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The Personal Property Secured Financing System of Venezuela: A Comparative Study and the Case for Harmonization

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THE PERSONAL PROPERTY SECURED FINANCING SYSTEM OF VENEZUELA: A COMPARATIVE STUDY AND THE CASE FOR HARMONIZATION

HORACIO E. GUTIÉRREZ-MACHADO*

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I. INTRODUCTION: FROM "COMPRE VENEZOLANO" TO "LAISSEZ FAIRE"

After decades of governmental economic protectionism and paternalism, the private sector in Venezuela has suddenly been forced to wake up to the reality of fierce global competition. Not unlike its Latin American neighbors, the Venezuelan government, known in the past as an avid regulator of, and omnipresent participant in, the local economy, is now enmeshed in a relentless regulatory "race to the bottom" aimed at earning the favor of foreign investors and multilateral credit agencies.

Many factors conspire against the local industrial and commercial sectors' efforts to adapt and survive in this changing environment. One major obstacle to achieving the level of industrial and commercial competitiveness needed for economic development is the scarcity of capital and credit. Indeed, as one scholar notes, "the importance of large amounts of credit for commercial and consumer transactions to expand the national economies of the Latin American countries cannot be overstated."¹ In Venezuela, the offer of commercial and consumer credit is limited, and when it does exist, it is usually prohibitively priced.² This scarcity of credit undercuts global competitiveness, makes it very difficult for entrepreneurs to obtain start-up capital and even makes it difficult for successful businesses to finance growth.³ In turn, a lack of credit to finance new and

1. Alejandro M. Garro, *Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform*, 9 Hous. J. INT'L L. 159, 201 (1987).

2. As an illustration, the lending rate in Venezuela reached 65.18 percent per annum in September, 1998. See INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL STATISTICS 771 (1999).

3. NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, HARMONIZATION OF THE SECURED FINANCING LAWS OF THE NAFTA PARTNERS: FOCUS ON MEXICO vii (1995).

established businesses curtails job generation.⁴ Thus, scarce credit inhibits economic development.

Paradoxically, very little has been done so far to modernize the legal apparatus that governs personal property secured lending and to create a climate of accessibility, legal certainty and predictability for both local and foreign lenders. The Venezuelan personal property secured financing system is a chaotic patchwork of uncoordinated Code sections and special laws enacted over several decades, mostly to regulate specific types of security interests applicable to particular types of collateral, or other asset-based financing methods. The security devices currently available under Venezuelan law include the civil possessory pledge,⁵ the commercial pledge,⁶ the chattel mortgage,⁷ the pledge without dispossession,⁸ the ship mortgage,⁹ the mortgage,¹⁰ as well as other devices commonly used for security purposes, such as the conditional sales,¹¹ the *reporto* (instrument repurchase agreement or "repo"),¹² warehouse receipts,¹³ and guarantee trusts.¹⁴

The only serious attempt to carry out a comprehensive reform of this patchwork was the Chattel Mortgage and Pledge Without Dispossession Act of 1975 (Chattel Mortgage Act) (*Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento de Posesion*).¹⁵ This attempt, however, for the reasons discussed below, has proved largely unsuccessful. Rather than simplifying Venezuela's secured financing system, the new devices created by the Chattel Mortgage Act have added to the complexity of the existing body of law.

4. *Id.*

5. See *Codigo Civil* [C. CIV.] arts. 1,837-54, *Gaceta Oficial* No. 2,990 (Venez.).

6. See *Codigo de Comercio* [C. COM.] arts. 535-43, *Gaceta Oficial* No. 475 (Venez.).

7. See *Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento de Posesion*, *Gaceta Oficial* No. 1,575 (Venez.) [hereinafter *Chattel Mortgage Act*].

8. *Id.*

9. See *Ley de Privilegios e Hipotecas Navales*, *Gaceta Oficial* No. 32,820 (Venez.) [hereinafter *Ship Mortgage Act*].

10. See *C. CIV.*, *supra* note 5, arts. 1,877-1,912.

11. See *Ley sobre Ventas con Reserva de Dominio*, *Gaceta Oficial* No. 25,856 (Venez.).

12. See *Ley General de Bancos y Otras Instituciones Financieras*, *Gaceta Oficial* No. 4,649 (Venez.).

13. See *Ley de Almacenes Generales de Depósitos*, *Gaceta Oficial* No. 19,105 (Venez.).

14. See *Ley de Fideicomisos*, *Gaceta Oficial* No. 496 (Venez.).

15. See *Chattel Mortgage Act*, *supra* note 7.

The existing Venezuelan law on security interest is not unlike that prevailing in the United States prior to the enactment of Article 9 of the Uniform Commercial Code (U.C.C.).¹⁶ In the United States, pre-Code law also consisted of a wide variety of security devices.¹⁷ Despite this variety of devices, gaps in the structure persisted.¹⁸ The law at this point became extraordinarily complex and the legal certainty and predictability objectives sought by pre-Code security devices were irremediably lost.¹⁹ The aim of Article 9 was to provide a simple and uniform structure within which the immense variety of the present-day secured finance transactions could go forward with less cost and with greater certainty.²⁰ In short, the U.C.C. accomplished in the United States what needs to be done in most Latin American countries, including Venezuela: a comprehensive reform of the secured financing system.²¹

This article focuses on the significant provisions of the most modern of Venezuela's statutes in the secured financing system, the Chattel Mortgage Act, and frequently compares them to their U.C.C. counterparts in an attempt to highlight areas in which legislative reform is desirable. A comparison to Article 9 of the U.C.C. is helpful because it provides a useful conceptual framework.²² This conceptual framework has had, and continues to have, a profound impact on the secured financing laws of countries all over the world, especially in countries that, like Venezuela, follow the civil instead of the common law tradition.²³

16. See Garro, *supra* note 1, at 159.

17. U.C.C. § 9-101, Official Comment at 795 (1994).

18. *Id.*

19. See National Law Center for Inter-American Free Trade, John M. Wilson-Molina, Mexico's Current Secured Financing System: The Law, the Registries and the Need for Reform 6 (1996) (preliminary paper submitted solely for distribution to the participants of the September 1996 Session of the United States-Mexico Law Institute, Santa Fé, New Mexico, on file with the *Inter-American Law Review*).

20. *Id.*

21. Garro, *supra* note 1, at 200. A similar situation existed in Canada until the enactment of the Personal Property Security Acts (PPS Acts) and the Civil Code of Quebec. See Ronald C.C. Cuming, *Article 9 North of 49°: The Canadian PPS Acts and the Quebec Civil Code*, 29 LOY. L.A. L. REV. 971, 973 (1996).

22. This article does not suggest that Article 9 be translated and incorporated wholesale into the Venezuelan legal system. Such an approach would not only be politically impracticable, but also technically inadequate, because among other things, it would fail to recognize the differing legal traditions and philosophical foundations that underlie the legal systems of Venezuela and the United States.

