Chima Williams Iheme

Towards Reforming the Legal Framework for Secured Transactions in Nigeria

Perspectives from the United States and Canada

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List of Abbreviations

ACA	American Consumers Association
ADR	Alternative to Dispute Resolution
Afr.LR (Comm)	African Commercial Law Report
ALI	The American Law Institute
All NLR	All Nigerian Law Report
Article 9	Revised 1999 Article 9 of the United States Uniform Commercial Code
BC	Bankruptcy Code (United States)
BGB	The German Civil Code
BIA	Bankruptcy and Insolvency Act (Canada)
BOFIA	Banks and Other Financial Institutions Act
CA	Court of Appeal
CAC	Corporate Affairs Commission
CAMA	Companies and Allied Matters Act
CAP	Chapter
CEAL	Center for the Economic Analysis of Law
Cir.	Circuit
CISG	The United Nations Convention on Contracts for the International Sale of Goods (the 1980 Vienna Convention)
CJN	Chief Justice of Nigeria
CSCS	Central Securities and Clearing System
DIP	Debtor-in-Possession
EBRD	European Bank for Reconstruction and Development
ECOWAS	Economic Community of West African States
ERNLR	Eastern Region of Nigerian Law Report
HC	High Court
HCJ	High Court of Justice
JCA	Justice of Court of Appeal
JSC	Justice of the Supreme Court
LFN	Laws of Federation of Nigeria

NAFTA	North American Free Trade Agreement
NCCSL	National Conference of Commissioners for the Uniform State Laws
NLR	Nigerian Law Report
NSCC	Nigerian Supreme Court Cases
NWLR	Nigerian Weekly Law Report
OHADA	Organization for the Harmonization of Business Laws in Africa
OPPSA	Ontario Personal Property Security Act
p.	Page
PMSI	Purchase Money Security Interest
pp.	Pages
PPSA	Personal Property Security Act
s.	Section
SC	Supreme Court
SCN	Supreme Court of Nigeria
SCNJ	Supreme Court of Nigerian Judgement
SME's	Small and Medium-Scale Enterprises/Entrepreneurs
UCC	Uniform Commercial Code
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USC	United States Code
UTRA	Uniform Trust Receipt Act
WACA	West African Court of Appeal
WRNLR	Western Region of Nigeria Law Report

Chapter 1
Introduction

Abstract This book rests on the presumption that ease of access to credit is the cornerstone of every country's economic development as no country may have any meaningful economic development if those willing to start up businesses or expand them cannot obtain sufficient credit to do so.

The sufficient availability of credit to business entities, especially the small- and medium-scale enterprises (SMEs), is interconnected with the nature of a country's legal framework on secured transactions. A modern secured transactions law entails the use of personal property to secure credit, while an unreformed one—like Nigeria's—among other shortcomings like lack of public notification system, focuses mainly on the use of real property as collateral. This is, however, a big problem and quite unsuitable for economic development because most SMEs and other forms of business organizations in Nigeria may not always have sufficient real property collateral to secure credit—and as a result, they do not always meet up with credit requirements from banks and other lending institutions. A secured transactions law that allows for the use of personal property as collateral provides comprehensive rules of creation, perfection, priority, as well as judicial and self-help enforcement channels, and creates confidence in lending by ultimately ensuring predictability, which no doubt makes credits sufficiently available for entrepreneurs.

Nigerian secured transactions law lacks the main features of a modern one because it provides no detailed rules (from creation to enforcement) on the nonpossessory use of personal property to secure credit. It is not yet fully recognized in Nigeria how much detrimental it is that its secured transactions law is compartmentalized—what inherently makes the system unpredictable and not trustworthy to financiers. The summary effect of all this is that there is no sufficient flow of credit in the economy, and this leads to economic underdevelopment. This book therefore seeks to come forward with solutions that might significantly address some of Nigeria's economic problems, especially those that emanate from insufficient availability of credit. In looking for solutions, the book takes a critical look at UCC Article 9 and is of the firm view that its unitary structure could offer a good example for Nigeria to follow in the reform of its secured transactions law. However, rather than rely exclusively on the US law, the book also takes a critical look at the Ontario Personal Property Security Act because in many respects, Canadian (Ontario) laws and the linked economic structures used to be closer to Nigeria's than those of the US.

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It is therefore the position of this book that through a comparative analysis that points out the commonalities and discrepancies between the two systems, the book will analyze those elements of UCC Article 9 and Ontario PPSA that could conveniently be adapted to suit Nigeria's local conditions. The idea is not to suggest the unaltered transplantation of the more suitable version of any one institution or rule but rather to see why there was a need to and how the Canadians managed to adjust the US transplants to local conditions—this comparative analysis would hopefully offer valuable tools to the Nigerian lawmakers towards the reform of Nigeria's secured transactions law.

