the harmonisation of law – the UNCITRAL experience at P56*

³³ Gerard McCormack *Secured Credit and the harmonisation of law – the UNCITRAL experience at P57*

While the rationale behind the exclusion of these categories of assets from the SIMPA remains unclear, it is evident that their omission represents a significant setback. It has deprived The Gambia, since 2013, of the opportunity to diversify lending practices and stimulate the development of its capital market where investment property could be used as collateral to access credit. With the increasing breakthrough in technological advancement and robotics, I am not sure it is a good idea for The Gambia, unlike many of its counterparts in the continent, to exclude securities as well as limit intellectual property from the scope of the SIMPA. Looking at other common law jurisdictions in the African continent, Section 3 as well as Section 12 of the Security Interest in Movable Property Act, 2019 of Uganda includes investment securities within the definition of ‘movable property’³⁴. Likewise, Section 2 of the Movable Property Security Rights Act, 2017 of Kenya defined “movable assets” to include investment securities³⁵. In the same vein, Ghana’s Borrowers and Lenders Act, 2020 (Act 1052) covers intangible personal property, including securities³⁶. There may be some sound policy reasoning as to why securities, aircrafts, ships and intellectual property in some respects are excluded from the scope of the SIMPA. This may perhaps be due to their international nature with The Gambia owing obligation under some International legal instruments and may therefore need some sector specific regulations to cover these areas of securities and charges. Notwithstanding that these may be plausible justification, I am of the view that the SIMPA should have been a starting point where The Gambia give rise to a capital market opportunity.

Given that The Gambia’s economy is largely dependent on tourism and agriculture with the former still recovering from the impacts of the COVID-19 pandemic and the latter facing persistent structural challenges, the country is now at a critical juncture to develop and harness

³⁴ See Security Interest in Movable Property Act, 2019 of Uganda.

³⁵ See Movable Property Security Rights Act, 2017 of Kenya.

³⁶ See Borrowers and Lenders Act, 2020 (Act 1052) of Ghana.

its capital market for raising investment capital. In 2017, The Gambia experienced a significant political shift when a long-standing government, widely regarded as dictatorial and in power since July 1994, was voted out in December 2016. The transition sparked renewed investor interest, particularly in tourism and other development sectors. The new government initiated some institutional reform processes in 2017 and set up an inquiry (the Janneh Commission), among many other commissions of inquiry, into the financial dealings of the former President Yahya A.J.J Jammeh and his close associates. The commission among other things recovered several valuables including five aircrafts. The Republic, a media organization specialized in investigative journalism, stated in its 30 April report that, *‘‘In 2018 and 2019, The Gambia government [sold five aircraft](#) left behind by the former dictator to a popular businessman, Momodou Turo Darboe, for \$740, 000 without any form of bidding, according to records. In July 2020, former finance minister Mambury Njie told lawmakers that the ‘‘... planes were bought through an offer made by the intended buyer and not by bidding.’’³⁷* The recovered assets from former President Jammeh such as the five aircraft and luxury vehicles could have been leased or used as collateral to raise immediate funds for transitional justice initiatives, including victim reparations. The absence of a sector-specific legal framework to enable the government utilize capital market mechanisms to unlock the value of its resources and inject liquidity into the economy³⁸ might have been mitigated if SIMPA had not excluded such categories of assets (Securities) from its scope at least until the enactment of the Capital Market and Securities Act in 2023.

³⁷ Mustapha K. Darboe, ‘The Assets of Gambia’s Former Dictator Go for a Song’ (30 April 2025) <<https://therepublic.gm/the-assets-of-gambias-former-dictator-go-for-a-song/3042>> accessed 14 May 2025.

³⁸ Amid allegations of the former President Yahya Jammeh emptying the Central Bank before his departure into exile in 2017.

