View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Penn Law: Legal Scholarship Repository

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2018

Insolvency Law as Credit Enhancement and Enforcement Mechanism: A Closer Look at Global Modernization of Secured Transactions Law

Charles W. Mooney Jr.
University of Pennsylvania Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

 Part of the Banking and Finance Law Commons, Bankruptcy Law Commons, Commercial Law Commons, Comparative and Foreign Law Commons, Conflict of Laws Commons, Finance Commons, Law and Economics Commons, Political Economy Commons, Property Law and Real Estate Commons, Secured Transactions Commons, and the Transnational Law Commons

Repository Citation

Mooney, Charles W. Jr., "Insolvency Law as Credit Enhancement and Enforcement Mechanism: A Closer Look at Global Modernization of Secured Transactions Law" (2018). *Faculty Scholarship at Penn Law*. 2178.
https://scholarship.law.upenn.edu/faculty_scholarship/2178

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

INSOLVENCY LAW AS CREDIT ENHANCEMENT AND ENFORCEMENT MECHANISM: A CLOSER LOOK AT GLOBAL MODERNIZATION OF SECURED TRANSACTIONS LAWS

Charles W. Mooney, Jr.*

I. INTRODUCTION AND BACKGROUND

In a 2004 article[1] (*Credit Enhancement*) I explained how the insolvency-related provisions of the Cape Town Convention (CTC) and its Protocol on aircraft equipment (Aircraft Protocol)[2] could provide important and effective credit enhancement for secured financing of commercial aircraft. The article argued that the principal effects of these provisions would occur *outside* bankruptcy as a result of the facilitation of otherwise unavailable financing or reductions in the costs of financing and *not* through their operation in actual insolvency proceedings.[3] In the years since publication of that article much water has flowed under the proverbial bridge in the important and related domains of global reforms of insolvency laws and secured transactions laws.[4] This brief essay

---

* Charles A. Heimbold, Jr. Professor of Law, University of Pennsylvania Law School. Thanks to Marek Dubovec for valuable comments on an earlier draft of this paper.

[1] Charles W. Mooney, Jr., *Insolvency Law as Credit Enhancement: Insolvency-Related Provisions of the Cape Town Convention and the Aircraft Equipment Protocol*, 13 Int'l Insolvency Rev. 27, 34-39 (2004) [hereinafter, Mooney, *Credit Enhancement*].

[2] Convention on International Interests in Mobile Equipment 2001, 2307 UNTS 285 (CTC); Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment 2001, 2367 UNTS 517 (Aircraft Protocol).

[3] Mooney, *Credit Enhancement*, *supra* note xr, at 39-42. For a consideration of more general ex ante effects, see Robert K. Rasumssen, *The Ex Ante Effects of Bankruptcy Reform on Investment Incentives*, 72 Wash. U. L.Q. 1159, 1163 ("Ex post efficiency involving the relatively few firms that file for bankruptcy should not come at the expense of ex ante inefficiency for all firms in the economy.").

[4] For example, a substantial literature has emerged that is highly critical of the so-called "safe-harbors" for financial contracts. *See, e.g.*, Stephen J. Lubben, *Derivatives and Bankruptcy: The Flawed Case for Special Treatment*, 12 U. Pa. J. Bus. L. 61 (2009); Mark J. Roe, *The Derivatives Market's Payment Priorities as Financial Crisis Accelerator*, 63 Stan. L. Rev. 539 (2011); David A. Skeel, Jr. & Thomas H. Jackson, *Transaction Consistency and the New Finance in Bankruptcy*, 112 Colum. L. Rev. 152 (2012); Richard Squire, *Shareholder Opportunism in a World of Risky Debt*, 123 Harv. L. Rev. 1151 (2010); Michael H. Weiss, *Using Derivatives to Create Bankruptcy Proof Loans*, 30 Cal. Bankr. J. 207 (2010). I have been critical as well of the over-breadth of the United States safe harbors, while recognizing the utility of safe harbors of an appropriate scope. Charles W. Mooney, Jr., *The Bankruptcy Code's Safe Harbors for Settlement Payments and Securities Contracts: When is Safe Too Safe?,* 49 Texas Int'l L.J. 245 (2014). Yet most of the critiques emphasize the detrimental role of the safe-harbors in the run-up to insolvency proceedings or in a financial crisis environment. For

revisits the relationship between insolvency law and secured credit. Taking into account earlier work—my own and that of others—relating to secured transactions law reforms and the role and social benefits of secured credit, it suggests that more nuanced and complex relationships mandate a more holistic approach toward law reforms in the areas of secured transactions and insolvency laws. An overarching theme is that in any given jurisdiction merely enacting modern, sensible secured transactions laws and insolvency laws may be insufficient to produce the intended benefits from either set of laws.[5]

The essay's focus is particularly appropriate for honoring Jay Westbrook in recognition of his many contributions to scholarship and law reform[6] and as an acknowledgement his catholic interests and pursuits. Among many other contributions, Jay has provided insight and wisdom for contemplation of the central role of priorities (including avoidance powers) in insolvency law, a sphere in which secured transactions law plays a central role.[7] Over his distinguished career he has devoted much effort and applied his enormous skills toward teaching and scholarship in the areas of insolvency law and secured transactions law. The cohort of legal scholars to which Jay and I belong were taught and inspired by a generation of professionals for whom these two bodies of law were inextricably tied. For these scholars, practitioners, and reformers a central, even dominant, issue in the United States during the mid-twentieth century was the treatment of nonpossessory security interests in insolvency proceedings—principally under the Bankruptcy Act and later the Bankruptcy Code. UCC Article 9 was conceived, created, and implemented under this background of bankruptcy law. The work of luminaries such as Grant Gilmore, Homer Kripke, and Peter Coogan, among others,

---

an evaluation that focuses on their global operation and laudable effects on liquidity, see Philipp Paech, *The Value of Financial Market Insolvency Safe Harbours*, 36 Oxford J. L. Stud. 855 (2016). For a rebuttal of Paech, see Riz Mokal, *Liquidity, Systemic Risk, and the Bankruptcy Treatment of Financial Contracts*, 10 Brook. J. Corp., Fin. & Com. L. 15, 58-68 (2015).

