

Legal Transplants in the Law of Secured Transactions. Current Problems and Comparative Perspectives

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A fortnight or three weeks before planting, give the ground a good deep ploughing, to prepare it for the reception of the tree. In planting, endeavor to suit the trees as well as possible to the soil [...]

Potts (1807).

If a cocoa tree is to grow well, it needs more than anything else a soil of good structure, permeable and deep. If the soil is of good structure and contains much humus, the roots penetrate well.

Never plant cocoa trees in soil with a lot of stones, or in soil where there is some hard layer.

FAO (1970).

1 Introduction

Secured transaction law (STL) is traditionally viewed as a highly technical legal field, made up of sophisticated intermingling between property and obligations, strongly dependent on official state law, and as such strictly connected to a local/national dimension. Reinforcing this view is the fact that in every jurisdiction, STL, due to its proprietary dimension, lives in connection with, and is dependent on, the technicalities of civil procedure and insolvency laws which often incorporate long-standing policy choices that can be very different from one legal system to another, and cannot be derogated from by way of private autonomy.

In considering the centrality of this subject, lying at the core of civil and commercial law, it comes as no surprise that academic literature on STL has been abundant at almost every latitude on the globe, and in almost all historical epochs. Going back to the last two centuries only, we notice that literature on the subject has mainly been

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occupied by national approaches, focused on national positive law and the formalities required to make up this area of the law. Comparative law has penetrated this field only at a later stage, and certainly not massively, so that one can easily say that comparative law treatment of the subject has been an exception rather than the rule. On the basis of almost twenty years of experience in this area of the law, I can also affirm that this view holds true for civil law studies, but more so for the common law ones.

When I met Professor Mauro Bussani he was not yet a Professor, but still a brilliant young Researcher dealing with STL, and I was a student looking for a supervisor for my university thesis in the field of German mortgage law. Of course, I was about to do it by way of the same national approach I have just described above, which is typically taught in standard university courses. The year I spent under Bussani's guidance as supervisor, and in supporting—the little I could—his research in German law for a monograph he was writing on STL, gave me the opportunity to give the matter some thought until it definitively changed my idea of what the law is and how it should be studied. Actually, far more than this, it changed the entire course of my life. I ended up choosing the study of comparative law in my own profession and started doing so in the field of Comparative STL.

This premise certainly explains why I chose this topic to celebrate Mauro Bussani's mentorship, but also calls for an explanation about Bussani's book mentioned above. I refer to 'Il problema del patto commissorio. Studio di diritto comparato' (2000).¹ It deals with a very specific (but crucial) aspect of STL, namely what, in English, is termed as 'forfeiture clauses', but does not really have an equivalence in terms of an operative meaning in Anglo-American jurisdictions. In the eyes of civil law practitioners, the problem of forfeiture clauses is with regard to the enforcement techniques available in a given legal system with reference to a security right over a specific asset. More precisely, it indicates a well-established rule, dating back to Roman law, according to which (i) proprietary rights used as security shall not coincide with the full ownership of the secured asset, which shall never fall in the hands of the creditor; this results in a (more or less) broad prohibition of the use of ownership as security; and (ii) the enforcement of a security must happen in court or under court control in order to guarantee judicial scrutiny of the enforcement's proportionality and an adequate debtor's protection. Even if it is true that English law (but not US law) shares with civil law, at least partly, what is mentioned in (i), it is, nevertheless, well-known that it does not share what goes under (ii), and this holds true for all the other systems belonging to the common law tradition. Bussani's book has been the first² (truly) comparative law analysis of this issue on the laws of three representative legal systems of Europe, namely Italy, France and Germany. The revolutionary aspect of this book was that the comparison applied here is not mere juxtaposition of descriptions of legal rules from different jurisdictions. On the contrary, it has been

¹Unfortunately, up to now, it has appeared only in Italian language, a circumstance which so far has strongly limited its potential impact on the international scientific community.

²This is my personal judgment on the basis of the extensive reading I have made in these last twenty years on STL in Italian, French, German, Spanish, Portuguese and English languages.

conducted through the lens of dissociation of the law from its legal formants (Sacco 1991a, b). This shows awareness of the composite nature of the law as it is shaped by different elements which impact operative solutions, often by meta-legal factors which normally go unnoticed in mere juxtaposition exercises. This methodological approach has been further developed in subsequent years, by Bussani, into the theory of legal pluralism as applied to understand not only colonial and post-colonial legal systems, or non-Western legal traditions, but also the very advanced and positive law-centred Western legal systems, as many other contributions in this book explain (Bussani 2010). Yet, only now do I have the tools to understand that the seeds of these further theoretical developments were in him already at those early times of our acquaintance. I still recall the discussions between Bussani and me that ended up in comparing not only the different specialist cultures lying at the core of STL, but, more than that, trying to trace back the divergences among legal systems to different, more subtle elements, for instance religious attitudes deriving from the prevalence, in Germany, of the Protestant version of the Christian religion and in Italy of its Catholic counterpart. It was surprising for me to discover that these elements could impact the law in our advanced and secular legal systems. I have learned from Bussani that these cultural/religious preferences, determining different (legal) mentalities, may have an impact on the policy choices of the legal systems, dictating (sometimes in a very covert way) the prevalence of paternalistic approaches to the problem of credit and security over more liberal attitudes. I think that these are still the profound elements dictating differences among legal systems. Whenever legal approximation of principles and technical solutions (in STL as well as in other legal branches) is not possible, it is most probably due to these implicit demarcations of legal systems. Mauro Bussani's timeless book has elegantly shown that these demarcations lie in meta-legal elements and, in so doing, he has suggested a broader approach to the meaning of 'law' and to its study that had no equal at that time and probably still has none, especially in a sector so traditionally close to meta-legal approaches such as STL. I am personally very glad that precisely through this book he became a Professor in Italy!

