

# USING THE UNCITRAL LEGISLATIVE GUIDE AS A TOOL FOR A SECURED TRANSACTIONS REFORM IN SUB-SAHARAN AFRICA: THE CASE OF MALAWI

Marek Dubovec & Cyprian Kambili\*

## I. INTRODUCTION

The purpose of this article is to introduce the reader to the on-going reform of the secured transactions framework in Malawi that seeks to increase access to credit, particularly for small and medium-sized businesses (SMEs). Malawi may become the first jurisdiction in Africa to have a modern and efficient legal framework in place for security interests in personal property.<sup>1</sup>

Malawi is a small, landlocked, former British protectorate in Southern Africa with a population of 13.1 million. Its economy was heavily regulated until the 1990's when, politically, multiparty democracy was introduced and, economically, liberalization of various aspects of the economy gained momentum.<sup>2</sup> Malawi is classified as a low-income country with a gross national yearly income (GNI) per capita of USD \$320.<sup>3</sup> Malawi's economy is based mostly on agriculture, with almost 80% being subsistence farming.<sup>4</sup> Agricultural commodities such as tobacco, tea, sugar, and edible nuts comprise the bulk of the country's exports, and its imports consist mainly of fuel and consumer goods.<sup>5</sup> Since 2006, Malawi has witnessed an average growth of 6% of its gross domestic product (GDP) each year, which, if sustained, has the potential to lift many of its

---

\* Marek Dubovec is a Senior Research Attorney at the National Law Center for Inter-American Free Trade, Tucson, Arizona, and Cyprian Kambili is a Legal Specialist at the Ministry of Industry and Trade, Malawi.

<sup>1</sup> Ghana established a collateral registry in 2010, but its legal framework is deficient in many aspects. See Marek Dubovec & Benjamin Osei-Tutu, *Reforming Secured Transactions Laws in Africa: The First African Collateral Registry in Ghana*, 45 U.C.C. L.J. 77, 111-19 (2013).

<sup>2</sup> See J. K. van Donge, *Kamuzu's Legacy: The Democratisation of Malawi: Or Searching for the Rules of the Game in African Politics*, 94 AFRICAN AFFAIRS 227 (1995); RICHARD RECORD & SIMON DAVIES, PRIVATE SECTOR INVESTMENT IN AN UNSTABLE BUSINESS ENVIRONMENT – EVIDENCE FROM THE 2006 INVESTMENT CLIMATE ASSESSMENT OF MALAWI (Centre for the Study of African Economics (CSAE) Conference: St. Catherine's College, Oxford, Economic Development in Africa Paper ID 234, Mar. 19-20, 2007), available at <http://www.csae.ox.ac.uk/conferences/2007-EDiA-LaWBiDC/papers/234-Record-Davies.pdf>.

<sup>3</sup> World Bank, *Malawi Country Brief*, <http://data.worldbank.org/country/malawi> (last visited Mar. 22, 2013).

<sup>4</sup> *Id.*

<sup>5</sup> Nicolas Lea & Lucia Hanmer, *Constraints to Growth in Malawi* 15, 21-22 (World Bank Policy Research Paper No. 5097, Oct. 2009), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/1W3P/IB/2009/10/27/000158349\\_20091027100216/Rendered/PDF/WPS5097.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/1W3P/IB/2009/10/27/000158349_20091027100216/Rendered/PDF/WPS5097.pdf).

citizens out of poverty.<sup>6</sup> However, notwithstanding these figures, private sector (foreign and local) investment remains dismal and accounts for only 3% of Malawi's GDP.<sup>7</sup>

To address this disparity, the Government of Malawi introduced *The Malawi Development & Growth Strategy (2006-2011)*.<sup>8</sup> This strategy represents an integrated approach to reduce poverty and achieve economic growth and wealth creation for all by transforming Malawi "from a predominantly consumption-based to a predominantly production-based economy, [therefore] turning it into a middle-income country."<sup>9</sup> The private sector is meant to be the engine behind the economy by transforming growth.<sup>10</sup> Malawi seeks to achieve this goal by increasing local and foreign direct investment into productive sectors and through promoting exports by addressing supply-side constraints, such as lack of access to finance through investment climate reforms.<sup>11</sup>

The World Bank published *The Malawi Enterprise Survey* of 2009,<sup>12</sup> illustrating that nearly 60% of businesses are sole proprietorships and 19% are limited liability companies. These percentages correspond to the nature of the Malawian subsistence agriculture economy. Over 80% of these businesses are small enterprises employing less than 20 workers. The economic phenomenon of having a few large enterprises at the top and a multitude of small enterprises comprising the rest of the economy is the problem of the "missing middle." One of the causes of this disparity is the limited access to finance that obstructs business start-ups, investment, growth in revenue, and employment.<sup>13</sup> In sub-Saharan Africa, up to 80% of private businesses do not have access to any credit.<sup>14</sup>

---

<sup>6</sup> *Malawi 2011, in Africian Economic Outlook*, AFRICANECONOMICOUTLOOK.ORG, available at [http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/Country\\_Notes/2011/Full/Malawi.pdf](http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/Country_Notes/2011/Full/Malawi.pdf). According to the report, Malawi is on track to attain five of the eight Millenium Development Goals (MDG) targets by 2015 in the following areas: eradication of extreme poverty; reduction of infant mortality; combating HIV/AIDS, malaria and other diseases; ensuring environmental sustainability; and developing global partnerships for development.

<sup>7</sup> World Bank, *Malawi Country Briefing*, *supra* note 3.

<sup>8</sup> REPUBLIC OF MALAWI, THE MALAWI GROWTH & DEVELOPMENT STRATEGY 2006-2011: FROM POVERTY TO PROSPERITY (2006), available at <http://www.malawi.gov.mw/Publications/MGDS%20November%202006%20-%20MEPD.pdf>. A successor strategy entitled *The Malawi Growth & Development Strategy II* has been adopted and published.

<sup>9</sup> *Id.* at xix.

<sup>10</sup> *Id.* at xx.

<sup>11</sup> *Id.*

<sup>12</sup> *Enterprise Surveys: Malawi*, WORLD BANK & INT'L FIN. CORP., <http://www.enterprisesurveys.org/Data/ExploreEconomies/2009/malawi> (last visited Mar. 22, 2013).

<sup>13</sup> Celine Kauffmann, *Financing SMEs in Africa*, 7 OECD POLICY INSIGHTS (2005), available at <http://www.oecd.org/dev/34908457.pdf>.

<sup>14</sup> INT'L FIN. CORP., SECURED TRANSACTIONS SYSTEMS AND COLLATERAL REGISTRIES 6 (2010) [hereinafter *Collateral Registries Toolkit*], available at <https://www.wbginvestmentclimate.org/uploads/SecuredTransactionsSystems.pdf>.

The World Bank's statistics of the amount of domestic credit provided to the private sector indicate that in 2010, it represented only 17.8% of Malawi's GDP.<sup>15</sup> This percentage is at par with its African neighbors of Tanzania and Zambia, which are also burdened with the outdated English legal framework for personal property security devices, and which lag behind many other developing countries that have recently undertaken secured transactions reforms.<sup>16</sup>

Against the foregoing background, one of the key challenges facing Malawi is the reform of policies, practices, and laws that have demonstrable impacts on access to credit. There is a general consensus that legal and regulatory frameworks relating to secured transactions laws directly impact access to finance for SMEs.<sup>17</sup> It has also been demonstrated that the social benefits accruing from secured transactions reforms likely outweigh the social costs.<sup>18</sup> A preliminary study undertaken by the Government of Malawi on the credit available to SMEs in 2008, entitled *SME Credit in Malawi: A Supply Side Study*, concludes that a "well defined and enforceable system of property rights is essential for an effective banking system."<sup>19</sup> The study also states that "[e]vidence suggests that as the legal power of a creditor becomes stronger, this causes a direct increase in ratio of private sector credit to GDP."<sup>20</sup> If this reform of the legal system is completed by looking at various international models and best practices, it has the potential to create a credit-friendly environment for private sector enterprises and their lenders.<sup>21</sup>

The authors argue that the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Secured Transactions (Guide) is an efficient comparative tool for the reform of the Malawian framework of secured transactions with the prospect of aiding Malawi to achieve significantly

---

<sup>15</sup> *Domestic Credit to Private Sector*, WORLD BANK, <http://data.worldbank.org/indicator/FS.AST.PRVT.GD.ZS> (last visited Mar. 22, 2013).