1.1 The Core Reasons for This Book: A Comprehensive Reform of Secured Transactions Law and Its Underlying Benefits

First of all, this book does not intend to exclusively describe the law as is—whereas doing that to a certain extent would provide a clear background in certain instances, the book will also in many instances make some normative arguments and legal propositions. The reason for this is obvious—a book whose central aim is law reform should discuss law both from the positive and normative perspectives. Hoping that the reader has been alerted as to how issues will later unfold in the book, the author shall hereunder introduce the core ideas.

There are basically two types of credit transactions that exist in market economies, namely secured and unsecured.[1] When a lender chooses to extend credit to a borrower without requesting something to back up the latter's promise to repay, its only hope of repayment is hinged on the borrower's promise.[2] However, where credit is given and secured by a collateral, a security interest in the collateral is created in favor of the lender, and upon the borrower's default to repay, the lender could use the collateral to satisfy its claim. In a nutshell, a legal framework that provides a detailed and predictable law on how security interests are created, perfected, prioritized, and enforced encourages lending, which ultimately leads to the sufficient availability of credit to all those who desire to do and expand business—hence the economic development of that country.[3]

[1] See Duca et al. (2002), p. 2.

[2] Where credit is extended without demanding for collateral to back it up, the lender is advised to obtain some kind of control over the debtor's assets. Such controls like changing the password for the software that is needed to operate an equipment or putting its lock on the door of a warehouse to ensure the removal of goods are done with his consent.

[3] See Ziegel et al. (1995), p. 3.

Article 9 of the US Uniform Commercial Code[4] (hereinafter: Article 9) and the Ontario Personal Property Security Act[5] (hereinafter: OPPSA or Ontario PPSA) are very good models that provide for comprehensive rules of creation, perfection, priority, and enforcement of security interests in personal property and fixtures. For this reason and those that will later be stated, Article 9 and OPPSA have been chosen as benchmark models that will form the cornerstone of this book. Nigeria lacks a modern secured transactions law that provides comprehensive rules regarding the creation, perfection, and enforcement of security interest in personal property—lenders place high emphasis on real property collateral, which invariably excludes many individuals and micro-, small-, and mid-scale entrepreneurs who are usually unable to provide real property collateral from obtaining affordable credits. This is the major reason the author believes that it is exigent for Nigeria to consider a reform of its secured transactions law with close reference to Article 9 and OPPSA provisions, together with any useful lessons that could be learned from a comparative analysis of the two models.

It is the author's suspicion, however, that an average lawyer or legislator in Nigeria will seriously question the need to transplant some elements[6] of foreign law or bother at all to learn any experiences and lessons that may come from comparing these laws to reform Nigeria's secured transactions law[7] in view of the saying that a known devil might be better than an unknown angel.[8] Notwithstanding this

[4]Article 9 is the article in the United States' Uniform Commercial Code that governs how security interests are created in personal property and fixtures in the securing of credits. Article 9 does not govern security interests in real property. Article 9 was revised in 1999 and 2001 and has been adopted in all the 50 states of the United States. See Duca et al. (2002), p. 65. The designation "Article 9" is a bit weird, considering that its bulky content is equivalent to a chapter in many other statutes.

[5]OPPSA is the Ontario version of the Canadian Personal Property Security Act (PPSA). In 1967, Ontario became the first common law province in Canada to adopt the PPSA with some modifications.

[6]Hornby (2010) defines "transplant" as a "movement of somebody or something to a different place or environment." There are two exactly opposite views as to whether or not a law could actually be successfully transplanted from one jurisdiction to another. For those who doubt the success of legal transplantation, Pierre Legrand has argued that if a law must be transplanted, then it can only succeed if other sociocultural factors are transplanted alongside, for instance, the culture and language of the country of origin. See Pierre (1997). Eva Hoffman supported Pierre and posited that "you can't transport human meanings whole from one culture to another any more than you can transliterate a text . . . because in order to transport a single word without distortion, one would have to transport the entire language around it . . . Indeed, in order to transplant a law, or a text, without changing its meaning, one would have to transport its audience as well." See Hoffman (1991), p. 175. Alan Watson, however, argues that law can actually be successfully transplanted. See Watson (1993), p. 21.

[7]"Security interest in personal property" as used in this book aims to encompass all transactions known to UCC Article 9 or Ontario PPSA, plus those in existence in Nigeria.