It is to honour this outstanding methodological contribution to STL that I will now analyze some aspects of the legal transplants phenomenon as it developed in the last decades and currently lives in the area of STL, a topic to which Bussani himself has devoted many studies in the course of the past two decades (Bussani 2001a, b, Bussani 2002a, b, 2004, 2006, 2007, 2016a; Bussani and Grimaldi 2014). I will try to shed some light on current trends in this field through Bussani's lens, that is, confronting positive law models with meta-legal elements such as culture, society, economy, law-making processes, or geopolitics (Bussani 2016a).

2 Setting the Course

I will first sketch the theoretical framework of the legal transplants theory as a useful tool to understand legal change in general, and link this background with the most

powerful driver of legal change in the field of STL, namely the movement towards harmonization (Sect. 3). On this premise, I will focus on the theoretical underpinnings pushing forward legal harmonization in STL (Sect. 4) and distinguish the main features of the initiatives in this direction, according to their technical and geographical scope. Here, the global UNCITRAL efforts will deserve particular attention due to their ambitious aspirations (Sect. 5). I will go on to dwell on other features regarding the methodology of harmonization in STL, that is the major decision-making processes underlying these developments (Sect. 6) and the technical instruments used to reach legal integration goal(s); these elements are also telling with respect to the potential of and risks faced by globalization in this field (Sect. 7). Then, I will illustrate the move from harmonization to modernization, which can be considered a sort of tacit admission of default by the most ambitious initiatives of legal integration of STL (Sect. 8). This way I will have collected materials enough to sketch an interim assessment on the operational impact these efforts have had and are likely to have in the near future, pointing to the reasons which can further create obstacles in their success (Sect. 9). Next, I will sketch the new challenges that legal changes in STL are about to face; if these new challenges are not considered by the agencies of legal integration and reform, and by the various forms of law-making process in this field, there will be no hope to make it real and workable (Sect. 10). Finally, I will point out the methodological contribution that comparative law (à la Bussani) can offer to legal change in STL (Sect. 11).

3 Legal Transplants and Secured Transactions: The Legal Harmonization Movement

As a powerful theoretical tool to understand legal change and the relation between law and society, the legal transplant theory has become an indispensable cultural component for any comparative lawyer. In brief, this theory denies a strict and unique connection between specific sets of rules, or a legal institution and a given society, by bringing back the development of any rule or institution to a constant borrowing or cross-fertilization among societies and laws. This borrowing ultimately rests on two main causes: a political or forced imposition of legal models from abroad, like it happened with the Code Napoléon by way of the Napoleonic conquests or within the colonization experiences, or an imitation of an external model due to its particular prestige, which might be exerted on a cultural or political élite and may often not have much to do with true knowledge of the foreign model or with its potential efficiency, once introduced in the recipient legal system. This has also happened with the Code Napoléon after the Napoleonic defeat, when many countries retained his Civil Code because of its prestige; or with the methodological imitation of the German Pandectistic school by the Italian scholars at the turn of the nineteenth century, despite the marked French character of the Italian civil code of 1865 (for the essentials on this theoretical framework see, at least, Watson 1974; Sacco 1992; Reimann 1993;

Mattei 1994; Ajani 2007; Sánchez Cordero 2010; Husa 2018; Graziadei 2019; but see also Legrand 1997 for cultural objections).

We will soon see (Sects. 4–10) how the analysis of legal transplants in STL is a useful prism to understand the modern forms the above two causes of legal change—imposition and prestige—may acquire in an age of accentuated globalization of trade and credit relations. In this era, imposition and prestige operate in a multilayered environment made of a variety of legal layers: global, regional, national, and local. Private and public law intersect with each other so that separating these sectors of regulation becomes more problematic. Each layer is co-produced by a variety of actors: not only are states law-makers today, but private actors, such as interests group, national or transnational associations of professionals and ‘experts’ actors, as well as major supranational agencies entrusted with the task of developing the law (UNCITRAL, UNIDROIT) and/or producing impact assessments by numbers capable of orienting, in a more or less, (c)overt way, also have a say in policy decisions on which rule has to be maintained and which has to be superseded (World Bank, International Monetary Fund, European Bank of Reconstruction and Development, Asian Development Bank, etc.). All these subjects are powerful drivers of change (for a legal pluralist view of legal phenomena inside and outside the Western legal tradition see Bussani 2010 and Bussani 2016b). In STL, modern forms of imposition and prestige appear as mixed and confused with one another, and are impacting, globally, national regimes, by pushing towards a massive legal harmonization movement which is trying to change the landscape in a top-down direction, basically along the lines of the North American model. In the following I will explore why and how this is happening, and its potential and risks.

4 Theoretical Underpinnings of Legal Harmonization

The localism of STLs in the terms sketched above (Introduction) has made this legal branch that is less amenable or adaptive to harmonization efforts truly capable of acquiring an operative dimension. It is not by chance that only forty years ago or so a famous comparative study of nineteen jurisdictions concluded that the legal divergences in substantive and international private laws were so numerous that there could be no real prospect for harmonization in this area (Drobnig 1977).

