TRENDS IN ASSET-SECURITY REFORMS: LEGAL TRANSPLANTS AND THE CONFLICT BETWEEN CIVIL LAW AND COMMON LAW SYSTEMS

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This paper looks at the legal position in Jersey with respect to the classification of property and the types of security generally available. It then looks at the specific position of security over tangible movables, which are expected to form part of the next wave of reforms to asset-security rules in Jersey. It then suggests some comparators for reform and useful models. It concludes with a brief discussion of the issue of legal transplants and the tension in law reform initiatives.

Introduction: property law in Jersey[1]

1 Property in Jersey, according to civilian law concepts, is divided into two basic types: immovable and movable. Immovable property includes land, buildings and leases with terms of more than nine years (which can only be created by contract passed before the court and which on registration become real rights). Security over this type of property, the most usual form of which is the hypothec under art 3 of the *Loi (1880) sur la Propriété Foncière*. A hypothec of ships is also possible under the provisions of the Merchant Shipping Act 1894 (United Kingdom, as applied in Jersey). Other types of property, including short leases, are classified as movables, but may be further subdivided into two types: tangible and intangible. Tangible property means, literally, something that can be touched. Tangible property would include everyday household objects and personal property, termed chattels in English law, including valuable items, such as cars, jewellery, paintings and antiques, furniture and other items (stamps, coins etc.) that could be the subject of security. Tangible property also includes items commonly used in business, such as computers, office furniture and machinery. Intangible property means, literally, items that cannot be touched, although there may be evidence on paper or in electronic form that witness their existence as species of rights. Intangible property includes shares, cash, bonds, debentures,

[1] This article is based on a paper given at a conference on "The Enforcement of Creditors' Rights in the Channel Islands: Issues in Asset Security and Insolvency" organised by the Institute of Law, Jersey on 13 October 2014.

performance and other rights under contracts, loans and other receivables, insurance policies and similar types of property. Curiously, it also includes short leases as well as *choses in action* which cannot be hypothecated under art 3 of the *Loi (1880) sur la Propriété Foncière*.

Security over tangible movables: the Jersey position

2 In Roman law, the two main types of security in tangible movables were the *pignus* and the *hypotheca*. Both forms of security could apply indifferently to movables or immovables. The essential difference between them was whether they gave possessory rights to the creditor, *hypotheca* being non-possessory in nature, while *pignus* involved delivery to the creditor as the representation of the guarantee under the security created.[2] In their transmission into the civil law, the hypothec became applicable uniquely to the situation of immovables, while the *pignus* (or *gage*) retained its application to both movables and immovables. In the French Civil Code, therefore, the *gage* has two varieties, the *nantissement*, applicable to movables, and the *antichrèse*, used in the case of immovables.

3 In property law matters, Jersey law absorbed parts of Roman law, including the law of servitudes, prescription and the definition of things deemed movable or immovable.[3] It was also later influenced by French law as well as the later codification which saw the law of property included within the Civil Code project that resulted in a definitive text of the law of persons, transactions and property in 1804. The French Civil Code largely retained its structure in respect of asset security till 2006 when radical reforms were introduced bringing in, *inter alia*, the concept of the *gage sans dépossession* (the pledge without dispossession [of the debtor]).[4]

4 In the way in which asset security was transmitted into Jersey law, there is a little ambiguity with respect to the hypothec. The hypothec is normally treated as an accessory right (*un droit accéssoire*), the primary right being the right to the debt (*droit au créance*) or the

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[2] See Zwalve, "A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods", Chapter 2 in Kieninger (ed), *Security Rights in Movable Property in European Private Law* (2004, CUP, Cambridge), at 40.

[3] See Nicolle, *The Origin and Development of Jersey Law* (5th ed) (2009, JGLR, St Helier) at [13.7].

[4] See Omar, "Updating the Framework for Asset Security in France: The Reforms of 2006" (2007) 2 *JCompL* 189. The section below on French law is a summary of the main points of this article.

performance of some other obligation (*l'acquittement d'une obligation*), as the rule is now in art 2393 of the Civil Code. In the event that the debt is not paid or the obligation remains unperformed, the creditor has the right accordingly to sell the property burdened by the hypothec so as to obtain satisfaction of the right to the debt or value of the performance, payment being made out of the proceeds of sale, any surplus being due to junior secured parties and/or the debtor, unless a foreclosure right was in operation, such as might exist in the case of a property that was subject to a *dégrèvement*. To assist the creditor to assert his right, the hypothec was deemed to give two particular sub-rights to the creditor: the *droit de préférence* (the right to be paid out of proceeds in the order of priority of the security) and the *droit de suite* (the right to follow the asset into the hands of third parties).

5 The *nantissement*, where the creditor obtains the property, would obviate the need for the *droit de suite*, although it could still exist in the rare instance that the creditor parted with possession so as to be able to trace it into third party hands. The customary law, however, only acknowledged the *droit de préférence* to exist in the case of the *hypothèque proprement dit* (simple hypothec or hypothec *simpliciter*), where the debtor retains the property, supposedly because of the application of the maxim: *meuble n'a point de suite par hypothèque* (a movable has no right to follow by hypothec). This principle has also been interpreted as meaning that movables cannot be hypothecated, although this reading may be suspect, the better view being that retention of possession is incompatible with the giving of a right of recourse over the property, such as by enabling the creditor to follow the property into the hands of a third party. This rule is now enshrined in art 2398 of the Civil Code.

6 The position with respect to the *droit de suite* is comforted by the commentators, both Jersey and French. Terrien states that, in the *vieux coûtumier*, if movables have been charged for the payment of debt and those movables are then sold to another, the creditor cannot follow the property into the hands of a third party in order to vindicate a claim in respect of the property that has been charged for that debt.[5] Terrien's repetition of and gloss on the civil law maxim: "*meuble n'a point de suite en Normandie . . . et est entendu que meuble n'a point de suite par hypothèque*" was accepted in *Re Lawrence*[6] (*per* Hammond, Bailiff), also following *Hayley v Bartlett*,[7] confirming that movables in

[5] Terrien, *Commentaires du Droit Civil etc* (c. 1574–1578).
[6] 1963 JJ 341 (*per* Hammond, Bailiff).
[7] (1861) 14 Moo PCC 251 (noted below).

Jersey cannot be hypothecated and cannot be used as the subject of a guarantee or security without delivery up of possession to the creditor. This, the court said, reflects the customary law position, in which the doctrine of apparent wealth provides that movables that have been secured should not remain in the possession of the debtor lest it give a false impression of the debtor's credit-worthiness and apparent availability of the assets for further security. In the case, certain goods were expressed to be subject to an agreement for sale in favour of a creditor, in substance a form of security for a loan. However, as the goods had not passed out of the possession of the debtor, the creditor could not claim that the goods should be excluded from *désastre* proceedings involving the company.

7 Pothier states that, in the custom of Normandy, movables are subject to hypothecs. However, his view was that a hypothec of movables was only an "imperfect hypothec" (*hypothèque imparfaite*), which lasted only so long as the movables were in the possession of the debtor. When movables were alienated out of the hands of the debtor and into the hands of third parties, the hypothecary right was extinguished.[8] Le Geyt concurs stating that the laws of France and Jersey are in agreement that the hypothecation of movables does not give the creditor any *droit de suite*. According to Le Geyt, an agreement to hypothecate is insufficient and there must be a taking of possession by the creditor.[9] Note that Pothier treats the *nantissement*, in which possession can be taken, as a subset of hypothec for these purposes.[10]

8 One of the reasons for the view that a *droit de suite* is lost unless a creditor takes possession is perhaps the application of another customary law maxim: *en fait de meubles, la possession vaut titre* (in the matter of movables, possession is worth title). This rule is now enshrined in art 2276 of the Civil Code, which also stipulates that a person losing the movable or from whom it has been stolen has three years from the loss/theft to reclaim (*revendiquer*) it from the person in whose hands it is found. Although the rule generally requires that the person taking property does so in good faith, the reason for treating possession as equivalent to ownership is said to be two-fold: (i) to assist the trade, in particular, in commercial goods, where it would be impractical and uneconomical to verify the chain of transfer of title and the rights of all respective title-holders; and (ii) as an evidentiary

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[8] Pothier, *Traité de l'Hypothèque* (1823–1825, Béchet ainé, Paris), Chapter 1, Section II, art 1.