[5] In another project now in progress I build further on this theme by considering secured transactions law reforms through the lens of Alan Watson's pathbreaking book, *Legal Transplants*. *See* Charles W. Mooney, Jr,, Lost In Transplantation? UCC Article 9 Principles As Legal Transplants ([June 23], 2018) (unpublished manuscript) (on file with author) (discussing, *inter alia*, ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993) (1974)).

[6] For example, Jay served as the United States Reporter for the American Law Institute's Transnational Insolvency Project and as co-chair of the United States delegation to the United Nations Commission on International Trade Law (UNCITRAL) for international insolvency projects.

[7] *See* Jay L. Westbrook, *Breaking Away: Local Priorities And Global Assets*, 46 Tex. Int'l L.J. 601 (2011); Jay L. Westbrook, *Introduction, University of Texas International Insolvency Symposium: The Priority Dilemma*, 46 Tex. Int'l L.J. xr (2011); Jay L. Westbrook, *Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies*, 27 Penn. St. Int. L. Rev. 869 (2009); Jay L. Westbrook, *Avoidance Of Pre-Bankruptcy Transactions In Multinational Bankruptcy Cases*, 42 Tex. Int'l L.J. 899 (2007) [hereinafter, Westbrook, *Avoidance*].

readily comes to mind.[8] Interestingly, this close relationship between the two areas and the corresponding focus in particular of academics is largely a phenomenon centered in North America, where it is commonplace for law teachers to teach both secured transactions law and bankruptcy/debtor-creditor law. In most of the world academics specializing in insolvency law are more likely also to be specialists in civil procedure (which to my mind, of course, also makes much sense[9]).

My observations in these pages also are inspired and informed in part by an ongoing research project consisting of a qualitative empirical study of business credit in Japan—the Japanese Business Credit Project (or JBCP)—involving interviews of representatives of Japanese financial institutions, governmental bodies, and businesses as well as legal professionals such as practitioners and academics.[10] The essay draws additional inspiration and insight from an invitational conference on the coordination of global reforms of secured transactions laws held in February 2017 (2017 Coordination Conference).[11] That conference brought together individuals representing many of the most important organizations that toil "on the ground" for reforms of secured transactions laws and insolvency laws. Unfortunately, too little of their experience and too few of their insights have found their way into the relevant literature. Given Jay's prominence in the field of empirical legal studies and his important contributions to law reforms, the value of connecting these experiences with the literature is especially appropriate to note in this well-deserved tribute for Jay.

Following this Introduction, Part II of the essay outlines what I refer to as the "modern principles of secured transactions law" (Modern Principles) that underlie recent and ongoing law reform efforts. It summarizes these reform initiatives and the principal theses and perspectives of both the advocates and critics of the Modern Principles. Part III proceeds on the assumption that the Modern Principles reflect in general a global consensus on the optimal features of secured transactions laws. It provides a synopsis of the discussions at the 2017 Coordination Conference. It also offers an overview of the JBCP and the principal relevant insights that the study has yielded thus far, albeit in tentative fashion given the current stage of the research and analysis. It concludes that the various obstacles and challenges to the implementation of Modern Principles-based secured transactions law reforms are under-studied and under-theorized. It reaches the same conclusion with respect to the relationship between secured transactions law and the

---

[8] *See* 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY at xi (1965) (referring to the important roles played by Kripke and Coogan).

[9] *See* Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 Washington & Lee Law Review 931 (2004).

[10] *See* Part III *infra*.

[11] The 2017 Coordination Conference was held on February 9-10, 2017, at the University of Pennsylvania Law School, Philadelphia, PA. It was co-sponsored by the International Insolvency Institute (III), the National Law Center for Inter-American Free Trade (NLC), and the Organization for the Harmonization of Business Law in Africa. *See* Part III *infra*. A follow-up coordination conference will be held in Madrid, October 16-17, 2018, co-sponsored by the III, the NLC, and Universidad Carlos III de Madrid.

relevant influences on a given State's business credit market. It calls for more rigorous investigation and analysis. Part IV considers links between both insolvency law and private international law (i.e., conflict of laws or choice-of-law rules) and secured transactions law. It argues that both bodies of law play roles that are vital to the operation of secured transactions in the business credit markets and that each should feature prominently in the processes of adoption and implementation of secured transactions law reforms. Part VI concludes the essay.

II. MODERN PRINCIPLES OF SECURED TRANSACTIONS LAW AND CURRENT REFORM EFFORTS

There has emerged a global consensus as to the set of Modern Principles that reflect general principles to which secured transactions law should adhere. The 2016 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Secured Transactions (Model Law)[12] is the epitome of the Modern Principles. It is a relatively direct descendant of Uniform Commercial Code (UCC) Article 9[13] and the various personal property security acts (PPSAs) adopted by Canadian Provinces[14] (together, sometimes referred to here as North American law). The Modern Principles also are reflected in other model laws,[15] in other secured transactions laws enacted by several States during recent years,[16] and in laws that are currently being considered by

---

[12] United Nations Commission on International Trade Law (UNCITRAL) Model Law on Secured Transactions (1 July 2016) [hereinafter, Model Law], http://www.uncitral.org/pdf/english/texts/security/ML_ST_E_ebook.pdf. The Model Law was inspired by its predecessor, UNCITRAL Legislative Guide on Secured Transactions (2007), http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf [hereinafter, Legislative Guide]. In July 2017 UNCITRAL approved the Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions [hereinafter, GTE], which will be published soon. *See* A/CN.9/914 & Add. 1-6, http://www.uncitral.org/uncitral/commission/sessions/50th.html.

[13] UNIF. COMMERCIAL CODE (U.C.C.) Article 9 (Secured Transactions) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

[14] *See, e.g.*, Ontario Personal Property Security Act, R.S.O. 1990, c. P.10 (OPPSA).

[15] *See, e.g.*, European Bank for Reconstruction and Development, Model Law on Secured Transactions (2004), *available at* http://www.ebrd.com/news/publications/guides/model-law-on-secured-transactions.html; Organization of American States, Model Inter-American Law on Secured Transactions, *available at* https://www.oas.org/dil/Model_Law_on_Secured_Transactions.pdf.