2.3 Perfection Methods: English Law and The Gambian law

In addition to the fact that Security agreements could be reached orally³⁹ by parties, Section 11 (2) of the SIMPA provides that ‘*if the security interest is a possessory interest, it takes effect from the moment the grantor delivers possession or control of the collateral to the secured creditor or a third party authorized by the secured creditor, unless otherwise agreed.*’

However, in the case of the English law, possessory or control perfection is not recognized. “There are four types of consensual security interests [in English law] ... [t]hese are the pledge, the contractual lien, the mortgage and the charge. [...] The pledge and the contractual lien are both possessory interests. [...] Since in English law pledges are only created by the transfer of possession, there cannot be a pledge of an intangible that is not a documentary intangible.”⁴⁰

The system only recognizes registration. Under Part 25 of the Companies Act 2006, registration is the only recognized method of perfecting charges created by companies as could be seen in Section 859A of the Act as amended. However, under *Section 895F* “*the court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the period allowed for delivery be extended.*”

The Gambia in this regard is similar to the UCC of the United States which recognizes perfection by possession covering security interests in tangible collateral like goods, instruments, and money by taking physical possession and perfection by control covering intangible collateral such as deposit accounts, investment property, letter-of-credit rights, and electronic chattel paper.⁴¹ Considering the nature of the economy of The Gambia, possessory and control perfection methods are ideal for the smooth running of the credit market. For the English, I believe the lack of recognition of these perfection methods by the companies Act is

³⁹ See Section 6 (1) of the SIMPA.

⁴⁰ Louise Gullifer and Jennifer Payne, *Corporate Finance Law - Principles and Policy* (Hart, 3rd ed., 2020) at Page 292.

⁴¹ See § 9-313 – Perfection by Possession and § 9-314 – Perfection by Control respectively.

perhaps based on its desire to separate pledges from other types of security interests in assets and certainly, “Pledges and liens are relatively little used in corporate finance.”⁴² While Section 4 and 5 of SIMPA defined the scope of "security interest" broadly, including interests created by oral agreement and possession, which aligns with common law pledges, however pledges are governed primarily by common law principles rather than statute in England. This was established in the case of *Donald v Suckling* (1866) LR 1 QB 585.⁴³

⁴² Louise Gullifer and Jennifer Payne, *Corporate Finance Law - Principles and Policy* (Hart, 3rd ed., 2020) at Page 292.

⁴³ In this case - A firm of brokers pledged securities (debentures) with bankers (Suckling) as collateral for a loan. The brokers had fraudulently acquired the securities from their clients (Donald). Donald sued the bank to recover them, arguing the brokers had no authority to pledge. The court held in favour of Suckling (the bank), affirming that a pledgee without notice of fraud can retain the security. This case established a key protection for pledgees dealing with agents.

Chapter 3: Priority, Control Rights and Enforcement of Security Interests, Similarities and Differences

Priority in the enforcement of security interests depends on several factors, including registration and the degree of control over the collateral. “For this reason, only non-possessory security interests are registrable, since possession is seen as sufficient publicity in itself.”⁴⁴ In his article, discussing the *the efficient enforcement challenge of secured transactions law reforms in civil law systems*, Tajti described control stating among other things that control in essence does not serve notice to the entire world “but rather ensures efficient disposal of the investment securities. To wit, ‘obtaining “control” means that the purchaser has taken whatever steps are necessary, given the manner in which the securities are held, to place itself in a position where it can have the securities sold, without further action by the owner.’”⁴⁵ As already noted, the creation and registration of charges is regulated by the English Companies Act. The English Companies Act does not recognize certain perfection methods such as perfection by possession or control. Priority rights are therefore reckoned from the date of registration of the instrument in accordance with Section 859A (4) of the Companies Act. However, In the case of The Gambia, Section 6 (1) of the SIMPA envisages the creation of a security agreement through oral agreement provided that the oral agreement is accompanied by the delivery of the movable property to be encumbered into the possession of the creditor. This is the same as perfection through control of the security asset where the creditor could sell the security and recover the debt without further action. According to Section 21 of the SIMPA, “*the priority of security interests is determined by the time of its perfection in accordance with Section 17 to 19 regardless of the date of creation of the security interest.*” It must therefore be noted that

⁴⁴ Louise Gullifer and Jennifer Payne, *Corporate Finance Law - Principles and Policy* (Hart, 3rd ed., 2020) at Page 292; referencing Law Commission, Registration of Security Interests: Company Charges and Property other than Land, Consultation Paper No 164 (2002), para 1.6.