23. Perhaps the most relevant example of the impact of the U.C.C. on countries following the civil tradition is the reform of the Civil Code of the Province of Quebec,

A scholar has stated that “[p]roblems of commercial law are apt to be similar or at least comparable in all commercial countries, so that in this field, perhaps more than in any other, foreign experience is likely to be instructive.”²⁴ Another has said that “[t]he genius of Article 9 lies in the fact that it reflects the needs of modern business financing and, as such, its basic concepts are universal.”²⁵ Thus, the potential impact of U.C.C.’s Article 9 is well recognized.

II. HISTORICAL BACKGROUND: ESCAPING NAPOLEON’S STRAITJACKET

In the area of security interests in personal and real property, the Venezuelan Civil Code closely follows the structure and substantive provisions of the French Civil Code.²⁶ Similar to the French Civil Code, the Venezuelan system recognizes two major forms of security interests:²⁷ a possessory device (referred to as “*prenda*”)²⁸ and a nonpossessory device (referred to as “*hipoteca*”).²⁹ However, as agricultural, commercial and industrial financing requirements increased in the twentieth century, Venezuela recognized the need for more flexible secured financing devices.³⁰ As a result, several special statutes were

Canada. For a discussion of the main aspects of the Quebec Civil Code, and particularly Title Three of its Book Six (Hypothecs), see Ronald C.C. Cuming, *Harmonization of the Secured Financing Laws of the NAFTA Partners*, 39 ST. LOUIS U. L.J. 809 (1995). See also Cuming, *supra* note 21, at 971, 974 (stating: “The international influence of [U.C.C. Article 9] has been nowhere more significant than in Canada. . . some of the more important features of Article 9’s conceptual infrastructure can be found in the Civil Code. . . Article 9 provided an approach for the drafters of the Civil Code through which much of the patchwork of security devices with their anomalies and inadequacies could be eliminated and replaced with a much more coherent system for the regulations of secured financing.”).

24. Peter Winship, *As the World Turns: Revisiting Rudolf Schlesinger’s Study of the Uniform Commercial Code “In the Light of Comparative Law,”* 29 LOY. L.A. L. REV. 1143 (1996).

25. See Cuming, *supra* note 21, at 989.

26. Garro, *supra* note 1, at 162.

27. See generally C. CIV., *supra* note 5, arts. 1,877, 1,939.

28. C. CIV., *supra* note 5, art. 1,939. Venezuela’s *prenda* is similar to the post-classical term *pignus*, which denotes a possessory secured transaction involving movable personal property as collateral. Garro, *supra* note 1, at 167.

29. C. CIV., *supra* note 5, art. 1,877. Venezuela’s *hipoteca* is a mortgage on real property. *Id.*

30. See generally Congreso de la República, Senado de la República, Diario de Debates, Exposición de Motivos y Proyecto de Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento de Posesión [hereinafter Senate Diary of Debates].

enacted to accommodate new economic realities. These statutes created devices like the aircraft mortgage³¹ and ship mortgage,³² which allowed discrete exceptions to the dispossession requirement, but preserved the conceptual underpinnings of the traditional pledge as the backbone of the personal property secured financing system.³³ The exceptions were carved out on a case-by-case basis. At times, the exceptions centered around the nature of specific types of collateral. At other times, the exceptions centered around the particular use to be given by the debtor to the proceeds of the secured loan. Due to this case-by-case approach, the exceptions did not create a systematic, comprehensive reform of the system and, for the most part, were adopted without regard to conceptual consistency.³⁴

Acknowledging the conceptual and practical shortcomings of the traditional devices, the Chattel Mortgage Act was signed into law on December 20, 1972.³⁵ It was the first deliberate attempt in Venezuelan history to bring about the much needed reform of the personal property secured finance system, employing a comprehensive approach and mindful of the developments in modern comparative law in the area.³⁶

III. THE VENEZUELAN CHATTEL MORTGAGE ACT: THE WRONG STEP IN THE RIGHT DIRECTION

A. General Structure

The Chattel Mortgage Act draws a distinction between a pledge without dispossession (*prenda sin desplazamiento de posesión*) and a chattel mortgage (*hipoteca mobiliaria*), despite the fact that both devices entail nonpossessory secured transactions involving personal property.³⁷ The key to the use of

31. Ley de Aviacion Civil, Gaceta Oficial No. 24,766 (Venez.). The provisions in this statute concerning the aircraft mortgage were later superseded by the Chattel Mortgage Act. See *supra* note 7.

32. Ship Mortgage Act, *supra* note 9.

33. Senate Diary of Debates, *supra* note 30, at 656.

34. *Id.*

35. Chattel Mortgage Act, *supra* note 7.

36. Senate Diary of Debates, *supra* note 30, at 655-656. The record indicates that the drafters used the special laws enacted in Spain, Argentina and Panama as primary guides in the drafting of the bill submitted to Congress. *Id.*

37. Chattel Mortgage Act, *supra* note 7, art. 5. See also Garro, *supra* note 1, at 183.

one device over the other is the particular type of collateral involved in the transaction.³⁸ The statute includes detailed lists of the assets that can become collateral under a chattel mortgage and those that can only be subject to a nonpossessory pledge.³⁹ The lists are expressly made mutually exclusive, and any attempt to use the wrong device for a particular type of collateral is penalized with absolute nullity at law.⁴⁰

A reading of the text of the statute does not provide the reader any clues as to why the drafters felt it was necessary to draw such a sharp distinction between the two devices, which in substance appear equivalent. A review of the congressional record reveals, however, that the answer lies in an attempt by the drafters to strike a balance between two worthy but conflicting policy considerations: the protection and promotion of asset-based financing, on the one hand, and the protection of purchasers, on the other.⁴¹ The drafters pose the question in terms of a policy choice between granting the secured party an action to recover the collateral from a purchaser (*acción reipersecutoria*), even if the purchaser acted in good faith, or relegating the secured party in the face of a purchaser.⁴² The problem is aggravated in this context because the Venezuelan Civil Code, like its French predecessor, codifies the principle *en fait de meubles, la possession vaut titre*.⁴³ As a result, *bona fide* purchasers would have priority in the collateral over a secured creditor.⁴⁴

The drafters felt that a unitary system would be overly simplistic and cause unfair results.⁴⁵ Consequently, the policy dilemma is resolved by the drafters in "salomonic" fashion distinguishing two different devices, one in which the secured creditor would be preferred, and another in which the *bona fide* purchaser would prevail. Accordingly, the security interest in the context of a chattel mortgage continues on the collateral notwithstanding sale or disposition thereof, even if the purchaser acted in good faith, and the buyer takes the collateral subject to

38. Garro, *supra* note 1, at 183.

39. Chattel Mortgage Act, *supra* note 7, arts. 21, 51.

40. *Id.* arts. 3, 51 para. 2.