[9] Le Geyt, *Constitution, Lois et Usages* (1846, Falle, St Helier), Volume 1, Ch. *Des Hypothèques*.

[10] Pothier, above note 8, art Préliminaire.

presumption in cases where evidence of title may have been lost (subject, of course, to proof being brought to the contrary).[11] In a situation in which neither the debtor nor the creditor had possession of the goods subject to a hypothec, then a third party would have the benefit of this maxim, leading necessarily to the loss of the *droit de suite*, unless bad faith could be proven.

9 In any event, the hypothecation of movables came to be doubted as possible in cases such as *Hayley v Bartlett*,[12] where the court was of the view that movables cannot be the subject of hypothecation and may not be sold or transferred by deed by way of guarantee in instances where actual delivery has not been made to the creditor. The court also relied on statements in other cases such as *Horlock v Nugent*,[13] where a simple agreement in writing for the transfer of movables, given by way of guarantee for a debt, could not constitute a preference in the creditor's favour where the goods remained in the debtor's possession and *Cook v Dodd*,[14] where a creditor who sought to establish a preferential claim was ousted of his pretensions in a situation where no delivery had been made of movables sold to him, nor had he been put in possession of the movables in any way.

10 Two reasons may be advanced for this change in position: (i) the influence of the codification process leading to the adoption of the French Civil Code, which swept away the variants in provincial customary law and in which the hypothec came to be restricted to immovables; and (as noted above) (ii) the advent of the customary law doctrine of apparent wealth, under which movables cannot be hypothecated (i.e. without transfer of possession) because to leave the goods in the hands of debtor would give a false view of the debtor's creditworthiness, possibly misleading others as to his standing with respect to property and ability to repay. This remains an issue with respect to forms of security where the debtor retains possession (e.g. the English floating charge or a pledge with constructive (but not actual) delivery or the French *gage sans dépossession*), if no other means of alerting third parties to the existence of security is available, such as a registration system.

11 In Jersey, the position was also rendered more certain by the passing of the *Loi (1880) sur la propriété foncière*, art 2 of which defines the hypothec as a real right attached to a *rente* or other claim, by virtue of which one or more parcels of immovable property (*biens-*

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[11] Terré and Simler, *Droit Civil: Les Biens* (2002, Dalloz, Paris), at [426].
[12] (1861) 14 Moo PCC 251.
[13] (1841) 154 Ex 342.
[14] (1856) 178 Ex 331.

fonds) is especially dedicated (*affecté*) to the repayment of those obligations. A hypothec confers on its holder a *droit de préférence*, a *droit de se porter tenant* (right to become a *tenant après décret/dégrèvement* in those procedures) and a *droit de suite*. Article 3 goes on to say that a hypothec may only be created in respect of immovable property (including incorporeal property regarded as immovable by virtue of the *Loi (1996) sur l'hypothèque des biens-fonds incorporels*). All other property, whether treated as movable or immovable by the law, can no longer be the subject of hypothecation and will not enjoy any *droit de suite* by hypothecation, whatever the stipulation may be to the contrary.

12 There are a limited number of exceptions: under art 4 of the 1880 Law, boats and sea-going ships (*navires et batiments de mer*) may still be hypothecated, such security (termed a ship's mortgage) now being given according to the provisions of Schedule 1 to the Shipping (Jersey) Law 2002, but only insofar as Jersey ships and shares in such ships (or ships and shares in ships with a British connection) are concerned. The position with respect to ships and shares in ships of other nationalities falls to be governed by customary law. Also, under art 15(2) of the Security Interests (Jersey) Law 2012, a security interest in the nature of a hypothec may be created over intangible movable property that is within the scope of the law.

13 Because of the convenience to the debtor of not having to give up possession of property that may be useful for business purposes, a reason that gave rise, in England and Wales, to both the pledge by constructive delivery and the (later) floating charge, debtors in Jersey have occasionally attempted to circumvent the prohibition on creating hypothec-like arrangements. Two devices were commonly used: (i) an agreement to transfer movables by way of guarantee for a debt, but without the concomitant transfer of possession, viewed by the courts as an ineffectual attempt at creating a "chattel mortgage": *Radio & Allied Industries Ltd v Gordon Bennett Wholesale (Jersey) Ltd*;[15] or (ii) a fictitious hire purchase agreement, by which a "sale" is effected to the lender, followed by an agreement under which the lender hires the goods back to the debtor coupled with an option to purchase the goods. In such cases, the goods never leave the hands of the borrower and the courts are quick to view such transactions as shams and as loans secured on movables without actual delivery up of possession: *Re Knights (Jersey) Ltd*[16] and *Re Chateau Plaisir*.[17]

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[15] (1959) 252 Ex 46.
[16] 1962 JJ 207.
[17] 1964 JJ 353.

Pledge over movables

14 As such, the only permissible device for the securing of movable assets is the pledge (or *gage*) with possession handed to the creditor. The device of effecting constructive delivery, seen in English law,[18] is apparently unavailable in Jersey, perhaps also because of the effect of the doctrine of apparent wealth (see above).

15 Because constructive delivery was not apparently developed in the case of tangible movables and also because of the limitation in the civil/customary law concept of security (being normally seen as fixed security in relation to identified assets), the natural extension of floating charge security to collections of assets, retained in the hands of the debtor, but subject to a charge that "crystallises" in the event of default, did not occur in Jersey and any such security, purporting to extend to Jersey assets, cannot be recognised: *Re Nield*.[19] Nonetheless, Jersey debtors are able to enter into foreign security, including floating charge-type security, as provided for in art 13 of the Security Interests (Jersey) Law 2012, although the effectiveness of such security is normally limited to foreign collateral.

16 Partial regulation of the conditions under which pledges can be taken exists by virtue of the *Loi (1884) sur le prêt sur gages*, which regulates pawn-broking in Jersey. A licence is required for such activities. All goods, excepting such as may bear a Crown hallmark or stamp, may be pawned, and, if not redeemed within a year, sold at public auction (if above a certain value). Goods may also not be accepted from minors, those under the influence of alcohol, who have no proof of ownership or who refuse to give their names and addresses for the record. A report must be made to the public authorities if goods are suspected to have been stolen.

Liens

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[18] There are six ways in which this may occur: (i) delivery of a document of title to the creditor; (ii) delivery of part of the goods as representative of the whole; (iii) delivery of the means of control (e.g. keys to a warehouse); (iv) attornment (the representation that the debtor now holds for the creditor); (v) the creditor formerly holding in one capacity (e.g. bailee) now holds as creditor; and (for sales of goods only); and (vi) delivery to a common carrier (under s 32(1), Sale of Goods Act 1979 (United Kingdom)). The delivery rule under (vi) is the same in Jersey: art 61, Supply of Goods and Services (Jersey) Law 2009.

[19] 1990 JLR *N*–18a.

