A Model Law on Secured Transactions. A Representation of Structure ? An Object of Idealized Imitation ? A Type, Template or Design ?

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I. – INTRODUCTION

The three senses of the noun-adjective "model" reproduced in the sub-title are copied from the Oxford English Dictionary.[1] They perfectly reflect the different inquiries that spring to mind whenever one enters onto the terrain of law reform through model laws.

(1) Should we understand model laws as we understand "model airplanes"?

(2) Should we understand them as we understand runway performers at a fashion show?

(3) Or should we understand them as we would understand an architect's or an engineer's template?

Unsurprisingly, the polysemic character of the word is manifest in current critical discussions about the utility and desirability of transnational model laws.

Some scholars, focusing on the first meaning, see model laws as nothing more than a simpler, reduced scale version of something else. So, for example, one often hears about a particular kind of model secured transactions laws that these laws are "Article 9 *lite*", or "Article 9 for dummies". They are just miniature, non-functioning, easily-broken reproductions of the genuine article.

Others, focusing on the idea that a model may be an object of imitation, see model laws in aspirational terms. Of course, few of us can look like a

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1 OED online q.v. "model".

fashion model or reach the state of moral grace achieved by Gandhi, Schweitzer, or Mandela. Concomitantly, we do not expect that any real law enacted by a State could ever achieve in practice what a model law promises.

Still others imagine model laws neither as impoverished reflections of anything that already exists in the world, nor as an ideal to which one should aspire, but rather as an archetype; not a blueprint, but an architect's sketch by which something may be created. In this sense, a model law appears more or less to be a variant on what UNCITRAL has already produced with its *Legislative Guide on Secured Transactions* (hereinafter: the *Legislative Guide*).

Since I first became involved with the activities of UNCITRAL's Working Group VI, I have speculated several times in print about the multiple dimensions of transnational secured transactions reform, and about the role of different policy instruments in achieving legal modernization and harmonization.[2] I do not propose to review those speculations here. Rather, I mean to focus on two specific questions: should UNCITRAL now undertake a project to transform the recommendations of the *Legislative Guide* into a Model Law of the type implied by the second usage reported by the OED, namely a template? and if so, how should it pursue that objective?

II. – DESIRABILITY, FEASIBILITY AND TIMING OF A MODEL LAW

Friedrich Karl von Savigny famously entitled one of his leading works *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*.[3] Widely seen at the time as a polemical response to the codification movement, von Savigny's book can also be read as a treatise on law reform. What conditions, he asked, conduce to successful law reform through judicial incrementalism, and what conditions conduce to legislative law reform?

Some years ago, as founding president of the Law Commission of Canada, I had occasion to reflect on von Savigny's hypotheses. In developing a Strategic Agenda and 5-year Research Plan, the Law Commission posed itself the following questions: (1) Why do we think that law reform needs to be

2 Notably, in R.A. MACDONALD, "Transnational Secured Transactions Reform: Book IX of the Draft Common Frame of Reference in Perspective", *Zeitschrift für europäisches Privatrecht* (2009), 745-782; *Idem*, "Three Metaphors of Norm Migration in International Context", 34 *Brooklyn Journal of International Law* (2009), 603-653; *Idem*, "In Praise of the Hypothecary Charge", *deCITA* (2007), 287-308; *Idem*, "Article 9 Norm Entrepreneurship", 43 *Canadian Business Law Journal* (2006), 240-291.

3 Frederick K. VON SAVIGNY, *On the vocation of our age for legislation and jurisprudence* (Abraham Hayward, trans) (London: Littlewood and Co., 1831) (reprinted New York: Arno Press, 1975).

textual? Why chirographic? (2) Why do we imagine that legislation is the ideal type of legal chirographism? Why a statute rather than international conventions, judicial judgements, treatises, practice manuals, cautionary tales, and so on? (3) Why do we think that law reform needs to be exclusively the product of the political State? Why do we believe that multiple constitutive (or epistemic) communities lack the capacity to develop better law? [4]

As we think about whether the *Legislative Guide* should be transformed into some type of Model Law, von Savigny's questions reveal their continuing relevance. Whether the field be science, medicine or law, the curse of the 21st century, we all know, is that the possible becomes the necessary. And in the case of a potential transformation of the *Legislative Guide*, the contingent (or the hypothetical, to borrow from Kant) becomes the universal (the categorical). Because we *can* generate a Model Law, we *must* produce a Model Law. I dissent. Wisdom is the ability to discipline desire by reason. Moreover, once we promulgate a legal "hammer" in the guise of a Model Law, every defect or imperfection in secured transactions law worldwide will come to be perceived as a legal "nail".

With these opening caveats, let me now briefly address the issues evoked by the title to this subsection.

A. Is a model law desirable?

The short answer is: No. There has never been a "one size fits all" multi-jurisdictional model law that has really succeeded – unless you count adoption of a Uniform Law by multiple legislatures of sub-national units.[5] But like all short answers, this answer conceals more than it reveals.

4 See LAW COMMISSION OF CANADA, *Strategic Agenda* (Ottawa: Supply and Services Canada, 1998). For further development of these themes, as elaborated in the work of the Law Commission of Canada, see R.A. MACDONALD, "Jamais deux sans trois … Once Commission, Twice Reform, Thrice Law", 22 *Canadian Journal of Law and Society* (2007), 117-143; *Idem*, "Unitary Law Reform, Pluralistic Law Re-substance: Illuminating Legal Change", 67 *Louisiana Law Review* (2007), 1114-1160; *Idem*, "Patchwork Law Review: Your idea is good in practice but it won't work in theory", 44 *Osgoode Hall Law Journal* (2006), 11-52 (with Hoi KONG); *Idem*, "Continuity, Discontinuity, Stasis and Innovation", in B. OPESKIN *et al*. (Eds.), *The Promise of Law Reform* (Sydney: The Federation Press, 2005), 87-101; *Idem*, "Law Reform and Its Agencies", 79 *Canadian Bar Review* (2000), 99-118; *Idem*, "ReCommissioning Law Reform", 35 *Alberta Law Review* (1997), 831-880.

5 Interestingly, Art. 9 of the *Uniform Commercial Code* and the *Uniform Personal Property Security Law* promulgated by the Uniform Law Conference in Canada, are two examples of multijurisdictional model laws that have achieved broad acceptance. Yet neither has been enacted in exactly the same language by every jurisdiction that has purportedly adopted it. See

Indeed, the answer might be different if the question were posed in the plural. For example, it might be that an architect's sketch document like a *Legislative Guide* could be transformed into multiple model laws more in the order of an architect's blueprints, each reflecting a different, contextually sensitive approach to the legislative art. Of course, were this route to be taken, one would confront the conundrum of deciding how many model laws should be developed: two, three, eleven? Any model presupposes a genus, a category. Hence, one would have to decide, in addition, the criterion of regroupment: is the key criterion "legal tradition"? is it related to the "nature of the economy"? perhaps the organizing principle should be related to "political and social structures"? [6] Finally, one might ask whether UNCITRAL should take the lead in developing these diverse model laws, or whether the optimal strategy would be to provide technical assistance to individual States, or States that voluntarily come together in regional groupings (for example, Mercosur, OHADA) to work towards enactment of similar national laws.

