Towards reforming South African secured transactions law: The value of a comparison with international and regional legal instruments*

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OPSOMMING

Hervorming van die Suid-Afrikaanse reg insake sekerheidstransaksies: Die waarde van 'n vergelyking met regsinstrumente op internasionale- en streeksvlak

Die artikel ondersoek hoe die Suid-Afrikaanse regsraamwerk vir sekerheidsregte in roerende goed hervorm kan word met behulp van 'n regsvergelyking met regsinstrumente op internasionale- en streeksvlak. In besonder stel ons voor dat 'n vertikale vergelykende studie gebruik kan word. Die vertrekpunt is om vas te stel wat die sleuteloogmerke en fundamentele beginsels van elk van die regsraamwerke is, ten einde inhoud daaraan te gee en om die onderlinge verwantskappe daarvan te oorweeg. Na aanleiding van hierdie ondersoek, bevind ons dat die volgende aspekte in toekomstige Suid-Afrikaanse regshervorming aangespreek moet word: (a) daar moet 'n enkele regsraamwerk wees wat op alle sekerheidsregte in roerende goed van toepassing is; (b) daar moet vasgestel word op watter stadium 'n sekerheidsreg in roerende goed geskep moet word, wat insluit of daar 'n duidelike onderskeid moet wees tussen die ontstaan van die reg en die oomblik waarop dit werking teen derdes verkry; (c) die omvang van die raamwerk moet omvattend (of inklusief) genoeg wees om 'n kommersieel lewensvatbare regsraamwerk daar te stel; (d) die meganisme waarmee publisiteit aan die sekerheidsreg verleen word moet deursigtigheid en regsekerheid bewerkstellig, terwyl dit ook kommersieel sinvol moet wees; (e) sekerheidsregte moet op 'n effektiewe wyse afgedwing kan word, terwyl die belange van skuldeisers en skuldenaars beskerm moet word; (f) daar moet duidelike en voorspelbare reëls wees ten einde die prioriteit van skuldeisers te bepaal; en (g) alle skuldeisers moet sover moontlik gelyke behandeling onder die reg ontvang. Hierdie studie stel dus voor dat 'n raamwerk met sleuteloogmerke en fundamentele beginsels ontwikkel word, welke raamwerk dan deur die Suid-Afrikaanse wetgewer en beleidmakers benut kan word om die Suid-Afrikaanse reg insake sekerheidsregte in roerende goed te hervorm.

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1 INTRODUCTION

The term "secured transaction law" is not as well known to South African lawyers as the concepts of "mortgage and pledge" or "real security law". However, the term "secured transactions law" is becoming increasingly popular internationally to denote the law that regulates a transaction that, in one form or another, purports to confer on a creditor a security right or interest in property, usually movable, owned by either the debtor or by a third party. The trite purpose of holding security is to ensure the repayment and/or enforcement of the debt due by the debtor. The general idea of secured transactions law frameworks is that the security right in terms of the secured transaction is created through a security agreement (a contract), but the security right exists with reference to a proprietary object (the encumbered asset). Thus, a vital consequence of the secured transaction is that the creditor has recourse against the encumbered asset as a result of holding a security right. However, this security right is only enforceable against third parties after the security right is made public in one of the recognised ways, failing which the security is only enforceable against the debtor.

The South African real security (or secured transactions) law framework concerning movable property is mostly still based on Roman law concepts. The last major reform to this framework was conducted with reference to special notarial bonds by the enactment of the Security by Means of Movable Property Act[1] in 1993.[2] The lack of reform since 1993 – and the apparent absence of plans to introduce any further reforms in the foreseeable future – stands in contrast to the high number of recent initiatives to reform secured transactions law frameworks elsewhere.[3] In many recent instances of national reform of secured transactions law frameworks, the law reform was directly influenced by an international legal instrument, a regional legal instrument or both.[4] These international and regional legal instruments typically consist of non-binding legal principles of international commercial law (or "soft law"), which are normative in nature.