⁴⁵ Tibor Tajti, *The Efficient Enforcement Challenge of Secured Transactions Law Reforms in Civil Law Systems—Self-Help Repossession, Strict Foreclosure, and Other Methods for the Acceleration of Enforcement of Security Interests* (Oxford University Press on behalf of UNIDROIT 2024) 14.

SIMPA only recognizes priority through perfection and not through the mere creation of the security.

Sections 14 to 36 of the SIMPA establishes the legal framework for perfection, priority, and enforcement of security interests that aligns with the monistic, functional approach advocated by international standards such as UCC Article 9. Perfection is primarily achieved through a notice-based registration system, and priority follows a ‘first-to-register or perfect’ rule. While this framework theoretically promotes transparency and efficiency, its impact is weakened by underutilization of the registry, a lack of awareness among stakeholders, and limited digital infrastructure. The registry’s website remained inaccessible throughout the research and writing process of this Thesis. The enforcement provisions, though allowing for extrajudicial approaches, they lack detailed procedures and institutional support, especially in dealing with intangible assets. Compared to the structured enforcement regime under English law, which include administration and receivership procedures, SIMPA lacks procedural clarity and robust creditor protections. Thus, while SIMPA reflects the legal architecture of a modern secured transactions regime, it remains ineffective without complementary reforms to strengthen its implementation, enforcement, and integration with broader commercial practices. This reinforces the Thesis’s central argument in Chapter 4 that a monistic system is not only legally preferable but must be institutionally supported to function effectively in The Gambia.

Section 37 of SIMPA dealing with mutual rights of the parties to a security agreement affirms the principle of contractual freedom between parties to a security agreement, allowing them to define their mutual rights and obligations, including terms for default, remedies, and collateral control. This provision aligns with the functional approach endorsed by the UNCITRAL Model Law and UCC Article 9, which prioritize party autonomy while establishing a framework for third-party rights. In the context of The Gambia, this statutory recognition is important for

promoting flexibility in secured lending arrangements, particularly for SMEs negotiating tailored credit terms. However, given the broader enforcement and institutional weaknesses identified in SIMPA, the utility of Section 37 is limited by the absence of clear mechanisms to resolve disputes or enforce customized terms. In contrast, systems like England's provide comprehensive judicial oversight and interpretive guidance on contractual enforcement, giving substantive effect to private agreements.

3.1 The Insolvency Regimes of England and The Gambia

It is noteworthy to state that “historically, receivership is not an insolvency proceeding at all, merely a method by which a secured creditor can enforce his security. Originally a mortgagee whose mortgagor defaulted could apply to the court to appoint a receiver to collect the rents and profits of the mortgaged property and apply these to payment of the mortgaged interest. Subsequently it was found more convenient for the appointment to be done by the mortgagor himself at the request of the mortgagee, thus obviating the need for an application to the court.”⁴⁶ The Gambia’s Insolvency Act of Act No. 18 of 1992 was modelled from the English Insolvency Act of 1986 which is the earlier legislation. In both England and The Gambia, the courts are empowered, where cause arise, to appoint an administrator or insolvency practitioner for the purpose of restructuring the company and possibly rejuvenate it into functional business. Section 11 of Schedule B1 of the English Insolvency Act as well as Section 3 of The Gambia’s Insolvency Act provides for the court’s appointment of an administrator where the court is satisfied that a company is or is likely to become unable to pay its debts among other things⁴⁷. In both England and The Gambia once an administration order is made by the court, and just

⁴⁶ Goode R, *Principles of Corporate Insolvency Law* (5th edition, Sweet & Maxwell 2018 at page 389).