[8]A new law usually introduces some changes in a legal system. Those who benefit from the wrong state of affairs that the new law has come to correct are usually reluctant and not enthusiastic about the new legal order. The proposal to transplant the UCC Article 9 model law on secured transactions to Nigeria is facing some confrontations from some established pressure groups who are already used to the obsolete system. In June 2013, the author visited four law firms in Nigeria, two in Lagos, and two

suspected reaction, the truth remains that the bulk of Nigerian security interest law is currently in a mess because the governing laws are based on a small set of disorganized statutes and conflicting court decisions. It is highly in order therefore for Nigeria to reform its law on personal property to reflect the experiences of Article 9 and OPPSA so that both local entrepreneurs and foreign direct investors could optimally realize the benefits of credit sufficiency in the economy—what could eventually lead to economic development. This proposal is further supported by the fact that England, whose laws Nigeria constantly looks up to, is currently being pressed by its scholars to consider a reform of its secured transactions law through the lens of Article 9.[9]

Owing to the incoherent and obsolete body of laws[10] that govern secured transactions in Nigeria, a lot of commercial hardships have often resulted, thereby necessitating the urgent need for reform.[11] The need for reform, however, could only be fully appreciated when a look is taken at other jurisdictions[12] to see how they have fared as a result of secured transactions law reform. Judging from the available opinions expressed in textbooks[13] and journal articles[14] by some leading authorities in this area of law, it is now almost settled that the secured transactions law of a country to a large extent determines the level of its economic development. These opinions are further given a leg when it is considered, for instance, that Article 9 and OPPSA have helped a great deal in providing favorable conditions for the blossoming of businesses and the availability of sufficient credits to entrepre-

in Benin City (names withheld). The author discussed the efforts of the World Bank's project through the Center for the Economic Analysis of Law (CEAL) to help Nigeria to acquire a new law of secured transactions. A good number of lawyers in the firms were not enthusiastic about the proposed secured transactions law because it will pose some initial difficulties, like getting to know the law and the cost of retraining staff.

[9]See McKnight (2006), p. 598, where the learned author pointed out that there "[h]ave been calls for reform of the English security interest law going as far back as the Crowther Committee in 1971." Similarly, see McCormack (2009), pp. 83–100.

[10]Nigeria acquired into its legal system all the statutes of general application that were in force in England on or before January 1, 1900. It also acquired the common law of England and the principles of equity. The sad story is that a bulk of these laws, especially those that touch on secured transactions, have remained unrevised since their acquisition and are no longer in tune with today's commercial realities.

[11]The Center for the Economic Analysis of Law (CEAL) embarked on a law reform project for Nigeria, and in 2009, it produced a draft law on secured transactions that has similarities with Article 9, but this draft is yet to come before the federal parliament. The draft is available at http://nigeria.ceal.org/docs/. All websites cited in this chapter have been last accessed on April 15, 2016.

[12]The jurisdictions to be comparatively examined here include mainly the United States and the Ontario province in Canada. However, the author finds the recent reforms in secured transactions law in Ghana, Liberia, Malawi, and Sierra-Leone very instructive.

[13]Tajti (2002a), p. 62; Fleisig et al. (2006), p. 23; Sena (2008), p. 13.

[14]See Reilly (2008), p. 40; see generally Cuming and Walsh (2000–2001), p. 339; see also Clark (2000), p. 129.

neurs and all other actors who need credit for one reason or the other that will ultimately improve the economy.[15]

Nigeria still retains a large number of laws transplanted from England,[16] including secured transactions law, which is scattered in several statutes and case law. While some of these earlier transplanted laws have since been amended by the British Parliament to accommodate modern trends in commercial transactions, the same set of laws remains unchanged in Nigeria. The effects of the continuous use of these obsolete laws are multifarious and to a large extent have prevented the Nigerian economy from the desired development.

In view of the obvious lapses that are inherent in Nigeria's secured transactions law, this book posits that there is little or no need for a contentious debate to convince anyone as to whether Nigerian secured transactions law really needs reform, being that the matter loudly speaks for itself. Judging from the number of countries[17] that have already reformed their secured transactions laws and how those reformed laws have really helped in developing their economies, a proposal for reform of Nigeria's secured transactions law should be sufficiently understood by this favorable statistics. Part of what is needed to ground a conviction as to the link between secured transactions law reform and economic growth is to show that elsewhere, where reforms on secured transactions laws have taken place, such reformed laws were substantially the cornerstone of economic development.[18] This book therefore aims at exposing the inadequacies of the current secured transactions law in Nigeria (covering hire purchase, conditional sale, equipment leasing, consignments, warehousing, and so on) and how a modern secured transactions law in particular could be created to help boost economic development by increasing access to credit, especially to SMEs.

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[15]Both the OPPSA and Article 9 accommodate and regulate the use of receivables and other kinds of personal property to secure lending. This makes it easy to acquire credit facilities and start up a business or reinforce same. See McCormack (2003), p. 401.

[16]Nigeria acquired into its legal system all the statutes of general application that were in force in England on or before January 1, 1900. It also acquired the common law of England and the principles of equity. The sad story is that a bulk of these laws, especially those that touch on secured transactions, have remained unrevised since their acquisition and are no longer in tune with today's commercial realities.