<sup>16</sup> *Id.* In Albania and Kosovo, credit to private sectors represents 38% of GDP. *Id.*

<sup>17</sup> Org. for Econ. Cooperation & Dev. (OECD), *Financing Innovative SMEs in a Global Economy* (Background Report prepared for the 2nd OECD Ministerial Conference on SMEs, June 2004 in Istanbul, Turkey), available at <http://www.oecd.org/cfe/smes/31919231.pdf> (last visited Mar. 22, 2013).

<sup>18</sup> John Armour, *The Law and Economics Debate About Secured Lending: Lessons for European Lawmaking?* (Centre for Business Research, Univ. of Cambridge Working Paper No. 362, Mar. 2008), available at <http://www.cbr.cam.ac.uk/pdf/wp362.pdf>.

<sup>19</sup> REPUBLIC OF MALAWI, *SME CREDIT IN MALAWI: A SUPPLY SIDE STUDY* (2008) (on file with authors).

<sup>20</sup> *Id.*

<sup>21</sup> Mehnaz Safavian, Heywood Fleisig & Jevgenijs Steinbuks, *Unlocking Dead Capital: How Reforming Collateral Laws Increases Access to Finance*, PUBLIC POLICY FOR PRIVATE SECTOR, Mar. 2006, at n.307, available at [http://siteresources.worldbank.org/INTTOPCONF3/Resources/307Safavian\\_Fleisig\\_Steinbuks.pdf](http://siteresources.worldbank.org/INTTOPCONF3/Resources/307Safavian_Fleisig_Steinbuks.pdf); Alejandro Alvarez de la Campa, *Increasing Access to Credit through Reforming Secured Transactions in the MENA Region* 36-37 (World Bank Policy Research Working Paper No. 5613, Mar. 2011), available at <http://elibrary.worldbank.org/docserver/download/5613.pdf?expires=1364229467&id=id&accname=guest&checksum=F461DCB71AAFE8E691CBCBED4BE7F7A6>.

expanded access to credit.<sup>22</sup> The authors question the criticism and arguments that the Guide's similarity to the United States Uniform Commercial Code Article 9 (UCC Article 9) militates against its international acceptance.<sup>23</sup> On the contrary, experiences on the ground in a number of countries, including Honduras,<sup>24</sup> Mexico,<sup>25</sup> Albania, and Kosovo,<sup>26</sup> prove these critics of the Guide and model laws wrong. Even so, the authors warn against the copy-and-paste type of transplantation of the Guide's recommendations and the future UNCITRAL Model Law,<sup>27</sup> other secured transactions model laws or any other foreign secured transactions legislation. Instead, the authors support a methodical approach to executing a reform based on effectiveness and efficiency of the proposed transplant only after reviewing the various arguments for and against the comparative method in law reform. The methodical approach entails first analyzing the current local legal, credit, and socio-economic frameworks, and second, adjusting the selected model to the local environment. This adjustment should be flexible enough to allow for the development of new credit products tailored to the needs of local businesses of all types (e.g., registered or unregistered companies) and all sizes (e.g., sole proprietors, family-owned companies, or large exporters), as well as the needs of different lenders (e.g., banks, non-financial institutions, sellers, buyers, etc.). If these issues are not taken into account when completing a secured transactions reform, the results can be counter-productive for a country.<sup>28</sup> Both authors have been directly involved in the Malawian secured transactions reform project undertaken by the International

---

<sup>22</sup> See generally U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V.12 (2010) [hereinafter UNCITRAL Guide], available at [http://www.uncitral.org/pdf/english/texts/security-ig/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](http://www.uncitral.org/pdf/english/texts/security-ig/e/09-82670_Ebook-Guide_09-04-10English.pdf).

<sup>23</sup> See generally Gerard McCormack, *American Private Law Writ Large? The UNCITRAL Secured Transactions Guide*, 60 INT'L & COMP. L. Q. 597 (2011).

<sup>24</sup> Boris Kozolchik, *Implementation of the OAS Model Law in Latin America: Current Status*, 28 ARIZ. J. INT'L & COMP. L. 1, 24-30 (2011).

<sup>25</sup> For the recent proposal to amend the Mexican legal framework, see Que reforma y adiciona diversas disposiciones del Código de Comercio y de la Ley General de Títulos y Operaciones de Crédito [Amending and supplementing certain provisions of the Commercial Code and the General Law of Negotiable Instruments and Credit Operations], Gaceta Parlamentaria [GP], Número 3411-VII, 13 de Diciembre de 2011 (Mex.), available at <http://gaceta.diputados.gob.mx/Black/Gaceta/Anteriores/61/2011/dic/20111213-VII/Iniciativa-4.html> (last visited Mar. 25, 2013).

<sup>26</sup> Jan-Hendrick Rover, *The EBRD's Model Law on Secured Transactions and its Implications for an UNCITRAL Model Law on Secured Transactions*, 15 UNIF. L. REV. 479, 501 (2010).

<sup>27</sup> See the materials of *UNCITRAL Working Group VI: Security Interests* that will start discussing a model secured transactions law at its 23rd Session, Apr. 8-12, 2013, in New York, which is available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/6Security\\_Interests.html](http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html).

<sup>28</sup> Poland and Madagascar experienced depressed access to credit post-reform. See Collateral Registries Toolkit, *supra* note 14, at 31.

Finance Corporation (IFC) to draft a modern secured transactions law. This law, entitled the *Personal Property Security Act*,<sup>29</sup> was signed by the President of Malawi on July 15, 2013.

The authors conclude that the Guide provides a suitable model for Malawi to follow in the reform of its secured transactions framework. Although the Guide is not actually a model law, it does include a set of recommendations and commentaries that could be, after careful adjustment, adapted to fit within any locality, including the Malawian environment. The commentaries are quite extensive and explain not only the preferred approach as set forth in the relevant recommendation, but also other approaches and their advantages and disadvantages.<sup>30</sup> As explained by Bazinas, “the Guide combines the certainty of recommendations with the flexibility of commentary, and can be thus used by States with different legal systems and at different levels of economic development.”<sup>31</sup> The flexibility inherent in the Guide undermines the criticism that it is UCC Article 9-centric. This article describes the Malawian reform project, and it could also provide guidance to other countries in sub-Saharan Africa that contemplate enacting secured transactions laws along the lines recommended in the Guide.<sup>32</sup>

## II. A CRITICAL REVIEW OF THE CURRENT LAWS ON SECURED TRANSACTIONS IN MALAWI

Until the PPSA was enacted, the Malawian framework for secured transactions was governed by English law-based devices, including common law, equity, and English statutes of general application.<sup>33</sup> The characteristic feature of such a framework is the existence of multiple laws that govern individual security devices.<sup>34</sup> The majority of these laws was cut-and-pasted from the English legal system and by now is severely outdated. They are unsupportive of modern financing practices, and the new types of assets that have emerged and command significant collateral value in the 21<sup>st</sup> century. As a result, they fail to channel credit to the private sector. For instance, these laws include a requirement that

<sup>29</sup> Personal Property Security Act No. 8 of 2013.

<sup>30</sup> “[T]he language of the Legislative Guide becomes quite specific, with the result that the recommendations, when taken together, bear a strong resemblance to statutory text.” Neil B. Cohen, *Should UNCITRAL Prepare a Model Law on Secured Transactions*, 15 UNIF. L. REV. 325, 328 (2010).

<sup>31</sup> Spyridon V. Bazinas, *Law Applicable to Security Rights in Movable Assets under the UNCITRAL Legislative Guide on Secured Transactions*, 30 BANKING & FIN. SERVICES POL’Y REP. 7, 7 (2011).