41. Senate Diary of Debates, *supra* note 30, at 656.

42. *Id.*

43. "With respect to movables, possession is title." C. CIV., *supra* note 5, art. 794.

44. Garro, *supra* note 1, at 169 n.34.

45. Senate Diary of Debates, *supra* note 30, at 656.

the security interest.⁴⁶ The *acción reipersecutoria* was perceived by the commission as the cornerstone of the new personal property secured financing system.

The *acción reipersecutoria* explains why the drafters did not allow chattel mortgages to be created in all kinds of personal property. Instead, the drafters intended to afford this maximum level of protection only to creditors holding a security interest on a select class of assets, where the collateral was of such type, value and characteristics that adequate notice of the existence of the security interest could be given to third parties by means of recordation of the security agreement in a public registry office.⁴⁷ In essence, but for their mobility, personal property eligible to be collateral under a chattel mortgage must share the basic economic and legal characteristics of real property.

Unlike in the case of a chattel mortgage, the security interest created through a pledge without dispossession would not trump the claim of a *bona fide* purchaser of the collateral, who would acquire the collateral free of the security interest.⁴⁸ In this situation, secured creditors lack the right to repossess the collateral from the buyer if the purchase was made without the buyer's knowledge of the existence of the pledge.

The dramatic difference in the legal position of the secured creditor under each of the two devices explains the decision to list a *numerus clausus* of movables eligible to serve as collateral for either a chattel mortgage or a pledge without dispossession. This list of specific movables excludes vast classes of valuable movables from the secured financing system.⁴⁹ Despite recognition that the dynamic nature of commerce would eventually render any such lists outdated, the lists were included because the drafter's felt that it would be dangerous to leave the

46. *Id.* at 661.

47. Senate Diary of Debates, *supra* note 30, at 656. The drafting commission identified the following general characteristics that personal property should have to be eligible to serve as collateral under a chattel mortgage: (i) durable (as opposed to perishable or disposable), (ii) identifiable (which excludes fungibles and others of difficult identification), (iii) economically valuable, and (iv) of such kind that commerce in such type of movables would not be hampered by a requirement that prospective buyers check for the existence of liens prior to acquiring them. *Id.* at 657.

48. *Id.* at 657.

49. Most significantly inventory. Under the Chattel Mortgage Act, merchandise, finished products and raw materials cannot be the subject of a chattel mortgage, and can only serve as collateral in a pledge without dispossession if they are "warehoused." Chattel Mortgage Act, *supra* note 7, arts. 51, 53(6). See also discussion *infra* Part III.E.

determination of which assets were sufficiently identifiable to serve as collateral for a chattel mortgage to interested parties.⁵⁰

The legal formulation of the chattel mortgage is equal to that of the mortgage of real property, while the pledge without dispossession is said to be but a variety of the traditional pledge in which debtor dispossession is not required.⁵¹ With respect to the chattel mortgage, the drafters did not purport to create a new secured financing device, but instead to “move” certain assets from the list of movables that could not be subject to a traditional mortgage of real property, to the list of assets that could be subject to a mortgage of such kind.⁵²

To protect legal commerce in personal property from the drastic effects of the *acción reipersecutoria* and to minimize the “secret lien” problem created by the nonpossessory nature of the two new devices, the commission created a registration system for personal property patterned after the real property recordation system inherited from the French tradition.⁵³ The “terra-centric” approach is perhaps the single most important conceptual flaw of the Chattel Mortgage Act. Like the real property recordation system, the new system is a registry of *collateral* instead of a registry of *debtors*. As such, the chosen registration system is inadequate for any kind of personal property that cannot be identified with particularity either by reference to its own characteristics or to the place where it is located.

B. “Debtor” Defined

Under the U.C.C., any person who has “rights in the collateral” can grant a security interest therein.⁵⁴ Although the phrase “rights in collateral” is not defined in the Code, at least one United States Circuit Court has held that the Code does not require that a debtor⁵⁵ have full ownership rights.⁵⁶ This same

50. Senate Diary of Debates, *supra* note 30, at 657.

51. *Id.*

52. *Id.*

53. See discussion *infra* Part III.H.2.

54. U.C.C. § 9-203(1)(c) (1994).

55. “Debtor” is defined in U.C.C. § 9-105(1)(d) as follows: “the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term “debtor” means

court also held that the requisite authority to create the security interest exists as long as the debtor "gains possession of collateral pursuant to an agreement endowing him with any interest other than naked possession."⁵⁷

The Chattel Mortgage Act has adopted a more narrow definition of debtor. Under the Act, the mortgagor (or pledgor as the case may be) can also be a person other than the obligor, but must have full ownership rights on the collateral.⁵⁸ The imposition of such a strict ownership requirement appears at odds with some of the most advanced features of the system created by the statute. For example, debtors are allowed to grant a chattel mortgage on a business establishment even when the mortgagor is not the owner but only a lessee of the premises where the establishment operates.⁵⁹ In such case, the statute mandates the automatic subrogation of the secured party in the rights and obligations of the mortgagor under the lease agreement upon foreclosure.⁶⁰ One cannot help but wonder why a debtor is allowed to create what for all practical purposes amounts to a mortgage on his or her rights as lessee of real property in the context of a chattel mortgage on a business establishment but not allowed to create any security interest on any other property in which he or she does not hold full legal title.

C. "Secured Party" Defined

The U.C.C. defines "secured party" broadly as a lender, seller, or other person in whose favor there is a security

the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires."

56. *Kinetics Technology International Corp. v. Fourth National Bank*, 705 F.2d 396 (10th Cir. 1983).

57. *Id.* at 399.

58. Chattel Mortgage Act, *supra* note 7, art. 1. See also Boris Kozolchyk, *What to do about Mexico's Antiquated Secured Financing Law*, 12 ARIZ. J. INT'L & COMP. L. 523 (1995). In describing the similar Mexican system he states "one who does not have ownership rights, or who cannot prove that he acquired his rights to the collateral as a debtor or creditor from someone who is an owner, cannot be a party to a secured transaction. Unlike a U.C.C. rule which states that 'title to the collateral is immaterial,' title to Mexican collateral is material and must be proven in a historical or chronological fashion." Kozolchyk, *supra*, at 529.

59. Chattel Mortgage Act, *supra* note 7, art. 25.

60. *Id.* art. 27.

interest.⁶¹ The Code does not establish any limitation as to what persons, or classes of persons, can be secured parties.