[17]In no particular order, the examples are Australia, Canada, New Zealand, Poland, and most of the Central and Eastern European countries, the United States, Malawi, Liberia, Sierra Leone, etc. Also, the French-speaking West African countries have adopted the Organization pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) law, which has similarities with Article 9. Book IX of the Draft Common Frame of Reference, which is a model law on secured transactions, closely resembles Article 9 and is serving as a reform template for European countries. Similarly, UK scholars are pushing the British government to consider a reform of its secured transactions law through the lens of Article 9. For example, see the UK secured transaction law reform project, headed by Prof. Louise Gullifer. Available at https://www.law.ox.ac.uk/projects/Secured_transaction.

[18]See generally *World Bank Building Effective Insolvency Systems* (1999)—A Report from the Working Group on Debtor-Creditor Regimes, esp. pp. 1–12. Available at http://www.worldbank.org/ifa/ipg_eng.pdf.

1.2 The Economic Advantages of Reforming Nigeria's Secured Transactions Law

No doubt, there are quite a number of advantages of reforming Nigeria's secured transactions law.[19] First, if Nigeria's secured transactions law is reformed following the path of Article 9 and OPPSA, it would bring the various laws on secured transactions under one roof, thereby making the applicable law very certain, accessible, and less controversial. Currently, there is no one statute in Nigeria that regulates secured transactions. Applicable laws each time are drawn from different obsolete statutes and court decisions that oftentimes contradict themselves.[20] Conflicting court decisions would not have posed great difficulty as they do today in Nigeria if there was a comprehensive statute that deals with secured transactions issues and serves as a true port of call when seeking to know what the law says—and could be used as basis for settling the conflicts engendered by conflicting court decisions.

Second, a reformed secured transactions law will provide a very predictable system of laws that governs the use of personal property as collateral as distinct from those of real property transactions, instead of muddling up both categories of property with the same governing laws. The result so far in Nigeria is that the logic of law applied to real property transactions is analogically extended, albeit wrongly, to personal property transactions. This happens because the distinction in terms of applicable laws for both categories of property is blurred—and this is one of the goals that can be achieved through secured transactions law reform.[21]

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[19]There is quite a number of literature on secured transactions law reform—but many of them did not focus on Africa and especially Nigeria—except the project of Center for the Economic Analysis of Law in 2009, which is yet to be completed. See http://nigeria.ceal.org/docs/.

[20]The inconsistencies could be drawn from the following cases. In *Ellochim Nig. Ltd & Ors v Mbadiwe* (1986) NWLR (part 14) 47 at 165, the learned Justice condemned the use of self-help and said: "It is no doubt annoying, and more often than not, frustrating, for a landlord to watch helplessly his property in the hands of an intransigent tenant who is paying too little for his holding, or is irregular in his payment of rents or is otherwise an unsuitable tenant for the property. The temptation is very strong for the landlord to simply walk into the property and retake immediate possession. But that is precisely what the law forbids." Ten years after, in *Umeobi v Otukoya* (1978)1 NLR 172 SCN, the same Justice said: "circumstances may exist in which a person may take an extra judicial remedial action to enforce his rights and still remain within the bounds of the law." See also the case of *Ojukwu v Military Governor of Lagos Sate* (1985) 2 NWLR (part 110) 806, where the use of self-help to recover property was condemned, and the Supreme Court decision in *Civil Design Construction Nig. Ltd v SCOA Nig. Ltd* [2007] 6 NWLR (Pt. 1030) at 300, where Justice Onnoghen said that self-help is uncivil and should not be found in the laws of civilized nations. But see *Awojugbagbe Light Industries Ltd v Chinukwe* [1995] 4 NWLR (part 390) 379, where Bello CJN said that the use self-help/force to recover property is an integral part of a secured party's right.

[21]For a discussion concerning the inseparability of personal and property laws and the difficulties associated with it in civil laws, see Tajti (2014), p. 163.

Third, reformed secured transactions law is expected to allow for the use of every personal property as collateral for the security of credits.[22] Currently in Nigeria (as already hinted at above), a huge emphasis is being placed on real property as the only desirable kind of collateral that can be used to secure lending because Nigerian law does not yet provide a clear-cut legal framework on the use of personal property[23] as collateral. The effect of this is that only a few who are able to afford land and buildings can secure credits and thus do business and expand. Small- and medium-scale entrepreneurs[24] who need credit in order to start up or expand businesses may not successfully do so because they typically have no real property to offer as collateral, and their best asset type is usually inventory (products and services), as well as receivables for the products and services sold—yet the current legal framework in Nigeria does not support the full use of these assets as collateral for credit. In other words, Nigerian banks and other financiers are very reluctant to lend out sufficient credit facilities to borrowers with personal property collateral because the rules that govern them are uncertain and unsettled.