[16] *E.g.*, Colombia, Ley No.1676 del 20 de Agosto de 2014, *Por la Cual se Promueve el Acceso al Crédito y se Dictan Normas sobre Garantías Mobiliarias*; See Mayer Brown, 'Colombia's New Law on Security Interest over Movable Assets Comes into Effect (28 April 2014) *available at* https://www.mayerbrown.com/files/Publication/4868229b-de56-4b53-8669-a55fcfdd728a/Presentation/PublicationAttachment/56e374b9-fab3-467f-b3b1-aa1d67beafbb/Update_New_Regulations_Moveable_Assets_Colombia_0414.pdf; Jordan, Pakistan; E-Mail from Murat Sultanov, Secured Transactions Specialist, World Bank Group, to Charles W. Mooney Jr. (June 18, 2018, 03:01 EDT) (on file with author).

other States.[17] While some disagreement might exist at the margin, I would include in the Modern Principles the following features: (i) public notice as a general condition for third-party effectiveness (perfection), including (x) a grantor identifier-based registry for registration of notices of security interests, and (y) recognition of the historical effectiveness of possession of tangible assets; (ii) clear and predictable priority rules to enhance certainty; (iii) provision for effective enforcement of security interests following a debtor-assignor's default; (iv) availability as all types of personal property as collateral, including future assets, securing future obligations; (v) free assignability of receivables; (vi) comprehensive coverage of all forms of security devices; (vii) extension of security interests to the proceeds of collateral; (viii) the general acceptance of freedom of contract for inter-party relations; and (ix) clear private international law (choice-of-law) rules. Other important principles embraced by the Model Law and other modern iterations of secured transactions laws are implicit in and follow as a part of the policy penumbra of these features. The Modern Principles also are embodied in the enormously successful CTC[18] and Aircraft Protocol[19] as well as the other CTC Protocols,[20] although these instruments adopt an object-based registry rather than a grantor identifier-based registry, as contemplated by the Modern Principles.[21]

The "overall objective" of the Model Law and related UNCITRAL texts "is to increase the availability and decrease the cost of credit by providing for an effective and efficient secured transactions law."[22] The same can be said of the CTC and its

---

[17] These states currently include, e.g., Bahrain, Bangladesh, Chile, Paraguay, Sri Lanka, St. Lucia, and Tunisia. E-Mail from Andres F. Martinez, Senior Financial Sector Specialist, World Bank Group, to Charles W. Mooney Jr. (July 1, 2017, 08:34 EDT) (on file with author); E-Mail from Murat Sultanov, Secured Transactions Specialist, World Bank Group, to Charles W. Mooney Jr. (July 1, 2017, 07:41 EDT) (on file with author); E-Mail from Murat Sultanov, Secured Transactions Specialist, World Bank Group, to Charles W. Mooney Jr. (June 18, 2018, 03:01 EDT) (on file with author).

[18] CTC, *supra* note xr.

[19] Aircraft Protocol, *supra* note xr.

[20] Since entering into force on March1, 2006, the CTC and Aircraft Protocol have been adopted by 73 contracting States and one regional economic integration organization (European Union). UNIDROIT, Status of the Convention on International Interests in Mobile Equipment, http://www.unidroit.org/status-2001capetown, accessed 5 Jan. 2018). The Protocols covering railway rolling stock and space assets are not yet in force. Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, 2007, 46 ILM 662; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (adopted 9 March 2012). A fourth Protocol covering mining, agricultural, and construction equipment is in progress. *See* UNIDROIT, Report (Nov. 2017), https://www.unidroit.org/english/documents/2017/study72k/cge02/s-72k-cge02-report-e.pdf.

[21] CTC, *supra* note xr, art. 18 (registration requirements).

[22] GTE, *supra* note xr, II., para 4.

Protocols.[23] Several studies and overwhelming empirical evidence confirm that the CTC and Aircraft Protocol have fulfilled this objective.[24] While the Aircraft Protocol may be *sui generis* in its strikingly demonstrable effects, the adoption of the UNCITRAL texts under the continued influence of North American law and the ongoing Modern Principles-influenced global reforms demonstrate that at least an important segment of expert opinion subscribes to the general effectiveness of the Modern Principles-based laws. Moreover, the adoption of the Modern principles would offer benefits of a coherent, accessible, and easily understandable legal regime for secured transactions even if it might not result in measurable increases in availability and reductions of costs in a given market.[25]

The apparent credit-enhancing attribute of Modern Principles-based laws does not alone, of course, prove that these laws *generally* promote social welfare. Indeed, for the past several decades an academic debate has ensued in the United States over the merits of affording security interests full priority in the bankruptcy proceeding of a debtor.[26] Critics of priority afforded under modern secured transactions laws and insolvency laws typically have focused on the "efficiency" (or not) of secured credit, with emphasis on the distributional effects of priority afforded security interests over unsecured creditors of debtors that actually become insolvent as well as the inability of some classes of creditors (such as tort creditors and taxing authorities) to adjust to the debtor's creation of senior security interests.[27] The academic debate continues.[28]

---

[23] ROY GOODE, OFFICIAL COMMENTARY TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT, 2.1, at 13 (3d ed. 2013).

[24] Charles W. Mooney, Jr., *The Cape Town Convention's Improbable-but-Possible Progeny Part Two: Bilateral Investment Treaty-Like Enforcement Mechanism*, 55 Va. J. Int'l L. 451, 454-58 (2015) (summarizing economic studies and CTC Discount, under which debtors located in CTC/Aircraft Protocols can receive substantial discounts on costs of financing).

[25] See [xr to pp. 19-20].

[26] *See* Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 Yale L.J. 1143 (1979).

[27] *See, e.g.*, Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 Yale L.J. 857 (1996). For a survey of much of the early literature and a rebuttal, see Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 Va. L. Rev. 2021 (1994); Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 Cornell L. Rev. 1349 (1997).

[28] *See, e.g.*, Barry E. Adler & George Triantis, *Debt Priority And Options In Bankruptcy: A Policy Intervention*, 91 Am. Bankr. L.J. 563 (2017); Wei Zhang, *The Paradoxes of Secured Lending: Is There a Less Uneasy Case for the Priority of Secured Claims in Bankruptcy?*, 16 U. Pa. J. Bus. L. 789 (2014). Currently work is underway to develop a formal methodology for assessing the economic benefits of commercial law reforms more generally under the auspices of the Commercial Law Center, Harris Manchester

This essay need not review and rehash these debates. Instead, it proceeds on the basis that in the setting of global secured transactions law reforms the Modern Principles reflect the current coin of the realm. Given that, a principal goal here is to draw attention to the challenges and obstacles faced in the adoption and implementation of Modern Principles-based secured transactions laws. Related to that aspiration, it also examines relationships between secured transactions law and the attributes of and influences on markets for business credit. Part III next turns to these tasks by drawing on the 2017 Coordination Conference and the JBCP.