Despite this state of the art, the pervasive thrust towards ‘legal harmonization’ or ‘integration’ very soon came to cover this field, basically at a global level (Rosett 1992; Andenas and Andersen 2012). It essentially aimed at various degrees of approximation of different national laws, in order to overcome legal obstacles preventing the spread of interstate-commerce. This started happening from the second half of the twentieth century and on grounds of two main driving forces.

On the one side, the legal harmonization movement emerged on the wave of the major legal reform of the field by the USA by way of Article 9 of the Uniform Commercial Code (Gilmore 1965; White and Summers 2018). This new regime—based on ‘functionalism’—was (and is) a dynamic regime, very different from those

existing in the European region (including both its civil law and common law legal experiences), structured on ‘formalism’ and therefore much more static. For those not accustomed to STL, in brief, the functional US regime acknowledges a unique discipline for all legal devices that are used by the parties for the purposes of security, irrespective of the legal form of each device (substance matters, not form). On the contrary, in formalistic regimes, traditional pledges only deserve the proper discipline as security devices, whereas other devices that can, in practice, be used by the parties to purport security function, are either prohibited or regulated by contract law, that is, by a different regime. The compact character of the functional regime reduces the rules to be considered in a secured loan negotiation, and therefore facilitates legal certainty and predictability regarding required formalities and corresponding legal effects, and in so doing reduces the cost of legal advice in secured lending. Other relevant and good parts of the functional US regime are (i) the non-possessory character of the regulated security which is made effective against third parties by way of (as we will see below, some form of) registration and not by way of the grantor’s dispossession. This makes it possible for the grantor to continue using the encumbered assets in the course of its ordinary business; (ii) A wide possibility to use all kind of assets, not only tangible and existing, but also intangible and future assets, or proceeds derived from existent assets, as security; (iii) A simplified form of registration which goes under the name of ‘notice filing’ and as such does not exist in European regions (not even in English common law); and (iv) the possibility of enforcing the security out-of-court, which is normally a quicker and more effective procedure under which the chances of obtaining a good value for the sale of the encumbered assets are maximized (Fiorentini 2009, 2013). It is no surprise that this innovative regime attracted the interest of and fascinated academics, professionals and governments. A speculation regarding its transplantation into other legal experiences, soon started.

On the other side, legal integration of STL also flourished on the basis of a growing amount of economic analysis pointing out the efficiency of security rights for both the creditor and the debtor, as well as for the general financial system (Rojas Elgueta 2017), a ‘virtue’ which is (too) generalized and taken for granted today (Fiorentini 2009). In particular, the efficiency of the US model was praised. This was considered the most modern and credit-friendly legal regime for STL (Armour 2008). Moreover, this view has been shared, and spread even further, by the most influential supranational agency working in the field of development and fight against poverty, namely the World Bank, according to which, categorically, “laws governing secured credit mitigate lenders’ risks of default thereby increasing the flow of capital and facilitating low-cost financing. Discrepancies and uncertainties in the legal framework governing security rights are the main reasons for the high costs and unavailability of credit, especially in developing countries” (World Bank 2015). Prestige and efficiency linked with each other. From the nineties onwards, the above has been the theoretical backdrop for the blooming of legal integration projects regarding security over movable assets in every corner of the globe. In the following I will present them, marking their main features.

5 Sectoral Versus General. Regional Versus Global

The first character of these projects is that due to the locality inherent in the subject matter, they come with a marked sectoral or regional dimension. Moreover, the more specialized these enterprises were the better had been their operational impact. Indeed, the scope of the first wave of harmonization either focused on security over very specific kind of assets, in order to respond to specific business demands through select commercial communities (or lobbies), or covered, broadly speaking, all kinds of secured transactions in the civil and commercial sector, on all type of movable assets, but focusing on specific geographical areas of the world, particularly connected by the common historical and political vicissitudes or economic developmental issues.

Notable examples of the first kind of harmonization initiatives are the 2001 UNIDROIT Convention on International Interests in Mobile Equipment (the so-called Cape Town Convention)³ relating to security over airframes, aircraft engines, railway rolling stocks and space assets and the 2002 EU Directive on Financial Collateral Arrangements (2002/47/EC)⁴ enacted to simplify the procedure for taking and enforcing security over financial collateral between (mainly institutional) traders in financial wholesale markets for national and cross-border transactions. The latter instrument coupled the characters of specificity of the objective scope and regional-ity. Thanks to their specialization, these both have been the most successful cases of harmonization so far (Saunders et al. 1999; Mooney 2014).⁵

Within the second category of harmonization efforts—the regional ones, with a general, all-encompassing scope of application—count, first, the 1994 European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transaction (Röver 1999),⁶ used, mostly in a piecemeal way, as a model for national legal reforms in the post-socialist Central and Eastern European countries after the fall of the socialist regimes. Despite EBRD ranking its impact in fostering STL reform in the supported countries as “highly successful” (EBRD 2012), scholars have noticed that reforms have been implemented differently in various countries, and that these divergences do not help operationalise harmonization (Tajti 2017).

³Text and protocols (Aircraft 2001, Rail 2007 and Space 2012) are available at unidroit.org with bibliographical references; see also the special issue of the *European Review of Private Law*, n. 12(1) 2004.

⁴OJ L 168, 27 June 2002, 43–50.

⁵For this evaluation of the Financial Collateral Directive see Commission staff Working Document, Impact Assessment Assignment of Claims, 12 March 2018, p. 124, available at www.ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/assignment-claims_en. In *Private Equity Insurance Group SIA v Swedbank AS* [2016] EUECJ C-156/15 the Court of Justice of the European Union delivered the first preliminary ruling on the interpretation of some aspects of this Directive. In particular it qualified the requirement of the financial collateral as being “in the possession or under the control of the collateral-taker” in order for an agreement to qualify under the Directive (Art. 2 para. 2).