<sup>32</sup> See Penina Machoka, *The Need for Efficient and Effective Secured Transactions Regimes in sub-Saharan Africa: The Case of Kenya*, 20 J. INT’L BANKING L. & REG. 395 (2005).

<sup>33</sup> See British Central Africa Order in Council, 1902 (No. 663), art. 22.

<sup>34</sup> A fuller doctrinal treatment is found in CASSIM CHILUMPHA, *THE LAW OF NON POSSESSORY CORPORATE SECURITY IN MALAWI* (2002).

property must be described specifically in a bill of sale.<sup>35</sup> This requirement practically eliminates the possibility for borrowers, such as sole proprietors, to obtain lines of credit secured with any type of collateral that periodically fluctuates. Because of this, how can credit be provided to a shopkeeper who changes its inventory on a daily basis by selling and receiving new supplies? Another significant impediment contained in this framework is the registries for individual security devices. The Malawian registries today still process and store registered documents manually in cabinets. The Malawian legal framework for security devices, as analyzed in detail below, neither addresses the needs of businesses for financing, nor allows local lenders to develop efficient credit products, such as business lines of credit or equipment leases.

### **A. The Bills of Sale Act**

The oldest piece of legislation that provides for a security device in Malawi is the Bills of Sale Act of 1967, which is based on the English Bills of Sale Acts 1878-1882.<sup>36</sup> The Act applies to every bill of sale<sup>37</sup> where the holder (i.e., the creditor) acquires the right to seize any personal chattels specifically referred to in the bill of sale. In other words, the bill of sale creates a fixed security interest over specific personal property.<sup>38</sup> The nature of the security interest, being fixed, also determines the nature of personal property it applies to. In Malawian practice, it is quite common to create a security in the form of a bill of sale over equipment, machinery, or motor vehicles, but not over inventory and accounts receivable.

As a corollary to constituting a fixed security interest, Section 10 of the Act requires that the property be in existence and be clearly identified at the time of the execution of the bill of sale.<sup>39</sup> Failure to specifically describe the property will render the security ineffective against third parties.<sup>40</sup> Similarly, the bill of sale is ineffective against third parties if it describes any property to which the

---

<sup>35</sup> Malawi Bill of Sales Act of 1967, ch. 48:03, § 10 [hereinafter Malawi Bill of Sales Act 1967], available at [http://www.malawilii.org/files/mw/legislation/consolidated-act/48:03/bills\\_of\\_sales\\_act\\_pdf\\_11284.pdf](http://www.malawilii.org/files/mw/legislation/consolidated-act/48:03/bills_of_sales_act_pdf_11284.pdf).

<sup>36</sup> See generally *id.*

<sup>37</sup> Section 2(1) of the Act states that “bill of sale” includes bills of sale, assignments, transfers, declarations of trust without transfers, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreement whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, is conferred . . .” See also Bills of Sale Act (1878) Amendment Act, 1882, 41 & 42 Vict., c. 31, § 4 (Eng.).

<sup>38</sup> The Act deems every attornment, agreement or instrument conferring a power of distress as a bill of sale. Malawi Bill of Sales Act 1967, *supra* note 35, § 2(1).

<sup>39</sup> *Id.* § 10.

<sup>40</sup> *Id.*

grantor did not have an ownership right at the time of execution.<sup>41</sup> This requirement excludes property that the debtor may acquire in the future. In regards to crops, the Act only applies to those crops that were actually growing on the date of the execution of the bill of sale.<sup>42</sup> Accordingly, the bill of sale is practicable only for a limited number of assets that already exist and to which the debtor can clearly demonstrate his ownership right.

The bill of sale is frequently utilized by unincorporated sole proprietors and SMEs that operate with fixed assets. The limitations set forth by the Act are not conducive to facilitating credit to a large segment of individuals and businesses that operate with inventory, accounts receivable, and other fluctuating assets. Accordingly, this device is suitable only for particular types of businesses and transactions, such as a bakery that needs an oven, a small construction company that needs a backhoe, or a restaurant that needs a truck to transport produce. In contrast, it is not suitable for a store that sells groceries or clothing, a farmer that needs seeds that must be planted and grown into a crop, or a manufacturer and supplier of goods to wholesale and retail stores. From the perspective of the majority of Malawian SMEs, the Act is a failure.

The view of Malawian lenders towards the Act is equally negative. They consider the requirement to strictly abide by the formalities as a landmine lurking in the Act. Any failure to comply with the strict requirements results in the bill of sale failing to achieve third party effectiveness.<sup>43</sup> This harsh remedy is the reason lenders typically incur an additional expense to ensure that the instrument has been executed properly. In *Patel v. Mandala Ltd.*,<sup>44</sup> the High Court of Malawi held a bill of sale over a motor vehicle void on the grounds that it did not conform to the Act. The bill of sale was voided since it provided for payment on demand contrary to the language of the prescribed form included in the schedule to the Act.<sup>45</sup> The High Court further held that under Section 16 of the Act,<sup>46</sup> a lender is not entitled to remove goods seized from the debtors' premises without a court

---

<sup>41</sup> *Id.* § 11.

<sup>42</sup> The Act defines personal chattels as “goods, furniture and other articles capable of complete transfer by delivery, and, when separately assigned or charged, fixtures and *growing crops*.” *Id.* § 2 (emphasis added).

<sup>43</sup> *Patel v. Mandala Limited*, 11 MLR 45 (1984) (High Court of Malawi). This is reminiscent of pre-code personal property security law in the United States. See Grant Gilmore, *Security Law, Formalism and Article 9*, 47 NEB. L. REV. 659 (1968).

<sup>44</sup> *Id.*

<sup>45</sup> The High Court of Malawi followed the English decision *Hetherington v. Groome*, (1884) 12 Q.B.D. 789.

<sup>46</sup> Section 16 reads, “All personal chattels seized or of which possession is taken under or by virtue of any bill of sale shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of.” Malawi Bill of Sales Act of 1967, *supra* note 35, § 16.

order before the expiry of five days.<sup>47</sup> The High Court stated that, where the foregoing occurred, the bill of sale was rendered void not only as against third parties, but also between the parties *inter se*.<sup>48</sup> This holding goes against the basic expectations of a lender and imposes draconian remedies for the violation of certain duties. A violation of a duty should not render a security interest ineffective between the parties. This is a harsh remedy that sets a trap for the lender, whose claim is thus relegated as unsecured and whose rights become vulnerable against third parties, including the insolvency administrator. As a result of the risk of invalidation and the necessary formalities that must be complied with, the increased cost incurred by the lender is passed on to the borrower.

The Act raises a number of other issues within the framework of the Malawian legal system, such as its unclear interplay with the country's Companies Act. The Bills of Sale Act does not apply to secured indentures created by a company registered under the Companies Act.<sup>49</sup> In practice, this interplay of the two acts creates a problem when a sole proprietor or other unincorporated business transforms into an incorporated company and as a result of which, the creditor's security may be rendered ineffective.<sup>50</sup>

As a general rule, bills of sale must be registered for the security to become effective against third parties.<sup>51</sup> The Act requires that a bill of sale be registered within fourteen days of the date of execution.<sup>52</sup> Failure to comply with the fourteen-day rule renders the bill of sale invalid. As a condition of registration, a bill of sale is required to be in the statutory form and must clearly set out the consideration for which it was given. Again, the creditor must abide by strict formalities not only in the process of executing a bill of sale, but also in the process of its registration. All registrations have to be effectuated at the central office of the Registrar General in the city of Blantyre by physical delivery of the documents. The registrar is required to maintain an index of the names of the

---

<sup>47</sup> The section is word-for-word Section 13 of the Bills of Sale Act (1878) Amendment Act, 1882, 45 & 46 Vict., c. 43 (Eng.). It was held under the English Bills of Sale 1878 Amendment Act 1882 that the creditor may remove goods before the expiration of five days with the consent of the debtor. *See also Tomlinson v. Consol. Credit & Mortgage Corp.*, (1889) 24 Q.B.D. 135 (Eng.).

<sup>48</sup> *See Patel v. Mandala Ltd.*, 11 MLR 45.