The case is worse for those who are potential entrepreneurs, who only have sound business ideas but do not have any kind of collateral to secure credits so as to execute their ideas. Elsewhere, for instance in the US and Ontario, the case is different, as small entrepreneurs can secure credit using their accounts receivable from the new enterprise. In other words, what is basically required from potential entrepreneurs are sound business ideas and plans on how to realize profits from a start-up. What makes this possible in the US and Ontario in the author's view is mainly due to the existence of Article 9 and the OPPSA respectively, which accommodate the uses of any kind of personal property as collateral to secure credit.

The fourth point is a beneficiary of the foregoing. If the Nigerian secured transactions law is reformed to include the use of an increasing panoply of personal property and fixtures as collateral, access to credit[25] would be much more

[22]This view is corroborated by Fleisig et al. (2006), chapter 1. Furthermore, it is not that there is any law in Nigeria that states the outright ban for the use of personal property to secure loan—instead, personal property is not an attractive collateral due to lapses that this book will address. As a result of these lapses, the treasure hidden in the use of personal property to secure loan has been unexploited so far in Nigeria.

[23]In Nigeria, personal property could be used as collateral in chattel mortgages, whereby the lender possesses the collateral until repayment. It is only incorporated debtors that can secure loans with their personal property yet continue to use them as factors of production under the arrangement of floating charges. See the ensuing chapters for details on floating charge. In Chap. 3, arguments for its transformation into floating lien are canvassed.

[24]Nigeria's economy is still developing; the number of small- and medium-scale enterprises is larger than the large-scale ones.

[25]Black's Law (2009), p. 424, defines "credit" "as the availability of funds either from a financial institution or under a letter of credit." Credit is very vital to the well-being of every economy. Many authors have expressed this view. For instance, Daniel Webster said that "credit is the vital air of the system of modern commerce. It has done more, a thousand times, to enrich nations, than

enhanced, and this would lead to an increase in the number of entrepreneurs doing business, which would ultimately lead to the desired economic growth. Furthermore, where the system encourages the growth of businesses due to easy access to credit, many jobs will be created as a result, thereby reducing high unemployment rate, as well as enhancing the economy. This point also rests on the fact that in Nigeria currently, it is hard to launch a new venture to a great extent due to the difficulty in raising sufficient credit.[26] This eventually leads to a highly monopolized market because only very few who have the needed collateral are able to secure adequate funds from the lending industry to start or expand in their businesses. And also, being that initial entry into a line of business in a largely unregulated market has a lot of financial implications, the few Nigerian entrepreneurs doing business do not usually have fierce competitors whose competitive activities could force down prices in the market. The end result is that there are high prices for items because only very few control the available businesses and, by extension, the market.

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all the mines of all the world. It has excited labor, stimulated manufactures, pushed commerce over every sea, and brought every nation, every kingdom, and every small tribe, among the races of men, to be known to all the rest. It has raised armies, equipped navies, and, triumphing over the gross power of mere numbers, it has established national superiority on the foundation of intelligence, wealth, and well-directed industry.

Credit is to money what money is to articles of merchandise. As hard money represents property, so credit represents hard money; and it is capable of supplying the place of money so completely, that there are writers of distinction, especially of the Scotch school, who insist that no hard money is necessary for the interests of commerce." To read a longer excerpt, see http://www.bartleby.com/73/359.html. Daniel Webster made this speech in the United States Senate on the 18th of March 1834, and Henry Dunning Macleod quoted it in his book—Macleod (1872).

Whereas Macleod expressed this powerful opinion a century ago, the concept of credit, and how it can jumpstart any economy, especially in developing countries, still seems largely a story for future generations. Obama in his joint session address to the United States Congress on Tuesday, February 24, 2009, among other things, lamented on the dire need of credit when he said in the following words: ". . .You see, the flow of credit is the lifeblood of our economy. The ability to get a loan is how you finance the purchase of everything from a home to a car to a college education; how stores stock their shelves, farms buy equipment, and businesses make payroll. But credit has stopped flowing the way it should. Too many bad loans from the housing crisis have made their way onto the books of too many banks. With so much debt and so little confidence, these banks are now fearful of lending out any more money to households, to businesses, or to each other. When there is no lending, families can't afford to buy homes or cars. So businesses are forced to make layoffs. Our economy suffers even more, and credit dries up even further. . ." The complete speech is available at http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress.

[26]For more information on the level of ease with which credit is obtained in Nigeria for starting up a business, see http://www.doingbusiness.org/data/exploreeconomies/nigeria/#getting-credit.

