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**THE RECOGNITION AND TREATMENT OF TITLE  
RETENTION IN THE LEGAL SYSTEMS OF THE UNITED  
KINGDOM, VIETNAM AND RELATED JURISDICTIONS: A  
COMPARATIVE STUDY**

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## **DECLARATION**

I, Hien Trinh, do hereby declare that this submission is my own work. I have not submitted it in substantially the same form towards the award of any other degree or qualification. It has not been written or composed by any other person and all sources have been appropriately referenced.

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## ABSTRACT

Title retention functionally serves as a security device for ensuring the payment of the purchase price in a sales contract, but not all jurisdictions recognize it as a security interest. The research aims to compare the recognition and treatment of title retention in Vietnam, England, France, the United States and Australia. It examines the issues arising in Vietnam concerning the existing law of title retention and the prospect of a reform that possibly involves the importation of the Article 9 model. The research is conducted using the doctrinal and comparative analysis methods with the aid of a critical outlook and a discussion on the legal transplant.

It is found that English law insists on the formalism approach that does not accept title retention to the original goods as a security interest. It raises the unexpected impact on the Sale of Goods Act after the *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd*<sup>1</sup> and *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*<sup>2</sup> rulings. Vietnamese law adopts the French law approach that treats title retention as a security interest, but it is merely a seller-based security interest that excludes the participation of other. Article 9 of the American Uniform Commercial Code and the Australian Personal Property Securities Act are an appealing and increasingly-accepted model of the law on secured transactions. It introduces the concept of purchase-money security interest that includes the title retention arrangement. The functionalism, unitary approach and the notice filing system under the Article 9 offer a comprehensive treatment of a purchase-money security interest as the exception of the general security interest.

The findings suggest that even though Article 9 is currently a good model in this area, the import of this model may encounter some resistance from the angle of legal culture and legal practice. From the Vietnamese perspective, it is possible to build the law of purchase-money security interest running parallel with other devices in the scheme of a Civil Code before considering adopting a unitary functionalism law of secured transactions.

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<sup>1</sup> 2013] EWCA Civ 1232, [2014] 1 WLR 2365

<sup>2</sup> [2016] UKSC 23; [2016] AC 1034

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## **LIST OF ABBREVIATIONS**

PMSI	Purchase-money security interest
PPSA	Australian Personal Property Securities Act 2009
PPSR	Australian Personal Property Securities Regulations
SGA 1979	Sale of Goods Act 1979
UCC	American Uniform Commercial Code
USA	The United States of America

# CHAPTER 1 INTRODUCTION

## 1.1 The issue

It is not unusual in the context of business transactions that sellers supply goods to buyers on credit or ship the goods prior to payment and then they bear the risk of non-payment by the buyer. Retention of title is a model that is frequently copied in order to induce buyers to make full payment in exchange for the full ownership. This clause reads in the simple form that the seller retains the property in the goods until the full payment of the purchase price is made by the buyer.

The requirement for passing of property diverges, and it is mostly divided into two principles, namely of consent and of delivery. The former requires title to be passed when a sale contract is concluded. Meanwhile, the latter rule provides that passing of property occurs at the time the goods are delivered to a buyer. A common feature of the two principles is that the passing of title in the goods does not depend on full payment of the purchase price. Despite the default rule as aforementioned, many national laws respect the principle of party autonomy that allows parties to tailor the transportation of title. Sellers insist on retention of title because they aim at escaping from the default rule of title transfer and the requirement of registration. Until the buyer makes full payment, the seller remains the owner of the goods to prevent them from joining the buyer's assets to be distributed to other creditors in case of insolvency. However, what happens in practice does not meet the expectation of title-retaining sellers. Retention of title often involves personal property, particularly consumer, workable goods or stocks-in-trade. Thus, possession, both physical and documentary, can place possessing buyers in a good position to make the goods at hand manufactured, mixed, fixed or resold. In the event of buyers' insolvency, sellers find themselves in dispute with other creditors in an effort to rank them above even secured creditors. Therefore, many varieties of retention of title clause are drafted to anticipate difficulties faced by non-possessing sellers<sup>1</sup>.

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<sup>1</sup> See Davies I, *Effective Retention of Title* (Fourmat Publishing 1991) at pp. 32-3

(1) A simple retention of title clause provides that the seller will retain the ownership in goods until the buyer has paid the purchase price<sup>2</sup>. This clause does not sufficiently allow sellers to trace into the proceeds of sub-sale. (2) An all monies (or current account) clause provides the seller a possibility to retain the title to the goods until they have recovered all outstanding debts arising from past, present and future transactions with the buyer<sup>3</sup>. (3) A proceeds of sale (or “tracing” or “prolonged”) clause will entitle the seller to any proceeds generating from a sub-sale to a third party<sup>4</sup>. This clause frequently authorizes the buyer to sell the goods and even the manufactured goods incorporating the goods supplied to a third party in the normal course of her business upon conditions that the buyer’s rights against a third party will pass to the seller, or the proceeds will be held in trust for the seller. (4) A manufacturing (or aggregation) clause provides that if the goods at hand are mixed or manufactured with other goods, the seller will retain the title in the whole of the newly manufactured goods<sup>5</sup>. A title retention clause may be drafted to cover both the proceeds and newly manufactured products and concurrently encompassing all debts of the buyer to the seller.

A sale on credit is undoubtedly an important financing device. A buyer can obtain credit from a seller and retention of title is consequently a method to secure payment. Title retention has the function of a security device aimed at the first priority to the goods supplied, their proceeds or new products. The demand for free flow of commerce has raised a significant question how a title retention clause is capable of protecting an unpaid seller without restraining a buyer from doing the ordinary course of business.

The ultimate goal of financing is to benefit both creditors and debtors, that is to say, debtors have access to secured debts to operate their business while creditors gain profit through their capital. However, title retention by nature is not qualified to create a security interest. It makes no sense that the seller ensures the performance of the buyer's obligation by his asset instead of

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<sup>2</sup> See Parris J, *Effective Retention of Title Clauses* (Collins 1986) at pp. 44-6

<sup>3</sup> *ibid*, at pp. 47-8

<sup>4</sup> *ibid*, at pp. 49-52

<sup>5</sup> *ibid*, at pp. 52-3

following the asset of the buyer or someone else. However, the buyer cannot charge what has not yet belonged to her. Retention of title is a contractual arrangement regarding the passing of property, but it has an impact upon third parties by its function. It results in the diversity of title retention treatments.

English law treats title retention as the seller's absolute proprietary right that allows the recovery of the goods when a buyer fails to pay the purchase price. *Romalpa*<sup>6</sup> is a striking case in this field since it recognized title retention extending to the proceeds of sub-sale by introducing fiduciary concepts into commercial law. However, courts have distinguished their cases from *Romalpa* to dismiss the validity of the proceeds clause by the argument that this clause is equivalent to a void registrable charge. Similarly, English courts do not acknowledge the first priority of title retention regarding newly manufactured products and their proceeds. In recent days, title retention has an expected impact on the sale of goods law under the *Bunkers'* ruling to the extent that the sale of consumable or workable goods subject to title retention is not a contract of sale within the scope of the Sale of Goods Act 1979.

Article 9 of the American Uniform Commercial Code brings title retention into the scope of secured transactions in personal property under functionalism. It is considered as "*the most innovated part of the Uniform Commercial Code*"<sup>7</sup>. A security interest is defined as "*an interest in personal property or fixtures which secures payment or performance of an obligation*"<sup>8</sup>. Security interests comprise any device that has a function to secure performance of obligation, regardless of the form of transaction, the type of collateral or the status of the debtor/secured party<sup>9</sup>. All security interests subject to the Article 9 receive the same treatment regarding attachment, perfection, priority, default and enforcement. Under this Article 9, title retention or conditional sales can be recognized and registered as a

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<sup>6</sup> *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd.* [1976] 1 WLR 676, at pp. 690, 693, 694

<sup>7</sup> Warren WD and Walt SD, *Secured Transactions in Personal Property* (8th edn, Foundation Press 2011), at p. 9

<sup>8</sup> U.C.C § 1-201(35)

<sup>9</sup> Nguyen X-T and Nguyen BT, *Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries* (2014) (Legal Studies Research Paper No. 2014-39, Robert H. McKinney School of Law, Indiana University), at pp. 8-9

purchase-money security interest. The concept of purchase-money security interests is broad enough to cover all kinds of title retention clause except for the all monies one. Title-retaining sellers by timely perfecting their security interest may gain the first in line of priority as they have expected.

Article 9 of the American Uniform Commercial Code is noticeable to set a model that is transplanted in many jurisdictions. The Australian Personal Property Securities Act (PPSA) brought into force in 2009 has put an end to the advantage of the *Romalpa* clause that was utilized with the expectation to create a device to secure payment without registration. The PPSA is a good lesson of transplanting Article 9 into the domestic law of secured transactions in personal property.

In Vietnam, sale and purchase transactions are mostly regulated by simple usages and practices, and the contract of sale is not often reviewed by a lawyer. The transfer of the goods is considered to be the transfer of property, especially with regard to personal property that is not required a certificate of title. Sellers hesitate to control or administer the goods delivered to the buyer, bearing in mind that it is not easy to identify particular items. To some extent, personal property is not the valuable and popular collateral comparable with real property. Therefore, title retention has not attracted attention in Vietnam up to now. The title retention clause is inserted in a contract of sale but few disputes in this area are brought to court. Practitioners and academics have long viewed retention of title as a contractual arrangement rather than concentrating on its function as a secured transaction. Only those who have researched foreign laws perceive the function of title retention, and Civil Code drafters are among them. In 2015, a revised Civil Code was enacted, and retention of title is categorized as a secured transaction. It adopts the French approach that treats title retention as a security interest and does not mention the concept of purchase-money security interest recommended in Article 9.

Briefly, title retention is increasingly receiving great attention in many jurisdictions. Article 9 undoubtedly has a great influence on the law of secured transactions in personal property that treat title retention as a purchase-money security interest under the functionalism approach. Many common law countries

have adopted the Article 9 model. The influence of this model is likely to be expanded since the UNCITRAL issued the Legislative Guide on Secured Transactions in 2009 that reflects the “tone and spirit” of the American model<sup>10</sup>. It leads to the tendency of legal transplant of the Article 9 in general and the concept of purchase-money security interest in particular.

## 1.2 Research question

This research has as an objective to explore the Vietnamese law of title retention and the integration of title retention as a security interest into the scheme of a civil code under a comparative approach. Many jurisdictions with differential treatment of title retention will be brought in to this comparative research including England, France, the United States and Australia. The research will also aim at investigating the issue of **legal transplantation**, since the Article 9 of the American Uniform Commercial Code has increasingly been a model for many jurisdictions to reform the law of secured transactions in personal property.

Therefore, the overall research question(s) will be: **How is retention of title recognized and treated as a security interest in Vietnam, England, France, Australia and the United States? What are the issues that would arise if it were adopted on a widespread basis in Vietnam?**

## 1.3 Research method

This is a comparative study of title retention; thus, the author will employ the doctrinal and comparative analysis with the aid of a critical approach. A doctrinal research approach is defined as one “*which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development*”<sup>11</sup>. In brief, a doctrinal research answers the question what the law is in a certain area by collecting, analyzing and synthesizing relevant case law and legislation<sup>12</sup>.

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<sup>10</sup> McCormack G, ‘American Private Law Writ Large? The UNCITRAL Secured Transactions Guide’ (2011) 60 International & Comparative Law Quarterly 597, at p. 598

<sup>11</sup> Definition by Pearce Committee cited in Hutchingson T, ‘Doctrinal Research’ in Watkins D and Burton M (eds), *Research methods in law* (Routledge 2013), at p. 10

<sup>12</sup> Dobinson I and John F, ‘Quantitative Legal Research’ in McConville M and Chui WH (eds), *Research methods for law* (Edinburgh University Press 2007), at pp. 18-9

Academics conduct a doctrinal research for not only problem- solving but also uncovering the status of the law in question as being coherent and consistent or not. At this level, secondary sources like scholarly commentaries and writing are studied to give in-depth discussion. A doctrinal analysis cannot be considered merely as the legal research that aims at finding the law for particular cases. Doctrinal researchers are required to reflect on the law to gain new insights<sup>13</sup>.

The doctrinal method is criticized for isolating rules of law from the context or from the purpose that they are going to serve. The social, political, economic, moral and the like factors are not considered as the underpinning or examined to evaluate the effect of law<sup>14</sup>. Despite the said criticism, a doctrinal analysis is still a principal and dominant method in law in the sense that, no matter what other legal research methods are adopted, a researcher must answer the question what law is at first glance<sup>15</sup>. Bearing in mind this debate, the present author will conduct a doctrinal analysis as the core method of this study to explore the law of title retention in various jurisdictions within the scope of the research.

Comparative analysis is the second method of research in this study. Comparative law can be defined simply as “*the comparison of the different legal system of the world*”<sup>16</sup>, but denotes more than a method of study or research<sup>17</sup>. It has the substantive feature to be regarded as an academic discipline, where law is examined in a new perspective<sup>18</sup>. One or more systems or a particular area of one or more systems are studied in relationship with others to gain new

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<sup>13</sup> Pendleton M, ‘Non-empirical Discovery in Legal Scholarship - Choosing, Researching and Writing a Traditional Scholarly Article’ in McConville M and Chui WH (eds), *Research Methods for Law* (Edinburgh University Press 2007), at pp. 162 - 3

<sup>14</sup> Hutchingson T, ‘Doctrinal Research’ in Watkins D and Burton M (eds), *Research methods in law* (Routledge 2013), at p. 16

<sup>15</sup> *Ibid*, at pp. 17, 28

<sup>16</sup> Zweigert K, *Introduction to Comparative Law* (Kötz H ed, 3rd rev. ed. edn, Clarendon Press; Oxford University Press 1998), at p. 2

<sup>17</sup> Watson A, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993), at pp. 1-2; Legrand P, ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58 *The Modern Law Review* 262, at p. 264

<sup>18</sup> Watson A, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993), at p. 9; Legrand P, ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58 *The Modern Law Review* 262, at pp. 264-5,

knowledge<sup>19</sup>. A comparative study of law, therefore, provides its own outlook for the subject-matter in question as opposed to other outlooks such as feminist legal study, social legal study or economic analysis of law.

As a research method in law, the crucial question is how to compare. It would make sense to put the home law on one side and other foreign laws in the other side. It is not difficult to identify a study as the macro-comparison or micro-comparison. The former is the comparison of different legal systems as a whole to learn about the legal style, culture, thinking, and procedure, whereas the latter deals with a particular area of law<sup>20</sup>. It is suggested that the micro-comparison starts with the presumption of similarity to seek best solutions, namely the harmonization in a specific area of law; in contrast, the macro-comparison involves the presumption of difference that identifies the legal mentality of compared legal systems<sup>21</sup>. The functional method of comparison which looks for various solutions to the same problem<sup>22</sup> could be a good start where the research question is dealing with a specific legal issue. This method runs in line with a doctrinal analysis in the sense that both of them isolate a set of rules from their context or purposes to study. However, the consequence of functional comparison does not always result in harmonization of law. Although starting with the presumption that the law in a specific area in different jurisdictions serve the same function, comparatists have inspiration from witnessing the difference in solutions at the outset to proceed on a comparative research. The functional method reveals many solutions for the same problem and the question of harmonization can only be satisfactorily answered through in-depth

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<sup>19</sup> Frankenberg G, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Havard International Law Journal* 411, at pp. 413-4; Watson A, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993), at p. 9

<sup>20</sup> Zweigert K, *Introduction to Comparative Law* (Kötz H ed, 3rd rev. ed. edn, Clarendon Press; Oxford University Press 1998), at p. 2, at pp. 4-5; Samuel G, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014), at p. 50

<sup>21</sup> See more discussion on two approaches in Samuel G, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014), at pp. 53-7. Zweigert K, in his leading text book, *Introduction to Comparative Law*, propose the presumption of similarity (Zweigert K, *supra*, at p. 40). Legrand argues that comparatists should acknowledge difference that emphasizes on socio-historical or socio-cultural context underpinning judicial decisions and legislation (See Legrand P, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *The Modern Law Review* 262, at pp. 239-240)

<sup>22</sup> See n. 16, at pp. 34-40

discussion. Accordingly, the difference in solutions should be explained in the light of their context.

A comparative research approach offers the chance to explore a concrete area of law in different contexts that expose deficiencies, contradictions or competing visions<sup>23</sup>. A critical approach is suggested to fix the weakness of the functional method<sup>24</sup>. A critical approach also helps to avoid hegemonic thinking and cultural biases. A comparative researcher may be an expert in her home law but a stranger to the foreign law. Therefore, her viewpoint on foreign laws cannot depart from her legal and cultural education; in other words, foreign laws are looked from the certain bias of the comparatist<sup>25</sup>. Instead of pretending to be neutral or objective, comparatists should keep a distance from their home jurisdictions to critique their own rules mindful of the foreign law. Comparative law should not look at law as a set of rules isolated from their surroundings but rather a component of social practices, accordingly, foreign law would be viewed with respect and appreciation for its legal culture as the underlying cognitive framework<sup>26</sup>.

Legal culture is defined as “*a specific way in which values, practices and concepts are integrated into the operation of legal institutions and the interpretation of legal texts*”<sup>27</sup>. The question is raised whether comparative law must involve other research like social or economic research to see all factors having influences on the set of rules of each jurisdiction in question. Hoecke recommends the paradigm of legal culture used as a tool for comparative law that is composed of six elements: (1) concept of law, (2) theory of legal sources, (3) methodology of

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<sup>23</sup> Frankenberg G, ‘Critical Comparisons: Re - thinking Comparative Law’ (1985) 26 *Harvard International Law Journal* 411, at p. 448

<sup>24</sup> See more discussion in Frankenberg G, *supra*, at pp. 445-8

<sup>25</sup> Legrand P, ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58 *The Modern Law Review* 262, at pp. 266-7. See more discussion on new approach to comparative law that law is considered as culture in Van Hoecke M and Warrington M, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 *International and Comparative Law Quarterly* 495, at pp. 491-513

<sup>26</sup> See more discussion on how civilians research the common law in Legrand P, ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58 *The Modern Law Review* 262, at pp. 237-8

<sup>27</sup> Bell G, ‘English Law and French Law - Not So Different?’ (1995) *C.L.P.* 69 cited in Van Hoecke M and Warrington M, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 *International and Comparative Law Quarterly* 495

law, (4) theory of argumentation, (5) theory of legitimation of law, and (6) basic ideology. Element (6) is the most important one that decides the level of comparison as the deepest whereas other elements are at intermediate level, and the comparison of legal rule and concepts is of surface. This new perspective of comparative law is valuable particularly with regard to the scope of this research where the Vietnamese law of title retention is compared with the law in this area in selected western jurisdictions. Although Vietnamese law has been rooted in the Asian legal system and deeply been influenced by the socialist legal system in the modern time, it borrows rules, concepts and even techniques from many western jurisdictions including France and the USA to build its legal framework of the market economy in the context of globalization, economic transition and integration. However, it does not mean that Vietnamese law is approaching closer to the international or widely-recognized standards, or the set of rules imported can survive identically in the Vietnamese legal and economic environment. A deep comparison may reveal both similarities and differences with regard to legal transplant.

The case of Vietnam illustrates a phenomenon that comparatists may notice, the process of legal transplants, that is to say, "*the moving of a rule or a system of law from one country to another*"<sup>28</sup>. Watson in his classic work proves that the considerable source of legal change in most jurisdictions is legal transplants, and transplanting is not only common but also socially easy<sup>29</sup>. His argument is challenged whether the legal transplant effectively occurs. Legrand asserts that the rule comprises propositional statement and invested meaning, the former of which is what Watson mentions in his work and the latter of which is changed through interpretation affected by the host jurisdiction's language and other cultural elements including socio-legal culture<sup>30</sup>. In other words, a rule once transplanted is not the original rule, thus legal transplant does not happen in reality. Both Watson and Legrand go to opposite extremes. Borrowing a model

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<sup>28</sup> Watson A, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993), at p. 21

<sup>29</sup> *ibid*, at pp. 94-5

<sup>30</sup> Legrand P, "The Impossibility of 'Legal Transplants'" (1997) 4 *Maastricht Journal of European and Comparative Law* 111, at pp. 116-7, 120-1

from foreign law is broadly agreed as a source of legal reform, and law is rarely original. Legrand even accepts that borrowing is the practice of law reformers for convenience<sup>31</sup>. Transplant could be seen as a metaphor for the legal phenomenon in discussion. The term “*transplant*” is attacked because it has misled us that a set of legal rules as an organ is removed and implanted into another legal system – a new organism and, after all, remains identical. Many terms have been suggested to have a more appropriate meaning such as legal transposition or legal irritant. Örucü advocates the term “*transposition*” as being used in music to emphasize that imported legal rules will be adjusted to suit new conditions<sup>32</sup>. Legal transplant is not simply the moving of a legal system or legal rules across national boundaries, rather the process involving the adaption to the socio-legal culture and demand of the host country. Teubner goes further by using the term “*irritant*” to insist that legal borrowing will stimulate the recipient to have active responses. Transformed rules irritate the legal culture of the host country, that is to say, the recipient legal culture will also undergo significant change, but still be different from the original jurisdiction one<sup>33</sup>. Despite the terminology debate, legal transplant becomes a generic word, at least, to describe what Watson mentions: “*the moving of a rule or a system of law from one country to another*”. Studying law from comparative perspective is not only an attempt to seek for similarities or differences, but from the viewpoint of legal transplant, comparatists should answer the following questions:

- How is the transplanted set of rules changed to suit the legal system and legal culture of the host country?
- Is the role of the transplanted set of rules changed in this process?
- In turn, do the legal system and legal culture undergo any change to suit the transplanted set of rules?

Today, the trend of economic transition, integration and globalization has promoted the legal harmonization in which legal transplant plays a vital role. As

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<sup>31</sup> *ibid*, at p. 121

<sup>32</sup> Örucü E, ‘Law as Transposition’ (2002) 51 International and Comparative Law Quarterly 205, at p. 207

<sup>33</sup> Teubner G, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies’ (1998) 61 Modern Law Review 11, at p. 20

a result, many countries, transplanting and transplanted, may have similar set of rules for common legal problems. However, the meaning and the role of transplanted rules may undergo significant change to create new interpretation that Teubner calls it "*new dissonances from harmonization*"<sup>34</sup>.

With regard to the present research, Article 9 of the American Uniform Commercial Code is a model for the law of secured transactions in personal property since many common law jurisdictions have reformed the law after it, including Canada, New Zealand and Australia. A successful transplant where the set of rules has reconciled and developed in a host jurisdiction may give a good lesson for any country that is planning to receive a model. This study is obviously a micro-comparative research that focuses on retention of title. The research question is formulated in functional terms to reflect functionalism - a fundamental method of comparative law. However, comparison will be done critically and in perspective of legal transplant to gain a deep understanding of title retention law in compared jurisdictions.

Vietnam is a home jurisdiction to be compared with other foreign jurisdictions, namely England, the United States, Australia and France. The scope of foreign laws is broad partly due to the diversity of legal solutions in this area. The context of Vietnam is also taken into account since this country having the economic transition and international integration is in the process of reconstructing the legal framework for private law in general and for commercial activities in particular. Although Vietnam has a foundation of a civil law legal family, it is willing to learn from the common law. Among common law jurisdictions, the United States law has been researched for years. Vietnam can learn good lessons from a broad scope of comparison. The significant influence of the American Uniform Commercial Code Article 9 in the common law world is an indisputable fact, but English law still keeps a distance from this impact, thus making a comparison between the two jurisdictions is worthy. Australia that has received the Article 9 model would be a good example of legal transplant. France, a civil law jurisdiction is also considered because Vietnam adopts the French law

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<sup>34</sup> *ibid*, p. 20

of title retention. Both Vietnam and France do not import the American scheme into their massive civil codes.

#### **1.4 Contribution to knowledge**

The research is intended to contribute significantly to current literature and knowledge relating to retention of title in a comparative perspective in which Vietnam is the home country. The comparative study emphasizing on home jurisdiction and other compared jurisdictions is conducted without limitation to functional method that merely answers the question whether jurisdictions in discuss has similar results for the same legal problems regardless of different solutions. The present author argues that some aspects of legal culture to some extent plays a vital role in differentiating treatment of title retention in each compared jurisdiction although they may share certain similarities with regard to the legal consequences. In other words, legal rules will be analyzed in their context to look into differences among jurisdictions.

The research contributes to the scholarship of title retention by offering a new standpoint from the angle of legal transplant. Legal transplant has been long regarded as the pragmatic device to renovate the particular set of rules or the legal system. Article 9 has been a model for the law of secured transactions in personal property including the treatment of title retention or a conditional sale as a purchase-money security interest. However, the reception of the Article 9 model has many levels. The author argues that although the unitary approach of the Article 9 is a great achievement to the extent that it provides a comprehensive set of rules, it does not make the law of secured transaction less complicated, at least regarding purchase-money security interests. The perfection and priority rules still depend on the classification of collaterals or secured assets into inventory, capital equipment, farm products, serial-numbered property and consumer goods. The set of rules for purchase-money security interests is relatively independent of the whole scheme of the Article 9, thus, it is not essential to import the full Article 9, but it is possible to consider the idea of purchase-money security interests only.

The research also has sought to make the contribution particularly to Vietnamese law with regards to title retention and the legal transplant experience. Although title retention as a security interest and a purchase-money security interest are not familiar concepts to both legal practitioners and academics in Vietnam, it is vital to import them into Vietnamese law to meet the requirement of international trade and business that Vietnamese companies have increasingly taken part in. The author will look into many mainstream legal concepts and theories that affect the process of making law in Vietnam in the case of title retention.

## **1.5 Structure of thesis**

The thesis has six chapters including **Chapter 1** on introduction and **Chapter 6** on conclusion. **Chapter 2** discusses the recognition and treatment of title retention in England. This chapter analyzes the orthodox approach to security interests that denies the treatment of simple title retention as a security interest. Meanwhile, title retention in the proceeds and new products can be held to be a charge that is in practice void due to lack of registration. The said approach also determines the priority rules regarding all kinds of title retention. This chapter also discusses unexpected outcome of title retention on the sale of goods laws that surprisingly urges the legal reform of title retention law. **Chapter 3** explores the rules of purchase-money security interests in the framework of the Article 9 of the American Uniform Commercial Code under formalism, the unitary approach and the notice filing system. **Chapter 4** examines how Australia moves from the orthodox approach inherited from English law to the renovated scheme of Article 9. **Chapter 5** explores the status of title retention in Vietnamese law where the law of title retention has been transplanted from the French approach. The French law will be discussed with regard to its treatment of title retention as a security interest. The main arguments lie in this chapter that addresses the issue of the legal transplant with regard to the Vietnamese current law of title retention and the possibility of receiving Article 9. The author considers whether the Article 9 model as a whole is essential element to reform the law of title retention by importing the concept of purchase-money security interest, or such

recognition can stand separately and independently from the scheme of the Article 9 model.

## CHAPTER 2 HOW IS RETENTION OF TITLE TREATED IN ENGLISH LAW?

### 2.1 Overview

Retention of title in English law is likely to develop into three stages in which the *Romalpa* case<sup>1</sup> is apparently a milestone. After *Romalpa*, there is a booming use of title retention clause in the contract of sale. Prior to *Romalpa*, there were few reported cases on title retention, although the concept of separation of ownership from possession was not unfamiliar. *McEntire v Crossley Brothers Ltd*<sup>2</sup> is noteworthy for highlighting the possibility of a conditional sale. Even though the concerned agreement did not contain a title retention clause, the condition for the passing of property had the similar effect. It was held that the purchaser could not create a charge on the machine supplied because the property had not passed; that is to say, the supplier still retained the title of the concerned goods. Although it is widely known that modern Irish law is rooted in English law, title retention surprisingly seemed to be recognized in Ireland before *Romalpa*. *McEntire v Crossley Brothers Ltd* in 1895, which approved the supplier's title retention to the goods in a conditional sale, is indeed an Irish case going to the House of Lords. Another Irish case, *Re Interview*<sup>3</sup>, dealing with the proceeds clause was reported one year earlier than *Romalpa*<sup>4</sup>.

Title retention was upheld in English law for the very first time in *Romalpa*<sup>5</sup> in 1975. Due to title retention and implied authority to sub-sell, the buyer owed fiduciary duties to the seller that resulted in the latter's tracing right to the proceeds of sub – sale. The judgment is astonishing to the extent that the tracing

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<sup>1</sup> *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd.* [1976] 1 WLR 676

<sup>2</sup> [1895] AC 457

<sup>3</sup> [1975] IR 382

<sup>4</sup> In fact, the judgment date of *Romalpa* in the court of first instance (the Queen's Bench Division) was 11 February 1975, almost one month earlier than *Re Interview* in the Irish High Court in 7 March 1975. *Romalpa* then went to the Court of Appeal and the judgment date was 16 January 1976.

<sup>5</sup> Davies I, *Effective Retention of Title* (Fourmat Publishing 1991), at p. 11

right arises not under an unauthorized but also authorized sale<sup>6</sup>. However, the critical point is that the unpaid seller is not in the position of unsecured creditors, but her proprietary claim over the asset that is supposed to be the property of the buyer is invisible to the rest of the world. Since *Romalpa*, the title retention clause has been drafted elaborately and complicatedly to cover all derivatives of the original goods, namely their proceeds and products or to extend to all indebtedness owed to the seller. A Romalpa clause becomes an alternative generic term to a title retention clause. The number of title retention cases from *Romalpa* to early 1990s has established the case law in this field. The great variety of Romalpa clauses and concerned disputed issues make the relevant law “a maze if not a minefield” – as in a frequently cited remark of Staughton J in *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* <sup>7</sup>. After the establishment of case law in title retention, new issues still arise, revealing that not only the status of title retention but also the conflicts between a title-retaining seller and a bona fide sub-purchaser are problematic<sup>8</sup>. Recent years have shown unexpected influences of title retention treatment on the sale of goods law that urge the question of a reconceptualization of title retention.

## **2.2 Validity under the Sale of Goods Act 1979**

### **2.2.1 Simple retention of title: A quasi – security interest under formalism**

The validity of the retention of title in the simple form is straightforward since the transfer of property is based on the arrangement of the parties. The Sale of Goods Act 1979 section 17(1) sets up a rule:

*“Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.”*

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<sup>6</sup> Goode RM, *Proprietary Rights and Insolvency in Sales Transactions* (Sweet & Maxwell 1985), at p. 84

<sup>7</sup> [1984] 1 WLR 485

<sup>8</sup> Milman D, ‘Priority disputes on corporate insolvency: the current state of play’ (2008) 233 *Company Law Newsletter* 1, at p. 4

Further, the Sale of Goods Act 1979 section 19(1) explicitly stipulates the reservation of the right of disposal that probably covers retention of title<sup>9</sup>:

*“Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled [.]”*

Parties to a contract of sale are unequivocally at their discretion permitted to tailor when and how the property in the goods is passed<sup>10</sup>. Title retention legitimately imposes conditions for the transfer of property. Even when the passing of risk is agreed to be at the time the delivery is made, title retention is still valid. The transfer of risk accompanied by the transfer of property is a default rule that can be contracted out<sup>11</sup>.

Basically, when the buyer is in insolvency, by invoking title retention, the seller can claim to repossess the goods that are at least identifiable in the former's possession and not fully paid. The claim is likely to be allowed, except for special situations involving the wording of a retention of title clause that will be discussed in the subsequent part<sup>12</sup>. At present, receivers, administrators or liquidators are likely to respect any title retention claim on the unpaid goods strictly and return them to the unpaid seller<sup>13</sup>, otherwise pay the purchase price to keep the on-going business. Nevertheless, in *Blue Monkey Gaming Ltd v David Hudson, Graham Bushby, Simon Bower*, the burden of proof is on the seller who is

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<sup>9</sup> McCormack G, *Reservation of Title* (Sweet & Maxwell 1995) at p.16

<sup>10</sup> *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25 at p. 30, *Re Andrabell* [1984] BCLC 522 at p. 526, *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 WLR 485 at p. 492, *Clough Mill Ltd v Martin* [1985] 1 WLR 111 at pp. 121 - 2

<sup>11</sup> Sale of Goods Act 1979 section 20

<sup>12</sup> “equitable and beneficial ownership shall remain with” the seller. See *In Re Bond Worth Ltd*. [1980] Ch 228

<sup>13</sup> *Compaq Computer Ltd v Abercorn Group Ltd & Ors* [1991] BCC 484 at p. 488, *Re Weldtech Equipment Ltd* [1991] BCC 16 at p.17

asserting a retention of title claim, and she should identify the stock subject to her claim clearly<sup>14</sup>.

However, the seller's entitlement to repossess the goods unpaid as an owner retaining title is challengeable. The fact that the buyer has possession of the goods itself could be a misrepresentation of who is the owner of the goods. In many cases, it is expressly or impliedly in the contract that the buyer has discretionary power to resell the goods to sub-purchasers or use them in the course of processing or manufacture to make new products<sup>15</sup>. Buyers of inventory such as raw materials or stock in trade are usually not expected to keep the purchased goods in their original status or refrain from reselling. Buyers of capital equipment are expected to exploit the utility of the goods in their daily operation right after taking delivery. Thus, notwithstanding the retention of title clause, the buyer is given rights to treat the goods as if they were her property<sup>16</sup>. It goes without saying that the property in the goods nominally remains with the seller, and it is activated only in the event of default of payment, particularly in the buyer's insolvency. In this sense, title retention operates as a security device<sup>17</sup>. The seller's ranking position against other creditors in the goods may be remarkably affected by the determination of the seller's interests in the goods unpaid under title retention, that is, the absolute ownership or a lesser proprietary interest arising by way of security. It may lead to a significant legal consequence since a security interest is basically enforced against third parties only when it has been registered. Registration of a title

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<sup>14</sup> 2014 WL 4355075. See more discussion in Stephens E, 'Clarification for administrators dealing with ROT claims: *Blue Gaming Monkey v Hudson and others*' - (2014) 5 Corporate Rescue and Insolvency 207, at p. 207

<sup>15</sup> *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium Ltd.* [1976] 1 WLR 676 at p. 679, *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25 at p. 32, *Clough Mill Ltd v Martin* [1985] 1 WLR 111 at p. 113, *Re Peachdart Ltd* [1984] Ch 131 at p. 138, *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150 at pp. 154-5, *Tatung (UK) Ltd v Galex Telesure Ltd* (1989) 5 BCC 325 at p. 328, *Re Weldtech Equipment Ltd* [1991] BCC 16 at pp. 16 - 7, *Compaq Computer Ltd v Abercorn Group Ltd & Ors* [1991] BCC 484 at p. 491

<sup>16</sup> Bradgate JR, 'Reservation of Title Ten Years On' [1988] Conveyancer and Property Lawyer 434 at p. 438

<sup>17</sup> Davies I, see n.5 at p. 8; McCormack G, see n. 9 at pp. 2-3; Worthington S, *Proprietary Interests in Commercial Transactions* (New York: Clarendon Press 1996) at p. 11

retention clause makes it less attractive to sellers who seek security for payment of the purchase price.

The debate on simple title retention as a registrable charge has been impractical since *Hendy Lennox* and *Clough Mill* established the rule. Under the retention of title clause, an unpaid seller has an ownership interest rather than a security interest on the unused and identifiable goods in the buyer's possession until and unless the purchase price is paid in full. The characteristic at the heart of a security interest<sup>18</sup> is found not to exist in title retention. It is directly figured out that a buyer cannot grant a security interest on a seller in the goods that have not become her property yet<sup>19</sup>. The full ownership of the goods remains with the seller subject to contractual terms, particularly of the passing of title<sup>20</sup>.

The *Hendy Lennox* and *Clough Mill* cases strictly follow formalism, which is one of the keystones of English law on secured transactions. The form of transactions depending on party autonomy will determine whether a transaction is a sale or a charge. Therefore, despite its widely-recognized security function, title retention is a contractual arrangement to pass the property in the goods in the scheme of a sale contract, rather than an agreement where the buyer confers a charge or a mortgage on the goods subject to her own property. On the other hand, it cannot be said that the English law on secured transactions is a "form over substance" one. The extended title retention clause, which covers the proceeds of sale or products incorporated the original goods, is found to be a disguised charge irrespective of an arrangement within a sale contract scheme<sup>21</sup>. The crucial point is, of course, the sharp distinction between ownership and lesser proprietary interests under English common law. Extended title retention does not have a strong legal foundation like section 17 and 19(1) of the Sale of Goods Act 1979 which both support a simple title retention clause.

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<sup>18</sup> A security interest has five characteristics. See Goode RM, *Goode on Legal Problems of Credit and Security* (Fourth edition. edn, 2009), at p. 11

<sup>19</sup> *Clough Mill Ltd v Martin* [1985] 1 WLR 111, at pp. 119 C-E, 122 B-C, 123 B-D, 125 B-D.

<sup>20</sup> *Hendy Lennox*, see n. 7, at p. 492 C-E

<sup>21</sup> See discussion in detail in sub-section 2.3.3.1

The functional approach that realizes the simple retention of title clause as a security interest was not adopted in *Clough Mill* due to the argument that it was not the buyer conferring but the seller retaining an interest in the property<sup>22</sup>. However, in *Re Bond Worth Ltd.*, a case suggested a functional approach to security transactions, it has prompted a fundamental right of a debtor in a security transaction, namely the equitable right to redeem the property that a buyer subject to retention of title may have<sup>23</sup>. It enables a debtor to redeem interests in the property conferred on a creditor to secure the former's obligation whenever this obligation is discharged. It seems that generally a seller has proprietary interest in the goods by retaining title pending the full payment of purchase price. This argument is challenged by a critical question under the formalism perspective: who has ownership of the goods? If it is satisfied that it should be the seller, the buyer does not arguably redeem an interest but rather than gaining a new interest as a result of full payment, that is, the title to the goods previously retained by the seller<sup>24</sup>. The present author is not satisfied with the notion of new interest in this context because it is likely to ignore a bundle of immense rights that the buyer has over the goods currently remaining in her possession. The buyer indeed has proprietary interests in the goods, among which is possessory interest<sup>25</sup>. Subject to an agreement, implied or explicitly, the goods are put into the flow of commerce or manufacturing operation without any restraint from the seller. Such interest probably constitutes to a great extent the property in the goods that the buyer expects to gain from a contract of sale. It is argued that the buyer's dominion over the goods is not equivalent to the property to the goods because she gains such discretionary power with the consent of the seller who is currently retaining title to the goods<sup>26</sup>. It is not a proprietary but contractual interest against the seller respecting the use and

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<sup>22</sup> *Clough Mill*, see n. 19, at p. 119 C-E

<sup>23</sup> [1980] Ch 228, at p. 248

<sup>24</sup> Worthington S, *Proprietary Interests in Commercial Transactions* (New York: Clarendon Press 1996), at p. 18

<sup>25</sup> Goode RM, *Goode on Legal Problems of Credit and Security* (Fourth edition. edn, 2009), at p. 4; Gough WJ, *Company Charges* (2nd ed. edn, Butterworths 1996), at p. 549

<sup>26</sup> *Clough Mill*, see n. 19, at pp. 116 G-H, 124 E-G. For further discussion, see Worthington S, see n. 24, at pp. 12 – 6

disposition of the goods<sup>27</sup>. This argument is questionable. Like the absolute ownership, other lesser proprietary interests can be acquired by an agreement and have effect against the rest of the world with regard to the subject matter of the interest at hand.

The buyer's dominion over the goods subject to retention of title, even though lacking full ownership certainly manifests on its face an absolute proprietary title to the eyes of third parties. The functional approach does not limit to the security function, but it also addresses the problem of ownership and possession separation. In the context of title retention, under the theory of new value, it is persuasive that title retention does not have a negative impact on the economic position of previously secured parties<sup>28</sup>. In other words, the title-retaining seller does not claim anything from the existing pool of assets subject to the interest of previously secured parties other than the goods supplied. However, she has a secret bite against subsequent buyers, secured parties and other creditors. Unlike a security interest, it is a whole bite that does not leave any surplus value if any to the buyer/debtor, preferential and unsecured creditors. However, it is not likely that the value of the goods increases at the time of repossession<sup>29</sup>. It is demonstrated that the position of title-retaining seller is not as attractive as it is supposed to be. The rapid depreciation of capital equipment and the short business life of inventory are unsatisfactory to the title-retaining seller<sup>30</sup>, and the extended title retention clause to the proceeds of sale or new products does not improve her position as discussed subsequently elsewhere in this chapter. From the standpoint of secured parties, preferential and unsecured creditors, title retention does not practically impose a serious threat<sup>31</sup>. The widespread use of title retention clause may alert existing would-be creditors of all kinds and buyers without the requirement of registration<sup>32</sup>. Therefore, the problematic

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<sup>27</sup> Gough WJ, *Company Charges* (2nd ed. edn, Butterworths 1996), at p. 549

<sup>28</sup> Gullifer L, 'Retention of Title Clauses: A Question of Balance' in Burrows AS and Peel E (eds), *Contract Terms* (Oxford University Press 2007), at pp. 287-9

<sup>29</sup> Gullifer L, "'Sales' on Retention of Title Terms: Is the English Law Analysis Broken?' (2017) Apr (133) *Law Quarterly Review* 244, at p. 247

<sup>30</sup> Bridge MG and others, 'Formalism, Functionalism, and Understanding the Law of Secured Transactions' (1999) 44 *McGill Law Journal* 567, at pp. 638-640

<sup>31</sup> *ibid*, at p. 640

<sup>32</sup> Gullifer L, see n. 29, at p. 247

separation of ownership and possession arising out of title retention is not sufficient to initiate reconceptualization thereof.

The simple retention of title clause has a firm legal ground to be valid without a requirement of registration as a charge. The buyer has not yet acquired the ownership of the goods subject matter of a contract of sale, despite its function providing security for the obligation of payment. In this sense, the simple retention of title clause is just a quasi-security interest.

### **2.2.2 “Retaining beneficial and equitable ownership”: Beyond the problem of wording**

*Re Bond Worth* is an attractive case due to the adoption of a functional approach and getting closer to the concept of purchase-money security interest. Whereas simple title retention enables the seller to seek the validity on the ground of the Sale of Goods Act 1979<sup>33</sup>, the wording of the concerned clause, namely “*equitable and beneficial ownership shall remain...*”, did not advance the seller in this case. Slade J started his argument by finding the existence of a charge as a legal consequence of the said retention of title clause<sup>34</sup>.

*“In my judgment, any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt, must necessarily be regarded as creating a mortgage or charge, as the case may be. The existence of the equity of redemption is quite inconsistent with the existence of a bare trustee-beneficiary relationship.”*

The affirmative answer then led him to the question how the charge was created, that is, by “*remain*” with the seller or “*grant*” by the buyer<sup>35</sup>. Although his functional approach has not been welcomed in respect of the simple retention of title clause<sup>36</sup>, Slade J did not deviate from orthodox reasoning respecting the passing of ownership. His finding was strongly based on the assumption that the

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<sup>33</sup> See section 2.2.1 of this thesis

<sup>34</sup> *Re Bond Worth*, see n. 23, at pp. 248-250

<sup>35</sup> *Re Bond Worth*, see n. 23, at pp. 250-6

<sup>36</sup> See section 2.2.1 of this thesis

legal title of the goods had transferred to the buyer. He argued that retention of equitable and beneficial ownership implied a transfer of legal title that had taken place at the moment of delivery of the goods<sup>37</sup>. He probably negated the reservation of equitable and beneficial ownership and adopted a grant and grant – back mechanism.

The operation of a grant and grant – back mechanism in *Re Bond Worth* was described as “*the entire property in the Acrilan [the goods] passes to Bond Worth [the buyer] followed by a security, eo instanti, given back by Bond Worth [the buyer] to the vendor, Monsanto*”<sup>38</sup>. It means the buyer at a certain moment had full ownership of the goods, thus it could grant a charge on the goods in the seller’s favour. This finding relied on the doctrine of *scintilla emporis* established by the decision in *Church of England Building Society v. Piskor*<sup>39</sup> and followed by *Capital Finance Co. Ltd. v. Stokes*<sup>40</sup>. The latter is the case Slade J referred to in the concerned argument. However, the grant and grant – back mechanism was challenged by an argument of the respondent relying on *Re Connolly Bros. Ltd (No. 2)*<sup>41</sup>. Accordingly, the buyer only gained equity of redemption when it acquired the goods<sup>42</sup>. The challenge has been raised again after the House of Lords’ decision in *Abbey National Building Society v. Cann*<sup>43</sup>. The abolishment of *scintilla emporis* doctrine by *Abbey* has placed the *Re Bond Worth* judgment in an unsteady position. *Re Connolly* and *Abbey* are analogical to the extent that a buyer obtained a credit to finance the purchase of a property and secured the payment by a charge or mortgage on that property prior to obtaining the property at hand. The former case found that the buyer had never acquired absolute ownership of the property other than the equity of redemption subject to the financier’s charge<sup>44</sup>. The latter held that the transaction of acquiring the property and granting the charge was one indivisible transaction that the buyer

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<sup>37</sup> *Re Bond Worth*, see n. 23, at p. 245

<sup>38</sup> *Re Bond Worth*, see n. 23, at p. 256

<sup>39</sup> [1954] Ch. 553

<sup>40</sup> [1969] 1 Ch. 261

<sup>41</sup> [1912] 2 Ch. 25

<sup>42</sup> *Re Bond Worth*, see n. 23, at p. 252

<sup>43</sup> [1991] 1 A.C. 56 (HL)

<sup>44</sup> *Re Connolly*, see n. 41, at p. 31

never acquired anything but the equity of redemption<sup>45</sup>. *Re Connolly* and *Abbey*, also *Piskor* and *Capital Finance* are cases dealt with real property, the principles, particularly of the first two cases can be transplanted to give a secured party in personal property a shelter<sup>46</sup>.

Generally, in a context of title retention, the buyer will not obtain the goods on credit unless she agrees with the title retention clause<sup>47</sup>. Under the “*one indivisible transaction*” principle in the *Abbey* case, it seems that the buyer in *Re Bond Worth* acquired only the equity of redemption<sup>48</sup>. On the other hand, in *Stroud Architectural Services Ltd v John Laing Construction Ltd*<sup>49</sup> following *Re Bond Worth*, it was held that the retention of “equitable and beneficial ownership”, which was similar to the corresponding clause in *Re Bond Worth*, created a charge granted by the buyer to the seller. The court at hand read the grant and grant – back mechanism in *Re Bond Worth* as occurring simultaneously<sup>50</sup>. In this sense, *Abbey* did not defeat, otherwise strengthened the grant and grant-back analysis<sup>51</sup>.

The two opposite perspectives on the decisions in *Re Bond Worth* and *Stroud Architectural* though uniquely demonstrate a critical question: Did the buyer obtain a full title to the property at any time? The affirmative answer should lead to a registrable charge in favour of the seller subordinate to any previous charge on after-acquired property. If conversely, the equity of redemption other than the full title is only sufficient to create a charge that takes priority subsequent to the charge conferred upon the seller. Although *Abbey* answered the question of priority while the two title retention cases mentioned above dealt with the

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<sup>45</sup> *Abbey*, see n. 43, at pp. 92 – 3

<sup>46</sup> de Lacy J, ‘The Purchase Money Security Interest: A Company Charge Conundrum?’ (1991) *Lloyd’s Maritime and Commercial Law Quarterly* 531, at p. 533

<sup>47</sup> McCormack G, ‘Charges and Priorities - the Death of the *Scintilla Temporis* Doctrine’ (1991) 12 *Company Lawyer* 11 at p. 13

<sup>48</sup> More discussion on the impact of *Abbey* on the decision in *Re Bond Worth Ltd*. in the sense of reconsideration of the latter, can be found in Davies I, see n.5 at pp. 117-120; Gregory R, ‘*Romalpa* Clauses as Unregistered Charges - A Fundamental Shift?’ (1990) 106 *Law Quarterly Review* 550; McCormack G, see n. 47, at p. 13; Hicks A, ‘Retention of Title - Latest Developments’ [1992] *Journal of Business Law* 398, at pp. 405-7

<sup>49</sup> [1994] BCC 18

<sup>50</sup> *ibid*, at p. 23

<sup>51</sup> Worthington S, see n. 24, at p. 22

nature of the seller's interest in the goods delivered to the buyer subject to title retention<sup>52</sup>, the reasoning of Lord Oliver in *Abbey* has caught my attention to the issue of in what manner the charge is created<sup>53</sup>. His reasoning suggests that it is not the sequence of interests involved to determine whether a security interest is created to be in line with the orthodox legal theory. In other words, it is not likely to be requisite that a debtor must have a legal estate in advance to grant a charge on it. It is acceptable that the acquiring of a legal estate and granting a charge should be bound together. The argument is very close to the concept of a purchase-money security interest, that is the tight relationship between the fund supplied and the acquisition of the estate. Indeed, *Re Connolly* and *Abbey* are considered to bring the concept of purchase-money security interest into English law<sup>54</sup>.

It is arguable that the negation of *scintilla temporis* doctrine and adoption of "one indivisible transaction" principle aim at resolving the question of priority. After a single transaction, technically and in theory, the debtor/buyer is left with the equity of redemption that may restrain the property at hand from attaching to other interests ranking superior or equally to the charge in the creditor/seller's favour. *Re Connolly* and *Abbey* do not indicate the underlying policy of the first priority granting to the financier advancing money to acquire the new property. Prior chargees cannot rely on her prior charge to gain windfall benefit because the property was not acquired by her advance or the debtor's money. This argument is at the heart of the concept of purchase-money security interest and justifies the first priority of purchase-money financiers, nevertheless the doctrine of "one single transaction" contribute another considerable justification.

It should be emphasized the parallel between the financing scenario in *Abbey* as Lord Oliver discussed and the scenario of title retention. A sale on credit is agreed upon a title retention arrangement, and it is obviously a credit enabling the buyer to acquire the goods. It raises the question why title retention can or

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<sup>52</sup> de Lacy J, 'Retention of Title, Company Charges and the *Scintilla Temporis* Doctrine' (1994) *Conveyancer and Property Lawyer* 242, at p. 245

<sup>53</sup> *Abbey*, see n. 43, at p. 92

<sup>54</sup> de Lacy J in his footnote said that *Abbey* introduced the concept of purchase money security interest into English law for the first time. See de Lacy J, see n. 52, at p. 247

cannot fall within this concept of security interest. It deserves an elaborate clarification, and the acceptance would be a landmark for the treatment of title retention.

### **2.2.3 Title retention: A boomerang returning to the sale of goods law**

Simple title retention has a firm legal ground of the SGA 1979 to be effective against the buyer's liquidators, administrators and creditors in the same goods. In recent years, title retention, in turn, has unexpected impacts on the SGA 1979.

#### **2.2.3.1 Buyers in possession and authority to sell**

Under title retention, a seller releases the possession of the goods to the buyer but does not transfer the property in the goods to the latter pending full payment of the purchase price. When the buyer makes a disposition of the goods to a *bona fide* donee, the seller has found her in a dispute with a third party. She asserts a claim against the third party for repossession of the goods, or the purchase price as damages by conversion. Meanwhile, a buyer in possession, even though does not have full ownership, may transfer a good title to the donee under the SGA 1979 section 25(1). It is a scenario of conflicting titles involving two innocent parties, a title-retaining seller and a bona fide third-party purchaser.

Basically, property law has strongly adopted the *nemo dat quod non habet* rule, that is to say, no one can transfer what she does not have. This rule is replicated in the first part of the SGA 1979 section 21(1) and the Factors Act 1889 section 9:

*"...where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had..."*<sup>55</sup>.

The application of those sections includes a situation where a buyer/sub-seller, possessing the goods but not yet obtaining the absolute title to them, makes a disposition thereof<sup>56</sup>. The claim of good title by the donee must satisfy three

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<sup>55</sup> SGA 1979 section 21 (1)

<sup>56</sup> Battersby G and Preston AD. , 'The Concept of " Property", "Title" and "Owner" Used in the Sale of Goods Act 1893' (1972) 35 Modern Law Review 268 at p. 282

requirements: (1) the buyer/sub-seller having bought or agreed to buy the goods must possess the said goods with the consent of the seller; (2) the buyer/sub-seller must deliver or transfer the goods under any sale or disposition thereof to any person receiving the goods in good faith, without notice of any right of the original seller in respect of the goods; and (3) if the abovementioned requirements are satisfied, the delivery or transfer will have the same effect as if the buyer/sub-seller making it was a mercantile agent in respect of the goods with the consent of the owner<sup>57</sup>. The last requirement is usually interpreted as the delivery made by the buyer/sub-seller in the ordinary course of business<sup>58</sup>. The effect of the sub-sale transaction has a reference to the Factors Act 1889 section 2(1) that allows a good title conferred on a *bona fide* purchaser without notice.