<sup>49</sup> Malawi Bill of Sales Act of 1967, *supra* note 35, § 23; *see also* Bills of Sale Act (1878) Amendment Act, 1882, 45 & 46 Vict., c. 43, § 17 (Eng.).

<sup>50</sup> *See Label Industries Ltd. v. Registered Trustees of Small Enterprises Dev. of Malawi*, Principal Registry, Blantyre, Civil Cause No. 526 of 1987 (High Court of Malawi) (unreported). The Court purported to be following the English decision in *Slavenburg's Bank NV v. Intercontinental Natural Resources Ltd.*, (1980) 1 All E.R. 955, 974-975.

<sup>51</sup> Secured transactions laws generally condition the effectiveness of security interests against third parties on registration or by providing public notice in some other form, such as by delivery of possession to the creditor.

<sup>52</sup> Malawi Bill of Sales Act of 1967, *supra* note 35, § 7; *see also* Bills of Sale Act (1878) Amendment Act, 1882, 45 & 46 Vict., c. 43, § 8 (Eng.).



grantors of bills of sale, arranged in divisions, so that registrations against grantors with the surname that begins with the same letter are placed in the same division.<sup>53</sup> However, the organization of registrations within each division need not be alphabetical, making it very difficult for searchers to locate particular registrations.<sup>54</sup> In Malawi, many names of individuals are very common, and a single division could easily have hundreds of entries under the letters of “P” or “B.” Add to that, the possibility that a bill of sale may have been already executed, but the 14-day window has not yet expired, and the searcher is left with an impossible task to determine the status of property.

Furthermore, where one executes a bill of sale over a motor vehicle, plant, or machinery that is registrable under the Road Traffic Act,<sup>55</sup> the practice is to register the bill of sale under both the Bills of Sale Act and in the Road Traffic Registry. However, no legal rule tells the creditor which of the two is the authoritative registry, and what the effects of registration, or the lack thereof, are on third parties and what their priorities among competing claims are. In addition to the lack of a clear legal rule for creditors in this situation, the Bills of Sale Act also includes a large number of exceptions to the registration requirements, making it impossible for third parties to determine whether the property remains unencumbered.<sup>56</sup>

Furthermore, the registration framework under the Act is as defective as the substantive framework. The registration requirements are fraught with formalities and the registry, in the manner it is organized and its registrations indexed, is practically unsearchable. Furthermore, a number of bills of sale are not subject to registration at all, and some property may be subject to double registration with unknown effects on third parties and their priorities. The Act has failed to facilitate credit to unincorporated SMEs for a number of reasons, including the inability to create security interests in property that debtors acquire in the future and in property to which debtors cannot prove their ownership rights. Even many English businesses chose to incorporate to escape the draconian rules of the English Bills of Sale Act, or had to reduce their financing needs to the extent that could be satisfied with title-based security devices.<sup>57</sup> From the Malawian lenders’ perspective, the Act is dysfunctional and not conducive to

---

<sup>53</sup> Malawi Bill of Sales Act of 1967, *supra* note 35, § 18(4).

<sup>54</sup> Lea & Hanmer, *Constraints to Growth*, *supra* note 5.

<sup>55</sup> Road Traffic Act, ch. 69:01 (Malawi), *available at* [http://www.malawilii.org/files/mw/legislation/consolidated-act/69:01/road\\_traffic\\_act\\_pdf\\_12284.pdf](http://www.malawilii.org/files/mw/legislation/consolidated-act/69:01/road_traffic_act_pdf_12284.pdf).

<sup>56</sup> Section 2(1) of the Bills of Sale Act excludes bills of sale on imported goods executed before their delivery to the purchaser or any warehouse. *See* Malawi Bill of Sales Act of 1967, *supra* note 35, § 2(1).

<sup>57</sup> *See* Jacob Ziegler, *A Canadian Academic’s Reaction to the Law Commission’s Proposals*, in *THE REFORM OF UK PERSONAL PROPERTY SECURITY LAW: COMPARATIVE PERSPECTIVES* 117, 149 (John de Lacy ed., 2010), who wrote, “[T]he [Canadian Bills of Sale] legislation was heavily encumbered with burdensome registration, execution and affidavit requirements which it a read target for bankruptcy trustees if the debtor became insolvent.”

lending due to its strict formality requirements and the relatively easy route for the debtor to avoid the security entirely.<sup>58</sup> Commentators observed that even the English system from which the Malawian Bills of Sale Act was transplanted is “in practical terms [a] little more than an historical footnote.”<sup>59</sup> Along these lines, in December 2009, the U.K. Department for Business, Innovation, and Skills published a consultation paper in which it recommended that bills of sale be abolished for consumer lending.<sup>60</sup>

### **B. The Farmers’ Stop-Orders Act**

The Farmer’s Stop-Orders Act applies to assignments of interest in crops by farmers.<sup>61</sup> Such assignments, made in the form of stop orders, are not subject to the Bills of Sale Act.<sup>62</sup> Although some aspects of practical utilization of stop orders resemble security interests, the Farmer’s Stop-Orders Act only applies to farmers and agricultural assets.<sup>63</sup> A farmer is defined in Section 2 as a tenant or owner of an agricultural holding who cultivates that holding for profit.<sup>64</sup> The same section also defines a stop order in two ways.<sup>65</sup> First, a stop order means any undertaking entered into by a farmer in which the farmer gives any person, as

---

<sup>58</sup> During a review of secured transactions laws, most financial institutions, particularly banks, made it clear that they regard the Bills of Sale Act as unnecessarily technical and try to avoid using it wherever they can devise an alternative form of financing. These views were expressed during an interview with the National Bank of Malawi’s Company Secretary in February 2010 conducted by one of the authors (notes are on file with authors).

<sup>59</sup> Michael Bridge, *The English Law of Security: Creditor-Friendly but Unreformed*, in SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW 81, 85 (Eva-Maria Kieninger ed., 2004). In England, The Law Commission, *Company Security Interests*, ¶ 23 (Law Com No. 296), available at [http://lawcommission.justice.gov.uk/docs/lc296\\_Company\\_Security\\_Interests.pdf](http://lawcommission.justice.gov.uk/docs/lc296_Company_Security_Interests.pdf) (last visited Mar. 25, 2013), describes the Bills of Sale Act 1878-1882 as follows, “Our consultation paper examined these provisions and concluded that they are out-of-date, unnecessarily complicated and unduly restrict the forms of secured borrowing available to small businesses.” Similarly John de Lacy noted, “Despite an almost universal acceptance of the failure of the Bills of Sale Acts, they still remain the main source of regulation in this area.” John de Lacy, *The Evolution and Regulation of Security Interests Over Personal Property*, in THE REFORM OF UK PERSONAL PROPERTY LAW: COMPARATIVE PERSPECTIVES 3, 19 (John de Lacy ed., 2010).

<sup>60</sup> See Duncan Sheehan, *The Abolition of Bills of Sale in Consumer Lending*, 126 L. Q. REV. 356 (2010).

<sup>61</sup> Farmers’ Stop-Orders Act, ch. 63:03 (Malawi), available at [http://www.malawilii.org/files/mw/legislation/consolidated-act/63:03/farmers\\_stop\\_order\\_act\\_pdf\\_13688.pdf](http://www.malawilii.org/files/mw/legislation/consolidated-act/63:03/farmers_stop_order_act_pdf_13688.pdf).

<sup>62</sup> *Id.* § 10.

<sup>63</sup> *Id.* § 2(a)-(b).

<sup>64</sup> *Id.* § 2.

<sup>65</sup> *Id.*

security for debt, any right in or over his growing or future crops, or the proceeds thereof.<sup>66</sup> The extension of the stop order to proceeds provides an added benefit to the farmer and the creditor, whose security is thus not restricted to the asset described in the stop order, as is the case of bills of sale.<sup>67</sup> Second, a stop order is defined as an undertaking in which a farmer authorizes any person to pay the proceeds of the farmer's crops to a third party in satisfaction of a debt owed by the farmer to that party.<sup>68</sup> As a matter of practice, Malawian lenders utilize a combination of both methods. The Act allows farmers to create fluctuating security interests over their crops and proceeds, similar to that of floating charges of companies.