The Chattel Mortgage Act, however, restricts the categories of creditors qualified to be secured parties and frequently requires a prior authorization.⁶² Under the statute, only the following creditors can be secured parties: (i) the national government, the states, local governments, the Central Bank, government-owned enterprises and other governmental instrumentalities; (ii) foreign banks and other international financial institutions authorized by the Superintendency of Banks; (iii) licensed local banks and other financial institutions; (iv) licensed local insurance companies; (v) corporations and other business associations previously authorized by the Superintendency of Banks that meet certain minimum capital requirements; and (vi) individuals and legal entities authorized by certain government instrumentalities.⁶³

It is generally acknowledged that the restriction on categories of creditors is controversial and was hotly debated among the drafters.⁶⁴ Nonetheless, restriction is justified on the grounds that prudence and caution are necessary given the novelty of the new devices.⁶⁵ It has also been indicated that the experience and the results obtained after the enactment of the law would determine whether the restrictions should be eased in future statutory amendments.⁶⁶ The limited use of the devices in Venezuela and the bureaucratic complications generated by the prior authorization requirement, coupled with the absence of any conceptual basis for the restriction, seem to signal that the time for such an amendment has come.

61. U.C.C. § 9-105(1)(m) (1994).

62. Chattel Mortgage Act, *supra* note 7, art. 19.

63. *Id.* Obtaining the necessary prior governmental authorizations may take several weeks after all the necessary documentation has been presented. In addition, while past authorizations were of indefinite duration, often allowing the applicant to become a secured party in any future chattel mortgage or pledge without dispossession, presently the practice is to authorize only specific transactions properly identified in the application. Therefore, a creditor must apply for authorization every time it is contemplating becoming a secured party under the statute.

64. Senate Diary of Debates, *supra* note 30, at 660. *See also* Garro, *supra* note 1, at 174-5.

65. Senate Diary of Debates, *supra* note 30, at 660. *See also* Garro, *supra* note 1, at 174-175.

66. Senate Diary of Debates, *supra* note 30, at 660.

D. Debts Capable of Being Secured

Under the Chattel Mortgage Act, a chattel mortgage or a pledge without dispossession can secure any present debt, any future obligation and any obligation subject to condition precedent (*condición suspensiva*).⁶⁷ In case of a future or conditional debt, the security interest is deemed to have been perfected on the date of registration of the security agreement in the public registry office if, in the case of a future obligation, the obligation materializes or, in the case of an obligation subject to condition, the condition is satisfied.⁶⁸ In case of debts subject to condition subsequent (*condición resolutoria*), the security interest exists until the condition is proved to have occurred.⁶⁹

The security interest can also secure payment obligations resulting from current accounts.⁷⁰ If the debt secured originates from a current account, the statute requires that the security agreement specify the maximum amount secured by the collateral and the conditions under which the obligations may become payable.⁷¹ Although the statute does not expressly say so, presumably in this case the security interest would not be extinguished in case the balance of the current account is temporarily reduced to zero. It is unclear whether a financial credit facility, such as a revolving line of credit, would be considered a current account, or if only open accounts between merchants would qualify. The question may be less important than it appears at first glance because obligations arising under lines of credit could also be considered either future or conditional obligations, and therefore, the fact that no advance has been made at the time when the security interest is registered does not affect its validity. However, even in such case, if a line of credit is not a current account for purposes of the statute, payment in full by the debtor of the balance outstanding in a revolving line of credit arguably may have the effect of extinguishing the security interest, in which case the lender may

67. Chattel Mortgage Act, *supra* note 7, art. 14.

68. *Id.*

69. *Id.*

70. *Id.* art. 10.

71. *Id.* art. 11.

lose its priority with respect to subsequent advances made under the facility.⁷²

Additionally, the debt secured can be one evidenced by bills of exchange or other negotiable instruments.⁷³ In such case, the statute requires that the security agreement identify the adequate instrument by reference to the number and value of the instrument, the series to which the instrument corresponds, the issue date, the maturity date, the manner of payment and any other useful identification information.⁷⁴

Finally, the Chattel Mortgage Act requires that the security agreement purporting to create either a chattel mortgage or a pledge without dispossession, specify the amount of the secured debt in local currency.⁷⁵ The requirement seems to go beyond the general obligation contained in the Venezuelan Central Bank Act,⁷⁶ that all foreign currency figures contained in official documents (including documents to be notarized or registered) must also be expressed in local currency at the exchange rate prevailing at the time the document is made. The language of the requirement under the Chattel Mortgage Act has generated uncertainty as to whether the secured debt itself must be denominated in lawful currency of Venezuela, or whether the coverage of the security will be limited to the amount of local currency expressed in the agreement, regardless of any devaluation suffered by such currency. This uncertainty raises an important issue because the Venezuelan currency ("Bolivar" or "Bs.") has devalued significantly during the last decade.⁷⁷ If foreign lenders are to be persuaded to engage in asset-based financing in Venezuela, this uncertainty must be eliminated.

72. The U.C.C., as currently adopted in most states, clarifies that "[i]f future advances are made while a security interest is perfected by filing [or] the taking of possession. . . the security interest has the same priority. . . with respect to the future advances as it does with respect to the first advance." U.C.C. §9-312(7) (1994).

73. Chattel Mortgage Act, *supra* note 7, art. 10.

74. *Id.* art. 12.

75. *Id.* arts. 22(3), 53(3).

76. Ley del Banco Central de Venezuela, art. 95, Gaceta Oficial No. 35,106 (Venez.).

77. See INTERNATIONAL MONETARY FUND, *supra* note 2, at 769. The problem has been mitigated by the practice of inflating the secured amount to anticipate the potential devaluation for the term of the secured debt. However, the longer the term of the loan the more difficult it is to accurately predict devaluation, particularly in a highly volatile economic environment like the one Venezuela is going through today. See THE WORLD BANK, TRENDS IN DEVELOPING ECONOMIES 1995 549-552 (1995) (describing Venezuela's economic environment).

E. "Collateral" Defined

The Chattel Mortgage Act starts with a general statement to the effect that all assets specifically set forth in the statute can be collateral provided that they are alienable (i.e. capable of being sold or otherwise disposed of consensually and in a foreclosure sale).⁷⁸

Despite the auspicious start, however, as discussed above,⁷⁹ the statute contains two detailed lists of the types of goods and rights that can constitute collateral for purposes of a chattel mortgage and a pledge without dispossession under the statute.⁸⁰ The lists are intended to be mutually exclusive. Collateral that can be the subject of a chattel mortgage cannot be the subject of a pledge without dispossession and vice versa.⁸¹ Any attempt to use a security interest device under the statute on the wrong type of collateral is null and void.⁸² Thus, chattel mortgages are allowed on commercial establishments (*establecimientos mercantiles o fondos de comercio*), motorcycles, automobiles, station wagons, buses, load vehicles, locomotives, train wagons, public transportation vehicles, aircraft, industrial machinery and copyrights,⁸³ while nonpossessory pledges are allowed on certain agricultural and forest products, cattle, tools, utensils and equipment used for agriculture, ranching and forestry, all equipment that is not subject to a chattel mortgage but is nonetheless capable of reasonable identification due to its particular characteristics (i.e. make, model, serial number), merchandise, finished products and raw materials that are warehoused, and collections or objects that are of some scientific or artistic value.⁸⁴

78. Chattel Mortgage Act, *supra* note 7, art. 1.

79. See discussion *supra* Part III.A.

80. Chattel Mortgage Act, *supra* note 7, arts. 21, 51.

81. Under the U.C.C. security interests can be created in any kind of asset which the Code classifies as goods. U.C.C. § 9-103 (1994). This includes consumer goods, equipment, farm products, and inventory. *Id.* §9-109(4). It also includes documents, chattel paper and instruments. *Id.* § 9-105. Additionally, assets classified as goods include general intangibles and accounts. *Id.* § 9-106.