⁶Text published in *Zeitschrift für Europäisches Privatrecht*, 1998, 766.

The second kind include the 1997 Acte Uniforme Portant Organisation des Sûretés issued by the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), revised in 2010 by the Acte Uniforme Révisé Portant Organisation des Sûretés. It is a uniform law regulating personal and proprietary security and, among the latter, security rights over both movables and immovables (Anoukaha 1998; Croq et al. 2012), with a marked French imprint.⁷ The 2010 revision broadened the type of assets that can be encumbered and introduced out-of-court mechanisms of enforcement. Data shows that this new model is being applied by OHADA states and is already bringing about some economic advancement (IFC's OHADA 2007: 11–12). In practice, however a lot of difficulties in the implementation of the uniform rules remain due to the obstacles from the specificity of the local cultures and practices, such as the training of professionals involved in secured transactions. For instance, African judges are not prepared to accept forfeiture clauses as admitted by the Uniform Act. Also, coordination problems between the Uniform Act and other sectors of the law which are of national competence only, such as tax law, still remain. In many OHADA countries tax law imposes registration requirements that are not in line with the Uniform Act (IFC's OHADA 2007: 24–25).

A third example of regional harmonization with all-encompassing scope is the Inter-American Model Law on Secured Transactions issued in 2002 by the Organization of American States (OAS)⁸ and supplemented by the 2009 Model Registry Regulations to provide urgently needed guidance to the jurisdictions of the region with respect to the establishment and operation of security rights registries. This model law is strongly inspired by the American model of Article 9 U.C.C. and the Canadian Personal Property Security Acts of the nineties, though it also considers the most representative civil law models such as German law (Kozolchik and Furnish 2006). In recent years many states of Latin America and the Caribbean have enacted national reforms inspired by this regional model [Peru (2006), Guatemala (2007), Honduras (2010), and Mexico (2010)] with a reform of the registry for security interests [El Salvador (2013–2014) and Costa Rica (2014)]. However, this regional effort at harmonization also faces many implementation problems. For instance, in Mexico operative results are still far from satisfactory. The adoption of a functional approach and regulating a single type of security subject to registration has been only partial because many secret liens, which go unregistered, still remain. Moreover, out-of-court enforcement mechanisms have been raising so many concerns of constitutional due process that they are basically not working in practice (Kozolchik and Furnish 2006, 146–165). This is just an example of how difficult the implementation of external rules based on legal cultures and practices different from those of the recipient legal system may be.

Beside these regional initiatives, the fervent activity of the United Nations Commission on International Trade Law (UNCITRAL) must be singled out because it has

⁷J.O. OHADA, n. 3 of 1 October 1997; see also ohada.com. Recast on 15 December 2010, in force since 16 May 2011; text available at www.ohada.com/actes-uniformes/938/984/chapitre-1-dispositions-generales.html.

⁸Text available at www.oas.org/dil/model_law_on_secured_transactions.pdf.

been the most ambitious of all—designed to operate on a global scale, and with an all-encompassing scope of application. It started with the (unsuccessful) 2001 Convention on the Assignment of Receivables in International Trade introducing uniform rules on assignment of receivables for security purposes,⁹ which never entered into force. Despite its addressing a single institution, the strong divergences existing at the national level in point of perfection and opposability to third parties of this device, together with the rigidity of the Convention as an instrument of harmonization (see below, Sect. 6) made this Convention too complicated to be implemented (Woo-jung 2018). Yet, the UNCITRAL activity carried on taking a broader, all-encompassing character. It resulted in the Legislative Guide on Secured Transactions of 2007, its 2010 Intellectual Property Supplement¹⁰ and the 2013 Legislative Guide on the Implementation of a Security Rights Registry.¹¹ Then this process culminated with the 2016 Model Law on Secured Transactions¹² reflecting the policies embodied in the earlier instruments and distilling from them a pure, user-friendly black-letter text to be used by the executive and legislative branches of governments.¹³ This last set of instruments basically incorporate the features of Article 9 U.C.C., at least with regards to the most salient aspects of (i) functionalism, i.e. designing a single legal regime for a “security right” covering both traditional (non-possessory) pledges and outright transfers of ownership to security purposes; (ii) creation of security rights; (iii) effectiveness against third parties; (iv) registration through a notice filing system, and (v) more favorable treatment of acquisition of security rights (i.e. retention of ownership similar devices) with respect to other security rights. A rich regulation is also devoted to conflict-of-law aspects which are also inspired by the US counterpart, though to a lesser extent than the substantive legal rules (Cohen 2018).

The all-encompassing UNCITRAL model has not been transplanted in its entirety into any jurisdiction so far. The following will help explain why (particularly under Sect. 7).

6 Legislative Versus Cultural

All the above harmonization initiatives share another feature, that is, they are aimed at a ‘legislative’ integration of the substantial STLs. ‘Legislative’ integration means that harmonization was meant to happen via the introduction of the suggested ‘models’ by way of legislative reform of the black-letter rules governing the subject matter

⁹Text available at www.uncitral.un.org/en/texts/securityinterests/conventions/receivables.

¹⁰Text available at www.uncitral.org/pdf/english/texts/security-lg/e/10-57126_Ebook_Suppl_SR_IP.pdf.

¹¹Text available at www.uncitral.org/pdf/english/texts/security/Security-Rights-Registry-Guide-e.pdf.