In a stop order, the farmer creates a security interest over the crops in favor of a lender. At the same time, the stop order gives instructions to a marketing institution where the farmer sells the crop to make payment to the financial institution. For the second definition of a stop order to become operational, the farmer must know which marketing institution it will sell the crop to. Accordingly, farmers that regularly sell to a marketing institution are more creditworthy than farmers, which have not made any arrangements to sell their crops.

For a stop order to become effective, it must be registered, and those that have not been registered are rendered null and void.<sup>69</sup> Stop orders rank in priority according to the date of their registration.<sup>70</sup> A registered stop order is enforceable even against a person who acquired the crop without actual notice of the existence of such a stop order.<sup>71</sup> Furthermore, the rights of lenders are well protected because a registered stop order cannot be extinguished by any sale, mortgage, or encumbrance of the land on which the crop grows.

The registry for stop orders is centrally located at the office of the Registrar General, and again, one has to physically deliver the documents for registration. The registration requirements are overly onerous, and lenders must deliver the stop order to the office in triplicate.<sup>72</sup> Upon delivery, the registrar signs and dates the stop order, and his signature is deemed to be sufficient evidence of registration.<sup>73</sup> The names of the farmers who have executed stop orders are entered into the index in alphabetical order.<sup>74</sup> In comparison to the bill of sale, the stop order is a much more effective device to access credit, but its availability is limited to farmers.

---

<sup>66</sup> Farmers' Stop-Orders Act, *supra* note 61, § 2(a).

<sup>67</sup> *Id.* § 2(a)-(b).

<sup>68</sup> *Id.* § 2(b).

<sup>69</sup> *Id.* § 3.

<sup>70</sup> *Id.* § 6.

<sup>71</sup> Farmers' Stop-Orders Act, *supra* note 61, § 9.

<sup>72</sup> Farmers' Stop-Order Regulations, 1956, reg. 2(1) (Malawi), available at <http://faolex.fao.org/docs/pdf/mlw117898.pdf> (last visited Mar. 25, 2013).

<sup>73</sup> Farmers' Stop-Orders Act, *supra* note 61, § 4(2).

<sup>74</sup> Farmers' Stop-Order Regulations, *supra* note 72, reg. 3.

### **C. The Commercial Credits Act**

The Commercial Credits Act was enacted in 1971 primarily to facilitate borrowing by business owners on the security of trading stock.<sup>75</sup> A business proprietor is defined as any person (not being an incorporated company or society) that, as the owner or occupier of any premises, carries on trade or business therein as a retailer or wholesaler.<sup>76</sup> Accordingly, like the Bills of Sale Act and the Stop-Orders Act, the Commercial Credits Act is specific to the particular type of debtor. Trading assets include goods held for sale in a store, stock in trade, plant and tools used in any trade or business, or any money or “things in action” received in the course of business, but exclude real property and fixtures.<sup>77</sup> The Act thus applies to unincorporated proprietors that operate as wholesalers or retailers. By definition, a significant number of businesses, such as the many Malawian garages that repair cars, are ineligible to create commercial charges under this law.

The Act authorizes a business proprietor, by an instrument in writing, to create a commercial charge in favor of a designated institution on all trading assets belonging to the business.<sup>78</sup> The designated institutions include banks, companies, and statutory bodies authorized specifically by the government.<sup>79</sup> The Registrar General maintains a list of designated institutions and thus not every lender can secure a loan with the charge under this law. Accordingly, the law creates a monopoly for particular types of lenders that are authorized to lend to a particular type of debtors.

Under the Act, the commercial charge may be fixed or floating.<sup>80</sup> The mechanics of the commercial charge are more or less the same as the mechanics of a fixed or floating charge created by an incorporated company under the Companies Act analysed below. Priority, as between commercial charges, is determined by the date of registration.<sup>81</sup> Every commercial charge is required to be registered within seven days from the date of execution.<sup>82</sup> For the registration to be completed, memorandum of the instrument creating the charge, a copy of the charge and prescribed particulars, must be delivered to the registry.<sup>83</sup> The Registrar General maintains a paper-based index of commercial charges organized according to the names of grantors.<sup>84</sup> The index, like that maintained under the Bills of Sale Act, is arranged in divisions, but the individual registrations are not

---

<sup>75</sup> Commercial Credits Act, 1970, ch. 48:06 (Malawi), available at <http://www.malawilii.org/mw/legislation/consolidated-act/4806>.

<sup>76</sup> *Id.* § 2.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* § 3(1).

<sup>79</sup> *Id.* § 2.

<sup>80</sup> Commercial Credits Act, *supra* note 75, § 3(2).

<sup>81</sup> *Id.* § 6(2).

<sup>82</sup> *Id.* § 7(1).

<sup>83</sup> Commercial Credits Regulations, 1971, reg. 3 (Malawi).

<sup>84</sup> *Id.* reg. 5.

organized alphabetically.<sup>85</sup> Practical utilization of the Act is inhibited by its limited scope and the cumbersome requirements for the creation and registration of commercial charges.

#### **D. The Hire-Purchase Act**

Another important legislation with respect to financing secured with personal property is the Hire-Purchase Act of 1964.<sup>86</sup> The Act is of limited scope, as it only applies to agreements where the amount does not exceed 3,000 kwacha, which is the equivalent of about seven U.S. dollars!<sup>87</sup> One may surmise that the intention of this limitation was to restrict the Act's applicability to low-value, and probably non-commercial, transactions, whereby individuals acquire primarily household goods on credit.<sup>88</sup> The schedule to the Act specifies the percentage of cash that must be paid before goods are delivered, and the period within which the full purchase price is payable.<sup>89</sup>

Section 4 of the Act prescribes formal requirements (e.g., the agreement must indicate the cash price) that if the seller fails to satisfy, will render the reservation of ownership ineffective.<sup>90</sup> In other words, if the agreement does not satisfy the formal requirements, the seller's purported ownership transforms into an unsecured contractual claim to payment that is vulnerable against other creditors and the insolvency trustee. When the seller, under a hire-purchase agreement, has satisfied all the formal requirements, it will be deemed to have retained title and will be assured of absolute priority in the insolvency of the buyer. The goods are not subject to the claims of buyer's creditors because the

---

<sup>85</sup> *Id.*

<sup>86</sup> Hire-Purchase Act of 1964, ch. 48:05 (Malawi). In Section 2 of the Act, "hire-purchase agreement" means—(a) any contract whereby goods are sold subject to the condition that, notwithstanding delivery of the goods, the ownership in such goods shall not pass, except in terms of the contract, and the purchase price is to be paid in two or more installments; (b) any contract which provides for the hiring of goods whereby the hirer has the right—(i) to purchase such goods after two or more instalments have been paid in respect thereof; or (ii) after two or more instalments have been paid in respect thereof, to continue or renew from time to time such hiring at a nominal rental, or to continue or renew from time to time the right to be in possession of the goods, without any further payment or against payment of a nominal amount periodically or otherwise; whether or not the agreement may at any time be terminated by either party or one of the parties; (c) any other contract which has, or contracts which together have, the same import as either or both the contracts defined in paragraph (a) or (b) of this definition, whatever form such contract or contracts may take.

<sup>87</sup> *Id.* § 3. Although this was a reasonable figure in 1971 for consumer transactions, the current exchange rate makes the Act obsolete.

<sup>88</sup> *Id.* The only sections that apply without the limitation of the amount are sections 4, 22, and 23.

<sup>89</sup> *Id.* § 24.

<sup>90</sup> *Id.* § 4.

buyer does not become the owner until the purchase price is paid in full.<sup>91</sup> Since the seller retains ownership, there is no requirement for registration, and third parties may be misled by the ostensible possession of the buyer.<sup>92</sup> Furthermore, upon default, the lender may sell the goods and does not have to account for any surplus to the buyer.<sup>93</sup> These outdated limitations seriously undermine the flexibility and competitiveness of lenders that are not able to develop hire-purchase products specifically tailored to the needs of buyers of goods on credit.