A detailed discussion on every condition is beyond the ambit of the thesis, but some disputed conditions may shed light on the position of the seller, the buyer and other relevant participants in the context of title retention. A simple retention of title clause is a good device to protect an unpaid seller so long as the goods are in possession of the buyer, but the former is not in an advantageous position to control the goods. A title-retaining seller is exposed to risk when an innocent third party relies on these exceptions to the *nemo dat* rule. However, section 25(1) of the SGA 1979, together with section 9 of the Factors Act 1889 reflect a need to ensure the flow of commerce. A purchaser in good faith buying from the seller selling in the ordinary course of business does not necessarily investigate the title to the goods concerned. This rule allows the transfer of good title even though the transferor has a lesser title.

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<sup>57</sup> *Archivent Sales & Developments Ltd v Strathclyde RC* 1985 SLT 154 at p. 156. The requirements can be split into many conditions, namely “Bought or agreed to buy”, “Possession of buyer”, “Consent of seller”, “Deliver or transfer”, “Sale, pledge or other disposition”, “Effect of delivery or transfer” and “Good faith and notice”, see Bridge MG and Benjamin JP, *Benjamin's Sale of Goods* (8th ed. / [gen. ed. : M. Bridge]. edn, London: Sweet & Maxwell 2010), at pp. 382 - 393

<sup>58</sup> Bridge MG and Benjamin JP, *Benjamin's Sale of Goods* (8th ed. / [gen. ed.: M. Bridge]. London: Sweet & Maxwell 2010), at pp. 390 – 391, *Archivent Sales & Developments Ltd v Strathclyde RC* 1985 SLT 154 at p. 157, *Forsythe International (UK) Ltd v Silver Shipping Co Ltd (The Saetta)* [1994] 1 WLR 1334, at p. 1351

The free flow of commerce policy underlying section 25(1) of the SGA 1979 may productively support a third-party buyer having a title conflict with a title-retaining seller. However, *Re Highway Foods International Ltd (In Administrative Receivership)*<sup>59</sup>, in which all the transactions were subject to title retention, possibly and unexpectedly exposes an innocent disponent to the risk of losing a good title relying on section 25(1). One of the conditions for the sub-purchaser to have a good title under section 25(1) is that the delivery of the goods to a third party “*under any sale, pledge, or other disposition*”. Therefore, a transaction between a buyer/sub-seller and a sub-purchaser must be a sale, not an agreement to sell. However, according to section 9 of the Factors Act 1889, it could be made “*under any agreement for sale, pledge or other disposition*”. A contract of sale bearing a title retention clause is no more than an agreement for sale, thus, does not satisfy the requirement of section 25(1). The *Re Highway Foods* court held that section 9 of the Factors Act 1889 covering an agreement for sale did not suffice to confer a good title on a sub-purchaser until she makes the full payment by referring to section 2 of the same Act<sup>60</sup>. It is noticeable that *Re Highway Foods* is the case in favour of both the original seller and the sub-purchaser, who set aside a middleman to directly deal with each other. The question is whether the title passed to the sub-purchaser under section 25(1) of the SGA 1979 or section 9 of the Factors Act 1889 to prevent the seller from repossessing the goods and then selling directly to the sub-purchaser<sup>61</sup>.

Beyond the context of *Re Highway Foods*, if the ruling at hand is widely followed, the extensive use of title retention in sale transactions is leading to a scenario jeopardizing the position of an innocent disponent in a title conflict<sup>62</sup>. Until the sub-purchaser pays in full, it entitles the original seller to repossess the goods or seek damages for conversion, even when the goods concerned is no longer in

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<sup>59</sup> [1995] BCC 271, at p. 276

<sup>60</sup> *Re Highway Foods*, see n. 59, at p. 276

<sup>61</sup> See a good case briefing of *Re Highway Foods* in Thomas S, ‘The Role of Authorization in Title Conflicts Involving Retention of Title Clauses: Some American Lessons’ (2014) 43 Common Law World Review 29, at p. 32

<sup>62</sup> Thomas S, ‘The Role of Authorization in Title Conflicts Involving Retention of Title Clauses: Some American Lessons’ (2014) 43 Common Law World Review 29, at p. 34.

possession of the buyer, and the sub-purchaser is in good faith dealing with the buyer/sub-seller in the latter's ordinary course of business.

The *Highway Foods* decision is correct, but it reveals that the English common law of title retention is not satisfactory in the context of title conflicts. The treatment of title retention has an unexpected influence on the application of section 25(1) of the SGA 1979, which is supposed to protect innocent third party dealing with a seller in the ordinary course of business.

It is suggested that the shortcoming could be improved if English law had a strong, clear rule providing for the role of authority to sell to solve the title conflicts of that kind. The respondents in *Re Highway Foods* did not contend the authority to sell, thus it is unfortunate that the issue was not discussed in the judgment. Nonetheless, if the authority to sell had been asserted successfully to transfer a good title to a sub-purchaser as discussed below, title retention clause in the sub-sale contract is irrelevant to resolve the title conflict between the seller and the sub-purchaser<sup>63</sup>. The sale by a buyer in possession stipulated in the SGA 1979 section 25(1) and the authority to sell demonstrate two different resolutions for title disputes with regard to retention of title, to the extent that this clause is incorporated in every transaction of the chain. It cannot be said that English law is inconsistent in this issue because the two resolutions have different postures. The SGA 1979 section 25(1) has its application in case the buyer in possession does not have authority to sell to effect the sub-sale "*as valid as if he were expressly authorized by the owner of the goods*"<sup>64</sup>. However, the defendant may rely on both to be protected against the conversion claim of the seller<sup>65</sup>.

When reliance upon the *nemo dat* rule fails, the disponent may contend that the buyer in possession is authorized by the seller to sell the goods, thus confers a good title on the disponent. Authority to sell at the outset seems inconsistent with

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<sup>63</sup> Thomas S, *ibid*, at pp. 42, 46

<sup>64</sup> Factors Act 1889 section 2(1)

<sup>65</sup> The defendant/sub-purchaser in *Fairfax Gerrard Holdings Ltd v Capital Bank Plc* [2007] EWCA Civ 1226 relied on the buyer's authority to sell and section 25(1) of the SGA 1979. It succeeded on the first proposition but failed the second because it could not prove that it was a purchaser in good faith.

title retention that contemplates the title to the goods to remain with the seller when the possession is transferred to the buyer pending full payment. Both parties in commerce are not likely to block the goods from business operation, particularly when they are inventory. Otherwise, it does not benefit any of them since the buyer cannot exploit the economic value of the purchase, at least until the full payment is made, to generate money for payment of the goods. The retention of title clause is broadly accepted not to aim at restricting the sub-sale, and in fact, usually accompanied by express or implied authority to resell<sup>66</sup>. Roskill LJ remarked in *Romalpa*, if it were held that there was no implication of the power to sell, it would impede the business purpose of the transaction<sup>67</sup>. The argument seems persuasive from the business perspective, but an authority to sell cannot automatically be an inherent part of a simple retention of title clause. Furthermore, the authority to sell is not incompatible with the retention of title clause if the proceeds of sub-sale are taking the place of the goods, or the title remains with the original seller irrespective of the sub-sale, or both. Without an expressed authority to sell, a question is whether the implication of authority to sell can be read from the retention of title clause itself. It is also doubtful whether an authority to sell, expressed or implied, without stipulating the passing of title, is equivalent to a transfer of a clear title to the sub-purchaser. In this respect, it should be a common understanding of both parties before the court<sup>68</sup>.

Alternatively, the commercial demand should be inferred from the facts. In *Four Point Garage Ltd v Carter*, the implication of authority to sell was found because the transaction is between two commercial garages, although there was a simple retention of title clause and from the knowledge of the seller, the buyer was engaging only in leasing and hiring, not retailing<sup>69</sup>. In *Fairfax Gerrard Holdings Ltd v Capital Bank Plc*<sup>70</sup>, an implication of authority to sell was established by the combination of a finance agreement and trust receipts. The finance agreement having a term of title retention required the buyer to assign the debt arising from

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<sup>66</sup> Atiyah PS, *Atiyah's Sale of Goods* (Adams J and MacQueen HL eds, 12th ed. / P.S. Atiyah, John N. Adams; with sections on Scots law by Hector MacQueen. edn, London : Longman 2010), at p. 471

<sup>67</sup> *Romalpa*, at p. 689

<sup>68</sup> *Romalpa*, see n. 1, at pp. 689, 691, 693

<sup>69</sup> [1985] 3 All ER 12, at p. 16

<sup>70</sup> [2007] EWCA Civ 1226; [2008] 1 All E.R.S (Comm) 632

the sale to customers to the seller, whereas, under the trust receipts, the buyer committed to keeping the proceeds of sub-sale on trust for the seller. Despite the argument on the inconsistency of the two documents treating the proceeds, both were held to carry an implied authority to sell, and more importantly, pass a good title to customers<sup>71</sup>. It is argued that nothing in the finance agreement and trust receipts in *Fairfax* contained an authority to transfer a good title to customers, and nothing could prevent an arrangement from stipulating an authority to sell subject to the original seller's title retention pending the full payment<sup>72</sup>. This argument seems correct because an authority to sell itself should be read in line with title retention, that is, the proceeds of sub-sale should take the place of the goods, or the title remains with the original seller irrespective of the sub-sale, or both. Furthermore, the sub-purchaser, who fails to rely on purchasing from a buyer in possession under section 25(1), should keep in mind to check not only the authority to sell but also the scope thereof. It also underlies a policy question who deserves to be protected. This argument is criticized for standing in the shoes of financiers setting up control over a chain of transactions, and, in *Fairfax*, the seller would have had a windfall from poor contracting, that is not setting up the scope of authority if the judgment had been given in its favour<sup>73</sup>.

It is worth briefly discussing the Article 9 of the United States Uniform Commercial Code with regard to the conflict between a secured party and a buyer of the collateral, even though it is not entirely equivalent to English law in the sense that title-retaining seller is not treated as a secured party. Title retention under Article 9 is limited to a security interest in the goods supplied and may grant the secured party the first position if she fulfils the statutory requirements of perfection. The purchaser can have a clear title of the security interest when she is a buyer in the ordinary course of business, which indeed requires the sale to the purchaser has been taken place<sup>74</sup>. Title retention having the effect of reserving a security interest is no longer a condition to transfer

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<sup>71</sup> *ibid*, at pp. 905-6

<sup>72</sup> Loi KCF, 'Retention of Title and Implied Authority to Pass Title to Sub-Buyers' [2008] Lloyd's Maritime and Commercial Law Quarterly 427, at p. 431

<sup>73</sup> Thomas S, see n. 62, at p. 37

<sup>74</sup> UCC §9-320(a). See more discussion in sub-section 3.4.3 of this thesis

property in the goods to the purchaser. Thus, title retention in the transaction with a sub-purchaser cannot prevent the sub-purchaser in good faith dealing with the seller in ordinary course of business to have a clear and free title. Beyond the requirement of buyer in the ordinary course of business, Article 9 also stipulates that a secured creditor can follow the collateral in the hand of third parties unless she authorizes a disposition “free of the security interest”<sup>75</sup>. The former Article 9 did not include the phrase “*free of the security interest*” that needed clarification in the PEB Commentary<sup>76</sup> and possibly raised a series of concerned disputes brought to court<sup>77</sup>. Entitlement to the proceeds under statutory provisions or under an agreement does not manifest a transfer of good title to a sub-purchaser despite the fact that it is a good evidence of authority to sell<sup>78</sup>. The authority to sell provision in Article 9 does not effectively solve the like - *Re Highway Foods* dispute in a sense to “protect” the sub-purchaser. Furthermore, it does not help much the *Fairfax* decision, if Article 9 model is introduced into English law, to have a solid justificatory ground as suggested<sup>79</sup> if the authority to sell if any in the two above-mentioned cases is not accompanied by the condition “free of the security interest”. Importantly, to protect a sub-purchaser buying subject to title retention, title retention should not be interpreted as an arrangement to transfer the title to the goods supplied, but a security interest as recommended in Article 9.

The treatment of title retention within the ambit of a sale transaction under English law in the context of title conflicts leads two undesirable outcomes. First, English law should clarify whether an authority to sell itself, express or implied can confer a good title to sub-purchasers. Secondly, title retention may spoil the law of buyer in possession, namely section 25(1) of the SGA 1979 and section 9 of the FA 1889, which is aiming at promoting a free flow of commerce, when it increasingly becomes a widespread phenomenon in the sale transaction.

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<sup>75</sup> UCC §9-315(a). See more discussion in sub-section 3.4.3 of this thesis

<sup>76</sup> PEB Commentary No. 3 Section 9-306(2) and 9-402(7)

<sup>77</sup> See more discussion with regard to express and unconditional; conditional; and implied authorization in Thomas S, see n. 62, at pp. 47-59

<sup>78</sup> See detailed argument in sub-section 3.4.3 of this thesis

<sup>79</sup> Thomas S, see n. 62, at p. 43

### 2.2.3.2 *Bunkers case: How title retention converts a sale into a non-sale transaction*

When the buyer fails to pay in full, the seller has the right to sue for the price of goods. Title retention equips the seller an alternative to following the goods that promotes her from the position of unsecured creditors particularly in the buyer's insolvency. However, repossession of the goods is not preferable or practical, for instances with regard to the working or consumable goods that no longer exist at the time of dispute as in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (Bunkers)*<sup>80</sup> or the goods resold oversea as in *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd (Caterpillar)*<sup>81</sup>. It has been witnessed that the nature of title retention transaction has been no longer problematic, but the effect of this clause on sale transactions has caused a lot of of concerns and debates in recent years.

In *Caterpillar*, it was possibly the first time the seller is exposed to the negative side of title retention clause. It was held that under the concerned title retention arrangement, the buyer had sold the goods as the seller's agent before paying in full. Thus, the property had not passed to the buyer at any time. The seller could not claim for the price according to section 49(1) of the SGA 1979. The *Caterpillar* case is criticized severely for the agency construction that is argued to be at odds with business common sense<sup>82</sup>. The problem of agency construction would be discussed in the next sub-section of this thesis. The other criticism is on the court's view that section 49 is the only situation giving rise to an action for the price<sup>83</sup>. The unexpected consequence of *Caterpillar* is the exclusion of action for the price and the limitation of actions against a buyer for non-payment to repossession of the goods or following the proceeds of sale if the title retention clause is a proceeds clause when the property is not passed. The point that section 49 exclusively provides for situations giving rise to an action for the price

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<sup>80</sup> [2016] UKSC 23; [2016] AC 1034

<sup>81</sup> [2013] EWCA Civ 1232, [2014] 1 WLR 2365

<sup>82</sup> Gullifer L, 'The Interpretation of Retention of Title Clauses: Some Difficulties' (2014) 4 Lloyds Maritime and Commercial Law Quarterly 564, at pp. 567-572

<sup>83</sup> *Caterpillar*, see n. 81, at [41]. See discussion in detail in Gullifer L, *ibid*, at pp. 575-9

is, fortunately, overruled in *Bunkers*<sup>84</sup>. The *Bunkers* ruling has drawn attention not only to the insolvency of one of the world largest suppliers in the bunker-supply market but also to its controversial decision respective to a supposed-to-be common notion of a sale contract. *Bunkers* involved a chain of transactions where bunkers were sold down, the seller-buyer transaction and one of the supplier-supplier transactions of which had a title retention clause. The end-buyer/ship-owner, was concerned about paying twice, once to the immediate seller and once to a supplier in the chain under title retention or maritime lien<sup>85</sup>. The end-buyer sought to apply section 49(1) to avoid the immediate seller's action for the price. The Supreme Court upheld the previous decisions considering the concerned contract was not a contract of sale. Bunkers (fuel oil) as consumable goods are likely to be consumed before the end of a credit term. In other words, where title retention restrains the passing of title pending full payment, bunkers probably no longer exist at the time the price is paid, or a claim for the price is brought into court. The court reasoned that the supply of bunkers is widely known to have a long credit term combined with title retention, and the express authority to use in propulsion is usually inserted in the contract. Therefore, the nature of the contract of this kind is the liberty to use the bunkers for propulsion prior to payment combined with the agreement to sell any remaining bunkers at the date of payment<sup>86</sup>, rather than the passing of property in the bunkers, which is the nature of sale contract. Once the bunker is delivered, the buyer is bound to pay the agreed price<sup>87</sup>. The failure to pass the property in the bunkers does not release the buyer from such obligation.

It would be good news on its face to any title-retaining seller that the right to sue for the price remains with them, and section 49, even *obiter*, is held to be not the only authority for an action for the price<sup>88</sup>. Nonetheless, it is not at the heart of this decision the right to sue for the price but that the contract of that kind is not a contract of sale possibly has a global impact on the applicability of the SGA

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<sup>84</sup> *Bunkers*, see n. 80, at [58], p. 1080

<sup>85</sup> *ibid*, at [2], p. 1060

<sup>86</sup> *ibid*, at [33] of p. 1048, [27] of p. 1069

<sup>87</sup> *ibid*, at [34] of p. 1049, [44] of p. 1051, [37] of p. 1072

<sup>88</sup> *ibid*, at [58], at pp. 1080-1

1979<sup>89</sup>. Title retention has been broadly used in combination with a substantially long-term of credit in sale and purchase transaction including the sale and purchase of consumable or working goods, which are supposedly put into the course of consuming or processing respectively right after taking delivery<sup>90</sup>. The impossibility of transferring the title in the goods when they no longer exist at the time of payment, due to the point on this matter in the highest authority case, *Bunkers*, would convert a used-to-be sale contract into a non-sale contract. Out of the title retention context, it further leads to the reconceptualization of CIF contract in which the passing of risk is preceding the passing of property in the goods<sup>91</sup>. It could be listed at least other five categories of other supply contracts out of the title retention context would be challenged under the *Bunker* ruling<sup>92</sup>.

It cannot be denied the decisive role of title retention in this reasoning to the extent that without such arrangement, the property in the bunkers is likely to pass elsewhere before the consumption. Contracts for the supply of bunkers are unexpectedly characterized into two different categories, one, possibly a contract of sale, for supply without extending credit or on credit but without title retention, and the other, a *sui generis* contract, for supply on credit and subject to title retention<sup>93</sup>. Again, it raises a question on the essence of title retention: for the security of purchase price or an arrangement to pass the property in the goods. Functionalism does not treat title retention as an arrangement to transfer ownership; instead, it considers title retention to have the effect limited to a security interest. If functionalism had applied into the context of *Bunkers*, it would have never been a question whether it were a contract of sale since the property constructively passed upon delivery or other events before the

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<sup>89</sup> See detailed discussion on how the *Bunker* decisions matters to the SGA 1979 in Gullifer L, see n. 29, at pp. 257-8; Bridge M, 'The UK Supreme Court Decision in the *Res Cogitans* and the Cardinal Role of Property in Sales Law' (2017) *Singapore Journal of Legal Studies* 345, at pp. 356-9

<sup>90</sup> Gullifer L, see n. 29; Bridge M, 'The UK Supreme Court Decision in the *Res Cogitans* and the Cardinal Role of Property in Sales Law' (2017) *Singapore Journal of Legal Studies* 345, at p. 356; Tettenborn A, 'Of Bunkers and Retention of Title: When is A Sale Not A Sale?' [2016] *Lloyd's Maritime and Commercial Law Quarterly* 24, at p. 26

<sup>91</sup> Tettenborn A, 'Of Bunkers and Retention of Title: When is A Sale Not A Sale?' [2016] *Lloyd's Maritime and Commercial Law Quarterly* 24, at p. 28

<sup>92</sup> Low KFK and Loi KCF, 'Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales' [2018] *Journal of Business Law* 229, at p. 248

<sup>93</sup> Gullifer L, see n. 29, at p. 257

consumption or manufacture of the goods. It is suggested that title retention over inventory should be re-characterized as “a retention of title floating charge”<sup>94</sup>. However, it would lead to onerous inconsistency in interpretation of title retention because this suggestion is limited to title retention in inventory including consumable, working goods or merchandise. Another recommendation is the application of *scintilla temporis* doctrine created under the *Re Bond Worth* case<sup>95</sup>. Accordingly, at the time the original goods are transferred to a third party or put into the manufacturing process, the title to the goods is passed to the buyer immediately<sup>96</sup>. It sounds on its face parallel with reasoning in a line of cases with regard to manufactured title retention clause (discussed later), that is, the title in the original goods is extinguished at the time the goods are put into the manufacturing process. The problem is the court, if following the *scintilla temporis* doctrine, would do violence on party autonomy concerning to the passing of title. It is worth repeating that from the formalism perspective, functionalism does not respect the freedom of contract by turning a contractual arrangement of title transfer into a statutory security interest. Therefore, acceptance of *scintilla temporis* doctrine in this sense is not well justified and raises the question of recognition of title retention under the functionalism approach as a whole.

### **2.3 Construction of fiduciary relationship**

Title retention is a good device for a seller to escape the position of general creditors in the buyer’s insolvency when the goods are still in the buyer’s possession. The normal creditor/debtor relationship is certainly not an expected consequence but likely to happen in case the goods are sub – sold. The plaintiff seeks another proprietary remedy relying on the fiduciary relationship, that is, the equitable right to trace. *Romalpa* is a prominent case introducing equitable principles into the commercial law and considered as the first case upholding the title retention clause. A line of subsequent cases has been divided into those

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<sup>94</sup> *ibid*, at pp. 264-5

<sup>95</sup> *Low KFK and Loi KCF*, see n. 92, at pp. 253-4

<sup>96</sup> *ibid*. *Low KFK and Loi KCF* base on the argument of Professor Gullifer for the correct analysis of *Caterpillar* in *Gullifer L*, see n. 82.

following or distinguishing the *Romalpa* decision and, combined with *Romalpa*, contributing to the law of title retention in England.

### **2.3.1 *Romalpa* model**

The retention of title clause in *Romalpa* was elaborate and complicated but showing the imbalance of two parts, namely between the all-monies part and the manufactured part. In the first all-monies part, there was an additional obligation imposing on the buyer to keep the goods ascertained as the property of the seller. This part expressly stipulated neither the authority of the buyer to sell the goods nor the seller's entitlement to the proceeds of sub-sale. Meanwhile, the manufactured part allowed the buyer to manufacture new products from the goods and sell them to a third party. Then, the seller was explicitly called as a fiduciary owner of new products and entitled to any claim that the buyer had against the sub-purchaser arising from the sub-sale transaction. The imbalance between two parts was explained that the problem dealt in the second part was more complicated than that of the first part<sup>97</sup>. Ironically, the dispute came into being within the framework of the first part when the plaintiff tried to submit the proprietary claim on the proceeds of sub-sale of the goods. It is astonishing that the seller was entitled to the proceeds without any agreement on the sub-sale of the original goods and the proceeds thereof, and the tracing right is applied to an authorized sale. The second part contained the wording indicating somewhat a fiduciary relationship between parties with regard to the manufactured products from the original goods. The Court of Appeal concluded that the second part implied the same relationship between the seller and the buyer with regard to the proceeds of sale<sup>98</sup>. The main authority cited in *Romalpa* is *Re Hallett's Estate*<sup>99</sup> providing for the establishment of the fiduciary relationship as a prerequisite for the right of tracing.

That the buyer had an authority to sell was the common ground in this case<sup>100</sup>. Thus, the question presented was whether there was a fiduciary relationship

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<sup>97</sup> *Romalpa*, see n. 1, at p. 688

<sup>98</sup> *Romalpa*, see n. 1, at pp. 690, 692-3

<sup>99</sup> [1880] 13 Ch D 696

<sup>100</sup> *Romalpa*, see n. 1, at p.680 [F-G]

entitling the seller to trace the proceeds of sub-sale. The judge of first instance and the judges of the Court of Appeal, in this case, had different findings on the fiduciary relationship. The judge of first instance relied heavily on the bailment created between the defendant and the plaintiff to conclude that it should be the fiduciary relationship beyond the plain creditor/debtor one between the seller and the buyer at hand<sup>101</sup>. Roskill LJ in the Court of Appeal complemented the agency relationship that required the defendant to be bound by the fiduciary obligation towards the plaintiff<sup>102</sup>. Meanwhile, Goff LJ and Megaw LJ did not make any effort to label the fiduciary relationship between the plaintiff and the defendant as sources of fiduciary obligations<sup>103</sup>. Although they inevitably had different constructions of the retention of title clause in hand, they came up with the same holding that a fiduciary relationship was established between the plaintiff and the defendant to uphold the tracing remedy in favour of the former.

Therefore, it raises a question about the nature of the fiduciary relationship between the seller and the buyer found in *Romalpa*. So far, the fiduciary relationship does not have a general definition<sup>104</sup> and categories of this relationship is not exhaustive. Categories of fiduciary relationships are also suggested not to have the same rules<sup>105</sup>.

It is likely another kind of fiduciary relationship if we are satisfied with the fact that an authority to sell must be accompanied with the duty to account imposed upon the buyer with regard to the proceeds in order to achieve the whole purpose of the clause. The property of the goods had never passed to the buyer until the sub-sale occurred. Thus, the seller's interest in the proceeds was rooted in the original goods. In other words, the beneficial interest vested in the seller with respect to the proceeds was original. Therefore, it can be argued that the

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<sup>101</sup> *Romalpa*, see n. 1, at pp.680 E-F, 682 C-G

<sup>102</sup> *Romalpa*, see n. 1, at p. 690 C- F

<sup>103</sup> Ulph J, 'Equitable Proprietary Rights in Insolvency: The Ebbing Tide?' [1996] *Journal of Business Law* 482, at p. 498

<sup>104</sup> Finn P, 'Contract and the Fiduciary Principle' (1989) 12 *UNSW Law Journal* 76, at p. 85, Sealy LS, 'Fiduciary Relationships' (1962) 20 *CLJ* 69 at p. 73, Weinrib EJ, 'The Fiduciary Obligation' (1975) 25 *The University of Toronto Law Journal* 1, at p. 7

<sup>105</sup> Sealy LS, 'Fiduciary Relationships' (1962) 20 *CLJ* 69 at pp. 73-4

duty to account for the proceeds to the seller was undoubtedly a fiduciary obligation allowing the seller to have the right of tracing.

Construction of a fiduciary relationship is problematic because the obligation to account for the proceeds is not accompanied by the obligation to segregate the proceeds for the seller as trust money. In *Romalpa*, the retention of title clause did not provide for the obligation to keep the proceeds of sub-sale in a separate account. The second part of the concerned title retention clause expressly dealing with the sale of manufactured goods only enabled the seller to any claim the buyer had arising from the sub-sale transaction. It is widely acknowledged that the obligation to segregate the proceeds would spoil the benefit of credit term as the submission of the defendant in *Romalpa*<sup>106</sup>. Thus, the buyer can use the proceeds at his discretion during the credit term. The Court of Appeal accepted that, in practice, the buyer was not restrained from using the proceeds for its own business during the credit period<sup>107</sup>, but had a strong response that it could reconcile well with the fiduciary relationship.

*"No doubt in practice, so long as all went well the plaintiffs would allow the defendants to use the proceeds of sale in their business, as I understand they did; but things ceased to go well, and now one has to determine the strict rights of the parties..."*<sup>108</sup>

Dr. de Lacy analyzed it as a doctrine of waiver<sup>109</sup>. It is suggested that the duty to account to the seller is not a strict fiduciary relationship in the sense that it can be waived in the buyer's ordinary course of business and reactivated in the buyer's insolvency<sup>110</sup>. Therefore, the obligation to account is not equated to the obligation to segregate the money received. It was suggested to be a concession from the seller when it could not control the proceeds in the hands of the buyer<sup>111</sup>. Nevertheless, in practice, sellers usually do not concern the source of

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<sup>106</sup> *Romalpa*, see n. 1, at p. 689 F-G

<sup>107</sup> *Romalpa*, see n. 1, at p. 692 E-F

<sup>108</sup> *Romalpa*, see n. 1, at p. 692 E-F

<sup>109</sup> de Lacy J, 'Romalpa Theory and Practice under Retention of Title in the Sale of Goods' (1995) *Anglo-American Law Review* 327, at p. 347

<sup>110</sup> *ibid*, at pp. 335-9, for further discussion on doctrine of waiver in retention of title

<sup>111</sup> Goodhart W and Jones G, 'The Infiltration of Equitable Doctrine into English Commercial Law'

money, even trust money, received from buyers<sup>112</sup>. The Court of Appeal precisely indicated the situation when title retention would efficiently operate, namely, in the buyer's insolvency. The doctrine of waiver suggested for the fiduciary obligation of this kind is somewhat reasonable and justified. It provides answers for arguments against the construction of agency at least two points<sup>113</sup>: the absence of a duty to segregate the money received for the seller's account and that the tracing right is not due right at the time of sub-sale but subject to a quite long credit term, for instances the fixing of 75 days in *Romalpa*.

However, the whole argument on the agency construction is confusing. Whatever categories the concerned fiduciary relationship belongs, a line of critical questions remain: What is the extent of the duty to account? Must the buyer account for the whole proceeds to the seller? If the amount of the proceeds is exceeding the amount of outstanding debts, does the buyer account only for the value of all outstanding debts and enjoy the surplus? And what if the amount of the proceeds is not enough to discharge all indebtedness? The affirmative answer to the second question is probably within the concept of fiduciary obligation. However, in the commercial context, it is considered a windfall for the seller, and it is not both parties' intents. *Romalpa* courts were silent on this matter. *Caterpillar* is the case following *Romalpa* in constructing an agency relationship when the goods were sub-sold before the buyer paid in full. The wording in *Caterpillar* title retention clause expressly required the buyer to hold the goods as a fiduciary agent and allowed the sub-sale of the goods in the ordinary course of business conditioned upon the account to the seller for the proceeds. The concerned court interpreted the obligation to account equivalent to accounting for the whole proceeds of sale.

Interestingly, the Irish case *Re Interview*<sup>114</sup> dealing with the proceeds of sub-sale subject to retention of title clause had a security interest approach. This case even earlier was neither mentioned before the Court of Appeal in *Romalpa*.

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(1980) 43 The Modern Law Review 489, at p. 507

<sup>112</sup> de Lacy J, see n. 109, at pp. 337-8

<sup>113</sup> See more discussion on criticisms on agency construction of title retention in Gullifer L, see 82, at pp. 567-572

<sup>114</sup> [1975] IR 382

Disputes in both cases were on the proceeds of sub – sale, but the two relevant title retention clauses were drafted differently. The title retention clause in *Re Interview* was a “proceeds” one that expressly stipulated the seller’s entitlement to all debts arising from the sub–sale by way of security<sup>115</sup>. The wording “*by way of security*” invited the court to accept the submission of the Companies Act 1963 section 99(1) and (2)(e) as the authority in favour of the receiver of the buyer<sup>116</sup>. These sections can be said to be equivalent to the English Companies Act 1948 section 95(1) and (2)(e) respectively that requires any charge created by a company, including a charge on book debts to be registered duly, otherwise, it would be void against liquidators and creditors of the company. *Romalpa* was quite a different situation since the relevant title retention clause did not mention the proceeds of sub–sale but contained the manufacturing clause. The whole clause in *Romalpa* had wording closely relating to fiduciary notion such as the duty to store the original goods and the newly manufactured products, and the status as “*fiduciary owner*” of the seller with regard to new products. It seems that the wording is a decisive feature in determining the nature of title retention.

However, after *Re Interview*, the Irish courts adopted *Romalpa* argument and even broadened its application. Retention of title in *Sugar Distributors Ltd v. Monaghan Cash and Carry Ltd*<sup>117</sup> is plainly a simple clause, and the judgment was delivered for the plaintiff to trace the proceeds of sub – sale. The judge followed and cited the interpretation of *Romalpa* in other Irish cases, namely *Re Stokes and McKiernan Limited*<sup>118</sup>. Accordingly, the right to trace in the context of simple title retention was based on the fact that property of the goods remained with the seller, and the purchaser sold on behalf of the seller and accounted to the latter for proceeds. In *Re Hickey (WJ) Ltd*<sup>119</sup>, retention of title incorporating an express trust regarding the goods and the proceeds together with the duty to keep the trust money in a separate account entitled the seller to trace the proceeds<sup>120</sup>. The

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<sup>115</sup> *ibid*, at p. 388

<sup>116</sup> *ibid*, at p. 396

<sup>117</sup> [1982] ILRM 399, [1981] IEHC 2

<sup>118</sup> *Re Stokes and McKiernan*, unreported, High Court, 12 December 1978

<sup>119</sup> [1988] I.R. 126

<sup>120</sup> de Lacy J, ‘Irish Retention of Title: The Trust Dimension’ (1990) *Conveyancer and Property Lawyer* 128, at pp. 130–1. In this article, the author remarks the trust dimension in Irish case law

influence of *Romalpa* on Irish case law is relatively significant to the extent that its approach has been adopted many times. Nevertheless, in a recent case, *Unitherm Heating Systems Ltd -v- Wallace as official liquidator of BHT Group Ltd (In Liquidation)*, the proceeds clause was drafted to authorize the sub-sale in the normal course of the buyer's business and assign all claims arising from sub-sale to the seller<sup>121</sup>. It also stipulated that the buyer would hold the proceeds on trust for the seller<sup>122</sup>. The judge of first instance held that the proceeds were trust monies allowing the seller to trace. The Court of Appeal reserved the decision, using three English cases, *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd*<sup>123</sup>, *Compaq Computer Ltd v Abercorn Group Ltd & Ors*<sup>124</sup> and *Re Andrabell*<sup>125</sup> as guidance.

The holding in *Romalpa* is striking because the argument on the fiduciary relationship between the seller and the buyer is formidable. It is supposedly an importation of equitable doctrines into commercial law that enables a title-retaining seller to bring a super-ranked proprietary claim in the buyer's insolvency. However, a new notion is not easy to accept since it significantly opposes the commercial practice and the parties' intent in a sale and purchase transaction. More importantly, it considerably affects other interests, like those of secured, preferential and unsecured creditors. Upholding the validity of the retention of title clause, in this case, has brought up a demanding consideration upon competing interests in insolvency and the need for transparency in retention of title transaction. As discussed later, the *Romalpa* approach does not merit the application of subsequent line of cases with regard to the title retention claim for the sub-sale proceeds, but this case has never been reversed or overruled. The Irish experience and the recent case *Caterpillar* demonstrate the

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regarding title retention.

<sup>121</sup> [2015] IECA 191

<sup>122</sup> *ibid*, at para. 16

<sup>123</sup> [1988] 1 WLR 150

<sup>124</sup> [1991] BCC 484

<sup>125</sup> [1984] BCLC 522

survival of *Romalpa* rule and the effort to draft a perfect “fiduciary” title retention clause leading to inconsistency in the interpretation of title retention<sup>126</sup>.

### 2.3.2 Negation of *Romalpa* principle

*Romalpa* is among the leading cases introducing equitable doctrines into commercial law<sup>127</sup> by recognizing the tracing right to the proceeds of an authorized sub-sale subject to a retention of title clause. If it were widely accepted, sellers would have retention of title as a device to escape the line of unsecured creditors and jump to the super-priority position in the buyer’s insolvency. Unlike secured creditors, they are not required to register their proprietary interest. Although its name has become another generic name of a retention of title clause, namely, *Romalpa* clause, its approach and theory do not merit the application in many subsequent cases.

The line of post-*Romalpa* cases can be sorted into three groups: (1) dealing with the claim on the goods supplied; (2) dealing with the proceeds of sub-sale including assignment of claims against the sub-purchaser; (3) dealing with new products deriving from the goods supplied. Negation of *Romalpa* principle has occurred mostly in the second group because the legal issue in *Romalpa* is the nature of the seller’s interest in the proceeds of sale. There are a remarkable number of cases concerned with the proceeds of sub-sale. In *Hendy Lennox and Re Andrabell*, the title retention clause was drafted simply and loosely that neither mentioned any term relating to bailment or fiduciary nor did it cover the proceeds or new products. These cases were distinguished from *Romalpa* on that ground<sup>128</sup>. In *E Pfeiffer Weinkellerei-Weineinkauf*, Phillips J, in order to hold that the defendant was authorized to sell for his own account, remarked that the fiduciary relationship in *Romalpa* was based on the “*particular wording*” of the clause and on the concession that there was a bailment between the plaintiff and

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<sup>126</sup> Low KFK and Loi KCF, see n. 92, at p. 238

<sup>127</sup> The other case is *Quistclose Investment Ltd. v. Rolls Razor Ltd.* [1970] AC 567. More discussion can be found in Goodhart W and Jones G, ‘The Infiltration of Equitable Doctrine into English Commercial Law’ (1980) 43 *The Modern Law Review* 489; Priestley LJ, ‘The Romalpa Clause and the Quistclose Trust’ in Finn P (ed), *Equity and Commercial Relationship* (The Law Book Company Limited 1987); Ulph J, ‘Equitable Proprietary Rights in Insolvency: The Ebbing Tide?’ [1996] *Journal of Business Law* 482

<sup>128</sup> *Hendy Lennox*, see n. 7, at p. 499 A-B

the defendant<sup>129</sup>. As discussed above, the problematic *Romalpa* decision is that a label like bailment or agency stuck on title retention is not a must to come up with a fiduciary relationship. Furthermore, the present author does not think that the Court of Appeal in *Romalpa* solely relied on the second part of the concerned title retention clause to imply the buyer's fiduciary obligation towards the unpaid seller, as the argument of Gibson J in *Andrabell*<sup>130</sup>. The fiduciary obligation is constructed upon the purpose of title retention, which is to secure the seller in the buyer's insolvency. The purpose can serve any form of this clause, and it helps to understand the implication, if any, by the clause. Indeed, Roskill LJ's argument, then agreed by Goff LJ, was based on the whole purpose of the clause to limit the authority to sell.

*"When, therefore, one is considering what, if any, additional implication has to be made to the undoubted implied power of sale in the first part of clause 13, one must ask what, if any, additional implication is necessary to make effective the obvious purpose of giving the requisite security to the plaintiffs?"*

The precise role of the second part in *Romalpa* is to clarify and illustrate how the purpose of retention of title clause works in the construction of the respective part.

*"...for it would be strange if the first part were to afford no relevant security when the second part is (as I think) elaborately drawn to give such security in relation to manufactured or mixed goods."*<sup>131</sup>

That being so, if there is an authority to sell, implied or express, regarding the goods in original status or new products, it should be in line with the purpose of retention of title<sup>132</sup>. In *Hendy Lennox* and *Andrabell*, the common ground was the authority of the buyer to sell the goods<sup>133</sup>.

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<sup>129</sup> *E Pfeiffer*, see n. 123, at p. 159 C-D

<sup>130</sup> *Re Andrabell*, see n. 125, at p. 528

<sup>131</sup> *Romalpa*, see n. 1, at p. 690 B-C

<sup>132</sup> de Lacy J, see n. 109, at pp. 344-5 for more discussion on the importance of the authority to sell on the construction of fiduciary relationship respecting retention of title.

<sup>133</sup> See *Hendy Lennox*, see n. 7, at p. 491G-H; *Re Andrabell*, see n. 125, at p. 527

The lesson of simple retention of title clause in *Hendy Lennox and Andrabell* might be well studied. Title retention clause since then has been comprehensively drafted. The terms relating to agency, bailment, and fiduciary have been expressly incorporated to establish a fiduciary relationship by retention of title, but the judge in *Tatung (UK) Ltd v Galex Telesure Ltd*<sup>134</sup> distinguished his case from *Romalpa*. Accordingly, title retention in *Tatung* expressly stipulated the plaintiff's interest in the proceeds as a contractual one, whereas the title retention clause in *Romalpa* did not mention the proceeds, and the interest of the plaintiff arose by operation of law<sup>135</sup>. In *Re Weldtech Equipment*, the case following *Tatung*, the retention of title clause stipulated the assignment of any claim that the buyer has against the sub-purchaser to the seller. The situation of the seller with regard to the proceeds of sub-sale seems to be “no-win”<sup>136</sup>.

The *Re Andrabell, Tatung and Re Weldtech Equipment* courts were not willing to read the fiduciary relationship in *Romalpa*. The buyer was placed in the position of a fiduciary towards the seller because the former had the authority to sell the original goods subject to the latter's title retention to the goods supplied. Relying upon the principle in *Re Hallett's Estate*, the fiduciary relationship of this kind that is rooted in the seller's proprietary interests in the original goods results in the right to trace into the proceeds of sub-sale. The existence of the plaintiff's interest in the proceeds of sale in a contract does not prevent the title retention clause from establishing a fiduciary relationship to be in line with the *Romalpa* principle.

Despite the efforts of drafters to expressly state the buyer's obligations as a bailee, an agent or a fiduciary, the holdings were disappointing since the courts found the obligations were inconsistent with the fiduciary relationship<sup>137</sup>. In *Hendy Lennox and Andrabell*, the existence of credit term and the lack of

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<sup>134</sup> (1989) 5 BCC 325

<sup>135</sup> *ibid*, at pp. 334-5

<sup>136</sup> See de Lacy J, 'Reservation of Title and Charges on Company Book Debts: The Death of *Romalpa*?' (1991) 54 *Modern Law Review* 736, at pp. 737-8; Hicks A, 'Retention of Title - Latest Developments' [1992] *Journal of Business Law* 398, at p. 409.

<sup>137</sup> *E Pfeiffer*, see n. 123, at p. 160 E-H, 161 A-B, *Tatung*, see n. 134, at p. 333; *Compaq*, see n. 124, at p. 496; *Re Weldtech Equipment Ltd* [1991] BCC 16, at p. 17

obligation to keep the proceeds of sub-sale in separate account were significant features to negate the *Romalpa* principle<sup>138</sup>. The latter case even went further to interpret the obligation to account as “*obligation not to mix the moneys received by the fiduciary with any other moneys*”<sup>139</sup>. Another feature found to be inconsistent with the nature of fiduciary of relationship is the seller’s interest in the defeasibility upon the payment of the outstanding debts. It is the equitable right to redeem the title of the goods and their proceeds that the buyer is entitled to enjoy when all debts are discharged. The judges in *Tatung*<sup>140</sup> and *Compaq Computer*<sup>141</sup> relied on a frequently quoted finding in *Re Bond Worth Ltd.* to construct a charge with regard to the proceeds of sub – sale.

*“...any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt, must necessarily be regarded as creating a mortgage or charge, as the case may be. The existence of the equity of redemption is quite inconsistent with the existence of a bare trustee-beneficiary relationship.”*<sup>142</sup>

This is precisely what the present author has quoted to discuss the purposive approach in the context of simple title retention. This approach did not help to construct a simple clause to be the creation of a charge upon the goods supplied. Irrespective of simple title retention or proceeds title retention, it is no doubt that the seller’s interest in the property in any case will be defeasible upon the payment of the debts. The doctrine of waiver again could throw a light on the defeasibility of the seller’s interest in the goods to see whether it could be reconciled with the fiduciary obligation in the context of title retention. The discharge of the debt, out of the event of the buyer’s insolvency, does not require the buyer to perform his fiduciary obligation strictly. The seller does not concern whether or not the money is really the proceeds of sale.

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<sup>138</sup> See *Hendy Lennox*, see n. 7, at p. 499 C-G; *Re Andrabell*, see n. 125, at pp. 532-3

<sup>139</sup> *Re Andrabell*, see n. 125, at p. 530

<sup>140</sup> *Tatung*, see n. 134, at p. 333

<sup>141</sup> *Compaq*, see n. 124, at p. 495

<sup>142</sup> *Re Bond Worth*, see n. 23, at p. 248

The strongest argument against the construction of fiduciary relationship is the finding that the buyer is obliged to account for the proceeds of sub-sale amounting to the sum of outstanding debts. This argument is challenged to be contractual rather than proprietary one. In *E Pfeiffer*, the plaintiff alleged that it was the duty to account for all the proceeds, but the defendant was entitled to the surplus, if any, under the contract. In this sense, the buyer does not have any equity of redemption in the balance of the fund but a personal claim against the seller<sup>143</sup>.

### **2.3.3 Construction of charges**

It is unanimously accepted that a simple retention of title clause does not amount to a registrable charge created by the buyer on the goods supplied. It is not the case involving the sale proceeds or new products manufactured from the goods that are the subject matter of a sale contract. The nature of the interest that the seller has on the proceeds or new products, is at the heart of title retention disputes. To reply the absolute proprietary interest claimed by the plaintiff, the defendant is likely to propose the accessory interest by way of security. Courts deal with the question of a charge first and then proceed to the question of priority. It is a clear approach adopted in *Compaq Computer*. The headings of the following sub-sections are named after the title of two questions presented before the said judge.

#### **2.3.3.1 Charge issue**

Slade J introduced the purposive approach to retention of title in *Re Bond Worth*<sup>144</sup>. In his frequently quoted statement, Slade J indicated that an interest by way of security in property must have at least two features with regard to the debtor, namely, (1) the defeasibility of the interest in property upon payment or realization of the property for the discharge of the debt and (2) the equity of redemption. Slade J strengthened his finding by relying on the judgment of Romer LJ in *Re George Inglefield Ltd.*<sup>145</sup> about essential characteristics of a

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<sup>143</sup> de Lacy J, see n. 109, at p. 350

<sup>144</sup> *Re Bond Worth*, see n. 23, at p. 248

<sup>145</sup> [1933] Ch. 1

mortgage: the feature of equity of redemption, the equitable right to redeem the property upon the discharge of the debts, and when the value of the property is not sufficient to pay the debts, the mortgagee is still entitled to the balance recovered from the mortgagor.

Despite the fact that drafters have learned the lesson of wording from previous cases, it is not a difficult task to figure out the characteristics of security in any retention of title extended to the proceeds of sale or newly manufactured goods. The buyer will undoubtedly have the property in the subject matter by paying the purchase price to the seller. Retention of title will be destructible upon the discharge of all debts owed to the seller<sup>146</sup>. It is also commonly accepted that in a case where the subject matter is realised to make the payment and the sum is not sufficient to cover the debts, the buyer still owes the balance to the seller.

With regard to the proceeds clause, the equity of redemption has been found as an important element to establish a charge. When the amount is more than the debts, it is suggested that the buyer has an interest in the subject matter by way of equity of redemption. The wording of some retention of title clauses has invited judges to read the proprietary residuary interest in the proceeds to be vested in the buyer/debtor. In *E Pfeiffer*, the clause stipulated that book debts arising from the goods supplied “*amounting to*” the buyer’s obligation would be passed on the seller. Relying exactly on the wording of the contract, the concerned judge constructed that the assignment is “*only up to the amount of [the buyer]’s outstanding debt*”<sup>147</sup>. It can be inferred that the buyer was entitled to the balance if the sum of book debts is more than the value of the secured obligations. However, many clauses have expressly provided that the buyer would account to the seller for the full proceeds of sale or assign all rights including those relating to the payment of purchase price of the sub-sale<sup>148</sup>. Heavily relying on the wording of the contract, plaintiffs submitted that they had

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<sup>146</sup> See *Re Bond Worth*, see n. 23, at p. 249; *E Pfeiffer*, see n. 123, at p. 161 B-C; *Tatung*, see n. 134, at p. 333; *Compaq*, see n. 124, at p. 495

<sup>147</sup> *E Pfeiffer*, see n. 123, at p. 160 D-G

<sup>148</sup> See *E Pfeiffer*, see n. 123, at p. 154 C-D; *Tatung*, see n. 134, at p. 328; *Compaq*, see n. 124, at p. 491; *Re Weldtech Equipment Ltd* [1991] BCC 16, at pp. 16-7

an absolute beneficial interest in the sale proceeds<sup>149</sup>. However, careful drafting did not help. The interest of this kind was found inconsistent with other obligations in *E Pfeiffer*, that is, the seller's interest in book debts was stipulated to be amounting to the outstanding obligation whereas the buyer must account to her all the proceeds<sup>150</sup>. In *Tatung* and *Compaq*, it was the defeasibility of the seller's interest upon payment of the debt leading to the implication of the buyer's residuary claim in the proceeds<sup>151</sup>. In *Re Weldtech Equipment*, the extraordinarily brief judgment following the *Tatung* case relied upon only the phrase "for securing our claim" to reach a conclusion<sup>152</sup>.

The seller's entitlement to a sum more than the debts owed to her is considered to have a windfall profit at the expense of the buyer and her other creditors<sup>153</sup>. This is the reason to read the contract irrespective of the wording referring to an absolute beneficial interest. It is acceptable that the buyer is entitled to the surplus after discharging the outstanding debts by the money generated from a sub-sale to avoid the windfall profit at the expense of the buyer and her other creditors. However, the question is whether it is a proprietary right. The entire fund recovered from the sub-sale including the profit must be used to discharge all outstanding debts first. The buyer's right to the surplus of the fund after paying all the debts is argued to be a personal claim as a counterweight to the obligation to pay the balance against the deficiency of the fund, rather than the equity of redemption to the proceeds<sup>154</sup>. The windfall may also occur if the seller repossesses the original goods, the market price of which has been increased at that time. The buyer undoubtedly cannot claim for the surplus value. The buyer in this situation may not incur any expense on the rise of the economic value of

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<sup>149</sup> See *E Pfeiffer*, see n. 123, at p. 155 H, 156 A-B; *Tatung*, see n. 134, at p. 333; *Compaq*, see n. 124, at p. 494

<sup>150</sup> *E Pfeiffer*, see n. 123, at p. 160 E-H, 161 A-B

<sup>151</sup> See *Tatung*, see n. 134, at p. 333; *Compaq*, see n. 124, at p. 496

<sup>152</sup> [1991] BCC 16, at p. 17.

<sup>153</sup> *Tatung*, see n. 134, at p. 333

<sup>154</sup> Dr. John de Lacy has produced a series of research papers on the nature of *Romalpa* principle where he insists on the nature of the buyer's right to the surplus is personal, not proprietary as equity of redemption. See de Lacy J, 'Proceed with Care' (1989) 10 *Company Lawyer* 188, at p. 189; de Lacy J, 'When is a Romalpa Clause not a Romalpa Clause? When It is a Charge on Book Debts' (1992) 13 *Company Lawyer* 164, at p.167; de Lacy J, 'Romalpa Theory and Practice under Retention of Title in the Sale of Goods' (1995) 24(3) *Anglo-American Law Review* 327, at pp. 340-1, 350

the goods, but even so, the most important contention is that the seller still has an absolute interest as a legal and beneficial owner.

The functional approach is not sufficient to identify retention of title as conferring a registrable charge on the proceeds in the context of title retention in England. The wording of the contract to some extent constituting the seller's absolute interest in the proceeds or setting up a fiduciary relationship, in some cases like *Romalpa* or *Caterpillar* to confer upon the seller an absolute interest in the proceeds, but in some cases, as discussed above, was utterly failed in this submission. Construction of the equity of redemption irrespective of the wording is likely to be a violent interference that only reflects the judges' intention.

The issue is always on the nature of the seller's interest in the proceeds: an absolute beneficial interest or by way of security. It is critical to find out whether at any time that the buyer has an absolute interest in the goods and the proceeds to comply with the orthodox that requires a person to create a security interest upon her own property. Noticeably, the question of who initially has the property in the proceeds has not been well addressed. Simple title retention itself does not confer upon the seller any interest in the proceeds of sale<sup>155</sup>. In *E Pfeiffer*, Phillips J relied on the wording of the retention of title clause, that is "*claims... [the buyer] gets... including his profits*", to come up with the conclusion that it was the assignment of the rights belonging to the buyer<sup>156</sup>. In response to the proceeds title retention clause, courts have focused on the issue of the defeasibility of the interest upon the debt discharge and the equity of redemption. It is likely that negating fiduciary relationship between the seller and the buyer is the way to vest the property of the proceeds in buyer as the judge's argument in *Compaq Computer*<sup>157</sup>. The concerned judge figured out that the security purpose was not sufficient for a registrable charge, but it was whether the title had passed to the buyer in order to create a charge upon the seller<sup>158</sup>. However, he did not proceed

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<sup>155</sup> Simple retention of title in *Hendy Lennox* and *Re Andrabell* case only dealt with the question whether the seller's entitlement to the proceeds is the absolute beneficial interest. Security interest was not the question presented before the court.