¹²Text available at www.uncitral.org/pdf/english/texts/security/MLST2016.pdf.

¹³Subsequently supplemented by the 2017 UNCITRAL Guide to Enactment of the Model Law on Secured Transactions, available at www.uncitral.org/pdf/english/texts/security/MLST_Guide_to_enactment_E.pdf.

in a variety of legal systems, according to a top-down movement (Bussani 2001a). Not enough attention has been paid to aspects connected with the devised implementation of such formal rules, for instance, the infrastructure pertaining to STL, structure and working methods of registries and courts, coordination between administrative offices involved in this field (registries and cadastres), and other capacity-building aspects such as the training of professionals involved in the matter like judges, lawyers, notaries, bailiffs, etc. (Tramhel 2017; Kanda 2017).

Of particular note is that the European region has been particularly fertile in producing, besides this kind of ‘legislative’ integration, activities aimed at a ‘cultural’ legal harmonization of the law of secured transactions (Fiorentini 2009). In Europe, the ‘cultural’ integration’s main result has been a huge pluriannual academic exercise financed by the EU, and resulting, again, in black-letter text published as a book. In the end, this product has not been connected with any enacted reform or official document stemming either from the EU institutions or from the legislative bodies of single legal systems, despite the initial intention of the EU institutions of using this material for a sort of European Civil Code. Of course, I refer to the famous Book IX of the 2009 Draft Common Frame of Reference (von Bar et al. 2009; Antonioli and Fiorentini 2011), providing for a coherent regime for security rights over moveable assets (Drobnig and Böger 2015). This uniform regime is strongly influenced by the functionalism of the American model and the UNCITRAL Legislative Guide, yet it is tempered by some divergences needed to make the new regime more acceptable to the potential civil law addressee. It acknowledges a single ‘security right’ which covers both traditional pledge-like devices as well as all uses of ownership as security; it also acknowledges better treatment for acquisition finance devices if compared with that of normal security rights; it does not borrow the US notice filing system, but creates a model for a European registry mixing innovative ideas with the models represented by some national registries of secured transactions and the Register enacted to implement the 2001 Cape Town Convention. What is worth stressing is that the functionalist approach of this model together with the difficulties in enacting a European register for security rights over movables has made this regime too different from the European national traditions to be translated as such into domestic legal reforms.¹⁴

For various reasons that are not important to investigate here, the top-down approach to legal transplants and its focus on legislative drafting (investing in the more ‘cultural’ initiatives also) has had, so far, a pervasive impact and certainly ranks among the causes for the poor operative impact of these enterprises.

¹⁴Beside Book IX of the DCFR, there is another kind of ‘cultural’ integration that has worked at European level. Differently from the former, it did not aim at producing a legislative-like text, but simply at refining the knowledge of secured transactions law. It was the multi-lateral comparative research project on “The Common Core of European Private Law”, directed by Mauro Bussani and Ugo Mattei, which has issued a book based on factual analysis of similarities and differences within a number of European jurisdictions on this topic (Kieninger 2004).

7 Hard-Law Versus Soft-Law

Two other connected general features of STL harmonization are also worthy of notice. They are with regards to, on the one hand, the decision-making processes accompanying the ‘legislative’ integration efforts and, on the other hand, the techniques used to achieve integration.

With regards to the first aspect, it would suffice to focus on the UNCITRAL working methods. It is well-known that UNCITRAL is a legal body of the United Nations with universal membership specializing in commercial law reform worldwide. It works through annual sessions where specific Working Groups meet, each dealing with one of the various subject-matters that are on the agenda. In these meetings, besides government representatives of the member states, non-members, such as interested national or international organizations can also participate. Observers are permitted to participate to the same extent as members, but are not involved in the decision-making. A famous controversy emerged between France and the USA in the period 2007–2009.¹⁵ The former country lamented the excessive US influence on the agenda and decision-making process within UNCITRAL and suggested some amendments to the rules of procedures, which, however, were not truly practicable (details in McCormack 2011: 8). Yet, this controversy underlined some problematic aspects that may distort the agenda and the goals of harmonization in favor of the interest of specific nations or lobbies. It was stressed that poorer nations were not able to send their representatives to the meetings, and, therefore, in the Working Groups the influence of the richer countries was stronger. Particularly, the influence of the USA was dominating. Besides this, it emerged that often states were underrepresented, whereas professional well-funded organizations, particularly emanating from single countries (again, the USA), were very active. For instance, in the Working Group on Insolvency, the American Bar Association has been very present, whereas in the Working Group on Security Interests a very active role has been played by the US-focused Commercial Financial Association. It comes as no surprise that the end-product is a text embodying the US model and aimed at spreading it throughout the world. While this operation can be neutral in terms of values if it results from the spontaneous and conscious choice of the represented countries, it is apparent that if such awareness fades away for some procedural or financial reasons, the risks of misappropriation of the aims of harmonization are high. Seemingly neutral (efficient) harmonization can be converted to pursue other geopolitical goals (Bussani 2010).

Coming now to the ‘legislative’ techniques of harmonization we can notice what follows. The instrument of international conventions to be ratified by each contracting state, or the use of other legislation-like regional techniques—typical hard-law instruments—have proved successful only where the said instruments covered a very specific sector of STL, and not the general regime. Such has been the case with the 2001 UNIDROIT Convention, or the 2002 EU Financial Collateral Directive (above, Sect. 4). The failure of the 2001 UNCITRAL Convention on Assignment of

¹⁵The documents substantiating this controversy are available at www.uncitral.un.org/en/about/methods/officialdocs.