⁴⁷ See Section 11 (a) of Schedule B1 of the English Insolvency Act and Section 3 (1) (a) of The Gambia’s Insolvency Act.

like the US concept of ‘*automatic stay*’⁴⁸ when a company files for Chapter 11 for bankruptcy, there cannot be the appointment of a receiver for purposes of winding up of the company or the institution of a legal suit against the company or its assets⁴⁹. This is meant to preserve the assets of the company against the reach of creditors for the successful restructuring and reorganization of the company.

In England, apart from the court’s power to appoint, Section 14 (1) Schedule B1 of the Insolvency Act states that ‘‘the holder of a qualifying floating charge in respect of a (company) property may appoint an administrator of the (company).’’ According Section 14 (3) Schedule B1 ‘‘for the purposes of sub-paragraph (1) a person is the holder of a qualifying floating charge in respect of a company property if he holds one or more debentures of the company secured — (a) by a qualifying floating charge which relates to the whole or substantially the whole of the company’s property, (b) by a number of qualifying floating charges which together relate to the whole or substantially the whole of the Company’s property, or (c) by charges and other forms of security which together relate to the whole or substantially the whole of the company’s property and at least one of which is a qualifying floating charge.’’ In circumstances as highlighted in the said section, the holder of a floating charge is allowed to appoint an administrator without referring to the court except that under Section 18 (1) (a) Schedule B1 ‘‘a person who appoints an administrator of a company under paragraph 14 shall file with the court— (a) **a notice of appointment**’’ with the view to preserve assets and maximize profit for the redemption of the security. The Insolvency Act of The Gambia does not have an equivalent provision for the holder of a floating charge to appoint an administrator. The Gambia’s

⁴⁸ See slides 44, 43 and 48 of the Lecture notes of Prof. Tibor Tajti (Thaythy) on *Bankruptcy Law Introduction and Quest for the Optimal Bankruptcy System (Part One)* where outlined the US concept of automatic stay and the effects of its violation thereof.

⁴⁹ See Section 43 of Schedule B1 of the English Insolvency Act and Section 6 of The Gambia’s Insolvency Act both of which provides for the effect of an administration order including the freezing of all legal claims against the company or its assets except as may be allowed or directed by the court.

Insolvency Act is more court oriented in that, all matters relating to the making of an administration order, discharge and supervision of such order is done by the court.

In the event of the disposal of the assets of the company under administration, Section 65 schedule B1 provides that - “(1) The administrator of a company may make a distribution to a creditor of the company. (2) Section 175 shall apply in relation to a distribution under this paragraph as it applies in relation to a winding up. (3) A payment may not be made by way of distribution under this paragraph to a creditor of the company who is neither secured nor preferential unless the court gives permission.” Section 175 (1) of the English Insolvency Act in cases of winding up of companies envisages that “in a winding up the company's preferential debts shall be paid in priority to all other debts.” Section 176A (2) provides that “the liquidator, administrator or receiver shall make a prescribed part of the company's net property available for the satisfaction of unsecured debts” which includes floating charges. Fixed charge holders are paid from the sale of the specific secured asset, outside the general asset pool. This part of Insolvency Act on winding up applies to companies placed under an administration order where its assets, as may be allowed by the court, are to be disposed of and should follow the priority regime outlined in Section 175 of the Act.