82. Chattel Mortgage Act, *supra* note 7, art. 3.

83. *Id.* art. 21.

84. *Id.* art. 51.

The statute expressly excludes from use as collateral assets already subject to a chattel mortgage or nonpossessory pledge.⁸⁵ This exclusion was based on a concern that allowing gradation of security interests would create priority disputes which could in turn discourage the use of the nonpossessory devices and risk the success of the new security financing system.⁸⁶ This concern seems exaggerated given the precedent of the mortgage of real property, which allows gradation, and which has not impaired the use of the device in several centuries of permanent use.⁸⁷

F. Treatment of Proceeds

The U.C.C. provides that a security interest "continues in any identifiable proceeds" of the collateral.⁸⁸ "Proceeds" is defined by the U.C.C. as including "whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds," and expressly includes "insurance payable by reason of loss or damage to the collateral."⁸⁹ "Cash proceeds" is defined as "money, checks, deposit accounts and the like."⁹⁰ The term "identifiable proceeds" is not defined in the Code, but case law has interpreted it to include "proceeds that are traceable under the law of the relevant jurisdiction."⁹¹

The continuation of the security interest in proceeds is critical in the structure of the U.C.C. because inventory and other goods that are held by the debtor for sale are collateral, and because the Code protects purchasers of the collateral under certain circumstances by allowing them to acquire the collateral free of the security interest.⁹²

The proceeds feature would be very useful in the context of a pledge without dispossession, where secured parties were not

85. *Id.* art. 2. One scholar has identified the possibility of different creditors holding secured rights in the same collateral (either concurrently or at different times) as one of the key principles of the contemporary lending marketplace. Kozolchyk, *supra* note 58, at 526-27. This principle, adopted by the U.C.C., has played a significant role in the development of the United States as the "world's largest and most active commercial and consumer credit market." *Id.* at 526.

86. Senate Diary of Debates, *supra* note 30, at 658.

87. C. CIV., *supra* note 5, art. 1,896.

88. U.C.C. § 9-306(2) (1994).

89. *Id.* § 9-306(1).

90. *Id.*

91. ROBERT L. JORDAN & WILLIAM D. WARREN, COMMERCIAL LAW 200 (4th ed. 1997).

92. See generally U.C.C. §§ 9-307, 9-308, 9-309.

given *acción reipersecutoria*, particularly because Venezuelan law protects the interests of *bona fide* purchasers of personal property.⁹³ However, the Chattel Mortgage Act does not expressly provide for the automatic continuation of the security interest on any proceeds other than insurance proceeds and expropriation payments.⁹⁴ Consequently, in case of sale of the collateral to a good faith purchaser by the debtor or the pledgor, the secured party would lose its security interest in the collateral and at the same time have no priority claim on the proceeds of the sale.⁹⁵

G. Charge on After-Acquired Property

The U.C.C. provides for security interests in after-acquired property and makes it clear that "a security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement."⁹⁶ The collateral, therefore, does not have to be owned by the debtor, or even exist at that time. The U.C.C. "validates a security interest in the debtor's existing *and future* assets, even though . . . the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral."⁹⁷

The Chattel Mortgage Act does not contain an after-acquired property provision of such broad scope. The entire secured financing system created under the statute was viewed by the drafters as an extension of the traditional possessory security devices (the *hipoteca* and the *prenda*), for which either delivery of possession of an existing tangible asset or a thorough identification of the affected land was essential for the existence and validity of the consensual lien.⁹⁸ Moreover, the registration system created by the statute could not function without reference to identifiable collateral.⁹⁹

93. C. CIV., *supra* note 5, art. 794.

94. Chattel Mortgage Act, *supra* note 7, art. 6.

95. See discussion *infra* Part III.K.

96. U.C.C. § 9-204(1) and Official Comment 1.

97. *Id.* § 9-204, Official Comment 2.

98. See discussion *supra* Part III.A.

99. Chattel Mortgage Act, *supra* note 7, arts. 22(4), 53(4).

Although in the context of the pledge without dispossession certain assets that may not physically exist at the desired developmental stage at the time when the security interest is created can be collateral,¹⁰⁰ the nature of the assets is so limited and exceptional that no practical after-acquired asset rule could be extrapolated from them.

Two limited situations can occur in the context of chattel mortgages where a charge on after-acquired property is automatically created. The first arises in the case of a chattel mortgage on a business establishment (*establecimiento mercantil*), where the Chattel Mortgage Act automatically extends the security interest to all fixtures,¹⁰¹ and also to merchandise and raw materials owned by the mortgagor.¹⁰² With respect to merchandise and raw materials in the business establishment, the mortgagor is allowed to sell them, provided that the mortgagor maintains in stock at all times merchandise and materials in equal or larger quantities and of equal or higher value.¹⁰³ If, however, the secured creditor has consented, the mortgagor may industrialize or transform the collateral, in which case the security interest continues in the resulting products.¹⁰⁴

The second situation arises in the context of an aircraft mortgage.¹⁰⁵ The statute provides that the mortgage in this case extends to the engines, communication and navigation equipment, tools and other accessories, components and spare parts of the aircraft, and that the security interest will continue in any such items after the same are removed from the aircraft and, unless otherwise agreed, on any items installed to replace them.¹⁰⁶

100. Such assets may include agricultural fruits or harvests and other by-products. *Id.* art. 51 sections (1), (3), (4).

101. *Id.* art. 27. In the case of fixtures (*instalaciones fijas o permanentes*), unlike in the case of the intellectual property and other equipment owned by the business, the statute does not expressly require that they be in existence and duly described in the security agreement. However, they must be owned by the owner of the establishment. *Id.* arts. 27, 28.

102. *Id.* arts. 27, 30.

103. *Id.* art. 30.

104. *Id.* art. 9. The equivalent provision in the U.C.C. (§ 9-315) sets forth certain conditions to the continuation of the security interest. The secured party, however, always has a right to proceeds.