1.3 Reasons for Choosing UCC Article 9 and Ontario PPSA as Benchmark Laws

The reader may want to ask why the author has particularly chosen these two laws[27] as the benchmark for analysis. The reasons for choosing them are as follows. First, Article 9 was not "born" grown-up, and its current revised[28] version has been a product of critical reviews that incorporated many court decisions over a long period, together with some industry-developed practices, and experiences.[29] Article 9 has passed the test of time and has improved with age, thereby rising to the status of a tested example of an efficient secured transactions law. In view of the success stories about the easy growth of businesses and acquisition of credit in the US, many countries[30] have as a result imported elements of Article 9 as tools for secured transactions law reform.

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[27]OPPSA and Article 9.

[28]The Revised Article 9 took effect as from July 1, 2001, and has been adopted by all the 50 states in the United States.

[29]Williams and Jamie captured the changes Article 9 has undergone in these words: "Article 9 of the Uniform Commercial Code ("UCC") deals with secured transactions in which a creditor takes a security interest in a debtor's personal property or fixtures. In 1998, Article 9 underwent major revision; these sweeping changes took effect on July 1, 2001, and were adopted in all 50 states. In 2010, a Review Committee appointed by the American Law Institute and the Uniform Law Commission suggested several additional amendments to Article 9. These changes, which will go into effect on July 1, 2013, are not meant to substantively revamp Article 9, but rather to provide clarity on certain issues that were proving problematic in practice, particularly with regard to financing statement filings. For example: UCC section 9-102(a) (68)—The new rule provides increased certainty regarding the name of an organizational debtor used on a financing statement. Old Rule: The name on the "public record" was the correct name of a registered organization. New Rule: The name on the 'public *organic* record' (defined as any record available for public inspection) is the correct name of a registered organization." Culled from Williams Mullen & Jamie Bruno, *Changes to Article 9 of the Uniform Commercial Code with Respect to Filling UCC Financing Statements* (2013), available at http://www.lexology.com/library/detail.aspx?g=7c91c4f6-4773-4d77-b389-92e2b35a45cf. Similarly, the decision in *Benedict v Ratner,* 268 US 353 (1925), rejected the view that accounts receivable could be assigned to a creditor as a form of collateral for credit. It was thought by courts then that the debtor's continuous possession of property subject of security interest could result to ostensible ownership problem. Today, the opinion of the court expressed in *Benedict* has been rejected by Article 9, which instead provided "filing" under section 9-205 UCC as a remedy to ostensible ownership problem.

[30]Personal Property Security Act (PPSA) is the name given to the personal property law of the various commonwealth countries. Canada was the first to adopt secured transactions law that resembles the Article 9 model in 1965, and in 1967 Ontario became its first province to adopt the Canadian PPSA. Other provinces have followed suit except Quebec, although Professor Tajti has pointed out in his book that Quebec, although a civil law province, "was forced to effectuate related reforms." Karen Redman corroborates this view as well. See Karen Redman, *International Trade — Service Providers International UCC Equivalents,* published in the METROPOLITAN CORPORATE COUNSEL (2010), available at http://www.metrocorpcounsel.com/articles/13084/international-ucc-equivalents (last visited on the 1st of October 2013). New Zealand adopted its PPSA in 1999 and Australia in 2009. Article 9 has also influenced many international instruments like the United Nations Legislative Guide on Secured Transactions, United Nations Convention on

Similarly, many international instruments such as the United Nations Legislative Guide on Secured Transactions, Book IX of the European Draft Common Frame of Reference (DCFR), the European Bank of Reconstruction and Development (EBRD)'s Model Law on Secured Transactions have genealogical traces to Article 9, even though sometimes the traces remain hidden. The spirit of Article 9 is fast infiltrating and diffusing into the legal systems of many countries, particularly those with common law heritage. While not intending to encourage Nigeria to join every bandwagon, the author reasonably believes that transplanting some elements (in adapted forms) of Article 9 and OPPSA, together with some crucial lessons therefrom to Nigeria, would contribute immensely to the solution of its economic quagmire, as well as remedy the disharmony that its secured transactions law currently faces with other [especially neighboring] jurisdictions.

Canada[31] is one of those countries whose Personal Property Security Act (hereinafter: PPSA) drew so much from Article 9. The Canadian PPSA has been adopted by all the Canadian provinces except Quebec, which has a civil law system, albeit as one learned author pointed out, Quebec has been pressured to equally make some reforms to achieve some kind of harmony with the other common law provinces.[32]

Although OPPSA has a lot of commonalities with Article 9, it has also some differences and idiosyncratic solutions that deserve to be examined. Ontario was the first common law province of Canada to adopt the Canadian PPSA. No doubt, OPPSA has been a large contributor to the economic success of Ontario due to its efficiency and comprehensiveness. The author shall make efforts to examine the commonalities and differences of the two with a view to determining which of their elements, as well as underlying lessons, would be most suitable for Nigeria. Another reason for comparing these laws rather than going straight to recommend one of them is that the usefulness of a law is much more apparent when it is compared with its kin. At the end of the comparison, policy makers and lawmakers are better convinced on the reasons or otherwise on the recommendations of certain