III. SECURED TRANSACTIONS LAWS AND MARKETS FOR BUSINESS CREDIT: INSIGHTS FROM THE 2017 COORDINATION CONFERENCE AND THE JAPANESE BUSINESS CREDIT PROJECT

Many of the challenges to adoption and implementation of Modern Principles-based secured transactions laws were considered at the 2017 Coordination Conference, during which several themes emerged.[29] One overarching theme was that enactment by a State of statutory reforms is insufficient of itself for successful implementation of a modern secured transactions law. Another was that global reform efforts would benefit greatly from increased coordination among the various organizations involved with that work. Examples of coordination failures abounded.

In many States modern reforms are resisted by entrenched interests, such as banks with dominant market shares of financing in the business credit markets.[30] It was

---

College, University of Oxford, and the International Institute for the Unification of Private Law (UNIDROIT) Foundation. *See* Jenifer Varzaly, The Economic Assessment of International Commercial Law Reform: Best Practice Guidelines (on file with author); *see generally* Economic Assessment of International Commercial Law Reform, https://www.law.ox.ac.uk/research-subject-groups/economic-assessment-international-commercial-law-reform. A cost-benefit analysis also is being conducted in connection with the draft MAC Protocol to the CTC. Warwick Economics and Associates, Preliminary Report to UNIDROIT, An Economic Assessment of the Fourth Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Agricultural, Construction and Mining Equipment (Oct. 2, 2017), https://www.unidroit.org/english/documents/2017/study72k/cge02/warwick-economic.pdf.

[29] *See* xr, *supra*. The 2017 Coordination Conference was conducted under the Chatham House Rule: "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed." Chatham House, https://www.chathamhouse.org/about/chatham-house-rule. The brief discussion here is based on my notes taken during the conference.

[30] *See, e.g.*, Summary of Thai Banker Association ... Opinions regarding the Business Security Act in connection with the World Bank's 29 Recommendations and DB Legal Rights Index (summarizing objections to World Bank's recommendations for reforms of secured transactions laws of Thailand) (on file with author).

generally acknowledged that the inability of banks to obtain favorable regulatory capital treatment for loans secured by personal property was a serious impediment to reforms. Resistance also is commonly asserted by legal academics and lawyers who may be troubled, for example, by apparent conflicts between the Modern Principles and existing legal traditions or by perceived potential disruptions of established practices and transactional patterns. Such resistance is typical in the case of many potential law reforms. Of particular interest here, however, are circumstances in which modern reforms may be enacted but are nonetheless ineffective, mentioned next.

Apparently many states have undertaken reforms with the primary goal of improving their rankings in the World Bank Doing Business Survey,[31] even though achieving that goal has not translated into actual improvements in access to credit through secured financings. New laws on the books sometimes sit on shelves, largely unused, because prospective users and beneficiaries lack sufficient understanding. Moreover, the generally poor state of insolvency laws around the world jeopardizes secured transactions law reforms. In some States modern, sophisticated registries have been inadequately utilized because of inadequate training of the registry staff as well as the user base. Difficulties in valuing collateral, especially movables, reflect another typical problem that was discussed. Judicial hostility to enforcement of secured transactions also was identified as a recurring problem.

Several problems associated with implementation of reforms were discussed. For example, some States have received conflicting advice and have enacted secured transactions laws that are not sufficiently compatible with newly adopted insolvency laws. Some advisors present States with very simple, streamlined versions of secured transactions laws that others consider hopelessly incomplete. Other advisors favor more complete statutory approaches that some consider hopelessly complex.

A clear consensus emerged that an important but enormously challenging obstacle to reform is the need for capacity building—stimulation of the capacities of prospective debtors and creditors to usefully and profitably employ secured transactions law reforms. This would include steps such as consultations with and education of the various stakeholders affected by secured transactions laws as well as cultural shifts in relevant attitudes and social norms.[32] Of course, the foregoing offers only a taste of the discussions. But a common thread appears to be that capacity building in various forms, including fundamental and structural changes in characteristics of credit markets and cultural and legal traditions and norms, are necessary conditions for successful

---

[31] The World Bank, Doing Business, http://www.doingbusiness.org. States may benefit in general from the perception that a higher ranking indicates an investment friendly economy. A State's leaders also may reap internal political benefits from higher rankings as well.

[32] *See, e.g.*, Neil B. Cohen, Capacity Building as a Key Determinant of Success in Secured Transactions Reform, http://www.uncitral.org/pdf/english/colloquia/4thSecTrans/Presentations/2ContGonST2/COHEN_Colloquium_Presentation.pdf.

implementation of modern secured transactions laws. Enactment of statutory text, alone, often may be a necessary but insufficient step.

The Legislative Guide, the Model Law, and the GTE do not adequately address these concerns. Instead, they are devoted almost exclusively to the development and enactment of *statutory text*. One might have thought that the GTE, at least, would take a broader approach, understanding that the nature of the Legislative Guide and Model Law necessarily are statutory-text oriented. But the GTE also declares a relatively narrow purpose—"to explain briefly the thrust of each provision of the . . . Model Law . . . and its relationship with the corresponding recommendation(s) of the . . . Legislative Guide . . . and other UNCITRAL texts on secured transactions."[33] Although the GTE does state that it "is designed to assist States in implementing the recommendations of" these texts, it limits its assistance largely to the explanatory purpose just mentioned.[34] Currently UNCITRAL's Working Group VI (Security Interests) has begun work on a new text—a "practice guide" for the Model Law (Practice Guide).[35] Like its UNCITRAL forebears, the Practice Guide appears to be directed primarily to users of statutory text based on the Model Law and not toward structural reforms addressing issues unrelated to statutory text. But the Practice Guide project has only just begun and it is encouraging that it contemplates a section devoted to financing micro-business.[36] One hopes that that the attention to micro-business will extend beyond the mere adoption and use of statutory text.

The foregoing is not so much a criticism of these UNCITRAL texts as it is a recognition that the Working Group and UNCITRAL generally may not be well suited to undertake projects beyond the more technical, statutory-text oriented work to date. A more holistic examination of business credit markets and the proper domain of Modern Principles-based statutory reforms would be welcome. The JBCP aspires to such an examination.