105. See Chattel Mortgage Act, *supra* note 7, ch. IV.

106. *Id.* art. 40.

H. Perfecting a Security Interest

1. The Writing Requirement

Unlike the U.C.C., which reduced the formal requisites for the creation of a security interest to a minimum,¹⁰⁷ the Chattel Mortgage Act elevates the formal requisites to the maximum, giving them the nature of conditions *sine qua non* for the very existence and validity of the lien.¹⁰⁸ While under both the U.C.C. and Chattel Mortgage Act the writing requirement is in the nature of a Statute of Frauds,¹⁰⁹ at least one United States Circuit Court has held that a security interest may be validly created even in the absence of a formal security agreement.¹¹⁰ The Chattel Mortgage Act, however, was drafted under the assumption that formal requisites are necessary to protect both the parties to the security agreement and third parties. Consequently courts in Venezuela have not in the past, and are not likely in the future, to take such a flexible approach.

Under the Chattel Mortgage Act, a security agreement must be in writing, in the form of either a public instrument,¹¹¹ or a private instrument later authenticated or acknowledged before a registrar or notary public.¹¹² In addition, the Act mandates the minimum content of a security agreement for each of the chattel mortgage and the pledge without dispossession.¹¹³ These include, for both devices:

1. the full name, nationality, marital status, domicile and profession of the debtor, the secured party and, if different from the debtor, the owner of the collateral;
2. the amount of the secured debt, expressed in local currency;

107. U.C.C. § 9-203(1)(a) and Official Comment 5.

108. Chattel Mortgage Act, *supra* note 7, art. 4. See also, Senate Diary of Debates, *supra* note 30, at 658.

109. See U.C.C. § 9-203(1)(a), Official Comment 5; see also Chattel Mortgage Act, *supra* note 7, art. 4.

110. *In re Bollinger Corp.*, 614 F.2d 924, 929 (3rd Cir. 1980).

111. A writing created and executed (and not merely acknowledged) in the presence of a qualified public official, typically a public registrar or a notary public. C. CIV., *supra* note 5, art. 1,357.

112. Chattel Mortgage Act, *supra* note 7, art. 4.

113. *Id.* arts. 22, 53.

3. applicable contractual and late payment interest rates;
4. time, place and manner of payment;
5. the amount of foreclosure costs and expenses to be recovered from the foreclosure proceeds;
6. description of the collateral;
7. description of the legal instrument or other transaction or event pursuant to which the mortgagor or pledgor acquired title to the collateral;
8. a declaration under oath by the owner of the collateral that the same is free from prior liens, encumbrances or other charges or attachments, and that their purchase price has been fully satisfied, unless the lien is created to secure the payment of the price;
9. if so agreed by the parties, the obligation of the debtor to purchase and maintain insurance for the collateral, and if insurance exists at the time of execution of the security agreement, a description of the coverage and the specific policies issued; and
10. designation of the place where notices to the debtor and the owner of the collateral should be sent, and where service of process should be made.¹¹⁴

In addition, for the pledge without dispossession, the statute requires the security agreement to include the following additional information:

1. identification of the premises where the collateral is physically located; and
2. specification of pledgor's obligations with respect to the preservation, conservation and return to the secured creditor of the collateral.¹¹⁵

With respect to the identification of the collateral, the Chattel Mortgage Act requires a level of specificity beyond that required under the U.C.C. The U.C.C. has been said to have a bias "toward a liberal interpretation of descriptions of collateral."¹¹⁶ Under the Code, "any description of personal

114. *Id.*

115. *Id.* art. 53.

116. JORDAN & WARREN, *supra* note 91, at 33.

property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."¹¹⁷ The official comment to §9-110 states that courts should refuse to follow pre-Code holdings adopting a more strict approach—namely that descriptions are insufficient unless they are of the most exact and detail nature, the so-called "serial number" test.¹¹⁸ This "serial number" test very closely resembles the level of specific description mandated by the Chattel Mortgage Act.¹¹⁹

As indicated above, the Chattel Mortgage Act's requirement that the secured debt be expressed in local currency¹²⁰ has created doubts as to whether foreign currency-denominated obligations can be adequately secured under the statute. Because the debt must be expressed in local currency at the time of execution of the security agreement, the devaluation of the Venezuelan currency after the date of execution can result in a substantial portion of the debt being left uncovered by the security interest. For example, assuming a Bolivar/dollar exchange rate of Bs. 500/U.S. \$1 at the time of execution of the security agreement, and a debt of U.S. \$1 million, the secured principal amount will be expressed in the security agreement as Bs. 500 million. If the Bolivar devalues 50 percent *vis à vis* the dollar between the time of execution of the agreement and the date on which the debt becomes payable, the debt in Bolivar terms will be Bs. 750 million, but the coverage of the security interest will not have increased. Under this scenario, the creditor will be unsecured for the Bs. 250 million resulting from the currency devaluation.

Given the monetary instability experienced by Venezuela since 1993,¹²¹ scenarios of sharp devaluations are not unlikely, and the distortions described above are an additional obstacle for the development of a cross-border personal property secured financing market. Given that the requirement of expression of

117. U.C.C. § 9-110.

118. *Id.* § 9-110, Official Comment.

119. See Chattel Mortgage Act, *supra* note 7, arts. 22(4), 53(4); see also Senate Diary of Debates, *supra* note 30, at 657.

120. Chattel Mortgage Act, *supra* note 7, arts. 22(3), 53(3).

121. See THE WORLD BANK, *supra* note 77, at 549; see also UNITED NATIONS, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, ECONOMIC SURVEY OF LATIN AMERICA AND THE CARIBBEAN 1995-1996 311-19 (1996) (both describing Venezuela's economic environment).

the secured debts in local currency does not appear to serve any legal or financial purpose, its elimination seems advisable.¹²²

2. The Registration Requirement

In addition to the writing requirement, the Chattel Mortgage Act conditions the very existence of the security interest upon the registration of the security agreement at a public registry office.¹²³ Like the U.C.C. drafters, the drafters of the statute deemed the registration requirement essential for the success of the nonpossessory personal property secured finance system, because only registration would provide purchasers and other third persons notice of the existence of the lien.¹²⁴ Notice filing was, therefore, the concept underlying both the U.C.C. filing system and the Chattel Mortgage Act's registration system. However, there are differences between the Chattel Mortgage Act and the U.C.C.