<sup>156</sup> *E Pfeiffer*, see n. 123, at p. 160

<sup>157</sup> *Compaq*, see n. 124, at p. 496

<sup>158</sup> See *Compaq*, see n. 124, at p. 493; *Gough WJ*, see n. 27, at p. 546

with this matter. Similarly, the *Tatung* judge did not give any effort to clarify why the debtor had property in the proceeds of sale, and simply considered it “*unquestionably vested in the defendants*”<sup>159</sup>. It is a somewhat inappropriate approach. The core question to determine the seller’s interest in the proceeds is whether it is original or granted by the buyer<sup>160</sup>. The proper analysis should be, like the argument of the dissenting judge in *Caterpillar*, that the property in the original goods passes to the buyer at the time of the sub-sale as an implication for the authority to sell. Therefore, the buyer has the original title to the proceeds to create a charge in the seller’s favour. This analysis would reverse the findings in *In Re Highway Food, Caterpillar and Bunkers* case as discussed elsewhere above.

With regard to new products, *Borden (UK) Ltd v Scottish Timber Products Ltd* demonstrates that simple title retention does not give the plaintiff any interest in new products manufactured from the goods supplied<sup>161</sup>. Simple retention of title is still effective in some cases that the goods were under process. It is better to assert a claim in the goods supplied, rather than the new products incorporated the original goods by some plain manipulation, that is, the goods can be reconverted into their delivered state<sup>162</sup>. Retention of title is operated on the original goods, like engines supplied by the seller incorporated in generators sets in *Hendy Lennox*. Simple retention of title can extend to processed goods that are not lost the identity of the original goods, like steel sheet cut from steel strip in the *Armour v Thyssen Edelstahlwerke AG* case<sup>163</sup>. It is inferred from these two cases that the goods even being processed but not losing their identity of originals goods can be repossessed under the effect of title retention.

Newly manufactured products in the context of title retention are unequivocally the combination at least of materials supplied by the seller and the buyer’s workforce. The classic *specificatio* principle<sup>164</sup> vests the ownership to the

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<sup>159</sup> *Tatung*, see n. 134, at p. 335

<sup>160</sup> *Worthington S*, see n. 24, at p.39

<sup>161</sup> [1981] Ch 25, at p. 47 C-D

<sup>162</sup> *Hendy Lennox*, see n. 7, at p. 493 G-H, 494 D-G

<sup>163</sup> [1991] 2 A.C. 339; [1990] 3 W.L.R. 810

<sup>164</sup> In case of manufacturing, the rule of acquisition of ownership is classified into *accessio* and *specificatio*. *Accessio* occurs when a subordinate thing is joined to a dominant one, accordingly the owner of the dominant thing will acquire the ownership of the whole. *Specificatio* is the case that

manufacturer who is responsible for the owner of materials for damages, except for the materials capable of being reconverted into its delivered status. This principle does not cause a severe problem when materials ceased to exist or destroyed in manufacturing process like yarn processed into carpet or resin into chipboard<sup>165</sup>. It is a more challenging task to deal with the case where the original goods, although they cannot be reconverted once processed, are capable of being identified. In *Chaigley Farms Ltd v Crawford Kaye & Grayshire Ltd (t/a Leylands)*, the plaintiff proposed that “*meat is meat, live or dead*” to extend simple retention of title to livestock to carcasses<sup>166</sup>. In *Re Peachdart*<sup>167</sup>, it is submitted that the supplied material, leather, was possibly identified in each handbag made from it. Thus, the buyer was still a bailee of handbags and an agent for the seller when selling them<sup>168</sup>. It is important to figure out whether the goods undergoing process or manufacture are lost their original identity. When the course of manufacture starts, the original goods have undergone a transformation to be new products of separate identity, despite the fact that the original goods were not completely extinguished or consumed<sup>169</sup>. Then the title is destroyed because the goods are losing their identity as raw material at the very beginning of the manufacture operation. This proposition is logical and to some extent parallel with the international trade law. For determining the country of origin of imported goods, the tariff shift rule is applied when all the constituent materials of the goods are from many countries. Accordingly, the country of origin is where the finished goods undergo a change in tariff classification.

The extinction of title of the original goods at the time of the manufacturing process does not resolve the issue with regard to the plaintiff's interest in newly manufactured products. Who has the first title of new products? The matter of the first title is of importance because the seller will have an absolute interest in new products if the answer is on him. Otherwise, the buyer will have a title

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a person transforms raw materials belonging to the other into a new thing. See more discussion in Bridge M and others, *The Law of Personal Property* (London : Sweet & Maxwell 2013)

<sup>165</sup> See *Borden*, see n. 161, at pp. 41 E-F, 44 E-F, *Clough Mill*, see n. 19 , at p. 125 E-G

<sup>166</sup> [1996] BCC 957, at p. 962

<sup>167</sup> [1984] Ch 131

<sup>168</sup> *ibid*, at p. 141 F-G

<sup>169</sup> *ibid*, at p. 142 E-H; *Chaigley Farms*, see n. 166, at p. 963, *Modelboard Ltd v Outer Box Ltd (In Liquidation)* [1992] B.C.C. 945; [1993] B.C.L.C. 623, at p. 953

sufficient to confer a security interest on the seller. The buyer is in the position of a manufacturer who can take advantage of the *specificatio* principle, in the other hand, the contract of sale stipulates that the seller generally has retained the title to manufactured goods. If manufactured title retention can confer the absolute interest upon the seller with regard to new products, it is suggested that the first title could be obtained by a contractual arrangement. Thus, retention of title would be a device to contract out of rules of property law<sup>170</sup>. Oliver LJ in *Clough Mill* was likely to support this proposition<sup>171</sup>. However, Goff LJ in the same case and other courts did not echo it. If the seller has the first title in new products, he will be entitled to the windfall benefit at the expense of the buyer who incorporates not only his materials but also his labour<sup>172</sup>. New products certainly have value added by incorporation of other materials belonging to the buyer or by her design or her workforce. It is likely a weak proposition if the value added is relatively minor in comparison with the goods supplied by the seller. Dealing with the matter of this kind, the judge in *Modelboard* did not take into account the value-added matter due to lack of evidence. He asserted that the windfall benefit in respecting new products was akin to the situation that the seller retook the possession of the original goods<sup>173</sup>. He raised two characteristics of a charge: (1) The title of new products would be vested in the buyer by payment of the purchase price of original goods, and (2) The sum owed to the seller was not the price payable in connection with the sale of new<sup>174</sup>. Above all, the *specificatio* principle in most cases may be impliedly applied by the argument that when the title in original goods ceases to exist at the start of the manufacturing process, the title of new products will be vested in the buyer<sup>175</sup>. A contractual arrangement cannot be effective to contract out property law in order to confer property in new products on the seller, simply because it is impossible for anyone to confer ownership on the other in what he has no title at all<sup>176</sup>. The

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<sup>170</sup> Webb D, 'Title and Transformation: Who Owns Manufactured Goods?' [2000] *Journal of Business Law*, at p. 531

<sup>171</sup> *Borden*, see n. 161, at p. 124 B-C

<sup>172</sup> *Borden*, see n. 161, at p. 119 G-H, 120 A-E

<sup>173</sup> *Modelboard Ltd v Outer Box Ltd (In Liquidation)* [1992] BCC 945, at pp. 952-3

<sup>174</sup> *Modelboard Ltd v Outer Box Ltd (In Liquidation)* [1992] BCC 945; [1993] BCLC 623, at p. 953

<sup>175</sup> See *Borden*, see n. 161, at p. 44 E-F by Templeman LJ, 46 E-F by Buckley LJ; *Re Peachdart*, see n. 167, at p. 142 G-H; *Clough Mill*, see n. 19, at p. 125 F-H by Sir Donaldson M.R.

<sup>176</sup> Webb D, see n. 170, at p. 534

plaintiff's interest in newly manufactured products under manufactured retention of title should be of a chargee.

### 2.3.3.2 Priority issue

Priority can be considered as the ordering of priority of successive charges and absolute interests if any over the same asset<sup>177</sup>. It is the ranking to distribute the company asset in winding up in which holders of floating charges compete with preferential creditors and unsecured creditors<sup>178</sup>. Registration does not affect the priority ranking of successive charges to the extent that the order of registration does not play a role in the ranking process. Otherwise, it determines the validity of charges created by a company chargor against other creditors in the ambit of Companies Act 2006 section 859(H)<sup>179</sup>. Registration as a prerequisite for the validity of company charges is relevant to the priority ranking of a particular charge in competition with other successive charges and absolute interests<sup>180</sup>. In a substantial number of court decisions, retention of title extended to the proceeds of sub-sale and manufactured goods is found to be a registrable charge created by a company chargor. This kind of charge falls within the requirement of registration to be effective. In almost all title retention cases, the extended clause is void against receivers, administrators, liquidators or other creditors due to want of registration. It is a non-complying registrable charge taking priority subsequent to a registered charge irrespective that the former is previously or subsequently created<sup>181</sup>. It should be noticed that the Insolvency Act 1986 recognizes the first priority position of the title-retaining seller respecting not only the goods supplied but also "*any property presenting the goods*"<sup>182</sup>. However, extended title retention is no longer a retention of title agreement within the scope of the Insolvency Act 1986 because it has been long considered as creating

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<sup>177</sup> Gough WJ, see n. 27, at p.741

<sup>178</sup> Goode RM, *Principles of Corporate Insolvency Law* (4th ed., Student ed. , London : Sweet & Maxwell 2011), at p. 275

<sup>179</sup> The former rules are found in Companies Act 1985 section 395(1) and Companies Act 1948 section 95(1)

<sup>180</sup> Gough WJ, see n. 27, at p. 899

<sup>181</sup> See the rule in Gough WJ, see n. 27, at p. 903, 932; McCormack G, see n. 9, at p. 132

<sup>182</sup> Insolvency Act 1986 Section 251

disguised charges<sup>183</sup>. Therefore, the bank's fixed or floating charge is less vulnerable to retention of title with regards to the proceeds of sub-sale or manufactured products<sup>184</sup>.

A title-retaining seller, in general, seeks for the first priority to other creditors to the extent that the goods and their derivatives do not make up the buyer's assets. Retention of title is likely to be a smart device aiming at coping with the fact that unsecured sellers are not in the advantageous position to compete with bank chargees over the same property. If extended title retention is amounting to a registrable charge, a question is raised whether it is attractive or practical to submit a registration for the purpose of ranking.

The registration system in England is transaction-based. The recent Companies Act 2006 (Amendment of Part 25) Regulations 2013 introduce a new regime for registration of a company charge, but it still rejects a notice filing system. Registration requires a submission to the registrar of the company a particular and a certified copy of a charge. In comparison with a notice filing system in which a financial statement is the only document to submit, covering multiple security agreements and having a capacity to be filed in advance, registration under a transaction system is relatively burdensome and costly<sup>185</sup>. With regard to any seller having a practice of selling on title retention and maintaining a long trading relationship with buyers, she would be loaded with hard work of registration for every sale transaction, but the benefit may not outweigh the cost.

The existing priority rules do not support the seller's first priority to the proceeds and manufactured goods. The priority rules in England, which are not based on the order of registration, are relatively complicated<sup>186</sup>. Some rules may be relevant in the context of extended title retention.

The most important one is the rule governing competition between complying and non-complying charges. Accordingly, a registrable company charge but

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<sup>183</sup> Insolvency Act 1986 section 251

<sup>184</sup> See more discussion in Gough WJ, see n. 27, at pp. 930 -1

<sup>185</sup> See more comparison between notice filing and transaction system in McCormack G, *Secured Credit under English and American Law* (Cambridge University Press 2004), at pp. 138-149

<sup>186</sup> See Goode RM, see n. 25, at p. 187; Gough WJ, see n. 27, at pp. 900 -1

unregistered has the priority subsequent to registered charges, despite the order of creation as discussed above<sup>187</sup>. With regard to competing complying charges, the order of creation is applied. The first created charge has priority over the subsequently created charge<sup>188</sup>. With regard to the competition between a fixed charge and a floating charge, a complying floating charge takes priority subsequent to a complying fixed charge irrespective of the order of creation<sup>189</sup>. Companies regularly create fixed or floating charges on book debts and stock in trade in favour of a bank chargee. Furthermore, a bank floating charge may have a restrictive clause that prevents the company chargor from creating charges ranking *pari passu* or prior to them. A registered restrictive clause results in the priority of the concerned floating charge over subsequent fixed charges with actual notice<sup>190</sup>. The proceeds of sub-sale or manufactured products deriving from the goods supplied are within the assets appropriated for the security interest of a bank chargee. Title retention may be created subsequently to the bank fixed or floating charge<sup>191</sup>. There is little room to create a charge under an extended title retention clause to have priority over banks and other financial institutions.

It is worth determining a charge created by title retention upon the proceeds or new products is a fixed or floating charge, at least for the purpose of winding-up where a holder of complying floating charge ranks prior to unsecured creditors, but subsequently to preferential creditors. The judgments with regard to this matter is controversial. In *Re Bond Worth* it was held that they were floating

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<sup>187</sup> See Goode RM, see n. 25, at p. 189; Gough WJ, see n. 27, at p. 903;

<sup>188</sup> See Goode RM, see n. 25, at p. 188; Gough WJ, see n. 27, at p. 903;

<sup>189</sup> See Gough WJ, see n. 27, at p. 905; McCormack G, *Registration of Company Charges* (Sweet & Maxwell 1994), at p. 134

<sup>190</sup> See the rule in McCormack G, *Registration of Company Charges* (Sweet & Maxwell 1994), at p. 134. The registered restrictive clause would have made the concerned floating charge prior to subsequent fixed charge due to constructive notice if the Companies Act 1989 were brought into force. Section 103 of this Act provides that “a person taking a charge over a company’s property shall be taken to have notice of any matter requiring registration and disclosed on the register at the time when the charge is created”. These provisions were never brought into force and have been repealed. The Companies Act 2006 does not have similar provision. However, the new section 859D (2)(c) (introduced in 2013) makes negative pledge clauses part of the required particulars for registration. See more in McCormack G, *Registration of Company Charges* (Sweet & Maxwell 1994), at p. 135; Gough WJ, see n. 27, at p. 935; Graham P, ‘Registration of company charges’ [2014] *Journal of Business Law* 175, at pp. 191-2

<sup>191</sup> See *Re Bond Worth*; *Re Peachdart*; *Tatung*; *Armour*, *Modelboard*; *Re Highway Foods*

charges. On the other hand, in *E Pfeiffer* and *Tatung*, the proceeds of sale and the assignment of claims arising from or connecting to the sub-sale were subject to a charge on book debts. In respect of newly manufactured products, in *Borden*, judges came to different conclusions. Templeman LJ and Buckley LJ considered it as a company bill of sale whereas Bridge LJ argued that it was a floating charge on the converted products.

The nature of a charge as fixed or floating one does not depend on the form but the true intention of the parties<sup>192</sup>. In other words, despite the label of fixed charge stuck on the security interest, judges are likely to look to the substance of contractual obligations. Clearly, in the context of title retention the parties do not intend to name the interest conferred upon the seller because the latter is seeking for a better position than of the chargor. It is emphasized that to carry on the task determining the category of the constructed charge, judges are expected to look to the substance of transaction. In practice, the nature of a charge created under extended title retention is not of concern since both fixed and floating charge cannot grant a title-retaining seller the expected first priority.

The question of priority is raised out of the context of insolvency where the proceeds in the form of book debts subject to title retention compete with an assignment of book debts to third parties. *E Pfeiffer* and *Compaq* are two cases dealing with competing interests of the title-retaining seller and the assignee over book debts. Even though a void charge was found due to lack of registration, the learned judges in both cases still proceeded with priority point. The assignee was not amounting to the concept of creditors in the ambit of Companies Act 1948 section 95 or Companies Act 1985 section 395, but a purchaser of choses in action<sup>193</sup>. A charge is valid against purchasers of all kinds irrespective of being registered or not. There are three approaches to the issue: (1) the basic rule, the first in time prevails, which is one that favours the seller; (2) the doctrine that a *bona fide* purchaser for value of legal interest without notice, which gives advantage to the assignee; (3) the *Dearle v Hall* rule which grant the first priority

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<sup>192</sup> See *Agnew and another v. Commissioner of Inland Revenue* [2001] UKPC 28, at p. 725 F-H. See Gough WJ, see n. 27, at pp. 601, 604-5; Gullifer L (ed), see n. 25, at p. 129

<sup>193</sup> Oditah F, 'Priorities: Equitable versus Legal Assignments of Book Debts' (1989) 9 Oxford Journal of Legal Studies 513, at pp. 519-520

to the party giving first notice of her interests to the debtor without notice of the prior assignment of the same subject matter<sup>194</sup>.

Although the two latter rules may on its face have the same result, the two approaches are different. The *bona fide* purchaser rule applies to resolve the conflict between an equitable and a subsequent legal assignment, whereas the *Dearle v Hall* rule applies to competing equitable assignments of choses in action<sup>195</sup>. The seller's interest in the proceeds of sub-sale is undoubtedly equitable, but the nature of the assignee's interest is debatable. The decision of *E Pfeiffer*, then followed by *Compaq*, relied on the Law of Property Act 1925 section 136(1) to conclude that assignment of debt was an equitable assignment with regard to priorities despite that the assignee could enjoy procedural advantages of a legal title<sup>196</sup>. The learned judge applied the *Dearle v Hall* rule giving judgment for the assignee who was the only party giving notice to the debtor. *Dearle v Hall* rule requires giving the notice to attach and perfect interests arising from an assignment of choses in action<sup>197</sup>. The argument of Phillips J is criticized because he refused the nature of the relevant assignment as a legal interest<sup>198</sup>. *Dearle v Hall* rule is unjust for the seller who is not in good position in comparison with the assignee to give notice to the debtor. The seller may not have information of the sub-sale transaction. If the seller's interest is an equitable assignment by way of floating charge, she is prevented from any contact with the sub-purchaser so long as the transaction is conducted in the ordinary course of business. It is not the case involving the doctrine of a *bona fide* purchaser in which an assignment by way of charge can be registered so that the subsequent legal purchaser is placed into the position of having constructive notice. Furthermore, *bona fide* purchaser rule applicable in this context can run parallel to priority rules in the insolvency context in the sense that lack of registration causes the seller to lose the priority.

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<sup>194</sup> See *Compaq*, see n. 124, at p. 497; *E Pfeiffer*, see n. 123, at p. 161 E-H

<sup>195</sup> McGhee J, Bridge S and Snell EHT, *Snell's Equity* (32nd ed. / general editor, John McGhee ; contributors, Stuart Bridge ... [et al.]. London : Sweet & Maxwell 2010), at p. ; Oditah F, see n. 193, at pp. 529 - 531

<sup>196</sup> See *E Pfeiffer*, see n. 123, at pp. 161 H, 162 A-C, H, 163 A-B.

<sup>197</sup> de Lacy J, 'The Priority Rule of *Dearle v. Hall* Restated' (1999) *Conveyancer and Property Lawyer* 311, at p. 312

<sup>198</sup> Oditah F, see n. 193, at pp. 519 - 520

The priority system in English law is not unitary but a scattered set of intersecting rules deriving from statutes and the common law. Lacking a uniform statutory system of priority rules, a priority dispute could be challenged by judicial decisions to the extent that the latter could declare the former to be false<sup>199</sup>. Title retention is not considered as a security interest but its extended form to the proceeds or the new products could be classified as a charge and enjoy the existing priority rules. The nature of competing interests, the order of creation, and registration are among factors determining priority ranking, but the order of registration does not play any role. An English transaction filing system requires every transaction to be registered. Registration of extended title retention to validate a charge on the proceeds or newly manufactured goods is not appealing and encouraging because the burdensome and costly registration is not compensated by the first priority irrespective of at least the order of creation or registration. A registered charge if any on the proceeds or new products is likely to be subordinate to other charges, fixed or floating, previously created by long-term blanket financiers. Furthermore, under the *Dearle v Hall* rule, the seller's interest is again subordinate in the conflict between the claim for the proceeds under title retention and the right of an outright purchaser of receivables<sup>200</sup>.

## **2.4 Concluding remarks**

The law of title retention in England at the time of this thesis is rooted in the common law, lacking specific statutory rules, and is depending entirely on the general rules on the sale of goods, fiduciary obligations and company charges.

The formalism approach does not support title retention to be treated as a security interest although it is broadly accepted and practically used to secure the payment of purchase price. Title retention has a firm legal ground of the SGA 1979 to enforce the seller's right particularly in the insolvency context where the administrator is refrained from treating the unpaid goods subject to title

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<sup>199</sup> See the discussion on the change of judicial opinions with regard to the conflict between liquidation expenses and a claim secured by a floating charge in Rajak H, 'Liquidation Expenses Versus a Claim Secured by a Floating Charge' (2005) 7 *Insolvency Intelligence* 97

<sup>200</sup> See more discussion in Gullifer L, see n. 28, at pp. 292-3

retention as the on-going without paying the price to the seller. The seller can call for the repossession of the unpaid goods, which are definitely not among the buyer's assets subject to other security interests or general assets to be realized for preferential and unsecured creditors.

Meanwhile, the common law treats title retention to proceeds of sale and newly manufactured products as a registrable charge that has usually been held to be void against liquidators, administrators and other creditors due to lack of registration. This situation is satisfactory from the perspective of long-term and receivable financiers, and to some extent providing a counterweight to the super-ranking of the title-retaining seller with regard to the original goods. However, the *Romalpa* and recent *Caterpillar* case consider the position of a title-retaining seller as an absolute beneficiary under the fiduciary doctrine rather than a charge holder. Title retention to the proceeds can be treated differently under the two approaches irrespective that they serve the same function. English law on this matter is inconsistent, unpredictable and therefore unsatisfactory.

Does the English law of title retention need reform in order to bring title retention in the scheme of registration for the purpose of public notice? Despite the likely unsatisfactory treatment of the proceeds clause, the requirement of registration is possibly not urgent, even from the perspective of blanket and receivable financiers who have priority over a title-retaining seller with regard to the proceeds and new products. From the standpoint of a seller, a transaction-based registration is a burden if registration is required to make title retention effective against third parties.

However, the *Bunker*, *Caterpillar*, and *Re Highway Foods* rulings have resulted in the undesirable and unexpected legal consequences with respect to the sale of goods law. It is recommended to treat title retention with regard to the sale of inventory as a title retention floating charge to cure unsatisfactory impacts on the sale of goods law. Furthermore, this recommendation may restrict the influence of *Romalpa* decision because the title retention floating charge makes the questions of authority to sell and the absolute beneficial interest in the proceeds to become irrelevant. However, other policy questions are coming, that

is, the current priority position of floating charge and the registration system are not desirable from the standpoint of the seller, and why title retention to capital equipment is out of the charge scheme.

## CHAPTER 3 PURCHASE-MONEY SECURITY INTERESTS: ARTICLE 9 MODEL

### 3.1 Overview

The United States Uniform Commercial Code (UCC) is not a work of the legislative process, instead it is a product drafted by the Permanent Editorial Board, which is composed of the American Law Institute and the National Conference of Commissioners on Uniform State Law<sup>1</sup>. It was first promulgated in 1952 with the objective to “*make uniform the law among the various jurisdictions*”<sup>2</sup>. Within the US federalist system, the state governments establish and enforce commercial law subject to their police power<sup>3</sup>. Thus, the various state laws govern commercial transactions. However, in addition to unifying the legal aspects of commercial transactions, the Code addresses all phases of commercial activities “*from start to finish*”<sup>4</sup> among states. The adoption of the UCC in all the states with or without amendments has significantly contributed to the UCC target, that is the uniformity in the commercial law in the country.

Article 9 addresses secured transactions, and together with the other ten articles of the code, ensure uniformity of the commercial law in the US. Unlike other parts of the UCC, which deal with sale, negotiable instruments, document of title or letter of credit that substantially inherited works from the previous uniform laws and the state common law, the drafters of Article 9 started their work almost afresh with the ambition to create new concepts, requisites and formalities for security interests in personal property<sup>5</sup>. The modernization of the law on secured transactions is considered “*a major achievement*” of the UCC<sup>6</sup>. Article 9 was

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<sup>1</sup> Foreword to Official Text and Comments, in Official Comments, at p. ix

<sup>2</sup> UCC § 1-103(a)(3)

<sup>3</sup> The state police power is provided in the Tenth Amendment to the United States Constitution to give the states any powers “*not delegated to the United States*” nor constitutionally prohibited to the states.

<sup>4</sup> *Uniform Commercial Code Official Text and Comments* (2014-2015 ed., Thomson Reuters 2014) (hereinafter Official Comments), at p. 3

<sup>5</sup> Brook J, *Problems and Cases on Secured Transactions* (Aspen 2008), at pp. 16-7

<sup>6</sup> See n. 1, at p. ix

entirely revised in 1998 and again amended in 2010<sup>7</sup>. All sections referred in this thesis are of the revised Article 9.

## **3.2 Concept of purchase money security interest**

Article 9 introduces the unitary approach and functionalism to the law on secured transactions in personal property. The enactment of Article 9 put an end to the pre-Code situation where the law was divided into several segments governing various security devices. The “*comprehensive and systematic*” set of rules treating the issue of priority is probably the most innovated part of Article 9<sup>8</sup>. A new concept of PMSI (PMSI), which was previously an interest arising from conditional sales or title retention sales, is recognized to have a super-ranking priority as an exception to the basic first-to-file-or-perfect rule. A PMSI must be a security interest for the purpose of Article 9 first.

### **3.2.1 Security interest: Functionalism and unitary approach in Article 9**

#### **3.2.1.1 Functionalism**

The distinction among various security devices in personal property is now extinguished under the formalism approach. All kinds of security devices are reduced to the one and the only concept: a security interest. A security interest is defined in Article 1 of the Code as follows.

*“Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation*<sup>9</sup>.

The above concept has a relatively narrow meaning since the Bankruptcy Code defines it as a “*lien created by an agreement*”<sup>10</sup> in which lien is “*charge against or interest in property to secure payment of a debt or performance of an obligation*”<sup>11</sup>. Security interests for the purpose of the Bankruptcy Code include real estate

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<sup>7</sup> See n. 1

<sup>8</sup> Jackson TH and Kronman AT, ‘Secured Financing and Priorities among Creditors’ (1979) 88 Yale Law Journal 1143, at p. 1144

<sup>9</sup> UCC §1-201(35)

<sup>10</sup> 11 U.S. Code §101(51)

<sup>11</sup> 11 U.S. Code §101(37)

mortgages, deed of trusts and security interests in personal property within the scope of Article 9.

Article 9 dealing with secured transactions has the scope of application to “*a transaction, regardless its form, that creates a security interest in personal property and fixtures by contract*”<sup>12</sup>. Thus, a contractual creation of a security interest within the abovementioned definition leads to the application of Article 9, notwithstanding the form of the transaction or the name labeled, or the intention given by the parties<sup>13</sup>. The substance of a transaction as a determinative feature of a security interest makes the cover of Article 9 as broad as possible. Giving the definition a general, all-embracing meaning together with a list of exceptions<sup>14</sup> is a technique aiming at prohibiting the creation of new devices<sup>15</sup>.

Prior to the enactment of the UCC, the functional approach was adopted in many laws dealing with different security devices in order to set up a requirement of registration to validate the transaction against third parties. Non-possessory security interests were in high demand in the nineteenth century because of the rise of manufacturing industry, railroad, civil and industrial construction, and the increase of sale on credit for consumer goods<sup>16</sup>. New financing devices other than a chattel mortgage were drafted including a trust receipt<sup>17</sup>, a factor’s lien<sup>18</sup> and a

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<sup>12</sup> UCC §9-109(a)(1). Article 9 is also applied to an agricultural lien, a sale of accounts, chattel paper, payment intangibles, or promissory notes, a consignment and other security interests arising under other sections of the UCC, see UCC §9-109(a)(2), (3), (4), (5), (6).

<sup>13</sup> Comment 2 to the UCC §9-109(a)(1), see Official Comments at p. 839

<sup>14</sup> UCC §9-109(d)

<sup>15</sup> Gilmore G, *Security interests in personal property* (Little, Brown and Company 1965), at pp. 295-7

<sup>16</sup> *ibid*, at p. 25

<sup>17</sup> The trust receipt is a document created by the buyer, called trustee, to effect the arrangement in which the financier, called entruster, will advance the purchase money to the seller of the goods. The financier honours the draft submitted by the seller in the exchange of document of title, usually the bill of lading that consigns the goods to the latter and then endorses to the former or the former is the consignee itself. Until the trustee tenders purchase price to the entruster, the latter has the title to the goods by retaining the document of title and the former possesses the goods in trust for the purpose of security for the repayment and usually has the right to sell the goods at hand. The trust receipt has an advantage to shift the security interest from the goods to the proceeds of sale. See R. C. N. J., ‘The Uniform Trust Receipts Act’ (1934) 20 Virginia Law Review 689, at p. 690

conditional sale<sup>19</sup>. The purpose at first was to seek a judicial recognition and ultimately evade the law of chattel mortgage and its filing system, but it resulted in new sets of rules and even new filing procedures<sup>20</sup>. The common feature of those transactions was that a creditor of each type expected to realize the asset at hand to discharge the debt when a debtor defaulted or went to bankruptcy. All gave rise to an ostensible ownership situation, that is the separation of ownership and possession, where third-party creditors were misled by the debtor's possession to consider the latter's specific asset as unencumbered.

To resolve the ostensible ownership problem, registration or filing is the perfect replacement for possession as a method to have the first priority claim in the debtor's particular asset. In the past, a transfer for security purpose in which the debtor/transferor continuingly possesses the collateral was treated as fraud and thus held to be void. Common-law courts relied on an English statute called the Statute of 13 Elizabeth I providing that any transfer made with "*intent [ ] to delay, hinder or defraud creditors and others*" were void<sup>21</sup>. This statutory provision took the form of s. 172 of the Law of Property Act 1925 and now appears as s. 423 of the Insolvency Act 1986 in England. This statute demonstrates two types of a fraud concerning retention of possession. It may be a sham transaction in the best-known *Twyne's Case* where the donor retained possession after the conveyance and acted as if it was his own. Therefore, the donor deceived creditors about the status of the asset that he owned them free and clear. In other words, the donor conveyed his asset to the donee to secretly secure the payment of the previous debt he had owed the donee. Possession, in this sense, manifests the ownership regardless of the secret conveyance. On the other hand, a non-possessory secured transaction that does not involve a transfer of property for

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<sup>18</sup> A factor's lien is frequently used to finance a manufacturing business by creating a security on inventory including raw materials, finished products and account receivables relating to the sale thereof.

<sup>19</sup> See more discussion in Glenn G, 'The Chattel Mortgage as a Statutory Security' (1939) 25 Virginia Law Review 316; R. C. N. J, 'The Uniform Trust Receipts Act' (1934) 20 Virginia Law Review 689; V. M. G. J, 'The Factors Lien Act: Virginia's New Security Device' (1951) 37 Virginia Law Review 1023; Glenn G, 'The Conditional Sale at Common Law and as a Statutory Security' (1939) 25 Virginia Law Review 559

<sup>20</sup> Gilmore G., see n. 15, at p. 296

<sup>21</sup> *Twyne's Case*, 3 Co.Rep. 80b, 76 Eng.Rep. 809 (1601)

security purpose raises a question of ostensible ownership where the debtor may deceive creditors that he owns an item of asset unencumbered<sup>22</sup>. Giving public notice of a security interest to make it effective against third parties is a solution for the ostensible ownership problem. Prospective creditors are required to carry due diligence to explore the public record of security interests when they enter the transaction of this kind. The historical background of American filing system shows that public filing is a surrogate for possession of the collateral to bring a priority claim<sup>23</sup>.

The American law on secured transactions in personal property mostly focuses on solving the ostensible ownership problem rather than the classic requirement of *nemo dat quod non habet*. The *nemo dat* principle raises the question whether the debtor has sufficient rights or title to tender a transfer of property. The following example demonstrates the primary differences between American law, which favours the ostensible ownership approach and English law, which strictly follows the *nemo dat* principle.

Example: The debtor as a true owner of a machine creates a security interest in favour of the lender and then disposes the same asset to the purchaser. The debtor defaults against the lender. The lender claims the machine from the purchaser<sup>24</sup>.

For both jurisdictions, the question presented would be whether the security interest survives the sale. Under the Article 9, it is crucial first to determine whether the lender filed a financing statement covering the machine at hand or whether she filed prior to the time the purchaser gives value and receives

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<sup>22</sup> See Harris S and Mooney C, Jr., *Security Interests in Personal Property: Cases, Problems, and Materials* (6th edn, Foundation Press 2016), at pp. 162-7 for more discussion on retention of possession, fraudulent conveyance and ostensible ownership to explore the historical background of the filing system

<sup>23</sup> Before Article 9, many security interest statutes provided for a filing or recording in a public office in order to recognize non-possessory security interests. Article 9 is a descendant of these statutes. See Harris S and Mooney C, Jr., *Security Interests in Personal Property: Cases, Problems, and Materials* (6th edn, Foundation Press 2016), at p. 166

<sup>24</sup> This example is adapted from the example stated in Davies I, 'The reform of English personal property security law: functionalism and Article 9 of the Uniform Commercial Code' (2004) 24 *Legal Studies* 295, at p. 301

delivery without knowledge of the given security interest<sup>25</sup>. Otherwise, she loses the machine to the purchaser. If the security interest is perfected timely, her claim is subject to whether she previously authorizes the debtor to transfer the collateral free of the security interest to third parties<sup>26</sup>, or whether the purchaser is a buyer in ordinary course of business<sup>27</sup>. Under English law, it depends on whether the debtor has sufficient rights to transfer good title to the purchaser. In the context of title retention, the good faith purchaser theory adopted in section 25(1) of the Sale of Goods Act 1979 is a counter-weight of the *nemo dat* principle to resolve the dispute between innocent parties upon the same asset<sup>28</sup>.

If Article 9 public filing scheme is deemed as a must-have solution for the ostensible ownership problem, not every transaction creating ostensible ownership is brought within this requirement. It is argued that the capacity of third parties to easily and accurately observe the separation of ownership and possession is an exception to the general principle. In this sense, how parties arrange their right and obligations is irrelevant<sup>29</sup>. Accordingly, many transactions could be excluded from the Article 9's scope of application, one of which is when the ostensible ownership problem is solved by another filing regime<sup>30</sup>.

However, Article 9 is criticized to the extent that it fails to give a sound explanation why a true lease and a true bailment are excluded from the scope although both transactions raise the serious ostensible ownership problem<sup>31</sup>. Both for- and against-functionalism commentators agree that the title analysis

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<sup>25</sup> UCC § 9-317(b)

<sup>26</sup> UCC § 9-315(a)

<sup>27</sup> UCC § 9-320(a)

<sup>28</sup> Davies I, 'The Reform of English Personal Property Security Law: Functionalism and Article 9 of the Uniform Commercial Code' (2004) 24 *Legal Studies* 295, at pp. 301-2

<sup>29</sup> Baird DG and Jackson TH, 'Possession and Ownership: An Examination of the Scope of Article 9' (1983) 35 *Stanford Law Review* 175, at pp. 179, 190

<sup>30</sup> *ibid*, at p. 190. Baird and Jackson in their classic article figure out many situations excluded from Article 9's rule: certificates of title regime which records security interest on automobiles, widespread knowledge that possessor of an asset is not the owner, short-time ostensible ownership situations like when a person lends a lawnmower to a neighbour or filing requirement inconsistent with the notion of negotiability as essential characteristic of money or bearer instrument.

<sup>31</sup> See more discussion in Baird DG and Jackson TH, see n. 29, at pp. 197-201

still plays a vital role in determining the application of Article 9<sup>32</sup>. Courts have given a great effort to distinguish security lease and bailment from true lease and bailment. The bailment for processing gives a good example in this respect. The bailment for procession is the case where the bailee processes the material supplied by the bailor and returns products in exchange for the service fee. In *In Re Medomak Canning Co.*<sup>33</sup>, the court looked into the nature of the transaction to find that it did not require a sale and purchase of the material to serve the interests of both parties, and the bailee did not intend to acquire title to the material. Thus, the court rejected the establishment of a PMSI in favour of the bailor which was submitted to be void against the holder of perfected security interest in after-acquired property and upheld the status of a mere bailment. Instead of relying on the allocation of title as in *In Re Medomak Canning Co.*, the *Kinetics* court emphasized on the Article 9 purpose that “[promotes] certainty in commercial loan transaction”<sup>34</sup>. The court assumingly implied the ostensible ownership problem when indicating that when “any agreement giving the debtor authority to exercise any outward indicia or manifestations of ownership or control, a would-be creditor could easily be misled into making a loan under an effective security agreement”<sup>35</sup>. The court ignored the title issue to conclude that the bailee has “rights in the collateral” with regard to the material supplied by the bailor to attach a security interest for the third party’s favour<sup>36</sup>.

The two foregoing decisions demonstrate that a title allocation and ostensible ownership approach can bring different outcomes. It leads to inconsistency and uncertainty in the treatment of lease and bailment transactions under American personal property law. From a functionalism perspective, it results from the fact that Article 9 does not apply to true lease and bailment<sup>37</sup>. From a formalism perspective, it is the failure of Article 9 to distinguish between ownership and

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<sup>32</sup> Bridge MG and others, ‘Formalism, Functionalism, and Understanding the Law of Secured Transactions’ (1999) 44 McGill Law Journal 567, at p. 599; Baird DG and Jackson TH, see n. 29, at pp. 197-8

<sup>33</sup> 25 UCC Rep.Serv.437 (1977)

<sup>34</sup> *Kinetics Technology Intern. Corp. v. Fourth Nat. Bank of Tulsa*, 705 F. 2d 396 (C.A.10(Okl.), 1983)

<sup>35</sup> *ibid*, at p. 399

<sup>36</sup> *ibid*, at p. 400

<sup>37</sup> Baird DG and Jackson TH, see n. 29, at pp. 200-1

security as different concepts because Article 9 stresses on ostensible ownership problem and de-emphasizes “ownership as a characteristic of solving disputes”<sup>38</sup>.

However, functionalism does not prevent American courts from responding the question of title allocation to deal with Article 9 priority dispute. In *Evergreen Marine Corp. v. Six Consignments of Frozen Scallops*<sup>39</sup>, the debtor who had taken the cargoes from the ocean carrier without presenting the original bill of lading was held to have a temporary entrustment of possession that did not suffice the requirement of “rights in the collateral” to create a security interest. The ocean carrier was found to be a bailee, not an owner of the cargo; therefore, the transaction between the carrier and the debtor is not a sale and purchase one<sup>40</sup>. The decision manifested that other laws, such as Article 2 on the sale of goods, bill of lading or general property law could interfere with the priority dispute with regard to the question of title allocation.

Article 9 and functionalism are possibly indifferent to title and ownership allocation, but the problem of title allocation can be supplemented by other laws. The most criticised characteristic of Article 9 could be that party autonomy is severely ignored so that almost all arrangements having a function of a security interest are brought in the scheme of Article 9 for the purpose of filing and priority ranking. It artificially broadens the concept of security interest to cover in-substance secured transactions irrespective of the form that the parties intentionally arrange for. The switch from formalism to functionalism is a considerable change in terms of the ideology and approach, that is, changing the focus from the allocation of title to third parties’ concern. Functionalism aims at ensuring that any contractual arrangement affecting existing or potential third parties’ rights, interests or claims in the same asset must be transparent to the rest of the world. The party who creates the ostensible ownership problem to competing secured creditors and claimants over the same asset bears the burden to correct the situation by either getting possession of the asset or making the public filing.

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<sup>38</sup> Davies I, see n. 28, at pp. 303-4

<sup>39</sup> 4 F3d 90, 21 UCC Rep. 2d 502 (1<sup>st</sup> Cir. 1993)

<sup>40</sup> See more discussion on this case in Clark B and Clark B, *The Law of Secured Transactions under the Uniform Code*, vol I (A.S. Pratt and Sons 2010), at p. 2-54, 2-55

### 3.2.1.2 Unitary approach

As mentioned above, prior to the UCC, many devices having the function of a security interest were created to meet the increasing demand of financing business transactions of all kinds, and to avoid the requirement of filing and rigid treatment under the law of chattel mortgage. It resulted in the enactment of a new statute to correspond to a newly-created device. The Uniform Conditional Sales Act 1919, the Trust Receipts Act 1933 and the Factor's Lien Act were typical examples. It resulted in various statutes accompanied by various filing systems corresponding to various security devices. Furthermore, under the federalist system, the law of secured transactions which was not a federal, but state law varied from state to state, reflecting somewhat "*local and regional tastes and styles in drafting*"<sup>41</sup>. Therefore, before the publication of the UCC, the law of secured transactions in personal property was segmental and complicated. This context gave rise to the uncertainty and costly expense to determine the status of a security device and choose the appropriate applicable law. The existence of different and separate filing systems did not facilitate a thorough credit checking, and they also incurred substantial expense<sup>42</sup>.

The fragmentation of the law on secured transactions in personal property unequivocally motivated a unitary approach in drafting Article 9. A transaction irrespective of its form as a chattel mortgage, a conditional sale or a trust receipt, is simpler than it appears because it serves the same function of securing payment or performance of other obligations<sup>43</sup>.

Functionalism other than formalism is employed to restrain the distinction among types of financing, the creation of new devices, and the possibility of several separate corresponding statutes. However, functionalism was not a new-born idea of Article 9; on the contrary, the pre-code security interest laws in personal property had long adopted this approach, the most typical of which is the Uniform Conditional Sales Act. On the one hand, in the American pre-Code context, whenever a new security interest was recognized by its function, a new

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<sup>41</sup> Gilmore G, see n. 15, at p. 141

<sup>42</sup> *ibid*, at p. 463

<sup>43</sup> *ibid*, at p. 289

statute was enacted to coincide with a new security device. On the other hand, functionalism adopted in various statutes produced the fundamental similarity among those devices. Therefore, the statutory distinction among different filing systems and treatment became cumbersome and unnecessary. It was an intense motivation to integrate the law in this area. Article 9 unitarily treats different security devices but carrying the same function in the one and the only regime of a sole concept of security interest. However, Article 9 fails to create a unique filing system for the country. Subject to the constitution, the commercial law remains state law; therefore, each state maintains a separate filing system.

### **3.2.2 Conditional sale: Statutory secured transaction under functionalism**

The conditional sale is defined as “*a sale in which the buyer gains immediate possession, but the seller retains title until the buyer performs a condition, esp. payment of the full purchase price*”<sup>44</sup>. It is a relatively popular term in the United States, interchangeably used with the term “retention of title” and the like. Despite the difference in terminology among jurisdictions, a conditional sale is ultimately a transaction based on an arrangement that the seller retains the title to the goods supplied until and unless the buyer discharges the full purchase price<sup>45</sup>.

In the first place, the conditional sale and the chattel mortgage were in discrete and distinct areas, contract law and secured credit law respectively<sup>46</sup>. American common law did not use to treat a conditional sale as a security interest. However, a conditional sale has operated beyond a conventional arrangement for payment of contract price, enabling a seller to reserve the goods supplied as a means of payment when a buyer defaults. A conditional sale was considered stronger than any popular security devices as a pledge or mortgage. To this extent, the goods were free of the debtor’s assets subject to any chattel mortgage, and the title-retaining seller could avoid the requirement of filing and the

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<sup>44</sup> Black’s Law Dictionary (9<sup>th</sup> edn, 2009), at p. 1454

<sup>45</sup> Gilmore G, see n. 15, at p. 67

<sup>46</sup> See more discussion in Gilmore G, see n. 15, at pp. 66-8; Glenn G, ‘The Conditional Sale at Common Law and as a Statutory Security’ (1939) 25 Virginia Law Review 559, at pp. 569-570, 578-585.

complicated procedure of foreclosure under the chattel mortgage law<sup>47</sup>. The conditional sale or the title retention transaction creates an ostensible ownership situation to not only subsequent secured creditors but also earlier secured creditors who may have a security interest in the debtor's after-acquired property. The earlier secured creditor may suppose the goods in the debtor's possession but secretly subject to title retention to be free or at least encumbered by only subsequent claims. The apparent security function of a conditional sale has caused a great deal of concern to third parties. This context was leading to the judicial and legislative reaction that the conditional sale, once used to secure payment, should be treated as a chattel mortgage<sup>48</sup>. It is suggested that the title-retaining seller who creates the ostensible ownership problem to both earlier and subsequent secured creditors should have the burden to cure it, in other words, to publicize his interest and notify the earlier parties<sup>49</sup>.

The Uniform Conditional Sales Act enacted in 1922 had a functional approach to the extent that they defined the conditional sale as a secured transaction. Therefore, the ostensible ownership created by these transactions could be resolved by the requirement of registration, but registration had a limited effect to the extent that it was needed to validate the sale against *bona fide* purchasers and lien creditors who levied prior to the recordation<sup>50</sup>. A non-recorded conditional sale remained good against the creditors of the buyer.

Article 9 replacing the Uniform Conditional Sales Act continues to treat a conditional sale as a security interest. It converts a conditional sale or title retention from a contractual arrangement to a security device within the scope of this article. In the same section defining a security interest, it expressly states that: "*The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer [...] is limited in effect to a reservation of a security interest.*"<sup>51</sup>. This treatment is re-emphasized in Article 2 on sales<sup>52</sup>. The

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<sup>47</sup> Gilmore G, see n. 15, at pp. 67-8

<sup>48</sup> *ibid*, at p. 68

<sup>49</sup> Baird DG and Jackson TH, see n. 29, at p. 189

<sup>50</sup> Glenn G, 'The Conditional Sale at Common Law and as a Statutory Security' (1939) 25 Virginia Law Review 559, at pp. 579-585

<sup>51</sup> UCC §1-201(35)

wording of these sections is somewhat unclear about how a security interest is created under a conditional sale. “*Reservation of a security interest*” indicates that it is seemingly not amounting to an outright sale with the grant-back of a security interest to the seller. Despite the above confusing wording, the title is transferred to the buyer under the further Article 2 wording: “*title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest*”<sup>53</sup>. Therefore, it can be inferred that title retention is statutorily no longer a contractual arrangement for the passing of title.

Statutory reconceptualization of title retention or conditional sale as a secured transaction is considered to extremely interfere with party autonomy on the passing of title conditional upon payment of full purchase price<sup>54</sup>. It is also inconsistent with the common law principle preserving private property “*against alienation except by free consent*”<sup>55</sup>. However, the development of conditional sales in the American common law and in practice has probably contributed to and supported the functional approach. The popularity of conditional sales was parallel with increasingly using after-acquired property secured transactions, particularly in financing industrial equipment<sup>56</sup>. Whenever the buyer acquired the goods supplied by the seller, the concerned goods were possibly caught by the after-acquired property arrangement between the buyer and the prior secured party to secure the pre-existing debt. Even though the seller was the one who advanced the full value of the new asset to the buyer under a sale on credit, she was left with the position of an unsecured creditor for the price<sup>57</sup>. A conditional sale or title retention, therefore, was designed to avoid the undesirable position and to cope with the after-acquired property security

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<sup>52</sup> UCC §2-401(1). “*Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.*”

<sup>53</sup> UCC §2-401(2)

<sup>54</sup> Bridge MG, ‘Form, substance and innovation in personal property security law’ [1992] *Journal of Business Law*, at p. 590

<sup>55</sup> *ibid*

<sup>56</sup> Wessman MB, ‘Purchase Money Inventory Financing: The Case for Limited Cross-Collateralization’ (1990) 51 *Ohio State Law Journal* 1283, at pp. 1292-3

<sup>57</sup> Gilmore G, see n. 15, at p. 64-5; Lloyd RM, ‘Refinancing Purchase Money Security Interests’ (1985) 53 *Tennessee Law Review* 1, at pp. 4-5

interest. The American common law quickly recognized the utility of conditional sale or title retention and adjusted to adapt to the new situation.

Article 9 successfully brings a conditional sale into the ambit of a security interest irrespective of the form the parties opt for to uncover it publicly. It is the debtor's possession of the goods, rather than the contractual allocation of title, under a conditional sale causing the risk to other competing interests in the same asset<sup>58</sup>. In this respect, it is a persuasive argument and a good justification to treat a conditional sale or title retention as a security interest. The justification for the treatment of title retention as a security interest may not theoretically defeat the argument based on party autonomy and formalism, which regards the buyer as having only possessory interest and the seller as remaining an absolute owner. Nevertheless, functionalism regarding conditional sale in the American context is a pragmatic approach in the sense that it focuses on the benefit of all related parties; thus, it outweighs any theoretical considerations.

### **3.2.3 Purchase-money security interest**

A PMSI is taking place a title retention arrangement to protect the unpaid seller from payment default. The unpaid seller, from now on called a secured creditor, has a purchase-money priority which prevails over both other earlier and subsequent security interests. To be a PMSI, a security interest must be within the UCC §9-103 definition that refers to not only a single but a trio of definitions, namely PMSI, purchase-money collateral, and purchase-money obligation. A PMSI is a security interest in goods "*to the extent that the goods are purchase-money collateral with respect to that security interest*"<sup>59</sup>.

Then purchase-money collateral is defined as "*goods or software that secures a purchase-money obligation incurred with respect to that collateral*"<sup>60</sup>.

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<sup>58</sup> *ibid*, at p. 197

<sup>59</sup> UCC §9-103(b)(1)

<sup>60</sup> UCC §9-103(a)(1)

In turn, a purchase-money obligation means “an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.”<sup>61</sup>

In brief, a PMSI occurs when the purchase-money collateral secures a purchase-money obligation. In other words, the goods, which are the subject matter of a sale contract and not the debtor’s pre-existing asset, are the collateral securing payment of their purchase price.

The purchase-money status depends on neither an express indication of a PMSI nor a description of its natures in a security agreement or a financing statement, and it does not require a separate security agreement, or a separate financing statement created uniquely for the purchase-money collateral<sup>62</sup>.

The scope of a PMSI is broader than title retention. The definition of purchase-money obligation categorizes a PMSI into a seller PMSI and a lender PMSI. The seller PMSI is the most equivalent to the concept of title retention or conditional sale since the obligation of an obligor/buyer is the payment of “all or part of the price of the collateral”, that is the purchase price of the goods supplied. On the other hand, to have a lender PMSI, a creditor who is a third party gives value to a debtor/buyer to acquire the collateral. It is relatively straightforward to prove that the goods subject to the sale contract are the collateral securing the respective purchase price in the context of a seller PMSI. It is not the case of a PMSI lender who must prove the purpose of the loan: the advance was made to let the debtor acquire the collateral, and this advance was “in fact so used”<sup>63</sup>.

Purchase-money collateral and purchase-money obligation are considered essential elements to describe how to establish a PMSI<sup>64</sup>, but the determination of a purchase-money obligation plays a crucial role<sup>65</sup>. Although the definition of purchase-money obligation seemingly places PMSIs into two categories, that is “the price of collateral” referring to seller PMSI and “value given to enable”

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<sup>61</sup> UCC §9-103(a)(2)

<sup>62</sup> *In re Saxe*, 491 B.R. 244 (Bankr. W.D. Wis., 2013), at p. 249

<sup>63</sup> Gilmore G, see n. 15, at p. 781

<sup>64</sup> Comment 3 to the UCC §9-103, see Official Comments at pp. 829-30

<sup>65</sup> *In re Price*, 562 F. 3d 618(4<sup>th</sup> Cir., 2009), at p. 624

referring to lender PMSI, the Official Comment does not try to distinguish them. Comment 3 to the UCC §9-103 provides a list of expenses that can be included in both categories, namely “*obligations for expenses incurred in connection with acquiring rights in the collateral, sale taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney’s fees, and other similar obligations*”<sup>66</sup>. It can be inferred from this list that the term “*price*” cannot be understood in common sense<sup>67</sup>. Since this list is not exhaustive, any expense that shares similar features of all listed expenses can be added. It is not limited to transaction costs like sale taxes, duties and finance charges that may enhance or add value to the collateral, but also any incurred in connection with the acquisition of collateral<sup>68</sup>.