B. Is a model law feasible?

Once again, the short answer is: No. Experience teaches that a global transnational model law is feasible only in three very particular situations: (1) where the idea is to create an international normative regime (as in the *UNIDROIT Convention on International Interests in Mobile Equipment*); (2) where the model creates a regime that deals with a relatively new field not subject to widespread or detailed regulation, and where the goal is to relieve national legislatures of the burden of statutory development (as would be the case if there were a project meant to structure basic principles relating to electronic commerce); or (3) where the model law is aimed at providing a short, specific, patch on an relatively closely defined existing framework of national legislation (as might have been the case of a short model law on, say, letter of credit financing). None of these situations obtain in respect of the *Legislative Guide*.

AMERICAN LAW INSTITUTE, Permanent Editorial Board for the Uniform Commercial Code, *Report on The Effect of Non-Uniform Scope Provisions in Revised Article of the Uniform Commercial Code*, <http://extranet.ali.org/directory/files/PEB1104.pdf>, and P.L. CHRISTOPHOROU / K.C. KETTERING / L.A. SOUKUP / S. WEISE, "Under the Surface of Revised Article 9: Selected Variations in State Enactments from the Official Text of Revised Article 9", 34 *Uniform Commercial Code Law Journal* (2002), 331 and "Analysis of State Variations", 34 *Uniform Commercial Code Law Journal* (2002), 358. For a review of interjurisdictional differences in Canada see R. CUMING / C. WALSH / R. WOOD, *Personal Property Security Law* (Toronto: Irwin Law, 2007).

6 On the issues, see R.A. MACDONALD, "Article 9 Norm Entrepreneurship", 43 *Canadian Business Law Journal* (2006), 240, at 252-271.

Moreover, every time one seeks to transform an existing chirographic normative instrument (whether a series of judicial decisions, or a practice manual, or a legislative guide) into another form of chirographic instrument such as a model law, one runs the risk of re-opening debate on controversial policy issues. Whatever one may think of the specific recommendations of the *Legislative Guide*, it is important to recall that they reflect the best available compromise among UNCITRAL member States. Many such compromises were reluctantly made and consensus was occasionally fragile. Should States seek to revisit policy choices made in the *Legislative Guide*, UNCITRAL would be put on the horns of a dilemma: either to accept a revisiting of these policy choices, the consequence of which would be to end up sponsoring two projects (a Legislative Guide and a Model Law) that point in different directions, or to refuse to entertain a reopening of policy questions, in which case support for the new project (the Model Law) would likely dissipate and continuing commitment to the *Legislative Guide* might also be compromised.

C. Is the timing right?

A third time, the short answer is: No. Any particular law reform project succeeds when there is a happy coincidence of supply and demand. A failure of equilibrium on either side of the balance scale is a recipe for failure.

Currently, in the realm of secured transactions law, there is an *oversupply* of model laws: the model law of the European Bank for Reconstruction and Development, the model law of the *Organisation pour l'Harmonisation en Afrique du droit des affaires* (OHADA), the von Bar Group's Draft Common Frame of Reference, and the Inter-American model law of the Organization of American States (OAS). There is not, however, an oversupply of Legislative Guides. The genius of the UNCITRAL *Legislative Guide* is that, to borrow an old saw of comparative law, it works not by "reason of the rule" (as is typically the case with formulaic model laws), but by "the rule of reason" (the detailed exploration of policy alternatives and the providing of elaborated rationales for the choices made). The Commentary of the *Legislative Guide* is not a dogmatic exegesis of a statutory text; it aims at a balanced presentation of existing and potential policy options and a justification for the recommendations on offer.

One might also observe that there is an *under-demand* for model laws. Some States, such as Ukraine, Australia and Hungary, were working on a reform of secured transactions law in much the same direction as proposed by the *Legislative Guide* at the same time, and have either recently enacted or are

on the verge of enacting a reformed law. Other States, such as those of the European Union, likewise have sponsored unofficial attempts to produce model laws (once again in much the same direction as UNCITRAL) meant for consumption by member States. States in neither of these situations (to which may be added those of the OAS) are plausible customers of yet another model law. Still other States or groups of States are in one of three situations: they are confronted with a model law that has been elaborated over time and which is in the final stages of pre-enactment; or they are well advanced in developing a new law that is respectful of local practice; or they are just beginning to consider whether (and how) to modernize secured transactions law.

For States in the first situation, it is too late to put a law reform process on hold while waiting for a model law, although a document like the *Legislative Guide* can nonetheless provide very valuable insight as to how existing proposals may be improved at their margins. For States in the second situation, unless the model law actually incorporates these local practices into its basic framework (or in the case of multiple model laws, into the basic framework of one of the variants), it is a *Legislative Guide* with extensive commentaries that focus on policy choices and rationales that will be most helpful. For States in the third situation, it is too early in the legislative reform process for them to benefit from a model law. Here also a *Legislative Guide* that moves from a statement of the problem, through an elaboration of key objectives, through a detailed discussion of failures of a variety of current approaches and the presentation of plausible policy options for enactment will provide States with the resources needed to make informed choices about how to proceed, without at the same time appearing to dictate particular outcomes.

D. *Quo vadis*?

The above paragraphs express scepticism about the desirability, feasibility and ripeness of an UNCITRAL project to develop a Model Law. In large part this scepticism derives from optimism about the *Legislative Guide*. Almost all of the advantages that can be obtained from the development and promulgation of a Model Law have been achieved with the *Legislative Guide*. The marginal utility of investing additional resources in a Model Law is low. However, this does not mean that UNCITRAL has no continuing role to play in the modernization of global secured transactions law through further elaboration of its *Legislative Guide*. What that role could be is explored in the Conclusion to this essay. Presently I should like to look at the range of considerations to which States contemplating enactment of new secured transactions legislation

based on a Legislative Guide or a Model Law should attend. I use the UNCITRAL *Legislative Guide* as a vehicle for illustrating these considerations.

III. – POLICY CONSIDERATIONS FOR ENACTING STATES

As von Savigny so carefully pointed out, it is not self-evident that law reform is always best accomplished by legislation. Were he speaking to a 21st century audience, he might well say that it is far from self-evident that international organizations should always advance their mission by promulgating legislative or quasi-legislative instruments. One is reminded of the wisdom of *Ecclesiastes* III, 1: "To everything there is a season, and a time to every purpose under the heaven." Sometimes an international convention is optimal; sometimes a model law; sometimes a legislative guide; sometimes a series of policy papers; sometimes non-chirographic technical assistance.

States seeking to modernize domestic law by reference to international instruments of whatever kind confront a number of issues demanding thoughtful consideration of social, economic and legal policy. These issues range from the sublime to the trivial. In reflecting on how UNCITRAL should address these considerations were it to contemplate moving from a *Legislative Guide* to a Model Law, four appear to me as non-trivial (even if perhaps not sublime).

A. Relationship to "other law"

A Legislative Guide is a document that purports to give guidance to States as to the optimal content of a particular piece of legislation. Inevitably a Legislative Guide that aims to provide specific direction as to norms to enact will also reflect meta-choices about scope of application, organization, style of expression, and the optimal precision of legislative rules.