17 The mention in art 8 of the Security Interests (Jersey) Law 2012 ("2012 Law") of the exclusion of a lien or other encumbrance or interest in movable property, created by any other enactment or by the operation of any rule of law (a general customary law or statutory lien), means that liens are recognised to exist over movables. A specific statutory lien exists in the case of intangible movables, such as shares, in favour of a company owed money in respect of those shares (a company law lien) and is similarly excluded from the ambit of the 2012 Law.[20] Examples of liens include possessory liens (e.g. the rights of persons who have performed work or supplied services to hold goods pending payment), maritime liens (such as for damage to persons or cargo, under art 124 of the Shipping (Jersey) Law 2002, or in respect of salvage, for which see Schedule 7 to the same) and certain statutory liens (e.g. art 69 of the Supply of Goods and Services (Jersey) Law 2009 giving the unpaid seller certain rights in relation to goods).

Other forms of security

18 Various creditors' rights, such as landlord's privileges (*droit de gage, droit de préférence, droit de suite, recours contre tiers* and *assurance*) and general creditors' rights (*droit de gage judiciaire, ordre provisoire, ordre de justice* and execution upon a judgment debt) also exist by way of security in defined circumstances.

Quasi-security

19 Sundry rights exist by virtue of which creditors may obtain rights against the debtor that have effect like asset security arrangements. There are two types: (i) retention (or reservation) of title clauses (applicable usually to movable goods); and (ii) set-off or netting arrangements (applying to mutual debts and dealings in the form of intangible movables).

20 Retention of title (ROT) clauses (also known as *Romalpa* clauses[21]) function in contractual arrangements for the sale or supply of (usually movable) goods where title is retained until full payment is made for the goods. The idea is that the supervening insolvency of the buyer will not affect the exercise of the seller's title and offers the

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[20] Article 7 of the Schedule to the Companies (Standard Table) Order 1992 provides a company with a lien over any moneys payable on a share (other than one that is fully paid) as well as the share itself unless the directors exempt it (whether partly or wholly).

[21] After the case of *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552 (England and Wales).

potential for the recovery of the goods unless the insolvency office-holder is prepared to tender the price to keep the goods. Practice in Europe differs as to the effect of such clauses, with the courts in England and Wales only prepared to recognise the effect of ROT clauses in the case of goods that are still *in specie* or that may be removed from composite goods without great cost or damage, while German and Dutch courts are prepared to recognise the effect of complex ROT clauses that extend title to composite goods and enable tracing of goods and/or proceeds into the hands of third parties.

21 Set off (*compensation de créances*) or netting arrangements apply to debts (intangible movables) owed concurrently by a number of parties to each other. In customary law, a creditor (such as a bank) enjoys a right to set off any mutual indebtedness *vis-à-vis* a debtor and thus allowing itself to merge all accounts held by the debtor with it so as to achieve that set off. In Jersey, the position in bankruptcy is regulated by the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005, which allows set off and netting arrangements to have effect notwithstanding the insolvency of one of the parties.

Setting the agenda for reform

22 In the run up to the enactment of the Security Interests (Jersey) Law 2012, the Explanatory Note accompanying the Draft Law lodged on 31 May 2011 explained that the law's purpose was to provide for a unified concept of security interest to accommodate security, not only by the methods known under the 1983 Law (security by possession and title transfer), but also the hypothec (or charge). This was so because the intention is to continue the *volet* of reforms in this area by introducing further rules covering other forms of property, including tangible movables such as motor vehicles, plant machinery and high value movable items, which is envisaged by the Jersey Financial Services Commission ("JFSC") as being particularly beneficial to stimulating lending in the local community as well as benefitting the financial services industry. At present, it appears that the intention for these future reforms is to use the text of the 2012 Law as the template on which grafting of further provisions will take place. This will necessarily limit the extent to which the provisions may depart in substance from the structure currently contained in that text with application to intangible movables. Nonetheless, it may be instructive to consider what influences on that scope could come from considering the genesis of the rules in Jersey within the civil law and examples that two jurisdictions, France and Mauritius, could supply.

Comparators and useful models

France

23 In France, asset security rules were incorporated alongside contract law and property rules in the Civil Code of 1804, although the roots of the asset security model are similar to those in Jersey. This codification created the framework which has largely governed the creation of security interests in the two intervening centuries until the major reforms that took place in 2006. In the classical French system, as codified, there were two varieties of security used by creditors to preserve their interests over particular assets belonging to their debtor and which are still commonly found as a means of assisting business lending. As noted above, these are the *hypothèque*, commonly found in cases of specific protection of real property interests and the *gage*, which applies to all varieties of property, with its two subsets: the *nantissement* and the *antichrèse*.

24 The difficulties with these traditional security devices related, in the case of the *hypothèque*, to the limitation to real property already in existence and, in the case of the *gage*, to the need to specify the particular assets to which the charge related and the unavailability of a non-possessory variety. Given the absence of a generic charge which could relate to the totality of assets, arguably French business was considerably hampered in its ability to raise finance adequately, although Zwalve has suggested that the availability of personal guarantees was more important in the context of financing sole traders and partnerships, the pressure for non-possessory security interests in fact not arising until after the advent of the "modern business corporation".[22] Partly remedying this, an early law provided a partial solution to the problem by allowing the grant of a charge over the goodwill of the business.[23]

25 However, the definition of goodwill outlined in the law was limited to the company name and trademark, furniture and machinery, client lists and any intellectual property rights, including copyright, industrial designs and patents, associated with the business.[24] Other non-possessory charges were also available for an eclectic list of assets, the result of individual laws addressing the financing needs of particular business sectors, including for automobiles, agricultural equipment and crops (including wine), goods for the hospitality and

[22] Zwalve, above note 2, at 48.
[23] *Fonds de commerce*.
[24] Article 9, Law of 17 March 1909. Zwalve, above note 2, at 48 suggests that the transfer or pledging of bills of lading in the Netherlands served as inspiration for the development of non-possessory security interests in France.

hotel industry, industrial equipment, warehoused goods, industrial raw materials and products, petroleum products, films and software exploitation rights.[25] Furthermore, charges over shareholdings (share accounts and fractional ownership interests)[26] were also introduced in a law in 1983, which permitted a streamlined procedure for the recording of charges on a register in relation to share accounts, but did not alter the requirements for notification of charges to the company as far as fractional ownership interests were concerned, leading to the retention of a cumbersome and costly process for companies generally. Professor Kieninger has suggested that the use of legislation in this area overall has hindered the development of a general non-possessory security interest in practice, as evidenced by case law denying the effect of such interests.[27]

26 A number of means were used over the years to address the deficiencies in the availability of security, notably through the use of the technique known in French as "debt-mobilisation".[28] This refers to the use of debts, to which the company is or becomes entitled, as a species of security against other loans granted usually by financial institutions. The use of a legal charge backed by a debt has already been mentioned. Other techniques were also developed. Thus there were the examples of the use of bills of exchange guaranteeing payment at a fixed date as consideration for loans, the use of rediscounting by banks, the issue of bills by banks backed by debt and assignment of debt.[29] In this last example, although the transfer of receivables to a third party was permitted, it was limited to instances where the debt was itself guaranteed by a hypothec or charge created over immovables. In addition, there was a complicated procedure which involved using the services of a notary public and the execution of deeds. As a species of financing, with the costs frequently outweighing any advantage, it rapidly lost popularity.

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[25] See Drobnig, "Secured Credit in International Insolvency Proceedings" (1998) 33 *Texas Intl LJ* 53 at 58; Kieninger, "Securities in Movable Property in the Common Market" (1996) 4 *ERPL* 41.

[26] Share accounts exist in *sociétés anonymes* and *sociétés par actions*, while fractional ownership interests exist in the case of *sociétés à responsabilité limitée*.

[27] Kieninger, above note 25, at 44–45.