In the case of The Gambia, Section 5 of the Act restricts all person from enforcing any security against a company which the court has granted an administration order for reorganization unless discharged by the court. Section 10 (1) of the Act which provides that “the administrator of a company may dispose of or otherwise exercise his or her powers in relation to any property of the company which is subject to a security to which this section applies as if the property were not subject to the security.” This includes floating and fixed charges. Subsection 3 continued stating that “subsection (1) applies to any security which, as created, was a floating charge; and subsection (2) applies to any other security.” However, Subsection (4) provided some comfort

for investors. It stated that “where a property is disposed of under subsection (1), the holder of the security has the same priority in respect of any property of the company directly or indirectly representing the property disposed of as he or she would have had in respect of the property subject to the security.” The essence of the Insolvency Act of The Gambia is to allow companies to reorganize and restructure through the appointment of a receiver who would guide the reorganization process of the company and during that period, the receiver is answerable to the court that appointed it.

Chapter 4: Fixed and Floating Charge Separation: Advocating a Monistic Approach to Secured Transactions in The Gambia and Recommendations

This Chapter advances a policy and legal argument for replacing the traditional dualistic approach to security interests of fixed and floating charges with a unified or monistic framework in The Gambia. Starting with terminology, Gilmore stated that: “The English language is over-blessed with words which mean several unlike things at the same time. English poetry no doubt benefits from the possibility of shorthand multiple reference but legal analysis does not. [Thus,] before coming to grips with the subject, we must dispose of a matter of terminology which has long plagued this field of law, obfuscated discussion and made clear analysis almost an impossibility [...].⁵⁰” Having said that, the dualistic system inherited from English common law has been foundational in The Gambian legal development however, it poses considerable practical and structural limitations. In its place, this Chapter proposes the adoption of a monistic model inspired by Article 9 of the United States UCC and the UNCITRAL Model Law on Secured Transactions. These frameworks treat all security interests in personal property through a single, functionally-driven legal structure. “Except for sales of accounts and chattel paper, the principal test whether a transaction comes under [Article 9 of the UCC] is: is the transaction intended to have effect as security?” “When it is found that a security interest as defined in Section 1-201(37) was intended, this Article applies regardless of the form of the transaction or the name by which the parties may have christened it.⁵¹” Such reform is particularly urgent for developing economies like The Gambia, where SMEs struggle to access credit and creditors face legal uncertainty in enforcement.

⁵⁰ Grant Gilmore, *Security Interests in Personal Property* (Little, Brown and Co., 1st ed., 1965), first volume, at 198.

⁵¹ See Professor Tibor Tajti (Thaythy) lecture notes *on the subject terminology, 3 Oct. 2019 at slide 13 – discussing fixed and floating charges*.

4.1 Conceptual Foundations of the Monistic Approach

The monistic approach to secured transactions is based on the principle of functional equivalence, treating all security interests uniformly regardless of their legal form. ‘*Article 9 is a purely functional, pragmatic approach that allows business practices to take place efficiently and that facilitates the development of new business practices*. It does not, unlike the European legal systems, start with a concept and then forces either judges or legislators to try to bend those concepts in order to accommodate business realities’’⁵². Under UCC Article 9, distinctions between types of charges are abandoned in favor of a comprehensive regime governing all consensual security interests in personal property. Security interests automatically attach to after-acquired property and future advances, and perfection is achieved through a notice-filing system that prioritizes simplicity and transparency. A key innovation of this approach is the “*floating lien*”⁵³ a security interest that extends to changing classes of assets such as inventory, receivables, or future assets, and allows the debtor to retain control of the collateral in the ordinary course of business. This flexibility accommodates commercial reality and encourages lending, particularly to SMEs and startups without fixed assets. Gilmore stated that “in the [United States] ‘**floating lien**’ is a term more often used in scorn or anger than in praise, although in England and Canada it has long been respectable for liens to float. It is surely true that under Article 9 a secured party may take a security interest which ‘floats’ over all of his debtor’s present and future assets [...]”⁵⁴ However, lien in simple terms should not be confused with floating lien. “Under English law, it [lien] usually refers to a passive right to retain a chattel arising by operation of law, for example, the right of a repairer to detain the

⁵²An Interview with visiting Professor Harry C. Sigman on Article 9 of the Uniform Commercial Code; [sigman.pdf](#).