Prior to these decisions internal to a model law is another: what is the relationship of the model law to other norms and instruments in a State? The UNCITRAL *Legislative Guide* reflects important choices of this type. For example, the *Legislative Guide* takes as its central theme "consensual secured transactions in movable property." From this, a number of *exclusions* and references to "other law" follow, even though, were one to cast the scope of the project only slightly differently, these topics would be included under the *Legislative Guide*. The point is obvious when one contrasts the *Legislative Guide* with the organization of the relevant chapters of a typical Civil Code. For example, the *Civil Code of Québec* (CCQ) conceives security rights as embracing all legal devices that provide for a right in property that attenuates

or counters the twin principles of universal patrimonial liability and equality of creditors.[7] Hence, and first, it embraces security on both movable and immovable property. Second, it embraces proprietary security (hypothecs), possessory security (rights of retention), mere execution preferences (privileges), and (like the *Legislative Guide*) the use of title to secure performance of an obligation (security trusts, instalment sales, rights of resolution, sales with a right of redemption, financial leases, and so on). Third, it embraces both consensual (hypothecs, title transactions, consensual liens) and non-consensual (legal hypothecs, privileges, rights of retention) security.

By contrast, the *Legislative Guide* is drafted to *include* various transactions and topics that the typical Civil Code book on security on property consigns to "other law", whether in a separate statute or another title of the Civil Code itself. These transactions include, for example, assignments not intended as security.[8] In so far as additional topics are concerned, the *Legislative Guide* contains chapters on registry systems, conflicts of laws, transitional measures and aspects of insolvency. While the *Legislative Guide* makes no claim that these matters should be included in a single statute dealing with security rights (on the model, say, of Article 9 of the United States Commercial Code (UCC)), the implication is that they are significant enough that they should be incorporated within the frame of *Guide*, rather than, like basic rules relating to contractual obligations, set-off and suretyship, left to be dealt with by "other law".

Both by decisions about what to include in the *Legislative Guide*, and by decisions that consign rules relating to immovables, non-proprietary security and non-consensual security to "other law", the *Guide* reflects particular policy choices as to what *really* matters. Such choices about coverage are, perhaps, appropriate in a Legislative Guide, but they have an entirely different import if made in a Model Law. In enacting a new law, for example, a State might evaluate the relative importance of all these topics differently. It might

7 For a review of the approach of the Civil Code of Québec to title security, see R.A. MACDONALD / J-F MÉNARD, "Credo, credere, credidi, creditum: Essai de phénoménologie des sûretés réelles", in S. NORMAND (Ed.), *Mélanges offerts au Professeur François Frenette (*Ste Foy: Presses de l'Université Laval (2006), 309-360.

8 It bears notice that unlike many Canadian PPSAs, the *Guide* does not impose a similar regulatory framework on consignments and leases for more than one year when these do not secure the performance of an obligation. See, for example, the *Personal Property Security Act* of New Brunswick (SNB, c. 7.1), Section 3(2) of which provides that the Act applies to a commercial consignment, a lease for a term of more than one year, a transfer of accounts or chattel paper, and a sale of goods without a change of possession, even when these do not secure payment or performance of an obligation.

well follow all the specific recommendations of the *Guide* to the letter, but decide to exclude matters that the *Guide* includes (enacting them in "other law"), and to include matters that the *Guide* excludes (thereby expanding the coverage of the *Guide*). If confronted with a Model Law, however, such State-specific context-driven alternative choices are much harder to make.

B. Commercial law or consumer law?

Historically, the "civil law" in the Romano-Germanic legal tradition, and the "common law" in the Anglo-American tradition were seen as the default regime of legal regulation. For example, in Romano-Germanic states, the civil law was conceived as the general regime of "private law" that would apply not only to commercial affairs by default, but also in matters of "public law" (although only to the extent explicitly incorporated). More than this, the civil law was understood as the basic regime of law governing everyday relationships and transactions between citizens. In derogation from the basic principles announced in a Civil Code, these States developed parallel Commercial Codes which often elaborated specialized rules governing transactions that were either "objectively" or "subjectively" commercial. Somewhat later, and in part because of the development of retail commercial activity and a service economy, these same States came to elaborate Consumer Codes. The rules governing security rights in the Civil Code formed the default regime of everyday transactions, to which the Commercial Codes engrafted regimes for relationships between enterprises, and Consumer Codes added special protections for transactions involving consumers.

In Anglo-American States, the common law was also conceived as the default regime of legal regulation, applicable equally to private law, including corporate/commercial affairs and (except where explicitly excluded – as in Crown liability) to public law matters. Consequently, as in the continental tradition, the everyday rules of the common law applied to both commercial relationships and consumer transactions. But since Anglo-American States were reluctant to enact general commercial or consumer codes, to keep up with evolving mercantile practice in the 19th century, legislatures were obliged to enact specific statutory regimes governing security rights (bills of sale, conditional sales, hire-purchase, corporate charges, etc.), and in the mid-20th century to regulate certain business practices though consumer protection legislation.

The *Legislative Guide*, like Article 9 of the UCC (which is, of course, not a commercial code in sense understood in Romano-Germanic systems), does

not follow the historical pattern of either civil law or common law States. Rather, it presumes that the basic default regime of secured transactions should be that governing *commercial* relationships, and that policy decisions to protect consumers and consumer-like third parties should be left to "other law" expressed in consumer protection acts, small loans acts, debtor-creditor law, and family property statutes. As a result, in addition to covering security over the core assets charged in everyday consumer transactions (automobiles, durable white goods, furniture, electronic devices, credit card receivables) and everyday business finance secured transactions (equipment, inventory and ordinary trade receivables), the *Legislative Guide* also contains recommendations relating to security over a number of more specialized assets (documents of title, negotiable instruments, bank accounts, letters of credit and, in its Annex, intellectual property).[9]

While the backdrop to the *Legislative Guide* is the panoply of commercial transactions, many Civil Codes take the opposite tack in structuring regimes of security on property. That is, they build most consumer protection rules into the basic regime of security rights and typically leave specialized commercial and financial transactions to other law. Hence, for example, (1) limitations on entitlement to grant security (natural persons not carrying on an enterprise may not, in principle, grant security without dispossession or an on a universality of assets), (2) the pre-default protection of a debtor's ownership prerogatives (a security right does not automatically attach to fruits, revenues and proceeds), (3) the grant of additional remedies to interrupt enforcement of security (hypothecary debtors may not only redeem the security upon default, but may also reinstate the security), contemplate consumers as the basic transactional constituency.[10] Here again, the *Legislative Guide* reflects a basic policy choice about what constitutes the core of a secured transactions regime

9 That is, while the *Guide* covers under its basic regime, (1) consumer goods, (2) inventory, equipment and receivables, and (3) specialized commercial property (bank accounts, letters of creditor, negotiable documents, negotiable instruments), particular rules relating to the consumer goods are, with only three exceptions, relegated to other law, while particular rules relating to the other categories of asset are included in the *Guide*. Of contemporary commercial, business and financial assets, only securities and certain payment rights under financial contracts and foreign exchange transactions are excluded from the *Guide*'s scope (see Recommendations 4(c), (d) and (e)).