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the Assignment of Receivables in International Trade, European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transactions, Book IX of the Draft Common Frame of Reference (DCFR), etc. For more insight on how Article 9 influenced EBRD, see Simpson and Menze (2001), pp. 5–12. Also, Tajti (2002a), pp. 214–216, pointed out that in Hungary, secured transactions law reforms have been launched via the Civil Code Amendments from (1996–2000), in Russia (the Mortgage Law of 1998), Kyrgyzstan (the Law on Pledge of 1997), Latvia (the Law on Commercial Pledge, 1999). Even England, which Nigeria often looks up for law reforms, has been recommended the Article 9 model, following the Diamond Report [1989]. See Cuming (1996), p. 971. Also see Tajti (2002b), p. 93.

[31]Canada is a federation with ten provinces and three territories. One of its provinces, namely Ontario, is the focus of this book. "Canada" as used in this book therefore does not refer to Ontario but refers to the entire federation. Ontario as used in this book does not also represent Canada.

[32]See Tajti (2002a), p. 214. For a deeper analysis on how Quebec reformed its secured transactions law and the level of resemblance with Article 9, see the seminal article of Bridge et al. (1999), pp. 649–664. Cuming (1996), p. 974.

elements of both laws.[33] It is also believed that if Nigeria reforms its secured transactions law to resemble those of Article 9 and OPPSA, more Canadian and US entrepreneurs may become more interested in investing in Nigeria due to similarities in secured transactions law—this will certainly improve the Nigerian economy.

Nigeria has been made the primary beneficiary of this research not mainly because it is the author's country but for a few more other reasons. First, the author knows firsthand the existing problems of Nigeria's secured transactions law beyond what are contained in available literature. The firsthand knowledge of these problems is therefore necessary in making sound reform proposals. Second, Nigeria is the most populous[34] country in Africa with over 150 million people,[35] with a lot of mineral deposits and business opportunities that require credit financing[36]—so that influx of foreign investments into the country as a result will invariably open new vistas at the continental level, which other countries in Africa will benefit from. Third, Nigeria's economy ranks number one in Africa,[37] which could mean that the economic and legal challenges that Nigeria faces are most likely similar with other countries in Africa, especially the ones in the Commonwealth.[38] This means that using Nigeria as a case study would be beneficial to other Commonwealth countries in Africa with similar legal and socioeconomic challenges, which may use the research conducted in this book as guide towards reforming their own secured transactions law.

[33]The weakness of a country's law is much apparent when compared with other countries that have reformed systems. By taking a look at developed systems (US and Ontario) that have had experiences that reflect in their secured transactions law, Nigeria in its quest to reform its secured transactions law could draw from the wealth of experiences buried in these models. On this point, see generally Bogdan (1994).

[34]See http://countrymeters.info/en/Nigeria/ for latest information.

[35]See the National Population Commission, Nigeria's website: http://www.population.gov.ng/.

[36]The Nigerian Investment Promotion Commission's website has some interesting details on the business opportunities in Nigeria. See http://www.nipc.gov.ng/whyng.html.

[37]Before 2014, South Africa's economy was the biggest in Africa. According to World Bank data, its gross domestic product (GDP) as at 2014 stood at 350.1 billion USD. See http://data.worldbank.org/country/south-africa. However, Nigeria's economy surpassed South Africa's following the rebasing of the former's economy in the same year to account for sectors such as telecommunications, airlines, movie production, etc. According to World Bank data, Nigeria's GDP currently stands at 568.5 billion USD. See http://data.worldbank.org/country/nigeria. See also "Nigeria Becomes Africa's Biggest Economy," (6 April 2014) *BBC News,* available at http://www.bbc.com/news/business-26913497.

[38]The following are Commonwealth countries in Africa that may find this book relevant. They are as follows: Botswana, Cameroon, the Gambia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Seychelles, Sierra Leone, South Africa, Swaziland, Tanganyika, Tanzania, Uganda, Zambia, and Zimbabwe.

1.4 A Note on Terminology

Nigerian law is richly endowed with a lot of English law's vocabulary that differs considerably from the language style in OPPSA and Article 9. Considering that this book primarily targets Nigerians and those interested in Nigerian law, the need to explain certain concepts that find roots in Article 9 and OPPSA is vitally important. First on the list is what is meant by "secured transactions."[39] This is the name given to the ninth chapter—strangely called an "article"—in the Uniform Commercial Code, which applies to every transaction in the United States that is secured by personal property or fixtures and the function of which is to secure a sale or loan credit.[40] Unlike in Nigeria where the term "secured transactions" may oftentimes be used to refer to real property transactions, in the US it is only restricted to transactions that are secured by personal properties or fixtures.