⁵³ According to UCC §§ 9-204 and 9-315 “A floating lien is a security interest that attaches to assets of a debtor which are constantly changing, such as inventory, accounts receivable, or after-acquired property, allowing the debtor to use or dispose of the assets in the ordinary course of business until default.”

⁵⁴ Grant Gilmore, *Security Interests in Personal Property* (1965), 1st vol., at 359.

thing repaired until he is paid⁵⁵” while lien under US law “is restricted to ‘statutory liens⁵⁶’ such as tax and judicial lien.

4.2 Historical Origins and Critique of the Fixed and Floating Charge Separation

Floating charges emerged in late 19th century in England to address the needs of commercial lenders seeking to secure interests over fluctuating assets without disrupting day-to-day business operations. “Prior to the industrial revolution of the 19th century, chattel security devices played a very modest role in the United Kingdom. With the arrival of the industrial revolution the need for all forms of credit grew rapidly, and with it the search by creditors for better and more flexible forms of consensual security”⁵⁷. “The common law courts recognized chattel mortgages on existing goods and such familiar title retention devices by suppliers of durables as conditional sales⁵⁸ and hire purchase agreements”⁵⁹. However, on the other part of the Atlantic, in Canada, “...before the introduction of Ontario's first Personal Property Security Act in 1967 a determined creditor had little difficulty tying up all of a debtor's assets and, in the case of banking loans, frequently did so in the form of a fixed and floating charge. The difference lay in the fact that it was more expensive and more time consuming than it is now, and more liable to be upset on the grounds of non-compliance with highly technical perfection requirements. Non-centralized registration offices and manually maintained records also made it more difficult to discover existing encumbrances.”⁶⁰

⁵⁵ See Professor Tibor Tajti (Thaythy) lecture notes *on the subject terminology*, 3 Oct. 2019 at slide 26 – *discussing the concept of lien*.

⁵⁶ See Professor Tibor Tajti (Thaythy) lecture notes *on the subject terminology*, 3 Oct. 2019 at slide 26 – *discussing the concept of lien*.

⁵⁷ Jacob S. Ziegel *the New Personal Property Security Regimes - Have We Gone Too Far?* ALBERTA LAW REVIEW [VOL. XXVIII, N0.4 1990] at 748

⁵⁸ *McEntire v. Crossley Bros. Ltd.*, [1895] A.C. 457.

⁵⁹ *Helby v. Matthews*, (1895) A.C. 471.

⁶⁰ Jacob S. Ziegel *the New Personal Property Security Regimes -- Have We Gone Too Far?* ALBERTA LAW REVIEW [VOL. XXVIII, N0.4 1990] at 749.

The important definition as discussed in Chapter 1 was given in *Re Yorkshire Wool combers Association*⁶¹, where Romer LJ identified the three essential characteristics of a floating charge viz: (1) it is a charge over a class of assets, present and future; (2) that class is constantly changing in the ordinary course of business; and (3) it is contemplated that the company can continue to deal with those assets until the charge crystallizes. Later, in *Illingworth v Houldsworth*⁶², Lord Macnaghten described a floating charge as "ambulatory and shifting in its nature, hovering over and so to speak floating with the property until some event occurs which causes it to settle." However, the utility of floating charges has long been debated. The City of London Law Society in discussing Secured Transaction Law Reforms expressed that "the problem is that insolvency legislation requires a distinction to be drawn between fixed and floating charges; and that doing so creates a substantial degree of uncertainty as to the effect of secured transactions. This is inefficient and expensive for borrowers and for lenders. It may lead to an increase in the cost of credit, over collateralisation or even the refusal of credit altogether⁶³." In modern insolvency regimes, concerns continue to grow over the potential abuse of floating charges by institutional lenders to the detriment of unsecured creditors. Critics argue that floating charges allow secured creditors to extract value from distressed companies while leaving little for other stakeholders. Legal scholars such as Roy Goode, Vanessa Finch, and John Armour have provided compelling critiques in this regard. Goode in discussing the *pari passu* rule and secured creditors including floating charge said, 'the effects of these rights in rem is substantially to reduce the corpus of assets available for unsecured creditors. When all of these⁶⁴ have been satisfied, the dividend produced by what is left is often pitifully small.⁶⁵ Vanessa Finch on the other hand, has highlighted how floating charges shift risks unfairly and