The JBCP is a research project that I am currently undertaking with two Japanese scholars.[37] Our goal is an assessment of Japanese markets for private business credit, including the Japanese laws that govern secured transactions in tangible movables (such as a firm's inventory or business equipment) and claims (such as a firm's accounts

---

[33] GTE, *supra* note xr, I., para 1.
[34] *Id.*, para 4.
[35] Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions: Annotated List of Contents, https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/071/55/PDF/V1707155.pdf?OpenElement [hereinafter, Practice Guide].
[36] *Id.*, Part IV.D., at 14-15.
[37] My co-investigators are Megumi Hara (Professor of Law, Gakushuin University Law School) and Kumiko Koens (Professor, Yamagata University Faculty of Literature and Social Sciences, Department of Public Policy and Social Studies). Professor Koens and I undertook preliminary work on the project during the summer of 2016. During this same time-frame Dr. Dubovec and I were organizing the 2017 Coordination Conference.

receivable) to secure extensions of business credit.[38] Among other aspects of the Japanese business credit market, the study investigates underlying causes of Japan's failure to embrace the Modern Principles in its legal framework. It examines Japan's law on perfection by registration of assignments of movables and claims (PRAMC)[39] and hypothetical revisions of that Act which would provide a first-to-register priority rule. The JBCP was inspired by some puzzling features of the Japanese market and related aspects of Japanese law. Consider that Japan possesses the third largest economy in the world (based on 2017 GDP),[40] is the home of sophisticated financial institutions as well as commercial and industrial firms of every type and size, and has a highly experienced and learned legal profession. Moreover Japan has an excellent track record of modernizing its insolvency laws, reflecting a propensity to learn and borrow from experiences in other States.[41] This background presents some puzzles. For example, why does Japan retain a relatively primitive legal regime for secured transactions and why has it failed to adopt the Modern Principles?[42] Notwithstanding this ostensibly unfriendly legal regime, why is business credit nonetheless apparently readily available in Japan?[43] And why are financings secured by movables (equipment and inventory), claims (receivables), and other personal property collateral such a small fraction of business credit in Japan when compared to the United States?[44]

---

[38] *See* Research Outline, Nov. 24, 2016 (on file with author) [hereinafter, Research Outline].

[39] *Dōsan oyobi Saiken no Jōto no Taikō Yōken ni kansuru Minpō no tokurei tō ni kansuru Hōritsu* [Act on Special Provisions, etc. of the Civil Code Concerning the Perfection Requirements for the Assignment of Movables and Claims], Law No. 104 of 1998 as amended and renamed by Law No. 148 of 2004 (Japan) [hereinafter PRAMC].

[40] Statistic Times, List of Countries by Projected GDP (April 23, 2017), http://statisticstimes.com/economy/countries-by-projected-gdp.php.

[41] *See, e.g.,* Minji Saisei Hou [Civil Rehabilitation Act], Law No. 225 of 1999 (Japan) [hereinafter, Civil Rehabilitation Act].

[42] *See* xr *infra* (discussing PRAMC and its interaction with Japanese Civil Code (Minpō)).

[43] *See, e.g.*, Bank of Japan, Financial System Report, Financial Activity Indexes, 30-33 (Oct. 2017), https://na01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.boj.or.jp%2Fen%2Fresearch%2Fbrp%2Ffsr%2Fdata%2Ffsr171023a.pdf&data=01%7C01%7Ccmooney%40law.upenn.edu%7Ccef92b7479b3460e208d08d5574b0b3c%7C6cf568beb84a4e319df6359907586b27%7C1&sdata=XgnI4m36mm6VwkxD3zhnyw8o7HA5JGEAYcdOmJae8Xg%3D&reserved=0) (demonstrating "financial institutions' active lending attitude").

[44] For convenience, such asset-based secured financing is referred to here as "ABL." *See* Ministry of Economy, Trade and Industry, Dōsan/Saiken Jōtotanpo no Genjō to Torikumi no Hōkōsei, [Current Status and Direction of Efforts on Transfer of Movable Assets/Claims as Collateral] (June 21, 2016) (on file with author) (unsecured credit, 46.6%; personal guaranty supported credit, 34.8%; real property secured credit, 15.6%; shares, bonds promissory notes secured credit, .7%; other property secured credit, 2.5%). While strictly comparable data for the Unites States is not available, the volume of ABL in the United States indicates that it represents a much larger share of business loans. *See*

Consider Japan's PRAMC. That law provides for a *sui generis* public-notice registration system for assignments (both outright and for purposes of security) of interests in movables and claims.[45] But this system co-exists with methods of assignment that are effective against third parties under the Japanese Civil Code *without* registration or any other form of effective public notice.[46] For example, an effective title-transfer assignment (*jõto tanpo*) of a movable may be made effective by the assignor's declaration without any actual delivery of possession of the movable (a so-called "fictitious delivery.")[47] It follows that the interest of a creditor that searches the registry, finds no conflicting registration of an assignment, and registers its own assignment as the first-to-register assignee, would nevertheless be subordinate to an earlier-in-time "secret" assignment made effective under the Civil Code.[48]

Substantial data exists with respect to the characteristics of the sources of business credit in Japan and the business debtors to which the credit is extended.[49] But these data do not adequately address or explain the puzzle of *why* the landscape of Japanese

---

ABL Advisor, the ABL Advisor Deal Tables, http://www.abladvisor.com/loan-volume-report ($60 billion of ABL in the United States in 2015); Federal Reserve Bank of St. Louis, Total Value of Loans for All Commercial and Industry Loans, Domestic Banks, spreadsheets available from https://fred.stlouisfed.org/series/EVAXDBNQ ($282.32 billion commercial and industrial loans in 2015).

[45] By providing a national registration system for the assignments of movables and claims PRAMC is a step in the right direction toward the Modern Principles and an improvement over pre-PRAMC law. But it fails to conform to the Modern Principles in several respects, including with respect to searches of the registry and indications of the property covered by a registration.

[46] MINPŌ [Civil Code] art. 183 ("If an agent manifests an intention that The thing possessed by it shall thenceforward be possessed on behalf of its principal, the principal shall thereby acquire possessory rights.")

[47] *Id.*; Souichirou Kozuka & Naoe Fujisawa, *Old Ideas Die Hard?: An Analysis of the 2004 Reformation of Secured Transactions Law in Japan and its Impact on Banking Practices*, 31 T. Jefferson L. Rev. 293, 306-07 (2009) (discussing predecessor of PRAMC to the same effect).