### **E. The Companies Act**

A company incorporated and registered under the Companies Act of 1984 may access credit via debentures or debenture stock.<sup>94</sup> The debentures are securities that may be secured by a charge, or that may be unsecured. Section 86 of the Act applies only to specified charges that include: (a) charges securing the issue of series of debentures; (b) a charge on the uncalled share capital of the company; (c) a charge created or evidenced by an instrument, which, if executed by an individual, would require registration under the Bills of Sale Act or the Farmers Stop-Orders Act; (d) a floating charge on the whole or part of the undertaking or property of the company;<sup>95</sup> (e) a charge on land or any interest in land; (f) a charge of the present or future book debts of the company; (g) a charge on calls made but not paid; (h) a charge on a ship or aircraft, or a share in a ship or aircraft; (i) a charge on goodwill, a copyright, a patent, or trademark of licences granted in respect thereof; and (j) a charge over shares in another corporate body.<sup>96</sup> Other forms of charges that do not fall into any of the foregoing categories are not registrable. Where a charge constitutes security over property requiring registration, and also over other property that does not require registration, the Act applies only to the former, but not the latter.<sup>97</sup> Accordingly, the Act is limited in scope, both in terms of types of borrowers and charges. Similar scope limitations are also characteristic of the other Malawian Acts examined above.

Where a company creates a registrable charge, it has a duty, under Section 86 of the Act, to register both the particulars of the charge and a certified

---

<sup>91</sup> Hire Purchase Act, *supra* note 86, § 4.

<sup>92</sup> *Id.*

<sup>93</sup> Chirwa v. Cent. African Transp. Co., (1980) 9 MLR 301 (Malawi Supreme Court of Appeal).

<sup>94</sup> Companies Act of 1984, ch. 46:03, § 76 (Malawi), *available at* [http://www.malawilii.org/files/mw/legislation/consolidated-act/46:03/companies\\_act\\_pdf\\_44933.pdf](http://www.malawilii.org/files/mw/legislation/consolidated-act/46:03/companies_act_pdf_44933.pdf).

<sup>95</sup> The operative definition of floating charge is based on English law. SIR ROY GOODE & LOUISE GULLIFER, GOODE ON LEGAL PROBLEMS OF CREDIT AND SECURITY ¶¶ 4-02 to 4-20 (Sweet & Maxwell 4th ed. 2009).

<sup>96</sup> Companies Act of 1984, *supra* note 94, § 86.

<sup>97</sup> *Id.* § 89.

copy of the instrument creating the charge with the Registrar of Companies (that is presently the Registrar General) within 28 days of the execution of the charge.<sup>98</sup> The 28-day window to complete a registration effectively creates a secret lien because third parties may not find out about an already created charge that is pending registration. A grace period to register a charge with retroactive effects to the date of execution is also typical of other Malawian laws on secured transactions. The registrar, after due examination of the submitted documents, issues a certificate in respect to any charge registered stating the date of registration and, if applicable, the amount secured. The certificate of registration is conclusive evidence that all requirements under the Act have been complied with. According to Section 89, with respect to charges required to be registered, priority in relation to one another is determined in accordance with the date of registration.<sup>99</sup>

In summation, the Companies Act exhibits similar features and deficiencies characteristic of the other Malawian Acts. Its scope is limited to registered companies that may create only specific charges subject to registration. The Companies Registry is operated as a document-registration system, whereby the debtor must submit the required documentation for review by the registrar. Furthermore, the twenty-eight day grace period creates uncertainty for prospective lenders whose charges may be subject to and subordinated to previously executed, but not yet registered, charges.

### III. GENERAL PROBLEMS WITH THE LEGAL REGIME FOR SECURED TRANSACTIONS IN MALAWI

The summary of the Malawian legislation reveals a number of deficiencies. First, all the Acts provide complex requirements for the creation and registration of the security devices. Second, the failure to comply with unnecessary and outdated formalities results in the security being avoided and annulled. Third, there is no uniform priority rule, which forces lenders to make difficult decisions. In addition to the statute, lenders must take into account a complex web of case law, and still face the risk of losing their rights to purchasers of their collateral under the Sale of Goods Act.<sup>100</sup> Fourth, the laws apply depending on various criteria, such as the type of property, transaction, or debtor. For examples, the Bills of Sale Act applies only where the debtor is an individual; the Commercial Credit Act applies only when the borrower is a business proprietor; the Farmers Stop-Orders Act applies only when the borrower is a farmer; and the Companies Act applies only when the borrower is registered at the Companies Registry. The multiplicity of applicable Acts also increases the

---

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Sale of Goods Act, 1967, ch. 48:01 (Malawi), available at <http://www.malawilii.org/mw/legislation/consolidated-act/4801>.

monitoring cost of the lender to ensure that the borrower does not change its status, which might result in the application of a different Act.

More similarities among the acts are evident in the registration process. Each act requires that, in addition to entering relevant particulars and identifying the parties and amount secured, a document evidencing the transactions, which may be prescribed, as in the Bills of Sale Act, or not, as in a floating charge under the Companies Act, must be submitted for registration. The registration system is an administrative challenge and the procedures are highly inefficient. The registrars not only manually enter information into indexes, but also scrutinize volumes of documents to ensure conformity with the relevant act.<sup>101</sup> Manual archiving of actual documents is another burden that the registries face. All these challenges contribute to an inefficient legal framework and the resulting cumbersome and costly practice of secured transactions in Malawi. It is noteworthy that all these Acts provide for similar requirements with respect to the creation, registration, effects of registration, and non-registration of security devices. All security devices are registrable at different registries that operate under similar document-registration procedures. These similarities raise a question as to the need of multiple acts to govern almost identical security devices.

This multiplicity of laws results in legal complexity, which was one of the reasons why the original UCC Article 9 replaced the individual statutes governing different security devices, such as conditional sales and factoring of accounts.<sup>102</sup> The Guide embraces this functional approach to secured transactions that is characteristic not only of UCC Article 9, but also of the provincial Personal Property Security Acts in Canada, the Australian, and New Zealand Personal Property Securities Acts, as well as a number of model laws and international conventions, including the Organization of American States' Inter-American Model Law on Secured Transactions and the United Nations Convention on the Assignment of Receivables in International Trade.<sup>103</sup> Under the functional approach, all devices that purport to secure an obligation are characterized as security interests subject to a uniform set of rules that provide for their creation, perfection, registration, and enforcement. Unifying the labels for the individual devices under the functional concept of security interest allows for a straightforward rule of priority.<sup>104</sup>

The foregoing assessment meshes well with other empirical studies on access to finance in Malawi. The *Malawi Investment Climate Assessment* found that the problem of access to and cost of finance may be a result of “problems in the business environment related to financial sector development—such as the

---

<sup>101</sup> Commercial Credits Act, *supra* note 75, § 5; Companies Act of 1984, *supra* note 96, § 325.

<sup>102</sup> According to Grant Gilmore, “the [UCC] Article 9 draftsmen set to work, bearing a banner with the strange device: *Simplify*.” Gilmore, *supra* note 43, at 668.

<sup>103</sup> Spyridon V. Bazinas, *The Work of UNCITRAL on Security Interests: An Overview*, 15 UNIF. L. REV. 315, 320 (2010).

<sup>104</sup> Bridge, *supra* note 59, at 82.



lack of a credit information registry, strong collateral laws, and electronic collateral registries—that prevent even better performing and more transparent firms from having access to financing and reduce overall economic growth.”<sup>105</sup> The Malawian legal framework for security devices is scattered among multiple Acts that apply to different types of debtors, property, and transactions, although their underlying function is the same—to secure credit. The framework is not only fragmented, but it is also outdated, as illustrated by the inefficiencies of the registry offices. Such a framework is not conducive to asset-based lending, and it is in urgent need of reform. While this section attempted to justify the need for a reform, the following section attempts to provide some guidance on the execution of such a reform.