First, The Chattel Mortgage Act provides that the registration of the security agreement has a "constitutive" effect, in that the security interest attaches and is perfected only when registration is made in accordance with the statute.¹²⁵ The U.C.C., on the other hand, sets forth a much more elaborate system. Under the U.C.C., attachment and perfection of a security interest may occur at different times, in any order,¹²⁶ and an unperfected security interest can still provide priority to the secured party over certain unsecured creditors.¹²⁷

Another significant difference between the Venezuelan system and the U.C.C. is that while the Chattel Mortgage Act requires registration of the security agreement itself, the U.C.C. permits (and favors) the use of a financing statement, a simple

122. Indication of the equivalent in local currency of any foreign currency amounts would still be necessary to comply with Art. 95 of the Central Bank Act, but it would not have the effect of limiting the secured amount like Articles 22(3) and 53(3) do. See *Ley del Banco Central de Venezuela*, *supra* note 76, art. 95; see also *Chattel Mortgage Act*, *supra* note 7, arts. 22(3), 53(3).

123. *Chattel Mortgage Act*, *supra* note 7, art. 4.

124. *Senate Diary of Debates*, *supra* note 30, at 658.

125. *Chattel Mortgage Act*, *supra* note 7, art. 4.

126. U.C.C. § 9-303(1) (1994). "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. . . If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."

127. *Id.* § 9-301.

notice indicating merely that the secured party who has filed may have a security interest in the collateral described.¹²⁸ Compared to the information the Venezuelan statute requires be included in every security agreement, the U.C.C. requires very little information to be disclosed in the financing statements.¹²⁹

Third, unlike the U.C.C., the Chattel Mortgage Act does not provide any solution to the problem of the debtor's change of residence or place of business or collateral moved out of the jurisdiction. A buyer in the jurisdiction to which the collateral has been moved is therefore not likely to get notice of the existence of the lien. This circumstance, coupled with the fact that the Chattel Mortgage Act does not provide for the continuation of the security interest neither in the collateral nor in the proceeds after a sale of the collateral to a third party in good faith, make the security illusory for most secured creditors, particularly inventory financiers with pledges without dispossession.

The U.C.C. provides that a filing made in the proper place does not cease to be effective due to a change in the debtor's residence or place of business, or the location of the collateral or its use.¹³⁰ Furthermore, under the U.C.C., secured parties have a four-month grace period to perfect the security interest in the jurisdiction to which the collateral has been moved, or to which a debtor has relocated.¹³¹

I. Priority

Because the issue of conflicting priorities is far less important under the Chattel Mortgage Act than in the context of the U.C.C., the Chattel Mortgage Act: (1) does not permit the creation of more than one security interest in each item of

128. *Id.* § 9-402.

129. As one commentator notes: "What is remarkable about Article 9's notice filing system is how little information the filer's financing statement—the only public document—must disclose to searchers. . . [I]t need only state the "types" of property covered; the specific items of collateral need not be identified; it need not tell where the property is located or the amount of the indebtedness; and it may have the effect of covering after-acquired property and future advances even though the financing statement never mentions these terms. . . and proceeds even though the financing statement is silent on this subject as well." JORDAN & WARREN, *supra* note 91, at 46.

130. See U.C.C. § 9-401(3) (1994).

131. *Id.* §§ 9-103(1)(d), 9-103(3)(e).

collateral;¹³² (2) does not provide for purchase money security interests;¹³³ and (3) does not provide for continuation of the security interest on proceeds or, except in very few limited cases, a charge on after-acquired property.¹³⁴

The Chattel Mortgage Act grants secured creditors special priority (*privilegio especial*) on the collateral to recover, to the extent covered in the security agreement, outstanding principal, accrued interest, and foreclosure expenses.¹³⁵ Accordingly, only claims for judicial costs incurred for the benefit of all creditors in connection with the preservation or foreclosure of personal property of the debtor are given priority over claims of a secured creditor under the Chattel Mortgage Act.¹³⁶ All other general and special claims on the debtor's personal property are subordinated by the statute.

Because the U.C.C. does allow the creation and coexistence of more than one security interest on the same collateral, the Code contains an elaborate system of priorities.¹³⁷ Two features of the Code system are worth mentioning here: first, priority is given in many situations to purchase money secured creditors¹³⁸ over non-purchase money secured creditors, and second, that priority among conflicting security interests is generally determined on the basis of a "first-to-file" rule.¹³⁹ The first of the features noted reveals a policy decision to prefer and protect suppliers and vendors and commerce in general.¹⁴⁰ The "first-to-file" rule, on the other hand, without necessarily achieving the comprehensive priority reform set out to be made by the drafters, has propitiated a degree of predictability which was lacking in the chaos of pre-Code secured financing law.¹⁴¹

132. Chattel Mortgage Act, *supra* note 7, art. 2.

133. See discussion *infra* Part III.J.

134. See discussion *supra* Part III.G.

135. Chattel Mortgage Act *supra* note 7, art. 17.

136. *Id.* art. 870(1).

137. See U.C.C. § 9-312 (1994).

138. In simple terms, sellers of goods which have not received full payment of the purchase price of the goods, or lenders that have financed the purchase of the goods by the debtor. See *id.* §§ 9-312(3), (4).

139. *Id.* § 9-312(5)(a).

140. See *id.* § 9-312, Official Comment 3.

141. JORDAN & WARREN, *supra* note 91, at 121.

J. The Absence of a Purchase Money Security Interest

While the U.C.C. gives first priority to purchase money secured creditors, the Chattel Mortgage Act does not give suppliers and other sellers of moveable goods priority over secured creditors. Such priority does exist with respect to sellers of real property, which by law retain a legal (as opposed to consensual) mortgage on the property sold, as security for the satisfaction of all obligations of the buyer under the purchase agreement.¹⁴² The absence of purchase money security interests may result in part from the drafters' belief that sellers of personal property desiring to retain a priority claim on the property being sold could do so by using the conditional sale mechanism.¹⁴³

K. The Secured Party and the Bona Fide Purchaser

As discussed above,¹⁴⁴ the structure of the Chattel Mortgage Act and, in particular, the dichotomy created to differentiate the chattel mortgage device from the pledge without dispossession, allow chattel mortgagees to repossess the collateral from even bona fide purchasers but does not offer similar power to creditors in a pledge without dispossession. Unlike chattel mortgagees, creditors in a pledge without dispossession are generally subject to being trumped by the claim of a good faith purchaser, regardless of whether the sale was made in the ordinary course of the debtor's business.

Essentially, in the case of a chattel mortgage, the buyer acquires the collateral subject to the security interest.¹⁴⁵ In the case of a pledge without dispossession, on the other hand, the only remedies for the secured party are the acceleration of the term for the repayment of the secured debt¹⁴⁶ and a criminal action against the breaching debtor.¹⁴⁷

142. C. CIV., *supra* note 5, art. 1,885(1).

143. *See Ley sobre Ventas con Reserva de Dominio, supra* note 11.

144. *See discussion supra* Part IIIA.

145. Senate Diary of Debates, *supra* note 30, at 659.

146. Chattel Mortgage Act, *supra* note 7, art. 6.

147. *Id.* art. 16.