10 The above limitations are taken from Arts. 2683, 2864, 2674, 2737, and 2761 respectively of the *Civil Code of Québec*. Interestingly, like Canada's *Personal Property Security Acts* but in derogation of its historical non-commercial orientation, that Code now also includes detailed rules relating to securities entitlements as part of its basic regulatory regime. See Arts. 2684.1, 2701.1, and 2714.1-2714.7 *CCQ*.

– commercial finance. And here again, however appropriate that choice may be in a Legislative Guide, drafting a model law instantiating such a choice implies decisions about legislative design that many States are less like to accept uncritically.

C. Organizational theme, style and mode of expression

To the degree that a model law is meant to serve as a template for legislative action, it is necessary to consider a number of features that are implicit in the manner of its drafting. Not surprisingly, these same features are also present, and apparent, in the way the *Legislative Guide* has itself been crafted.

A first point to observe is that the general organizational theme of functionalism pervades the *Guide*. The unitary and functional approach first elaborated in Article 9 underlies the basic scope provision. In addition, functionalism underlies the *Guide*'s concept of proceeds – a concept that embraces not only what is received in replacement of charged property (that is, through a notion of real subrogation), but also what is received upon disposition of charged property even if the property remains charged following disposition, and what in normal civil law parlance is characterized as natural or civil fruits (revenues), even if no disposition takes place. Furthermore, the general priority regime of the *Guide* assumes that identical rules should govern present property and future property, single assets and universalities, corporeal and incorporeal property – all deemed to be functionally equivalent assets. Finally, even where the *Guide* contemplates (as in acquisition financing) the use of title as security, the creditor's title right (retention of title) is structured so that it produces "functionally equivalent results" to those that obtain under the regime governing acquisition security rights.[11]

Second, the style of the recommendations of the *Guide* is very much that of a common law statute. The general ossature of the civil law that divides normative instruments into categories and sub-categories interrelated in descending orders of generality is not followed. Rather, each recommendation appears as a more-or-less free standing specific direction to a court. Even though the *Legislative Guide* contains a series of recommendations grouped

11 These dimensions of functionalism are explored in detail in M.G. BRIDGE / R.A. MACDONALD / R.L. SIMMONDS / C. WALSH, "Formalism, Functionalism, and Understanding the Law of Secured Transactions", 44 *McGill Law Journal* (1999), 567-663. An important conclusion of that article is that even in regimes characterised as "formalist" courts have deployed second-order functionalist analysis to prevent creditors from using new contractual forms to skirt regulatory controls.

by chapter topic, each is written with numerous paragraphs and sub-clauses of the type that would induce a reader to imagine that the recommendation could simply be transposed into statutory language by the removal of the opening words "The law should provide …" If this were done, it is obvious that the resulting model law would rest on similar, common law, assumptions about the style of legislation, and the manner in which the conceptual apparatus of the statute is presented.

A further point about the mode of legislative expression involving a significant policy choice by States concerns the role of mandatory and suppletive rules. As a general principle of statutory drafting in common law States, one does not announce norms that merely set a default position away from which parties are entitled to derogate by contract. That is, the principle of party autonomy finds expression not just in relation to its basic content – parties may choose their co-contracting party, the terms of their agreement, and the consequences they wish to attribute to these terms upon default – but also in terms of what the legislation states. Statutes are a vehicle of regulatory control that should be sparse and tightly drafted; they are not a technique for facilitating human interaction. This view of legislation is reflected both in the absence of suppletive rules structuring the relationship of the parties prior to default, and is present in the general principle that permits non-judicial realization of security rights, even as against consumers.

All the above choices are not inappropriate in a Legislative Guide. But once a Guide is transformed into a model law, several other considerations enter into play. In brief, in a model law these very significant and highly contingent choices about legislative technique would be given an immutability that many States would find unpalatable.

D. Ideal-type or lowest common denominator rules

A final policy issue flows directly from the fundamental operating assumption that underlies the *Legislative Guide*. When attempting to think about law reform, law reformers are often torn between two approaches. One is to imagine the possibility of enacting the perfect law, as seen from an ideal-type perspective. Doing so requires reformers to abstract from the messy world of conflicting economic interests, politics and history reflected in the current legislative regimes of all States. The goal is to proclaim a few basic policy objectives, to assert fundamental axioms about human and regulatory behaviour and to deduce a normative regime that rests on these axioms and achieves these goals in the most efficient and effective manner. This is the

approach taken by the *Legislative Guide* and by a number of model law proposals of the past decades – EBRD and OAS regimes most prominently.

The other approach is to take the law as it exists in the State or the States for which one is proposing a law reform project and (in the case of multiple States) to find the lowest common denominator of policies, principles and concepts that are consistent with the law in each State. In such an approach, the reality test is not undertaken by reference to axioms and assumptions about human behaviour, but rather by reference to how human beings are actually reacting in relation to a set of existing policy prescriptions. Such a lowest common denominator approach is that taken by the OHADA proposals in West Africa and by the von Bar project's DCFR for the European Union.[12] It is also, surprisingly to some, the approach taken within the United States by the Article 9 (UCC) project. No-one today believes that Article 9 is derived from an ideal-type law reform endeavour. The choice of its initial scope provisions was largely dictated by issues vexing U.S. commercial law in the late 1940s. Its second version, Article 9.2, began to depart from the limpid style of a codification and was overlain with detailed rules shaped by U.S. bankruptcy law and a general distrust of judge's ability to understand its basic policies. Indeed, with its most recent amendments, Article 9 has radically departed from the partially ideal-type perspective that animated its creation half a century ago. Article 9.3 now more resembles the kind of lowest common denominator model law that is jurisdiction-specific in scope, approach and mode of legislative expression.

In view of the evolution of Article 9, one might ask of the *Legislative Guide* whether it can be effectively transformed into a model law on the ideal-type basis, and if so, whether it should be so transformed. Alternatively, one might ask whether the necessary accommodation to local circumstance would require that, were a model law to be derived from the *Guide*, it be recast into a number of regional model laws of the lowest common denominator kind.

IV. – CONTENT AND STRUCTURE OF A MODEL LAW

It is difficult to respond meaningfully to queries about the content and structure of a model law without focusing on particular States and particular

12 On the approach of the DCFR, see I. SMITS, "The Draft Common Frame of Reference: Methodological Nationalism and the Way Forward", 3 *European Review of Comparative Law* (2008), 270. For a comparison of the DCFR and UNCITRAL *Legislative Guide* approaches see R.A. MACDONALD, "Transnational Secured Transactions Reform: Book IX of the Draft Common Frame of Reference in Perspective", *Zeitschrift für europäisches Privatrecht* (2009), 745-782.

legal regimes. Nonetheless, based on experiences in drafting and re-drafting secured transactions laws in different contexts, it seems to me that several issues must be considered prior to picking up the legislative pen. In other words, the answer to the question whether the model law should *include,* for example (1) intellectual property-related issues, (2) conflicts of laws, (3) insolvency, and (4) specialized transition rules (as the *Guide* does) and should *exclude*, for example, (1) immovables, (2) non-consensual security, and (3) consensual liens (as the *Guide* does) presupposes a more general reflection on what the model law is meant to do within the legal regime into which it is being inserted.