The reader may want to ask how "secured transactions" law differs from "security interest" law in the context of this book. The answer would be that "secured transactions" being a US nomenclature refers only to transactions secured by personal property (and fixtures), although the same term is randomly used in Nigeria to refer to transactions secured by real and personal property. "Security interest" law may be used to refer to real and personal property laws at the same time. Hence, one could oftentimes hear "security interest" in a building or car, meaning that the secured party has an *in rem*[41] interest in that building or car that served as collateral for credit. For the purpose of this book, whose focus is only on personal property and fixtures, the term "secured transactions law" shall be used to refer exclusively to personal property, while "security interest law," unless otherwise stated, shall be used to refer to both personal and real properties.

Second, the term *in rem* right was mentioned above and deserves to be immediately explained. It refers to the right that a secured party has over a collateral for the purpose of securing payment obligation on the part of the debtor. The common law equivalent is "proprietary right." This is different from right *in personam*,[42]

[39]Black's Law (2009), p. 1475, defines "secured transaction" as "a business arrangement by which a buyer or borrower gives collateral to the seller or lender to guarantee payment of an obligation."

[40]Black's Law (2009), p. 713, defines "fixture" as "personal property that is attached to land or building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home. . ." See UCC section 9-102 (a)(41).

[41]Black's Law (2009), p. 864—"against a thing. . .involving or determining the status of a thing and therefore the rights of persons generally with respect of that thing." Graveson captured it in these words: "an action *in rem* is one in which the judgment of the court determines the title to property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated." See Graveson (1974), p. 98.

[42]Black's Law (2009), p. 862—"against a person. . .involving or determining the personal rights and obligations of the parties . . . of a legal action brought against a person rather than property." Also, Graveson said that it is "an action whose object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgment in such an action is merely to bind the parties to it. A normal action brought by one

which is a right of a secured party towards another party rather than over an asset. Immediate examples of the latter are contracts of guarantee and indemnity.[43]

Also the term "charge" is capable of causing some confusion under the Nigerian law because a "charge" could refer to a form of *in rem* right over a debtor's asset until a payment obligation is met. In another sense, "charge" could refer to the "fixed charge" and "floating charge" from the viewpoint of Companies and Allied Matters Act.[44] In the case of a floating charge,[45] it can only be created by an incorporated debtor[46] over its assets to cover present and future assets until the occurrence of certain conditions (crystallization) that convert a floating charge to a fixed charge.[47]

Another term that deserves to be clarified is "lien." Its use in the US is much broader than in Nigeria, which got the concept from English law. In Nigeria, *lien* arises by operation of law to the effect that a lienee has merely a right to retain an item of another (lienor) until a payment for a service rendered is made by the lienor; for instance, an artisan's lien. Albeit this limited concept is known also by American law (the most important form being the "mechanic's lien," which, however, provides protection not only to mechanics but also to anyone who provides

person against another for breach of contract is a common example of an action *in personam*." See Graveson (1974), p. 98.

[43]See Section 4 of the Statute of Frauds 1677.

[44]See chapter two of this book for a discussion on charges in Companies and Allied Matters Act, LFN 2004.

[45]The first English judge who was confronted with the concept of floating charge was Lord Macnaghten. First in *Government Stocks and Other Securities Investments Co. Ltd v Manila Rly Co* [1897] AC 81 at 87, he said that "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is the essence of such a charge that it remains dormant until the undertaking ceases to be a going concern, or until the person in whose favor the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default."

Seven years afterwards, in *Illingworth v Houdsworth* [1904] AC 355 at 358, Lord Macnaghten also said: "[a] floating is ambulatory and shifting in nature, hovering over the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." A year before *Illingworth*, Romer LJ in *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch. 284 had given a description of a floating charge—that a charge is a floating charge if "it is a charge over a class of assets present and future; that class will be changing from time to time; and until the charge crystallizes and attaches to the assets, the chargor may carry on its business in the ordinary way." Romer LJ, however, warned that this was only a description, although this description later became the hallmark of a floating charge. But after about a century since Romer LJ's description of a floating charge, Lord Millett in *Agnew v Commissioners of Inland Revenue* [2001] 2 AC, 710, warned that it was only the third characteristic in Romer LJ's description (freedom to deal with assets in the ordinary course of business) that was the true characteristic of a floating charge. Lord Millett's view conforms with the court's opinion earlier on in *Siebe Gorman & Co. Ltd v Barclays Bank Ltd.* [1979] 2 Llyod's Rep.142.

[46]See Goode (2003), p. 111.

[47]See *infra*, Sects. 2.6–2.6.4 of this book for a fulsome discussion on floating charge.