[28] *Mobilisation des créances*.

[29] Decree-Law of 25 August 1937, Title III of Ordinance no. 67–838 of 28 September 1967, Law no. 69–1263 of 31 December 1969 and Law no. 76–519 of 15 June 1976.

27 Arguably, the needs of business were not really served until the early 1980s, when concerted lobbying by financial institutions and businesses alike inspired the Government to produce a law, sponsored by Senator Dailly and which ever since has been referred to by his name.[30] The law stated as its purpose the facilitating of credit to business and contained in 16 relatively succinct articles a framework that has astonished commentators by the remarkable success it has experienced in the French business context. In brief, the law allowed any financial institutions to have made in their favour and delivered a document of title[31] which would entitle the institution to any debt owed by a third party to the debtor. Debts which were certain in amount and due, even if at a later date, could be assigned. Debts owed under an executed deed could also be transferred even if amounts were yet to be determined. The document of title had to include certain details prescribed by law. These were to permit the identification of the parties and the debts to which the document related, for example by incorporation of references to invoices, bills or other documents, as well as details of the due date and amounts. These elements were to be provided in writing, including by means of electronic technology. Failure to include these details was strictly sanctioned as the law rendered any purported transfers void and ineffective. Transfer of the debt made this the property of the creditor institution. In addition, unless stated otherwise in the contract, the signatory to the transfer became automatically a guarantor for the amount due. Further endorsements or transfers could be operated, but only for the benefit of other credit institutions.

28 Once the document was signed, it bound the parties and was effective as against third parties.[32] The original debtor could not modify any rights attached to the debt the subject of the transfer. With the transfer, any security or guarantee attached to it was automatically transferred for the benefit of the financial institution. The creditor institution had the right to prevent the third party from paying into the hands of the original debtor, provided that notice of the transfer had been given in the prescribed form. Once this was done, payment could only be made to the creditor and the third party was not deemed to

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[30] *Loi Dailly* (Law no. 81–1 of 2 January 1981), as amended by Law no. 84–46 of 24 January 1984 and later incorporated in the Monetary and Financial Code.

[31] *Bordereau*.

[32] *Opposabilité* is a feature of French law that subjects validity as regards third parties to, usually, some form of notice or registration. Failure to comply does not necessarily affect the parties' rights under the contract, but may hinder their enforcement against assets in the hands of third parties.

have discharged his debt unless he did so. The third party could acknowledge the transfer and sign a deed accepting the assignment. However, he lost any rights which could have been exercised against the debtor personally, unless he could bring proof that the creditor institution had acted deliberately in a way contrary to the third party's interests. One last point of note about the law was that it permitted creditors to issue instruments on the back of receivables designed to allow the assignment of a part of the eventual proceeds. This technique allowed for wider participation in the financing operation and spread the risk attendant by regenerating cash flow for the credit institution. Assignments under this law were very commonly found and the use of the technique was widespread, subject to the limitations inherent in its structure.

29 Despite the advances made by the introduction of the *Loi Dailly*, it remains noteworthy that, prior to the recent changes, the French system for asset security prompted Professor Wood, when creating a jurisdictional classification on the basis of perceived hostility or sympathy to security, to place France at the most hostile end of the scale, together with Austria and Italy.[33] This view has been echoed by others, such as Professor Drobnig, who also lists France last in his analysis of creditor-friendly countries.[34] It is thus not surprising that the antiquity of the system for asset security in France prompted a number of calls for serious consideration of reforms. However, it was not until the occasion of the bicentenary of the Civil Code that a fresh impetus was given to this process. Speaking to a colloquium organised in 2004 as part of the bicentenary celebrations, the then President Jacques Chirac noted that the *Garde des Sceaux* had already taken the initiative to set up a working group of academics and practitioners in September 2003 to discuss reforms to asset security, chaired by Professor Michel Grimaldi of *Université Panthéon Assas* (*Paris II*).

30 The Grimaldi Working Group presented its final report on 31 March 2005 to Dominique Perben.[35] The report predicated the basis for legislative reform of the framework on the introduction of a new Book IV in the Civil Code specifically addressing security issues and

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[33] See Wood, *Comparative Law of Security and Guarantees* (1995, Sweet and Maxwell, London) at paras 1–7.

[34] Drobnig, above note 25, at 55.

[35] Two other commissions, conducted by the Inspectorate-General of Finances (with the assistance of the General Council of Bridges and Roads and the Inspectorate-General of Judicial Services) respectively examined the issues of reverse mortgages/equity release plans and general mortgage-based credit, reporting in June and November 2004.

regrouping provisions currently spread across different parts of the Civil Code. The reforms would also repatriate asset security rules contained in texts such as the Monetary and Financial Code and other asset-specific regimes, for example that dealing with security over vehicles.[36] This would be in order to make the Civil Code framework coherent and accessible to potential debtors and creditors alike. The overall framework would be modernised with key definitions being supplied as well as by the introduction of new types of security developed through practice. The articulation of security law with insolvency law would also be strengthened by a specific article applying security rules to the situation of insolvent debtors unless expressly excluded by provisions of texts dealing with insolvency, currently contained in Book VI of the Commercial Code.

31 With the completion of the reforms in mind, the Government decided to include a clause authorising enactment by ordinance within a draft law titled "trust and modernisation in the economy" that was presented to the National Assembly shortly after the production of the report.[37] This text was an omnibus piece of legislation, containing proposals to improve the legal environment for business, enhance available financial tools (hence the need to reform security devices), boost investor confidence as well as allow for financial growth through ameliorating savings potential. Article 6 of the text was widely drafted in order to permit the Government: (i) to reform the rules relating to guarantees, charges, privileges (priority interests) and hypothecs with view to greater flexibility and efficiency as well as ease of creation; (ii) to modify other provisions dealing with assignment, subrogation and novation of contracts; (iii) to bring within the text of the Civil Code the rules relating to retention of title clauses; (iv) to introduce into the same text existing models in practice covering the use of letters of intention and comfort as well as autonomous guarantees; (v) to reform the rules on forcible expropriation and enforcement orders; and, finally, (vi) to carry out consequent reforms to other texts necessary in light of the main reform proposals. Nine months would be given for the relevant ordinances to appear with only the consequent amendments of other texts being subject to a 12-month maximum, ratification laws for each ordinance being laid before Parliament three months after the appearance of the texts.

32 This ambitious menu appeared to go well beyond the possible scope of legislation by ordinance, which, under the French Constitution is strictly controlled. This led the report on the proposals,

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[36] Decree no. 53–968 of 30 September 1953.
[37] National Assembly Draft Law no. 2249, dated 13 April 2005.

despite overall support for the nature of the reforms, to recommend greater detail in the drafting so as to place precise limits on the Government's ability to legislate.[38] The effect of the changes to the text, supported by the corresponding Senate report,[39] can be seen in the final version of the text.[40] The first five of the six operative paragraphs of the article are qualified in the following way: para (ii) completely disappears, on grounds that its subject matter was not dealt with by the Grimaldi Report and that separate proposals needed to be produced, while in order perhaps not to disturb the numbering, para (i) is divided into two sections with its content considerably limited to, on the one hand, introducing a charge over business stock,[41] simplifying the constitution of security over movables and permitting charges over movables without dispossession (*gage sans dépossession*) and, on the other hand, improving the functioning of charges over immovables (*antichrèse*) and developing mortgage-based credit instruments, the two being mentioned being the tack-on mortgage (*hypothèque rechargeable*) and the American-inspired reverse mortgage (*prêt viager hypothéquaire*). Furthermore, para (iii) explicitly subjects the inclusion of retention of title rules to codification under the *droit constant* principle, while para (iv) is circumscribed by definitions being provided for the devices being integrated. Finally, para (v) is limited by the purpose of the reforms being stated so as to produce a better distribution of the product of sale under judicial supervision and to promote disposals of assets by agreement (*vente amiable*).