Receivables has shifted the harmonization techniques towards the preferential use of legislative guides or model laws, which are typical soft-law instruments. A lesson we may derive from this is that soft-law is more appropriate than hard-law in helping spread uniform standards in legal sectors characterized by highly technical and cultural divergences. While these divergences hinder agreement on new (one-sided) legislative solutions based on a ‘take it or leave it’ approach, soft-law leaves more options for regulation on single technical points and allows recipient states the freedom to cherry-pick single solutions that can help in reducing divergences (certainly in a more gradual, but (in the long run) probably more effective manner.

8 From Harmonization to Modernization

Almost as a reaction to the strong divergence between, on the one hand, the array of legal integration initiatives and, on the other hand, the poor practical harmonizing results at the operative level, at least with regard to the global initiatives stemming from UNCITRAL, in the last decade, the proclaimed aim of legal harmonization efforts, and even its narrative, changed. If we analyze the UNCITRAL (2017) Guide to Enactment of the Model Law on Secured Transactions we notice a shift from the concept of ‘uniformisation’, via international conventions, or ‘harmonization’, via model laws, towards the more nuanced concept of ‘modernization’ of STLs. The same shift can be noticed in academic literature, as well as in documents stemming from governments and non-governmental agencies active in this sector, such as the International Monetary Fund or the World Bank (McCormack 2011). While it could be argued that ‘modernization’ may simply be a synonym for harmonization or legal integration, it is worth stressing here that it is not, because it consists in the minimum achievable vis-à-vis the ambitious harmonization and legal integration efforts. Indeed, what has been achieved so far, also on the basis of the ideas and solutions spread by the UNCITRAL work, has been (merely) national reforms, in select jurisdictions. The emergence of piecemeal national reforms has certainly helped in changing old laws (sometimes also) according to supranational standards (World Bank, Doing Business 2017),¹⁶ but has not reduced divergences between jurisdictions, nor has it had a harmonizing impact on relevant conflict-of-law aspects. While this process should be cautiously monitored because it could hide the risk of a dominating culture of STL (such as in the case of the US) being softly super-imposed over other less powerful jurisdictions, yet it certainly maintains a lively competition among models which, if cautiously guided, could also reinforce respect for different cultures and policy choices in the area of secured transactions around the globe.

¹⁶According to the Report, over the past decade 82 economies have reformed their legislation governing secured transactions, with Latin America and Caribbean being the most recent example of robust reforming in this area.

With regard to the European region, some jurisdiction, such as France¹⁷ (Fiorentini 2006) or Belgium¹⁸ (Dirix 2016), or, in a much less coherent and effective way, Italy,¹⁹ as well, have gone through the path of ‘modernization’. What is worth stressing is that none of these national reforms have adopted the large supranational harmonization models such as the UNCITRAL Legislative Guide or the Book IX DCFR, particularly, they have not adopted functionalism. Each of these select jurisdictions has been (and is) debating, achieving, delaying or refusing reform (UK and Germany), following their own path, trying to be as adherent as possible to the local problems of this field of the law, rooted in the local traditions, and in the local operative problems deriving, for instance, from the organization of publicity systems or the practice of the tribunals or the respect for the secrecy of the debtor’s indebtedness in the commercial circuit (for a survey on national reforms in Europe and beyond see Gullifer and Akseli 2016). This movement translating modernization into national-oriented legal reforms seems to be headed, at least in Europe, towards a direction in which local culture, meaning a different way to do things—it does not mean a static idea of the law in Legrand’s terms (Legrand 2003)—nevertheless matters.²⁰ However, it is clear that the EU countries are strong in terms of culture, techniques and economy. Following its own path of reform requires for a country to have a ‘status’ that in other areas of the world may not be given.

9 Interim Assessment

The materials gathered in the above survey make it now possible to sum up some shared features of harmonization in STL, and to venture into an overall interim assessment. The shared features of the above initiatives which bear a more significant impact and deserve further consideration are, (i) them—more or less—incorporating the functionalism of Article 9 U.C.C. (which, together with the small variations of the Canadian, Australian and New Zealand systems,²¹ may be considered to form a unitary model) and trying to spread it throughout the world; and (ii) the

¹⁷Ordonnance n. 2006-346, of 23 March 2006, relative aux sûretés, JORF n. 71, of 24 March 2006, 4475, texte n. 29.

¹⁸Loi 11 July 2013, Loi modifiant le Code Civil en ce qui concerne les sûretés réelles mobilières et abrogeant diverses dispositions en cette matière, MB, 2 August 2013, n. 2013009377, 48463, in force since 1 January 2018.

¹⁹Law n. 119 of 30 June 2016, G.U. n. 153 of 2 July 2016, introduced in Italy a non-possessory pledge to be registered in an electronic register which, however, has not yet been implemented. Therefore, the new pledge exists only on the paper, and is still not effective.

²⁰Culture-specific traits of integration are to be found in the current French–German effort to prepare a legislative draft for a Code Européen des Affaires, containing also rules for STL. Working languages are French and Germany only. Prof. Bussani is partaking to this initiative. See www.codeeuropeendesaffaires.eu.