Comment 3 stating “*a close nexus between the acquisition of collateral and the secured obligation*” figures out a circumstance when a security interest does not qualify a purchase-money status<sup>69</sup>. When the collateral is obtained on unsecured credit, and subsequently, a security interest is created to secure the purchase price, it is not a PMSI<sup>70</sup>. In this sense, the wording with regard to a lender PMSI provision, that is “*value given to enable the debtor to acquire rights*” may lead to the assumption on the sequence of the loan and the acquisition of collateral. Accordingly, the loan comes first and then acquisition, or at least they simultaneously occur<sup>71</sup>. Courts have dealt with several cases where the loan was advanced after the possession and even the acquisition of property. In *North Platte State Bank v. Production Credit Ass’n of North Platte*<sup>72</sup>, the debtor/buyer had physical possession of the goods before the execution of the security agreement with the lender who honoured the cheque directly to the seller for the purchase price and then claimed a PMSI in the goods. The given court held that the debtor/buyer had both possession and title in the goods before the lender extended credit, therefore, even though the money advanced to pay the purchase

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<sup>66</sup> Comment 3 to the UCC §9-103, see Official Comments, at p. 830

<sup>67</sup> *In re Price*, see n. 65, at p. 626, *In re Graupner*, 356 B.R. 907 (Bankr. M. D. Ga., 2006), at p. 912, 919

<sup>68</sup> *In re Price*, see n. 65, at p. 562

<sup>69</sup> Comment 3 to the UCC §9-103, see Official Comments, at p. 830

<sup>70</sup> Comment 3 to the UCC §9-103, see Official Comments, at p. 830

<sup>71</sup> *Gilmore G*, see n. 15, at p. 784

<sup>72</sup> 200 N. W. 2d 1, 189 Neb. 44 (Neb., 1972), at pp. 46-8

price, it did not help the debtor to acquire any right in the collateral because he had already had all<sup>73</sup>. The distinction between the money advancing to acquire the collateral from the money paying the purchase price is vital, only the former of which qualifies to be a PMSI. It is not sufficient to have a purchase-money status if the lender has a written security agreement covering the collateral in question and advances money to pay the purchase price<sup>74</sup>. In *In re Cunningham*, it clarifies that a PMSI is not qualified if the lender advances money to finance a pre-existing obligation<sup>75</sup>.

In contrast, the *Spartan Motors* court<sup>76</sup> discussed whether the after-advanced funds may qualify the purchase-money status, considering mainly the issue that possession and title of the goods had passed before the loan is advanced<sup>77</sup>. The given court relied on Gilmore's commentary that induced a court to find whether "*the loan transaction appear[ed] to be closely allied to the purchase transaction*"<sup>78</sup>. Gilmore emphasized that "*rigid adherence to particular formalities and sequences should not be required*"<sup>79</sup>. It was held that a transaction was sufficiently *closely allied* where the negotiation for a sale and purchase is conditional upon the availability of the loan and/or at the time of the sale, the lender committed to extending amount required to pay the purchase price<sup>80</sup>. The *Spartan Motors* court does not negate the finding of the *North Platte State Bank* court; rather, it clarifies *North Platte State Bank* case by stating that in the latter case, the loan was not a factor for negotiating the sale and purchase, and the lender did not commit to giving value enabling the debtor to pay the purchase price<sup>81</sup>. Under *Spartan Motors* court's view, possession and title are elements, important but not dispositive, in the "*closely allied*" test<sup>82</sup>. The sequence of the loan and the acquisition of property is narrow and inflexible to determine a PMSI. The *Spartan*

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<sup>73</sup> *ibid*, at p. 52

<sup>74</sup> *ibid*

<sup>75</sup> (Bankr. W.D.N.C., 2012), at pp. 7-9

<sup>76</sup> *General Elec. Capital Commercial Auto. Fin., Inc. v. Spartan Motors, Ltd.*, 675 N.Y.S.2d 626, 246 A.D.2d 41 (N.Y.A.D. 2 Dept., 1998)

<sup>77</sup> *ibid*, at p. 631

<sup>78</sup> *ibid*.

<sup>79</sup> Gilmore G, see n. 15, at p.782

<sup>80</sup> *Spartan Motors*, see n. 76, at p. 632

<sup>81</sup> *Spartan Motors*, see n. 76, at p. 633

<sup>82</sup> *Spartan Motors*, see n. 76, at p. 633

*Motors* court's ruling is persuasive because the "*closely allied*" test demonstrates the interrelation between the advance and the acquisition of new assets beyond the sequence of happening.

The common law has shed light on the relatedness between the PMSI and the underlying contract. The core characteristic of a PMSI is that the parties engage in the given transaction bearing in mind that the secured creditor finances the transaction of acquiring new assets, in other words, the up-coming asset other than pre-existing one secures the loan advancing to acquire it. It makes a PMSI different from ordinary security interests and distinguishes a purchase-money transaction from other secured transactions for general business purposes.

### **3.3 Establishment of purchase-money security interest**

The requisite for claiming priority is that a PMSI must be enforceable against the debtor and third parties; in other words, it should be attached to the collateral and perfected. The establishment of a PMSI must comply with the general rules of a security interest that require attachment and perfection.

#### **3.3.1 Attachment**

Attachment plays a dispositive role to determine the effectiveness of a security interest not only against a debtor but also subsequent purchasers and other secured and non-secured creditors. A security interest cannot be perfected if it does not attach to any collateral<sup>83</sup>. Unless otherwise prescribed, the attachment occurs when a security interest "*[becomes] enforceable against the debtor with respect to the collateral*"<sup>84</sup>. There are three prerequisites for the enforceability of a security interest, namely (1) "*value has been given*", (2) debtor's rights in the collateral or power to transfer rights in the collateral to a secured party, and (3) "*the debtor has authenticated a security agreement that provides a description of the collateral*"<sup>85</sup>. It does not matter which feature occurs first, but all of them must exist to make a security interest effective.

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<sup>83</sup> UCC §9-308(a)

<sup>84</sup> UCC §9-203(a)

<sup>85</sup> UCC §9-203(b)

The first requirement is that “*value has been given*”<sup>86</sup>. This requirement is usually undisputed because the extension of credit is usually clear<sup>87</sup>.

The second requirement is that the debtor must have “*rights in the collateral or the power to transfer rights in the collateral to a secured party*”<sup>88</sup>. It manifests the idea of functionalism that is not strictly requires full ownership to create a security interest. Under the principle of *nemo dat quod non habet* (no one can transfer what she does not have)<sup>89</sup>, a security interest only attaches to the extent of rights that a debtor has<sup>90</sup>. A debtor cannot grant a security interest more than what she has<sup>91</sup>. In this sense, for example, the security interest only attaches to 25% undivided interest in an item of equipment if the debtor only co-owns this item to this portion.

“*Rights in the collateral*” has been construed under the concept of other laws, particularly Article 2 on the sale of goods, showing that mere possession is not qualified<sup>92</sup>. *Evergreen Marine Corp.* is a good case to see how the title allocation plays a vital role in defining “*rights in the collateral*” as discussed elsewhere in the thesis<sup>93</sup>. The debtor can acquire “*rights in the collateral*” by estoppel for a security interest to attach. In *First National Bank of Omaha v. Pleasant Hollow Farm, Inc*<sup>94</sup>, A and B had a production agreement where A owned the crop and B planted and grew the crop by its equipment and employees. A bank advanced a loan to B secured by the crop upon the physical inspection of the land. At the time of inspection, the officer of A did not make clear that A owned the crop. The court ruled that A could not be estopped to deny that B has “*rights in the*

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<sup>86</sup> UCC §9-203(b)(1)

<sup>87</sup> Harris S and Mooney C, Jr., *Security Interests in Personal Property: Cases, Problems, and Materials* (6th edn, Foundation Press 2016), at p. 145

<sup>88</sup> UCC §9-203(b)(2)

<sup>89</sup> Harris S and Mooney C, Jr., see n. 87, at p. 146

<sup>90</sup> Comment 6 to the UCC §9-203, see Official Comment, at p. 848

<sup>91</sup> Harris S and Mooney C, Jr., see n. 87, at p. 146

<sup>92</sup> See more discussion on case law involving “rights in the collateral” in Clark B and Clark B, *The Law of Secured Transactions under the Uniform Code*, vol I (A.S. Pratt and Sons 2010), from p. 2-52 to p. 2-63

<sup>93</sup> See sub-section 3.2.1.1 of this thesis

<sup>94</sup> 532 NW2d 60, 30 UCC Rep. 2d 269 (Mo. Ct App. 1993)

*collateral*” to attach a security interest<sup>95</sup>. The debtor is also deemed to have “*rights in the collateral*” if it does not have a formal title but the control over the asset and bearing a risk of loss<sup>96</sup>. “*Rights in the collateral*” may be examined under the ostensible ownership theory where the debtor can misrepresent the potential creditors by the control or possession of the collateral as in the case *Kinetics*<sup>97</sup>.

However, Article 9 is considered as an exception of the *nemo dat* rule. It allows a debtor to create a security interest that attaches to greater rights than the debtor has in some cases<sup>98</sup>. To enforce a security interest, other than “*having rights in the collateral*”, a debtor alternatively is required to have “*the power to transfer rights in the collateral*”. This requirement reflects an exception to the *nemo dat* rule. According to the *nemo dat* rule, when a security interest is created on the collateral, a debtor only has residual rights in this property to create a subsequent security interest. Strictly speaking, the *nemo dat* rule grants the first priority to the first-in-time attached security interest in the same collateral. However, the first-to-file-or-perfect rule and the pre-filing ability, which are not in line with the *nemo dat* rule, give rise to a typical situation that a prior attached is subordinate to a later-in-time attached security interest. The competition of conflicting security interests in the same collateral is solved by the ranking relying on the order of filing rather than the order of attachment<sup>99</sup>. The time of filing is dispositive even though at that moment the first-to-file security interest has not yet attached to the collateral, and the latter-to file competing security interest is perfected earlier<sup>100</sup>. The notice filing system enables filing of a financing statement to be done prior to the attachment and perfection of a

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<sup>95</sup> See more discussion on this case in Clark B and Clark B, *The Law of Secured Transactions under the Uniform Code*, vol I (A.S. Pratt and Sons 2010), at p. 2-59, 2-60

<sup>96</sup> *Chambersburg Trust Co. v. Eichelberger*, 588 A2d 549, 15 UCC Rep 2d 1080 (Pa. Super. Ct. 1991)

<sup>97</sup> See sub-section 3.2.1.1 of this thesis

<sup>98</sup> Comment 6 to the UCC §9-203, see Official Comment, at p. 848. See more discussion, particularly examples of this situation in Harris S and Mooney C, Jr., ‘Using First Principles of UCC Article 9 to Solve Statutory Puzzles in Receivables Financing’ (2010) 46 *Gonzaga Law Review* 297, at pp. 301-2, Plank T, ‘Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language’ (2013) 68 *The Business Lawyer* 439, at pp. 456-9

<sup>99</sup> See Example 2 in Plank T, ‘Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language’ (2013) 68 *The Business Lawyer* 439, at pp. 456-7

<sup>100</sup> See Example 3 in Plank T, ‘Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language’ (2013) 68 *The Business Lawyer* 439, at pp. 457-9

security interest. Thus, filing is a method of perfection, but in some certain cases, filing does not guarantee a perfected security interest because the security interest has not yet attached to the collateral. Therefore, the priority rules of Article 9, irrespective of the debtor only has residual rights in the collateral, place the creditor having subsequently-attached security interest but first-to-file in the first priority position. It is considered “*the power to transfer rights in the collateral*” for enforceability and attachment.

In brief, the first-to-file-or-perfect rule as an exception to the *nemo dat* principle empowers the debtor the ability to transfer rights in the collateral to a secured party. Consequently, having rights in the collateral is not the only capacity to have a security interest attaching to the given collateral. The priority rules create the power to transfer rights in the collateral to meet the requirement of enforceability and attachment<sup>101</sup>.

Most of the collateral types call for the existence of a security agreement. It is the third requirement for attachment, but not the only one possibility. However, the secured party’s possession or other control over some particular collateral are also the methods to attach<sup>102</sup>. With respect to a security agreement, the UCC §9-203(b)(3)(A) expressly requires the debtor’s authentication and a description of the collateral. A signed-writing security agreement containing such a description is ideal, but it is not always the case. It is very common before courts that the plaintiff alleges on a financing statement giving details of collateral combining with other documents other than a “labelled” security agreement, one of which may show the debtor’s signature or authentication. Generally, the definition of “*agreement*” and “*security agreement*” in the UCC does not strictly demand a separate document for a security interest<sup>103</sup>. In *In re Numeric Corp.*<sup>104</sup>, the First Circuit Court holds that “[a] writing or writings, regardless of label, which

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<sup>101</sup> Harris S and Mooney C, Jr., ‘Using First Principles of UCC Article 9 to Solve Statutory Puzzles in Receivables Financing’ (2010) 46 Gonzaga Law Review 297, at p. 302

<sup>102</sup> UCC §9-203(b)(3)

<sup>103</sup> Agreement is defined as “*the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade...*”. UCC §1-201(a)(3). Security agreement means “*an agreement that creates or provides for a security interest*”. UCC §9-102(a)(74).

<sup>104</sup> 485 F. 2d 1328 (1<sup>st</sup> Cir., 1973)

*adequately describes the collateral, carries the signature of the debtor, and establishes that in fact a security interest was agreed upon, would satisfy both the formal requirements of the statute and the policies behind it*<sup>105</sup>. Today, the term “authenticate” and “authenticated” are aiming at replacing “sign” and “signed” respectively<sup>106</sup>. Therefore, evidence of a security interest agreement is broadened beyond the requirement of the signed writing to encompass authentication of all records. The debtor’s authentication requirement is deemed to suit two purposes: One is an evidentiary base to prevent disputes over the type of collateral subject to the security interest, and the second is to serve as a Statute of Frauds<sup>107</sup>.

The content of a security agreement must have the description of collateral, the purpose of which is evidentiary<sup>108</sup>. The standard of description is that “*it reasonably identifies what is described*”<sup>109</sup>. It does not require the exact and detailed description<sup>110</sup>. The UCC suggests several ways to suffice the description test<sup>111</sup>, the most noticeable of which is identifying the collateral by a type of collateral defined in the Code<sup>112</sup>. Generally, there are four primary types of collateral, namely consumer goods, equipment, farm products, and inventory<sup>113</sup>. However, in a consumer goods transaction, identifying collateral by the category of consumer goods is not sufficiently described unless it has descriptive components beyond the type<sup>114</sup>. Although generic terms like equipment,

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<sup>105</sup> *ibid*, at p. 1331. See more in *Baystate Drywall, Inc v. Chicopee Sav. Bank*, 429 N.E 2d 1138, 385 Mass. 17, 32 U.C.C Rep. Serv. 1315 (Mass., 1982), at p. 1141, *In re Jojo’s 10 Rest. Llc*, 455 B.R. 321, 74 UCC Rep. Serv. 2d441 (Bankr. Mass., 2011), at p. 326

<sup>106</sup> The former UCC requires a proper security agreement signed by the debtor. The revised UCC §9-102(a)(7) defines “authenticate” to encompass “sign” and “attach or logically associate with the record an electronic sound, symbol, or process”. With regard to the requirement of security agreement as a condition for enforceability, the former and the revised UCC are different only in the requirement of signature and authentication respectively (See *In re Rowe*, 369 B.R. 73 (Bankr. Mass., 2007, note 2, at p. 80)

<sup>107</sup> Comment 3 to the UCC §9-203(a)(3), see Official Comment, at pp. 847-8. See *In re Numeric Corp.* see n. 104, at p. 1331

<sup>108</sup> Comment 2 to the UCC §9-108(a), see Official Comment, at p. 837

<sup>109</sup> UCC §9-108(a)

<sup>110</sup> Comment 2 to the UCC §9-108, see Official Comment, at p. 837

<sup>111</sup> UCC §9-108(b)

<sup>112</sup> UCC §9-108(b)(3)

<sup>113</sup> Comment 4 to the UCC §9-102, see Official Comment, at p. 817

<sup>114</sup> UCC §9-108(e) and Comment 5 to the UCC §9-108, see Official Comment, at p. 837

inventory or farm products are deemed to be good description for attachment, super-generic description is not sufficient. Collateral described as “*all the debtor’s asset*” or “*all the debtor’s personal property*” or the like wording does not meet the requirement of description<sup>115</sup>. The underlying policy of these provisions is suggested that debtors and creditors are expected to have appropriate consideration in drafting the collateral description other than making use of the boilerplate of “*all assets*”, and the likely result is that some property of the debtor would be unencumbered<sup>116</sup>.

A financing statement, meanwhile, expands the sufficient indication of collateral beyond the description under the section 9-108 to embrace “*all assets*” or “*all property*”<sup>117</sup>. Attachment and filing clearly serve different purposes, and description might suffice for the purpose of filing but not necessarily for the purpose of attachment<sup>118</sup>. In some situations where there are gaps between a security agreement and a financing statement with respect to the description of collateral, the description in the former prevails since attachment has a role of attaching the security interest to the specific collateral. Meanwhile, a financing statement serves as giving notice to third parties and determining of priority between competing interests in the same collateral. It does not make the status of collateral effective unless the security interest attaches to the concerned collateral. In *In re Nightway Transp. Co., Inc*<sup>119</sup>, after considering the function of a security agreement and a financing statement, the court concluded that it was the security agreement governing the extent of the creditor’s security interest.

Any wording like “*all equipment*” may raise the question whether it encompasses after-acquired items since after-acquired collateral and future advances are allowed under the UCC<sup>120</sup>. When the description of collateral does not expressly provide for the after-acquired property, it is the intention of parties determining

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<sup>115</sup> UCC §9-108(c)

<sup>116</sup> Harris S and Mooney C, Jr., see n. 87, at p. 150

<sup>117</sup> UCC §9-504

<sup>118</sup> Comment 2 to the UCC §9-504, see Official Comment, at p. 981

<sup>119</sup> 96 B.R. 854 (Bankr. N.D. Ill., 1989), at p. 857

<sup>120</sup> UCC §9-204(a)(c)

the issue rather than statutory rules<sup>121</sup>. With regard to some collateral like inventory and receivables that are constantly turning over in the ordinary course of certain businesses, courts may hold that the given inventory and receivables include not only items at the date of the security agreement but also after-acquired ones<sup>122</sup>.

Attachment is at the heart of the American law on secured transactions in personal property. A security interest is not effective, in other words, a debt remains unsecured, until and unless it attaches to the collateral irrespective of a financing statement may be previously submitted.

### **3.3.2 Perfection: Filing a financing statement**

The term “perfection”, “perfect” or “perfected” in Article 9 refers to a legal step to establish priority over other interests in the collateral. A perfected security interest is the one that has attached, and all statutory requirements are fulfilled<sup>123</sup>. Different methods of perfection are recognized to suit different types of collateral<sup>124</sup>. There may be more than one method available to a type of collateral<sup>125</sup>, for instance, the goods can be perfected by either filing or possession. It is noticeable that filing a financing statement is the most popular method applying to almost all types of collateral, except deposit accounts and letter-of-credit rights and money taken as the original collateral<sup>126</sup>. Perfection by filing constitutes a central part of Article 9 since “*a financing statement must be filed to perfect all security interest*”<sup>127</sup> subject to exceptions<sup>128</sup>. Filing is not necessary when a security interest can be perfected by other permissible methods<sup>129</sup> including perfection upon attachment<sup>130</sup>, perfection upon the

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<sup>121</sup> Comment 3 to the UCC §9-108, see Official Comment, at p. 837

<sup>122</sup> *In re Nightway Transp. Co., Inc.*, see n. 119. at p. 858-9

<sup>123</sup> Comment 2 to the UCC §9-308(a), see Official Comment, at p. 874-5

<sup>124</sup> Harris S and Mooney C, Jr., see n. 87, at p. 160 for classification of methods of perfection with regard to types of collateral

<sup>125</sup> Harris S and Mooney C, Jr., see n. 87, at p. 158

<sup>126</sup> UCC §9-310(a) and UCC §9-312(b)

<sup>127</sup> UCC §9-310(a)

<sup>128</sup> UCC §9-310(b)

<sup>129</sup> Comment 2 and 3 to the UCC §9-310, see Official Comment, at pp. 878-9

<sup>130</sup> UCC §9-310(b)(2)

occurrence of another event<sup>131</sup>, perfection under other law<sup>132</sup> or the law of other jurisdiction<sup>133</sup>, perfection by taking possession, delivery or control<sup>134</sup>.

Filing a financing statement, which is a method of perfection, sets up the priority of a security interest against third parties. In *General Motors Acceptance Corp. v. Washington Trust Co. of Westerly*, the court verified that filing additionally carried the function of guaranteeing that third parties will have notice of existing security interests in collateral<sup>135</sup>, or to be exact, the possibility of a perfected security interest. Article 9 does not strictly require any legal step of establishing a security interest to be done chronologically. A security interest can attach after the financing statement is filed. For instance, even though a financing statement is filed with regard to the after-acquired collateral, a security interest attaches and is perfected only when the debtor acquires rights in the concerned collateral.

The American filing system is one of **notice filing**. A financing statement with the limited amount of information, instead of a security agreement, is filed in order to notify prospective creditors about a security interest possibly attaching to particular assets of the debtor. Sufficient information for a financing statement is: (1) the name of the debtor, (2) the name of the secured party or a representative of the secured party and (3) the collateral<sup>136</sup>. The secured party's name does not play any role in the searching system, and any change in the secured party's name does not cause seriously misleading. Meanwhile, the debtor's name plays a crucial role because the index for filing and searching is built upon it<sup>137</sup>. The significance of the debtor's name in filing and searching leads to many revisions of relevant provisions of Article 9. The success of the notice filing name-based system depends substantially on how convenient and correct that the filing record or the search logic can reveal a financing statement containing the prospective debtor's name.

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<sup>131</sup> UCC §9-310(b)(1), (5), (9)

<sup>132</sup> UCC §9-310(b)(3)

<sup>133</sup> UCC §9-310(b)(10)

<sup>134</sup> UCC §9-310(b)(4), (5), (6), (7), (8)

<sup>135</sup> 386 A.2d 1096, 120 R.I. 197 (R.I., 1978), at p. 1099

<sup>136</sup> UCC §9-502(a)

<sup>137</sup> Comment 2 to the UCC §9-503(a), see Official Comment, at p. 978

There are two “safe harbours” to indicate the collateral covered by a financing statement. The description can pursue the requirement of Section 9-108. Accordingly, a sufficient description should reasonably identify what is described<sup>138</sup>. Specific listing and describing by categories are among the list of examples of reasonable identification<sup>139</sup>. A financing statement otherwise can indicate that it covers all assets or all personal property<sup>140</sup>. The latter indication is likely to be inconsistent with sub-section 9-108(c) that denies super-generic description. However, the requirement of identification of collateral in security agreement as a requisite for attachment and identification of collateral in a financing statement have different roles. Identification of collateral as “*all the debtor’s assets*” or “*all the debtor’s personal property*” is not sufficient for the purpose of a security agreement, but still good for the purpose of filing<sup>141</sup>.

A financing statement does not require the identity of the filer since the given identity is not included in the search system<sup>142</sup>, but the filer must obtain an authenticated authorization from the debtor<sup>143</sup>, including the *ipso facto* authorization. An authenticated security agreement suffices the *ipso factor* authorization; thus, the filer does not need a separate authorization<sup>144</sup>.

Filing of a financing statement is not effective to perfect a security interest subject to other state or federal filing system<sup>145</sup> or state certificate-of-title law<sup>146</sup>. State certification-of-title laws require consensual security interests to be noted on the certificate of title. Automobiles, the popular collateral is covered by certificate-of-title laws. In *Pet Food Experts, Inc. v. Alpha Nutrition, Inc.*<sup>147</sup>, both competing secured creditors failed to be listed as a lienholder on the Title of the

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<sup>138</sup> UCC §9-504(1) and UCC §9-108(a)

<sup>139</sup> UCC §9-108(b)

<sup>140</sup> UCC §9-504(2)

<sup>141</sup> See discussion in sub-section 3.3.1 on attachment of this thesis

<sup>142</sup> Comment 2 to the UCC §9-509, see Official Comment, at p. 989

<sup>143</sup> UCC §9-509(a)(1)

<sup>144</sup> UCC §9-509(b) and Comment 4 to the UCC §9-509, see Official Comment, at p. 989

<sup>145</sup> UCC §9-311(a)(1). See Comment 2 to the UCC §9-311, see Official Comment, at p. 881. Documented ship, civil aircraft, railroad rolling stock, patents, copyrights and trademarks are among the list. See Clark B and Clark B, *The Law of Secured Transactions under the Uniform Code*, vol I (A.S. Pratt and Sons 2010), at 2-97 and 2-98.

<sup>146</sup> UCC §9-311(a)(2)

<sup>147</sup> (R.I. Super, 2016)

vehicle, even though one of them did file an appropriate financing statement validly indicating the collateral as all of debtor's "*presently owned and hereafter acquired equipment*"<sup>148</sup>. The foregoing security interests were held unperfected<sup>149</sup>. The interplay between certificate-of-title law and Article 9 is discussed in *Sovereign Bank v. Hepner (In re Roser)*<sup>150</sup>. The certificate-of-title law replaces Article 9 to the extent of procedural matters that includes filing, recording, releasing, renewing, or extending liens<sup>151</sup>. In turn, Article 9 governs priority between a security interest filed under the certificate-of-title law and the rights of a lien creditor arising from Article 9 in light of perfection date recorded in the Certificate of Title<sup>152</sup>.

The notice filing system does not provide much information. The filing record does not reveal other interests that may attach to the collateral including tax and other statutory liens<sup>153</sup>. The whole purpose of notice filing system is to give public notice that the collateral indicated is possibly subject to the claim of the secured party of record<sup>154</sup>, but it is a possibility rather than a confirmation of a security interest. Anyone having an interest is charged with the burden to make further inquiry to "*disclose the complete state of affairs*"<sup>155</sup>. Under the *In re Oak Rock Fin. LLC* ruling<sup>156</sup>, diligent interested parties would discover the status of collateral by searching the public record and take appropriate action, otherwise suffered the consequences<sup>157</sup>.

The notice filing system supports the first-to-file creditor to gain the competitive advantage over the later-to-file creditor. The requisite information in a financing

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<sup>148</sup> *ibid*, at p. 13

<sup>149</sup> *ibid*

<sup>150</sup> 613 F.3d 1240 (10th Cir., 2010)

<sup>151</sup> *ibid*, at p. 1245

<sup>152</sup> *ibid*

<sup>153</sup> Harris S and Mooney C, Jr., see n. 87, at p. 167

<sup>154</sup> Comment 2 to the UCC §9-502, see Official Comment, at p. 973; Courts have reaffirmed the foregoing purpose; see *In re Comprehensive Review Technology, Inc.*, 138 B.R. 195 (Bankr. S.D.Ohio, 1992), at p. 200 reviewing a number of cases stating the purpose of notice filing system; see *In re Oak Rock Fin., LLC*, 527 B.R. 105 (Bankr. E.D.N.Y., 2015), at p. 115

<sup>155</sup> Comment 2 to the UCC §9-502 and Comment 4 to the UCC §9-322, see Official Comment, at p. 973 and 910 respectively

<sup>156</sup> 527 B.R. 105 (Bankr. E.D.N.Y., 2015)

<sup>157</sup> *ibid*

statement does not include the amount of secured obligations. The later-to-file creditor cannot know the value of the prevailing claim in advance except that the first-to file creditor will have the first priority against the collateral of record to secure even an obligation incurred later than her interests. Therefore, the first-to-file creditor can competitively bid on subsequent loans against the collateral of record that is currently in the debtor's asset and not qualified to grant a prevailing PMSI to the later-to-file creditor<sup>158</sup>.

Limited information supplied for filing is said to have some benefit. It reduces the cost of filing, searching and filing administration<sup>159</sup>. It supports the grant of a security interest on inventory and receivables<sup>160</sup>. The asset of this kind is frequently turning over in the ordinary course of the debtor's business. Inventory or account financing is also done periodically or involved series of loans. An inventory or account financier files an initial financing statement and renews every five years to cover such categories of collateral rather than refile whenever an advance is made. The filing notice system, therefore, matches well with the first-to-file-or-perfect rule. A debtor in this context who has repeated transactions with the same secured creditor does not incur more transaction cost to finance every purchase of inventory<sup>161</sup>.

However, the filing notice system does not support a debtor who would like to grant many security interests in the equipment collateral to different secured creditors. The later-to-file creditor is not willing to extend secured credit when her interest is lower-ranking, and the prevailing claim cannot be determined in advance. In this sense, a transaction-based registration system is relatively attractive. This system provides sufficient information the later-to-file creditor to decide, and each registration is corresponding to the discrete amount of secured obligation in the absence of a future advance clause. Therefore, it is relatively open to a debtor who would like to take out loans against the same collateral from different creditors.

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<sup>158</sup> Jackson TH and Kronman AT, see n. 8, at p. 1180

<sup>159</sup> Baird DG, 'Notice Filing and the Problem of Ostensible Ownership' (1983) 12 The Journal of Legal Studies 53, at p. 59

<sup>160</sup> *ibid*, at p. 59; Jackson TH and Kronman AT, see n. 8, at p. 1180

<sup>161</sup> Jackson TH and Kronman AT, see n. 8, at p. 1180

## 3.4 Purchase-money security interest priority

### 3.4.1 Overview

One of the most striking achievements of Article 9 is the first-to-file-or-perfect rule. Priority ranking no longer depends on the order that secured transactions are created. The order of filing or perfection has become the primary rule resolving conflicting secured claims on the collateral. Nevertheless, a valid PMSI has its priority out of the first-to-file-or-perfect rule. As an exception to the first-to-file-or-perfect rule, the PMSI priority is non-temporal<sup>162</sup> allowing the first ranking over earlier filed security interests in the same collateral.

The first priority of a PMSI would not be questionable if the after-acquired property interest holder were required to accomplish some new act of perfection; in other words, the after-acquired property interest was not perfected automatically upon the debtor's acquisition of property, therefore could not be ranked according to the earlier time of filing. In this sense, the PMSI holder had the advantage to file her interest before the after-acquired property interest holder acknowledged that the debtor acquired new property or took appropriate action to protect her interest. However, the Article 9's recognition of after-acquired property security interest to be automatically perfected whenever the debtor acquires the concerned collateral raises the question whether a PMSI deserves the first priority irrespective of the time of filing or perfection<sup>163</sup>.

The first priority of PMSI can be justified under the "situational monopoly" theory. The after-acquired property clause creates a "situational monopoly" enabling a first-to-file secured lender to have a special competitive advantage over other lenders in dealing all subsequent loans to a debtor<sup>164</sup>. The recognition of PMSI can blunt the situational monopoly created by the after-acquired property clause to the extent that a debtor can obtain new loans on nearly competitive terms whether from an after-acquired property interest holder or

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<sup>162</sup> Comment 2 to the UCC §9-324, see Official Comment, at p. 919

<sup>163</sup> See Gilmore G, see n. 15, at pp. 743-8, 777; Jackson TH and Kronman AT, see n. 8, at p. 1165

<sup>164</sup> Jackson TH and Kronman AT, see n. 8, at pp. 1167-1172 for more discussion on how the situational monopoly is created

other creditors<sup>165</sup>. The first priority of PMSI is relatively persuasive because the debtor has more opportunities to access to credit than under the “situational monopoly” situation.

The “new money” theory can additionally shed light on the first priority of a PMSI<sup>166</sup>. The purchase-money financing is extended to acquire discrete assets that are not previously owned by the debtor, and the purchase-money loan is secured by the new assets. Article 9 strictly defines a PMSI to cover this type of transaction only in order to distinguish a purchase-money loan from any funding for general business purposes<sup>167</sup>. The new assets acquired under the purchase-money loan can contribute value to the debtor’s whole assets, then benefit other creditors to some extent. Furthermore, the PMSI does not touch or shrink the debtor’s pool of assets subject to earlier-perfected security interests. The purchase-money loan, therefore, does not threaten earlier-secured loan, and it is not the matter of concern to earlier creditors except that an earlier creditor would like to extend credit against the up-coming assets<sup>168</sup>.

Competitors with a PMSI holder can be classified into three types for the purpose of this present thesis: (1) unsecured creditors including lien creditors and the debtor’s trustee in insolvency, (2) sub-purchasers, (3) secured creditors<sup>169</sup>. A PMSI must comply with the general rules of priority since it is at first a security interest. Article 9 provides some specific priority rules for a PMSI to make it an exception to general security interests.

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<sup>165</sup> Jackson TH and Kronman AT, see n. 8, at p. 1172

<sup>166</sup> Jackson TH and Kronman AT, see n. 8, at pp. 1175-8 for more discussion on the new money theory and the tracing requirement with regard to a PMSI

<sup>167</sup> UCC §9-103; Jackson TH and Kronman AT, see n. 8, at p. 1175; Keith GM, ‘A Primer on Purchase Money Security Interests Under Revised Article 9 of the Uniform Commercial Code’ (2001) 50 University of Kansas Law Review 143, at p. 166; See more discussion on the concept of PMSI in sub-section 3.2.3 of this thesis

<sup>168</sup> Keith GM, ‘A Primer on Purchase Money Security Interests Under Revised Article 9 of the Uniform Commercial Code’ (2001) 50 University of Kansas Law Review 143, at p. 166; Jackson TH and Kronman AT, see n. 8, at p. 1177

<sup>169</sup> This classification is based on and adapted to the classification of competitors with general secured creditors by Clark B and Clark B, *The Law of Secured Transactions under the Uniform Code*, vol I (A.S. Pratt and Sons 2010), at 3-1

### 3.4.2 Purchase-money secured creditor vs. unsecured creditors

Fundamentally, a debtor is bound by a security agreement even though it is not perfected. Article 9 distinguishes the attachment and the perfection of a security interest to the extent that the former deals with the effectiveness of a security interest and the latter determines the priority ranking. A perfected security interest does not strengthen the secured creditor's position against the debtor; on the other hand, failure to perfect does not change the parties' relationship<sup>170</sup>.

When a security interest fulfills the requirement of attachment, it is enforceable against not only the debtor but also third parties including purchasers and creditors<sup>171</sup>. This general rule is subject to many exceptions stipulated in Article 9. For examples, an unperfected security interest is subordinate to the interest of lien creditors and certain buyers<sup>172</sup>, or an unperfected security interest is subordinate to a perfected security interest<sup>173</sup>. A general unsecured creditor cannot defeat the priority of a secured creditor over the collateral on the ground that the security interests is not perfected<sup>174</sup>. There is no exception with regard to general unsecured creditors unless they claim the collateral in the status of lien creditors or through a trustee in the debtor's insolvency.

Lien creditors are protected against an unperfected security interest. A lien creditor is defined as (1) "a creditor that has acquired a lien on the property involved by attachment, levy, or the like"; (2) "an assignee for benefit of creditors from the time of an assignment"; (3) "a trustee in bankruptcy from the date of the filing of the petition"; or (4) "a receiver in equity from the time of appointment"<sup>175</sup>. When the rights of a lien creditor intervene between the attachment and the perfection of a security interest, or at the time the security interest is filed but unattached, the secured creditor's priority position is defeated by the intervening

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<sup>170</sup> *In re Brooker*, 36 B.R. 839 (Bankr.M.D.Fla., 1984), at pp. 840-1

<sup>171</sup> UCC §9-201(a), §9-203(b)

<sup>172</sup> UCC §9-317

<sup>173</sup> UCC §9-322(a)(2)

<sup>174</sup> Clark B and Clark B, *The Law of Secured Transactions under the Uniform Code*, vol I (A.S. Pratt and Sons 2010), at 3-3

<sup>175</sup> UCC §9-102(a)(52)

claim<sup>176</sup>. Unlike other security interests, a PMSI enjoys a grace period of 20 days starting from the day a debtor receives delivery of the collateral to be perfected. An unperfected PMSI is good against the rights of lien creditors at the time the latter arises if the given financing statement is filed within the abovementioned grace period<sup>177</sup>.

Under the bankruptcy law, at the time the petition of the bankruptcy is filed, a bankruptcy trustee<sup>178</sup> is given the rights and powers of a hypothetical person who has an unsatisfactory judicial lien on the debtor's property under the relevant non-bankruptcy law<sup>179</sup>. This is called a strong-arm clause. Thus, under Article 9, a trustee can avoid any unperfected security interest on the date of petition. The debtor-in-possession who is a business debtor filing Chapter 11 petition and continuing to operate its business<sup>180</sup> also has the rights and powers of a lien creditor under Article 9 to avoid certain unperfected security interests<sup>181</sup>. The policy for the trustee's avoiding power is clear. It is said to be a mirror reflecting the situation of unperfected security interests at the time a judicial lien intervenes in non-bankruptcy cases<sup>182</sup>. It is seemingly a sanction to lenders who delay giving public notice of their security interests<sup>183</sup>. The purpose of perfection is not only for setting up priority against other security interests in the same collateral, but it also aims at avoiding the trustee's "strong arm" power.

### **3.4.3 Purchase-money secured creditors vs. purchasers**

A "purchaser" is defined broadly as a person "*taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property*"<sup>184</sup>. When a security

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<sup>176</sup> UCC §9-317(a)(2)(A)

<sup>177</sup> UCC §9-317(a)

<sup>178</sup> The trustee is appointed in bankruptcy case filed under Chapter 7 of the Bankruptcy Code "for the purpose of liquidating the property of the estate and distributing the proceeds to creditors". See Harris S and Mooney C, Jr., see n. 87, at p. 457

<sup>179</sup> 11 U.S.C §544(a)

<sup>180</sup> The bankruptcy case is filed under Chapter 11 of the Bankruptcy Code for the purpose of reorganization. Generally, a trustee is not appointed. See Harris S and Mooney C, Jr., see n. 87, at p. 457

<sup>181</sup> 11 U.S.C §1107 and §544(a)

<sup>182</sup> UCC §9-317(a)(2). See Harris S and Mooney C, Jr., see n. 87, at p. 466

<sup>183</sup> Harris S and Mooney C, Jr., see n. 87, at p. 467; Clark B and Clark B, see n. 174, at p. 6-12

<sup>184</sup> UCC §1-201(29) and (30)

interest attaches to the collateral, it is enforceable against third parties, namely other secured creditors, general creditors and purchasers. In the competition with general purchasers, a secured party has a shelter of section 9-315(a) providing for continuance of a security interest in the collateral notwithstanding sale, lease, license, exchange or other disposition thereof; and the attachment of identifiable proceeds. In other words, when the collateral is disposed of, the secured party can both follow the collateral in the hand of a third-party transferee and claim for the proceeds, but she may have only one satisfaction<sup>185</sup>.

The UCC, and particularly Article 9, also aim at promoting the free flow of commerce<sup>186</sup>. The continuance of security interest in the collateral is a matter of concern to bona fide parties who acquire the collateral in the ordinary course of business. Bone fide purchasers in many cases take free of security interest under the shelter of other provisions in Article 9, leaving the secured party only the security interest attaching to the proceeds. In brief, the general rule to enforce a security interest against purchasers upon attachment can be defeated in three circumstances:

- A buyer is a buyer of goods in ordinary course of business;
- A secured creditor authorizes the disposition of the collateral free from the security interest;
- A buyer receives delivery before the security interest is perfected.

#### **3.4.3.1 Buyers of goods in ordinary course of business**

Under section 9-320(a), a buyer of goods in ordinary course of business, not including persons buying farm products<sup>187</sup>, takes free despite the fact that the security interest is perfected, and the buyer knows its existence. It is crucial to determine who satisfies the status of a buyer in ordinary course of business. A buyer in ordinary course of business is defined in Article 1 as *“a person that buys*

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<sup>185</sup> Comment 2 to the UCC §9-315, see Official Comment, at pp. 892-3

<sup>186</sup> Clark B and Clark B, see n. 174, at p. 3-2

<sup>187</sup> A buyer of farm products from a person engages in farming operations cannot take free of a security interest created from the latter even though the former is a buyer in ordinary course of business but can assert Section 1324 of the Food Security Act of 1985, 7 U.S.C §1631. See UCC §9-320 (a) and Comment 4 to this section in Official Comment, at p. 907.

*goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, [...], in the business of selling goods of that kind*<sup>188</sup>. It excluded any buyer who “*acquires the goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt*”<sup>189</sup>. In other words, it is not necessary to check the public record when a buyer buys in the ordinary course of business from a seller in the business of selling goods of that kind, in good faith and without knowledge that the sale violates a third-party’s security interest, and does not take in bulk, or as security for, or to satisfy antecedent debt.

It emphasizes that the buyer must buy from the seller “*in the business of selling goods of that kind*”, that is almost limited to the seller of inventory<sup>190</sup>. Section 9-320(a) dealing with buyers of goods in ordinary course of business primarily applies to inventory collateral<sup>191</sup>. However, it indicates that the section primarily, other than solely, applies to the inventory collateral<sup>192</sup>. Furthermore, the second sentence of the statutory definition clarifies that the sale to the buyer must comport with “*the usual or customary practices in the kind of business in which the seller engages or with the seller’s own usual or customary practices*”<sup>193</sup>. A buyer who buys a worn-out car from the seller who is in the business of renting cars is not likely to have a shelter of a buyer in ordinary course of business because the seller is not engaged in selling cars, used or new. However, it is the ordinary course of business if selling worn-out cars are the seller’s usual practice constituting a course of dealings, or this practice is proved to be quite popular in the industry of that kind, even though it is not the seller’s primary business. The *Tanbro* court concluded that despite a secondary business, the sale within the industry norm could be in the ordinary course of business<sup>194</sup>.

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<sup>188</sup> UCC §1-201(9)

<sup>189</sup> *ibid*

<sup>190</sup> Clark B and Clark B, see n. 174, at p. 3-24

<sup>191</sup> Comment 3 to the UCC §9-320, see Official Comment, at p. 906

<sup>192</sup> Comment 3 to the UCC §9-320, see Official Comment, at p. 906

<sup>193</sup> UCC §1-201(9)

<sup>194</sup> *Tanbor Fabrics Corp. v. Deering Milliken, Inc*, 350 NE2d 590, 19 UCC Rep. (NY 1976), cited in Clark B and Clark B, see n. 174, at p. 3-24

Reading together the foregoing statutory definition and the provision under section 9-320(a) with regard to the buyer's knowledge of the security interest, it should be interpreted to be a mere knowledge of a security interest encumbering the goods to meet the requirement of a buyer of goods in ordinary course of business<sup>195</sup>. Thus, knowledge of a sale violating the terms of security agreement is not qualified.

It is required that a sale must have taken place<sup>196</sup>. It refers to Article 2 definition of a sale as "*the passing of title from the seller to the buyer for price*"<sup>197</sup>, and the title to the goods is not passed prior to "*their identification to the contract*"<sup>198</sup>. It depends on the seller's commitment with regard to delivery to determine the passing of title or the parties' agreement<sup>199</sup>. Payment of full purchase price is not a criterion to determine the passing of title. Any arrangement amounting to title retention or reservation has an effect of reserving a security interest<sup>200</sup>. Therefore, when the debtor/dealer transfers the collateral to a buyer in the ordinary course of business subject to title retention, the fact that the latter has not yet paid the purchase price in full does not cut off her claim as a buyer in ordinary course of business against the dealer's secured party.

A buyer in the ordinary course of business cannot have a shelter of section 9-320(a) if the security interest is not created by her immediate seller. It is a scenario of the so-called purchase of "pre-encumbered" goods where the goods are subject to a security interest that the immediate seller does not create<sup>201</sup>. A buyer, even though qualifying as a buyer in ordinary course of business purchasing from the seller of this kind, cannot take free of the security interest. In practice, a buyer in the ordinary course of business buying from the seller in the business of that kind is not motivated to conduct a search of public record which is time-consuming and costly. Investigating in the seller's source of title as

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<sup>195</sup> Comment 3 to the UCC §9-320, see Official Comment, at p. 906

<sup>196</sup> Clark B and Clark B, see n. 174, at p. 3-30

<sup>197</sup> UCC §2-106(1)

<sup>198</sup> UCC §2-401(1)

<sup>199</sup> UCC §2-401

<sup>200</sup> UCC §2-401(1)

<sup>201</sup> See discussion in detail in Richard HN, 'Section 9-320(a) of Revised Article 9 and the Buyer in Ordinary Course of Pre-Encumbered Goods: Something Old and Something New' (2000) 38 Brandeis Law Journal 9

recommended by the Official Comment to avoid the title conflict<sup>202</sup> is not desirable in this context. There is no clear explanation in the Official Comment why a buyer in ordinary course of business from the seller who created a security interest have more favoured protection than a buyer in ordinary course of business of pre-encumbered goods. Both of them buy from the seller in the business of that kind and have no alert to check the status of the goods.

### **3.4.3.2 Authority to make disposition**

Section 9-320(a) only applies when the disposition of the collateral to a buyer in ordinary course of business is unauthorized<sup>203</sup>. It refers to section 9-315 providing that the secured party can follow the collateral in the hand of third parties unless she authorizes the disposition free and clear of the security interest at hand<sup>204</sup>. Various manners of authorized dispositions brought to a great number of litigations under the former Article 9 that was read as follows: *“unless the disposition was authorized by the secured party in the security agreement or otherwise”*<sup>205</sup>. It was clarified in the PEB Commentary that the secured party must authorize the disposition of the collateral free and clear of the security interest, and whether it is an effective, express or implied, authorization is a question of fact<sup>206</sup>. The revised Article 9 adopts the standpoint of the PEB stressing and adding the wording that the disposition must be authorized free and clear to enable a third party to take free. Furthermore, whether a conditional authorization, for instance, the consent to a disposition conditioned upon the secured party’s receipt of the proceeds, constitutes an effective authorization under Section 9-315(a)(1) is at the court’s discretion<sup>207</sup>.

Under the revised Article 9, the secured party’s entitlement to the proceeds, under Section 9-315(a)(2) or under expressed terms of an agreement, is not

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<sup>202</sup> Comment 3 to the UCC §9-507, see Official Comment, at p. 985

<sup>203</sup> Comment 6 to the UCC §9-320, see Official Comment, at p. 907

<sup>204</sup> UCC §9-315

<sup>205</sup> Former UCC §9-306(2). See more discussion on case law involving the former UCC 9-306(2) with regard to express and unconditional; conditional; and implied authorization in Thomas S, ‘The role of Authorization in Title Conflicts Involving Retention of Title Clauses: Some American Lessons’ (2014) Common Law World Review 29, at pp. 47-59

<sup>206</sup> PEB Commentary No.3 Section 9-306(2) and 9-402(7)

<sup>207</sup> Comment 2 to the UCC §9-315, see Official Comment, at p. 893

itself amounting to an effective authorization of disposition<sup>208</sup>. In the context of title retention contractually expanding to the proceeds, Article 9 treats it as a PMSI in the collateral and in the proceeds created by an agreement. In the absence of an explicit term authorizing the disposition of the collateral free and clear of the security interest, even in the case of inventory collateral, it is not an easy task for any purchaser to prove an effective authorization of disposition. The attachment of a PMSI or any general security interest to the proceeds, under section 9-315(2) or an agreement, does not manifest the secured party's intention to authorize the disposition free and clear of the security interest. It is instead a solution to cope with the problem of ostensible ownership. Taking a security interest in personal property, though it may seem strange, is to follow the proceeds<sup>209</sup>. To this extent, the status of collateral as equipment or inventory is not taken into consideration. When the collateral is inventory, a secured party assumingly expects the disposition of the collateral to generate the proceeds to discharge debts. However, the existence of proceeds clause itself is probably not more than the authorization of disposition subject to a security interest, and a purchaser must prove more to constitute an authorization to dispose of the collateral free and clear. After all, the authority to sell provision does not have a great impact on a buyer in ordinary course of business who has a stronger shelter of Article 9-320(a) to take free of a security interest created by an immediate seller. In other words, checking the public record or inquiring into the authorization to sell is not a burden imposed on a buyer in ordinary course of business<sup>210</sup> even though they bear the risk of buying from a seller who does not create a conflicting security interest.

#### **3.4.3.3 Buyers receive delivery**

Even though a buyer is not qualified as a buyer in ordinary course of business or proof of effective authorization cannot be established, a buyer can take free and clear of a security interest under section 9-317(b). Accordingly, buyers must give value and receive delivery of the collateral without knowledge of the security

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<sup>208</sup> *ibid*

<sup>209</sup> Wessman MB, see n. 56, at p. 1286; Scott RE, 'A Relational Theory of Secured Financing' (1986) 86 Columbia Law Review 90, at p. 925

<sup>210</sup> Richard HN, see n. 201, at p. 37

interest and before it is perfected<sup>211</sup>. A purchase-money secured party has a grace period of 20 days after the debtor receives delivery of collateral to file a financing statement<sup>212</sup>. Therefore, if a purchase-money secured party files a financing statement timely but after a buyer receives delivery of the collateral, the former has priority over the latter, but subject to whether the latter is a buyer in ordinary course of business or not.

#### **3.4.4 Purchase-money secured creditors vs. other secured creditors**

Between competing secured creditors, Article 9 adopts “the first-in-time, first-in-right” principles in general, and it relies heavily on the first-to-file-or-perfection rule. A PMSI is an exception since it may gain the priority superior to earlier secured credits. This part discusses the general priority rules governing conflicting security interests first and then proceeds on priority rules governing PMSIs.

##### **3.4.4.1 “First-in-time, first-in-right” rule**

The *first-to-file-or-perfect* rule applies to the competition between perfected security interests. Whenever two conflicting security interests are unperfected, the order of attachment governs the priority between them<sup>213</sup>. In *Pet Food Experts*<sup>214</sup>, the court found that not only two competing security interests were not perfected, they also attached to the collateral simultaneously. Because Article 9 fails to govern the case, the given court relied on equity to give judgment for the creditor having after-acquired property clause. The *Pet Food Experts*’ ruling is that the priority should be given to the party that carried the most diligence. It is in line with the Article 9 *first-to-file-or-perfect* rule that favours the diligent party who conducted a search of other possible creditors and duly filed the security interest<sup>215</sup>.

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<sup>211</sup> UCC §9-317(b)

<sup>212</sup> UCC §9-317(e)

<sup>213</sup> UCC §9-322(a)(3)

<sup>214</sup> *Pet Food Experts, Inc. v. Alpha Nutrition, Inc.* (R.I. Super, 2016)

<sup>215</sup> *ibid*, at p. 18 and footnote 13

With respect to conflicting perfected security interests in the same collateral, the first-to-file-or-perfection rule is applied and interpreted to serve the purpose of the notice filing system. Section 9-322 provides that among perfected conflicting security interests, the first-to-file one takes priority. The above priority rules look simple at first glance, but it raises critical questions when it is implemented within the scheme of a notice filing system. In a simple scenario with two loans from two creditors, the first-to-file loan takes priority. It is not always the case when the first-to-file creditor makes future advances, or subsequently enters new security agreements covering the collateral described in the pre-existing financing statement, or in all foregoing situations, the debtor paid off the original loan. A financing statement may be filed initially to perfect a specific security agreement. In other words, a specific security agreement initiates a financing statement to perfect the concerned security interest. However, a financing statement does not contain much information except for the debtor's name, the secured party's name and the indication of the collateral. The collateral can be described by categories or simply referred to "all asset" or "all personal property" that does not reveal any specific information. It does not indicate any security agreement. In *Interbusiness Bank v. First Nat. Bank of Mifflin*, the court asserted that a financing statement did not necessarily refer to or have a connection with any specific security agreement; instead, it covered the certain collateral that was possibly subject to a claim<sup>216</sup>. In *In re Gilchrist Company* and *In re Comprehensive Review Technology, Inc.*, the courts granted judgment for future advances and new security agreements covered by an earlier-filed financing statement<sup>217</sup>. In *In re Gilchrist Company* and *In re Oak Rock Fin.* case, subsequent security agreements covered by earlier-filed financing statements were granted first priority even when the debtor paid off the original loans<sup>218</sup>.