#### IV. COMPARATIVE SEARCH FOR LEGISLATIVE SOLUTIONS TO SECURED TRANSACTIONS IN MALAWI

What should Malawi do to correct the deficiencies in its current legal framework for security devices? Two approaches come to mind: 1) engage in a tedious process of fixing the individual Acts and bring them to the standards of the 21<sup>st</sup> century; or 2) overhaul the legal framework in its entirety by replacing it with a modern statute.<sup>106</sup> The first approach would preserve the *status quo*, where the lender must first properly classify the debtor and collateral, and then apply the relevant law. Accordingly, the lender would still need to determine whether the debtor is an unincorporated business or a registered company, and whether the property offered as collateral is a vehicle, fixture, crop, etc. The lender will also still need to closely monitor the debtor to ensure that it does not change its type, such as by incorporation, or transform some of its collateral, taking it outside of the scope of the originally applied Act. This relative complexity in the initial assessment and subsequent monitoring entails a cost that would be ultimately shifted on to the debtor. The second approach entails the enactment of an Act that would apply to all security devices irrespective of the nature of the debtor and personal property. This approach would reduce the legal complexity and cost of credit, and it has become the centrepiece of many reforms.<sup>107</sup> A new law that brings all security devices under a single functional framework would create certainty, simplicity, and predictability. The functional approach is also the hallmark of the Guide.<sup>108</sup> The next equally important issue is how to go about

---

<sup>105</sup> World Bank Group, Africa Region, Private Sector Unit, *Summary of Malawi Investment Climate Assessment*, Note No. 26, 38365 (2006), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/01/29/000020439\\_20070129092241/Rendered/PDF/383650Malawi0Investment0Climate0note026.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/01/29/000020439_20070129092241/Rendered/PDF/383650Malawi0Investment0Climate0note026.pdf).

<sup>106</sup> “[E]nactment of special legislation for secured transactions is often the simpler and more successful reform.” Collateral Registries Toolkit, *supra* note 14, at 39.

<sup>107</sup> I GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 290-94 (2011).

<sup>108</sup> See UNCITRAL Guide, *supra* note 22, at 61 Recommendation 8.

creating such a functional framework. The authors argue below that the best approach would be to look to other jurisdictions that have undertaken a similar transformation, or to model laws, and adjust the chosen model to the local environment. In this process, foreign concepts and institutions should not be imported as such or merely transplanted.<sup>109</sup> Given the Anglophone common law legal tradition inherited in Malawi, the country should be looking to the systems or models that are based on a similar legal tradition. This approach would entail transplanting and modifying an existing secured transactions law, model law, or the Guide itself, which is legal tradition-neutral and “seeks to rise above differences among legal regimes.”<sup>110</sup>

Zweigert and Kotz developed the theory that legal texts, institutions, and legislative solutions can be transferred from one jurisdiction to another.<sup>111</sup> In the process of transfer, the key test is functionality. The test of functionality provides that if a “legal transplant” can effectively and efficiently serve the needs of, and be useful to, the receiving system, its origin is irrelevant.<sup>112</sup> Legal transplants that have been freed of “[their] conceptual context and stripped of [their] national doctrinal overtones best satisfy the test of functionality.”<sup>113</sup> Transplanting a model law or recommendations contained in a guide produced by an international body should already be stripped of the national doctrinal overtones. In the process of transplanting, it is critical to identify the problem that the receiving system seeks to address and do so “without reference to the concepts of [any] legal system.”<sup>114</sup> Professor Xanthaki argued that in developing legislative solutions, “effectiveness is the platform for transferability of laws, institutions and legislative solutions.”<sup>115</sup> Sir Kahn-Freund, professor of comparative law at University of Oxford, recognized the uses of “foreign patterns” of law in legal reform to promote economic change “which foreign law is designed either to express or produce.”<sup>116</sup> At the same time, he cautioned that this is also one area where the problem of transplantation arises with the possibility of a rejection of

---

<sup>109</sup> *Legal Efficiency of Secured Transactions Reform: Bridging the Gap Between Economic Analysis and Legal Reasoning*, in SECURED TRANSACTIONS REFORM AND ACCESS TO CREDIT 128 (Frederique Dahan & John Simpson eds., 2008).

<sup>110</sup> UNCITRAL Guide, *supra* note 22, at 1.

<sup>111</sup> KONRAD ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34-47 (Tony Weir trans., 1998).

<sup>112</sup> Antonios Emmanuel Platsas, *The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks*, 12.3 ELECTRONIC J. COMP. L. (2008), available at <http://www.ejcl.org/123/art123-3.pdf>.

<sup>113</sup> ZWIEGERT & KOTZ, *supra* note 111, at 44.

<sup>114</sup> *Id.* at 34.

<sup>115</sup> Helen Xanthaki, *On Transferability of Legislative Solutions*, in DRAFTING LEGISLATION: A MODERN APPROACH 16 (Constantin Stefanou & Helen Xanthaki eds., 2007).

<sup>116</sup> O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 2 (1974).

the legal transplant.<sup>117</sup> Sir Kahn-Freund advised that transplants can only be useful if the context of the receiving legal system has been fully taken into account.<sup>118</sup>

Arguments have been advanced suggesting the impossibility of the transfer of legislative solutions. It has been argued that each legal system is a product of a particular culture, therefore resulting in “autonomous epistemological clusters,” and making it impossible to effectively transplant legal solutions, or indeed come up with legal models of wider application.<sup>119</sup> The argument has also been advanced that legal transplants can become “legal irritants,” resulting in an “evolutionary dynamic” in the receiving legal system and “trigger[ing] a whole series of new and unexpected events.”<sup>120</sup> Professor Gillespie, an expert on legal transplantation in East Asia, went so far as to rule out the possibility of modeling “legal transplantation determinatively” in commercial law reform with extant theories of legal transplantation.<sup>121</sup> In the context of transplanting secured transactions laws, one needs to understand the credit market context. In other words, who are the constituents upon whom the framework will be transplanted?

The credit market is becoming increasingly multinational.<sup>122</sup> Foreign banks acquire local lenders or lend directly across the borders. Large industrial conglomerates establish their presence in developing economies and finance the economies’ suppliers, sellers, and dealers of equipment and lease a variety of assets to local businesses. Foreign buyers and consumers of commodities finance their production and delivery. Local SMEs gradually connect to these networks and supply-chains, becoming an integral part of its process. Would a law transplanted from a system where many of these players already operate be harmful to growth, become a legal irritant, or otherwise impair local culture? The arguments about the effect on legal culture have tended to emanate from front-loaded definitions rather than neutral referents. For instance, Legrand, professor of comparative law at Université Panthéon-Sorbonne in France, defines legal culture as normative precepts of an “interpretive community” that relate to the identity of the community.<sup>123</sup> This excludes any possibility of the transfer of legislative solutions. The problem with Legrand’s definition is that it assumes, erroneously, that legal culture means “national legal culture” and that it is

---

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 27.

<sup>119</sup> Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44, 44-45 (1997).

<sup>120</sup> Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

<sup>121</sup> JOHN S. GILLESPIE, TRANSPLANTING COMMERCIAL LAW REFORM, DEVELOPING A ‘RULE OF LAW’ IN VIETNAM 287-304 (2006).

<sup>122</sup> See Spiros V. Bazinas, Richard M. Kohn & Louis F. Del Duca, *Facilitating a Cost-Free Path to Economic Recovery—Implementing a Global Uniform International Receivables Financing Law*, 44 UCC L. J. 2 (2012), which highlights the growing value of receivables and argues for the ratification of the United Nations Convention on the Assignment of Receivables in International Trade (2001).

<sup>123</sup> PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 27 (1999).

something immutable.<sup>124</sup> However, this is not necessarily the case. Legal culture may change and be spread over a much wider area than a nation-state. Furthermore, experience suggests that using ideas from other jurisdictions, legislative guides, or model laws is a very useful approach in setting up the infrastructure necessary for a legal culture associated with a market economy.<sup>125</sup>

It is doubtful whether the Euro-centered debate on comparative transplants is of any value to law reform in former British protectorates and colonies, such as Malawi. The only arguments that may be relevant are those advanced by Gillespie. However, by approaching the debate through the prism of the arguments that have arisen largely in the context of European private law, it falls short of useful advice for secured transactions law reform in Anglophone sub-Saharan Africa. In assessing the usefulness and need of a reform, the most important factor should be effectiveness as measured by the extent to which lending increases.<sup>126</sup> In the authors' opinion, the possibility of transplants is timely, particularly in the reform of secured transactions laws.<sup>127</sup> Yet, transplanting a law entails different procedures than transplanting a secured transactions framework. Both authors have been involved in such transplants. In their experience, for the transplant to work, it must be accompanied by a number of other activities and it must include the relevant stakeholders in the transplanting process. This transplanting process involves modification, deletion, and addition of many provisions from the transplanted text. Transplantation also involves outreach to the community, training of lenders, borrowers, and lawyers, modification of related statutes and regulations, such as those that require banks to maintain certain reserves against secured loans, and others. Accordingly, in the context of secured transactions, transplanting entails much more than simply enacting a law of a foreign jurisdiction.