33 With the enabling text in place, the Garde des Sceaux was able to state in the closing address to a conference in late 2005 that the reforms to asset security rules (as well as other reforms in the fields of rules on raising equity, electronic contracts and signatures, insolvency law, arbitration as well as proposed changes to contract law and the rules on prescription) all formed part of an overall ambition to modernise the French legal model and to promote its use at the international level.[42] Finally, in conjunction with the Minister for the Economy, then Thierry Breton, the *Garde des Sceaux* presented the final outline of reforms in the shape of a draft ordinance to the Council of Ministers on 22 March 2006, which was enacted the following

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[38] National Assembly Report no. 2342, dated 25 May 2005.

[39] Senate Report no. 438, dated 29 June 2005.

[40] Article 24, Law no. 2005–842 of 26 July 2005 ("Law of 2005").

[41] This particular charge being expressly required by Parliament to be enacted in the Commercial Code.

[42] Closing address on 16 November 2006 to a conference titled "*Paris: Place de droit*".

day.[43] However, there were differences between the Grimaldi proposals and those contained in the final draft.

34 The first major difference between the various proposal stages is how the reforms are organised. Although the Government accepted the recommendation for a new Book IV, which allows for the improved display and location of asset security provisions covered by some 205 articles, the suggestion that other security devices would be repatriated was not followed in its entirety, despite the provisions on security over vehicles being integrated in the section dealing with charges.[44] In fact, the provisions of the *Loi Dailly* and charges over financial instruments remain in the Monetary and Financial Code, while many of the other sector-specific devices remain untouched. Furthermore, the intention that the Civil Code should provide for complete coverage of asset security is denied effect by some of the innovations that were recommended being placed, as will be seen below, by the Ordinance of 2006 within other texts, such as the Commercial Code or the Consumers' Code. In addition, leaving the range of devices potentially incomplete, the scope of the Grimaldi Working Group was limited at the outset by removing the question of fiduciary transfers (*fiducie-sûreté*) from its remit, given that the Government was intent on setting up a separate Working Group to consider trust (*fiducie*) matters generally.[45] Finally, and of major concern, the apparent lack of co-ordination between the work in parallel of the Grimaldi Working Group and the then projected reforms of insolvency law, given the close connexion, seems inexplicable.[46] The Ordinance of 2006 in fact introduces a provision stating that asset security rules do not prevent the application of insolvency rules in the context of such proceedings.[47] This provision falls within an opening section repeating pre-existing rules on the notion of security as obligation as well as the

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[43] Ordinance no. 2006–346 of 23 March 2006 ("Ordinance of 2006").

[44] These are the subject of specific mention in arts 2351–2353, Civil Code (references in this section to articles are to the post-Ordinance of 2006 numbering and/or rewording).

[45] See Ancel, "Recent Reform in France: the Renaissance of a Civilian Collateral Regime", paper delivered at EBRD-World Bank Conference on Collateral Reform and Access to Credit (9 June 2006) at 5–6.

[46] See Le Corre, "Les incidences de la réforme du droit des sûretés sur les créanciers confrontés aux procédures collectives", *JCP La Semaine Juridique, Ed. E*, 2007 *no. 1185* 24, at 24; Ancel, above note 45, at 5.

[47] Article 2287, Civil Code. The Grimaldi Working Group would have created the presumption that asset security rules would apply unless the insolvency law had rebutted this expressly.

pari passu principle,[48] which are also joined by a new article incorporating express mention of the conditions under which retention of goods or title is available as a security right.[49]

35 Overall, the assessment of the impact of the Grimaldi Report is that greater attention in the reforms has been paid to security *in rem*, though there are still discrepancies between the recommendations and the contents of the Ordinance of 2006. The Grimaldi Report recommended that the definitions of the various types of security available should be set out subject to an overarching requirement that they be interpreted strictly by the courts. Furthermore, the priorities between security types would be clarified, particularly with respect to the ranking of items within the categories of general priority interests (*privilèges généraux*), super-priority interests (*privilèges spéciaux*) and the articulation between the various categories of priority interests and security over movables or immovables, all of which have now seen enactment.[50]

36 In relation to the charge, there was an important recommendation which would see a re-definition of terminology, under which the *gage* is no longer a subset of the *nantissement* and used for movables alone. The term *gage* will now be used for the charge over tangible movables, while the term *nantissement* is reserved for a charge over intangible movables.[51] The provisions governing the *antichrèse* move unchanged in substance to the section dealing with security over immovables. This represents a new shift in the cleavage between the institutions when compared with both the Roman Law and pre-2006 Civil Code positions. The Grimaldi Report also recommended that the general regime for charges over movables be reformed by permitting the constitution of security over future assets and over collections of assets, similar in concept to the floating charge, and which would allow the debtor to substitute assets where, the example being given in the report itself, the charge is created over renewable business stock.[52] Furthermore, the Grimaldi Report recommended the charge also be extended to include the situation where the debtor does not dispossess

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[48] *Ibid*, new arts 2284–2285 (formerly arts 2092–2093).

[49] Complying with para (iii) of art 24, Law of 2005. The language of the article is in slightly different terms from that set out in the report. See also arts 2367–2372, Civil Code.

[50] Articles 2330–2333, Civil Code.

[51] *Ibid*, arts 2333 and 2355 respectively.

[52] This is taken into account in the articles noted immediately above which incorporate the same definition, stating that the security may be taken out over: "a movable good or collection of movable goods, present or future".

himself of the property secured, making it a more flexible instrument. The inspiration for this move is attributed partly to art 9 of the American Uniform Commercial Code and partly to a similar development in Québec called the *hypothèque mobilière* (hypothec on movables). The result of the creation of this security instrument is to enable the same good to be charged to a number of creditors, although new rules will subject this type of legal charge to the requirements of writing and publicity so as to put third parties on notice and a registration system similar to that in force in Québec is envisaged.[53] However, the Grimaldi Report suggested the maintenance of the existing prohibition on accelerated loan recovery procedures (*clause de voie parée*), but would remove that on the forfeiture clause (*pacte commissoire*), subject to the production of an expert valuation.[54] The forfeiture clause is, however, unavailable where the contract involves consumer lending.[55]

37 Although accepting the above proposals, in relation to charges of the non-dispossession variety, the Ordinance of 2006 does go further than the Grimaldi Report, which only considered business stock as an example of a collection of assets capable of being subject to a charge, in creating within the Commercial Code a special *gage sans dépossession* to apply solely to business stock and which may only be used to guarantee lending to businesses by authorised credit institutions.[56] The Grimaldi Report also recommended that the framework for charges over debts should be updated and an extension to cover physical money in dedicated bank accounts introduced. Similarly, charges over financial instruments would be included for the first time in the Civil Code and would also be modernised by defining when the charge becomes effective to put third parties on notice. The first of these suggestions has seen enactment through the Ordinance of 2006,[57] while the latter proposal in relation to financial instruments remains governed by the provisions of the Monetary and Financial Code. The location of security devices in texts outside the Civil Code adds to the fragmentation noted earlier.

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[53] Articles 2336–2337, Civil Code now impose the formality requirements.

[54] *Ibid*, arts 2348 and 2365. See Le Corre, above note 46, at 27, who suggests this rule may come into conflict with the insolvency prohibition on the payment (except by way of authorised distribution) of pre-commencement debts. Nonetheless, this exception has a certain vintage, being analogous to the *pactum Marcianum* authorised in Justinian's Digest (D.20.1.16.9).