It has been long confirmed that a financing statement and a security agreement are not interrelated. A financing statement does not cover a particular security agreement but certain types of collateral. For this policy, a financing statement

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<sup>216</sup> 318 F.Supp 2<sup>nd</sup> 230 (M.D. Pa, 2004), at pp. 240-1

<sup>217</sup> 403 F.Supp. (197 E.D.Pa., 1975); and 138 B.R. 195 (Bankr. S.D.Ohio, 1992) respectively

<sup>218</sup> See *In re Gilchrist Company*, 403 F.Supp. (197 E.D.Pa., 1975), *In re Oak Rock Fin., LLC*, 527 B.R. 105 (Bankr. E.D.N.Y., 2015), at pp. 119-121

can be filed under the authorization of a debtor or a potential debtor prior to the formation of a security interest or the attachment of a security interest. The filing date of an initial financing statement is effective with regard to multiple security agreements, both previously and subsequently executed, so long as succeeding continuation statements are duly filed to continue the effect of the initial financing statement. A financing statement is effective for five years after the date of filing. It will lapse on the expiration of the effective period unless a continuation statement is filed within six months before the end of this period<sup>219</sup>. Filing a separate financing statement is not required for every transaction, provided that a transaction is within the scope of the pre-existing financing statement; otherwise prescribed, it would nullify the purpose of notice filing<sup>220</sup>.

Although filing is a method of perfection, thanks to pre-filing, it separately set up a priority date for the concerned security interest that is not dependent on the date of perfection. When a security interest is filed before it attaches to the collateral, the given security interest is perfected at the time of attachment, but it enjoys the priority according to the time of filing. The first-priority security interest with regard to a future advance or after-acquired property can be maintained even though at the time of filing, both parties did not have any agreement or any intention to include a subsequent security agreement or after-acquired property or future advance<sup>221</sup>. In brief, the notice filing system accompanied by the limited requirement of information and pre-filing capacity enable a financing statement to cover multiple security agreements having the collateral as described.

Under a notice filing system, a financing statement is floated to cover all the assets or personal properties of the debtor in order to perfect any security agreement bearing the same debtor, creditor and collateral within the scope of the statement, and sets up the date of priority for the security interest at hand. In combination with the recognition of floating lien under the provision of after-acquired property, a floating financing statement empowers the secured creditor

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<sup>219</sup> UCC §9-515(b) and (c).

<sup>220</sup> Comment 2 to the UCC §9-322, see Official Comment, at p. 910; See *In re Gilchrist Company*, 403 F.Supp. (197 E.D.Pa., 1975), at p. 202

<sup>221</sup> Comment 2 to the UCC §9-502, see Official Comment, at p. 973

a great advantage over other creditors. In other words, it is likely to leave nothing for the debtor to create the first security interest in favour of subsequently filed creditors.

#### **3.4.4.2 Priority rule of purchase-money security interest**

To have the first priority, a PMSI must satisfy the requirement of section 9-324 that is classified according to the types of collateral, namely (1) general or non-inventory purchase-money priority, (2) inventory purchase-money priority, (3) livestock purchase-money priority and (4) software purchase-money priority.

The priority rule with regard to general purchase-money and inventory purchase-money priority will be discussed in detail. Livestock and software are special collateral in the context of the USA that can be left out of the discussion for the purpose of this thesis.

##### **a. Non-inventory purchase money security interest**

The general rule for purchase-money priority provided in the sub-section 9-324(a) applies to all collateral except for inventory, farm products livestock and software. Inventory are goods, other than farm products, which “*are leased by a person as a lessor*”, or “*are held by a person for sale or lease or to be furnished under a contract of service*”, or “*are furnished by a person under a contract of service*”, or “*consist of raw materials, work in process, or materials used or consumed in a business*”<sup>222</sup>. The implied criterion of the term “inventory” is that the sales or leases are or will be in the debtor’s ordinary course of business<sup>223</sup>.

The creditor may lose an incentive to perfect her interest early because the purchase-money priority is non-temporal. Thus, to take priority over an earlier-perfected conflicting security interest in the same collateral, a PMSI must be perfected when the debtor receives possession of the collateral or within twenty days after that<sup>224</sup>. The purchase-money creditor’s knowledge of pre-existing

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<sup>222</sup> UCC §9-102(a)(48)

<sup>223</sup> Comment 4 to the UCC §9-102, see Official Comment, at p. 817

<sup>224</sup> UCC §9-324(a)

conflicting security interest or that other creditor has filed against the same collateral does not disqualify the purchase-money status<sup>225</sup>.

Timely perfection is necessary to protect potential creditors who rely on the debtor's possession and the accuracy of the public record to deal with the debtor. It is worth noting that the filing system does not call for labeling the security interest as a purchase-money one. Searchers do not have information about the status of collateral. To potential creditors who may have a later-in-time filing, purchase-money or non-purchase-money collateral is meaningless in any dealing with the debtor. Nonetheless, without the requirement of timely perfected PMSI, potential creditors would have been misled by the debtor in possession if the purchase-money creditor had delayed her filing. It would have resulted in relatively serious consequence because a later-in-time filed PMSI has the first priority. The twenty-day grace period allowed for non-inventory purchase-money priority may place the PMSI in secret temporarily. The grace period bonus is justified on the ground that it is the business practice of filing after delivery regarding non-inventory purchase-money collateral<sup>226</sup>. To earlier-in-time filed creditors with after-acquired property clause, the public record does not reveal much information about an intervening security interest, that is whether it is a PMSI that makes pre-existing interests to be subordinate. Again, before making additional advances against the debtor's new property, it is strategic to make further inquiries.

The question about when the debtor "*receives possession*" of the collateral is also in dispute since Article 9 does not define the term "possession". It is worth mentioning that the term "*receives possession*" is interpreted correspondingly with respect to the trigger date running the grace period for non-inventory collateral and the time of giving notification for inventory purchase-money priority<sup>227</sup>. Possession in Article 9 is mentioned in two contexts: (1) within the scheme of notice filing where the debtor possesses the collateral, and (2) as a

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<sup>225</sup> Comment 3 to the UCC §9-324, see Official Comment, at p. 919

<sup>226</sup> Comment to the former UCC §9-312, cited in Gilmore G, 'The Purchase Money Priority' (1963) 76 Harvard Law Review 1333, at p. 1387

<sup>227</sup> See Comment 4 to the UCC §9-324, see Official Comment, at p. 920, and Gilmore G, see n. 15, at p. 799

method of perfection<sup>228</sup>. Court decisions show the split of authority in interpreting the term “*possession*”: a line of cases employed the obligation standard, while the other applied the physical control standard<sup>229</sup>.

Although constructive possession is treated as analogous to actual possession in some circumstances, the draftsman of the original UCC, Gilmore in his treatise *Security Interests in Personal Property* interprets possession as the debtor’s physical possession at her place of business. The *Kunkel* court<sup>230</sup> relied on Gilmore’s interpretation to give judgment for the purchase-money creditor since the debtor had never obtained possession of the collateral to trigger the date of giving notice as a condition to perfect an inventory PMSI<sup>231</sup>. In *In re Automatic Bookbinding Service, Inc.*<sup>232</sup>, it was held that possession was received at the time all the installments were delivered at the place of the debtor/buyer rather than the later time when the goods were fully installed to complete tender of delivery terms. The given court cited Gilmore to highlight physical possession and clarified the meaning of possession under the notion of ostensible ownership. The commentary to the section 9-324 also indicates that the debtor receives possession of collateral in this context when component parts of the goods are in possession of the debtor. This situation is sufficient to impress other potential lenders that the debtor acquires interests in the goods as a whole<sup>233</sup>.

The situation where the debtor receives possession under a non-Article 9 transaction and later buys the goods subject to the secured credit is complicated due to the competition between the physical control standard and the obligation standard. It is better to discuss the obligation standard with respect to the given issue before moving to the physical standard since the leading case *Brodie Hotel Supply, Inc. v. United States*<sup>234</sup> set up a cornerstone for the obligation standard but then were mentioned or distinguished in many cases adopting the physical

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<sup>228</sup> *ibid*, at p. 522

<sup>229</sup> *Citizens Bank v. FED. Financial Services*, 509 S.E.2d 339, 235 Ga. App. 482 (Ga. App., 1998), at p. 340

<sup>230</sup> *Kunkel v. Sprague National Bank*, 128 F.3d 636 (C.A.8 (Minn.), 1997)

<sup>231</sup> See UCC §9-324(b)(3) for the requirement of inventory purchase-money priority that will be discussed latter.

<sup>232</sup> 471 F.2d, 546, 11 U.C.C. Rep.Serv. 897 (4<sup>th</sup> Cir., 1972)

<sup>233</sup> Comment 3 to the UCC §9-324, see Official Comment, at p. 919

<sup>234</sup> 431 F.2d 1316 (9<sup>th</sup> Cir., 1970)

control approach. In *Brodie*, Lyon (the debtor) “took possession” of the restaurant including equipment from Brodie several months before he entered a bill of sale executed a chattel mortgage with Brodie, and a financing statement was filed to secure the unpaid purchase price of the equipment<sup>235</sup>. The *Brodie* court held that the trigger date for ten-day grace period<sup>236</sup> is when Lyon became a debtor for purposes of Article 9 irrespective of the debtor had possessed the equipment long before. The given court relied on the definition in Article 9 describing a debtor as “a person who owes payment or other performance of the obligation secured”<sup>237</sup> to argue that Lyon did not owe performance of the obligation secured by the collateral until the time of the bill of sale<sup>238</sup>. Thus, Brodie timely perfected its PMSI to prevail over the earlier-filed security interest.

Disputes have demonstrated that a sale on approval<sup>239</sup> and a lease-purchase transaction<sup>240</sup> are common situations where a purchase-money creditor did not perfect a PMSI at the time a debtor physically possess the goods under the bailment and the lease respectively. That the debtor physically possessed property before the creation of a security agreement may raise the question whether this security interest qualifies for the purchase-money status. As discussed elsewhere in this chapter, the later passing of the title and the “*closely allied*” test will give answer. Courts have also ratified the purchase-money status of the transaction at hand when the creditor-debtor relationship was held to be the event running the grace period<sup>241</sup>. To the contrary, many courts applied the physical possession standard. Several decisions tried to distinguish the case at hand from *Brodie* in terms of the completion of the deal. In *Brodie*, the prospective debtor took possession of the goods during a negotiation for purchase; thus, he was not obligated until and unless the sale was closed.

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<sup>235</sup> *ibid*, at pp. 1317-8

<sup>236</sup> The former UCC §9-312(4) provided ten days after the debtors receives possession as the grace period to perfect a non-inventory PMSI.

<sup>237</sup> Former UCC §9-105(d)

<sup>238</sup> *Brodie*, see n. 234 at p. 1318

<sup>239</sup> *Prior Bros., Inc., Matter of*, 632 P.2d 522, 29 Wn.App. 905 (Wash. App., 1981)

<sup>240</sup> *Brodie Hotel Supply, Inc. v. United States*, 431 F.2d 1316 (9<sup>th</sup> Cir., 1970), *Rainier Nat. Bank v. Inland Machinery Co.*, 631 P.2d 389, 29 Wn.App. 725 (Wash. App., 1981), *Color Leasing 3, L.P. v. F.D.I.C.*, 975 F.Supp. 177 (D.R.I., 1997)

<sup>241</sup> *In re McHenry*, 71 B.R. 60 (Bankr. N.D. Ohio, 1987), at p. 63

However, in *James Talcott, Inc. v. Associates Capital Company, Inc*<sup>242</sup>, the lease-option agreement bound the debtor retroactively as of the delivery date, and the leasee/buyer possessed the equipment as a “debtor” at the date of delivery<sup>243</sup>. In *In Re Micheals*<sup>244</sup>, the court found that, unlike *Brodie*, the eventual debtor was obligated to purchase the equipment since he signed purchase orders that took place before delivery<sup>245</sup>. The *In Re Michaels* court went further by acknowledging the physical control standard as a better approach and criticizing the obligation standard<sup>246</sup>. The physical control standard is considered to reduce “*the risk of mistaken reliance by potential or existing creditors on the debtor's apparent ownership of assets*” and promote “*the underlying policies of the Uniform Commercial Code in affording certainty, predictability for commercial transactions, and public disclosure*”<sup>247</sup>. Meanwhile, the obligation standard “*provides an opportunity for mischief and transforms the 20-day grace period into an open-ended time for perfection*” and discourages early filing and the policy of timely perfection with respect to purchase-money priority<sup>248</sup>. Furthermore, it neglects the ostensible ownership problem arising from the time the debtor physically possesses the collateral<sup>249</sup>. It allows the purchase-money priority to be effective by subsequent events, such as signing the contract of sale or execution of security agreement that cannot be observed by third parties<sup>250</sup>. Additionally, the meaning of the term “*debtor*” or “*collateral*” in the phrase “*the debtor receives possession of the collateral*” is inconsistent with the respective term “*debtor*” or “*collateral*” in a financing statement. “*Debtor*” and “*collateral*” indicated in a financing statement are not factors reflecting an existing creditor-debtor relationship since filing a financing statement can precede the formation of a security agreement. The

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<sup>242</sup> 491 F.2d 879 (6th Cir., 1974)

<sup>243</sup> *ibid*, at p. 883

<sup>244</sup> 156 B.R. 584 (Bankr. E.D. Wis., 1993)

<sup>245</sup> *ibid*, at p. 590

<sup>246</sup> *ibid*, at p. 590-1

<sup>247</sup> *ibid*, at p. 590

<sup>248</sup> *ibid*, at p. 591. See Cornman J, ‘When Is a Debtor “In Possession” Under U.C.C. § 9-312(4)?’ (1987) 19 Arizona State Law Journal 261

<sup>249</sup> Baird DG and Jackson TH, see n. 8, at p. 198

<sup>250</sup> *ibid*, at p. 199

obligation standard is also inconsistent with the meaning of possession in other disputes like *Kunkel* or *Automatic Bookbinding Services*<sup>251</sup>.

If it is agreed that filing is a good method to solve the ostensible ownership problem arising from non-possessory secured credit<sup>252</sup>, Article 9 would be applied uniformly if the physical control standard rather than the obligation standard were adopted to determining the grace period. The physical control approach ensures predictability and certainty for commercial transactions that is the underlying policy and purposes of Article 9 and the UCC<sup>253</sup>.

However, there is the criticism of the physical control standard. This standard focuses on disguised security interests and ignores a true lease or a true bailment<sup>254</sup>. It does not consider that non-Article 9 transactions do not fall within the filing scheme, so it is unfair to require given transactions to be filed in order to protect the eventual PMSI<sup>255</sup>. The physical control standard also ruins the commercial utility of transactions like a sale on approval or lease with purchase option<sup>256</sup>.

The adoption of the obligation standard and the physical control standard in interpreting the phrase “*debtor receives possession*” results in the split of authority. Nonetheless, cases like *Talcott* and *In re Michaels*, even though categorized in the physical control line of cases<sup>257</sup>, still looked to “obligated” factor. In other words, the grace period was triggered at the time of actual possession because the debtor was found to be obligated at this time. In *Citizens Bank v. FED. Financial Services*<sup>258</sup>, the court is correct to comment that the line between the obligation standard and the physical standard is just “*superficially*

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<sup>251</sup> See the above discussion on *Kunkel* and *Automatic Bookbinding Services* case

<sup>252</sup> Baird DG and Jackson TH, see n. 8, at p. 183

<sup>253</sup> Cornman J, ‘When Is a Debtor “In Possession” Under U.C.C. § 9-312(4)?’ (1987) 19 Arizona State Law Journal 261, at pp. 276-7

<sup>254</sup> Zinnecker TR, Pimzy Whimsy in the Eleventh Circuit: Reflections on *In re Alphatech Systems, Inc.*, (2005) 40 Gonzaga Law Review 379, at pp. 413-15

<sup>255</sup> *ibid*, at pp. 416-7

<sup>256</sup> Clark B and Clark B, see n. 174, at p. 3-72

<sup>257</sup> See Cornman J, see n. 253, at p. 272; Zinnecker TR, see n. 254, at pp. 411-2, 424-5; See *Matter of Miller*, 44 B.R. 716 (Bankr. N.D. Ohio, 1984), at p. 720; *Citizens Nat. Bank of Denton v. Cockrell*, 850 S.W.2d 462 (Tex., 1993), at p. 464

<sup>258</sup> 235 Ga. App. 482 (Ga. App., 1998)

*divergent*<sup>259</sup>, at least with regard to situations where physical possession precedes the execution of security agreement and underlying sale contract. The current official commentary to the UCC upholds the obligation standard by stating that possession in the purchase-money priority context with respect to the foregoing issue commences when the goods become collateral<sup>260</sup>. Possession in the purchase-money priority context is interpreted in a non-uniform manner. In cases where the debtor owed performance of obligation secured by the asset at the time physical possession was received, the physical standard applies. On the other hand, the obligation standard is adopted in cases where physical possession precedes the security agreement.

b. Inventory purchase-money priority

A perfected PMSI in inventory must comply with the sub-section 9-324(b) and (c) to attain super-priority. The requirement is relatively burdensome to the extent that it involves not only timely perfection but also notification to the holder of the conflicting security interest in the same collateral.

The grace period for perfection does not apply to an inventory PMSI. The given security interest must be perfected when a debtor receives possession of the inventory<sup>261</sup>. When the debtor receives possession is determined in line with the similar requirement with respect to non-inventory purchase-money security discussed above<sup>262</sup>.

Notification is required in order to protect the earlier-filed secured creditor against the debtor's fraud<sup>263</sup>. The draftsmen of Article 9 explain the need for notification based on the practice of inventory financing. An inventory financier typically makes periodic advances upon the debtor's application against upcoming inventory or periodic release of old inventory when new inventory is

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<sup>259</sup> *ibid*, at p. 486

<sup>260</sup> Comment 3 to the UCC §9-324, see Official Comment, at p.920

<sup>261</sup> UCC §9-324(b)(1)

<sup>262</sup> Comment 4 to the UCC §9-324, see Official Comment, at p.920

<sup>263</sup> *Fedders Financial Corp. v. Chiarelli Bros., Inc.*, 221 Pa.Super. 224 (Pa. Super., 1972), at p. 231; *In re Daniels*, 35 B.R. 247 (Bankr.W.D.Okla., 1983), at p. 250

received, believing that she has the first priority in the new inventory<sup>264</sup>. However, a fraudulent debtor may grant the PMSI in the inventory to another creditor<sup>265</sup>. When the inventory secured creditor learns about the up-coming inventory encumbered by a super-priority PMSI, she may consider not to make an advance that is subordinate to another interest. Notification is not required for non-inventory purchase-money priority because periodic advances against up-coming goods are unusual in financing equipment and consumer goods<sup>266</sup>. Notification must be authenticated<sup>267</sup>. It does not limit to written form but encompassing authentication of all records, that is both intangible form and tangible form<sup>268</sup>.

Parties to be notified are creditors who have filed “*a financing statement covering the same types of inventory prior to the date of filing of the PMSI*”<sup>269</sup>. Overall, a purchase-money creditor is only required to send a notification to earlier-filed creditors who have a security interest in the same inventory. A purchase-money creditor should search the public record to identify earlier-filed creditors and send the notification to the address provided in the relevant financing statement. An earlier-filed creditor is considered to receive notification when it is delivered to this address<sup>270</sup>.

The notification should be sent within five years before the debtor receives possession of the collateral<sup>271</sup>. It does not matter that a holder of conflicting inventory security interests receives notification before or after the PMSI is filed, so long as both the perfection of PMSI and receipt of notification occur before a debtor receives possession of the inventory. In *Kunkel* as discussed above, which is decided under the former UCC, the debtor was held not ever to possess the inventory to trigger the date determining the period of giving notification. In other words, since the debtor had never possessed the inventory, the purchase-

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<sup>264</sup> Comment 4 to the UCC §9-324, see Official Comment, at p. 920

<sup>265</sup> *ibid*

<sup>266</sup> *ibid*

<sup>267</sup> UCC §9-324(b)(2)

<sup>268</sup> See UCC §9-102(a)(7), (70) and Comment 9 to UCC §9-102, see Official Comment, at p.823-4

<sup>269</sup> UCC §9-324(c)(1)

<sup>270</sup> Comment 6 to the UCC §9-324, see Official Comment, at p. 920

<sup>271</sup> UCC §9-324(b)(3)

money creditor was not required to give notification to the holder of conflicting inventory security interests. The commentary to the revised UCC agrees with the *Kunkel* court's ruling to recognize the super-priority of perfected PMSI even if the notification is not given to the extent that the debtor never receives possession of the collateral<sup>272</sup>. A purchase-money secured party is not required to send notification separately for each time she expects to acquire the PMSI, that is, for each time the debtor receives possession of the inventory, so long as the inventory described in the notification are corresponding to the inventory delivered<sup>273</sup>.

A notification should state that "*the person sending the notification has or expects to acquire a PMSI in inventory of the debtor*" and describe the inventory<sup>274</sup>. Article 9 and relevant commentary do not give any instruction on how detailed and precise a notification should be. However, a notification should function as a warning to earlier-filed creditors holding conflicting inventory security interest about the first-priority encumbrance on the up-coming inventory<sup>275</sup>. Several cases under the former UCC showed many situations that a notification qualified the requirement for the super-priority status of a perfected PMSI<sup>276</sup>. In *Fedders*<sup>277</sup>, the court held that the description listing a line of inventory was sufficient for purposes of inventory purchase-money priority and rejected the contention that inventory must be described by the serial number<sup>278</sup>. The notification in *In re Daniels*<sup>279</sup> did not contain the term "purchase-money", rather, it mentioned that concerned the bank "[had]taken, or [planned] to take a security interest" in a line of collateral including inventory<sup>280</sup>. However, the bank was held to have a super-priority on the ground that the prior-filed creditor could not be misled nor

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<sup>272</sup> Comment 5 to the UCC §9-324, see Official Comment, at p.920

<sup>273</sup> *Fedders Financial Corp. v. Chiarelli Bros., Inc.*, 221 Pa.Super. 224 (Pa. Super., 1972), at p. 231

<sup>274</sup> UCC §9-324(b)(3)

<sup>275</sup> Comment 4 to the UCC §9-324, see Official Comment, at p. 920

<sup>276</sup> The former section 9-312(3)(c) provides for the description of inventory "by item or type". The phrase "by item or type" is abolished in the revised section 9-324(b)(4)

<sup>277</sup> *Fedders Financial Corp.*, see n. 273

<sup>278</sup> *ibid*

<sup>279</sup> *In re Daniels*, 35 B.R. 247 (Bankr.W.D.Okla., 1983)

<sup>280</sup> *ibid*, at p. 248

confused by a notification letter that only a purchase-money creditor was required to send<sup>281</sup>.

c. Purchase-money security interests in proceeds

The priority in the debtor's asset subject to a security interest is extending to its proceeds irrespective of the security agreement, or the financing statement does not include the proceeds as the collateral<sup>282</sup>. The proceeds, in general, is automatically perfected. If the security interest in the original collateral is perfected, the security interest in proceeds is perfected, too<sup>283</sup>. The effective period of an automatically perfected security interest in proceeds is twenty days running from the date of attachment. On the 21<sup>st</sup> day, the security interest in proceeds becomes unperfected unless it has a continuance of perfection<sup>284</sup>. The identifiable cash proceeds including "*money, checks, deposit account and the like*"<sup>285</sup> remain perfected indefinitely if the security interest in the original collateral is perfected<sup>286</sup>. However, the perfection of cash proceeds does not depend on the continuance of perfection of the original collateral<sup>287</sup>. Thus, the cash proceeds receive further protection than pure cash collateral. The only methods to perfect deposit account or money as original collateral are control or possession respectively<sup>288</sup>.

For non-cash proceeds that are defined as "*proceeds other than cash proceeds*"<sup>289</sup>, perfection other than automatic perfection should be done timely to keep the perfection runs continuously. Timely perfection is necessary to avoid a gap of unperfected status between the automatic perfection and the next perfection. A security interest in proceeds should be perfected by a financing statement or an

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<sup>281</sup> *ibid*, at p. 251

<sup>282</sup> UCC §9-315(a)(2) and §9-203(f)

<sup>283</sup> UCC §9-315(c)

<sup>284</sup> UCC §9-315(d) and Comment 4 to the UCC §9-315, see Official Comment, at p. 893

<sup>285</sup> UCC §9-102(a)(9)

<sup>286</sup> UCC §9-315(d)(2)

<sup>287</sup> UCC §9-315(d)(2) and Comment 7 to the UCC §9-315, see Official Comment, at p. 894

<sup>288</sup> See UCC §9-312(b)(1), (3) and Comment 5 to the UCC §9-312, see Official Comment, at p. 885. Accordingly, perfection by control arises from an agreement among the secured party, debtor and bank. The bank complies with instructions of the secured party with respect to disposition of the funds on deposit, although the debtor retains the rights to direct such disposition.

<sup>289</sup> UCC §9-102(a)(58)

amendment when the attachment of the proceeds occurs or within the 20-day period of automatic perfection<sup>290</sup>. A continuously perfected security interest in proceeds, thus, enjoy the time of filing or perfection as to the security interest in the original collateral<sup>291</sup>. However, if the proceeds are the kind of collateral perfected by filing a financing statement, and it is not obtained by cash proceeds, it is otherwise perfected<sup>292</sup> without taking further steps.

The proceeds collateral can be perfected as after-acquired property to achieve the same result if the financing statement covers the type of the proceeds. For instances, a financing statement describes the collateral as inventory and receivable account. The account, therefore, is both the proceeds of the inventory and the after-acquired collateral. However, the distinction between the proceeds and the after-acquired property is particularly meaningful in the bankruptcy context. The property acquired after the commencement of the bankruptcy case is not subject to a security interest created before that time<sup>293</sup>. On the other hand, this rule does not apply to the proceeds of the collateral subject to a pre-bankruptcy security agreement<sup>294</sup>.

Basically, the purchase-money priority is extending to the identifiable proceeds of purchase-money collateral so long as the security interest in proceeds is perfected under the general rules as discussed above<sup>295</sup>. However, the distinction between cash proceeds and non-cash proceeds is additionally essential since the two categories have different treatments with regard to the inventory purchase-money priority. The purchase-money super-priority in inventory is only extending to identifiable cash proceeds “*received on or before the delivery of the inventory to a buyer*”<sup>296</sup>. In *Sony Corp. of America v. Bank One, West Virginia, Huntington NA*<sup>297</sup>, the issue before the court is whether the buyer’s check dated one day later than the shipment were the cash proceeds received “*on or before*

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<sup>290</sup> UCC §9-315(d)(3)

<sup>291</sup> UCC §9-322(b)(1)

<sup>292</sup> UCC §9-315(d)(1)

<sup>293</sup> 11 U.S.C §522

<sup>294</sup> *ibid*

<sup>295</sup> UCC §9-324(a) and Comment 8 to the UCC §9-324, see Official Comment, at p.921

<sup>296</sup> UCC §9-324(b)

<sup>297</sup> 85 F.3d 131 (C.A.4 (W.Va.), 1996)

*the delivery*” of the goods<sup>298</sup>. The court argued that the term “*on or before the delivery*” aimed at distinguishing cash proceeds and account proceeds<sup>299</sup>. In other words, the UCC draftsmen differentiated transactions in which buyers pay in cash from transactions parties set up a credit arrangement<sup>300</sup>. The debtor Sony and the buyer were found to arrange a cash transaction rather than a sale on credit. It was held that in the modern business these days, slight delay between unloading of goods and the issuance of a check in payment for those goods had been reasonably expected and not attributed to the extension credit to the buyer for that short period of time<sup>301</sup>. Thus, the inventory purchase-money priority extended to the cash proceeds of inventory. The *Kunkel* court followed *Sony Corp.* and additionally explained that a cash sale was a sale in which the seller did not expressly extend credit to the buyer regardless of delay in payment<sup>302</sup>.

The distinction between the purchase-money priority in inventory and non-inventory collateral is justified by differences between inventory financing and non-inventory financing. Account or receivable financiers seldom rely on accounts generated from the sale of equipment, whereas they rely on account generated from the sale of inventory<sup>303</sup>. The policy on its face seems to favour account financiers and put inventory financiers in a disadvantageous position. Inventory financiers cannot follow the collateral sold in the ordinary course of the debtor’s business, and their entitlement to the proceeds is limited to cash proceeds. However, this policy is justified by the fact that the cash generated from an account financier is used for paying the inventory financing<sup>304</sup>. Furthermore, the cross-collateralization is solely accepted with regard to inventory PMSIs where the new purchase-money inventory collateral replaces the old one.

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<sup>298</sup> *ibid*, at p. 136

<sup>299</sup> *ibid*

<sup>300</sup> *ibid*, at p. 137

<sup>301</sup> *ibid*

<sup>302</sup> *Kunkel*, at p. 646

<sup>303</sup> Clark B and Clark B, see n. 174, at 3-72; Comment 8 to the UCC §9-324, see Official Comment, at p.921

<sup>304</sup> Comment 8 to the UCC §9-324, see Official Comment, at p.921

d. PMSI in commingled goods, accession, products or mass

The collateral may be put in processing or manufacturing that their identity is lost. In this situation, the collateral becomes commingled goods which are defined as “*goods that are physically united with other goods in such a manner that their identity is lost in a product or mass*”<sup>305</sup>. Article 9 does not have specific rules with regard to PMSI in this respect. In other words, the general rules will apply. A security interest does not remain in the original collateral that has become the commingled goods since the identity thereof is lost in the manufacturing process<sup>306</sup>. However, the security interest attaches the resulting product or mass<sup>307</sup>. If the original collateral is perfected, a security interest in a product or mass is perfected and enjoys the filing date of the original collateral to establish priority<sup>308</sup>. Although the provision of Article 9 is silent, the respective official comment clarifies that the security interest in the product and mass cannot exceed the value of the debt secured by the security interest in the commingled goods<sup>309</sup>. When a product or mass is made from more than one types of commingled goods subject to many security interests of different creditors, the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods, regardless of the purchase-money status<sup>310</sup>.

Article 9 distinguishes accession from commingled goods. Accession is defined to be “*goods physically united with other goods in such a manner that the identity of the original goods is not lost*”<sup>311</sup>. Section 9-335 governs a security interest in accession in a minimal way. The security interest continues in the accession<sup>312</sup>, and the accession remains perfected so long as the security interest in the original collateral is perfected<sup>313</sup>. An accession financier can remove an accession from other goods if she has priority over the claims of other parties in the

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<sup>305</sup> UCC §9-336(a)

<sup>306</sup> UCC §9-336(b) and Comment 3 to the UCC §9-336, see Official Comment, at p. 949

<sup>307</sup> UCC §9-336(c)

<sup>308</sup> UCC §9-336(d), (e)

<sup>309</sup> Comment 4 to the UCC §9-336, see Official Comment, at p. 949

<sup>310</sup> UCC §9-336(f)(2) and Comment 4 to the UCC §9-336, see Official Comment, at p. 949

<sup>311</sup> UCC §9-102(a)(1)

<sup>312</sup> UCC §9-335(a)

<sup>313</sup> UCC §9-335(b)

whole<sup>314</sup>. However, she is required to reimburse for the cost of repair of any physical injury to other goods or the whole<sup>315</sup>. This section does not answer whether an accession financier acquires a security interest in a whole; and if yes, whether she has a perfected security interest in a whole<sup>316</sup>. The priority rules with regard to an accession borrow from the general rules of priority including the priority of a PMSI<sup>317</sup>. Having a good financing statement and a timely notification, a purchase-money secured creditor always has priority over other inventory financiers as to the items described regardless of later filing. However, a security interest in an accession is always subordinate to a security interest in the whole that is perfected in compliance with a certificate-of-title statute covering almost all kinds of motor vehicles<sup>318</sup>. It can be said that Section 9-335 gives relatively clear and concise rules to the area of accession financing<sup>319</sup>.

### **3.5 Concluding remarks**

Under the unitary approach and functionalism adopted by Article 9, title retention, like other devices that secure payment or performance of obligations, regardless of forms, is treated as a security interest. The unitary approach, which brings together requisites and formalities for security interests into a single statute, was triggered to solve the segmental and complicated status of the law on secured transactions prior to the publication of the UCC. It should be stressed that the dynamic of creating new security devices by function, the adoption of functionalism in pre-Code statutes corresponding to new devices and the federalist system in the United States context considerably result in demand for the unitary treatment of security interest. Functionalism strongly supports the unitary approach to the extent that it restrains the differentiation among financing instruments, the creation of new security devices that aims at evading the requirement of filing or perfection, and the possibility of enacting new statutes to confront with new devices.

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<sup>314</sup> UCC §9-335(e)

<sup>315</sup> UCC §9-335(f)

<sup>316</sup> Comment 5 to the UCC §9-335, see Official Comment, at p. 948

<sup>317</sup> UCC §9-335(c)

<sup>318</sup> UCC §9-335(d)

<sup>319</sup> Clark B and Clark B, see n. 174, at p. 9-90

Title retention or conditional sale is the cornerstone of the PMSI. The cover of PMSI extends to loans advanced by third parties to acquire rights in the collateral because it shares the same characteristic of title retention, that is the contribution of new value to the debtor's business. Both kinds of PMSIs support a relatively competitive debt financing market that cannot be attained if it is dominated or monopolized by a first-to-file creditor with after-acquired property clause without the recognition of the PMSI and the respective first priority.

Article 9 distinguishes types of collateral that are typically categorized into inventory, equipment, farm products and consumer goods. Inventory, which is expected to be consumed or processed or sold in the ordinary course of business, receives special treatments. In the context of a PMSI, cross-collateralization, the first priority that is limited to the cash proceeds and the requirement of notification sent to earlier-filed secured parties are particular rules with regard to the inventory collateral.

A filing notice system that is simple, fast and cost-saving is also a core requirement for the operation of the PMSI. Generally speaking, it provides a relatively accurate, easily-determined date for priority purposes that is premised on the filing date. Furthermore, it is not necessary to file a financing statement corresponding to a specific secured transaction. This advantage is specifically practical when the collateral is inventory, even in the case of a PMSI. However, a notice filing system accompanied by the first-to-file priority rule has some weakness to the extent that it favours the interest of a first-to-file creditor. The later-in-time creditor does not have enough incentive to file against the same collateral to have only subordinate interest irrespective of the order that advances are made. The notice filing system does also not reveal much information relating to the filed security interests, especially the amount of secured obligation.

Although there are some restraints on later-in-time creditors and the debtor, it is undoubted that the benefit of a filing notice system outweighs its cost. Article 9 is a good model for the secured transaction law in personal property in terms of efficiency, and for the recognition of title retention as a security device in terms

of promoting transparency and competitive debt financing market. Transplanting the treatment of title retention in Article 9 into a jurisdiction is certainly involving the adoption of functionalism doctrine, and it also raises questions about the transplant of notice filing system and the unitary approach as well.

# CHAPTER 4 RETENTION OF TITLE IN THE AUSTRALIAN PERSONAL PROPERTY SECURITIES ACT 2009

## 4.1 Overview

Prior to the enactment of the Personal Property Securities Act 2009 (hereinafter “PPSA”), the Australian law on secured transactions and the treatment of title retention were based mainly on the English common law<sup>1</sup>. There were four types of secured transactions recognized at common law and in equity, namely mortgage, charge, pledge, and lien<sup>2</sup>, all of which were interests created or granted by the debtor over her existing or future asset. Title retention does not amount to a registrable charge irrespective of the goods subject matter of this transaction were appropriated to secure the buyer’s obligation of payment. It did not fall into the scheme of company charges registration because the seller/creditor retained the title to the goods supplied. Because the title to the goods belonged to the unpaid seller, she could reclaim the goods in the buyer’s insolvency or prevent them from falling into the scope of floating charge created by the buyer/debtor<sup>3</sup>. If title retention was contractually extended to the proceeds or products manufactured or assembled from the original goods, the unpaid seller’s interests in the proceeds or end products were likely to be construed as being created by way of charge and subject to registration under the Corporation Act to be valid against third parties<sup>4</sup>. Concerning the proceeds, Australian law slightly departed from English law to the extent that courts of the former jurisdiction were willing to enforce the trust clause<sup>5</sup>. In *Associated Alloy*<sup>6</sup>, the Australian High Court upheld

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<sup>1</sup> Stumbles JGJ, ‘The PPSA: The Extended Reach of the Definition of the PPSA Security Interest’ (2011) 34 University of New South Wales Law Journal 448, at p. 449; Brown D, ‘Australian Secured Transaction Law Reform’ in Gullifer L and Akseli O (eds), *Secured Transactions Law Reform Principle, Policies, and Practice* (Hart Publishing 2016), at p. 145

<sup>2</sup> Whittaker B, ‘Review of the Personal Property Security Act 2009: Final Report,’ (Commonwealth of Australia, 2015) [www.ag.gov.au](http://www.ag.gov.au), at p. 11

<sup>3</sup> Duggan A, ‘Romalpa Agreements Post- PPSA’ (2011) 33 Sydney Law Review 645, at pp. 646-7

<sup>4</sup> *ibid*, at p. 647

<sup>5</sup> See more discussion on the relevance of *Associate Alloy* case to English law in de Lacy J, ‘Corporate Insolvency and Retention of Title Clauses: Developments in Australia’ (2001) 2 Insolvency Lawyer 64

the effectiveness of the title retention trust clause over the future-acquired proceeds the buyer received from selling products made from the goods the seller had supplied<sup>7</sup> and denied construing the clause at hand as a registrable charge<sup>8</sup>. This decision somehow confirmed that parties to a transaction could evade the secured transaction treatment by opting for other forms.

After a long reform process starting from the 1970s, the PPSA 2009 came into force on 30 January 2012<sup>9</sup>. The outcome was not the codification of pre-existing rules. Instead, it set up a new regime for the law on secured transactions in personal property following the PPSA pattern initiated by Canadian law<sup>10</sup>. Canadian common law provinces and federal territories implemented their PPSAs from 1976 to 1982<sup>11</sup>. New Zealand then followed the Canadian province Saskatchewan PPSA to build the secured transaction law in personal property, and the New Zealand PPSA 1999 came into effect on 1 May 2002<sup>12</sup>. The PPSA model borrows the concept and structure from Article 9 of the UCC<sup>13</sup>. Accordingly, it adopts the functional approach and “notice filing” registration system and brings all security devices by function into a unitary treatment regarding creation, now called attachment and perfection, priority ranking and enforcement. It also introduces the concept of PMSI that replaces the pre-PPSA treatment of title retention.

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<sup>6</sup> *Associated Alloys Pty Ltd v ACN 001 452 106* (2000) 202 CLR 588

<sup>7</sup> *ibid*, at pp. 603-610

<sup>8</sup> *ibid*, at pp. 610-1

<sup>9</sup> Brown D, ‘Australian Secured Transaction Law Reform’ in Gullifer L and Akseli O (eds), *Secured Transactions Law Reform Principle, Policies, and Practice* (Hart Publishing 2016), at p. 145. For more information on Australian personal property security law reform, see Brown D, *ibid*, at pp. 146-8; Fisher S, ‘Personal Property Security Law Reform in Australia History, Influences, Themes and The Future’ in de Lacy J (ed), *The Reform of UK Personal Property Security Law Comparative Perspective* (Routledge-Cavendish 2010), at pp. 366-386; Duggan A and Brown D, *Australian Personal Property Securities Law* (2nd ed. edn, LexisNexis Butterworths 2016), at pp. 18-24

<sup>10</sup> Duggan A and Brown D, *Australian Personal Property Securities Law* (2nd ed. edn, LexisNexis Butterworths 2016), at p. 23; Barns-Graham V and Gullifer L, ‘The Australian PPS Reforms: What will the New System Look Like?’ (2010) 4 *Law and Financial Markets Review* 394, at p. 394

<sup>11</sup> Walsh C, ‘Transplanting Article 9: The Canadian PPSA Experience’ in Gullifer L and Akseli O (eds), *Secured Transactions Law Reform Principles, Policies and Practice* (Hart Publishing 2016), at p. 49 (footnote 5)

<sup>12</sup> Gedye M, ‘The New Zealand Perspective’ in Gullifer L and Akseli O (eds), *Secured Transactions Law Reform Principles, Policies and Practice* (Hart Publishing 2016), at p. 115

<sup>13</sup> Walsh C, see n. 11, at p. 49; Gedye M, see n. 12, at p. 115

The Australian PPSA has a PPSA style and learns the lesson from New Zealand, Canadian, and United States legislation<sup>14</sup>. The works of UNCITRAL and UNIDROIT also have some impacts<sup>15</sup>. Since the implementation of the PPSA 2009, Australian lawyers and relating parties have got acquainted with new vocabulary in the law on secured transactions. A security interest from the present time has a statutory definition, and the meaning is broader than ever before<sup>16</sup>. The parties to a security interest are called the secured party and the grantor. The grantor, in general, is the one having the interest in the collateral to which a security interest is attached<sup>17</sup>. The term “*grantor*” instead of the term “*debtor*” as in Article 9 is used to acknowledge that the grantor may not be the one who owes payment or performance of an obligation secured by a security interest<sup>18</sup>. The secured asset is called as the collateral that is defined as “*personal property to which a security interest is attached*”<sup>19</sup>. Other terms are also imported as “*attachment*” and “*perfection*”.

## **4.2 Concept of purchase-money security interest**

### **4.2.1 Security interests: Functional approach**

The PPSA sets up a unitary regime for secured transactions in personal property. All the security devices with regard to personal property are brought under the ambit of a single law. The functional approach broadens the scope of application to embrace many transactions that have been traditionally regarded as quasi-security interests like title retention. It also establishes a unified set of rules to govern attachment, perfection, priority and enforcement, and a single electronic registration system for all types of security interests. Under the unitary

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<sup>14</sup> Parliament of the Commonwealth of Australia HR, *Personal Property Securities Bill 2009 Explanatory Memorandum* (2008-2009), at p. 10

<sup>15</sup> *ibid*

<sup>16</sup> Barns-Graham V and Gullifer L, ‘The Australian PPS Reforms: What will the New System Look Like?’ (2010) 4 *Law and Financial Markets Review* 394, at p. 394

<sup>17</sup> PPSA 2009 s 10

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

approach, the PPSA replaces over 70 Commonwealth, State, Territory statutes, common law and equity rules governing personal property security interests<sup>20</sup>.

The reform of personal property securities law in Australia is a reform of legal thinking to be in line with what has implemented in other common law jurisdictions like the United States, Canada, and New Zealand<sup>21</sup>. The functional approach is employed, and all security devices are treated under a single concept “security interest”. Security interest for the first time is statutorily defined as:

*“an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).”*<sup>22</sup>

This definition is similar to Canadian and New Zealand PPSAs and is not far from the UCC definition. Courts will look at the substance of a transaction rather than the form to find out whether it creates a security interest. A slight difference between the American and Australian definition is that the Australian texts emphasize the irrelevance of the identity of the person having title to the property.

The PPSA provides a non-exhaustive list of transactions securing payment or performance of an obligation as examples of security interests<sup>23</sup>. They are a fixed charge, a floating charge, a chattel mortgage, a conditional sale agreement, a hire purchase agreement, a pledge, a trust receipt, a consignment, a lease of good, an assignment, a transfer of title, and a flawed asset of arrangement. This list gives examples of transactions falling within the PPSA’s scope due to the security function thereof rather than limiting the concept of a security interest to the listed transactions<sup>24</sup>. Fixed charge, floating charge, chattel mortgage, pledge are conventional secured transactions long accepted in Australia whereas others are security interests in substance recognized from the enactment of PPSA.

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<sup>20</sup> *ibid*

<sup>21</sup> *Barns-Graham V and Gullifer L*, see n.16, at p. 395

<sup>22</sup> PPSA 2009 s 12(1)

<sup>23</sup> PPSA 2009 s 12(2)

<sup>24</sup> *Whittaker B*, see n. 2, at p. 45

The PPSA adopts the ostensible ownership as the primary principle, recognizing it as a material concern that could be solved by the requirement of perfection including registering a financing statement; otherwise, the given security interest could not prevail over competing interests in the same collateral in some instances<sup>25</sup>. The PPSA has a scope of application beyond security interests in substance to cover three kinds of transaction called "deemed" security interests, namely the interest of (1) a transferee under a transfer of an account or chattel paper, (2) a consignor who delivers goods to a consignee under a commercial consignment, (3) a lessor or bailor of good under a PPS lease<sup>26</sup>. These transactions are treated as security interests irrespective of they do not secure payment or performance of an obligation. Transactions of those kind also create the problem of ostensible ownership like a non-possessory security interest. Therefore, the extension of the PPSA to those given transactions is for perfection and priority ranking, but not for applying enforcement rules.

The Australian PPSA provides a good lesson to deal with the ostensible ownership problem arising from true lease and bailment, which does not secure payment or performance of an obligation. Unlike Article 9, PPSA-style legislations include lease and bailment into their scheme of perfection and priority but limit the scope of application to certain types of lease and bailment called a PPS lease. In the Australian PPSA, a PPS lease generally embraces any lease or bailment of goods that have a particular long term, for instances for more than one year or more than 90 days concerning serial-numbered property<sup>27</sup>, and the lessor or bailor must regularly engage in the business of leasing or bailing goods respectively<sup>28</sup>. In *Albarran and Others v Queensland Excavation Services Pty Ltd*, it is argued that the lessee has rights not limited to possessory rights, but also proprietary rights to attach a security interest to the concerned item<sup>29</sup>. The court relied on the policy addressed in the New Zealand Commission's report on the

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<sup>25</sup> Whittaker B, see n. 2, at p. 39-41

<sup>26</sup> PPSA 2009 s 12(3)

<sup>27</sup> PPSA 2009 s 13(1). The lease or bailment term may have more than one-year term, or indefinite term, or a term of up to one year that is automatically renewable or renewable at the option of one party.

<sup>28</sup> PPSA 2009 s 13(2)

<sup>29</sup> [2013] NSWSC 852, at para. 26

PPSA to treat the commercial lease similar to chattel mortgages and charges as well as title-based securities because it raises the same degree of apparent ownership<sup>30</sup>. It is understandable that a long-term lease can raise a relatively severe ostensible ownership problem. However, without an explanation, it is not clear why a lessee or a bailor must be engaged in the business of leasing or bailing goods respectively. Bailment is worth a few words of discussion in this respect. Basically, two types of bailment are subject to the PPSA, one of which in substance secures payment or performance of an obligation to be treated as a security interest<sup>31</sup>. The other is deemed security interest that must have three conditions, two of which are mentioned above, namely (1) more than one-year term in general, (2) the bailor is regularly engaging in the business of bailing goods, and (3) “*the bailee provides value*”<sup>32</sup>.

In *Re Arcabi Pty Ltd*, to find that the bailor was not to engage in the business of bailing goods, the court relied on New Zealand Court of Appeal’s argument in *Rabobank*<sup>33</sup>. The *Rabobank* court interpreted the word “*in the business of [bailing] goods*” as that the owner actually intended to gain profit from the bailment and excluded bailment where the bailor did not receive payment, and it is the business of the bailee<sup>34</sup>.

With regard to the condition requiring the bailee to provide value, the *Re Arcabi Pty Ltd* court avoided answering the given question that was considered difficult. Otherwise, it provided two alternative interpretations<sup>35</sup>. One was the requirement that the bailee provided consideration at large that included services the bailee provided the bailor, and bailment was incidental to such

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<sup>30</sup> *ibid*, at para. 31

<sup>31</sup> [2014] WASC 310, at para. 19

<sup>32</sup> PPSA 2009 s 13(3)

<sup>33</sup> *Re Arcabi Pty Ltd*, see n. 31 at para. 24

<sup>34</sup> *Rabobank v McAnulty*, [2011] NZCA 212, at para. 40. The New Zealand PPSA has the equivalent provision that treats a lease for more than one year as a security interest even though it does not meet the requirement of the security interest definition. This provision mentions “*lease and bailment of goods*” to embrace into a lease for more than one year, but the remainder of the provision refers only lease. The *Rabobank* court came to conclusion that the reference to lease should be considered as shorthand references back to the phrase “*lease and bailment of goods*”. *Ibid*, at para. 27.

<sup>35</sup> *Re Arcabi Pty Ltd*, see n. 31, at para. 26

performance. A warehouse agreement and car repair in a garage were examples in this sense. The other was the specific consideration that the bailee gave for the bailment. It is argued that the latter alternative was preferable since it was aiming at limiting the application of PPS lease on bailments<sup>36</sup>. The former alternative may include all bailments into the concept of PPS lease because the bailee always provides consideration by performing a service<sup>37</sup>.

The provisions for PPS lease do not probably take into account of Article 9 experiences concerning bailment for processing where the bailee use the material supplied by the bailor and return products in exchange for the fee<sup>38</sup>. The bailment of this kind is likely not at the common knowledge that the bailee does not own the goods like wheat in a grain warehouse, or cars in the garage for repair, particularly when the bailee also manufactures its own goods to sell. The material in possession of the bailee raises serious ostensible ownership problem since the bailee can misinterpret her interest in the goods to third parties.

Bailment for processing is also a good illustration that the Australian PPSA policy dealing with ostensible ownership is likely to have a gap if it excludes the bailment of this kind from the scope of the PPS lease. The bailor is doubted to be “*regularly engaged in the business of bailing good*”. It can be primarily argued that the bailor in the given transaction is regularly engaging in the business of bailment because the profit gained is the value added when the bailee return processed or manufactured goods. However, in this transaction, the bailee receives service fee other than making payment for using the materials. It does not meet the requirement that the bailee provides value if a relatively narrow interpretation is accepted.

Although Australia and the United States belong to the common law tradition, the context in Australia is not similar to that of the United States, which had long adopted functionalism in many statutes to treat, for instances, conditional sales and trust receipts as registrable security devices prior the publication of the

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<sup>36</sup> Duggan A and Brown D, *Australian Personal Property Securities Law* (2nd ed. edn, LexisNexis Butterworths 2016), at p. 81

<sup>37</sup> *ibid*

<sup>38</sup> See discussion in part 3.2.1.1 of this thesis

UCC<sup>39</sup>. Formalism, which strictly stresses the legal form of property transfer and the grant theory in which a debtor must own the asset to create a security interest, has a deep root in the Australian-Anglo common law thinking<sup>40</sup>. The focus on the question who owns the property from the formalism perspective surprisingly complements the operation of functionalism. In *Albarran*, it was correctly asserted that the concept of ownership was not irrelevant even in the case of PPSA priority framework<sup>41</sup>. In this case, the defendant leased and transferred possession of caterpillars to the company M. M was periodically invoiced and paid to the defendant the amount corresponding to finance charges payable by the defendant to its secured creditors who financed the defendant to acquire the caterpillars. M then created security interests in favour of F in the caterpillars. F through its receivers claimed possession of the caterpillars. The *Albarran* court tried to answer the question who was the true owner of the vehicles and found that M owned one and the defendant owned the two others<sup>42</sup>. M had paid out all expenses incurred for the defendant to acquire one caterpillar, and after that, the defendant did not render any invoice relating to this caterpillar. Concerning two caterpillars belonged to the defendant, the court found that M possessed under a lease accompanied by an agreement to transfer title upon the discharge of the finance<sup>43</sup>. The lease was qualified as a PPS lease that required registration.

It is worth noticing that the surrounding circumstances relating to three motor vehicles were similar except that M did not pay out the finance charges relating to the concerned two caterpillars. This fact was apparently invisible to third parties who were likely to take security interests in the caterpillars due to M's possession and possibly a clear concerned public record showing that they were unencumbered. The *Albarran* court was correct to distinguish ownership from "rights in the collateral" that M had to attach a security interest to the caterpillars. M's full ownership acquired by the discharge of the finance cut off any

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<sup>39</sup> See discussion on part 3.2.1.1 of this thesis.

<sup>40</sup> Gullifer L (ed), *Goode on Legal Problems of Credit and Security* (4<sup>th</sup> edn, first published 2008, Sweet & Maxwell 2012) at p. 11

<sup>41</sup> *Albarran and Others v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852, at para. 11

<sup>42</sup> *ibid*, at para. 11-9

<sup>43</sup> *ibid*, at para. 17

proprietary rights of the defendant in the concerned item. In contrast, the rights of defendant in the other items remained and lack of registration resulted in subordination to the claim of other secured creditors with respect to those items.

The United States case law demonstrates confusion and uncertainty when it deals with ostensible ownership problem arising from commercial lease and bailment<sup>44</sup>. The Australian ruling in *Albarran* proves that it is not the failure of functionalism to distinguish between ownership and security as different concepts, but the uncertainty in American law in this respect is a result of failing to bring true or commercial lease and bailment into the ambit of Article 9. The PPSA treatment of PPS lease is valuable for any jurisdiction, even the United States, that considers bringing lease and bailment into the scope of the law on secured transactions in personal property for perfection and priority.