Let me put the point slightly differently, using three illustrations. It is one thing to say in a legislative guide that States wishing to modernize their law so as to produce an efficient and effective secured transactions regime should (1) adopt a functional approach, (2) separate creation from third party effectiveness, (3) provide for a general registry of security rights, (4) order priorities primarily by reference to time rather than quality of claim, (5) permit non-judicial realization, and (6) establish a non-discriminatory regime of acquisition financing. It is quite another, however, to say that the rules required to operationalize such principles need to appear in that order, in a single legislative document, drafted in the form of an *Income Tax Act*.

Again, it is one thing to propose, to take another example, that States adopt an extensive rule relating to the transfer of a security right into the proceeds "arising on account of secured collateral" or to project a security right into attachments to immovable property. It is quite another to presume that, in order to achieve this objective, States will have to recharacterize fruits, products and revenues, and to stretch their concept of real subrogation to capture proceeds even when the security right survives disposition.

Finally, it is one thing to provide for alternative approaches in a legislative guide as the UNCITRAL *Guide* does in respect of unitary and non-unitary approaches to acquisition financing. It is quite another to imagine that an enacting State would not have to choose between the proffered alternatives.

To illustrate these points I propose simply to set out for comparative purposes alternative approaches to drafting of rules relating to scope, proceeds and acquisition financing, taking two Canadian models – the Ontario *Personal Property Security Act* (OPPSA) and the *Civil Code of Québec* (CCQ) – as exemplars. Of course, I could have also chosen to illustrate the point by comparing the concepts of priority in the OPPSA and rank in the CCQ, and the notions of perfection in the OPPSA and publicity in the CCQ. This said, I

believe the three illustrations I have selected are sufficient to illuminate the contrast. I leave to the reader's judgement the appropriate lessons to draw from these comparisons.

A. Scope

There are, obviously, several ways to express scope provisions. The approach taken by Article 9 and its derivatives (as well as by the *Legislative Guide*) is to treat the legislative instrument in question as a discrete enactment and describe the situations to which it applies. So, for example, the OPPSA defines a "security interest" since that is the primary term by which the application of the Act is determined. The definition accomplishes two objectives. It limits the term to interests in "personal property"; and it enacts a legal fiction according to which certain other transactions that do not secure performance of an obligation – transfers of accounts and chattel paper, leases of more than one year – are deemed to be "security interests":

> "*security interest*" means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation, (a) the interest of a transferee of an account or chattel paper, and (b) the interest of a lessor of goods under a lease for a term of more than one year;

The fiction is then repeated in Section 2, which speaks specifically to scope.[13] Given this broad scope, the Act enumerates, in Section 4, a list of excluded security devices and transactions.

> *4(1)* Except as otherwise provided under this Act, this Act does not apply, (a) to a lien given by statute or rule of law, except as provided in subclause 20(1)(a)(i) or section 31; (b) to a deemed trust arising under any Act, except as provided in subsection 30(7); (c) to a transfer of an interest or claim in or under any policy of insurance or contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account; (d) to a transaction under the Pawnbrokers Act; (e) to the creation or assignment of an interest in real property, including a mortgage, charge or lease of real property,

13 2. Subject to subsection 4 (1), this Act applies to, (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing, (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and (ii) an assignment, lease or consignment that secures payment or performance of an obligation; (b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and (c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation.

> other than, (i) an interest in a fixture, or (ii) an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property; (f) to an assignment for the general benefit of creditors to which the Assignments and Preferences Act applies; (g) to a sale of accounts or chattel paper as part of a transaction to which the Bulk Sales Act applies; (h) to an assignment of accounts made solely to facilitate the collection of accounts for the assignor; or (i) to an assignment of an unearned right to payment to an assignee who is to perform the assignor's obligations under the contract. *(2)* The rights of buyers and sellers under subsection 20(2) and sections 39, 40, 41 and 43 of the Sale of Goods Act are not affected by this Act.

The central logic of the OPPSA is transactional, not conceptual; that logic is also directed to consequences rather than principles; and the style of drafting reflects this logic.

Now compare not only the substance but also the type of formulation of scope in the OPPSA to that found in the CCQ. Book VI, on security on property, begins by situating the idea of a security right (the hypothec) and other legal devices (prior claims) within the broader framework of debtor-creditor relationships, and by stating how these notions derogate from the default principles of debtor-creditor law.[14] Once the principle and exception are established, the CCQ elaborates a functional definition of the hypothec in article 2660:

> A *hypothec* is a real right on a movable or immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whosever hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking as determined in this Code.

The CCQ then defines, in laconic fashion, the legal nature, types and scope of the concept.

> *2664(1)* Hypothecation may take place only on the conditions and according to the formalities authorized by law. *(2)* A hypothec may be conventional or legal.

> *2665(1)* A hypothec is movable or immovable depending on whether the object charged is movable or immovable property or a universality of movable or immovable property. (2) A movable hypothec may be created with or without

14 *2644*. The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors. *2646(1)* Creditors may institute judicial proceedings to cause the property of their debtor to be seized and sold. *(2)* If the creditors rank equally, the price is distributed proportionately to their claims, unless some of them have a legal cause of preference. *2647*. Prior claims and hypothecs are the legal causes of preference.

delivery of the movable hypothecated.

2666 A hypothec is a charge on one or several specific corporeal or incorporeal properties, or on all the properties included in a universality.

In view of the logic of debtor-creditor law – creditors may seize only the debtor's exigible estate (the common pledge) – it is necessary to deal with transactions that deploy title to property to secure the performance of an obligation. The CCQ states a default principle in Article 1801.

1801 Any clause by which a creditor, with a view to securing the performance of the obligation of his debtor, reserves the right to become the irrevocable owner of the property or to dispose of it is deemed not written.

This principle is subject to two exceptions: the Quebec equivalent of the historical *fiducia cum creditore*, the sale with a right of redemption; and the security trust. The CCQ regulates the former by deeming, in Article 1756, the seller to be a borrower and the acquirer to be a hypothecary creditor, thereby incorporating by reference the entire third-party effectiveness, priority and enforcement regime governing hypothecs. Article 1263 regulates the latter, in a manner similar to the OPPSA, by imposing a procedural overlay on the transaction: the trust deed must be registered, and following default, the trustee must follow the enforcement regime applicable to hypothecs.

A comparison of these two techniques for achieving a regulation of security devices through adoption of a functional approach reveals that there is nothing inherent in the "substance of the transaction" idea that demands adoption of the drafting style of a common law statute. The OPPSA achieves its goal with a general fiction: ownership is a security right; the CCQ achieves the same goal with one particular fiction: a sale with a right of redemption is a security right. In other words, there is nothing inherently uncivilian about organizing a regulatory regime governing secured transactions to achieve functionally equivalent outcomes.[15] While the CCQ regime does not presently regulate retention of title using the same fiction as it applies to sales with a right of redemption, as explained in Section C below, it achieves a like regulatory effect by adopting the same technique it applies to security trusts.