[55] Article 37, Ordinance of 2006, inserting a new para into art L 311–32, Consumers' Code.

[56] *Ibid*, art 44, creating new arts L 527–1 – 527–11, Commercial Code.

[57] Articles 2355–2366, Civil Code.

38 Nonetheless, the situation of security *in rem* in relation to immovables is also improved. The Grimaldi Report recommended the enactment in statutory form of recent French practice, accepted by the courts, of the *antichrèse-bail* (lease-charge), where the creditor is able, while enjoying the fruits of the property, to grant occupation rights to a third party or the debtor himself.[58] Furthermore, recommendations would enhance hypothec rules in a number of ways, including by replacing the super-priorities enjoyed by vendors with statutory hypothecs and permitting the creation of hypothecs as security to cover future lending subject to some evidential restrictions. The first set of proposals was not within the scope of the authorisation provided by the Law of 2005 and thus failed to make it into law. However, hypothecs covering future lending are now permitted.[59] What may be difficult for a common-law observer to understand is that hypothecs of future interests are heavily circumscribed in their use even after the "enlargement of [their] field of application" in the Ordinance of 2006.[60] Other improvements, however, do assist, including the extension of the maximum period of registration of the security interest to 50 years,[61] simplification of the rules for removing the registration notice and,[62] as also recommended in the Grimaldi Report, the statutory definition of subrogation and concession of priority.[63] Of interest to creditors, the prohibition on the forfeiture clause has also been lifted for immovables, the exception being in the case of property constituting the debtor's principal home.[64]

39 The interest of reforms to *in rem* security, in particular, is the introduction of new security devices. In light of the commissions conducted by the Inspectorate-General of Finances, the Grimaldi Working Group considered proposals to introduce new hypothec types, the first being the tack-on mortgage (*hypothèque rechargeable*),[65] which would avoid fresh security for further lending

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[58] *Ibid*, art 2390.
[59] *Ibid*, art 2422.
[60] *Ibid*, arts 2419–2420. See Simler, "La réforme du droit des sûretés", *JCP La Semaine Juridique*, Ed. E, 2006 no. 1559 662, at 665.
[61] *Ibid*, art 2434.
[62] *Ibid*, art 2441.
[63] *Ibid*, art 2424.
[64] *Ibid*, art 2459.
[65] Le Corre, above note 46, at 27 is of the view that tacking might possibly infringe the transactional avoidance rules if the tacking occurred during the nullity period (*période suspecte*).

becoming necessary and enhance the priority status of lenders.[66] Interestingly, the tack-on mortgage would be able to benefit lending from other creditors, who would enjoy parity of priority. The use of the tack-on mortgage would be subject to the use of a clause in the mortgage deed specifically authorising security for future loans and itself the subject of publicity requirements, while it would also be necessary for a fresh contract to be used for any later advances and for this to be also subject to certain measures of publicity. A further hypothec type was the American-inspired reverse mortgage (*prêt viager hypothéquaire*), a type of equity release plan, to cover lending with recovery being delayed till the mortgagor's death or sale of the property. Although the Working Group was a little sceptical about such plans, given the risk for over-indebtedness affecting debtors of advanced age and leaving little by way of inheritance,[67] the Government was keen for their introduction to raise the rate of home-ownership for the young by facilitating access to hypothecs, to develop consumer credit and consequent economic growth through consumer spending and to resolve the financial difficulties of the elderly.[68]

40 As a result, both of these devices are now part of the arsenal of security instruments available for financing needs. However, the location of the reforms leaves something to be desired, since references to the tack-on mortgage appears three times, in the Civil Code, where it is authorised,[69] in the Consumers' Code, where its use is subject to certain rules in the case of consumer lending,[70] and in the Commercial Code, where lending to individuals exercising professional activities is covered by the rules of the Consumers' Code, where the property secured is a principal residence.[71] The reverse mortgage, on the other hand, appears once, but in the Consumers' Code.[72] Nonetheless, in the wake of the security reforms, certain steps have been taken to make the use of the devices created more attractive.

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[66] There is, however, the issue of the disproportionate guarantee formed by such a hypothec if it were constituted for a sum in excess of the original loan amount precisely in order to permit the tacking of future advances.

[67] The seriousness with which the French take the issue of inheritance may be seen in the institution of the heirs' portion, limiting the freedom of testators to devise a specified proportion of personal assets.

[68] Speech by Thierry Breton on the Reform of Asset Security Law (22 March 2006).

[69] Article 2422, Civil Code.

[70] Article 40, Ordinance of 2006, creating arts L 313–14 – 313–14–2, Consumers' Code.

[71] *Ibid*, art 43, creating art L 526–5, Commercial Code.

[72] *Ibid*, art 41, creating arts L 314–1 – 314–20, Consumers' Code.

These include reducing notarial fees for the creation of security instruments,[73] reducing registration fees for hypothecs,[74] defining the maximum rate of interest for reverse mortgages,[75] permitting tax exemptions for registration fees in connection with changes to mortgage deeds[76] and, finally, defining the calculation for repayments of reverse mortgages.[77] Interestingly, evidence emerged early on to suggest that, as early as October 2006, the tack-on mortgage was being offered by financial institutions, while the reverse mortgage came into use in Spring 2007 once lenders had worked out how to operate them effectively.[78]

41 In the final analysis, the recommendations made in the Grimaldi Report covered many major points that served to update the framework for security interests in France. It is notable that part of the underlying reason for the proposals was the desire to enhance the attractiveness of French law through modernisation. The recommendations, although only partially enacted, were designed to succeed by making security interests easier to constitute and operate in France, but did not appear to go as far as to adopt the very wide flexibility of their counterparts in other systems. In fact, although the influence of the Anglo-American system can be felt and, indeed, was acknowledged in the Grimaldi Report a number of times (the art 9-framework influence on the general charge and the American antecedents for the tack-on and reverse mortgages), what resulted as reforms owe more to an intrinsically French methodology for reform. This is what Ancel called a "renaissance" that is able to rely on its "civilian heritage", all the while constructing a "more efficient and credit-oriented secured transactions law".[79] Nonetheless, the Grimaldi Report recognised the necessity to accord to creditors the right forms of security in order to assist in the financing needs of the debtor. Furthermore, the underlying assumption behind a number of the new security devices, particularly the tack-on and reverse mortgages, is that they will allow debtors to liberate capital in order to facilitate spending, which in turn might stimulate growth.

42 Nonetheless, early views on the reforms revealed that opinion was divided among commentators as to the overall utility of the reforms

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[73] Decree no. 2006–558 of 16 May 2006.
[74] Decree no. 2006–729 of 22 June 2006.
[75] *Arrêté* of 24 August 2006.
[76] Law no. 2006–1666 of 21 December 2006 (Finance Law of 2007).
[77] Decree no. 2006–1540 of 6 December 2006.
[78] Ministry of Finance Press Statement (8 December 2006).
[79] Ancel, above note 45, at 3.

undertaken. Simler suggested that, with the exception of the few innovative devices introduced into French law, the project had nothing of the "revolutionary" about it, since the reforms took place within the closely guarded limits authorised by the Law of 2005 and failed to address the substantive content of the existing security framework.[80] Ancel suggested the tidying up process and creation of a special place within the Civil Code served to "clearly [display]" the devices for domestic and foreign users, but failed to address the underlying complexity of the security regime.[81] Nonetheless, of interest potentially to Jersey, Ancel felt able to suggest that the reforms could be used as examples by other jurisdictions that were members of the French legal family and that any "shortcomings" in the text were explicable by reference not to any defect in the civilian legal tradition, but to the political imperatives that underlay the text.[82]

Mauritius

43 Like Jersey, Mauritius is a member of the mixed legal family with a legal system that contains elements of both the civil and common law. The original substantive law is French inspired and derived, thus the great codifications that have been applied in Mauritius, including the Civil Code, the Civil Procedural Code, the Criminal Code and the Commercial Code. Although changes to these Codes have been inspired by local developments as well as by reference to developments in France, more modern legislation in the commercial law field (broadly defined) since the Victorian period has been inspired by developments in the United Kingdom, including in areas such as company law, intellectual property as well as banking and finance law etc. The position in this regard is not significantly different from the history of other members of the Commonwealth where commercial laws are remarkably similar because of their common origin. Recent work in this field, the reforms of insolvency law in 2009, has been inspired by the position in a number of Commonwealth countries, including the United Kingdom, Australia and New Zealand.