#### **4.2.2 Purchase-money security interest**

A conditional sale is among the list of security interests. The term “conditional sale”, which is under common understanding in the American and Canadian context amounting to title retention, is imported into the PPSA. However, a conditional sale in the Australian context is broader than title retention. In business common sense, it is an agreement subject to any condition not limited to title retention to be satisfied to complete a sale transaction<sup>45</sup>. It is suggested that the term “conditional sale” should be removed and the arrangement would be referred as “*an agreement to sell subject to retention of title*” to avoid any ambiguity and uncertainty<sup>46</sup>.

Since title retention is subject to an in-substance security interest under the PPSA, a title-retaining seller can protect her interest under the PMSI framework to gain the super-priority position. Title retention as a security interest in substance from now on does not degrade the priority claim over the goods supplied so long as the seller/secured party complies with the requirement of a

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<sup>44</sup> See discussion on sub-section 3.2.1.1 of this thesis

<sup>45</sup> Whittaker B, see n. 2, a p. 46

<sup>46</sup> *ibid*, at p. 47

PMSI. Nevertheless, the regime of PMSI has drastically changed the nature of relationships arising from *Romalpa* agreements.

A purchase-money security interest (“PMSI”)<sup>47</sup> is defined in section 14(1) PPSA 2009:

- (a) a security interest taken in collateral, to the extent that it secures all or part of its purchase price;*
- (b) a security interest taken in collateral by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights;*
- (c) the interest of a lessor or bailor of goods under a PPS lease*
- (d) the interest of a consignor who delivers goods to a consignee under a commercial consignment.*

Although this definition does not refer to the related concept of purchase-money collateral and purchase-money obligation, it has a similar effect to the Article 9 definition. Specifically, it is similar to the definition under the former UCC except that the former UCC stipulated that a seller PMSI is the one “*taken or retained by the seller*”<sup>48</sup>. The word “*retained*” does not appear in the Australian version. Thus, it is questionable that the PPSA impliedly considers title retention as the passing of property to a buyer together with the grant-back of a security interest in favour of a seller. The PPSA lacks provisions corresponding to the UCC that expressly considers title retention limited to a reservation of a security interest<sup>49</sup>, and “*title passes to the buyer... despite any reservation of security interest*”<sup>50</sup>.

The concept of PMSI is classified as a seller and a lender PMSI. From the American experience of the application of this concept, determination of a PMSI should respond to many issues. Among them is the scope of purchase-money obligation concerning “*purchase price*” and “*value for the purpose of enabling*” with regard to a seller and a lender PMSI respectively. The PPSA expressly states

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<sup>47</sup> The exact term in the PPSA 2009 is without hyphen: *purchase money security interest*, while the term in Article 9 has hyphen: *purchase-money*.

<sup>48</sup> Former UCC §9-107

<sup>49</sup> UCC §1-201(35) and 2-401(1)

<sup>50</sup> UCC §2-401(2)

that purchase price or value “includes... credit charges and interest payable for the purchase or loan credit”<sup>51</sup> that is narrow relative to the corresponding interpretation under Article 9 that generally covers “expenses incurred in connection with acquiring rights in the collateral”<sup>52</sup>.

The PPSA has the same solution to Article 9 dealing with situations called mixed security interests where the purchase-money collateral secures other obligations, or another collateral secures the purchase-money obligation<sup>53</sup>. They are called mixed securities under Australian law. The purchase-money status remains, but the PMSI is limited to the purchase-money obligation or the purchase-money collateral<sup>54</sup>.

It changed the legal consequence of all monies title retention clause under the leading *Amour v Thyssen Edelstahlwerke AG* case<sup>55</sup>, as illustrated in the following example<sup>56</sup>.

Example: All monies retention of title clause pre-PPSA and post-PPSA

D grants a security interest to SP1 in all present and after-acquired property. Later, SP2 sells an item of equipment to D. The title retention clause states that SP2 retains ownership of the goods until all debts owing to SP2 including the purchase price are paid in full.

The all monies retention of title clause is upheld in pre-PPSA under the sale of goods law and the *Amour* case. Generally, SP2 has priority over SP1 in the equipment even though the purchase price of the equipment is paid in full.

Under the PPSA s 14(3), title retention is treated as a PMSI and debts other than the purchase price of the equipment are not a purchase-money obligation. If SP1

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<sup>51</sup> PPSA 2009 s 14(8)

<sup>52</sup> Comment 3 to the UCC §9-103, see Official Comment, at p. 830

<sup>53</sup> UCC §9-103(f) allows the purchase-money collateral to secure non-purchase-money obligation and the non-purchase-money collateral to secure purchase-money obligation in non-consumer goods transactions.

<sup>54</sup> PPSA 2009 s 14(3), (4). Unlike Article 9, the PPSA 2009 only defines purchase-money obligation corresponding to its definition of PMSI.

<sup>55</sup> [1991] 2 AC 339; [1990] 3 WLR 810

<sup>56</sup> This example and its following discussion are adapted from Duggan A, see n. 3, at pp. 656-7

and SP2 perfect their security interest properly, SP2 has priority over SP1 in the equipment to enforce the payment of it. With regard to other debts, the priority between SP1 and SP2's security interest in the equipment depends on who perfects the concerned security interest first.

The PPSA PMSI embraces a PPS lease and a commercial consignment in the ambit. This treatment of PPS lease as a PMSI is not found in Article 9, but it expressly considers the consignor's interest in goods as a PMSI in inventory. Generally, a lease can be categorized into two types: one in substance secures payment or performance of an obligation, and the other is not in substance a security interest but qualifies to be a PPS lease<sup>57</sup>. A PPS lease has a term of more than one year, and the lessor or bailor engages in the business of leasing or bailing goods respectively. It should be noticed that a sale and lease back to the seller is excluded from the concept of PMSI. If a PPS lease which is a deemed security interest for the purpose of the PPSA had not been treated as a PMSI, it would have given rise to an undesirable outcome<sup>58</sup>. Suppose that a lessor leases an item of equipment under a two-year operation lease that may fall within the scope of after-acquired property subject to an earlier-filed security interest granted to another creditor<sup>59</sup>. It is unexpected that a PPS lease in the given case was subordinate to the earlier-filed after-acquired property security interest with regard to the item of equipment at hand.

However, a security lease cannot be itself a PMSI under the PPSA. It raises the question whether the like undesirable outcome occurs if the secured party/lessor does not have the first priority<sup>60</sup>. The point is that a security lease should meet all conditions of a PMSI to have a purchase-money status.

With regard to commercial consignments, the scope excludes any transaction in which a consignee is an auctioneer or in the business of selling or leasing goods of other<sup>61</sup>. The exclusion demonstrates that the ostensible ownership problem is

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<sup>57</sup> PPSA 2009 s 13

<sup>58</sup> Duggan A and Brown D, see n. 36, at p. 246

<sup>59</sup> *ibid*

<sup>60</sup> Whittaker B, see n. 2, at pp. 316-7

<sup>61</sup> PPSA s 10

not serious to be solved, and registration is unnecessary if third parties has general knowledge of it.

### **4.3 Establishment of purchase-money security interest**

A PMSI must comply with the general rule governing security interests to be effective against the grantor and third parties. Attachment and perfection are two imported concepts referring to the enforceability and priority ranking respectively.

#### **4.3.1 Attachment**

In general, “*a security interest attaches to collateral*” to be effective against the grantor when (1) the grantor “*has rights in the collateral, or the power to transfer rights in the collateral to the secured party*”, and (2) “*value is given for the security interest*”<sup>62</sup>. A security agreement is implicitly required since the PPSA applies to consensual security interests<sup>63</sup>.

Attachment and a written security agreement with a description of the collateral are required for a security interest to be enforceable against third parties<sup>64</sup>. The slight difference from Article 9 is that attachment under the PPSA is not sufficient to enforce a security interest against third parties, and it does not require an authenticated security agreement with a description of the collateral. The given requirement is separately provided for enforceability against third parties.

Enforceability of a security interest under the PPSA can be said to have two levels: (1) against the grantor, in other words, when “*the security interest has attached to the collateral*”, and (2) against third parties. Despite the foregoing difference, the enforceability against third parties under the PPSA corresponds well to Article 9.

The absolute property is more than sufficient to grant a security interest, but it is uncertain when the grantor is not an owner but having possession of the

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<sup>62</sup> PPSA s 19(1), (2)

<sup>63</sup> Duggan A and Brown B, see n. 36, at p. 106

<sup>64</sup> PPSA s 20(1), (2). Alternatives for a written security agreement is the secured party's possession of collateral, or perfection by control.

collateral. It expressly states that “*when the grantor obtains possession of the goods*” under a conditional sale including arrangement subject to title retention, as well as under a PPS lease, she has “*rights in the collateral*”<sup>65</sup>. In other words, it is not merely a possessory right but amounting to the proprietary right to grant a security interest<sup>66</sup>.

The formalities requirement, for instance, a written security agreement, is strictly essential to enforce a security interest against third parties and constitutes a condition for the perfection purpose. Possession and perfection by control are also alternatives to meet the formalities requirement<sup>67</sup>. In the title retention context, these alternatives are not suitable because the goods subject to title retention are expected to be released to the buyer/grantor. The formalities requirement can be expressed as follows:

- (1) A security agreement is evidenced in writing;
- (2) The writing is signed by the grantor or adopted or accepted by the grantor by her conduct showing her intention to adopt or accept the writing;
- (3) The writing contains a description of the collateral<sup>68</sup>.

Writing is defined broadly to include any record of word or data<sup>69</sup>, and method of signing includes both hand-writing and encrypted signature<sup>70</sup>. The requirement of the signed writing by a grantor evidenced a security agreement is considered to facilitate the practice of sale and purchase transactions that possibly involves the correspondence exchange between parties, and a buyer/grantor may sign only a piece of correspondence or accept by her conduct<sup>71</sup>.

Like American courts, Australian courts have adopted the collage doctrine to decide that a combination of writings with adequate references showing a description of the collateral and the grantor’s signature or other conduct of

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<sup>65</sup> PPSA s 19(5)

<sup>66</sup> *Albarran and Others v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852, at para. 26

<sup>67</sup> PPSA s 20(1)(b)

<sup>68</sup> PPSA s 20(2). See *Carrafa v Doka Formwork Pty Ltd*, [2014] VSC 570 (2014), at para. 43

<sup>69</sup> PPSA s 10

<sup>70</sup> PPSA s 20(3)

<sup>71</sup> Whittaker B, see n. 2, at p. 123; Duggan A and Brown D, see n. 36, at p. 117

acceptance can fulfil the formalities requirement<sup>72</sup>. The writing evidencing a security agreement must contain a description of the collateral. The writing can describe the collateral as the grantor's all present or after-acquired property or all present or after-acquired property except specified items or classes of personal property. Article 9 does not allow a similar description for the purpose of attachment, but it is acceptable for a description of the collateral in a financing statement. Except for this, the PPSA adopts the Article 9's approach that only requires a description sufficient to "*make possible the identification of the collateral described*" rather than an "*exact and detailed*" one<sup>73</sup>. With regard to a PMSI, the collateral must be carefully identified. The priority status is granted only to a security interest securing the purchase price of the collateral or the value enabling a grantor to acquire rights in the collateral. In sale and purchase transactions subject to title retention, it is not likely to cause the problem of description because the goods subject-matter of the sale agreement are also the collateral subject to the relevant PMSI, and they must be identified to fulfil requirements of the sale of goods law.

#### **4.3.2 Perfection**

Perfection, like attachment, is a freshly-imported term introduced into the Australian legal system. It refers to the validation of a security interest in light of priority against other creditors and other third parties. Basically, a security interest fulfilling the formalities requirement is effective against third parties as in the foregoing discussion, but it is not a condition to set up priority over other competing claims in the same collateral. However, perfection does not mean absolute priority enjoyed by a security interest over other interests since there is usually a scenario of two or more competing perfected security interests in the same collateral<sup>74</sup>. It is also not essential to have a perfected security interest to be superior to other interests, for example, is the case of two competing unperfected security interests<sup>75</sup>.

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<sup>72</sup> *Carrafa v Doka Formwork Pty Ltd*, [2014] VSC 570 (2014), at para. 45-50,

<sup>73</sup> Comment 2 to the UCC §9-108, see Official Comment, at p. 837

<sup>74</sup> Duggan A and Brown D, see n. 36, at pp. 132-3

<sup>75</sup> *ibid*

In general, under the PPSA, perfection can be classified into three modes, namely registration, possession and control, all of which carry the function of giving public notice about the possibility of a security interest<sup>76</sup>. There are also additional modes of temporary or automatic perfection where the concerned security interest is not revealed to the public during the time of perfection<sup>77</sup>.

Registration, which is a term used in Australian jurisdiction instead of the term “filing” in Article 9, is apparently the main method of perfection, and in the title retention context, it is the most suitable one since the goods/collateral are expected to be in a grantor’s possession.

Prior to the PPSA, the Australian registration law provided different regimes for different types of collateral or types of security interests or types of debtors, for instances are the bill of sale register, the motor vehicles securities register, or the register of company charges<sup>78</sup>. Under the functional approach, security interests by function are subjected to the same treatment including a unique registration system. The Australian PPSA adopts the concept of a notice filing register that covers almost all security interests, but it also has its own developments and achievements. The Australian registration is centralized, that is to say, the registration is at the federal level and subject to federal statutes. Registration is governed not only by the PPSA but also the Personal Property Securities Regulations (hereinafter “PPSR”) supplementing the PPSA. The personal security interest law in the United States and Canada is state-based; therefore, registration or filing is subject to different state-based systems.

The content of a financing statement under the Australian law reveals more information than of Article 9, which requires only details of the secured party, of the grantor and a description of the collateral<sup>79</sup>. Searchers can learn from a PPSA

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<sup>76</sup> Whittaker B, see n. 2, at p. 127

<sup>77</sup> *ibid*

<sup>78</sup> See more discussion on the Australian pre-PPSA registration in Duggan A and Brown D, see n. 36, at pp. 161-4

<sup>79</sup> PPSA s 153(1), Item 1, 2, and 4 of the table

financing statement the end time of registration, whether the security interest is subordinate to any other security interests, whether it is a PMSI<sup>80</sup>.

A security interest is registered against the grantor's name, or the serial number of collateral if it is consumer property<sup>81</sup>. In the latter case, it is not required to include the grantor's details into a financing statement<sup>82</sup>. Searchers rely on the grantor's name or serial number to discover any possible security interests upon their concerned collateral. Any mistake in registering the grantor's name or serial number that leads the search against the grantor's name or serial number respectively to an undisclosed security interest will invalidate the financing statement<sup>83</sup>, thus making the security interest unperfected unless it is perfected by other modes. Article 9 does not combine the grantor's name search and the serial number search in the notice filing system. Serial numbered property may be subject to non-UCC filing systems like a state certification-of-title one where, for example, an automobile is the collateral.

A description of the collateral is supposed to be one of the most crucial parts of a financing statement. It provides details of which asset of the grantor is encumbered. Despite its expected function, the idea of a notice filing system is to provide limited information that demands further inquiries. The study on Article 9 financing statement demonstrates that searchers will be given notice about the possibility of a security interest upon the debtor's asset, which is usually all existing or after-acquired property or some categories of property. Except for involving serial-numbered consumer property, a financing statement under the PPSA does not deviate much from its Article 9 counterpart, even though it calls for relatively comprehensive data. A description must meet all the following requirements<sup>84</sup>:

- Indicating the collateral as commercial property or consumer property;

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<sup>80</sup> PPSA s 153(1), Item 5, 6, and 7 of the table

<sup>81</sup> Serial-numbered property is identified as, aircrafts, motor vehicles, watercraft, some intangible property like a design, a patent, a plant breeder's right, a trade mark or a license over any intangible property. See PPSR Schedule 1 Clause 2.2.

<sup>82</sup> PPSA s 153(1), Item 2 of the table

<sup>83</sup> PPSA s 164(1)(b), 165(a), (b)

<sup>84</sup> PPSA s 153(1), Item 4 of the table

- Indicating the serial number in case it is consumer property. Indicating the serial number of commercial property is optional;
- Indicating a single class prescribed by the PPSR, namely agriculture; aircraft; all present and after-acquired property; all present and after-acquired property, except; financial property; intangible property; motor vehicles; other goods; watercraft<sup>85</sup>;
- Proceeds must be described in compliance with the PPSR, that is to say, it must be described as the present and after-acquired property, or identified particular property by item, or by the class of personal property<sup>86</sup>.

If there are two or more different classes of the collateral, the security interest must be registered separately<sup>87</sup>. For instance, a car dealer may grant a security interest in cars, tool and equipment, parts and accessories to seek financing assistance. The secured party must register a financing statement describing the collateral as “commercial property, motor vehicle”, and another financing statement describing the collateral as “commercial property, other goods”.

Uncertainty occurs by the compulsory indication of commercial or consumer property, and a single class prescribed by the PPSR. For example, a secured party must distinguish between motor vehicle, aircraft, watercraft, and other goods, or between financial property and intangible property. A financing statement also has a free text field so that a secured party can give a more specific description of collateral than foregoing compulsory identification. It is worth repeating that Article 9 does not require any compulsory indication of category or class of the collateral although it does define categories of goods, for example, equipment, inventory, or chattel paper. In the Article 9 financing statement, the filer is at his discretion to describe the collateral at hand by filling in a free text field.

It cannot conclude that an Article 9 or a PPSA financing statement can give more information of the collateral to prospective secured parties or lenders. The following illustration may shed light on this point. Assuming that a secured party

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<sup>85</sup> PPSR Schedule 1 Clause 2.3

<sup>86</sup> PPSR Schedule 1 Clause 2.4

<sup>87</sup> PPSA s 153(1), Item 4 of the table

supplies credit to a car dealer by taking a security interest in cars, trucks and other motor vehicles, accessory and parts, tool and equipment to operate the car dealer's service. In an Article 9 financing statement, collateral described in a free text field as "all and after-acquired inventory and equipment" sufficiently covers types of assets within the parties' intention with regard to collateral. In a PPSA financing statement, the secured party must indicate the collateral as commercial property and a single class of collateral that requires at least two financing statements to indicate "motor vehicles" and "other goods" separately. Both of financing statements may or may not need a description in a free text field like an "all and after-acquired" term, or details like accessory and parts, tool and equipment. In a context that a grantor is a car dealer, it is expected that motor vehicles on sale, accessory and parts, tool and equipment for the service are collateral despite that they are described as inventory and equipment under Article 9 or motor vehicles and other goods under the PPSA financing statement. However, the filer under the PPSA and PPSR scheme has more burden to provide compulsory information that may not satisfy the searcher's demand for information. In fact, a searcher who proposes a secured loan is in a strategy to ask for further information, for instance, specific security agreements, after looking at the registration in both jurisdictions.

The registered security interest must be indicated as a purchase-money one to enjoy the super-priority ranking. However, it is ambiguous about the legal consequence of failing to tick the PMSI box. If it makes a seriously misleading defect, the registration is ineffective, and as a result, the security interest is not perfected<sup>88</sup>. The PPSA does not define a "seriously misleading defect". In *Future Revelation Ltd v Medica Radiology & Nuclear Medicine Pty Ltd*, the New South Wales Supreme Court relied on Canadian case law to find that a defect is seriously misleading if a search does not disclose a concerned security interest<sup>89</sup>. In other words, the purpose of registration is to reveal a possible security interest granted by a grantor upon the collateral, so a defect that makes this purpose impossible must be seriously misleading. Failing to tick the PMSI box

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<sup>88</sup> PPSA s 164(1)(a), s 21

<sup>89</sup> [2013] NSWSC 1741

does not lead to an undisclosed security interest until and unless the reference to the collateral or the grantor is correct. The undisclosed information is the expected purchase-money status. Thus, it is satisfactory to keep the financing statement effective, but the secured party cannot claim the super-priority ranking.

On the other hand, the wrong indication of a PMSI in the collateral is a defect causing an ineffective registration<sup>90</sup>. The security interest is, therefore, unperfected. The validity of a security interest against third parties is challenged not only regarding the super-priority ranking but also a general security interest as a whole.

Article 9 does not require a PMSI notice in a financing statement. However, to enforce a PMSI in inventory, the purchase-money secured party is expected to send a notification to earlier secured parties holding a conflicting security interest in the same collateral. Notification via a public registration is the best way of giving notice to the extent that it constructively informs the rest of the world about the existence of a PMSI in the collateral. Surprisingly, an Article 9 financing statement does not carry this function. This policy is explained that a PMSI only has a severe impact on earlier after-acquired property security interests, and the purchase-money status is meaningless to later security interests. Generally, an earlier-filed creditor does not have any respond against the interference of a PMSI, except for inventory financing. If an inventory financier knows about a PMSI filed against the same collateral, she will consider not to make the further advance to the debtor to finance the up-coming inventory. This is the reason why Article 9 is only concerned with a compulsory notification to earlier-filed creditors with regard to inventory collateral. The Article 9 solution is likely efficient since the notice is sent directly to all concerned creditors, whereas, under the PPSA, the concerned creditors need to search the record whenever making an advance for any intervening PMSI.

The indication of a PMSI does not bring much benefit to both existing and potential creditors other than earlier-filed inventory financier who may prefer

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<sup>90</sup> PPSA s 164(1)(b), s 165(c)

private notification about a PMSI as demonstrated in the Article 9 policy. Under the PPSA, the secured party, particularly a purchase-money lender even loses a perfected security interest when it is turning out a non-purchase-money one. It is, therefore, recommended to abolish the requirement of purchase-money indication in a financing statement<sup>91</sup>.

In brief, description of collateral under Article 9 is at the filer's discretion to optimize the secured party's interests whereas under the PPSA, it is compulsory to give relatively discrete information that causes burden rather than the benefit to the secured party.

The philosophy of the notice filing system initiated by Article 9 is a simple notice saying that a security interest possibly encumbers some or all the debtor's assets. Follow-up inquiry with the debtor will give more information about any outstanding security agreement covering the collateral. The PPSA notice filing system does not fully satisfy with this policy. It expresses the concern about the likeness of "inappropriate or overreaching registration" where the grantor's asset appears more heavily encumbered than in fact it is<sup>92</sup>. It requires to some degree a belief about a security interest. To register a financing statement, a person must believe "*on reasonable grounds*" that the secured party described in a financing statement "*is, or will become, a secured party in relation to the collateral*", otherwise a civil penalty will apply<sup>93</sup>. The requirement of belief aims at preventing unnecessary or harassing registration<sup>94</sup>.

Unlike Article 9, the PPSA does not ask for the grantor's consent when the secured party registers a financing statement before a security agreement comes into existence. The grantor's consent is argued to cause an administrative burden for advance registration<sup>95</sup>. However, the requirement of the grantor's consent discourages annoying or inappropriate registration. It is also easier to ascertain the grantor's consent than the secured party's belief. The PPSA also requires a

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<sup>91</sup> Whittaker B, see n. 2, at p. 213

<sup>92</sup> See detailed discussion in Whittaker B, see n. 2, at pp. 214-221

<sup>93</sup> PPSA s 151(1)

<sup>94</sup> Whittaker B, see n. 2, at p. 215

<sup>95</sup> Whittaker B, see n. 2, at p. 216

financing change statement to end the registration when a secured party mentioned in a financing statement has never been a secured party in relation to the collateral or no reasonable grounds exists to believe in a future security agreement<sup>96</sup>. In general, the foregoing statement must be submitted within five business days after the day of registration if there is no security agreement or no reasonable grounds<sup>97</sup>. However, a secured party does not have any obligation to remove a valid financing statement when all secured obligations are discharged, and there is no commitment of future advance, or when the particular collateral is free from the security interest until and unless a person who has interests in the collateral sends a written amendment demand<sup>98</sup>. The secured party's obligation to remove a financing statement when the negotiation is failed under the PPSA does not strengthen the certainty of outstanding security interests in the collateral covered by a financing statement. Any prospective secured party when discovering an effective financing statement is in a strategy to ask for follow-up information, for example, whether there is no collateral described in a financing statement secured any obligation owed by a prospective grantor. If it is the case, a grantor should demand a financing amendment statement to remove an existing financing statement, thus ensuring that a prospective creditor will have the first priority by registration.

Advance filing or registration is a unique advantage of a notice filing system whereas it is impossible in the transaction-based registration. It allows not only a candidate secured party to set up a date for priority purpose by registering a financing statement before a security agreement comes into being but also facilitates the possibility of one registration covering multiple continuing security agreements that enjoy the same priority date. The PPSA places a relatively heavy burden on a registrant at the applying stage, the underlying policy of which is probably to avoid several unnecessary and annoying registrations. Advance registration, therefore, should be applied in the light of careful consideration. The PPSA is not likely to fully adopt the philosophy of

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<sup>96</sup> PPSA s 151(2)

<sup>97</sup> PPSA s 151(3)

<sup>98</sup> PPSA s 178(1)

Article 9's notice filing system, that is a simple notice of possibility, not a certainty of a security interest.

#### **4.4 Purchase-money security interest priority**

The priority regime imported from the Article 9 model is one of the novel features of the PPSA. Basically, the first-to-file rule takes the place of the previous long-standing priority rule relying on the order of security interest creation. The first priority of PMSI is recognized, constituting a turning point change in the treatment of *Romalpa* clause.

##### **4.4.1 Purchase-money secured creditor vs. unsecured creditor**

Generally, a security interest is enforceable against the grantor and third parties when it attaches to the collateral and the formalities requirement is met. Registration as a mode of perfection is not required to validate a security interest against third parties. Perfection is, first and foremost, a concept dealing with priority matters. This default rule is corresponding to the Article 9 principle. Likewise, in the bankruptcy or winding up context, an unperfected security interest is nevertheless challenged.

When a security interest is unperfected at the time some insolvent events commence, this unperfected security interest "*vests in the grantor*" immediately before these events occur<sup>99</sup>. These challenging circumstances are listed as follows: (1) "*an order is made, or a resolution is passed, for the winding up of a company or a body corporate*", (2) "*an administrator of a company or a body corporate is appointed*", (3) "*a company or a body corporation executes a deed of company arrangement*", (4) "*a sequestration order is made against a person*", and (5) a person becomes a bankrupt by a voluntary filing for bankruptcy<sup>100</sup>. Other insolvency-related events like debts agreements, personal insolvency agreements or receivership are excluded<sup>101</sup>.

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<sup>99</sup> PPSA s 267(1), (2)

<sup>100</sup> PPSA s 267(1)(a)

<sup>101</sup> Duggan A and Brown D, see n. 36, at pp. 406-7

The term “*vests in the grantor*” is debatable since other terms like an “*ineffective*” in the Canadian versions of PPSA or “*void*” under the previous Australian Corporation Act are relatively conventional and understandable<sup>102</sup>. However, the Australian PPSA, the Canadian versions, and even Article 9 reach the same legal consequence in this context, that is the grantor has all rights and interests in the collateral free from any security interest for the benefit of general creditors when a security interest is not perfected at the insolvent event.

The Corporation Act complements the PPSA by providing that even if the security interest is perfected at the time of insolvent event, it still vests in the company grantor if it is registered after 20 business days of the date the security agreement came into force or within six months before the trigger of the insolvency proceeding<sup>103</sup>. In other words, any secured transaction between a secured creditor and a company debtor is registered six months before the commencement of the insolvency proceeding must be registered within 20 business days running from the date when the security agreement takes effect to be effective against the liquidator or administrator. This period can be extended by the court’s order relying on three grounds, that is the delayed registered was due to inadvertence, or “*was not of such a nature to prejudice other position of creditors or shareholders*”, or that “*on other grounds it is just and equitable to grant a relief*”<sup>104</sup>. Terms and conditions to make the extension are also at the court’s discretion<sup>105</sup>.

Section 558FL of the Corporation Act to some extent spoils the policy of unity that the PPSA is carrying. The above-mentioned requirement uniquely applies to security interests granted by a company and perfected by registration. The similar provisions can be found in section 266 of the previous Corporation Act dealing with company charges. This section possibly aims at encouraging quick registration of a company charge, but it is argued that section 267 of the PPSA vesting in the grantor of the unperfected security interest at the time of some

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<sup>102</sup> Whittaker B, see n. 2, at p. 407; Duggan A and Brown D, see n. 36, at p. 407

<sup>103</sup> Corporation Act s 588FL

<sup>104</sup> Corporation Act s 588FM(1), (2)

<sup>105</sup> Corporation Act s 588FM(3)

insolvency events sufficiently carries out this function<sup>106</sup>. The policy is unsatisfactory because it does not apply to all grantors<sup>107</sup>. Section 588FL is a good demonstration of the enormous influence of the company law in the law of security interest in Australia.

The above discussion is relevant to all security interests including PMSIs. In brief, an unperfected PMSI when attached and enforceable is effective against unsecured creditors. It is only attacked in some insolvency events provided in section 267 of the PPSA and possibly section 588FL of the Corporation Act. A PMSI in the Australian law does not enjoy a grace period as in Article 9. The Article 9 purchase-money creditor has 20 days running from the date the debtor receives delivery of the collateral to file a financing statement which is good against the lien creditor's right even though the later arises before the perfection of the PMSI.

#### **4.4.2 Purchase-money secured creditor vs. buyers**

The PPSA has a set of rules called the taking free rules applying to the competing interests between a secured party and a transferee. Transferees in the taking free rules are mostly the buyer or the lessee of the collateral under a contract of sale or a lease respectively (called collectively "buyer" hereinafter)<sup>108</sup>.

Like Article 9, a security interest continues in the collateral even when the collateral gives rise to proceeds<sup>109</sup>. In other words, a buyer takes the collateral subject to the security interest. However, the PPSA certainly has a concern about the free flow of commerce, so that *bona fide* buyers have a chance to prevail a secured party and obtain a clear title to the collateral, leaving the secured party a claim for the proceeds but not a second bite of the collateral.

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<sup>106</sup> Whittaker B, see n. 2, at pp. 438-9

<sup>107</sup> *ibid*

<sup>108</sup> "Buyer" is not a defined term, but it can be in common sense the one who acquires personal property under a contract of sale. See Gedye M, 'A Hoary Chestnut Resurrected: The Meaning of "Ordinary Course of Business" in Secured Transactions Law' (2013) 37 Melbourne University Law Review 1, at p. 6

<sup>109</sup> PPSA s 32(1)(a)

The taking free rules in the Australian PPSA are relatively complicated. The PPSA has taking free rules governing an unperfected security interest, buyers in the ordinary course of business, authorization of sale free and clear of a security interest slightly that is corresponding to similar provisions in Article 9. It also has rules for particular cases like serial-numbered collateral, purchasing motor vehicles from a dealer, and low-value consumer goods for personal use which are not discussed in this thesis.

#### **4.4.2.1 Unperfected security interest**

Sub section 43(1) governing competing interests between a buyer and a secured party who does not perfect the concerned security interest has simple wordings. A buyer of personal property “*takes the personal property free of an unperfected security interest in the property*”<sup>110</sup>. Article 9 does not have a corresponding provision although it does have a provision giving the same consequence when it applies to a security interest that has never been perfected. The vision of Article 9 drafters is that there is a time between the attachment and perfection of a security interest at which a claim, for instance, a claim of a buyer, intervenes, defeating the security interest at hand. A buyer giving value and receiving delivery before a security interest is perfected takes clear title to the concerned collateral<sup>111</sup>. It is suggested that the PPSA provides for a buyer to take free if at the time “*the buyer becomes a buyer*”<sup>112</sup> or “*on the date of the sale*”<sup>113</sup>, a security interest is unperfected. The Explanatory Memorandum clarifies that it is personal property subject to an unperfected security interest, and the example given for the conflicting interest of this kind sets up the fact that the secured party does not register the collateral on the PPS Register or perfect it by using other perfection methods<sup>114</sup>. It can be inferred that the taking free rule applies at least when the security interest is eventually unperfected. Even though it is silent on the situation where the security interest is perfected at any time after the sale

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<sup>110</sup> PPSA s 43(1)

<sup>111</sup> UCC §9-317(b)

<sup>112</sup> Gedye M, ‘A Hoary Chestnut Resurrected: The Meaning of “Ordinary Course of Business” in Secured Transactions Law’ (2013) 37 Melbourne University Law Review 1, at p. 5

<sup>113</sup> Duggan A and Brown D, see n. 36, at p. 278

<sup>114</sup> Personal Property Securities Bill 2009 Explanatory Memorandum, see n. 14, at p. 27

occurs, it is good to infer that perfection of the security interest does not change the consequence since the buyer has already taken a clear title<sup>115</sup>. This consequence is satisfactory since a prudent buyer other than a buyer in ordinary course of business strategically check the PPS Register before entering to a contract of sale. The subsequent event of perfection, therefore, cannot put her in a disadvantageous position. However, subsection 43(1) is ambiguous about which event of the sale occurs before the perfection of the concerned security interest so that a buyer can take a clear title. Specifically, it is the time when a contract of sale is created, or a sale takes place, or, corresponding to Article 9 when the buyer both gives value and receives delivery before the security interest is perfected. It should be noticed that sub section 43(1) does not require “*without knowledge of the security interest*” condition, but Article 9 does.

#### **4.4.2.2 Authority to sell**

A buyer can inquire into the authorization to sell or whether the dealing will cut off the security interest to take a clear title to the goods subject to a perfected security interest. Under Section 32(1)(a), in the event of dealings or dispositions giving rise to the proceeds, a security interest continues in the collateral. On the other hand, it discontinues when the secured party expressly or impliedly (1) authorises the disposition or (2) agrees that the concerned dealing extinguishes the security interest on the other<sup>116</sup>. At first, not all dispositions except for dispositions giving rise to the proceeds are within the scope of section 32(1)(a). A disposition as a gift or to discharge a pre-existing debt even authorized by a secured party does not cut off a security interest<sup>117</sup>. When two events generating the discontinuance of a security interest are read together, it can be inferred that the PPSA does not insist that the authority to sale must indicated that the disposition is free and clear of the security interest. Otherwise, section 32(1)(a) did not include the event of an agreement on the dealing giving rise to the proceeds that extinguishes a security interest. The corresponding provision is not found in Article 9. Therefore, when the authorization is silent on whether the

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<sup>115</sup> Duggan A and Brown D, see n. 36, at p. 278

<sup>116</sup> PPSA s 32(1)(a)

<sup>117</sup> Whittaker B, see n. 2, at p. 269

sale is still subject to a security interest, the secured party is considered to authorize the disposition free of a security interest. In *Lewis v LG Electronics Australia Pty Ltd*<sup>118</sup>, a retailer contracted with different suppliers on different title retention terms that did not mention whether buyers take a clear title or whether the disposition was subject to the supplier's security interest or title retention<sup>119</sup>. In different title retention terms, the condition of the authority to dispose of the goods varies, including the disposition in the ordinary course of business, and/or selling as an agent or bailee of the supplier, and/or holding the proceeds in a separate account for the supplier. The *Lewis* court concluded that when the secured party authorized the sale of inventory in the ordinary course of business under section 32(1), the authorization made the concerned PMSIs equivalent to a floating charge where the chargor could sell the inventory in the ordinary course of business free of a charge until crystallization<sup>120</sup>. This argument produces an understanding that section 32(1)(a) does not allow a secured party to give a consent for the grantor to dispose of the collateral subject to a security interest<sup>121</sup>. Also, the authority to sell in a supply agreement itself is sufficient for sub-buyers to gain a clear title to the goods but they must satisfy the requirement of buyers in the ordinary course of business<sup>122</sup>. However, a secured party can expressly forbid the grantor to dispose of the collateral until full payment. In this respect, a secured party does not authorize a disposition, and the buyer takes the goods subject to the security interest<sup>123</sup>.

The *Lewis* case demonstrates that the requirement of a buyer in the ordinary course of business play a crucial role in the PPSA's taking free rules. This requirement is substantially relevant to section 32(1) governing authorization to sale and section 46 governing a transaction in the ordinary course of business. It is interesting that section 46 does not limit to unauthorized transactions. Rather, it supplements the condition of a transaction in the ordinary course of business

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<sup>118</sup> [2014] VSC 644 (2014)

<sup>119</sup> *ibid*, at para. 10 and 11

<sup>120</sup> *ibid*, at para. 39

<sup>121</sup> Mr. Whittaker does not refer the *Lewis* case but has the same understanding. See Whittaker B, see n. 2, at p. 269

<sup>122</sup> *Lewis v LG Electronics Australia Pty Ltd*, see n. 118, at para. 70 and 71

<sup>123</sup> *ibid*, at para. 109

to the taking free rule under section 32(2). The *Lewis* court applied both sections to conclude that the suppliers under title retention terms cut off their security interests in the disputed collateral when they were sold to purchasers<sup>124</sup>. In other words, it seems that a buyer relying on the authority to sell to claim a clear title should additionally prove that the sale is on the ordinary course of business. To some extent, the requirement of selling in the ordinary course of business undermines the strength of section 32(1) that should have applied regardless of this requirement. It imposed a relatively onerous burden of proof on buyers who claim the clear title to the disputed goods.

#### **4.4.2.3 Buyer in ordinary course of business**

Section 46 of the PPSA is the taking free rule applying to sale in ordinary course of business. The requirements are summarized as follows:

- The sale has taken place;
- In the ordinary course of the seller's business of selling personal property of that kind;
- A security interest is given by the seller;
- The buyer buys personal property without actual knowledge that the sale constitutes a breach of the security agreement.

It is required that the sale between the grantor and the buyer must be taken place. The wording of section 46 makes it clear that the goods must be "*sold*" in the ordinary course of the seller's business of selling of personal property of that kind. The terms "buyer", "sold" or "sale" are not defined in the PPSA but are long understood under the sale of goods law. The *Lewis* court applied the Goods Act 1958 to clarify the meaning of relevant concepts<sup>125</sup>. Accordingly, there is a sale when the property in the goods is transferred from the seller to the buyer<sup>126</sup>. The property in the goods is passed not earlier than when the goods are ascertained, and at such the time the parties intend<sup>127</sup>. In *Lewis*, buyers who bought under a

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<sup>124</sup> In *Lewis*, some suppliers require the sale to purchasers to be in the ordinary course of business, but some do not.

<sup>125</sup> *Lewis v LG Electronics Australia Pty Ltd*, see n. 118, at para. 47, 64 and 73

<sup>126</sup> Goods Act 1958 s 6, cited in *Lewis v LG Electronics Australia Pty Ltd*, at para. 48

<sup>127</sup> Goods Act 1958 s 21, 22, cited in *Lewis v LG Electronics Australia Pty Ltd*, see n. 118, at para. 48

layby contract of sale bearing a reservation of ownership clause and did not make full payment could not take free of the security interests. The learned court concluded that there was no sale because the property in the goods was not transferred until and unless payment was made in full<sup>128</sup>. This approach was supported by a detailed discussion on the Canadian case law and commentary. It demonstrates that the concept of sale employed in the PPSA is determined in light of the sale of goods law, and the PPSA does not displace the existing law relating to the sale of goods<sup>129</sup>. This approach seems correct at first glance, but not persuasive when applying to the conditional sale or title retention which are now a security interest under the PPSA. Coming back to the *Lewis* case, non-payment in full and the reservation of ownership clause were wrongfully combined to determine whether the sale was taken place, or at least the court's argument was not fully supported by a thorough discussion on the interface between the PPSA and the sale of good act with regard to conditional sales.

The *Re Highway Foods* case in English law raises the problem with regard to a chain of transactions<sup>130</sup>. The facts in *Re Highway Foods* are to some extent similar to transactions in *Lewis* to the extent that the suppliers had a PMSI in the goods, and the buyer did not pay in full to the grantor under a layby contract bearing a reservation of ownership clause. Both cases have the same outcome that the buyer could not have a clear title to the goods despite the different treatments of title retention in the two jurisdictions

Although the Australian law of secured transactions has changed dramatically from English law model to Article 9 model, it does not give a satisfactory answer to the matter discussed above. The long-standing law on the sale of goods has not been renovated so far to catch up with the PPSA but has a significant impact on the PPSA operation. The Australian approach is entirely different from Article 9. First, under Article 9, the authorization should be the authorization of sale free and clear of the security interest for the purpose of taking free; otherwise, the disposition is subject to the concerned security interest. Second, to invoke the

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<sup>128</sup> *Lewis v LG Electronics Australia Pty Ltd*, see n. 118, at para. 60

<sup>129</sup> *ibid*, at para. 65-72

<sup>130</sup> See sub-section 2.2.3.1 of this thesis discussing buyers in possession and the authority to sell

authority to sell granted by a secured party to a debtor to gain the clear title, a buyer is not required to be a buyer in ordinary course of business. It is worth mentioning that the pre-code secured transaction law in the United States did not accept the concept of floating charge. Furthermore, Article 2 on the sales of goods was drafted compatible with Article 9 concerning conditional sales and title retention. Article 2 and Article 1 definition of security interest expressly provide that title retention has a limited effect of reservation of security interest<sup>131</sup>.

Section 46 is corresponding to the equivalent provision of Article 9 at least on its face. However, like determining what the sale is as discussed above, “*the ordinary course of business*” may have a meaning somewhat deviating from the original model. The Explanatory Memorandum clarifies that the buyer can only have the shelter if the interest is acquired in the ordinary course of the seller’s business of selling property of that kind<sup>132</sup>. In other words, selling property of that kind must be the seller’s business to satisfy the requirement of “*in the ordinary course of business*”.

Under Article 9, the meaning of ordinary course of business is not limited to the seller’s business of selling goods of that kind as the Australian PPSA seemingly adopts. The sale also “*comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices*”<sup>133</sup>. It further clarifies that the section applies primarily to inventory collateral<sup>134</sup>. Nothing suggests that section 9-320 has the scope of the application solely to inventory collateral or narrowly inventory for sale. The sale of superseded equipment or the goods as secondary business has a chance to be in the ordinary course of the seller’s business if it is an industry norm<sup>135</sup> or done on a regular basis.

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<sup>131</sup> UCC §2-401(1) and §1-201(35)

<sup>132</sup> Personal Property Securities Bill 2009 Explanatory Memorandum, see n. 14, at p. 31

<sup>133</sup> UCC §1-201(9)

<sup>134</sup> Comment 3 to the UCC §9-320, see Official Comment, at p. 906

<sup>135</sup> *Tanbor Fabrics Corp. v. Deering Milliken, Inc.*, 350 NE2d 590, 19 UCC Rep. (NY 1976), cited in Clark B and Clark B, *The Law of Secured Transactions under the Uniform Code*, vol I (A.S. Pratt and Sons 2010), at p. 3-24

The Australian PPSA does not have provision excluding some transactions from the ordinary course of the seller's business, like a transfer in bulk, or as security for, or in the total or partial discharge of a pre-existing debt like Article 9. The phrase "*ordinary course of business*" is familiar in the insolvency law concerning voidable transactions and the former floating charge law. It is recommended that not only Australian precedents are relevant, but also the PPSA experiences in other jurisdictions should be taken into consideration<sup>136</sup>. The Explanatory Memorandum expressly considers that the taking free rule does not apply when the sale is made at the time of financial stress and for the sellers' financial stress<sup>137</sup>.

The *taking free* rule concerning the ordinary course of business applies solely to the case where a buyer purchases from the seller who creates the security interest. This requirement corresponds precisely to the Article 9. However, in a relatively advantageous position, a buyer of pre-encumbered goods can invoke other provision in the PPSA to protect her interest against the secured party. The following example demonstrates this point<sup>138</sup>.

Example 1: SP1 has a perfected security interest in D's manufacturing equipment. D, a manufacturer, then sells the equipment to Dealer, who is in the business of selling and purchasing used manufacturing equipment. Buyer buys the equipment at hand from Dealer.

Like Article 9, the taking free rule does not apply to the transaction between Dealer and Buyer because the Dealer did not create the security interest.

Despite that the security interest continues in the collateral after the disposition under the ambit of section 32, it is temporarily perfected within 24 months starting from the time of transfer or by the end time for the registration, whichever comes earlier<sup>139</sup>. Section 52(1) provides that the buyer for value can take the goods free of the security interest perfected temporarily immediately

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<sup>136</sup> See detailed discussion in Gedye M, see n. 112, at pp. 19-30

<sup>137</sup> Personal Property Securities Bill 2009 Explanatory Memorandum, see n. 14, at p. 31

<sup>138</sup> This example is adapted from the example given in part 2.90 in the Personal Property Securities Bill 2009 Explanatory Memorandum, see n. 14, at p. 31

<sup>139</sup> PPSA s 34(1)

before the time of the sale unless otherwise perfected, and subject to an exception that the buyer has actual knowledge at the time of sale that the sale constitutes a breach of a security agreement. Thus, in order to have a continuously perfected security interest against Dealer, SP1 must perfect, for instance by registration, the security interest against Dealer within the foregoing grace period, but to prevail Buyer, the registration must be done before the sale has taken place. SP1 strategically registers against Dealer as soon as she discovers the unexpected transfer of the collateral to avoid the effect of temporary perfection.

Under Article 9, a secured party, regardless of the transfer of collateral, has a continuous perfection rather than a temporary one. Buyers of pre-encumbered goods only have a chance when they are located in a state other than the seller's state, and the transfer is taken place beyond the grace period of one year for the secured party to perfect the security interest in this state. Comparatively, Australian law is a good shelter for buyers of pre-encumbered goods in the ordinary course of business. Section 52(1) is likely to have an underlying policy preferring buyers in ordinary course of business who are not able to discover the security interest by searching the public record, and secured parties who lose the security interest because of a transfer without their consent have a disadvantageous position. However, the provision is less favourable to secured parties since the mode of temporary perfection is less favourable. In the context of buyers of pre-encumbered goods, both secured parties and buyers of pre-encumbered goods are innocent and meriting a shelter. An original debtor transfers the collateral without a secured party's consent, and the transaction is usually invisible to the secured party's eyes. It is persuasive to place a security interest in the collateral transferred without consent in the mode of temporary perfection. It encourages the secured party to register the security interest against a new debtor for public notice, and to some extent urges the secured party to watch the collateral in the debtor's hand actively. Nevertheless, the secured party deserves a grace period to uncover the unexpected out-of-sight transfer of collateral. During this period, a security interest should be effective against third parties including buyers in the ordinary course of business.

### 4.4.3 Purchase-money secured creditor vs. other secured creditors

Basically, the PPSA adopts the first – to – file (or register, according to Australian term) rule and has some variants to determine priority between conflicting perfected security interests.

#### 4.4.3.1 Default priority rule

Section 55 provides for the default priority rule between security interests in the same collateral applying when there is no other rule determining priority<sup>140</sup>. Priorities may be subject to a subordination agreement that may arrange an earlier-registered to be subordinate to a latter-registered competing security interest<sup>141</sup>.

The default priority rule can be summarized as follows:

- Between unperfected security interests in the same collateral, priority is determined by order of attachment<sup>142</sup>;
- Between a perfected and an unperfected security interest in the same collateral, the former takes priority over the latter<sup>143</sup>;
- Between many perfected security interests in the same collateral, priority is determined by order of priority time<sup>144</sup>, that is the earliest time of registration time, the time the secured party “*first perfects the security interest by taking possession or control of the collateral*”, and “*the time the security interest is temporarily perfected*”<sup>145</sup>.

Basically, the PPSA default rule seemingly corresponds to the Article 9 priority rule. The first perfection day is the priority time in the case of continuous perfection<sup>146</sup>, covering all advances including future advances secured by this agreement<sup>147</sup>.

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<sup>140</sup> PPSA s 55(a)

<sup>141</sup> PPSA s 61

<sup>142</sup> PPSA s 55(2)

<sup>143</sup> PPSA s 55(3)

<sup>144</sup> PPSA s 55(4)

<sup>145</sup> PPSA s 55(5)

<sup>146</sup> PPSA s 55(6) and s 56

#### 4.4.3.2 Priority rule of purchase-money security interest

##### a. PMSI in the original collateral

Recognition of PMSI and its first rank in the Australian PPSA has changed the status of *Romalpa* agreements considerably. Registration of a PMSI is a public notification about the first priority on the collateral indicated. Before the enforcement of the PPSA, a title-retaining seller's claim did not compete with a secured party's claim in the goods supplied because the goods can be recovered under the title retention arrangement that prevents the goods at hand from joining the buyer's assets. The recognition of the PMSI does not lead to a considerable change in the outcome, but the owner status is shifted to the status of a secured creditor that requires a good registration to establish the first priority against other creditors.

The PPSA registration system requires timely registration<sup>148</sup> and an express notice of a PMSI in the financing statement<sup>149</sup>. The requirement of PMSI indication in the financing statement is uniquely Australian approach as discussed elsewhere in the thesis<sup>150</sup>. The PPSA does not oblige a purchase-money secured party to send notification about the PMSI in time to competing earlier-registered secured parties. A secured party in Australian jurisdiction, therefore, whenever makes an advance against the coming inventory as the collateral earlier registered, strategically check the public record for any intervening PMSI in the same collateral.

Although there are separate priority rules governing inventory PMSI and non-inventory PMSI<sup>151</sup>, the only difference is the timeframe for the requirement of timely registration. For inventory PMSI, the rule for timely registration generally provides for two kinds of collateral, namely goods and other kinds of collateral. Goods are defined as "*personal property that is tangible property*" not including

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<sup>147</sup> PPSA s 58

<sup>148</sup> PPSA s 62(2)(b) and (3)(b)

<sup>149</sup> PPSA s 62(2)(c) and (3)(c)

<sup>150</sup> See discussion in section 4.3.2 of this thesis

<sup>151</sup> PPSA s 62(2) and (3)

financial property or an intermediated security<sup>152</sup>. Accordingly, the PMSI should be perfected by registration at the time “*the grantor, or another person at the request of the grantor, obtains possession of the inventory*” for inventory that is goods, and when “*the PMSI attaches to the inventory for inventory of other kind*”<sup>153</sup>. For non-inventory PMSI, the secured creditor enjoys the grace period of 15 business days triggering by the event that the grantor, or another person at the request of the grantor, obtains possession of the collateral for the collateral that is goods, and when the PMSI attaches to the collateral for the collateral of other kinds<sup>154</sup>.

Article 9 does not have the separate rule for collateral that is goods and that is of other kinds. It expressly defines purchase-money collateral limiting to goods and software that can be physically possessed. Article 9 also grants the grace period for filing a financing statement covering non-inventory PMSI, and the 20 – day length of time is slightly different from the PPSA corresponding provision. However, Article 9 case law is split in determining when and how the debtor takes possession for the purpose of PMSI priority<sup>155</sup>. The Australian PPSA, like Article 9, does not give the meaning of possession, even though it deals with the concept of possession in some situations that cannot apply to the context of PMSI priority rules<sup>156</sup>. It is recommended that the PMSI priority rule should clarify that the grantor obtaining possession refers to the time when the grantor obtains that possession “*in its capacity as grantor*”<sup>157</sup>. Thus, it would eliminate debates arising from the situation where the grantor physically obtains possession of the collateral before the attachment of respective security interest.

#### b. PMSI in proceeds

The priority ranking for a PMSI in proceeds is governed by general rules applying for the attachment and perfection of the proceeds and specific rules with regard

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<sup>152</sup> PPSA s 10

<sup>153</sup> PPSA s 62(2)(b)

<sup>154</sup> PPSA s 62(3)(b)

<sup>155</sup> See discussion in sub-section 3.4.4.2 of this thesis

<sup>156</sup> PPSA s 24

<sup>157</sup> Whittaker B, see n. 2, at pp. 325-6

to a PMSI. The general priority rules for the proceeds can be summarized as follows:

- A security interest attaches to the proceeds of the collateral unless otherwise agreed<sup>158</sup>;
- The time of registration or perfection of the original collateral is the time of registration or perfection of the proceeds relating the original collateral<sup>159</sup>;
- A security interest in the proceeds can be perfected by reference to the perfection of security interest in the original collateral or temporarily perfected<sup>160</sup>.