15 For a detailed review, see R.A. MACDONALD, "Faut-il s'assurer qu'on appelle un chat un chat? Observations sur la méthodologie législative à travers l'énumération limitative des sûretés, 'la présomption d'hypothèque' et le principe de 'l'essence de l'opération' ", in E. CAPARROS (Ed.), *Mélanges Germain Brière* (Montréal: Éditions Wilson et Lafleur, 1993), 527-594.

B. Proceeds

Consider now the question of proceeds. The OPPSA offers an exceptionally wide definition of "proceeds". As with the definition of a security interest, it rests on a fiction driven by the desire to achieve a particular regulatory outcome regardless of the conceptual framework of the underlying law.

> "*proceeds*" means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with collateral or the proceeds therefrom, and includes, (a) any payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom, (b) any payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and (c) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;

This broad conception of proceeds is extended even further so as to include even what is received upon disposition even if there is no ground for subrogation (*i.e.* the security continues in the initially charged asset). The consequences of the proceeds right are then described by reference to the way the right may achieve the best status as against third parties (*i.e.* the manner in which it can be perfected). Here again, it is to be noted that the announced rule significantly departs from the underlying premise of third-party effectiveness in that because perfection is fictitious (*i.e.* automatic without the need to file a new financing statement). Section 25 provides:

> *25(1)* Where collateral gives rise to proceeds, the security interest therein, (a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free of the security interest; and (b) extends to the proceeds.
>
> *25(2)* Where the security interest was perfected by registration when the proceeds arose, the security interest in the proceeds remains continuously perfected so long as the registration remains effective or, where the security interest is perfected with respect to the proceeds by any other method permitted under this Act, for so long as the conditions of such perfection are satisfied.
>
> *25(3)* A security interest in proceeds is a continuously perfected security interest if the interest in the collateral was perfected when the proceeds arose.
>
> *25(4)* If a security interest in collateral was perfected otherwise than by registration, the security interest in the proceeds becomes unperfected ten days after the debtor acquires an interest in the proceeds unless the security interest in the proceeds is perfected under this Act.

Finally, Section 30(5) of the OPPSA provides that the priority rules applicable to perfected security interests in initially encumbered collateral apply to proceeds derived therefrom.

Consider now the analogous rules in the CCQ. To begin with, under Article 2674 the right to proceeds only includes proceeds of disposition, and then is limited to situations of real subrogation – that is, to cases where the hypothec on the initially charged property is extinguished because the property was sold in the ordinary course of business of the debtor.

> *2674(1)* A hypothec on a universality of property subsists but extends to any property of the same nature which replaces property that has been alienated in the ordinary course of business of an enterprise. *(2)* A hypothec on an individual property alienated in the same way extends to property that replaces it, by the registration of a notice identifying the new property. *(3)* If no property replaces the alienated property, the hypothec subsists but extends only to the proceeds of the alienation, provided they may be identified.

Of course, while the CCQ does not adopt a general proceeds-of-disposition rule that goes beyond the real subrogation concept (*i.e.* does not afford the creditor a proceeds right where the hypothec continues to charge initially encumbered property), it would not be difficult to re-draft Article 2674 to accomplish that outcome in respect of movable hypothecs. The first paragraph of the article need only to be replaced with a clause such as: "A hypothec on a universality of property subsists notwithstanding the alienation, other than in the ordinary course of business of an enterprise, of property falling within the universality, and also extends in all cases to property that is received in connection with the alienation." Such a re-draft would not, however, cover the case of products, fruits and revenues. These assets, while derived from initially encumbered assets, are in no way proceeds. The basic principle of the CCQ hypothecary regime flows directly from fundamental property law concepts: the rights of *usus, fructus* and *abusus* accrue to the owner (or *mutatis mutandis* the titulary of a lesser real right). Article 2733 provides:

> A hypothec does not divest the grantor or the person in possession, who continue to enjoy their rights over the charged property and may dispose of it, subject to the rights of the hypothecary creditor.

Moreover, Articles 2736 and 2737 state that, even when in possession, the hypothecary creditor may neither use the charged property nor appropriate its fruits without the grantor's permission. In these cases, while the policy requiring a separate charging clause to encumber fruits as initial

collateral is in my view preferable, nothing prevents re-drafting the Code so that a hypothec automatically embraces natural fruits and civil fruits (revenues). The codal provision to capture fruits and revenues would simply mirror the existing rule relating to on accessions: "A hypothec extends to fruits and revenues generated by the hypothecated property, including the natural increase of animals and plants." [16]

As in the case of the scope provisions, the OPPSA and the CCQ reflect obvious differences in legislative technique. The OPPSA again relies on a fiction that trumps existing property concepts in order to achieve a desired outcome. In this respect, the functional definition of proceeds is no different from the functional definition of a security interest. Of course, in both cases, the same critique of functionalism may be made. Both the current and suggested drafting of the CCQ illustrate how it is possible to achieve substantively identical results to those generated by the OPPSA while nonetheless respecting the conceptual logic of basic property law. An important lesson can be derived from this conclusion. There is nothing inherently uncivilian about attempting to legislate a modernized secured transactions regime that extends a security right into all identifiable assets that are derived directly or indirectly from the initially encumbered asset.

C. Acquisition financing

Consider now a third illustration – the regime governing acquisition financing. Following Article 9, the OPPSA adopts a generic view of acquisition financing that focuses on the nature of the security right – a purchase money security interest – and not on the parties to it (*i.e.* sellers, lessors or lenders).

> "*purchase-money security interest*" means, (a) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its price, (b) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the collateral, to the extent that the value is applied to acquire the rights, or (c) the interest of a lessor of goods under a lease for a term of more than one year.

16 Art. 2671 CCQ states the current accessions rule: "A hypothec extends to everything united to the property by accession." It is not necessary to provide that non-regenerative products subtracted from initially charged assets are also charged since they would automatically be subject to the security right by virtue of the principles of the right to follow (Art. 2660, 2751) and indivisibility of hypothecs (Art. 2662).

For a third time one sees the impact of functionalism in the elaboration of a key concept in the OPPSA. The idea is simply that there are many ways by which a person (a debtor) may acquire the utilities of a movable asset equivalent to an ownership right. Whether as a purchaser, an exchanger, the beneficiary of a loan for consumption, or through operation of the rules of specification, any transaction translative of ownership is an acquisition transaction. Likewise, any transaction not translative of ownership but that produces functionally equivalent results – a lease, a loan for use, a complex deposit, a possessory right as beneficiary of a trust, a commercial consignment – will be considered as an acquisition transaction. Moreover, the functionalism extends beyond the characterization of the transaction. All providers of financing – whether the co-contracting party (seller, exchanger, consignor, lessor, lender for consumption, etc.) or a third party (lender of money, trustee, etc.) – and all forms of acquisition financing – whether in cash, credit or in kind – are caught by the definition, although Section 2(2) of the OPPSA preserves the non-consensual rights of sellers under the *Sale of Goods Act*.