In the context of secured transactions reform, arguments have been advanced by McComarck, professor of international business law at the University of Leeds, that because of the closeness of the Guide to UCC 9, there is a risk of rejection of the Guide as providing solutions for legislative reform.<sup>128</sup> While the origin of a legislative solution may have some bearing on its reception in a legal system, the most operative cause to the decision of adopting solutions is the need and usefulness to the receiving legal system. In any case, the statements

---

<sup>124</sup> Jan M. Smits, *Legal Culture as Mental Software, or How to Overcome National Legal Culture* (Maastricht Faculty of Law Working Papers No. 2007-2), abstract available at <http://ssrn.com/abstract=1007447> (last visited Mar. 25, 2013).

<sup>125</sup> See Jan M. Smits, *Import and Export of Legal Models: The Dutch Experience*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 551 (2003), for the experience in Eastern Europe.

<sup>126</sup> Luzius Mader, *Evaluating the Effects: A Contribution to the Quality of Legislation*, 22 *STATUTE L. REV.* 119, 126 (2001).

<sup>127</sup> The expression is inspired by Pierre Legrand. See Pierre Legrand, *The Impossibility of Legal Transplants*, 4 *MAASTRICHT J. EUR. & COMP. L.* 111 (2003).

<sup>128</sup> Gerard McCormack, *UNCITRAL, Security Rights and the Globalization of the U.S. Article 9*, 64 *N. IR. LEGAL Q.* 485 (2011); see also GERARD MCCORMACK, *SECURED CREDIT AND THE HARMONIZATION OF LAW: THE UNCITRAL EXPERIENCE*, at vii-ix (2011).

of the problems and solutions that the Guide seeks to advance are sufficiently flexible so that one can conclude that they no longer resemble “the national doctrinal overtones” of UCC Article 9. The Canadian, New Zealand, and Australian Personal Property Security Acts (PPSA) all exhibit a high degree of closeness to the Guide, perhaps more so than UCC Article 9. It should not be forgotten that the preeminence of the UCC Article 9 approach was its initial appeal to the individual states that had previously operated in a scattered legal framework with a multiplicity of laws regulating individual security devices, such as conditional sales, as much so as is the case currently in Malawi.<sup>129</sup>

Furthermore, Professor McCormack’s critique of the Guide is centered around its proximity to UCC Article 9 without actually evaluating its impact on the credit market and overall economy of the United States. Its impact has been particularly positive on SMEs that operate as sole proprietors, as illustrated by surveys of filings in a number of states, including Illinois, Indiana, Texas, and Utah, which indicate that about 50% of all filings are made against individual debtors.<sup>130</sup> This number excludes purchase money loans secured with consumer goods that are perfected automatically, consumer loans secured with motor vehicles that are perfected subject to certificate of title statutes, non-possessory security interests taken in household goods that are rendered unenforceable by federal law, and tax liens filed against individuals. These simple mathematics lead to the conclusion that about 50% of all secured loans under UCC Article 9 are made to individuals who operate a business either in the form of a sole proprietorship or informal unregistered partnership. This is the kind of potential borrower who is struggling to obtain credit in Malawi. The argument that the failure of the Guide is due to its proximity to UCC Article 9 is therefore not supported by the day-to-day financing practices and the potential economic impact.

## V. FINAL REMARKS

The effectiveness and impact of a secured transactions reform is measured by the extent to which all types of borrowers gain access to credit and at reasonable rates of interest. Credit will become more available only when the rights of lenders are adequately protected in and outside of insolvency. The cost of credit will be reduced if the onerous, previously existing requirements on the creation of security interests and their registration are eliminated. All of these

---

<sup>129</sup> Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); UNCITRAL Secretariat, *A Note by the Secretariat on Article 9 of the Uniform Commercial Code of the United States of America*, ¶¶ 3-8, A/CN.9/132, in UNCITRAL VIII Y.B. 222-231 (1977), available at [http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb\\_1977\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf); GILMORE, *supra* note 106, ch. 9.

<sup>130</sup> The surveys are on file with the authors. In the United States, businesses operated by individuals as sole proprietorships, partnerships, and Subchapter S entities by far outnumber corporations. See *Romney’s Tax Reboot*, WALL ST. J., Feb. 23, 2012, at A14.

aspects should be addressed in the secured transactions law. However, the enactment of a functional law is just one step toward creating a credit-friendly environment. Training of lenders, businesses, and other relevant stakeholders on best practices of asset-based lending is another critical component of a reform.<sup>131</sup>

In the reform of a secured transactions framework, adequate attention must be paid to the process of transplanting, as well as to the transplanted product itself.<sup>132</sup> Failures in the process of transplanting a law and executing the overall reform may have disastrous consequences.<sup>133</sup> The availability of a model law or legislative guide is just one aspect of the process of the legislative reform. As a first step, an adequate model must be selected. The test of functionality is critical in the selection process and requires that a law only be transplanted if it has the potential of real impact on the local credit market as experienced in the host economy. The second step entails the adaptation of the selected model to the local environment. Attention to local culture in a wider socio-economic context and the necessary adaptation of the model are critical.

Malawi had subjected a number of models to the test of functionality and set out on the path of reforming its secured transactions framework with the assistance of the IFC. A local drafting committee was formed in the fall of 2010 that prepared an initial draft secured transactions law—the Personal Property Security Bill—based on the New Zealand PPSA.<sup>134</sup> This choice was made deliberately as a reaction to the earlier study of the Malawian credit framework that had identified deficiencies in the Malawian secured transactions framework and its inability to channel credit to the private sector. However, the New Zealand PPSA was not “transplanted” as a piece of legislation ready for immediate enactment. Rather, it was refined and attuned by the drafting committee to the local credit practices as well as to the cultural and socio-economic environment. This refinement process involved a close examination of the Guide and incorporation of a number of its recommendations. Once the recommendations of the Guide are converted into a model law, other countries wishing to reform their secured transactions law will be able to directly utilize the model law.

The Malawian drafting committee included public and private sector representatives, academics, policy-makers, and IFC consultants that merely

---

<sup>131</sup> See Collateral Registries Toolkit, *supra* note 14, at 91-97, on the importance of training.

<sup>132</sup> Robert J. Daniels, Michael J. Trebilock & Lindsay D. Carson, *The Legacy of the Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111, 116 (2011).

<sup>133</sup> In the context of secured transactions laws, successful and unsuccessful transplants may be encountered in a number of Latin American countries. See Marek Dubovec, *A Guide to a Successful Adoption and Implementation of the Organisation of American States Model Law on Secured Transactions and Registry Regulations in Honduras—The National Law Center Experience*, 43 UCC L. J. 825 (2011).

<sup>134</sup> New Zealand PPSA (1999), Act No. 126 is available at <http://www.legislation.govt.nz/act/public/1999/0126/latest/DLM45900.html>.

guided the process. Both authors actively participated in the deliberations. Furthermore, the refined Malawian PPSA draft was presented and extensively discussed at stakeholders' forum where a large group of participants, including commercial law judges, registrars, business owners, and creditors voiced their opinions. Eventually, the initially transplanted New Zealand PPSA, refined by the Guide, was domesticated in a way that fits within the Malawian environment. Both authors hope that the Malawian PPSA will get implemented in the near future so that credit can start flowing into the economy and so that other countries in sub-Saharan Africa may begin to follow this model.