⁶¹ *Re Yorkshire Wool Combers Association Ltd* [1903] 2 Ch 284.

⁶² *Illingworth v Houldsworth* [1904] AC 355.

⁶³ The City of London Law Society, 'Secured Transactions Reform: Discussion Paper 2, Fixed and Floating Charges on Insolvency' (2014).

⁶⁴ Preferential creditors including statutory obligations and wages.

⁶⁵ Goode, *Principles of Corporate Insolvency Law*, 4th edition, 2011 at Ch. 8-04 page 239.

offer minimal benefit to the wider restructuring process⁶⁶. Armour also argues that “floating charges allow secured creditors to capture “option value” to the detriment of enterprise value and other creditor classes”⁶⁷.

In England, this criticism culminated in significant law reform proposals. Notably, the Cork Report (1982)⁶⁸, which formed the basis of the Insolvency Act 1986, criticized floating charges for undermining the principle of equitable distribution in insolvency. It recommended enhanced scrutiny and priority restructuring to protect unsecured creditors. Later, the Insolvency Review Committee (1992) and the Company Law Review Steering Group (2001) further examined the utility of floating charges. The latter explicitly questioned their continued justification and proposed that security over circulating assets should be replaced by registration-based systems like those under UCC Article 9. More recently, Professor Gerard McCormack has argued for the abolition of floating charges in the UK, citing their redundancy in a modern credit system. He contends that floating charges are conceptually outdated and procedurally opaque, especially compared to the clarity and efficiency of functional security regimes⁶⁹. In this context, the alignment of the English reform discourse with the monistic principles of UCC Article 9 and UNCITRAL becomes evident. The momentum toward abolishing or transforming floating charges in England bolsters the argument for The Gambia to abandon the dualistic tradition and adopt a more streamlined and functional secured transactions framework starting with the amendment of the Companies Act of 2013. Notably, the definitional approach to fixed

⁶⁶ Finch, *Corporate Insolvency Law*, 2nd edition, 2009, Cambridge University Press, New York.

⁶⁷ Armour, “The Law and Economics of Corporate Insolvency”, 2001.

⁶⁸ In January 1977 a wide-ranging review of insolvency law and practice was set up by the then Secretary of State for Trade and Industry, Mr Edmund Dell, under the chairmanship of Sir Kenneth Cork. Its terms of reference included consideration of “less formal procedures as alternatives to bankruptcy and company winding up proceedings in appropriate circumstances.” Its magisterial Report, published in June 1982. [House of Commons - Trade and Industry - Second Report](#).

⁶⁹ McCormack, *Reconstructing European Insolvency Law*, 2017.

and floating charges under the Companies Act is not aligned with the functional framework adopted by SIMPA, revealing a lack of coherence that warrants legislative alignment.