Reform initiatives worldwide are essentially focused on developing or improving security devices whereby a movable asset can be given as security, not by means of the traditional restrictive rule that possession must be transferred to the creditor, but through the more flexible notion of having the security right registered in a public register. In South Africa, the closest we have come to such a system is the registration of notarial bonds that comply with the SMPA. The main requirements to constitute this special notarial bond are that the bond must

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1 57 of 1993 (hereafter "SMPA").

2 See the South African Law Commission *Report on the giving of security by means of movable property (Project 46)* (1991) (hereafter "SALC *Report*"), which culminated in the enactment of the SMPA.

3 For example in Belgium, Scotland, Zambia and Malawi, to name a few.

4 African countries that have reformed or are in the process of reforming their secured transactions laws include Zambia (Movable Property Security Interest Act 3 of 2016 with the asset register becoming operational from 2016); Ghana (a collateral registry was launched under the Borrowers and Lenders Act, 2008 (Act 773)); Malawi (Personal Property Security Act 8 of 2013 and Personal Property Security Regulations, 2015, with the registry operational from November 2015); Nigeria (Secured Transactions in Movable Assets Act 3 of 2017, which came into force on 30-05-2017); and Zimbabwe (Movable Property Security Interests Act 9 of 2017, date of commencement to be determined), to name but a few.

be registered in terms of the Deeds Registries Act[5] and that the bond must hypothecate "corporeal movable property specified and described in the bond in a manner which renders it readily recognizable".[6] The general questions arising from the SMPA are whether notarial bonds still conform with international trends and, if not, what reforms can be introduced.

However, the purpose of this contribution is not to provide a detailed analysis of the potential shortcomings of the current South African system or to make firm recommendations on how the law should change. Instead, this contribution illustrates a possible methodology or approach that South African policymakers could follow when evaluating the current system and investigating the prospect of future reform. It is often the case with countries embarking on a reform process to search for and find inspiration from other legal jurisdictions, typically ones that follow the same legal tradition, and thereby to conduct a so-called *horizontal* comparative study. However, another approach, which has become particularly popular in the field of secured transactions law, is to conduct a so-called *vertical* comparative study. Instead of comparing with other domestic systems, a vertical comparative study focusses on international and/or regional soft law as the benchmark for comparison.[7] International and regional soft law entail non-binding agreements, principles and/or declarations, which only become binding to the extent that the country in question decides to adopt the relevant measures into its positive law.[8] The benefits of soft law include the fact that these non-binding principles are more flexible and thus easier to implement than hard-law instruments.[9] Furthermore, because soft-law instruments contain legal principles that are general in nature, it usually is possible to adapt these principles to accommodate domestic legal traditions.[10]

To illustrate the value of a vertical comparative study for South African law reform, we selected three soft-law instruments – one international and two regional.[11] With reference to each of these, we identify the "key policy objectives" and "fundamental principles" as normative standards against which to evaluate the current South African framework and to serve as inspiration for future reform.[12] From the discussion below, it becomes evident that the key policy objectives of the different frameworks are very similar, but that there are some differences in the fundamental principles and/or the practical implementation of the principles. Such differences represent, for instance, the choices that a country like South Africa would have to make when embarking on a reform initiative – assuming that South African

5 47 of 1937.

6 S 1(1) of the SMPA.

7 See Akkermans "The use of the functional method in European Union property law" 2013 *European Property Law Journal* 96 concerning this vertical dimension in the context of the impact of European Union law on domestic property law.

8 Gabriel "Toward universal principles: The use of non-binding principles in international commercial law" 2014 *International Trade & Business Law Review* 242.

9 In the context of international commercial law, "hard law" creates legally binding obligations on parties (states in this instance). Courts, locally and/or internationally, may enforce these legally binding obligations. Moreover, these hard law instruments impose mandatory responsibilities on states and other international bodies, but also provide the same parties with enforceable rights, as stipulated in the agreement.