[48] *Id.* Given these attributes of the Japanese legal framework it is not surprising that Japan scores only 5 out of 12 on the 2018 World Bank Doing Business Survey (hereinafter, WB DB Survey) "strength of legal rights index under the "Getting Credit" topic. The World Bank, Doing Business, Japan, http://www.doingbusiness.org/data/exploreeconomies/japan#getting-credit#tokyo. While there is much to criticize about the WB DB Survey, such a critique is beyond the scope of this essay. Japan ranks only 77th out of 190 under "Getting Credit" in the 2018 WB DB Survey. *Id.* However, other evidence indicates that business credit is readily available in Japan. *See* note xr, *supra*.

[49] *See, e.g.,* Ono, Arito, et al., *A New Look at Bank-Firm Relationships and the Use of Collateral in Japan: Evidence from Teikoku Databank Data*, in THE ECONOMICS OF INTERFIRM NETWORKS (T. Watanabe, I. Uesugi, and A. Ono, eds.) 191-214 (2015).

business credit and the relevant legal regime has evolved and persists. The JBCP is investigating *why* the patterns and characteristics of Japanese business credit markets exist, *how* they have developed, and *what* are the underlying cultural, political, and legal influences. While we have developed a set of hypotheses to be tested through our research,[50] we approach the project from the perspective of basic research without taking any positions as to the nature of any potential modifications of the Japanese legal regime. The methodology for the JBCP is based on semi-structured interviews supported by analyses of published and unpublished commentary and reports of judicial decisions, empirical analyses of data on business credit markets in Japan and other markets. To date we have conducted more than thirty interviews of commercial bankers, staff of government ministries and regulators, and academics. Although our formal analysis of interview data is only beginning, some preliminary data from our research to date are illustrative.

One preliminary indicative result is that it is likely that ABL in Japan would be quite limited even if the Modern Principles were incorporated into Japanese private law, all other factors being equal. This is consistent with several of our initial hypotheses on which the research has been structured.[51] Reasons for this potential ineffectiveness of secured transactions reforms include lenders' concerns about the reliability of ex ante valuations of recoveries from movables collateral. The relative unlikelihood that a Japanese business firm in financial distress will become subject to a formal insolvency proceeding in which collateral might be valued and dealt with contributes to these concerns.[52] Another explanation for such potential ineffectiveness is the stigma commonly associated with public registration of assignments. All of these considerations find some support in our preliminary data. One implication of this potential futility of Modern Principles-based reforms it that changes in the structure of the business credit market would be essential for the effectiveness of such reforms. Such changes might be beneficial (development of a robust secondary market for movables, for example) or not (increased incidence of priority conflicts). This reaffirms a theme that emerged from the 2017 Coordination Conference, discussed above—merely enacting Modern Principles-based secured transactions laws in any given market may not yield the intended benefits of increased availability of credit at a lower cost. The JBCP seeks to increase understanding of how and under what circumstances Modern Principles-based secured transactions laws could be most effective and to identify the underlying social, cultural, legal, and economic prerequisites for successful implementation of effective secured transactions laws.

---

[50] *See* Research Outline, *supra* note xr, 6-7. Note that consideration of hypothetical revisions of the PRAMC that would provide a first-to-register priority rule provide an analytical medium for exploring in interviews the normative case for modernization of Japanese secured transactions law.

[51] *Id.*

[52] This phenomenon is discussed in Part IV, *infra*. There are, of course, other reasons for concerns about recoveries that we hypothesize, such as thin secondary markets and wrongful dispositions or removals by debtor firms. *Id.*

Another explanation as to why adoption of the Modern Principles in Japan might not produce beneficial reductions in the cost of credit or increases in the availability of credit is the already existing availability of low-cost credit even in the absence of Modern Principles.[53] For example, preliminary indications are that the observance of business norms in Japan makes conflicting claims to the same collateral rare, which would potentially mute the effects of adopting a Modern Principles-based first-to-register priority scheme. Even more significant, the prevalence of government guarantees for loans to small and medium sized businesses substantially reduces incentives for lenders to rely on collateral when such guarantees are available.[54]

The foregoing notwithstanding, even if adoption of a Modern Principles-based secured transactions regime would not offer optimal benefits, on balance such adoption would likely provide substantial benefits for the Japanese market (and for other markets). The Modern Principles offer a coherent, user-friendly legal framework for parties wishing to utilize personal property as collateral. There is little to commend legal regimes that are costly, cumbersome, and uncertain, Moreover, and irrespective of the magnitude of potential benefits of the adoption of the Modern Principles in Japan, there is value in achieving a better understanding of the potential effects (or lack thereof) of reforming secured transactions laws in Japan and in other markets.

In sum, reform processes would benefit from more rigorous studies of approaches to secured transactions law reforms beyond the mere adoption of statutes and guidance from closely related texts. In addition to academic research projects such as the JBCP, reform efforts also would benefit greatly from a more systematic approach to the use—and memorialization in the literature—of experiences and lessons learned from work of individuals and organizations "on the ground" in the process of implementing reforms.

---

[53] In an extremely low interest rate environment, such as exists in Japan, a material reduction of financing costs is not realistic. *See* Bank of Japan, Average Contract Interest Rates on Loans and Discounts (Nov. 2017) (Short-term loans: 0.325%, City banks; 1.002%, Regional banks; 1.298%, Regional banks II; 1.955%, Shinkin banks. Long-term loans: 0.965%, City banks; o.888%, Regional banks; 0.988%, Regional banks II; 1.674%, Shinkin banks.), http://www.boj.or.jp/en/statistics/dl/loan/yaku/yaku1711.pdf. But the potential for increasing the availability of business credit in such an environment should remain an important goal. On availability of credit, see notes xr, *supra*.

[54] For example, in the sample of borrowers that were the subject of one important study, of the borrowers that provided non-real property collateral or guarantees, 44.6% had loans covered by public guarantees and only 14.2% had loans covered by other collateral or private guarantees. If bank deposit collateral (essentially just a compensating balance compensation arrangement rather than credit enhancement) and private guarantees are not considered, non-real property collateral was provided by only 2.4% of the borrowing firms. Ono, Arito, et al., *A New Look at Bank-Firm Relationships and the Use of Collateral in Japan: Evidence from Teikoku Databank Data*, in THE ECONOMICS OF INTERFIRM NETWORKS xr (T. Watanabe, I. Uesugi, and A. Ono, eds., 2015).