The significance of the definition lies in the priority position that accrues to the acquisition financer. In general terms, the idea is to provide that the purchase-money security interest will have priority over even previously-registered (and in the case where there is a grace period for registration of a purchase-money security interest, even previously-*perfected*) holders of non-acquisition security interests. The complexity of Section 33, describing the priority rule, derives from the fact that it must trace rules not only for sellers and lenders, but also because it envisions different rules for inventory and other assets, and because it must solve internal priority problems among competing acquisition financers. This is especially important in the case of sub-Section 33(3) dealing with competitions between lender and seller acquisition financing.

> *33(1)* A purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor, if, (a) the purchase-money security interest was perfected at the time, (i) the debtor obtained possession of the inventory, or (ii) a third party, at the request of the debtor, obtained or held possession of the inventory, whichever is earlier; (b) before the debtor receives possession of the inventory, the purchase-money secured party gives notice in writing to every other secured party who has, before the date of registration by the purchase-money secured party, registered a financing statement that describes the collateral as, or as including, (i) items or types of inventory, all or some of which are the same as the items or types of inventory that will be subject to the purchase money security interest, (ii) inventory, or (iii) accounts; and (c) the notice referred to in clause (b) states that

the person giving it has or expects to acquire a purchase-money security interest in inventory of the debtor, describing such inventory by item or type.

33(2) Except where the collateral or its proceeds is inventory or its proceeds, a purchase-money security interest in collateral or its proceeds has priority over any other security interest in the same collateral given by the same debtor if the purchase-money security interest, (a) in the case of collateral, other than an intangible, was perfected before or within ten days after, (i) the debtor obtained possession of the collateral as a debtor, or (ii) a third party, at the request of the debtor, obtained or held possession of the collateral, whichever is earlier; or (b) in the case of an intangible, was perfected before or within ten days after the attachment of the purchase-money security interest in the intangible.

33(3) Where more than one purchase-money security interest is given priority by subsections (1) and (2), the purchase-money security interest, if any, of the seller has priority over any other purchase-money security interest given by the same debtor.

Compare this formulation to the position set out in the CCQ. A first observation is that the CCQ continues to distinguish between rights available to (1) sellers and lessors who deploy title as an acquisition financing device, (2) sellers and other prior owners whose acquisition financing agreements are translative of ownership and who take a vendor's hypothec, and (3) third party financers such as lenders. Consider first the case of sellers and lessors. As under the OPPSA, the non-consensual rights of sellers are preserved (Articles 1740-1741). Retention of title transactions are explicitly regulated by Articles 1745-1749 in a manner analogous to hypothecary rights:

1745(1) An instalment sale is a term sale by which the seller reserves ownership of the property until full payment of the sale price. *(2)* A reservation of ownership in respect of a road vehicle or other movable property determined by regulation, or in respect of any movable property acquired for the service or operation of an enterprise, has effect against third persons only if it has been published; effect against third persons operates from the date of the sale provided the reservation of ownership is published within 15 days. As well, the transfer of such a reservation has effect against third persons only if it has been published.

1749(1) A seller or transferee who, upon the default of the buyer, elects to take back the property sold is governed by the rules regarding the exercise of hypothecary rights set out in the Book on Prior Claims and Hypothecs; however, in the case of a consumer contract, only the rules contained in the Consumer Protection Act are applicable to the exercise by the seller or transferee of the right of repossession.

Similarly, but in a more attenuated fashion, financial leases (leasing) and leases for more than one year are also made subject to certain features of the

hypothecary regime. As with leases for more than one year that do not secure the performance of an obligation under the OPPSA, the third party effectiveness and priority regimes are applicable, but the enforcement regime is not.

Articles 1842 and 1847 on leasing, and 1852 on leases provide:

> *1842(1)* Leasing is a contract by which a person, the lessor, puts movable property at the disposal of another person, the lessee, for a fixed term and in return for payment.
>
> *1847(1)* The rights of ownership of the lessor have effect against third persons only if they have been published; effect against third persons operates from the date of the leasing contract provided the rights are published within 15 days.
>
> *1852(1)* The rights resulting from the lease may be published. *(2)* Publication is required, however, in the case of rights under a lease with a term of more than one year in respect of a road vehicle or other movable property determined by regulation, or of any movable property required for the service or operation of an enterprise, subject, in the latter case, to regulatory exclusions; effect of such rights against third persons operates from the date of the lease provided they are published within 15 days. A lease with a term of one year or less is deemed to have a term of more than one year if, by the operation of a renewal clause or other covenant to the same effect, the term of the lease may be increased to more than one year.

In each of these cases of title security held by an owner, the CCQ elaborates a slightly different regime. But in all, the question of the acquisition financer's priority is determined by reference to basic principles of property law: *nemo dat quod non habet*. The only one of these transactions that contemplates direct third-party acquisition financing is the contract of leasing. In all the other cases, a lender seeking to benefit from the priority of an owner would have to take an assignment of the seller's or the lessor's rights, as the case may be. This differentiated regime also applies in the case of the vendor's hypothec: only true sellers (and by extension other former owners of assets sold under a contract translative of ownership – e.g. exchangers) may claim a vendor's hypothec, and the privileged priority position attaching to it.

> *2954* A movable hypothec acquired on the movable of another or on a future movable ranks from the time of its registration but after the vendor's hypothec, if any, created in the grantor's act of acquisition, provided it is published within 15 days after the sale.

As in the two cases previously noted -- scope and proceeds –, one can see obvious differences in legislative technique. It is true that there are substantive differences between the OPPSA and CCQ regimes, especially as concerns third-party lender acquisition financing, but these can be overcome simply by

modifying codal drafting. All that is required is an amendment to the codal rules on subrogation (Article 1656) providing that "Any creditor that advances money to a debtor for the purpose of enabling that debtor to acquire movable property, or rights as a lessee or beneficiary of a financial lessee, is subrogated into the rights of the seller, lessor or financial lessor upon proof that the money advanced was used to acquire the rights in question."

The signal distinction between the two drafting approaches is this. The OPPSA relies on the fiction that the seller (or any other prior owner) of property necessarily has no interest in the asset being sold other than the desire to obtain its price. This fiction enables the entire panoply of property rights and remedies elaborated over the past several centuries in order to protect a seller's or other owner's interests to be reduced to a simple economic calculation. And once this "reduction" is accomplished, it is easy to expand the fiction into a fully functional description of acquisition financing in which lenders and owners are treated as equals. Here, a third time, the OPPSA relies on a fiction that trumps existing property concepts in order to achieve a desired outcome. And yet, as sub-Section 33(3) of the OPPSA reveals, it is impossible to obliterate the concept of ownership: as between earlier lender acquisition financers and later seller acquisition financers (including not only owners in agreements translative of ownership, but also lessors), priority goes to the seller, presumably because ownership still counts for something.

It follows from the above that, while the regime of acquisition financing in the CCQ is drafted in a way that maintains conceptual distinctions between principal rights *in re* (habitually ownership) and accessory rights *in re* (habitually hypothecs and pledges), there is nothing in this conception of property rights or drafting style that prevents achieving substantively identical results to those generated by the OPPSA. In particular, there is nothing inherently uncivilian about attempting to provide approximately equal access to an acquisition financing priority for sellers, lessors and lenders, and preserving within the category of such financers a special priority for owners over lenders.