10 Gabriel 2014 *International Trade & Business Law Review* 244.

11 A broader study could include other instruments.

12 See Akkermans 2013 *European Property Law Journal* 110.

policymakers would seek to achieve the same objectives as those set by the international and regional bodies.

2 KEY POLICY OBJECTIVES AND FUNDAMENTAL PRINCIPLES OF SELECT INTERNATIONAL AND REGIONAL INSTRUMENTS

2 1 International instruments: The UNCITRAL documents

Arguably, the most influential international soft-law instruments regarding secured transactions law are the United Nations Commission on International Trade Law (UNCITRAL) *Legislative guide on secured transactions*[13] and the UNCITRAL *Model law on secured transactions.*[14] The latter was followed by the UNCITRAL *Model law on secured transactions: Guide to enactment*,[15] which explains the policy options that would influence the extent to which the provisions of the UNCITRAL *Model law* can be adopted, and by the UNCITRAL *Practice guide to the model law on secured transactions*,[16] which provides further practical guidance on how to implement the provisions of the UNCITRAL *Model law*. The introduction to the UNCITRAL *Guide* states that the ultimate purpose of the *Guide*, and arguably also of the *Model law*, is to "establish a single comprehensive regime for secured transactions". Primarily, therefore, these legal instruments serve as a template of what should be included as part of an effective secured transactions law framework. The Belgian Pledge Act of 11 July 2013 is one example of national legislation that has been adopted along the lines of the recommendations made in the UNCITRAL *Guide.*[17] Furthermore, according to UNCITRAL, the *Guide* influenced secured transactions law reform in Australia and South Korea as well.[18] Also, there are some examples of other states currently using the UNCITRAL *Guide* in their reform initiatives.[19]

The UNCITRAL *Guide* is a sophisticated normative instrument that contains non-binding legal principles that a country may choose to incorporate into its national legal framework.[20] According to Akseli, key objectives and essential

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13 2008 (hereafter the UNCITRAL "*Guide*").

14 2016 (hereafter the UNCITRAL "*Model law*"). The World Bank Group also prepared publications that could inspire secured transactions law reform, and of which the content resembles the key policy objectives contained in the UNCITRAL instruments mentioned below. See, for example, the World Bank's *Principles for effective insolvency and creditor/debtor rights*, its annual *Doing business reports* and *Secured transactions systems and collateral registries* (2010).

15 2017.

16 2019.

17 Dirix and Sageart "The new Belgian Act on security rights in movable property" 2014 *European Property Law Journal* 232.

18 McCormack *Secured credit and the harmonisation of law: The UNCITRAL experience* (2011) 187 (hereafter McCormack "*Secured credit*"). However, the author argues that the resemblance of the principles contained in such national legislation can also be attributed to "the distillation of principles that come from the American Article 9" (192).

19 The Scottish Law Commission considered the UNCITRAL *Guide* as part of its project towards reforming the law of moveable transactions. The recommendations of the Commission are included in its *Report on movable transactions* (Scot Law Com 249, 2017).

20 Macdonald "A model law on secured transactions. A representation of structure? An object of idealized imitation? A type, template or design?" 2010 *Uniform Law Review* 446.

policies are the building blocks of international instruments.[21] Thus, it is appropriate that the UNCITRAL *Guide* draws a distinction between key policy objectives and fundamental principles (or policies) to make it easier for a national legislator to implement the recommendations of the *Guide*. The key policy objectives of the UNCITRAL *Guide* are listed in recommendation 1 of the *Guide* and these objectives set out a broad policy framework that legislators may use to implement legislative reform. In simple terms, the key policy objectives provide general reform goals for the national legislator, which would then speak to the economic and/or social needs that the national legislator intends to address through implementing secured transactions law in a specific form.[22] Moreover, the key policy objectives could then inspire the purpose section of a particular piece of legislation or be included as part of the long title of a statute of the adopting country. The UNCITRAL *Guide* stipulates eleven key policy objectives, while the UNCITRAL *Model law* also follows these objectives.[23] These eleven key policy objectives are as follows:[24]

(a) The availability of secured credit should be expanded to increase the availability of low-cost credit.