²¹The Australian Personal Property Securities Act 2009, in force from January 2012 and the New Zealand 1999 Personal Property Securities Act.

trend regarding their operational impact. On this point, there seems to be a correlation between, on the one side, specialization and regionalisation of harmonization efforts and positive (or relatively positive) operational impact. On the other hand, global aspiration and stronger Americanization (what is evident particularly with the previously mentioned UNCITRAL initiatives) with poor practical results. Indeed, none of the more representative European legal systems has comprehensively ever adopted these Americanized supra-national models, not even English common law. Similarly, obstacles to the implementation of these global all-encompassing models arise also from other non-European legal traditions, such as India (Armour et al. 2009). Americanization may be hindered by political and ideological divergences, even independently from technical aspects, and this may happen in some quarters of the world where avoiding what comes from America is a driving force (Schauer 2010). Legal transplant experiences so far and only on the surface demonstrate that circulation of legal models in this field works better within similar legal traditions, i.e. common law models circulate better in common law legal systems than in civil law systems (as is the case of the circulation of Article 9 U.C.C. in Canada, New Zealand and Australia). Indeed, this assumption must be supplemented, and therefore also corrected, with the caveat that relevant technical divergences may be detected even in legal systems from the same civil or common law tradition. For instance, the differences are still extremely large between the US model and English law (Sheehan 2018). The reasons for this may lie in meta-legal factors, such as the stronger impact of tradition in the English legal system than in the USA (Paterson 2018). Furthermore, discrepancies between the robustness of creditors' protection are not aligned according to the demarcation between common law and civil law, creditors' protection being stronger in the USA, UK and Germany, and weaker in France, Italy or India (Armour et al. 2009; same results already in Bussani 2000 with regards to Germany v France and Italy in the field of forfeiture clauses). These considerations speak for the path dependence of legal transplants in STL, but also call for the need to explain the reasons for this dependence, which are not simply explained by the contrast between common law and civil law.

10 New Horizons for the Harmonization of Secured Transactions Law

It is now time to consider how ongoing social, political, economic, and technological developments may impact STL in the years to come. We saw above how numerous legal systems around the globe have reformed or are considering reforming their national regimes. The numerous legal harmonization initiatives undoubtedly follow the lines of the functionalism adopted by the super-model of Article 9 U.C.C. which is considered to incorporate current global best practices.

Nonetheless, novel challenges confront STL, putting to the test traditional dogmas and precepts, including the best practices embedded in modern international

standards. In this rapidly evolving context, it is of critical importance to consider whether the current legal transplant/harmonization framework—already weighed down by implementation difficulties at any level and by the risk of suppressing the less economically supported cultures—possesses sufficient breadth and flexibility to accommodate powerful drivers of change characterising the decades to come, or will have to be revised. I will refer here to at least three powerful challenges that can be identified. It is against these that the idea and practice of legal transplants as carried on so far in STL will need to be measured.

Firstly, it is a fact that we cannot part any more from a strong interconnection between STL and finance laws. This linkage has a series of implications. To begin with, the fall of the barrier of STL was intended as a purely private law subject. Further, any reform of STL, particularly on a supra-national scale, will have to be made keeping in mind the consequences it can have on public law regulations such as financial regulations (Castellano and Dubovec 2018). One important topic which shows the connection between these two disciplines is the issue of overcollateralization. This happens when a borrower encumbers all its assets to the extent that in case of subsequent financial distress it has no more free assets to use in order to get new credit. In the business sector, this means secure default and probably the opening of a liquidation procedure. On the contrary, having some residual assets to encumber in emergency situations would allow businesses access to reorganization schemes. These different outcomes may easily have a general impact on public interests, since they may mean, for instance, loss of job for many people and other macro-economic consequences. This scenario suggests that future global best practices could consider suggesting a mixed private/public law regulation limiting the amount of assets one borrower could encumber.

In the same vein, it could be argued that banks and financial institution, when agreeing to collateralized loans, should be bound to require a (certain) level of overcollateralization (that is a value of the secured asset superior in a certain proportion to the amount of the credit granted, the so-called ‘loan to value ratio’) in order to be sure that in case of the debtor’s default and realization of the secured assets, they could still ensure full satisfaction of their creditors’ rights without incurring the risk of possible excessive falls in the value of the said assets. It is noteworthy that in this field a sort of ‘inverse’ legal transplant could happen. Indeed, some European legal systems have already developed flexible rules requiring a certain level of overcollateralization. It is, for instance, the case of German case law developing flexible rules on *Überschuldung* (Bussani 2010). On the contrary, in the USA this has not happened. However, for the USA there could be prospective problems of compatibility of similar rules with the Fifth Amendment, because such rules could be deemed to amount to deprivation of “property without due process of law” (Schwarcz 2018).

This undivorceable marriage between STL and finance should not be limited to being an aspect reserved for academic debates on paper, but should have an actual impact in the way future legal change in this area will have to be imagined and conducted, that is involving experts in public law disciplines such as banking and financial regulation.

Secondly, the cross-border nature of STL has increased enormously as a consequence of digitization of commerce, as well. This fact puts even more pressure than before on what has always been the Gordian knot of harmonization of STL: the difficulties in establishing the applicable law to a given cross-border transaction, because of the diversity of international private law rules. Today as before, predictability of the applicable law is an important aspect even before a litigation arises, because it impacts the cost of the credit. It has been recently shown how the (apparently) small differences in the conflict-of-law provisions between Article 9 U.C.C. and the UNCITRAL Model Law are conducive to enormous practical problems that will inevitably result in costly legal advice for the businesses (Cohen 2018). Scholars will have to find a way out of this hurdle in the near future.²²