The U.C.C. also contemplates situations in which, under certain circumstances, a buyer of the collateral takes free of the security interest even though the security interest is perfected. This is sometimes true even where the buyer knew of the existence of the security interest at the time of the purchase, but did not know that the sale was in violation of the security agreement.¹⁴⁸ The U.C.C., however, limits the situations in which that happens to sales made to "buyers in the ordinary course of business."¹⁴⁹ A buyer in the ordinary course of business is defined as one who "in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party. . .buys in ordinary course from a person in the business of selling goods of that kind. . ."¹⁵⁰ The definition, therefore, restricts the application of the rule primarily to inventory.¹⁵¹ Furthermore, even if the buyer meets the requirements mentioned above and is consequently able to acquire the collateral free of the security interest, the secured party still has a claim on the proceeds of the sale¹⁵² and a charge on the debtor's after-acquired property.¹⁵³

L. Enforcement

The drafters of the Chattel Mortgage Act created a special expedited judicial enforcement procedure for the security interests contemplated under the statute.¹⁵⁴ Extra-judicial self-help repossession, however, is not allowed under the Act, and private sale arrangements are likewise not permitted. Foreclosure can only be accomplished with judicial intervention, by means of a public auction conducted by the court.¹⁵⁵ The rejection of self-help repossession, a traditional American remedy, is in line with the European tradition in this area.¹⁵⁶

In addition, like its European predecessors, the Chattel Mortgage Act incorporates the prohibition against *pacto*

148. U.C.C. § 9-307, Official Comment 2 (1994).

149. *Id.* § 9-307 (1).

150. *Id.* § 1-201 (9).

151. *Id.* § 9-307, Official Comment 2.

152. See discussion *supra* Part III.F.

153. See discussion *supra* Part III.G.

154. Chattel Mortgage Act, *supra* note 7, Title IV.

155. *Id.* arts. 70, 74.

156. JORDAN & WARREN, *supra* note 91, at 249.

comisorio and, accordingly, agreements providing for the creditor's right to retain the collateral in satisfaction of the debt are null and void.¹⁵⁷ The Act does, however, grant the secured creditor a right of first refusal to acquire the collateral in case the owner intends to sell it, provided that the price agreed to by the parties is lower than the balance of the secured debt.¹⁵⁸ In such case, the creditor shall have an unsecured claim for the deficiency.¹⁵⁹

Finally, the Chattel Mortgage Act provides for a two-year Statute of Limitations for enforcement actions,¹⁶⁰ which is one of the shortest in the Venezuelan legal system.¹⁶¹

IV. CONCLUSION: HARMONIZATION AND THE ROAD TO INTERNATIONAL COMMERCIAL INTEGRATION

The state of development of the international consumer and commercial credit markets and the move away from an economy centered upon land toward one revolving around moveable and intangible property demand reforms of the traditional secured financing devices and indicate the need for a modern personal property secured financing system. At the conceptual level, therefore, it would appear that no effort need be wasted persuading the Venezuelan Congress of the importance of a legal system providing for clear and simple rules facilitating predictable outcomes in the area of creation and enforcement of security interests in personal property.

The novelty of the nonpossessory devices, and the dramatic departure from long-standing legal tradition they represented, however, caused the drafters to be cautious and to prefer to model the new devices after existing structures of Roman law and Napoleonic tradition instead of starting anew. The drafters of the Chattel Mortgage Act thus opted for implementing a timid evolutionary (as opposed to revolutionary) step in the direction of the development of a stand-alone personal property secured fin-

157. C. CIV., *supra* note 5, art. 1,844.

158. Chattel Mortgage Act, *supra* note 7, art. 61.

159. *Id.*

160. *Id.* art. 18.

161. Under the Venezuelan Civil Code, the statute of limitations is generally ten years for personal actions and twenty years for property actions. See C. CIV., *supra* note 5, art. 1,977.

ancing system, while admitting that in time further reforms would be needed.

The time for such reforms has arrived. Over twenty five years have passed since the enactment of the Chattel Mortgage Act and the Venezuelan economy has been fundamentally transformed during such period. The people of Venezuela have witnessed a significant decline of their standard of living, the collapse of the local financial system, the lifting of the barriers to international competition and a significant contraction of commercial and consumer credit. Personal property secured financing is still a rarity in Venezuela and many of the devices contemplated under the Chattel Mortgage Act have not been used more that a handful of times in the history of the statute.

In Venezuela's current economic environment, new local and international secured credit lines should be invited and welcome. Access to secured credit lines would allow local entrepreneurs to obtain the capital necessary to upgrade and transform their businesses to survive, and thrive, in the current competitive world, and give consumers ways to improve, or at least maintain, their standard of living. One of the ways to do this is to create a secured financing system which moves away from the outdated principles embedded in the real estate secured financing model, and recognizes the principles that govern today's commercial markets.

The U.C.C. can provide guidance in the area of access to credit, as its provisions have been lauded for making possible the development of the world's biggest and most active commercial and consumer credit market. Other civil law jurisdictions, such as the Canadian province of Quebec, have been successful in achieving substantive international harmonization of the secured financing system without a traumatic breach of the philosophical integrity of their legal systems. Following the blue print provided by the U.C.C., reforms should be made, or at least carefully considered, in the following areas:

- The current dual system of the Chattel Mortgage Act, with its unavoidable redundancies, overlaps, gaps, and contradictions, has proven overly complicated. Consequently, from a structural view point, the use of a unitary secured financing system in Venezuela is advisable. This would eliminate the current "patch-work" of

uncoordinated devices created at different times to accommodate specific kinds of asset-based financing and would promote greater efficiency.

- A national recording system, benefiting from the technological advances of the day, should be implemented to provide lenders and buyers effective notice of existing liens on the collateral. The recording system should be a registry of debtors as opposed to a registry of collateral.
- All limitations as to who can be a secured creditor should be eliminated.
- Requirements as to the types of rights that the debtor must have on the collateral to validly create a security interest should be relaxed. Full ownership rights should not be required.
- Limitations as to what assets can become collateral should also be reduced to a minimum.
- A workable inventory secured financing should be implemented.
- Security interests concurrently held by different creditors on the same collateral should be allowed.
- The requirement that secured debts be expressed in local currency should be eliminated.
- Continuation of the security interest on proceeds and after-acquired property, in addition to the contractual and criminal actions currently contemplated in the statute, should be provided to protect the creditor in case of sale or disposition of the collateral by the owner.
- With the proper safeguards, commercially reasonable private sales of the collateral upon default should be allowed to expedite enforcement and to avoid lengthy and expensive judicial foreclosure proceedings.
- Also with the proper safeguards, creditor retention of the collateral in satisfaction of the debt upon default should be allowed for the same reasons.

Such reforms would go a long way toward creating a uniform secured financing system, capable of stimulating Venezuela's economic growth.