(b) Debtors should be able to use the full inherent value locked in their assets as collateral for the secured transaction.

(c) It should be possible to create a security right in a sufficient yet straightforward manner.

(d) All types of creditors and all types of secured transactions should be treated equally under the law.

(e) It is imperative to provide a non-possessory security right in respect of all types of assets.

(f) The law should provide certainty and transparency, preferably by introducing a general security rights registry.

(g) There should be certain and clear priority rules.

(h) There should be efficient procedures for the enforcement of the secured creditor's rights if the debtor defaults.

(i) The parties to the secured transaction should have "maximum flexibility to negotiate" the terms that suits them best, thus incorporating the principle of party autonomy.

(j) The interests of all persons affected by a secured transaction should be balanced.

(k) To enjoy mutual benefits, states should align their secured transactions law regime with that of their trading partners, thus promoting the principle of harmonisation of secured transactions law.

In addition to these key policy objectives, the UNCITRAL documents provide for fundamental principles, which function as the building blocks to achieve the overarching key policy objectives. Effectively, the fundamental principles

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21 Akseli *International secured transactions law: Facilitation of credit and international conventions and instruments* (2011) 44.

22 See "Introduction" UNCITRAL *Guide* para 48.

23 UNCITRAL *Model law: Guide to enactment* para 17.

24 See recommendation 1(a)–(k) of the UNCITRAL *Guide*.

contain the detail of the suggested legal rules and allow a country to implement a fundamental principle in a manner that best suits the context of that country. The fundamental principles of the UNCITRAL documents are as follows:

(a) The scope of the framework should be as comprehensive as possible concerning the type of assets, security devices, secured obligations and secured transactions to which the framework can be applied.[25]

(b) A secured transactions law framework must follow a functional, integrated and comprehensive approach.[26]

(c) It should be possible for a security right to exist in respect of an asset that either does not exist yet or that the debtor will acquire in future.[27]

(d) The framework must allow for the original security right to extend to all – or at least most – proceeds resulting from the original encumbered asset.

(e) There should be a clear distinction between the time when the security right is created and the time when that right becomes effective against all third parties.

(f) A general security rights registry must be introduced that would notify the public at large concerning a change in the status of a proprietary interest in the now encumbered asset.

(g) More than one creditor should be able to take multiple security rights in the same asset.[28]

(h) The priority of the security right must be determined on a temporal basis making use of clear and detailed rules.[29]

(i) The legal framework should be facilitative and not formalistic,[30] meaning that the framework must provide parties with as much party autonomy as possible to structure the secured transaction as they deem fit.

(j) The framework must allow for efficient enforcement proceedings, which should include extrajudicial enforcement – thus, enforcement without court intervention.[31]

(k) The framework should allow for equal treatment of all types of creditors; in other words, there must not be a distinction between a creditor (lender) under a secured loan and a creditor (seller) under a credit sale.[32]

2 2 Regional instruments

Two regional instruments arguably[33] served as precursors to the development of the UNCITRAL *Guide*, namely the Organization of American States (OAS) *Model inter-American law on secured transactions* in 2001[34] and the European

25 Ch I of the UNCITRAL *Guide* para 4.
26 "Introduction" UNCITRAL *Guide* para 62; ch I of the UNCITRAL *Guide* para 104.
27 Recommendation 13 of the UNCITRAL *Guide* (creation of a security right).
28 "Introduction" UNCITRAL *Guide* para 67.
29 Ch III of the UNCITRAL *Guide* paras 15–18.
30 See in this regard, "Introduction" UNCITRAL *Guide* para 70; recommendation 10 of the UNCITRAL *Guide*; ch 1 of the UNCITRAL *Guide* paras 115–118; and art 3 of the UNCITRAL *Model law*.
31 Recommendation 142 of the UNCITRAL *Guide* and art 73 of the UNCITRAL *Model law*.
32 "Introduction" UNCITRAL *Guide* para 72.
33 See McCormack *Secured credit* 11.
34 Hereafter the "OAS *Model law*".