IV. INSOLVENCY LAW AND PRIVATE INTERNATIONAL LAW AS INSTRUMENTS OF SECURED TRANSACTIONS LAW REFORM

This Part considers the roles and significance of insolvency law and the rules of private international law (choice-of-law) for the operation and effectiveness of secured transactions laws. First consider insolvency law. It is widely accepted and not controversial that an effective secured transaction legal regime necessarily requires the existence of an insolvency law framework that generally respects and recognizes the effectiveness of security interests in insolvency proceedings. As mentioned above, the Secured Transactions Legislative Guide, the Insolvency Legislative Guide, and the Model Law on Secured Transactions contemplate the existence and importance of this baseline.[55] Of course, the devil is in the details and controversy exists as to treatment in specific circumstances.[56] But in some jurisdictions the role of insolvency proceedings is not merely benign in its recognition and respect for security but may play a crucial, even indispensible, role in the effectiveness of secured transactions law. The contrast between the United States and Japanese environments is especially striking in this context.

Secured creditors in the domestic United States setting may reliably predict that in the case of a debtor's financial distress the firm typically will end up in a Chapter 11 proceeding if a consensual out-of-court workout arrangement cannot be achieved.[57] This being the case, these creditors normally would have confidence as well that judicial supervision accompanying a Chapter 11 case will typically result in collateral being identified and available. Moreover, the valuation and treatment of secured claims in a Chapter 11 case provide an important means of enforcing security interests as a viable alternative to nonjudicial dispositions or collections of collateral or judicial enforcement outside on an insolvency proceeding. Under the Bankruptcy Code a claim is a secured claim to the extent of the amount of the secured debt, if the collateral value exceeds the debt, or the value of the collateral, in the case of an undersecured claim (i.e., if the debt exceeds the collateral value).[58] In general a secured creditor is entitled to receive the value of its secured claim even if the collateral is not disposed of and the reorganized debtor continues to own and use the collateral after confirmation of a plan of reorganization.[59] Moreover, Chapter 11 may be especially beneficial to a secured creditor's recovery when a Chapter 11 debtor's assets (including the secured creditor's

---

[55] *See* Legislative Guide, XII.A.3., para 13, at 425; Model Law, art. 35 (security rights retain priorities in insolvency proceedings); GTE, III., para 8.

[56] *See* Legislative Guide, XII.A.5., paras 18-36, at 427-31.

[57] Of course, a corporate debtor whose financial condition is essentially hopeless may simply be abandoned or liquidated.

[58] See 11 U.S.C. § 506(a) (determination of secured status).

[59] For example, a secured claim may be dealt with by issuing securities providing for a payment stream the present value of which equals the amount of the secured claim. *See* 7 COLLIER ON BANKRUPTCY ¶ 1129.04[2][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016).

collateral) are sold as a going business in a "363 sale."[60] Of course, recoveries of value from of collateral—whether inside or outside of an insolvency proceeding—contribute to (and benefit from) the existence of a robust, thick secondary market for collateral such as inventory and equipment. This would be the case whether a disposition occurs as a part of a going business disposition or, instead, in piecemeal transactions (including in a liquidation proceeding under Chapter 7). But it also stands to reason that the ready availability and typical use of Chapter 11 as a medium for disposition supports such a secondary market by providing a relatively user-friendly, transparent, and reliable platform for the disposition of assets.

Contrast the situation in the United States with that in Japan, where the incidence of formal insolvency proceedings for distressed debtors is quite small by comparison.[61] Secured creditors in Japan accordingly lack the confidence and assurance with respect to collateral that the likely prospect of a Chapter 11 proceeding provides in the United States. Note that this is not the result of adverse treatment of secured claims under Japanese insolvency law. Even when insolvency proceedings ensue, the *failure* of Japan's Civil Rehabilitation Law routinely to stay enforcement of and administer secured claims may well contribute to the absence of a predictable framework for handling secured claims against distressed debtors.[62] But the principal problem in this context appears to be the *underutilization* of insolvency proceedings for distressed business debtors, not the substance of Japanese insolvency laws.[63] This is not so much a product of inadequate laws on the books but one of local legal culture.[64] It is this

---

[60] For a discussion of sales of substantially all of a Chapter 11 debtor's assets under Bankruptcy Code section 363, see Charles W. Mooney, Jr., *The (Il)Legitimacy of Bankruptcies for the Benefit of Secured Creditors*, 2015 U. Ill. L. Rev. 735, 738-41 [hereinafter, Mooney, *Secured Creditors*].

[61] During the January-September 2017 period the number of court filings of business insolvency proceedings in Japan (an average of 700 filings per month) were less than 1% of the number of filings in the United States (an average of 7,905 per month). Trading Economics, Japan Bankruptcies, https://tradingeconomics.com/japan/bankruptcies; Trading Economics, United States Bankruptcies, https://tradingeconomics.com/united-states/bankruptcies. Compare the relative size of each country's GDP for 2017, which (in billions of US $) was 19,417.114 for the United States and $4,841.221 for Japan (about 25% of the United States GDP).

[62] *See* Civil Rehabilitation Act, *supra* note xr, art. 53 (right of separate satisfaction of security interest); International Law Office, Civil Rehabilitation Procedure, 2 (2006), http://www.internationallawoffice.com/Newsletters/Insolvency-Restructuring/Japan/Asahi-Koma-Law-Offices/Civil-Rehabilitation-Procedure ("As a general rule, secured creditors may foreclose on their collateral outside the proceedings under the civil rehabilitation procedure.").

[63] Of course, it is plausible that the underutilization of insolvency proceedings may result from the substance of the relevant insolvency laws in ways that may be unrelated to the treatment of secured claims.

[64] *See, e.g.*, Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence From the Federal Bankruptcy Courts*, 17 Harv. J. L. & Pub. Pol. 801 (1994).

underutilization, combined with the absence of a robust secondary market for movables, that seems to make reliance on inventory and equipment as collateral much less appealing in Japan than in the United States. Insolvency law can provide an hospitable environment for recognition and enforcement that encourages the use of secured transactions and thereby facilitates the availability of business credit.[65] But the central point here is that the substance of insolvency law may matter little if the law is underutilized (or if the relevant insolvency law does not adequately deal with secured claims). This is consistent with the thesis of *Credit Enhancement* that a principal role of insolvency law is the effect of its long shadow on the primary behavior of market participants outside of and unrelated to any actual or anticipated insolvency proceeding. In this case it is not only possible flaws in the applicable insolvency law but the underutilization of insolvency law that casts the shadow.