D. It's not what you say; it's how you say it

The above observations illustrate that there are no principles announced by the *Legislative Guide* that cannot be adapted for application to any common law system or any civil law system. While I have no direct expertise in Chinese, Islamic or manifold chthonic legal traditions,[17] I hold as an article of

17 For a careful elaboration of these diverse legal traditions, see H.P. GLENN, *Legal Traditions of the World: Sustainable Diversity in Law* (3rd ed.) (Oxford: Oxford University Press, 2007).

faith that should a State, the law of which is cognate to one or the other of these legal traditions, decide to adopt a modernized secured transactions regime, there are no principles of the *Guide* that could not be coherently expressed using the conceptual apparati of that tradition. For these States, as with European and Latin American civil law States, the issue is fundamentally one of legislative technique: how best to formulate the desired legal rule.

Implicit in the three comparisons drawn between the OPPSA and the CCQ is my belief that the success of legislative law reform is highly dependent on (1) how well the statute or Code in question reflects the conceptual structure of existing law, and (2) how closely the style of legislative drafting resembles the dominant style deployed in the jurisdiction in question. To make this point, I should like once again to use the scope provisions of the OPPSA, contrasting these with an alternative developed in the *Draft Civil Code of Quebec* (DCC) of 1978.[18] Recall the definition of "security interest" in Section 2 of the OPPSA:

> "*security interest*" means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation, (a) the interest of a transferee of an account or chattel paper, and (b) the interest of a lessor of goods under a lease for a term of more than one year;
>
> 2. Subject to subsection 4 (1), this Act applies to,
>
> (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
>
> (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and
>
> (ii) an assignment, lease or consignment that secures payment or performance of an obligation;
>
> (b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and
>
> (c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation.

Compare this statutory formulation with Articles 281-282 of the DCC of 1978.

> *281.* No person may assert a right to property in order to secure payment of an obligation, except by way of hypothec.

18 Civil Code Revision Office, *Report on the Québec Civil Code, Volume I : Draft Civil Code* (Quebec: Éditeur officiel, 1978), at 258.

> Any stipulation the effect of which is to preserve or confer a right to property in order to secure payment of obligation is a stipulation of hypothec.
>
> It may only preserve or confer a hypothec in favour of the creditor, subject to the formalities required for the constitution and publication of hypothecs.
>
> *282*. The preceding article applies regardless of the number, name or nature of any acts made, and notwithstanding the terms used.
>
> Thus, regardless of the conditions, any alienation or lease of property or any other agreement which comes under the preceding article entails transfer of ownership subject to a hypothec in favour of the creditor or, as the case may be, merely confers a hypothec upon him, and any option or obligation to purchase which it may entail is then without effect.

Does anyone doubt that a scope provision of a Model Law drafted in the latter form is more likely to achieve legislative uptake in a jurisdiction with a Civil Code than a provision drafted in the manner of Article 9 and the OPPSA? And does anyone doubt that, once enacted as part of a Civil Code, such a provision is more likely to be assimilated quickly into the everyday practice of law in such a State? *Q.E.D*.

V. – CONCLUSION

A number of general themes about the modernization of the law of security on property may be derived from the above discussion. I list them here summarily:

(1) A single, one-size-fits-all Model Law of Secured Transactions drafted from an ideal-type perspective is neither desirable nor feasible.

(2) Multiple regional model laws drafted from the lowest-common-denominator perspective are preferable.

(3) Even though drafted from an ideal-type perspective, because the UNCITRAL *Legislative Guide* is written as a Guide, it has an important role to play in helping regional groups and organizations produce first-rate lowest-common denominator model laws.

(4) Norm entrepreneurs in States reforming domestic legislation tend to like model laws in part because the title itself suggests a degree of finality and easy enactability that a document entitled Legislative Guide does not.

(5) All model laws, including Article 9 UCC in each of its iterations, are subject to tweaking by individual enacting States. No model law – whether ideal-type or lowest-common-denominator type – is ever enactable without modification, and of those directly enacted in an unmodified form, none has ever taken root.

(6) The resources required of UNCITRAL to produce even a single model law (let alone a more desirable brace of model laws) at this time would not be compensated by the additional impetus for legislative reform that would be gained from the effort.

This does not mean, however, that there is no further role for UNCITRAL in this domain. Here is one significant step that I believe Working Group VI could undertake in the shorter term to promote the *Legislative Guide*.

The Working Group should select a half dozen of the key recommendations and principles of the *Guide* to serve as methodological exemplifications. It should then produce two or three different drafting proposals illustrating mechanisms for achieving the policy objective set out in the recommendation as currently set out in the *Guide* (that is, without in any way reopening policy debate). My candidates for such texts would be these: (a) the scope recommendations; (b) the recommendations relating to proceeds; (c) the general recommendations about third party effectiveness and registration; (d) the general recommendation about priority; (e) the general recommendation about non-judicial enforcement; and (f) the general scope recommendation about what constitutes an acquisition financing transaction.

It would then be necessary to do a scouting of existing secured transactions regimes to identify the two or three representative "models" of drafting styles. The Working Group would then ask the Secretariat (assisted by an appropriately-selected Expert Group) to prepare draft provisions on each topic. The Secretariat would also prepare an explanatory text to indicate the rationale for the substantive drafting choices made, and an explanation of exactly how each of these different legislative models actually achieve the objective set out in the relevant recommendations of the *Legislative Guide*.

The outcome of such a project would be a document of about 250 pages combining a methodological and procedural Introduction, and about 120-150 additional pages (*i.e.* six sections of 20-25 pages) with alternative drafting models of the type illustrated in section III(D) above, addressing six key concepts and providing an explanation of their operation and interpretation.

* * *

I should now like to conclude by returning to the three senses of the noun-adjective "model" reproduced in the sub-title to the Essay that I copied from the Oxford English Dictionary.

A representation of structure: It would be a mistake to conceive a potential UNCITRAL model law as "Article 9 for dummies". The *Legislative Guide* is a richer, more elaborated and pedagogically sophisticated normative instrument. It needs no "model" in miniature.

An object of idealized imitation: It would also be a mistake to conceive a potential UNCITRAL model law as an unrealizable statement of moral perfection. Here again, the *Legislative Guide* serves to elaborate such an aspiration while nonetheless explicitly tempering the aspiration with the *realpolitik* of the world in which real States enact real laws. It needs no further Platonic pure form as orienting idea.

A type, template or design: Finally, it would also be a mistake to conceive a potential UNCITRAL model law as an archetype or a blueprint. No single model law could ever provide such a blueprint, and the *Legislative Guide* is already a carefully worked out statement of considerations that should inform the move by national States from recognition of the need for action towards the elaboration of their own context-specific domestic legislation.

In law reform, as in life, the perfect is the enemy of the good, and the quest for the perfect often undermines the good already accomplished. Let this not be the case with the UNCITRAL *Legislative Guide on Secured Transactions*.