Bank for Reconstruction and Development (EBRD) *Model law on secured transactions* in 1994.[35] Therefore, for purposes of this contribution, we decided to include these two regional instruments, along with UNCITRAL documents, to illustrate the value of conducting a vertical comparative study to reform South African real security law. Therefore, in what follows, we extract the key policy objectives and fundamental principles of the OAS *Model law* and the EBRD *Model law* as we have done regarding the UNCITRAL *Guide* above.

2 2 1 OAS Model law

The key policy objectives of the OAS *Model law* are similar to those of the UNCITRAL instruments. Therefore, it is not necessary to repeat them here, except to point out two differences, namely that, unlike the UNCITRAL instruments, the OAS *Model law* does not include key policy objectives concerning party autonomy and harmonisation.

Unlike the UNCITRAL instruments, the OAS *Model law* does not list fundamental principles as such. Therefore, what follows is our deduction, based on the provisions of the *Model law*, regarding what would be the fundamental principles of the OAS *Model law*. In the first instance, the OAS *Model law* follows a unitary system of legal rules, similar to the unitary approach incorporated as part of the UNCITRAL instruments. Similar to the UNCITRAL instruments, the scope of the framework recommended by the OAS *Model law* is comprehensive, both in respect of the type of movable property and in respect of which type of obligation may be secured. Also similar to the UNCITRAL instruments, the OAS *Model law* potentially subscribes to a clear separation between the creation and third-party effectiveness of a security right but retains the traditional labels according to which security devices are classified. Also corresponding to the UNCITRAL instruments, another fundamental principle is the incorporation of a general registry in which to register a security right. However, unlike the UNCITRAL instruments, the OAS *Model law* proposes the possibility to register a possessory security right to determine the *priority* but not the creation of this possessory right. Moreover, it is also a fundamental principle to have transparent and predictable priority rules. Even though the OAS *Model law* allows for extrajudicial enforcement, like the UNCITRAL instruments, the OAS *Model law* prefers the use of a combination of extrajudicial enforcement and expedited judicial enforcement, which means that it is the only instrument discussed here that directly recommends the use of expedited judicial enforcement.[36]

2 2 2 EBRD Model law and EBRD Core principles

Similar to the idea behind the UNCITRAL key policy objectives listed above, the EBRD *Core principles for secured transactions law* of 1994[37] sets out the goals of secured transactions law reform. Therefore, the EBRD *Core principles* should be read with the EBRD *Model law*, since the former lays down the philosophy against which the provisions of the latter should be interpreted.[38] The ten EBRD *Core principles* roughly correspond to the UNCITRAL key policy

35 Hereafter the "EBRD *Model law*".

36 Art 55 of the OAS *Model law*.

37 Hereafter the "EBRD *Core principles*".

38 Röver *Secured lending in Eastern Europe: Comparative law of secured transactions and the EBRD Model law* (2006) 86 (hereafter "Röver *Secured lending*").

objectives, since both provide possible legal reform goals. The EBRD *Core principles* are comprised of the following ten principles:

(a) Credit security must be able to reduce the risk of giving credit, resulting in more credit becoming available on improved terms.

(b) The law should allow the "quick, cheap and simple creation of a proprietary security right" without dispossessing the debtor of his or her asset.

(c) If the secured debt is not paid, the security holder must be able to realise the charged (or encumbered) assets to satisfy the secured creditor's (charge holder's) claim before discharging the claims of competing creditors.[39]

(d) The charged property should be realised promptly and at the market value of the property.

(e) The security right (charge) should remain effective after the insolvency or bankruptcy of the debtor.

(f) The cost to create and maintain the security should be kept as low as possible.

(g) The secured transactions law framework must have a comprehensive scope of application.

(h) An effective method to publicise the security right must be implemented.

(i) There should be rules governing the competing rights to the encumbered asset.

(j) Parties should be able to adapt the security they use to fit the needs of the secured transaction, thus emphasising the importance of party autonomy.