44 In respect of security interests and secured transactions, however, the position is a little more complex and will depend on a number of factors: the nature of the asset itself and the property classification within which it falls as well as the status of the parties to the transaction. It may also depend on when the secured transaction was introduced into Mauritian law as to the legal system that inspired the

[80] Simler, above note 60, at 665–666.
[81] Ancel, above note 45, at 4.
[82] *Ibid*, at 3.

particular security right. Given that the underlying system for the classification of property is civil law inspired, it is unsurprising that many of the rules governing security over property are contained in the Civil Code of 1808 (*Code Civil Mauricien*). As such, the spirit of the security system functions, akin to in many other civil countries, on the basis of a *numerus clausus* (closed number) model where security types match the underlying classification of property into immovables or movables.

45 In the Civil Code therefore, there are the general rules familiar to civil lawyers and that are contained in Title XVII. These make available the *nantissement* (charge/pledge) over movable and immovable property.[83] The pledge over movables (*gage*) is of both possessory and non-possessory (*sans déplacement*) types.[84] Specific rules are provided in relation to *gages sans déplacement* to govern particular assets, such as motor vehicles,[85] professional, industrial and agricultural equipment[86] as well as a special *gage* over shares that may only be created in favour of banking institutions.[87] The pledge over immovables (*antichrèse*) may also be created.[88] In Title XVII that follows, there are rules on preferential rights for creditors (*privilèges*),[89] which may be created over movables,[90] particular types of movables, including tax claims and rents,[91] as well as special rights in favour of banking institutions.[92] *Privilèges* may also be created over immovables.[93] The same title also contains the rules on the creation of mortgages (*hypothèques*) over immovables.[94]

46 Unusually for a Civil Code, Title XVII also contains rules derived from common law practice in relation to fixed and floating charges,

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[83] Articles 2071–2072, *Code Civil Mauricien.*
[84] *Ibid,* arts 2073 – 2094–1 (common rules for *gages*) and 2095–2099 (*gages sans déplacement)* respectively.
[85] *Ibid,* arts 2100–2111.
[86] *Ibid,* arts 2112–2129.
[87] *Ibid,* arts 2129–1 – 2129–6.
[88] *Ibid,* arts 2130–2136. The *antichrèse* is simply the right to receive the fruits from use of the property and not a mortgage proper (*hypothèque*).
[89] *Ibid,* arts 2137–2146. Articles 2154–2162 deal with the preservation/ registration (*conservation*) of *privilèges*.
[90] *Ibid,* arts 2147–2149.
[91] *Ibid,* art 2150.
[92] *Ibid,* arts 2150–1 – 2150–6.
[93] *Ibid,* arts 2151–2153.
[94] *Ibid,* arts 2163–2184.

but which may only be created in favour of certain listed institutions.[95] These rules were introduced on the occasion of a modernisation of the law that took place in 1983, which created a uniform rule for publicity for security that allowed for more transparency in the case of the floating charge, which had until then remained a matter of private contract between lender and borrower. Whereas in other common law oriented countries, the introduction of the floating charge was effected at common law, in Mauritius, the provisions were inserted into the Civil Code and grafted onto the pre-existing civil law model. It appears that these reforms in particular were designed to reflect the commercial practice which had arisen and which had gravitated, on a model similar to that in other member nations of the Commonwealth, to requiring floating charge security to normally be given for loans.

47 The 1983 reforms also enabled some changes to the rules surrounding *gages*, *hypothèques* and *privilèges*. The idea behind the 1983 reforms was also to treat all security instruments within a single text. However, the position today is that the Civil Code framework is not the exclusive preserve of security interests. For example, the Commercial Code provides for rules relating to the pledge of receivables (*nantissement de créances*)[96] and to the special pledge (*gage spécial*) that may be created in favour of certain prescribed financial institutions (*institutions agrées*).[97] There are also rules in the Hire Purchase and Credit Act 1964 governing transactions by which property in goods (movables for the most part) passes only on payment that also confer rights on creditors pending settlement of the whole of the purchase price. Furthermore, the Companies Act of 2001 establishes publicity requirements for charges given by incorporated entities (s 127 and onwards), while the priority rules in the Civil Code must be read together with those in the Insolvency Act of 2009 in order to establish the priority between creditors.

48 Reflection of the proposals for reform in Mauritius appeared to prompt work by the Law Commission on the island which resulted in the production of a report in August 2012. There is a clear acknowledgment of a need to review the Civil Code provisions in light of changes in practice with the preference being to have regard to the French experience of reforms to the law on security that took place in 2006. Referring to the 1983 reforms, the report spoke approvingly, viewing the reforms as having worked well in practice. However, two reasons in particular prompted further consideration of reforms: for

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[95] *Ibid*, arts 2202 – 2202–55.
[96] Articles 92–1 – 92–5, *Code de Commerce*.
[97] *Ibid*, arts 92–6 – 92–11.

one, the experience in practice over the past three decades that has revealed some deficiencies in the application of the rules in relation to fixed and floating charges; the second being that the model for the Mauritius provisions, those in the French Civil Code, had undergone some modernisation in the reforms of 2006 and features of the modernisation process were suitable for inclusion within the Mauritian framework.

49 On the issue of fixed and floating charges, an examination of lending practice revealed that floating charges were being agreed to in relation to sums (often of low amounts) resulting in a disproportion between the amounts lent and the security taken, usually expressed as being over the debtor's total asset base. This had the impact of making unavailable the equity in the debtor's property for further security and thus lending. Furthermore, the registration of floating charges was almost never expunged, even on the lending coming to an end, resulting in the debtor's collateral being secured for a limitless time. The view was that it was necessary to restore an equilibrium between debtors and creditors' rights by making it possible for the security to be taken over an appropriate value of collateral, while allowing debtors to request that registrations be expunged at the expiry of the lending arrangement. There would also be a sunset clause applicable to registrations in that they would expire at the end of ten years unless renewed, with the Registrar being able to expunge them as of right at the end of this period. Furthermore, the ability to constitute floating charges by private contracts (*acte sous seing privé*) for all lending would be restricted to amounts below a certain threshold. For amounts above the threshold, the constitution of a notarial deed (*acte authentique*) would be required, the rationale being the increased risk for borrowers in relation to high value lending that required greater protection through the intervention of a notary.

50 The French reforms that were looked to were focused on three areas: the *gage*, the *hypothèque conventionelle* (hypothec by contract) and the introduction of security through retention of title. In relation to the first, the report notes that the *gage sans déplacement* has become the security of preference in the French system, given that post-reform it may be used in relation to all debts and may cover all movables and even collections of movable assets. In this respect, it compares favourably with the floating charge model. Nonetheless, not all of the features of the new French *gage* system, in the way it was set out in the French text, would be imported into Mauritius, given the view taken that the drafting was somewhat confused and did not clearly separate out the provisions governing the ordinary *gage* with surrender of the asset into the hands of the creditor from the rules for *gages sans déplacement*. The *Code Civil Mauricien* provisions were deemed clearer in import and were moreover familiar to practitioners in the

format presented in the text since the last reforms in 1983 were introduced.