4.3 Merits of the UCC Article 9 and UNCITRAL Model Law Approach

Gullifer and Payne in their book, *Corporate Finance Law - Principles and Policy* expressed that “the floating charge has suffered many blows over the years, and yet retains its popularity amongst lenders. To some extent, this is hard to fathom. As a priority device, it is severely limited, as discussed above.⁷⁰” Thus, floating charge is still popular in the business community. The functional, monistic approach now known to us as floating lien, embodied in UCC Article 9 and the UNCITRAL Model Law offers a unified and flexible legal framework for creating, perfecting, prioritizing, and enforcing security interests through registry-based filings. Unlike the rigid English distinction between fixed and floating charges, the monistic model facilitates a more adaptable and economically inclusive secured transactions regime. The merits of the monistic approach to security are numerous but the most notable of them **include the fact that:** It eliminates unnecessary doctrinal distinctions and creates a single legal regime that treats all security interests equally; it reduces legal complexity for lenders, borrowers, and courts; it recognizes future assets, after-acquired property, and fluctuating asset classes; the model empowers SMEs and non-traditional borrowers to obtain credit using movable assets; priority is determined based on *time of registration or perfection*, reducing litigation over classification and crystallization; it provides an environment for standardization and predictability lowering legal and administrative expenses for all parties involved; and the adoption of UNCITRAL principles enhances cross-border commercial transactions and fosters integration into the global financial system.

⁷⁰ Louise Gullifer and Jennifer Payne, *Corporate Finance Law - Principles and Policy* (Hart, 3rd ed., 2020) at Page 319.

4.4 The Gambia's Partial Movement Toward Monism and Missed Opportunities

The Gambia's adoption of the SIMPA in 2014 signalled a commitment to modern secured transactions reform. SIMPA embraces many principles found in UCC Article 9 and the UNCITRAL Model, such as functional definitions of security interests (*see Section 4 (1) of SIMPA*), the use of a public collateral registry, and recognition of security in intangible and future assets. However, several key limitations have prevented SIMPA from realizing its transformative potential. SIMPA operates separately from the Companies Act of 2013 and explicitly excludes aircraft, ships, and investment securities some of the most valuable asset types in modern finance. Some commercial actors and practitioners remain unaware of SIMPA's provisions, leading to reliance on outdated or repealed statutes like the Bills of Sale Act. Leaving out some of these crucial financial assets and instruments that could be utilized as collateral to access credit was a missed opportunity that have left The Gambia with a partially reformed but underperforming system that fails to deliver the benefits of a truly monistic secured transactions regime.

4.5 Legislative and Policy Recommendations

To realize the full potential of secured credit reform and align with international best practices, The Gambia should undertake the following:

- I. Legislative Consolidation: Unify SIMPA with relevant provisions in the Companies Act 2013 and the Capital Market and Securities Act 2023 to create a comprehensive and coherent Secured Transactions law.
- II. Scope Expansion: Amend SIMPA to include high-value assets such as securities, ships, and aircraft, possibly with specialized rules and procedure.

- III. Registry Modernization: Improve the functionality and accessibility of the existing digitized collateral registry by ensuring seamless integration with business registration systems and enabling reliable, real-time public access.
- IV. Capacity Building: Implement targeted training for lawyers, judges, registry officials, and financial institutions to foster understanding and utilization of the reformed regime.
- V. Public Awareness Campaigns: Develop outreach initiatives to educate SMEs and entrepreneurs on using movable assets as collateral under SIMPA.
- VI. Transitional Provisions: Introduce rules allowing existing fixed and floating charges to be converted into monistic security interests, avoiding disruption while promoting legal uniformity.

These measures would significantly strengthen The Gambia's legal infrastructure for secured lending, reduce barriers to credit for SMEs, and attract foreign investment through alignment with international norms.

4.6 Conclusion

While the dualistic system of fixed and floating charges has historical roots in English common law, it is increasingly seen as outdated in today's global financial environment. The monistic model, exemplified by UCC Article 9 and the UNCITRAL Model Law, provides a simpler, more effective legal framework for secured transactions. For The Gambia, adopting a monistic secured transactions system is both feasible and necessary to improve credit access, especially for SMEs, and to enhance economic resilience and integration into the global financial framework. The growing calls within England to abolish or reform floating charges further confirm the undesirability of this separation and present The Gambia with an opportunity to align itself with modern secured transactions law.

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