The EBRD *Model law* does not use the terms "fundamental policies" or "fundamental principles". However, in its introduction, it refers to "essential features" of the EBRD *Model law*, which are arguably the functional equivalent of the concept of fundamental principles as per the UNCITRAL instruments. Therefore, the essential features (in other words, fundamental principles) of the EBRD *Model law* are as follows:

(a) There should be a comprehensive framework that enables parties to use all their assets to secure all types of secured obligations.

(b) The security right must comply with the essential qualities of a traditional property right; thus, the creation and third-party effectiveness of the right should occur simultaneously. This approach differs from the corresponding fundamental principle under the UNCITRAL *Guide*.

(c) The framework must exclusively secure *business* credit. This feature differs from the other instruments discussed above.

(d) It should be possible to describe the secured debt and charged (encumbered) property with a large degree of flexibility.

(e) Concerning publicity, the security right (charge) should be registered in a general registry that is publicly accessible. However, the registry should not be used for the possessory charge or the unpaid vendor's charge.[40]

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39 The EBRD *Model law* and the EBRD *Core principles* use the concept of a "charge", whereby the type of security device is classified either as a registered charge, a possessory charge, an unpaid vendor's charge, or an enterprise charge.

(f) It must be possible to transfer the charged (encumbered) property free of any charges.

(g) Enforcement should take place without any court intervention or consent from the debtor, which arguably borders on self-help.

(h) It should be possible to take all assets of an enterprise as security (making the EBRD *Model law* the only legal instrument that includes this aspect).

(i) The parties should be allowed a large degree of party autonomy concerning their secured transaction.

Even though the EBRD *Model law* does not list clear and predictable priority rules or the promotion of equal treatment of different types of creditors as essential features, the *Model law* does contain provisions concerning these features. Consequently, one can infer that the EBRD *Model law* tacitly supports these aspects as principles.

2 3 Common aspects

From the above, it is relatively clear that the different international and regional legal frameworks seek to achieve roughly the same goals (key policy objectives or core principles) but that they sometimes recommend different ways (fundamental principles) to accomplish these goals. Indeed, when comparing the various instruments, one can identify the following aspects that should be considered when reforming the South African law of secured transactions:

(a) Lawmakers should establish a single legal framework, which applies to all security rights in movable property – thus, following either a unitary approach as with the UNCITRAL instruments, a non-unitary approach as with the OAS *Model law*, or a commercially facilitative approach as with the EBRD *Model law*.

(b) A decision must be made on exactly how a security right should be created, which includes whether there must be a clear separation between creating the security right and affording third-party effect to the security right. In this regard, the UNCITRAL instruments and OAS *Model law* require a clear separation, while the EBRD *Model law* recommends that creation and third-party effectiveness should take place simultaneously.

(c) The scope of the framework should be comprehensive (or inclusive) enough to create a commercially viable legal framework. Therefore, as many categories of movable property as possible should be available to secure as many types of obligations as conceivable.

(d) There should be a publicity method, which achieves transparency and legal certainty, while being commercially sensible. The choice is typically between so-called "transaction filing" and "notice filing".[41]

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40 An unpaid vendor's charge is a way to incorporate retention of ownership as part of a framework. The unregistered unpaid vendor's charge is transformed into a security that is akin to a right that a registered charge holder would have, but only for a period of six months. See Röver *Secured lending* 83.

41 Notice-filing involves filing a simplified document and merely provides notice that a security *possibly* exists. Conversely, transaction-filing involves filing either a complete security agreement or more comprehensive information than with notice-filing; it *confirms* that a security right exists.

(e) Enforcement measures should be effective, while sufficiently protecting the debtor's interests. A crucial choice in this respect is whether the law should allow extrajudicial enforcement.

(f) There should be clear and predictable rules to determine the priority ranking of creditors.

(g) All creditors should, as far as possible, receive equal treatment under the law, regardless of the nature of the security device (for instance, a security right versus retention of title).