The priority rule of PMSI applies to both the original collateral and its proceeds<sup>161</sup>. In this respect, a purchase-money secured party has the first priority in the proceeds of the original collateral if she has good registration of a PMSI against the collateral as discussed above. This rule does not apply to account as proceeds of inventory<sup>162</sup>. However, a secured party should take perfection steps to enforce the first priority in the proceeds against other creditors. It is worth repeating that the PPSA expressly recognize the attachment of a security interest to the proceeds unless otherwise provided by the security agreement<sup>163</sup>. As discussed later, the perfection of the original collateral to a great extent makes the proceeds thereof perfected. Secured party's entitlement to the proceeds is crucial in any legislation following the Article 9 model. Nothing restrains a grantor from transferring the collateral to third parties. The existence of authorization to transfer is one of the factors to determine whether she still has the first priority in the collateral possessed by a third party. Without the attachment of the proceeds to a security interest, it is probably meaningless to hold a security interest in personal property, particularly inventory.

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<sup>158</sup> PPSA s 32(1)(b)

<sup>159</sup> PPSA s 32(5)

<sup>160</sup> PPSA s 33

<sup>161</sup> PPSA s 62(2), (3)

<sup>162</sup> PPSA s 64

<sup>163</sup> PPSA 32 (1)(b)

The following examples illustrate the difference in the priority of a *Romalpa* agreement relating to the proceeds under the pre-PPSA and post-PPSA law of security interest in personal property<sup>164</sup>.

Example 1: SP1 sell to D a printer subject to a simple title retention clause. D does not pay the purchase price in full but sell the printer to another purchaser on 90-day credit term. D also grant a security interest to SP2 in all and after-acquired receivable account. Both SP1 and SP2 claim the account arising from the sale of the printer.

The pre-PPSA law enforced the right of SP1 in the printer as an owner without any requirement of registration, but SP1 could not claim the account as the proceed of the original goods. The title retention arrangement did not include an extension to the sale proceeds.

The PPSA treats the title retention clause as a purchase security interest that also attaches to the proceeds whether or not the security agreement includes the proceeds. However, a PMSI should be registered in time, and a financing statement should indicate that it is a PMSI. Also, the proceeds should be perfected. If all the requirements of priority and perfection are fulfilled, SP1 has the priority in the proceeds over SP2 without a prior agreement.

Example 2: All facts are the same as facts in Example 1, except that SP1 has a proceeds title retention clause.

Pre-PPSA Australian case law was somewhat split in recognition of the right of SP1 in the proceeds. Following English law, some cases treated the proceeds clause as the creation of a registrable charge, accordingly void against other creditors if it was not registered, assuming that SP1 is a company<sup>165</sup>. In contrast, the *Associated Alloy* court upheld the effectiveness of the title retention trust clause over the proceeds and denied construing the clause at hand as a

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<sup>164</sup> Example 1 and Example 2 is adapted from Example 1 given in Duggan A and Brown D, see n. 36, at p. 231

<sup>165</sup> Duggan A, see n. 3, at p. 647; Duggan A and Brown D, see n. 36, at p. 336

registrable charge<sup>166</sup>. Thus, if the proceeds title retention clause was drafted to in the form of trust as in the *Associated Alloy* case, SP1 was likely to have a claim in the proceeds over SP2 without a registration.

According to the PPSA, SP1 has the same consequence of first priority as it may have in Example 1.

In brief, the PPSA creates a statutory security interest in the proceeds to replace an equitable charge or a fiduciary relationship established by the agreement or the title retention clause.

As mentioned above, the attachment of a security interest to the proceeds does not amount to all-time automatic perfection. The proceed is perfected either by reference to the perfection of security interest in the original collateral<sup>167</sup> or by temporary perfection<sup>168</sup>. In all cases, a security interest in the proceeds can enjoy the time of registration or perfection of a security interest in the original collateral as the priority time so long as it is continuously perfected<sup>169</sup>. With regard to perfection by reference to the perfection of a security interest in the original collateral, a financing statement can describe the proceeds for perfection by a click on the proceeds option<sup>170</sup>. The register can choose to describe the proceeds as all present and after-acquired property, or by item, or by a class of personal property<sup>171</sup>. The first choice is default whenever the register clicks the “proceeds” option<sup>172</sup>. The proceeds option and the technical support by just one-click are really at a secured party’s convenience. It seemingly encourages and reminds a secured party to include the proceeds in a financing statement.

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<sup>166</sup> *Associated Alloy*, see n. 6, at pp. 603-611; See more discussion in Duggan A and Brown D, see n. 36, at pp. 336-7

<sup>167</sup> PPSA s 33(1)

<sup>168</sup> PPSA s 33(2)

<sup>169</sup> PPSA s 33(5)

<sup>170</sup> PPSA s 33(1)(a)

<sup>171</sup> PPSA s 153(1), PPSR s. 5.5 and Schedule 1, cl. 2.4

<sup>172</sup> Duggan A, see n. 3, at p.673

If the financing statement does not mention the proceeds, but the proceeds are the kind of the collateral described, the security interest in the proceeds is perfected by registration<sup>173</sup>.

If the proceeds are currency, cheque, or deposit account, or a right to the insurance payment or other payments as indemnity or compensation for loss or damage to the collateral or proceeds, and the security interest in the original collateral is perfected, the security interest in the proceeds is automatically perfected<sup>174</sup>. It is corresponding to Article 9 that provided for automatic perfection of cash proceeds.

Temporary perfection is applied when the security interest in the proceeds is not perfected by reference to the perfection of a security interest in the original collateral as described above. The time length of temporary perfection is five business days starting from the day the security interest in the original collateral attaches to the proceeds<sup>175</sup>. A secured creditor can perfect a security interest in the proceeds within the period of temporary perfection to keep the perfection to run continuously<sup>176</sup>. The period of temporary perfection in the PPSA is relatively short in comparison with the like period in Article 9 that is of 20 days. A secured party in Australian should response promptly against the attachment of the proceeds, but it depends much on the grantor who knows precisely the time of attachment. Thus, it is strategic to fill in the “proceeds” option in the financing statement against the original collateral.

Article 9 similarly has the underlying policy to encourage an explicit description of the proceeds in a financing statement. The “proceeds” one-click option is absent in the form of an Article 9 financing statement. Article 9 merely provided that if the security interest in the proceeds is perfected other than by temporary perfection at the time the security interest attaches to the proceeds regardless how it is perfected, it is not subject the 20-day period of temporary perfection<sup>177</sup>.

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<sup>173</sup> PPSA s 33(1)b)

<sup>174</sup> PPSA s 33(1)(c)

<sup>175</sup> PPSA s 33(2)

<sup>176</sup> PPSA s 33(3)

<sup>177</sup> UCC §9-315(d)(3)

The purchase-money priority of the proceeds is not always good even though the security interest in the proceeds is continuously perfected. It is the case that the PMSI in accounts as the proceeds of inventory is subordinate to a non-PMSI in accounts (the PPSA calls the latter as “*priority interest*”)<sup>178</sup>. The priority interest must be granted for new value<sup>179</sup>, and the account collateral must be the original collateral<sup>180</sup>. The registration time of the priority interest must be earlier than the time of registration or perfection of the PMSI in inventory<sup>181</sup>. Otherwise, a timely notification should be sent to a purchase-money secured party<sup>182</sup>. The PPSA provision is corresponding to Article 9 to some extent but has a substantial number of derivations.

The PPSA and Article 9 carry out the similar underlying policy protecting an account financier against a purchase-money inventory financier<sup>183</sup>. Nevertheless, the two provisions in the PPSA and Article 9 are drafted in different approaches. The PPSA has a separate provision directly and expressly figuring out the competing interest, that is the non-PMSI in accounts and limiting this priority interest into the security interest granted for new value and in accounts as the original collateral<sup>184</sup>. The priority interest is protected even though it is registered later than the inventory PMSI, so long as a timely prescribed notification is sent to the holder of the PMSI.

On the other hand, Article 9 simply lists the kind of collateral subject to the first priority of a PMSI in inventory, namely the inventory as the original collateral, chattel paper or an instrument constituting proceeds of the inventory and proceeds of the chattel paper, identifiable cash proceeds received on or before the delivery of the inventory to the buyer<sup>185</sup>. It can be inferred that the non-cash proceeds other than chattel paper are excluded from the first priority. It can also

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<sup>178</sup> PPSA s 64

<sup>179</sup> New value is defined as “*value other than provided to reduce or discharge an earlier debt or liability owed to the person providing the value*”. PPSA s 10.

<sup>180</sup> PPSA 64(1)

<sup>181</sup> PPSA s 64 (1)(a)

<sup>182</sup> PPSA s 64(1)(b)

<sup>183</sup> Whittaker B, see n. 2, at p. 330; Comment 8 to the UCC §9-324, see Official Comment, at p. 921

<sup>184</sup> PPSA s 64

<sup>185</sup> UCC §9-324(b)

be inferred that the priority of an inventory PMSI in the non-cash proceeds would follow the general rule of priority.

The following examples illustrate the different approaches to competing security interests in accounts in the two jurisdictions<sup>186</sup>.

Example 3: D grants a security interest to SP1 in all present and after-acquired inventory, and the security interest is registered on Day 1 against inventory. On Day 3, D purchases from SP2 a certain type of inventory subject to a PMSI, and SP2 filed a financing statement on the same day indicating the PMSI in inventory. Later, D sells the inventory at hand producing an account. D defaults to both SP1 and SP2 who claim the accounts. Assuming that both SP1 and SP2's security interest in the disputed accounts remain perfected, and the accounts are not outstanding.

Under the PPSA, SP1 has a security interest in the accounts as the proceeds of inventory, in other words, it is not the original collateral. Therefore, section 64 protecting non-PMSI in accounts discussed above does not apply. SP2's PMSI in accounts as proceeds of inventory has priority over SP1's security interest in the same accounts.

Under Article 9, the accounts at hand are non-cash proceeds of the inventory collateral. SP2 does not have a PMSI priority over SP1 in the same accounts as proceeds of inventory. The general rule of priority applies to determine the competition between the two security interests. SP1's and SP2's security interest in the account proceeds is perfected at the perfection time of the respective security interest in the original collateral. Therefore, SP1 has priority over SP2 as to the accounts.

Example 4: All facts are the same as Example 3, except that SP1 has a security interest and a relating financing statement against D's present and after-acquired inventory and accounts on Day 1.

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<sup>186</sup> The following Example 3, 4 and 5 are created upon and adapted from examples given in Comment 9 to the UCC §9-324, see Official Comment, at p. 921-2

The PPSA section 64 applies, so SP1 has priority over SP2 as to the accounts on the ground that the accounts are registered as the original collateral.

The legal consequence remains in Example 3 under Article 9.

The two examples demonstrate that Article 9 does not recognize the purchase-money priority of the non-cash proceeds concerning the inventory PMSI and does not distinguish the account collateral of the competing security interest as the original collateral or the proceeds. Although the UCC Official Comment addresses the policy to protect an account financier from the first priority of an inventory purchase-money financier, it seems that a non-purchase-money inventory financier can also benefit. Meanwhile, the PPSA strictly requires that only account financiers have priority over purchase-money inventory financiers with regard to the proceeds generating from the sale of inventory.

American law recognizes the characteristic of inventory in business operation. Inventory is shifting assets that a rapidly and frequently put in the ordinary course of business; therefore, a PMSI in inventory in practice does not last for a long time. A secured creditor cannot follow the inventory collateral that is transferred to third parties in the ordinary course of business to ensure the flow of commerce. The purchase-money priority does not extend to the proceeds of inventory collateral that is not identifiable cash proceeds "*received on or before the delivery of the inventory to a buyer*" to protect other account and receivables financiers<sup>187</sup>. Australian law has similar limitations to inventory PMSI but does not recognize PMSI cross-collateralization in inventory like Article 9. Therefore, taking a PMSI in inventory is not appealing and desirable under the PPSA.

c. PMSI in product or mass and accession

The collateral as raw materials can be put into a manufacturing process; thus, the original identity is lost, and new end products are coming into existence. The collateral can also be processed, assembled or attached to the extent that the original identity remains, or they are capable of being reconverted.

The Pre-PPSA title retention clause faced the same problem when the original goods are assembled, attached, processed or manufactured. The English common law has dealt with many situations: for instances, like steel sheet cut from steel strip in *Armour v Thyssen Edelstahlwerke AG*<sup>188</sup>, engines assembled in generators in *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd*<sup>189</sup>, leather processed into handbags in *Re Peachdart Ltd*<sup>190</sup>, or resin manufactured into wood boards in *Borden (UK) Ltd v Scottish Timber Products Ltd*<sup>191</sup>. The very first question is whether the title of the original goods is disappeared, or whether they are capable of being reconverted into the original state when they are transformed into newly manufactured products of the different identity. In this respect, simple title retention sufficiently covers the first two foregoing cases, and the title-retaining seller is entitled to the goods, for instances, steel sheet or engines.

The PPSA distinguishes the product or mass from accession. When the collateral is manufactured, processed, assembled or commingled that the original identity is lost in the product or mass, or become unidentifiable parts of the product or mass, the question would be whether the secured party has a continuing security interest in the product or mass<sup>192</sup>. When the collateral is installed in, or affixed to, the other goods, they become an accession to other goods<sup>193</sup> if their identity is not lost in other goods<sup>194</sup>. The question in this situation would be whether the security interest in the original collateral remains in the accession.

The PPSA has made considerable changes to recognize a continuing security interest in the product or mass producing from the collateral, whether or not they are subject to title retention. It is noticeable that the priority rule for general collateral and purchase-money collateral are separated to the extent that the

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<sup>188</sup>[1991] 2 A.C. 339; [1990] 3 W.L.R. 810

<sup>189</sup> [1984] 1 W.L.R. 485

<sup>190</sup> [1984] Ch. 131

<sup>191</sup> [1981] Ch. 25

<sup>192</sup> PPSA introductory section of part 3.4

<sup>193</sup> PPSA s 10

<sup>194</sup> It is recommended that accession should be defined to the extent that their identity is not lost to avoid the overlap between the product and mass, and the accession priority rules. See Whittaker B, see n. 2, at p. 346

former does not supplement the latter as in the case of a continuing security interest in proceeds.

The perfection and priority rules applying to a PMSI with regard to product or mass commingled, processed, or manufactured from the original goods can be summarized as follows:

- Generally, a security interest in goods continues to mass or product so long as the identity of the goods is lost<sup>195</sup> in the product or mass<sup>196</sup>;
- The security interest continuing in the product or mass is “*limited to the value of the goods on the day on which they became part of the product or mass*”<sup>197</sup>;
- A perfected PMSI in the goods continuing in the product or mass takes priority over a non-PMSI in the goods continuing in the product or mass<sup>198</sup>;
- A perfected PMSI in the goods continuing in the product or mass takes priority over a non-PMSI in the product or mass given by the same grantor<sup>199</sup>.

The following examples illustrate how the PPSA changes title retention with regard to the new product or mass<sup>200</sup>.

Example 1: SP1 supplies leather to D, a company manufacturing handbags subject to a title retention clause. D also grants a security interest in present and after-acquired accounts and stock to SP2 which is duly registered. D defaults to both SP1 and SP2 who claim the handbags made from leather supplied by SP1.

The Pre-PPSA case law relying upon English law did not extend a simple title retention clause to the new product. For the manufactured title retention clause, it was considered to create a registrable charge upon the new product; thus, in

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<sup>195</sup> The identity is lost in a product or mass if “*it is not commercially practical to restore the goods to their original state*”. PPSA s 99(2)

<sup>196</sup> PPSA s 99(1)

<sup>197</sup> PPSA s 100

<sup>198</sup> PPSA s 103(a)

<sup>199</sup> PPSA s 103(b)

<sup>200</sup> This example is created upon the fact of the *Re Peachdart Ltd* case

most cases, the title-retaining seller had a void charge against third parties due to lack of registration<sup>201</sup>. SP1, whether or not having a manufactured title retention clause, could not assert the first priority over SP2 with regard to all the handbags.

The PPSA does not require an arrangement to extend a security interest in the goods to the product and mass comingled, processed or manufactured from the goods. In other words, a security interest in the original goods continues automatically in the product and mass. Therefore, SP1 has a security interest in the product or mass if SP1 has a security interest in the original goods. In this example, if SP1 has a perfected PMSI in leather, SP1 has priority over SP2' s security interest in the handbags.

Under the PPSA, an automatically continuous security interest in the product and mass is unquestionable, and the priority thereof depends on nature and perfection status of the security interest in the original goods.

The PPSA provides a relatively desirable outcome for the purchase-money inventory financier concerning the product and mass. The English common law governing manufactured title retention clause probably contributes valued experiences and lessons to the PPSA in this respect. In comparison to Article 9<sup>202</sup>, the PPSA has created an achievement.

With regard to the accession, the PPSA makes substantial progress in comparison with the pre-PPSA common law<sup>203</sup>. It defines accession<sup>204</sup>. It provides for a set of rules to establish priority between a security interest in the accession and other interests not limiting to a security interest in the other goods in the whole<sup>205</sup>. Furthermore, it has rules governing how to remove the accession to enforce the

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<sup>201</sup> Duggan A and Brown D, see n. 36, at p. 265-6

<sup>202</sup> See more discussion on Article 9 dealing with comingled goods, the product and mass in sub-section 4.4.3.2 of this thesis

<sup>203</sup> Duggan A, see n. 3, at p. 682

<sup>204</sup> PPSA s 10

<sup>205</sup> PPSA s 89-91

security interest in the accession<sup>206</sup>. It is noticeable that the PPSA does not have separate rules for PMSI in this respect.

The security interest in the original collateral “*continues in*” the accession<sup>207</sup>. The PPSA anticipates that at the time of accession coming into existing, the security interest may or may not attach to the original collateral. In the latter case, the security interest in the accession is subordinate to any interest in the other goods at the time the collateral becomes an accession, unless the holder of an interest in the other goods has consented or disclaimed the security interest in the accession or agreed to the removal of the accession<sup>208</sup>. For instance, SP1 has a security interest in D’s car. SP2 has a security interest in D’s tyres which have already been fixed in cars. SP2, therefore, has the priority subordinate to SP1.

The fact that a security interest attaches to the original collateral at the time of becoming the accession is likely to happen occasionally, at least with regard to title retention case. To this extent, a security interest in an accession has priority over any interest hold by a person with interest in the goods as a whole<sup>209</sup>. This default rule does not mention perfection against two competing interests as a requirement. Attachment of security interest at the time the collateral becomes an accession may suffice.

Example 2: SP 1 has a security interest in D’s generators. SP2 sells D a kind of engine usually installed in generators subject to title retention. D later installs the engines supplied by SP2 in generators. D defaults against SP1 and SP2, and both claim engine<sup>210</sup>.

Under the *Hendy Lennox* in the English common law, SP2 can assert the right of title retention in engines installed in generators. Under the PPSA, SP2 has a security interest in engines preceding SP1’s claim in the same collateral under the default rule other than a purchase-money security status, and without considering whether SP2 perfects its security interest or not.

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<sup>206</sup> PPSA s 92-97

<sup>207</sup> PPSA s 88

<sup>208</sup> PPSA s 91

<sup>209</sup> PPSA s 89

<sup>210</sup> This example is created upon the facts of the *Hendy Lennox* case

In this respect, with regard particularly to title retention, English common law and the PPSA has almost the same consequence, that is SP2 has the first priority in the accession even without registration. The position of SP2 is akin to a purchase-money secured party, but there is no requirement of perfection. The right to accession is somewhat a secret lien, and to some extent, the PPSA does not solve the problem of the pre-PPSA law.

As a default rule, it has some exceptions that require perfection of security interest in the accession. Those exceptions grant the first priority to other secured party making advance after the accession is coming into existence, execution creditor or bona fide purchaser whose interest arises after the accession, but before the security interest in the accession is perfected<sup>211</sup>. It is argued that those rules give the foregoing competing interest holders a chance to discover the interest of an accession financier. To be exact, they establish a counterweight to a secret lien created by the default rule.

It is a surprise that the PPSA rule of accession corresponds to old rather than revised Article 9 promulgated in 1998. The revised Article 9 amends considerably the rule of a security interest in the accession to avoid a secret lien and the conflict with the certificate-of-title statute. The general rules of priority apply to solve the conflict relating to accession. Therefore, if the accession financier has a PMSI in the accession, she has the first priority so long as she has a good perfection against the security interest at hand regardless of whether she files a financing statement earlier or later than the perfection of other security interest in the whole. Article 9 successfully clarifies the law of accession in this sense<sup>212</sup>.

#### **4.5 Concluding remark**

The Article 9 model is an appealing offer of a package deal to any jurisdiction to reform the law on secured transactions in personal property. Broadly speaking, the Australian PPSA adopts the functional approach, unitary treatment and

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<sup>211</sup> PPSA s 90. See more discussion in Duggan A and Brown D, see n. 36, at pp. 259-262

<sup>212</sup> Clark B and Clark B, *The Law of Secured Transactions under the Uniform Code*, vol I (A.S. Pratt and Sons 2010), at pp. 9-90

notice filing system, all of which are the main idea of Article 9 although it follows the Saskatchewan PPSA format. The Article 9 and PPSA-typed models provide a relatively coherent, consistent and cost-saving system of secured transaction law.

In comparison with Article 9, the Australian PPSA has a significant achievement that is a uniform secured transaction law and a unified registration system including serial-numbered property registration. The requirement of attachment and perfection for priority purpose is established for all security interests by function and further embraces other transactions called deemed security interests that do not secure the performance of obligation but creates the ostensible ownership problem.

With regard to title retention treatment, the PPSA has made a significant change turning a contractual arrangement of title transfer condition into a statutory security interest. A relatively simple, fast, and cost-saving notice filing system support the registration of a PMSI. The burden of filing is generally compensated by the first priority in the original collateral extending to the proceeds, accession and the product and mass produced from the original collateral without an agreement. The Australian notice filing system slightly departs from Article 9 scheme to the extent that it requires a public notice about the nature of a security interest by a compulsory indication of a PMSI rather than being a pure means of setting up priority against other competing security interests in the same collateral. However, the information of this kind does not benefit much both earlier-filed creditors, who prefer an individual notification to checking the public record whenever making an advance, and later-filed creditors, who are not interested in a purchase-money status of an earlier-filed security interest. Therefore, it does not outweigh the cost of the wrong indication of a PMSI where a secured party loses an effective financing statement against the collateral as a whole.

The first priority of a PMSI is justified under some strongly supportive theories like the “new money” or “situational monopoly”. It does not raise serious problems when the collateral is equipment or fixed assets. However, in practice, it is a policy question on the benefit of account or receivable financiers who are

likely to compete with purchase-money inventory financiers with regard to the proceeds. The PPSA recognizes the need to balance interests between account financiers and purchase-money inventory financiers. An inventory purchase-money secured party can maintain the first priority in the cash proceeds, but the security interest in the account that is generated from the sale of the inventory collateral is subordinate to a non-purchase-money security interest in accounts. Therefore, a PMSI in merchandise inventory does not bring many benefits to a secured creditor. It is relatively desirable to accept cross-collateralization in the inventory, or at least in inventory of the same kind.

The inventory collateral problem and the old firmly-rooted concept of floating charge have raised much confusion and uncertainty, particularly in the taking free rules with regard to a buyer in ordinary course of business and a buyer relying on authority to sell to claim the priority in the goods. However, the former concept of a floating charge which bases on the authority to sell has interfered to require the sale in the ordinary course of business together with the authority to sell to enable a buyer to take free from a security interest.

Adoption of PMSI cannot be done successfully without changing the relevant provisions in the sale of goods law. Treating title retention as a purchase-money security interest means that the concerned arrangement in a contract of sale has no longer been contractual transfer of property within a framework of a sale and purchase transaction. It requires a violent interference to interpret title retention limited to a consensual secured transaction and force the transfer of property to follow the default rule. Australian law lacks the corresponding provision in the law of sale. It results in the situation where title retention functioning as an arrangement to transfer property still plays a significant role in interpreting the concept of a sale. In this respect, it is particularly important to English law that currently copes with the *Bunkers* ruling. Although Australian adopt the Article 9 model, it fails to change the corresponding provisions in the sale of goods law to treat title retention as a purchase-money security interest only. Therefore, the problem arising from the *Bunkers* ruling, and even *Caterpillar* and *Re Highway Foods*, cannot be satisfactorily solved under the current PPSA.

## CHAPTER 5 RETENTION OF TITLE IN VIETNAMESE LAW: A LIMBO STATUS

### 5.1 Overview of Vietnamese law on secured transactions

The Vietnamese Civil Code is the main source of the law of secured transactions. The Code is not a mirror of the French Civil Code. It adopted the spirit and the format of the Russian Civil Code when it was enacted for the first time in 1995.

In the Code, the law of secured transactions is titled as “Securing Performance of Obligation” belonging to Book III on “Obligations and Contracts” because the scope of application covers both personal and real security. However, this approach is severely criticized because the drafters emphasize the sphere of personal rights but fail to look security interests as property rights<sup>1</sup>. The Civil Code underwent two revisions in 2005 and 2015, with many recommendations to reform the law of secured transactions. The latest revision still places this area in the part of “Obligations and Contracts” rather than the part of “Ownership and Other Property Rights”, or a separate part of security interests as in the French Civil Code. Despite the position in the Code, some considerable achievements are attained.

Although the Civil Code 2015 still allocates the law on secured transactions in the part of obligations and contracts, it acknowledges that security interests are relating to property rights rather than personal rights. As a result, when a security interest is enforceable against third parties, a secured party has the right to follow the collateral and the right to realize the collateral to discharge the debt subject to priority rules<sup>2</sup>. Prior to the Civil Code 2015, these fundamental rules were not provided officially.

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<sup>1</sup> Nguyen X-T and Nguyen BT, *Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries* (2014) Legal Studies Research Paper No. 2014-39 (Robert H. McKinney School of Law, Indiana University), at p. 23

<sup>2</sup> Vietnamese Civil Code Article 295.1

Security interests are categorized into nine types: pledge, charge, deposit, security collateral, escrow account, title retention, guarantee, pledge of trust, and retention of property<sup>3</sup>. Although the drafters understand that security interests can be categorized into personal and real securities, or security interests in movables and immovables as in the French Civil Code, the distinction of those kinds is not clear since the Code simply provides a list of security interests without identifying their nature.

The law requires a security interest to be created upon assets owned by a debtor, but it expressly acknowledges that title retention is an exception to the formalism approach<sup>4</sup>. Furthermore, title retention is recognized as a security interest for the first time.

Vietnamese law adopts the concept of perfection under the Vietnamese phrase translated as “enforceability against third parties”, but it does not mention the concept of attachment<sup>5</sup>. It lacks provisions for the enforceability against the debtor when a security interest attaches to the collateral. Therefore, the general contract rules apply to determine the enforceability between the two parties subject to specific formalities requirement. Registration is the only method of perfection under the former Code, but from now on perfection can be done by registration and possession<sup>6</sup>. There are four systems of registration based on the category of the collateral: aircrafts; vessels; land-use right and fixtures; and personal property and others<sup>7</sup>. It can be said that Vietnam has a unitary system of registration for security interests in personal property. The law of secured transactions reaches the landmark when registration is recognized to be a condition of enforceability against third parties and for the priority purpose. Under the former Civil Code, registration is a formalities requirement to validate a security agreement.

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<sup>3</sup> Vietnamese Civil Code Article 292

<sup>4</sup> Vietnamese Civil Code Article 295.1

<sup>5</sup> Vietnamese Civil Code Article 297.1

<sup>6</sup> *ibid*

<sup>7</sup> Decree 102/2017/NĐ-CP on Registration of Secured Transactions

The Civil Code also maintains the general rules with regard to priority and enforcement for all kinds of security interests that in practice apply to a pledge or a charge primarily. The first-to-file-or-perfection is the main rule of priority: the first perfected security interest has the first priority, and a perfected security interest has priority over an unperfected security interest<sup>8</sup>. Between two unperfected security interests, priority is determined by order of creation<sup>9</sup>. It is corresponding to the general rule of priority in Article 9.

The law of secured transactions, particularly in personal property, however, has some significant shortcomings. The Civil Code fails to address the problem of ostensible ownership created by a secured transaction in personal property. Although it has a provision that the proceeds take the place of the inventory as collateral when the inventory collateral is sub-sold, it does not have a general rule for attachment of a security interest to the proceeds and its perfection. It lacks the priority rule to solve the conflict between a secured party and a buyer in the same asset, even though there is a provision allowing the debtor to transfer the non-inventory collateral to a third party under the secured party's authorization. The Civil Code has a provision to replace the consumable inventory collateral by the inventory of the same kind and quantity, but it lacks provisions for workable or raw material inventory. The question remains whether a security interest in the original collateral is extinguished when they are put into the manufacturing process.

## **5.2 Retention of title as a security interest**

The Vietnamese Civil Code 2015 is closely tied to the Japanese and German Civil Code rather than a Romanistic spirit of the French Civil Code<sup>10</sup>. However, it surprisingly adopts the French treatment of title retention as a security interest, which does not exist in the German Civil Code. It is worth a brief discussion on title retention in French law before proceeding on the current Vietnamese law in the same area.

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<sup>8</sup> Vietnamese Civil Code Article 308.1

<sup>9</sup> *ibid*

<sup>10</sup> Vietnam received the legal technical assistance from Japan for the Civil Code drafting project for the Civil Code 2005 and 2015.

### 5.2.1 Title retention in French law

The French law of security interests has been codified in the Civil Code to cover almost all kinds of security interests. This area underwent a reform in 2006 having the objective of modernization and economic efficiency<sup>11</sup>. Title retention as a security interest is an important outcome of the 2006 reform.

Under the Civil Code, security interests are categorized into personal and real security, and the real security is sub-categorized into security interests in movables and immovables. With regard to security interests in movable property, French law does not adopt a unitary approach that has the same treatment and priority rules for all security devices. In other words, security devices are distinguished to the extent that each security device has its own rules. Therefore, it lacks the interaction between different security devices particularly with regard to priority conflicts and, as a result, bears inconsistency<sup>12</sup>. A *gage* is probably the most important security device in personal property which is defined as an agreement in which a debtor gives a creditor a priority to be paid over other creditors out of the former's moveable assets, current or future<sup>13</sup>. A *gage* can be possessory or non-possessory. The legal regime for a *gage* is considered to achieve, to a certain extent, simplification, clarification and economic efficacy since it adopts the first-to-file-or-perfection rule and a unique system of enforcement for both possessory and non-possessory *gage*<sup>14</sup>. This approach is possibly shifted closer to the unitary approach of Article 9 model. However, the scope of *gage* excludes a security interest in incorporeal movables (*nantissement*) and title retention, both of which have their own rules.

Title retention treatment was codified and recognized as a security interest in movables in the French Civil Code and Commercial Code for the first time in

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<sup>11</sup> See detailed discussion on Renaudin M, 'The Modernisation of French Secured Credit Law: Law As a Competitive Tool in Global Markets' (2013) 11 International Company and Commercial Law Review 385

<sup>12</sup> Haimo SH, 'A Practical Guide to Secured Transactions in France' (1984) 58 Tulane Law Review 1163, at p. 1165

<sup>13</sup> French Civil Code Article 2333

<sup>14</sup> Renaudin M, 'The Modernisation of French Secured Credit Law: Law as a Competitive Tool in Global Markets' (2013) 11 International Company and Commercial Law Review 385, at p. 387

2006, but this concept has been accepted since 1980 within the scheme of the insolvency proceeding<sup>15</sup>. The security interest of this kind is called as “retention of title as a security” (*la retenue à titre de garantie*). There are only six relatively concise articles for retention of title as a security. It cannot classify correctly the French law of secured transactions on personal property into formalism or functionalism from the Anglo-American perspective. Title retention treatment as a security interest could be a good illustration for this point. Under the Civil Code, the title retention clause which postpones the transfer effect arising from a contract of sale until full payment of purchase price creates a guarantee by retaining the ownership of a thing<sup>16</sup>. By default, the buyer acquires the ownership when the parties agree upon the thing and the price despite the fact that the thing has not yet been delivered or the price has not paid<sup>17</sup>. On the other hand, ownership may be retained to secure payment of purchase price. The security interest of this kind is not created by a debtor upon the items she owned, but by a creditor retaining title to the goods to secure payment under a contract of sale. This notion sounds unfamiliar and undesirable under the formalism perspective. It is slightly close to the functional approach since the Civil Code recognizes title retention as a security interest by its function. However, title retention is exceptional since other devices like the assignment of book debts or hire-purchase agreement are not classified as a security interest by its function.

It is worth noting that only a seller can be a title-retaining creditor. The Civil Code sets up the link between a sale and purchase transaction with title retention as a security interest by stressing on a title retention clause in a sale contract as a source of security interest of this kind. A lender who advances money to acquire the property cannot have a title retention as a security interest as she does not have the original title to the concerned property<sup>18</sup>.

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<sup>15</sup> Dorst A and Gagnier AD, ‘France’ in Willems M and International Bar Association ib (eds), *Retention of Title In and Out of Insolvency* (Globe Law and Business 2015), at p. 125

<sup>16</sup> French Civil Code Article 2367

<sup>17</sup> French Civil Code Article 1583

<sup>18</sup> In practice, the sale of cars on credit is secured by title retention that is transferred to a professional lender by way of subrogation under an auto loan agreement. In 2016, the Court of Cassation gave an opinion considering the subrogation of this kind may be an unfair term, and unenforceable. Consequently, the auto loan secured by title retention becomes unsecured. See

Title retention must be in a writing agreement<sup>19</sup>, and it can be appeared in a document governing a number of commercial operations agreed by the parties<sup>20</sup>. It is required that the wording must be sufficiently clear and unequivocal<sup>21</sup>. In practice, a seller's terms and conditions usually contains a title retention clause. A small print of title retention clause may not suffice the formal requirement<sup>22</sup>. The Commercial Code provides that the title retention agreement must be entered not later than the delivery time so that the seller can have a recovery claim in the bankruptcy proceeding<sup>23</sup>. The parties may agree on the sale, and at that time transfer of property has occurred, a separate title retention agreement can be executed effectively later as long as it is at the latest at the time of delivery. In this sense, title retention is not amounting to the concept of PMSI, which disqualifies the security of antecedent debt and requires the money advanced to acquire the collateral. It is likely that the third party's right interferes in the gap between the above-mentioned points of time. This provision shows a confusion in French law regarding the treatment of title retention.

Title retention can be enforced against third parties without want of public registration as long as it fulfils the formal requirement discussed above. The absence of registration requirement is one of many points leading to the doubt over the nature of title retention under French law since title retention is apparently a non-possessory security interest. However, by invoking the right of the owner, a title-retaining seller can choose to publish the contract to earn more benefits and protections in insolvency proceedings. In this respect, the owner does not need to provide the proof of ownership, and she can initiate a claim to restore the goods without the limitation of time<sup>24</sup>. Otherwise, other recovery

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Press Release: S&PGR: Title Retention Opinion Could Affect French ABS. (2017, March 30). *Dow Jones Institutional News*, p. Dow Jones Institutional News, Mar 30, 2017

<sup>19</sup> French Civil Code Article 2368, French Commercial Code Article L624-16

<sup>20</sup> French Commercial Code Article L624-16

<sup>21</sup> Dorst A and Gagnier AD, see n. 15, at p. 127

<sup>22</sup> *ibid*

<sup>23</sup> French Commercial Code Article L624-16

<sup>24</sup> French Commercial Code Article L624-10

claim must be submitted within three months starting from the date of publication of the order commencing the proceedings<sup>25</sup>.

Although title retention is located in the part of security interests in movables, the wording treats it as the owner's absolute interest rather than a security interest. It does not mention the priority between the title retention claim and the competing security interest in the same items. It simply provides that a creditor can request the return of the property in order to recover the right to dispose of it<sup>26</sup>. A creditor can invoke self-help by asking a debtor to return the property; otherwise, she must go to court to obtain a writ of execution<sup>27</sup>. Even though the creditor owes the debtor the surplus if the value of the property exceeds the amount of the secured debt, the wording shows that the enforcement of title retention as a security interest is equivalent to the enforcement of ownership right. Comparatively, a *gage* can be enforced by a petition in court for an order of sale. The secured creditor can alternatively petition the court for an order to keep the collateral for payment and pay the balance to the debtor if the value of the property exceeds the amount of secured debt. At the time of creation of a *gage*, the parties can agree upon that the secured creditor would become the owner of the collateral and enforce this right without the court's order. The legal consequence of enforcement where the property is seized by a creditor may be the same between title retention and a *gage*, but the French Civil Code drafters have born in mind that the rights of a title-retaining creditor is absolute as of an owner of the property. The French orthodox perspective does not consider title retention as a source of priority because it is contradictory to the fact that the title remains with a seller rather than belonging to a buyer<sup>28</sup>. This thinking has framed the treatment of title retention even as a security interest but lacking the respective priority rule. Therefore, the only point to possibly see title retention as a security interest is the debtor's right to redeem the surplus between the value of the property and the amount of the secured debt.

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<sup>25</sup> French Commercial Code Article L624-9

<sup>26</sup> French Civil Code Article 2371

<sup>27</sup> Dorst A and Gagnier AD, see n. 15, at p. 133

<sup>28</sup> van Erp JHM and Akkermans B, *Cases, Materials and Text on National, Supranational and International Property Law* (Oxford: Hart 2012), at p. 476

It is clear that an unpaid seller can enforce the recovery of the property under the title retention clause as long as the property remains in kind in the buyer's possession. However, when a buyer creates a possessory *gage* on the concerned goods in favour of a third party, the latter is not obliged to check whether the property is subject to a title retention<sup>29</sup>. Therefore, a third party with possessory rights has priority over a title-retaining creditor<sup>30</sup>. The priority of possessory *gage* over title retention does not mirror the subordinate ranking of the former security device in a competition with an earlier registered non-possessory *gage*. The law of *gage* adopts the first-to-file-or-perfection rule, whereas, it can be assumed that the subordinate priority of title retention in competition with a possessory *gage* is justified by the lack of registration with regard to title retention and the fact that the holder of possessory *gage* possesses the property.

In competition with a secured party having a turning *gage* with substitution goods (*gage tournant avec substitution de merchandise*), that is a cross-collateralization, a title retention claim has priority subordinate to the given secured party if a turning *gage* has been agreed upon before the delivery of the property<sup>31</sup>. The Court of Cassation was likely not to take into consideration the nature of purchase-money credit and the new money theory to grant the first priority to the title-retaining seller.

The law of title retention as a security interest does not have priority rules with regard to the conflict between a title-retaining creditor and a sub-purchaser. The French Civil Code has two important rules concerning personal property in this sense. Article 1599 invalidates a sale of a thing belonging to another, and Article 2276 provides that possession is amounting to a title. Under the French law perspective, although title retention is recognized as a security interest in personal property, title remains with the seller until and unless the buyer pays the full purchase price. Despite Article 1599, Article 2276 as an exception allows a transfer of good title to a sub-purchaser who relies on the initial purchaser's

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<sup>29</sup> Court of Cassation, September 11, 2012 11-22.240 cited in Dorst A and Gagnier AD, see n. 15, at p. 131

<sup>30</sup> Dorst A and Gagnier AD, see n. 15, at p. 131

<sup>31</sup> Court of Cassation, May 26 21010, 09-65-812 cited in Dorst A and Gagnier AD, see n. 15, at p. 131

possession in good faith<sup>32</sup>. The outcome is desirable to the extent that French law does not require a registration to validate title retention against third parties.

Title retention is not statutorily recognized to be extended to the proceeds of sub-sale and manufactured/combined goods, even though the parties agreed upon. However, there are some exceptions. When the property is sold to a sub-purchaser, without consensual agreement, an unpaid seller has a personal action for the purchase price against a sub-purchaser only if the latter has not yet paid her own seller<sup>33</sup>. When the subject of title retention is the fungible goods, title retention attaches to property of the same kind and quality in the debtor's possession up to the amount of the debt remaining due<sup>34</sup>. When the goods subject to title retention are incorporated into other goods but remain in kind and can be recovered without causing damage to other goods, the incorporation does not extinguish title retention<sup>35</sup>.

French law recognizes title retention as a security interest, but it has a limited scope. It does not fully anticipate and give solutions for extinguishment disputes when the concerned property is sub-sold or undergone manufacturing process. In other words, even though title retention has a close nexus with personal property that substantially includes shifting or circulating assets, the French law of title retention as a security interest only facilitates the fixed status of the asset. Furthermore, the treatment of title retention does not manifest the nature and the content of a security interest. Rather, it is similar to the treatment of absolute property rights conferred upon a true owner. The subject of a security interest of this kind is the title to the goods or ownership rights, rather than the goods themselves as the collateral. The only method to enforce title retention, that is the recovery of the property, shows the super-priority of title retention on its face but the underlying policy is the enforcement of ownership right instead of the "new money" and "situational monopoly" theory relating the concept of PMSI. It can be said that title retention as a security interest in French law does not adopt the concept of PMSI.

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<sup>32</sup> Dorst A and Gagnier AD, see n. 15, at p. 128

<sup>33</sup> Dorst A and Gagnier AD, see n. 15, at p. 130; French Civil Code Article 2372

<sup>34</sup> French Civil Code Article 2369

<sup>35</sup> French Civil Code Article 2370

## 5.2.2 Title retention in Vietnamese law

Title retention is categorized as a security interest for the first time in the Vietnamese Civil Code 2015. It mirrors the French Civil Code approach to title retention with some significant variants. Corresponding to the French treatment of title retention as a security interest, the title to the goods is the subject of the security interest of this kind. The only method of enforcement is the recovery claim so that an unpaid seller repossesses the property in kind<sup>36</sup>. The Vietnamese law treats the seller as an owner more strictly in comparison with the French law. In this sense, an unpaid seller does not owe the balance to a debtor when the value of property exceeds the amount of unpaid debt. On the other hand, the former does not have an unsecured debt when the value of the property is diminishing below the amount of unpaid debt. A seller must refund a debtor subject to any depreciation caused by the exploitation of the goods in the normal course of business if the latter pays the purchase price partly<sup>37</sup>. A seller is also entitled to damages when the property is lost or damaged<sup>38</sup>. It is corresponding to the provision that the risk is transferred to the buyer notwithstanding title retention, unless otherwise agreed<sup>39</sup>. Furthermore, the wording emphasizes that even though the law of title retention is located in the part of secured transactions in the Civil Code, a title retention transaction is described under sale and purchase terms. “Buyer” and “seller” are used instead of other terms referring to a secured transaction, such as secured party/debtor, pledger/pledgee, or chargor/chargee.

Under the Civil Code, a buyer has rights to use, enjoy fruits and profits generating from the property<sup>40</sup>. However, it does not mention solutions for extinguishment disputes when the property is resold, consumed, or put into the manufacturing process.

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<sup>36</sup> Vietnamese Civil Code Article 332

<sup>37</sup> Vietnamese Civil Code Article 332

<sup>38</sup> Vietnamese Civil Code Article 332

<sup>39</sup> Vietnamese Civil Code Article 333.2

<sup>40</sup> Vietnamese Civil Code Article 333.1

The title retention arrangement must be in writing. It can be established in the sale contract or separately. The Vietnamese Civil Code has a unique provision with regard to a sale on credit. Accordingly, title retention is an implied term in a contract of sale on credit<sup>41</sup>. Parties can expressly agree otherwise to avoid a default title retention arrangement<sup>42</sup>. A contract of sale on credit is required to be in writing<sup>43</sup>. It can be inferred that without a title retention clause, a seller can enjoy the benefit of title retention as a security interest under the Civil Code as long as she has a written contract of sale on credit and registers it<sup>44</sup>. It is argued that this provision aims at protecting a seller engaging in a sale on credit transaction against the risk of non-payment. However, although the parties can contract out, the provision of implied title retention violently interferes with the rights of buyers buying on credit. Without an agreement on transfer of property, property is transferred at the time of delivery<sup>45</sup>. However, a sale on credit extinguishes this implied term and replaces it by another implied term of title retention. If the seller selling on credit makes use of title retention as an implied term to register it against not only the buyer but also other creditors, it will lead to unexpected outcomes with regard to the debt financing market. Institutional financiers may raise the interest of secured credit or depend on real property as the collateral to advance credit because it is not easy to compete with title-retaining sellers with regard to personal property. The above discussion is only a presumption mainly relying on the Civil Code provisions. In practice, title retention has never been a serious threat to institutional financiers in Vietnam. Sellers do not probably have any idea of security function arising from title retention arrangement. It is witnessed that title retention arrangement exists in a sale contract for a long time, particular in sales between Vietnamese and foreign party, but disputes relating to or arising from the sale of this kind are rarely reported. It is remarkable that although the Vietnamese Civil Code recognizes a security interest created upon after-acquired property, but it requires

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<sup>41</sup> Vietnamese Civil Code Article 453.1

<sup>42</sup> *ibid*

<sup>43</sup> Vietnamese Civil Code Article 453.2

<sup>44</sup> Do VAT, 'Seller's Title Retention to the Goods Under the Civil Code 2005' (2016) 9 State and Law 18 (Vietnamese), at p. 22

<sup>45</sup> Vietnamese Civil Code Article 161

registration of amendment whenever after-acquired property comes into existence except for after-acquired inventory collateral. Thus, a blanket lien can be created on inventory but not on non-inventory collateral. Recognition of title retention as a security interest is not a demand of setting up a counter-weight to a blanket lien or avoiding a situational monopoly creating by a blanket lien.

The significant point making the treatment of title retention in the Vietnamese Civil Code departing from the French approach is the requirement of registration for the purpose of enforcement against third parties<sup>46</sup>. The registration system in Vietnam is a transaction – based one where an agreement creating a security interest must be submitted for registration. Before the enactment of the Civil Code 2015, without formal recognition of title retention as security interest, registration was required to enforce the title retention clause to the extent that a title-retaining seller has priority over other secured creditors if the registration was made within fifteen days starting at the date of creation of the sale contract<sup>47</sup>. This rule was corresponding to the Article 9 requirement of timely perfection for the first priority of a PMSI in non-inventory collateral. However, timely registration as in the previous law discontinues in the new Civil Code. It is ambiguous about the relationship between the priority rule of title retention and registration. The general priority rule is the first-to-file one with regard to the conflict between many registered security interests in the same collateral. The Civil Code lacks a separate priority rule for title retention. It can be inferred from four extremely brief articles with regard to title retention that a title - retaining seller has the first priority under the right to recover the property as long as she fulfils the requirement of registration. The order of registration and timely registration do not play any role in setting up the priority of title retention against other security interests.

There is no priority rule for the competition between a title-retaining seller and a buyer, but a true owner of the goods has a shelter against a third party who possesses the goods in good faith to recover to the goods, except that a third party in good faith gives value and receives the delivery from a person who

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<sup>46</sup> Vietnamese Civil Code Article 331.3

<sup>47</sup> Decree 163/2006/NĐ-CP On Secured Transaction Article 13.2

possesses the property under the owner's consent<sup>48</sup>. It is problematic that the law of title retention has a blurred distinction between a secured party and an owner to determine the status of a title-retaining seller when it accepts title retention as a security interest.

The same problem occurs when the original goods undergo a manufacturing process. The Civil Code lacks provisions for attachment, perfection, priority and enforcement in this context for all kind of security interests including title retention. Without a title retention agreement extending to newly-manufactured products, the question is whether a title-retaining seller is still qualified as an owner of the original goods to set up co-ownership in the products<sup>49</sup>.

Before the enactment of the Civil Code 2015, title retention was enforced as a contractual arrangement in a contract of sale on credit<sup>50</sup>. The parties could agree upon the condition of transferring the title to the goods<sup>51</sup>, including that the property was not transferred until and unless the full purchase price was paid. A seller as an owner of the goods could reclaim the goods when a buyer failed to make payment under an agreement or in the absence of agreement, under the statutory right to recover the goods. In this sense, the goods were not subject to the buyer's asset upon which the buyer could create a security interest in favour of other creditors. As discussed above, without recognition of title retention as a security interest, an unpaid title-retaining seller can invoke provisions protecting a true owner against third parties who possesses the goods in good faith or claiming co-ownership in case of mixing, incorporating or processing the original goods to form new products.

The new treatment of title retention as a registrable security interest has an unsatisfactory legal consequence to a seller selling on credit. To enforce title retention against third parties, a seller must conduct a registration. The implied term of title retention in a sale on credit does not support much a seller in

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<sup>48</sup> Vietnamese Civil Code Article 167

<sup>49</sup> If the goods are mixed, incorporated or processed with other goods to produce new products, all owners of original goods co-own the new products. Vietnamese Civil Code 2005 Article 236, 237, 238.

<sup>50</sup> Vietnamese Civil Code 2005 Article 461

<sup>51</sup> Vietnamese Civil Code 2005 Article 439.1

practice because its enforceability against third parties still depends on registration. Before the Code 2015, an unpaid seller subject to title retention can claim for the recovery of the goods as an owner without want of registration. To some extent, registration has a function of giving public notice that provides a proof for the latter recovery claim if any, particularly in an insolvency proceeding. The Insolvency Law enacted in 2014 does not have any particular provision for title retention, but the enforceability of the Civil Code 2015 has changed the position of a title-retaining seller significantly. Having registered title retention, the seller of this kind is treated as a secured creditor. However, the rule enforcing a security interest under the Insolvency Law does not support the enforcement of title retention claim. Under the Insolvency Law, the collateral is realized to discharge the secured debt. The surplus between the value of the collateral and the amount of debt will join the debtor's asset; on the other hand, the deficiency thereof will make the secured creditor at hand to be an unsecured creditor with regard the unpaid amount of debt<sup>52</sup>. The Civil Code 2015 does not treat the goods, but title retention as the collateral, and the enforcement of title retention as a security interest is simply the recovery of the goods.

The law of title retention undoubtedly imports the French approach with some modifications, especially the requirement of registration. However, the Civil Code 2015 does not make any improvement in this area except for the formal acceptance of a security interest by its function.

### **5.3 Title retention treatment from the perspective of legal transplant: The case of Vietnam**

Globalization has urged nations to have harmonized and uniform standards to promote the international trade. For a developing country having a transition economy like Vietnam, legal transplant is a convenient, fast and to some lesser extent effective means to have a legal framework facilitating the international economic integration. Legal transplant could be caused by imposition, prestige or economic performance<sup>53</sup>. The imposition occurs as a result of military conquest

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<sup>52</sup> Insolvency Law 2014 Article 53.3

<sup>53</sup> Graziadei M, 'Comparative Law as the Study of Mixed Legal System' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2008),

or colonization. Meanwhile, a foreign system of rules can be voluntarily received because it has proved to be a good model. The demand of economic performance in the era of globalization, international integration and economic transition has furthermore initiated the legal reform in many countries. Many international organizations or institutions like the World Bank, UNIDROIT or UNCITRAL, have actively engaged and supported this process by recommending model laws or funding law reform projects. These actions involve to some extent legal transplant and reception in many recipient countries. The UNCITRAL Legislative Guide on Secured Transactions is an example that provides recommendations to any country that needs a reform for the law of secured transactions. This document analyses and suggests multiple choices for title retention treatment.

Vietnam has witnessed all causes of legal transplant into the legal system since the ancient time. Due to the close and sensitive relationship between Vietnam and China before the conquest of the French colonizer in the nineteenth century, Vietnamese formal law and order were borrowed from feudal China, whereas some local customary law remained<sup>54</sup>. In the French colonial period, French civil and commercial law were imported and received, but their application was limited to French citizens and European or to the relationship between French and indigenous Vietnamese. In the north (Tonkin) and central Vietnam (Annam), two separate civil codes, along with the criminal procedure codes and penal codes were enacted, all of which were drafted by French lawyers<sup>55</sup>. Although being received cautiously and even hostilely at first, French concepts and ideology have played a vital role in the Vietnamese modern legal system, at least that Vietnam today insists on code – formulated law. Noticeably, Vietnam belonged to the family of socialist law after it gained independence from France. Today, Vietnamese law has changed much to meet the demand of economic transition and international integration, but the socialist idea which has a strong

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at pp. 455-461

<sup>54</sup> Hooker MB, *A Concise Legal History of South-East Asia* (Clarendon Press 1978), at pp. 93-4

<sup>55</sup> Vietnam in French colonial period did not have a single legal system due to the French administration. The South Vietnam (Cochin-China) is a French colony directly administered by French civil service. The North (Tonkin) and Central Vietnam (Annam) are two French protectorates that French made some concession to the native autonomy. See more discussion in Hooker MB, *A Concise Legal History of South-East Asia* (Clarendon Press 1978), at pp. 153-166

resistance against judge-made law can be traced. In recent years, the Vietnamese Supreme Court has published reports of its selected decisions that has an effect of case law within the scheme of the judicial reform.