51 For the *hypothèque conventionelle*, the idea is that the *hypothèque rechargeable* (tack-on hypothec) would be introduced for the constitution of a single security in relation to one or more lending agreement with the same creditor, thus allowing for further lending from the same creditor without needing to constitute further security, provided that the amount of future lending is determinable. The benefit of the hypothec may also be assigned to another creditor for lending from the latter, although a notarial deed is required. In any event, subject to limited exceptions, the tack-on hypothec can only be given over existing property, which prevents its use in the form usually found in lending in the United Kingdom, where the purchase–money security interest (particularly for home purchases) is very common. Finally, the retention of title provisions to be inserted in the Civil Code will essentially act in the context of property sales, where such clauses will serve as guarantees against the payment of the price and allow for recovery in the case of mixed property (only if separable without damage) as well as tracing into proceeds of a sub-sale in clearly defined instances.

52 Overall, the report sets out the proposed text of a new Chapter V *bis* (following chapters dealing with the obligations of sellers and buyers of property) on retention of title clauses,[98] a new substituted section on *gages sans déplacement*,[99] new provisions governing the *hypothèque conventionelle*[100] and targeted amendments to a number of articles within the part dealing with floating charges to deem excessive any security obtained over assets worth more than three times the underlying lending, while subjecting lending of more than MUR 2 million to the requirement for a notarial deed. At their simplest, it appears that the proposals would go some way towards meeting the three basic goals of a security framework: obtaining an enforceable interest as against the debtor, providing a mechanism for the enforcement of the interest and giving the creditor priority over other claims against the asset.[101] However, the view may be taken that, while publicity is clearly a feature of the system as currently constituted, a review of the extent and number of *privilèges* is a matter that may determine whether the fulfilment of the third goal is entirely possible.

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[98] Draft arts 1657–1 – 1657–6, *Code Civil Mauricien*.
[99] *Ibid*, draft arts 2095–2126.
[100] *Ibid*, draft arts 2180 – 2183–2.
[101] Westbrook *et al.*, *A Global View of Business Insolvency Systems* (2010, Martinus Nijhoff, Leiden), at 31, 34, 37.

53 The first goal seems, nonetheless, to be clearly met, particularly with the recommendations of the Law Commission, inasmuch as two of the modern features of a security system, including the availability of non-possessory security interests and security for future credits are met by the proposals for reform to the regimes for *gages sans dépossession* and *hypothèques rechargeables*. What is more problematic, though, is that the third feature, the possibility for security over future (or after-acquired) collateral is, while permitted in the case of *gages sans dépossession*,[102] not fully catered for in relation to immovables, the *hypothèque rechargeable* only permitting this in exceptional circumstances.[103] Similarly, the availability of private enforcement is quite restricted in the Mauritian model, the exception being the practice in relation to the appointment of receivers on the back of a floating charge.

54 The provisions on retention of title, which also feature in the proposals, are interesting in that they propose the integration of a title retention framework within the part of the Civil Code dealing with the sale of property and the obligations of seller and buyer. This treatment is consonant with the way in which, in many jurisdictions, retention of title is not regarded as assimilated into security frameworks, being often deemed to be quasi-security in nature.[104] The way in which the provisions are drafted are perfectly in keeping with the way many civil law countries view retention of title as an incident of a property transfer transaction. The recovery and tracing principles seem modest and on the light side of these clauses, which can, in the German model, be quite complex and permit tracing into composite goods and the proceeds of sales, even if mixed. Where the proposals may not go far enough is in terms of *opposabilité*, one of the consequences of title retention lying outside the standard security framework being that they mostly escape registration and publicity requirements, which is perceived in many cases as an advantage compared with pledge type arrangements.[105] One suggestion that is canvassed might be to require registration for transactions over a certain threshold,[106] the analogy possibly being drawn with the proposed enhanced requirements for creation of a floating charge by notarial deed for amounts over MUR 2 million.

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[102] Draft art 2096, *Code Civil Mauricien*.
[103] *Ibid*, draft arts 2180 (limitation to present assets) and 2181 (exceptions).
[104] Westbrook *et al.*, above note 101, at 26.
[105] *Ibid*, at 28.
[106] *Idem*.

55 Overall, while clearly inspired by their French counterparts and the French experience of reform, the target of the measures proposed by the Law Commission in Mauritius appeared to owe somewhat to a lore mixed methodology, with elements of common law practice influencing the shape of the measures proposed. This might also reflect the general experience of mixed legal jurisdictions, where common law elements tend to change shape more rapidly owing to the influence of developments in other members of the common law family, which contain many of the dominant and commercially focused jurisdictions in the world.

Legal transplants and the tension in law reform

56 Space does not permit a rehearsal of all the arguments around the concept of legal transplants. Suffice it to say that the main issue here is whether the direction of reforms in Jersey should pay more attention to legal heritage, as the examples of France and Mauritius in particular demonstrate, or more to commercial exigencies, in other words, the influence of those jurisdictions with which Jersey does business and which have moved forward in terms of providing unitary frameworks for security interests. In particular, it is easy to see the attractiveness of the unitary security device in art 9 of the American Uniform Commercial Code in the way that it functions for security in movables,[107] when compared with the disperse security regime in France and generally in civil law jurisdictions. This is particularly so in light of the expansion of the model across the world and its adoption or influence on changes in a number of jurisdictions, including Australia, New Zealand and many of the Canadian provinces.[108] It is also clear to see the influence of this model in the drafting of the 2012 Law.

57 Furthermore, certain of the principles introduced by the art 9 model, including that of publicity, have influenced the re-drafting of provisions within other security regimes.[109] The implicit recognition of

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[107] See Sigman, "Security in Movables in the United States—Uniform Commercial Code Article 9: A Basis for Comparison", Chapter 3 in Kieninger (ed), above note 2.

[108] See Cuming, "The Internationalization of Secured Financing Law: the Spreading Influence of the Concepts UCC, art 9 and its Progeny", Chapter 22 in R Cranston (ed), *Making Commercial Law Essays in Honour of Roy Goode* (1997, OUP, Oxford).

[109] See Van Erp, "Globalisation or Isolation in New Dutch Property Law? The New Civil Code of the Netherlands and the New Civil Codes of the

the model in the European Bank of Reconstruction and Development's Model Law on Secured Transactions 1994, on which recent reforms in some Eastern European countries have been based, as well as on the United Nations Convention on the Assignment of Receivables in International Trade 2001 and the UNIDROIT Convention on International Interests in Mobile Equipment (or Cape Town Convention) 2001 has appeared to signal moves towards the acceptance of this model as reflective of an international standard.[110] As such, the problem for civil law jurisdictions, which have not generally embraced this model, is how they are perceived to perform in comparison with those that have. This is a position that some say is reflected in the World Bank's annual survey called *Doing Business*, where, measured against key performance indicators, civil law jurisdictions are generally perceived as doing less well than their common law counterparts.

57 In the final analysis, whichever the road down which the law makers in Jersey choose to travel, it is clear that the choice between legal heritage and economic performance is one that will arise again and again in relation to rules with a strong commercial flavour. It is to be hoped that some sensitivity is shown with respect to the origins of Jersey law and that rules inspired by other traditions, whether Jersey shares these or not, are not simply brought in to substitute for existing ones without proper consideration of the impact the changes will have on the overall shape of Jersey law.

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Netherlands Antilles and Aruba Compared" (2003) 7 (5) EJCL in section 3, copy available at: <www.ejcl.org/75/art75-2.html>.

[110] Sigman, above note 107, at 54.