

# A Model Law on Secured Transactions

*A representation of structure? An object of imitation? A type or design?*

**Roderick A. Macdonald**

F. R. Scott Professor of Public and  
Constitutional Law, Faculty of Law,  
McGill University  
President, Royal Society of Canada

# Desirability, Feasibility, Timing

- Von Savigny's caution
- Modes of law reform
- Is the possible the necessary?

# Desirability of a Model Law

- One size fits all?
- Multiple states or multiple sub-national units
- Relevant differences: legal or political or social or economic?
- Where should initiative lie – UNCITRAL or groups of states, or individual states
- *Tentative conclusion: probably not*

# Feasibility of a Model Law

- Three situations of feasibility
  - (1) an international regime (receivables)
  - (2) new field (financial instruments)
  - (3) discrete legislative patch (letters of credit)
- None obtain here
- Risk of reopening policy debate when transforming one instrument into another
- *Tentative conclusion: probably not*

# Is the moment Propitious?

- Needed coincidence of supply and demand
- Model law oversupply: EBRD, OAS, DCFR, OHADA; but no Legislative Guide oversupply
- Model law underdemand:
  - states already enacted (Ukraine, Australia);
  - states having commissioned drafts (DCFR);
  - states having to attend to local practice;
  - states in need of technical assistance
- *Tentative conclusion: probably not*

# Policy Considerations

## *Internal structuring*

- Relationship to « other law »
- Consumer law or commercial law model
- Organisation, style and mode of expression of rules
- Ideal-type or lowest common denominator

# Policy Considerations

## *Relationship with “other law”*

- Inclusions and exclusions reveal policy perspectives
- *Excludes*: immoveables; non-consensual; possessory liens
- *Includes*: registry systems; conflicts; insolvency
- *Tentative conclusion: a reflection of a particular approach to defining its subject matter*

# Policy Considerations

## *Commercial law or consumer law?*

- Role of civil code as general law (common law)
- Role of commercial code as exception for enterprises
- Role of consumer code as exception for consumer transactions
- Which of these orientations should a model law adopt?
- *Tentative conclusion: Legislative Guide proposes a general law of commerce in which consumer perspectives are a forced exclusion*



# Policy Considerations

## *Organization, Style, Mode of Expression*

- Basic methodological themes of Guide:
  - Functionalism: scope, proceeds, acquisition financing
  - Statute: no conceptual pyramiding; specific rules to answer specific practice conundrums; mistrust of courts
  - Suppletive rules: default position even for suppletive rules always favours stronger economic interest
- *Tentative conclusion: a common law approach*

# Policy Considerations

## *Ideal-type or lowest common denominator?*

- Lowest common denominator: DCFR; OHADA; (within US) Article 9; Canadian PPSA  
What is workable trade-off among states
- Ideal-type: Legislative Guide, EBRD  
Derives rules from idealized liberal ideology of market exchange
- *Tentative conclusion: ideal-type works best as a Guide, not a model law*

# Contents and Structure of a Possible Model Law

- *Scope:* two forms of functionalism
- *Proceeds:* two concepts of thing and value
- *Acquisition financing:* a seller's ontology
- *Priority:* is property different from rank?
- *Third-party effectiveness:* is perfection different from publicity?

# Scope: I

- “security interest” means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation, (a) the interest of a transferee of an account or chattel paper, and (b) the interest of a lessor of goods under a lease for a term of more than one year;
- Subject to subsection 4 (1), this Act applies to,
  - (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest

# Scope: II

- **2644.** The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors.
- **2646.** If the creditors rank equally, the price is distributed proportionately to their claims, unless some of them have a legal cause of preference.
- **2647.** Prior claims and hypothecs are the legal causes of preference.
- **2660** A hypothec is a real right on a movable or immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whosever hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking as determined in this Code.

# Proceeds: I

- “proceeds” means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with collateral or the proceeds therefrom, and includes,
  - (a) any payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom,
  - (b) any payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property, and
  - (c) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;
- Where collateral gives rise to proceeds, the security interest therein,
  - (a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free of the security interest; and
  - (b) extends to the proceeds.

# Proceeds: II

- **2674.** A hypothec on a universality of property subsists but extends to any property of the same nature which replaces property that has been alienated in the ordinary course of business of an enterprise.

A hypothec on an individual property alienated in the same way extends to property that replaces it, by the registration of a notice identifying the new property.

If no property replaces the alienated property, the hypothec subsists but extends only to the proceeds of the alienation, provided they may be identified.

- **2733.** A hypothec does not divest the grantor or the person in possession, who continue to enjoy their rights over the charged property and may dispose of it, subject to the rights of the hypothecary creditor.

# Acquisition Financing: I

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



# Acquisition Financing: II

- **1745.** An instalment sale is a term sale by which the seller reserves ownership of the property until full payment of the sale price.

A reservation of ownership in respect of a road vehicle or other movable property determined by regulation, or in respect of any movable property acquired for the service or operation of an enterprise, has effect against third persons only if it has been published; effect against third persons operates from the date of the sale provided the reservation of ownership is published within 15 days.

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

# Conclusion

- What is a Model Law: A representation of structure? An object of imitation? A type or design?
- Representation: Article 9 “lite”; Article 9 for dummies –  
NO – need to work in practice
- Object of imitation: unrealizable statement of moral perfection –  
NO: need to operationalize
- A type or design: an archetype or a blueprint --  
NO: this is the role of a Legislative Guide
- *Tentative conclusion: the perfect is the enemy of the good*