Last, but not the least, the impact of new technologies has been undervalued in the STL harmonization efforts so far. Whereas digitization has impacted, where possible, the dematerialization of registries of securities, trying to switch from paper-based systems to one electronically run (UK e-conveyancing reform started in 2002), or has introduced new methods for taking possession of an asset, like ‘control’ for book-entries securities (Article 9 U.C.C.; Book IX DCFR, etc.). However, the newest digital technologies like Internet of Things (IoT), Distributed Ledger Technology, Blockchain and Artificial Intelligence have not been considered at all in the law-making processes of STL. Yet, their potential for increasing the effectiveness of STL is enormous. We can think of the use of the so-called “smart contracts”²³ as security agreements. “Smart contracts” are agreements wherein execution is automated, usually by computers. Such contracts are designed to ensure performance without recourse to the courts. Automation basically brings self-help remedies into the contract. Any contractual breach can be automatically verified at its occurrence and automatically raises the cost of the breach to extremely high amounts. This has a deterrent effect that basically ensures contractual performance by excising human discretion from contract execution. In this way, it is clear that “smart contracts” have the potential to make superfluous the legal formalities required to prove breach (or default events) and can eventually imply excluding courts from enforcement (Raskin 2017). Of course, any recourse to such technology in STL, as well as in other areas of the law, should happen after careful consideration of the risks involved in the use of such devices in a sector where due process of law or judicial control over any loss of property is a highly estimated value for many societies, also enjoying constitutional protection. However, it is the duty of scholars, policy-makers and law-makers to engage in the study of how these technological resources could be used to

²²An interesting perspective suggest that comparison between the effects of conflict-of-law rules under Article 9 and under the UNCITRAL Model Law may lead to ‘inverse’ transplants, that is from the rules in the UNCITRAL soft-law instrument into Article 9. The field of private international law the good terrain for new phenomena of cross-fertilization in STL to arise (Cohen 2018).

²³Smart contract is a “computer code that, upon the occurrence of a specified condition or conditions, is capable of running automatically according to prespecified functions. The code can be stored and processed on a distributed ledger and would write any resulting change into the distributed ledger”: definition by Smart Contracts Alliance/Chamber of Digital Commerce, White Paper, September 2018, available at www.digitalchamber.org/smart-contracts-paper-press/.

improve efficiency of STL. Let us just sketch a couple of examples. Security agreements in the guise of “smart contracts” could reduce verification and monitoring costs for the secured creditor during the credit relationship. Blockchain²⁴ registries, fed by an IoT network of interconnected assets, could increase the accuracy of a constantly self-updating registry information. Moreover, legal reform should consider the potential of blockchain systems to re-shape registries of non-possessory security rights in a form which could not be compatible with the current forms envisaged by the supranational soft-law models. The latter all seem to be based on the idea of an (electronic, but) centralized book, whereas the former would be a decentralized system (Rodríguez de las Heras Ballel 2018).

These hints show that considering digital technology in law reform could mean having to completely re-build models, best practices and current working methods in the circuit of legal harmonization of STL. Are we about to face a revolution of global legal models by way of technology? If it is so, it is clear that any legal drafting initiative, led by scholars, government representatives, and lobby representatives, of any kind which will not be enriched and supported by a participatory process in which lawyers and governments cooperate with technology experts will be a poor exercise. To this inclusiveness of the ‘others’ comparative lawyers are certainly more open than the municipal ones.

11 Conclusions. The Need for a Comparative Approach in Secured Transactions

By way of conclusion, a message and a warning emerge. The message invites harmonization efforts to use more comparative law. Indeed, comparative law has at least two roles to play here. On the one side, it is an intellectual tool for the understanding of law and legal change, within the broad vision sketched above (n. 1) of law as a legal phenomenon that includes meta-legal factors, and of lawyers who are aware of the multiplicity of the legal layers which make every legal experience a unique system, despite its being made up by borrowed, adapted and cross-fertilized elements. On the other side, comparative law is an operative tool. It makes lawyers aware of the impact that operational elements must have when understanding—and even more when designing—legal change. By paying attention to the effects that operational infrastructures, settled practices, societal attitudes, religious beliefs, policy choices, etc. have on the legal systems, comparative law has the potential to offer a practical dimension that other legal disciplines have not had so far (Bussani 2016a).

And now the warning. Trying to put into practice Bussani’s attention to the geopolitical meaning of legal change behind the harmonization movement, comparative law

²⁴The Blockchain is a decentralized and cryptographic ledger of immutable data records replicated and distributed to each member/node of a peer-to-peer network. It allows the cryptographic recording of transactions and permits “smart” contracts that self-execute automatically if their conditions are met (Rodrigues 2018).

warns academics about their responsibilities in spreading a model—the US one—so very much connected with a history, society and economy not very replicable in most of the other regions of the world, including the advanced European ones. As the above survey has hinted, this effort would easily be perceived as a deculturization and a loss of meaning for many recipient legal systems. The many implementation deficiencies mentioned above (Sects. 4–8) have shown this with clarity. As the good farmer prepares the ground before planting a tree, so should the lawyer start from the ground of the recipient legal system, preparing a bottom-up a reception of a new (foreign) legal model, adapting the tree as much as possible to the soil. Science as an elitist soft-power that spreads easily through the world can be used and abused by geopolitical aims that may not be the fruit of a spontaneous choice from the recipient cultures.

Among the challenges for comparative lawyers approaching STL reform there is a need to balance innovation and tradition, and wealth with sustainable development, in the awareness that each legal experience will find its own measure. There can be no ‘one-size-fits-all’ model. Mauro Bussani’s teaching of comparative law invites STL studies to use more comparative law and less drafting.

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