To have a legal framework for a market economy, Vietnam has transplanted and received many foreign laws or model laws. There are two typical examples: rules on publicly-held corporation are drafted following the United States unitary board model and arbitration law incorporates the UNCITRAL Model Law on International Commercial Arbitration. The Civil Code is also a good example of legal transplant in Vietnam. The first Civil Code enacted in 1995 was drafted after the Russian Civil Code, and accidentally adopted the Germanic scheme instead of Romanistic spirit of the French Civil Code. However, the treatment of title retention as a security interest is the product of legal transplant of the French approach.

### **5.3.1 Import of the French approach**

The French approach to title retention as a security interest is flawed. It fails to conceptualize a new statutory security device and get stuck. It does not successfully and effectively figure out what kind of rights the seller has in the goods: an absolute ownership or an accessory security right. A current report of The Court of Cassation's opinion shows the undesirable status of title retention as a security interest in French law that treats the title to the goods as the collateral<sup>56</sup>. The Court of Cassation viewed the subrogation clause that transfers the seller's title retention rights to a professional financier as an unfair term, and thus unenforceable<sup>57</sup>. The French law fails to look at the concept of title retention to have a link with the concept of a PMSI, which considers the seller's title retention is equivalent to the security right in the goods arising from advancing the fund for the buyer to acquire the goods at hand. The title to the goods, not the goods themselves, are the collateral under the French approach. Therefore, that a financier subrogates a title-retaining seller to title retention rights, not the title to the goods, is a justification for treating the subrogate clause as an unfair term. As

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<sup>56</sup> Press Release: S&PGR: Title Retention Opinion Could Affect French ABS. (2017, March 30). *Dow Jones Institutional News*, p. Dow Jones Institutional News, Mar 30, 2017

<sup>57</sup> *ibid*

a result, it turns a secured debt into an unsecured one. In practice, the purchase of cars in France is usually funded by professional financiers under the subrogation arrangement in order to take advantage of title retention as a security interest<sup>58</sup>. The Court of Cassation's opinion has a negative impact on the debt financing market with regard to consumer loan transactions<sup>59</sup>. The opinion does not contribute to the development of the law of title retention in comparison with the same court's ruling in the past. In 1988, the Court of Cassation reversed the Court of Appeal ruling, considering title retention is the accessory right to the claim for the purchase price. Therefore, when the vendor endorsed the bill of exchange in favour of the bank, the vendor conveyed both the receivables against the buyer and the right ancillary to it<sup>60</sup>.

Considering title retention as a unique security device accessible to a seller, French and Vietnamese law does not take into account the idea of asset-acquiring financing proposed under the concept of PMSI. It is a transaction in which a person claims a property right in the goods to secure the buyer's obligation to pay the purchase price<sup>61</sup>. Not only a seller but also a lender could provide credit to a buyer to acquire assets. In practice, sellers in general possibly have a demand for cash and are not professional financiers who are willing to extend the credit term. The theory of "new money" supporting the first priority of PMSIs suggests that asset-acquiring financing can be done by both a seller and a lender as long as the fund is provided to acquire new assets. In other words, a purchase-money loan is secured by the asset that is not previously owned by the debtor before, and as a result, does not touch or shrink the debtor's pool of assets reserved to secure other creditors' loans. In many jurisdictions like Vietnam, where the blanket lien is recognized, at least with regard to inventory or shifting asset, the first priority of asset-acquiring financing is meaningful to break the situational monopoly that restrains the debtor from obtaining secured credit at

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<sup>58</sup> *ibid*

<sup>59</sup> *ibid*

<sup>60</sup> Court the Cassation, 11 July 1988, D 1988, IR, 240, cited in Erp JHMv and Akkermans B, *Cases, Materials and Text on National, Supranational and International Property Law* (Oxford: Hart 2012), at pp. 477-8

<sup>61</sup> UNCITRAL, *Legislative Guide on Secured Transactions*, United Nations Publication Sales No. E. 09. V. 12 (2010) (hereinafter *Legislative Guide*), at p. 320. The *Legislative Guide* calls it an acquisition financing transaction.

competitive terms from other creditors. Under Article 9, a PMSI is defined to cover title retention in sale contracts and lending transactions in which the value is given to acquire the collateral. A title retention sale is considered to be equivalent to a loan advancing for this purpose. Both are PMSIs because they share the same core characteristic, namely the credit extended and secured not by the pre-existing but new collateral. It is a good justification for the super-priority ranking enjoyed by the purchase-money creditor and that a PMSI is limited to the purchase price of the collateral. Title retention, in the name of a PMSI, should comply with the law of secured credit in order to grant the seller/creditor a favoured treatment in comparison with other creditors including secured creditors and even debtors in the personal bankruptcy context. The PMSI approach is considered to be a fully integrated concept where there is no distinction between secured credit supplied by the seller and the lender to purchase the asset, and a PMSI is at first a security interest to comply with general rules of the law on secured transactions<sup>62</sup>.

The seller-based approach and the owner-based enforcement method involving title retention as a security interest also prevent the debtor from granting lower-ranking security interest to other creditors. French law does not have the priority rule for the competition between title retention and other security devices, but having a provision requiring a seller accountable for the surplus between the value of the property and the amount of outstanding debt to the buyer. In other words, the surplus will join the buyer's assets for the enjoyment of general creditors rather than any secured creditor. Under Vietnamese law, a title-retaining seller takes the goods all irrespective of whether there is deficiency or surplus between the present value of the concerned goods and the outstanding debt. Therefore, the goods subject to title retention cannot be realized for the benefit of the buyer's unsecured creditors.

Under the Article 9 model, a PMSI is at first a security interest that follow the general priority rules. In this respect, it is the competition among several secured creditors in which a purchase-money creditor has the first priority. In other

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<sup>62</sup> *ibid*, at p. 332

words, treating title retention as a true security interest gives a debtor a chance to create lower-ranking security interests in favour of other creditors. Therefore, it does not prevent a debtor from accessing secured loan bidden by other creditors when a PMSI is created upon the same assets.

In comparison with English law, the French law of title retention results in the same legal consequences with regard to simple title retention despite the fact that both jurisdictions employ different concepts. In both jurisdictions, an unpaid seller is entitled to recover the goods that is still identified in the debtor's possession in and out of the insolvency proceedings without want of registration. With regard to the proceeds and new products, other creditors who has a security interest in accounts and after-acquired property respectively generally have the first priority. It should be noticed that in English law, a seller is found in practice to have a void charge in the proceeds or new products due to lack of registration. Despite the fact that both English and French law may reach the same legal consequences, the English logic is satisfactory because it recommends a clear distinction between two different kinds of property rights, namely the ownership right and the real security right.

Vietnamese law unfortunately imports the French approach to build the law of title retention with some modifications that does not contribute any improvement to the approach of this kind. The requirement of registration may, on its face, bring the treatment of title retention as a security interest closer to the concept of a security right in personal property. However, the requirement of registration under the security interest treatment is not compensated by the priority extended to the proceeds and new products.

During the process of drafting the Civil Code 2015, drafters addressed the problem of title retention by conducting many researches on the treatment of title retention in many jurisdictions. Although the Civil Code imports the scheme of German Civil Code which does not recognize title retention as a security interest, it insists on treating title retention as a security interest. In practice, before the enactment of the Civil Code 2015, title retention is introduced in Vietnam through international sale contracts that is usually drafted by a foreign

party or terms and conditions offered by a foreign party. This thesis was in fact initiated by an inquiry from a domestic company who received a request from overseas company asking it not to take delivery of a consignment that was allegedly subject to the title reserved by the original seller. Title retention is widely known in Vietnam in the simple form. However, disputes over title retention are rarely brought to court. It could be said that the law of title retention was not under a pressure to have a reform. The Civil Code has a role to introduce a new security device to the secured credit market. Accordingly, title retention is a security device uniquely reserved for a seller whereas other financiers who are willing to bid for loan cannot deploy it. From the viewpoint of a seller, title retention as a security interest in the Civil Code is not desirable and appealing since it requires registration but does not protect a title-retaining seller in extinguishment disputes where the goods are sub-sold or put into the manufacturing process.

The law of title retention in particular and secured transactions in general in Vietnam does not learn a lesson from Article 9. A minor influence of this model could be traced in the pre-Code 2015 requirement of timely registration. Some versions of the Civil Code 2015 draft kept the timely registration as a condition to grant the first priority to an unpaid title-retaining seller. The draft also had a priority rule for title retention as a security interest which cannot be seen in the French Civil Code and the Civil Code 2015.

Treating title retention as a security interest in Vietnam today is unquestionable or debatable even though it was received slowly and doubtfully both in practice and theory. The further question should be which approach is suitable and economically effective in the Vietnamese context. The Vietnamese legal system is a civil law one where the Civil Code is considered a cornerstone of private law, and the diversity of security devices accompanied by respective different treatments has a deep root that places a strong barrier to the import of the unitary approach.

### 5.3.2 Transplanting PMSI concept into the scheme of Civil Code

The discussion above reveals an effort to transplant some provisions of Article 9 into the law of title retention. It is not necessary to be a project to reform the whole law of secured transactions, changing it from a multi-device system into a unitary one by adopting the functionalism approach. Article 9 is a combination and interaction of functionalism, a unitary approach and a notice filing system. The Vietnamese law of secured transactions in personal property law lacks all above features but has a desire to treat title retention as a security interest by function. The French approach is proved that the new title-based security device does not accommodate the credit availability from both the financier and the buyer's side. However, it is questionable whether the concept of PMSI can survive in the body of the multi-device-based law of secured transactions within the massive scheme of a Civil Code.

The unitary approach is not amounting to an absolute concept that rejects any distinction. The Article 9 and the PPSA model do not maintain a diversity of security devices, but it classifies the types of collateral and provides different treatments. More importantly, although a PMSI is subject to the general rules, it has its own label and a separate status from general security interests. The UNCITRAL recommends that asset-acquiring financing can be governed under the scheme of unitary approach or non-unitary approach to achieve equivalently functional outcomes, even though the former is a better solution<sup>63</sup>.

The crucial point is that the law of PMSIs should be built upon the interaction and dependence with the general law of security interests. Under the Vietnamese Civil Code, a consensual security interest in personal property may have the form of a pledge, a charge or title retention. Although the law of secured credit basically does not adopt the unitary approach, a pledge and a charge share a great number of general rules offering the unique treatment with regard to the collateral, the enforceability against third parties (perfection), the priority and the enforcement. Vietnam also has a unique registration system for security

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<sup>63</sup> See Legislative Guide, at pp. 377-381 for Recommendations 187-202 with regard to the non-unitary approach

interests in personal property for secured parties of all kinds. The import of the whole concept of PMSI as a separate security device is possible in this context. A PMSI would be governed by the general rules subject to some exceptions. The advantage of a PMSI is that general lenders, not only sellers, can use this device to advance secured credit to a buyer who needs fund to acquire new assets. Subject to the general rules of security interest in personal property, the purchase-money collateral which is usually the goods in a sale contract is available for the buyer to create other lower-ranking security interest in favour of other creditors. It can be said that the scheme of a civil code is an advantage to import the concept of PMSI without the need to reform the whole law of secured transactions in personal property to formally accept the unitary approach. In contrast, the English law of secured transactions where different security devices accompanied by different logic and treatments contained in different legal texts or in common law is under the pressure of reform, and the question of unitary approach should be considered thoroughly and seriously to achieve a desirable outcome. The context of English law in this area is close to the pre-Code situation in the United States and obviously the same as in other common law jurisdictions like Canada, New Zealand and Australia. The diversity of security devices is not only due to the form of transaction but also the kind of debtor. Therefore, the law of PMSI would contribute to the fragment and complication with regard to secured transactions in personal property.

However, it cannot be said that the law of secured transactions in civil law jurisdictions, particularly in personal property is not urgent to be reformed. The shortcoming of Vietnamese law in this area is that it does not look personal property in its active status, namely in the form of shifting or circulating assets, or under the possibility to be transferred when it becomes obsolete. It does not take into account the ostensible ownership problem created by the characteristic of personal property where possession manifests ownership on its face. Therefore, it does not deal with extinguishment disputes when the collateral is sub-sold or put into the manufacturing process. The legal transplant of PMSI will not be satisfactory if the Civil Code does not provide rules relating to the proceeds or new products deriving from the original collateral.

A notice filing system is not a pre-requisite to introduce and operate the law of PMSIs. Registration does not determine the nature of a PMSI. Rather, it carries the function of giving public notice about the possible existence of a security interest in particular items or class of assets that is meaningful to any potential secured creditors, or an earlier-registered secured party who is holding a security interest in the after-acquired inventory collateral when the debtor applies for credit to acquire inventory. On the other hand, the first-to-file-or-perfect rule is essential for a security interest in the proceeds and a new product in extinguishment disputes in which the given priority is antedated back to the time when the security interest in the original collateral is registered. Priority ranking relying on the order of creation possibly results in the debate on the time when a security interest in the proceeds or in new products is created. For example, it would be the day when the original agreement is concluded or when the proceeds or new products come into existence. In any case, it is apparently more difficult to determine than the day of filing or registration. A notice filing system and the first-to-file-or-perfect rule is also a good combination to enhance a prompt notification of a security interest for the purpose of priority ranking.

Priority ranking in Vietnamese law is based on the order of registration rather than creation. In this respect, it is crucial to register a security interest as soon as possible when the security agreement is formed to gain the expected priority. Although a secured party cannot pre-register a prospective security interest as in a jurisdiction fully adopting the Article 9 model, the first-to-register rule is a good condition to build the rules for the proceeds and new products in extinguishment disputes. It allows the security interest in the proceeds and new products to have the priority day of the original collateral subject to continuance of perfection.

It is unquestionable that a notice filing system facilitates the market of secured credit in the sense of a convenient, fast, easily-determined and cost-saving system. Even though Vietnam has a unique registration system for security interests in personal property and maintains electronic registration, it is a transaction-based one. Registration is burdensome and costly to any inventory financiers including purchase-money secured creditors because registration is required routinely and regularly whenever credit is advanced. In brief, the

reform question to replace a transaction-based system by a notice filing one is usually considered from the viewpoint of economically effective secured transaction law.

Functionalism is a prerequisite to adopt the concept of PMSI. The French approach does recognize the function of title retention arrangement that is not limited to the transfer of title but also provide a device to secure payment of purchase price. However, functionalism has the broader scope to cover any device carrying the same security function, such as a hire-purchase transaction. The import of PMSI in the scheme of a civil code is the acceptance of functionalism in specific cases rather than taking it as a backbone of the secured transaction law. Again, the question of functionalism is particularly important beyond the ambit of a PMSI. Functionalism is a significant condition to build the secured transaction law under the unitary approach in which any transaction functioning as to secure the payment or performance of other obligations is treated unitarily without distinction of forms and types of secured creditors. However, resist against adoption of functionalism as a whole package does not restrain the legal transplant of PMSI into a system of multiple security devices.

A civil code plays a vital role and manifests a proud achievement of legislation in any civil law jurisdiction. It is argued that a code-formulated system is an obstruction to adopt a good law of secured transactions like Article 9 in modern times<sup>64</sup>. The development of social and economic relationships today makes them more complicated than they were at the time of the first enactment of the Napoleon Code where the economy was mainly based on agriculture. An all-in-one code covering from the law of persons, property, torts to contracts and obligations is unfit for an everyday growing-up body. This argument seems persuasive since a comprehensive and massive legal text like a civil code must be built upon a logic or a legal science that connects all parts together. The Vietnamese Civil Code is a good example in law-making demonstrating a confused and doubtful choice between the model of the French Civil Code and the German Bürgerliches Gesetzbuch. Furthermore, the debate on the position of the

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<sup>64</sup> Nguyen X-T and Nguyen BT, see n. 1, at p. 21

law on secured transactions in a civil code is on-going since the relationship of this kind is at the intersection of personal and property rights. The recommendation to place the law of secured transactions in a separate part and at the same level with the law of contracts and obligations and tort law as demonstrated in the French Civil Code has not received full support until now. In the Vietnamese context, it is an obstacle to update the law of secured transactions to respond to a dynamic secured credit market in a developing economy because the revision or reform of this area must be put within the whole project, namely the revision of the civil code or at least the law of contracts and obligations. It is recommended to have separate legal texts rather than a massive code like a civil code to avoid the rigid status and make it flexible to change the law. However, the recommendation of this kind attacks the heart of the civil law tradition in which a civil code is considered as a constitution in private law<sup>65</sup>. The existence of a civil code in a civil law jurisdiction has been never questioned or doubted in the perspective of civil law lawyers. From the present author's viewpoint, the demand for a good law on secured transactions in general and title retention in particular even though it is parallel with the demand for a good law in many other areas is not a pre-requisite to replace a civil code by many separate legal texts. This question mainly involves the law-making technique. Vietnam, like other civil law jurisdictions, must change the legislative practice of initiating a big project for the revision of the civil code as a whole. A civil code can be divided into many books or chapters or sections that can be revised or changed in an independent project. It is possible to keep the law of secured transactions within the scheme of a civil code, and in the other hand import the Article 9 approach. Vietnam can learn the lesson of the French Civil Code to take the law of secured transactions out of the part "Contracts and Obligations" and divide it into sub-categories for real property and personal property. In a long-term project of reform, the law of secured transactions in personal property can adopt the unitary approach, functionalism and the notice filing system.

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<sup>65</sup> See the discussion on the important role of the civil law and the need to reform the civil code at modern times when commercial law, labour law and administrative law have increasingly developed in Renaudin M, see n. 14.

However, if the unitary approach cannot be adopted, the concept of PMSI can be transplanted into the body of the secured transaction law that maintains the diversity of security devices as the current status of Vietnamese law. It serves as a security device next to other devices like a pledge or a charge that can be granted upon personal property. It is necessary to expand the first priority to any secured credit advanced to acquire the new asset regardless of who supplies the fund, a seller or a lender. Treating title retention as a security interest and adoption of the PMSI must be accompanied by the requirement of registration. The current Vietnamese experience demonstrates an undesirable law when the requirement of registration is not amounting to expanding the first priority of title retention to the proceeds and new products. In this respect, the legal transplant of PMSI concept must be done with the legal transplant of the priority rules to cover the situation where the original collateral is sub-sold or put into manufacturing process. Adopting the PMSI without adopting the whole package of unitary approach, functionalism and notice filing system is not the best alternative, but in the Vietnamese context where the function of title retention is still unfamiliar, it offers a new security device to the secured credit market that is on increasing demand of credit for trading and manufacturing. Furthermore, the legal transplant of the PMSI is a good introduction of functionalism and a good preparation for the unitary approach in a bigger project to reform the law of secured transactions as a whole.

The Australian experience with regard to the enactment of the PPSA demonstrates that despite the law of secured transaction in personal property is contained in a legal text, other relating law, particular the law of sale should be correspondingly revised to have a desirable outcome. The cross examination or review between different laws with regard to the reform of a specific area of law is necessary in any jurisdiction.

Vietnamese law demonstrates some interactions between the law of title retention and the sale of goods law. The latter treats a sale on credit as implying a title retention agreement. However, this provision is not satisfactory as discussed in detail above and should be abolished completely.

The *Bunkers* ruling in English law is worth a throughout consideration because it proves an unexpected impact of title retention on the sale of goods law. The Vietnamese Civil Code defines a contract of sale as an agreement in which a seller transfers the property in the goods to a buyer, and the buyer makes payment to the seller. The property in the goods is possibly not transferred to the buyer when the goods are destroyed due to the consumption or manufacturing process during the effective period of title retention. Vietnamese law would encounter the same problem as experienced in English law if the *Bunkers* ruling is learnt and imported.

The English law experience in *Re Highway Foods* also shows that in a chain of transactions, each of which contains title retention, a bona fide sub-purchaser may lose the right to take the goods free and clear because she has not paid the full purchase price. The legal consequence of title retention in this context attacks the free flow of commerce and raises the substantial cost due to the recovery of the goods. The Vietnamese law with regard to taking free requires a bona fide purchaser to have a contract in which she gives value in exchange of the possession of the goods. It remains silent on whether a bona fide purchaser has paid for the goods or all she needs is a contract of this kind. Vietnamese law does not have a distinction between a sale and an agreement to sale. However, when title retention is treated a method to reserve the title until and unless the full purchase price is made, a bona fide purchaser subject to title retention may lose the right to take the goods free and clear.

The French approach cannot give a desirable answer for the problems discussed above regardless of the recognition of title retention as a security interest. Title retention as a security interest is severely based on the ownership right to establish the priority and enforcement. In other words, the title still remains with a seller until and unless the purchase price is paid in full. It prevents the transfer of property to a buyer after the consumable or workable goods are extinguished in the buyer's ordinary course of business. This point, again, proves the need to treat title retention as a normal security interest at first with the full meaning like the Article 9 model's recommendation. Therefore, it is critical to transplant the provision in Article 2 of the UCC complementing the definition of a sale contract.

Accordingly, title retention must have the effect limited to reserving a security interest in the goods supplied, and the law should violently provide that the transfer of property follows the default rule rather than the parties' agreement on title retention. This treatment, even though interfering and ignoring party's autonomy to a certain extent, would avoid the possibility of rethinking the sale of goods law in terms of title retention with regard to consumable or workable goods.

#### **5.4 Concluding remark**

The code-formulated legal system as of France and Vietnam has shown a willingness to adopt functionalism through the recognition of title retention as a security device. However, the law of title retention in these jurisdictions is unsatisfactory. The approach to title retention as a security interest is different from the concept of PMSI initiated under Article 9. It is a seller-based security interest that excludes the participation of other lenders into providing secured credit to acquire new assets relying on the first priority. Title retention as a security device is depending on the concept of ownership rights to build the priority status and the method of enforcement. In this respect, it does not share much similarities with other security devices in the sense of accessory property rights. Recognition of title retention as a security interest in the Vietnamese and French jurisdiction, therefore, does not facilitate the availability of secured credit to acquire new assets.

On the other hand, a PMSI can be brought into a system of multiple security devices like the Vietnamese or French law of secured transactions in personal property. Under Article 9 and other laws following the unitary approach, a PMSI has its own name and its own treatment with regard to perfection and priority because it is an exception to general security interests. The crucial point to make a good law in this respect is to build comprehensive priority rules which govern not only the conflict interests between secured creditors including purchase-money creditors but also the conflict between a purchase-money creditor and a buyer, the conflict arising when the original collateral is put into manufacturing process.

Furthermore, it is critical to change the sale of goods law corresponding to the introduction of PMSI into the law of secured transactions. As a result, title retention is treated consistently among various areas of law to avoid an unexpected outcome of the *Bunkers* ruling as learnt from English law.

## CHAPTER 6 CONCLUSION

### 6.1 Treatment of title retention in Vietnam and compared jurisdictions: England, the United States, Australia and France

Title retention has the function that is not limited to a contractual arrangement to transfer the title in the goods in a contract of sale, but importantly it is a security device to save the first priority in the goods supplied to an unpaid seller in the insolvency proceeding or the extinguishment dispute where the goods are sub-sold or put into the manufacturing process. However, the treatment of title retention is diverse among jurisdictions.

Formalism, bearing on the sharp distinction between the ownership right and the possession right is the dominant approach in England that does not accept that title retention is a full but rather a quasi-security interest<sup>66</sup>. The general rule of property rights and the Sale of Goods Act 1979 are to protect an unpaid seller as the owner of the goods so that other creditors cannot claim the concerned goods to discharge debts owed by the buyer. The obstacle to recognizing title retention as a security interest is that this arrangement is created under the form of sale and purchase transaction where the seller still has absolute ownership pending full payment of purchase price. The formalism approach strictly requires the collateral to be the debtor's asset<sup>67</sup>. The super-ranking of title retention, speaking in terms of priority, with regard to the original goods without registration could be justified by the underlying policy to encourage sale on credit and small-scaled credit market or to dilute the monopoly of blanket security or the new money theory<sup>68</sup>. However, when title retention in the goods supplied covers not only the purchase price but also all indebtedness owed to the seller, the new money theory is failed to justify the *Amour*<sup>69</sup> ruling that upheld the current super-ranking with regard to other debts. However, the super-ranking of the title-

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<sup>66</sup> Gullifer L (ed), *Goode on Legal Problems of Credit and Security* (4<sup>th</sup> edn, first published 2008, Sweet & Maxwell 2012) at p. 3

<sup>67</sup> *ibid*, at p. 11

<sup>68</sup> Gullifer L, 'Retention of Title Clauses: A Question of Balance' in Burrows AS and Peel E (eds), *Contract Terms* (Oxford University Press 2007), at pp. 287-9

<sup>69</sup> *Amour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339

retention does not in practice cause a serious threat to other secured creditors as it is supposed to be, both previously and subsequently taking a security interest in the same asset, particularly when the goods are inventory, which remains in the buyer's possession for a short time. In this respect, the super-ranking does not automatically expand to derivative assets as the products or proceeds of the original goods, and the proceed or manufacturing title retention clause is held to create a registrable charge<sup>70</sup>.

Under the Article 9 and the Australian PPSA scheme of a PMSI, a title-retaining seller has the priority over other creditors including ones who filed a financing statement covering the same collateral earlier. Functionalism initiated by Article 9 and followed by many PPSA jurisdictions aims at promoting the availability of secured credits through the competition among various credit providers<sup>71</sup>. Under this approach, regardless of form, an arrangement is treated as a secured transaction if it has the function to secure payment or performance of other obligations. Title retention is an arrangement of this kind. Article 9 and the Australian PPSA introduce a new concept of PMSI that has the nature of an asset-acquiring security device. Inspired by the idea of title retention, a PMSI preserves the first priority in the collateral to the secured party despite the order of filing or perfection. A PMSI does not uniquely serve the seller but also any lender who advances money to the debtor to acquire new assets. A PMSI is a counterweight to a blanket lien which is supposed to establish a monopoly situation preventing the debtor from accessing credit from other sources<sup>72</sup>.

The French and the Vietnamese jurisdictions recognize title retention as a security interest relying on the seller's right to reserve the title to the goods until and unless the purchase price is paid in full. The security interest of this kind is

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<sup>70</sup> *Re Andrabell* [1984] BCLC 522; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 WLR 485E; *Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150; *Tatung (UK) Ltd v Galex Telesure Ltd* (1989) 5 BCC 325; *Compaq Computer Ltd v Abercorn Group Ltd & Ors* [1991] BCC 484; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25; *Re Peachdart Ltd* [1984] Ch 131

<sup>71</sup> UNCITRAL, Legislative Guide on Secured Transactions, United Nations Publication Sales No. E.09.V.12 (2010) (hereinafter Legislative Guide), at p. 334

<sup>72</sup> Jackson TH and Kronman AT, 'Secured Financing and Priorities among Creditors' (1979) 88 *The Yale Law Journal* 1143, at p. 1172

far from the concept of a PMSI to the extent that it cannot be granted to a general lender. Instead of relying on the “new money” theory, the first priority is supported by the absolute ownership right which remains with the seller. In other words, the collateral subject to the security interest of this kind is the title to the goods. The enforcement is heavily based on the enforcement of ownership rights rather than the general rules applied to a security interest. This approach is debatable and undesirable from both theoretical and practical viewpoints. Title retention as a security interest in French law and Vietnamese law is a security interest on its face, but the nature of ownership right has never changed, even in the Vietnamese context, title retention must be registered to validate against third parties. The position of title-retaining sellers is not improved in comparison with what they used to be in the past where title retention was merely a contractual arrangement to transfer property in a sale contract. A lender who subrogates the seller to title retention may lose not only the first priority but also a security interest as a whole according to the recent French court of cassation’s opinion<sup>73</sup>.

Personal property, which is the primary subject matter of title retention or a PMSI, is rapidly and frequently changed its status through the ordinary course of business conducted by the person who possesses them. They can be the consumable or workable goods, raw materials or merchandise that should be put into consumption or the process of manufacturing or sub-sold to generate money for discharge of indebtedness. In this respect, title retention or the first priority to the original goods is not sufficient to secure the payment if they are extinguished or sub-sold. Both English law and Article 9 recommend solutions for extinguishment disputes.

In England, lawyers have made a great effort to draft various types of title retention clause to extend title retention to the proceeds of sale or new products manufactured from or incorporated in the supplied goods. The super-ranking in this context, unlike title retention to the original goods, is a matter of concern to other creditors, particularly institutional financiers who have blanket security

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<sup>73</sup> Press Release: S&PGR: Title Retention Opinion Could Affect French ABS. (2017, March 30). *Dow Jones Institutional News*, p. Dow Jones Institutional News, Mar 30, 2017

interests and other receivable financiers. The common law treats title retention to the proceeds of sale and newly manufactured products as a registrable charge. The existing registration system and the priority rules in England do not support the registration of title retention. Extended title retention has usually been held to be void against liquidators, administrators and creditors due to lack of registration<sup>74</sup>. This situation is satisfactory from the standpoint of long-term and receivable financiers, and to some extent providing a counterweight to the super-ranking of the title-retaining seller with regard to the original goods.

However, the treatment of title retention concerning the proceeds is not consistent. The *Romalpa* case remains an authority that can reverse the position of a title-retaining seller from a charge holder to an absolute beneficiary under the fiduciary doctrine. The lesson of wording plays a crucial role, and a well-prepared drafter does not hesitate to include terms indicating a fiduciary relationship with regard to the proceeds to seek the first priority and escape from the requirement of registration. The super-ranking of the title-retaining seller under the fiduciary relationship, furthermore, does not have a sound underlying policy. First, it demonstrates an invasion of equitable doctrine into commercial transactions that insist on mutual interests or win-win relationship rather than the demand for loyalty. Second, it has a negative impact on third parties due to lack of transparency, and finally, it attacks the balance of interest between title retention sellers and other secured creditors in the sense that the former is relatively advantageous with regard to the original goods.

Although the security approach has been dominant in almost all disputes dealing with the proceeds clause, the recent case *Caterpillar* and the Irish law on title retention are good illustrations that there is a competition between the fiduciary approach established by *Romalpa* and the security approach. Title retention to the proceeds can be treated differently under the two approaches irrespective that they serve the same function. English law on this matter is inconsistent, unpredictable and therefore unsatisfactory.

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<sup>74</sup> *Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150; *Tatung (UK) Ltd v Galex Telesure Ltd* (1989) 5 BCC 325; *Compaq Computer Ltd v Abercorn Group Ltd & Ors* [1991] BCC 484; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25; *Re Peachdart Ltd* [1984] Ch 131

Under Article 9 and the Australian PPSA where title retention is treated as a PMSI, a question is raised whether the first priority remains when the collateral is replaced by the proceeds or new products. A security agreement and financing statement may expressly identify the collateral to include the proceeds. However, a security interest including a PMSI is statutorily extended to cover the proceeds. Without an agreement, the secured party still has rights to “*any identifiable proceeds of the collateral*” irrespective of the secured party authorizes the disposition of the collateral free of the security interest<sup>75</sup>. However, with regard to an inventory PMSI, the purchase-money priority is only extending to cash proceeds including checks, money and deposit accounts<sup>76</sup>. Non-cash proceeds including receivable accounts and chattel papers are also the collateral subject to the claim of receivables financiers. The provision with regard to the proceeds generating from the inventory collateral manifests the policy to balance the interests between inventory PMSI financiers and receivables or account financiers who may supply cash to pay the purchase of inventory<sup>77</sup>.

The Australian PPSA follows and supports the policy as mentioned earlier. Account financing plays a vital role in the debt financing market, and it also provides the fund for the purchase of inventory. An inventory purchase-money secured party can maintain the first priority in the cash proceeds, but the security interest in the account that is generated from the sale of the inventory collateral is subordinate to a non-purchase-money security interest in accounts. It is seemingly at first glance an improvement for any inventory financier who used to be a title-retaining seller and subordinate to the claim of a receivables financier under the application of the *Dearle v Hall* rule. However, it is not easy to oblige the grantor to sell the inventory in terms of cash on delivery. Inventory financiers cannot take advantage of the all-monies clause because the PPSA does not allow inventory cross-collateralization. It can be said that a PMSI in merchandise inventory does not bring many benefits to a secured creditor because naturally, the inventory of this kind is turning over rapidly in the

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<sup>75</sup> UCC §9-315(a)(2)

<sup>76</sup> UCC §9-324(b)

<sup>77</sup> Comment 8 to the UCC §9-324, see Official Comment at p. 921

ordinary course of business. It is desirable to accept cross-collateralization in the inventory as in Article 9, or at least inventory of the same kind.

Concerning processing and manufacturing, Article 9 and the Australian PPSA does not require an arrangement to extend a security interest to new products. Without an agreement, a purchase-money secured creditor can claim the right to the accession or the product or mass. Article 9 distinguishes between accession and commingled goods. Accession is “*goods that are physically united with other goods in such a manner that the identity of the original goods is not lost*”<sup>78</sup>. Commingled goods are “*goods that are physically united with other goods in such a manner that their identity is lost in a product or mass*”<sup>79</sup>. Basically, the security interest and the status of perfection is extended to accession or a product or mass incorporating the original collateral without an agreement. The difference between accession and commingled goods is that a purchase-money status cannot exist in the latter, even though the security interest remains in a product or mass resulting from processing or manufacturing commingled goods<sup>80</sup>.

The Australian PPSA has similar rules applying for comingled goods and accession. It provides a desirable solution from the standpoint of a purchase-money inventory financier in comparison with Article 9 and English law with regard to comingled goods that lost the identity into the product or mass through the process of manufacturing. The first priority remains in the competition with any secured creditor who has a non-PMSI security interest in other comingled goods continuing in the product and mass or the product and mass themselves.

However, the treatment of accession in the PPSA departs from Article 9 and remain close to the legal consequence under the English common law. Basically, the security interest continues in the accession that allows the relevant secured creditor has the priority over other secured creditors who claim the accession as a whole without the requirement of perfection of the purchase-money status. In this respect, Article 9 successfully clarifies the law of accession by imposing the general rules of priority including the exceptions with regard to a PMSI.

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<sup>78</sup> UCC §9-102(a)(1)

<sup>79</sup> UCC §9-336(a)

<sup>80</sup> UCC §9-336(f) and Comment 4 to the UCC §9-336, see Official Comments at p. 949

Functionalism that brings title retention into the ambit of a security interest in substance or by its function does not only serve the purpose of transparency, but it also enhances the availability of the secured credit. Looking at title retention as only a consensual arrangement to pass the title to the goods and stressing on the absolute property rights remained with the seller until the full purchase price is paid prevent a buyer/debtor from granting a lower-ranking security interest in favour of other creditors as demonstrated in the English, French and Vietnamese approach. In other words, a buyer cannot obtain credits from other secured creditors by using the goods subject to title retention as the collateral.

Can we consider English law and Article 9 as two competing models in treating the matter of title retention? Both jurisdictions manifest the two mainstreams underlying the law of secured transactions: that is to say formalism and functionalism. The Article 9 has gained some glory since many common law jurisdictions like Australia have shifted from the English law model to the Article 9. On the other hand, although English law illustrates confusion between the fiduciary or the security approach in treating the proceeds title retention clause, it achieves the balance of interests among relating parties that make the law of title retention not to be in the urgent need of reform<sup>81</sup>. The current English law of title retention recommends a model in which registration of title retention is not necessary to enforce the super-ranking and absolute right of the title-retaining seller in the insolvency proceedings. Registration will be a burden to title retention if the registration system itself is not reformed into a relatively simple, fast and cost-saving filing-notice system. In contrast, other creditors may have a concern that the expense of registration incurred to title-retaining sellers may be compensated by some more benefits like extending the first priority to the proceeds and new products, even though it may be subject to some limitations. In other words, the existing balance of interests under the existing English common law is likely to be broken. In this respect, from the perspective of blanket and receivable financiers, the requirement of registration of title retention is not appealing.

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<sup>81</sup> See discussion in Gullifer L, 'Retention of Title Clauses: A Question of Balance' in Burrows AS and Peel E (eds), *Contract Terms* (Oxford University Press 2007)

Today, it is surprising that the reform of English law in this area is desperate for the survival of the law on sale of goods concerning raw materials or consumables goods after the *Bunkers* ruling<sup>82</sup>. Title retention threatens the seller's right to sue for a price as demonstrated in the *Caterpillar* case<sup>83</sup>. The *Re Highway Foods* ruling<sup>84</sup> also intervenes in the submission of a bona fide purchaser to keep the goods by relying on the rule of a buyer in possession because she also buys under title retention arrangement, and the purchase price is not paid in full. The widespread use of title retention, therefore, breaks the chain of transactions and restrains the flow of commerce unexpectedly.

It cannot be denied that the treatment of title retention in English law is favourable from the perspective of formalism. Vietnamese scholars who are likely to emphasize on title retention as a contractual arrangement can find a good justification to oppose the treatment of title retention as a security interest. The French approach does not provide a clear and satisfactory treatment because title retention is just labeled as a security interest but an absolute property right in substance. However, the side effect of title retention on the sale of goods law is a serious threat as in the English model.

Treating title retention as a PMSI is a comprehensive solution that the English, French and Vietnamese approach cannot offer. A PMSI at first is an in-substance security interest, and as a result under the unitary treatment of the Article 9 model, it should comply with the general rules of attachment, perfection, priority and enforcement. The most considerable achievement of Article 9 and the PPSAs is the comprehensive system of priority rules that govern the conflict in the same assets between a secured creditor and unsecured creditors including a lien holder and a trustee in the insolvency proceeding, secured creditor and sub-purchasers, a secured creditors and other secured creditors. It also supplies the priority rule to govern the situation where the original collateral is put into the manufacturing process. The first priority rooted in the status of original

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<sup>82</sup> *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2015] EWCA Civ 1058; [2016] UKSC 23; [2016] AC 1034

<sup>83</sup> *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 WLR 2365

<sup>84</sup> *Re Highway Foods International Ltd (In Administrative Receivership)* [1995] BCC 271

purchase-money collateral is considered to extend to the proceeds or the new product subject to the policy that takes into account other benefits rather than only enhancing the secured credit market in general or asset-acquiring financing in particular. The free flow of commerce and the availability of account or receivable financing are among the consideration. The unitary approach does not mean that the Article 9 model does not have any distinction. It severely distinguishes different types of collateral and recognizes that each type, namely inventory, farm products, equipment, customer goods, and serial-number property, bears special characteristics and receives some particular treatment.

## **6.2 What should the law of title retention in Vietnam look like when title retention is accepted as a security interest?**

The current title retention law in Vietnam imports the French approach. As discussed above, the approach of this kind is not satisfactory; thus, it is raised the question of reform, and the Article 9 model is suggested to be the good law in this area. However, it is debatable that Article 9 and the PMSI concept are the solely good solution to the title retention issue. The Article 9 model is undoubtedly relatively desirable since it provides a robust and transparent security device as a counter-balance to a blanket lien, the all-inclusive shopping for all matters arising from a secured transaction in personal property, and a fast, convenient and cost-saving unitary approach including a notice filing system. Importing or transplanting a law even it is proved to be a good one in the parent country is not an easy task since it encounters the resist from the angle of legal culture and legal practice.

This research has discussed the problem of legal transplant in compared jurisdictions as a good lesson to the law-making in Vietnam. Legal transplant increasingly occurs due to the impact of the globalization that demands the harmonization among jurisdictions at least in commercial law. In England, the Article 9 recommendation is not favourable because it conflicts with the fundamental principle of secured transaction law, that is the formalism approach. Among the package of functionalism, a notice filing system and unitary approach, the last one is possibly tough to change in England where the whole system of diverse security devices is operated well and steadily in overall. The familiarity

with the current system and the balance of interests concerning the law of title retention are also the strong reluctance to shift to the new approach. Meanwhile, the Australian PPSA is a good illustration that a previous English-like system in the concerned area of law can adopt the Article 9 model as a whole package.

French law is another valuable solution to the extent that nothing restrains the adoption of a PMSI or title retention as a security interest alone, the former of which is entirely preferable. The approach of this kind cannot exploit the benefit of an all-inclusive package, but in the short term, it can solve many urgent problems, namely the unexpected outcome of title retention on the sale of goods law, the uncertain treatment of the proceeds generating from selling the goods subject to title retention as a charge or a trust.

Within the scope of the present thesis focusing on the law of title retention, some good lessons can be learnt from Article 9 and the PPSA as a product of Article 9 transplant with regard to the law of title retention. The legal transplant as demonstrated in Australia, which is a jurisdiction belonging to the same legal tradition with the United States, the common law system, has raised some valuable lessons for the Vietnamese jurisdiction. In this sense, even though Vietnam is not a common law country, it would share achievements and face problems similar to Australia that has imported the Article 9 approach.

First, title retention should be treated within the concept of purchase-money security interest rather than a security interest under the French approach. The goods supplied, therefore, has a status of the collateral that is able to attach to lower-ranking security interests. It also allows other financiers rather than a seller who are willing to bid for a loan to acquire new asset can have the first priority in the newly-acquired collateral.

Second, the distinction at least between inventory and non-inventory collateral is crucial in the treatment of a purchase-money security interest. Although Article 9 insists on the same treatment for all types of security interests, it distinguishes the types of collateral that are typically categorized into inventory, equipment, farm products and consumer goods. Inventory (or stock), which is expected to be consumed or processed or sold in the ordinary course of business, receives

special treatments. In the context of a PMSI, the item of inventory collateral secures not only their purchase price but also other PMSIs incurred by the other items of inventory collateral, which is known as cross-collateralization of PMSIs in inventory. Furthermore, an inventory PMSI has separate priority rules particularly requiring notification sent to earlier-filed secured parties. The relatively burdensome requirement aims at preventing earlier-filed secured parties from advancing credit to the debtor to acquire new assets. Fraudulent debtors may apply for advances under a future advance and after-acquired property clause without revealing the intervening super-priority security interest. The categorization of collateral and the special treatment of inventory PMSI are at the heart of the functionalism scheme with regard to a PMSI. However, the Australian law has slightly departed from the Article 9 model in this respect. Under the PPSA, the indication of purchase-money status in registration is required instead of giving notice to earlier-registered creditors who have a security interest in the same collateral. Therefore, an earlier-registered secured creditor who has an after-acquired security interest should strategically check the public record for the intervening PMSI whenever she is going to advance credit. It does also not accept cross-collateralization concerning an inventory PMSI. In this respect, it does not acknowledge the importance of the distinction between inventory and non-inventory collateral.

Thirdly, the law of purchase-money security interest must have the taking free rule to solve the conflict between a purchase-money secured creditor and a sub-purchaser underlying the policy of balance between the enhancement of the secured lending market and the free flow of commerce. The title-retaining seller is no longer the owner of the goods supplied under the concept of a PMSI. Therefore, she cannot invoke the provisions that protect a true owner against a third party who at present possesses the goods without the original seller's consent.

In this respect, Article 9 has a clear distinction between a buyer in ordinary course of business and a buyer relying on the authority to sell, both of whom claim the taking free in the competition with a purchase-money secured creditor. In the new era of the Article 9 or PPSA model, the taking free rule concerning a

buyer in ordinary course of business is primarily relevant to the sale of inventory in which selling in the ordinary course of business is firmly required. On the other hand, selling in the ordinary course of business is supposed to be irrelevant when a buyer relies on the seller's authority to sell.

The Australian PPSA does not have a satisfactory distinction between a buyer in ordinary course of business and a buyer relying on the seller's authority to sell to set up the priority against a secured creditor. In other words, the rules with regard to the two abovementioned cases are overlapped. The requirement of selling in the ordinary course of business should not apply in the context of authority to sell. The seller can transfer a title free and clear of a security interest if the secured party authorizes a disposition free and clear irrespective of whether the sale is in the seller's ordinary course of business. Furthermore, the wording of taking free rule under the authority to sell does not have the phrase "*free of the security interest*" that is similar to the old version of Article 9. The concept of floating charge is employed to interpret that any security interest accompanied by an authority to sell the collateral is equivalent to a floating charge so that the transferee in the ordinary course of business can take free. Again, the requirement of "*in the ordinary course of business*" is stressed in the context of authority to sell. Interpretation of taking free rule in light of the floating charge concept possibly avoids a line of disputes as witnessed to arise under the former Article 9, but it is not desirable. The PPSA has put an end to floating charges since it does not prevent the grantor from exploiting the collateral for business purposes. Under the unitary approach, the PPSA recognizes that any security interest automatically attaches to the proceeds, accession, the product or mass generating from selling or manufacturing the collateral respectively in the absence of an agreement of this kind. However, the secured party basically has the right to follow the collateral disposed to third parties without an effective authorization. In this sense, the PPSA has corresponded well to Article 9, but it does not strictly follow Article 9 policy concerning the priority rules applying to a dispute between a secured creditor and a third-party buyer. Accordingly, a buyer in ordinary course of business is

not required to check the public record to find out whether a security interest encumbers the goods or investigate the seller's authority to sell.

In contrast, without a position of a buyer in ordinary course of business, inquiries into any encumbrance and the authority to sell is a strategy to avoid a conflict with any secured creditor. The PPSA does not take into consideration of this policy, and the *Lewis* court confirms the approach<sup>85</sup>. Therefore, the taking free rule under the authority to sell narrows its scope of application and overlaps with the taking free rule of a buyer in ordinary course of business.

The priority between a secured creditor and a third-party buyer is a good illustration of legal transplant where the original rules have been transformed under the legal system of the host country. Although Australia and the United States are in the same legal tradition, they departed each other considerably in the area of secured transaction law, at least with regard to the acceptance of floating charge. In an Anglo-Australian jurisdiction, the floating charge concept has long rooted and played a vital role in granting security interests in the circulating pool of assets. The category of floating charge is reluctantly abolished by a uniform concept of a security interest does not mean that it does not leave any trace in the new system. The Vietnamese jurisdiction may not encounter the same problem of floating charge since this concept is not officially mentioned in the law and scholarship. However, it is crucial to draft the taking free rules with a clear distinction between a buyer in the ordinary course of business and a buyer relying on the authority to sell with a thorough consideration of the underlying policy as recommended under Article 9.

Fourthly, the reform of the secured transaction law in personal property must be done concurrently with the review and modification of related laws. The American jurisdiction has an advantage that Article 9 was drafted within the scheme of the uniform commercial law which involves sales, negotiable instruments, secured transactions..., whereas the PPSA enactment is an independent project. With regard to PMSIs, the law on sale of goods may substantially interfere with the application of the PPSA as witnessed in Australia.

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<sup>85</sup> *Lewis v LG Electronics Australia Pty Ltd*, [2014] VSC 644

On the other hand, from the English law experience, the PPSA regulations on PMSIs are likely not to neutralize unexpected outcome of title retention arrangement on the survival of the sale of goods law in some cases. It is strictly required to insert a rule considering title retention to have an effect of a security interest to ensure that the sale of goods law is consistent with the secured transaction law in personal property that now has a functional approach. This rule will restrain title retention from being an arrangement to transfer title in the goods so that it does not play any role in interpreting what a sale is. The concept of sale is critical to solve the conflict between a purchase-money secured creditor and a buyer in the ordinary course of business. The English case *Re Highway Foods* demonstrates the possibility of a buyer in ordinary course of business who is also subject to title retention to lose the title to the original title-retaining seller. The Australian PPSA does not improve the position of a buyer in this sense because the sale of goods law is not adjusted to comply with the new concept of security interest. Furthermore, to avoid that an unexpected outcome of the English *Bunkers* case, the unified treatment of title retention as a security interest will redo treating the transfer of raw material and consumable goods as the sale of goods.

Fifthly, a notice filing system instead of a transaction-based one would facilitate the adoption of a PMSI to gain a more considerable extent of efficiency. A filing-notice system that is simple, fast and cost-saving is also a core requirement for the operation of PMSIs. Generally speaking, it provides a relatively accurate, easily-determined date for priority purposes that is premised on the filing date. Ranking priority according to the time a security interest is created or executed is undoubtedly not an easy task that may result in the debate whether it is the date of a security agreement or the date of delivery. Furthermore, a filing-notice system allows a financing statement to be filed preceding the creation of a security agreement and the extension of credit to the debtor and covers multiple security agreements. In other words, it is not necessary to file a financing statement corresponding to a specific secured transaction. This advantage is specifically practical when the collateral is inventory, even in the case of a PMSI. The purchase-money secured party is not required to file for every up-coming

inventory item. It cannot be said that the recognition of PMSI cannot combine with the transactional filing system. The problem is that it is far from workable and efficient, at least in case of inventory financing because it is time-consuming, inconvenient, and costly for registration every time a transaction is executed.

However, a notice filing system accompanied by the first-to-file priority rule has some weakness to the extent that it favours the interest of a first-to-file creditor. The underlying policy is to encourage early and timely filing to solve the ostensible ownership problem. The later-in-time creditor does not have strong incentive to file against the same collateral to have only subordinate interest irrespective of the order that advances are made. Furthermore, the notice filing system does not reveal much information relating to the filed security interests, especially the amount of secured obligation. Potential creditors only learn whether the specific collateral as a matter of their concern is possibly encumbered. They should make further inquiries to the debtor as to, for example, the attachment of the security interest or the amount of the secured obligation or whether the loan is fully paid off. Again, inventory financier before making further advance may inquire the debtor for more information regarding the intervening PMSI in inventory. From the debtor's perspective, whereas it does not incur transaction cost to deal with the same secured creditor for series of loans especially against inventory or receivables, the notice filing system does not support the debtor who would like to take out loans against the same collateral, mainly equipment collateral, from different lenders. Furthermore, notice filing is a name-based system; thus, searchers must enter the debtor's name precisely to uncover the collateral in question. It depends much on the searching skill and the convenience and accuracy of the search engine. Although there are some above-mentioned restrains on later-in-time creditor and the debtor, the benefit of a filing-notice system outweighs its cost.

Above all, legal transplant of a PMSI in Vietnam has confronted more challenges than any common law jurisdictions. The first and foremost is the under-developed status of secured transaction law and the unfamiliarity with the technique and function of title retention. Title retention is recognized as a security interest, but the treatment relies heavily on the French approach that

appraises the seller-based approach and the owner-based enforcement method. Introducing title retention as a security interest in the Civil Code is the first-step offer of a new security device to the debt financing market rather than initiated by a high demand of satisfactory comprehensive rules for this transaction in practice.

A code-formulated system is a feature that is at the outset an important obstacle to import a PMSI concept. A civil code is considered as a proud achievement and a heart of a civil law jurisdiction, but an all-in-one code is not suitable to cover the rapidly-changing and complicating relationships in modern times<sup>86</sup>. However, this problem is relating much to legal technique and legislative practice. It is possible to transform a civil code into several interrelated books, one of which is the book on secured transaction law so that the amendment or reform can be done without the need to revise the whole code.

The unitary approach is one of many reasons leading to the hesitation to the Article 9 model occurred in England as well as Vietnam. In England, shifting from formalism to functionalism is urgent today because of the potential threat of title retention to the most popular law, that is the sale of goods law. This situation should be handled in this way, and therefore, the abolishment of the fundamental formalism principle is compensated by the survival of the sale of goods law. In Vietnam, the adoption of functionalism through the recognition of title retention as a security interest is relatively smooth. It is not necessary to adopt the unitary approach where the well-accustomed security devices like a pledge or a charge are likely to change into a uniform concept of security interest. A PMSI can be survived in a system where the diversity of security devices is maintained even though it cannot achieve a desirable efficiency that it would have in a unitary system like Article 9. The Vietnamese Civil Code underwent a significant revision, and a new code was enacted in 2015. It lost a chance to transplant the concept of PMSI because of the opt for the French approach. It takes a considerable length of time to have a second chance to reform the law of title retention when a next project to revise the code is initiated again. At that time, the law of secured

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<sup>86</sup> Nguyen X-T and Nguyen BT, *Transplanting Secured Transactions Law: Trapped in the Civil Code for Emerging Economy Countries* (2014), at p.21

transactions in personal property and the PMSI should follow the Article 9 model whether or not is an integral part of a civil code or separated to be written in an independent legal text.

Article 9 is a good model for the secured transaction law in personal property in terms of efficiency, and for recognition of title retention as a security device in terms of promoting transparency, credit availability and competitive debt finance market. Transplanting the treatment of title retention in Article 9 into a jurisdiction is undoubtedly involving the adoption of functionalism doctrine, and it also raises questions about the transplant of notice filing system and the unitary approach as well.

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