The rules of private international law, like insolvency law, play an important role in the operation and effectiveness of secured transactions laws. For example, at the outset of a secured financing a prospective creditor must take account of the applicable law in order to ensure that a prospective security interest is effectively created and perfected (third-party effectiveness) and will achieve the desired priority (vis-a vis third parties such as a debtor's creditors, potential insolvency representative, and buyers). Accordingly, global efforts toward modernization and harmonization of secured transactions laws, discussed above,[66] have included harmonized secured transactions choice-or-law rules (STCOL rules) as a core feature.[67]

A secured creditor also must take account of which State's *insolvency* laws might apply. For example, under which State's law governing avoidance of preferences and fraudulent transfers would the security interest and payments of secured obligations be tested?[68] The applicable insolvency law, including the applicable avoidance law, might or might not be the law of the forum in which an insolvency proceeding might be

---

[65] Such an hospitable environment contemplates that the applicable insolvency law would provide a regularized and coherent structure for the recognition and administration of secured claims. It does not necessarily contemplate that secured creditors would have a controlling influence over the proceeding. *See*, Mooney, *Secured Creditors*, *supra* note xr, at 751-63. For an empirical analysis of the so-called "secured creditor control" phenomenon, see Jay L. Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. Ill. L. Rev. 831.

[66] *See* xr, *supra*.

[67] *See* Model Law, arts. 84-100; Charles W. Mooney, Jr., *Choice-of-Law Rules for Secured Transactions: An Interest-Based and Modern Principles-Based Framework for Assessment*, 22 Unif. L. Rev. 638 (2018) (advocating a framework for evaluating STCOL rules that takes account of the various stakeholders' interests and the substance of the Modern Principles).

[68] *See* Westbrook, *Avoidance*, *supra* note xr, at 901-04 (arguing that the insolvency law of the "home country" (i.e., the State of the debtors "center of main interests"), which should govern the distribution of the proceeds of an avoidance recovery, also should govern avoidance actions).

opened.[69] While a consensus on the need for and characteristics of harmonized STCOL rules may be emerging,[70] it may be that less consensus exists as to the need for and the content of harmonized insolvency choice-of-law rules (HICOL rules).[71] However, unless an international governmental organization (such as UNCITRAL or the Hague Conference on Private International Law) or a non-governmental organization (such as the American Law Institute or the International Insolvency Institute) seriously explores the prospect for the adoption of HICOL rules, the prospects will remain uncertain and the merits will remain untested. Hopefully an appropriate organization will undertake a project on HICOL rules in the near future.[72]

VI. CONCLUSIONS AND SOME PATHS FORWARD

Several conclusions may be drawn from this discussion.

The Model Law and related UNCITRAL texts, together with the CTC and the Aircraft Protocol, have established and solidified a global consensus in support of the Modern Principles of secured transactions law. But a State's enactment of a Modern Principles-based statutory text may not be sufficient to achieve the desired goals of increasing the availability and decreasing the cost of business credit. A corollary emerging from the JBCP is that these goals may be achieved (or may already exist) in some markets even in the absence of a modern secured transactions law. This suggests the potential benefits of more rigorous studies of secured transactions law reform processes and business credit markets. In particular, studies should more systematically

---

[69] *See, Id.*; Charles W. Mooney, Jr., *Harmonizing Choice of Law Rules For International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests*, 9 Brook. J. Corp., Fin. & Com. L. 120, 128 (2014) [hereinafter, Mooney, *Harmonizing*] (discussing a "synthetic" proceeding in State A in which the State A court applies the insolvency law of State B for the benefit of State B creditors).

[70] *See* note xr, *supra*. That is not to say, however, that a consensus exists on all aspects of a STCOL regime. For example, disagreement remains as to whether perfection and priority of assignments of claims (receivables) should be governed by the law of the assignor's (debtor's) location (the better approach) or another law, such as the law governing the claim. For an utterly convincing analysis and argument supporting a location-of-assignor STCOL rule, see Catherine Walsh, *The Law Applicable to the Third Party Property Effects and Priority of an Assignment: Whither the EU?*, 22 Unif. L. Rev. 721 (2018). For another, generally favorable assessment of the location-of-assignor STCOL rule, see Yuko Nishitani, *Cross-border Assignment of Receivables: Conflict of Laws in Secured Transactions*, 22 Unif. L. Rev. 826 (2017).

[71] *See* Mooney, *Harmonizing*, *supra* note xr (exploring prospects for and benefits of implementing HICOL rules).

[72] To date UNCITRAL has not given priority to a consideration of HICOL rules. There is precedent lending support for NGOs to embark on such a project. *See* American Law Institute & International Insolvency Institute, ALI-III Global Principles for Cooperation in International Insolvency Cases 2012, https://www.iiiglobal.org/sites/default/files/ALI-III%20Global%20Principles%20booklet_0.pdf.

incorporate and memorialize the experiences of individuals and organizations pursuing reforms "on the ground." An intergovernmental organization such as UNCITRAL or UNIDROIT may not be the best sponsor for such investigations. Non-governmental organizations, perhaps in support of conventional academic studies (such as the JBCP), may present better alternatives.

The discussion also reaffirms the conclusion in *Credit Enhancement* that insolvency law has major instrumental effects on primary behavior of market participants unrelated to actual or anticipated insolvency proceedings. Preliminary indications from the JBCP suggest that the relatively remote possibility in Japan that a firm will resort to formal insolvency proceedings or that secured claims will be effectively dealt with in insolvency proceedings negatively affect the reliable ex ante valuation of recoveries from movables collateral in the Japanese market. This clearly indicates that if insolvency proceedings dealing effectively with secured claims were the norm for financially distressed firms it could enhance the reliability of such ex ante valuations.

Private international law rules also are crucially important to the implementation and effectiveness of the Modern Principles, as discussed above. It is well established (and confirmed by the text of the Model Law) that STCOL rules perform an essential function for the operation of secured transactions laws. But an exploration of HICOL rules, including their potential impact on the application and operation of secured transactions laws is needed and overdue. Hopefully an appropriate organization will take up this project in the not too distant future.