Therefore, for the South African framework to comply with international trends, it would have to address each of these aspects. These aspects also enable a study of South African law to determine whether (and if so, to what extent) the current framework falls short and the ways in which the law can be reformed to remedy the identified deficiencies.

3 ILLUSTRATION WITH REFERENCE TO SOUTH AFRICAN LAW

It is not possible to conduct an exhaustive evaluation of the South African framework with reference to the above-listed aspects in a single article; one can probably write an article (or multiple articles) on each aspect. Therefore, to illustrate the vertical comparative methodology proposed by this article, we have selected three of the above-listed aspects. For each of them, we summarise how it links to the key policy objectives and fundamental principles deriving from the international and/or regional legal instruments mentioned above, followed by a brief comment on how the current South African law compares to these principles. The discussion also includes reference to some of the policy choices facing South African lawmakers, should it be decided to embark upon a formal reform project. As illustrated below, these policy choices should be guided by the key policy objectives and fundamental principles mentioned above.

Therefore, the illustrations below will focus on the following aspects: (1) how comprehensive the scope of the frameworks should be regarding the types of assets included as part of a legal framework; (2) the manner in which the publicity of the security right should take place; and (3) the manner of enforcement that would be most effective.

3 1 Comprehensive scope

All the frameworks share a key policy objective that increased access to secured credit is a by-product of a legal framework with a comprehensive scope of application. At least three fundamental principles relate to this objective, namely (a) that the framework should be as inclusive as possible when it comes to categories of assets, obligations and persons, as per the UNCITRAL instruments and the OAS *Model law*; (b) that debtors should be able to use any or all of their assets to secure any or all type(s) of obligation(s), which becomes possible only if another fundamental principle is present, namely (c) that it should be possible to define the secured debt and encumbered property in as flexible a manner as possible, as per the EBRD *Model law*.

When comparing the current South African law to these fundamental principles, as derived from international best practice, it becomes apparent that the current framework is not comprehensive (inclusive) enough to enable debtors to use any or all of their movable assets as security via a non-possessory security device, namely the special notarial bonds currently regulated by the SMPA. An analysis

of this difficulty should include an examination of issues such as: (a) the types and/or categories of movable property that may be encumbered; (b) the degree to which the specificity principle influences the scope of the framework; (c) the extent to which the security right should extend to future assets, proceeds, a mass, a product, and fixtures attached to immovable property; and (d) the nature of the secured obligations that should be accommodated by the framework.

The question of how comprehensive the scope of the framework should be is influenced by how strictly the specificity principle is adhered to. The specificity principle concerns how specific the asset description (and in some frameworks, the secured obligation) should be. Specificity supports transparency by notifying outsiders about the *exact* asset(s) covered by the creditor's security. In the South African context, the SMPA endorses a strict specificity principle in terms of how assets subject to a special notarial bond must be described. Section 1(1) of the Act provides that, to grant a real security right, the notarial bond must burden "corporeal movable property specified and described in the bond in a manner which renders it readily recognizable".[42] The current requirement is so strict that it effectively excludes, among others, revolving assets, proceeds, an all-asset type security,[43] and future assets from the scope of a special notarial bond due to the inability to describe such assets in a way that meets the standard of specificity set by the Act. Accordingly, an important question in any future reform project would be whether a trade-off can be made between the importance of specificity (in meeting the transparency principle) and allowing more flexibility regarding the kinds of assets covered by the framework. A possible solution is to allow an asset (or assets) to be described specifically or generically, as long as an asset-description standard allows for the reasonable identification of the encumbered property.[44]

Incorporeal movables (claims) are also excluded from the SMPA.[45] Therefore, a separate system, namely that of cessions *in securitatem debiti*, currently applies to incorporeal assets. Accordingly, a further question in any law reform initiative would be whether incorporeal movables should be included in the new framework or whether these assets should be dealt with separately.

3 2 Publicity

The key policy objectives that correspond to the question of publicity, and thus the achievement of transparency, include: (a) recommendation 1(f) of the UNCITRAL *Guide*, which mentions that certainty and transparency should be achieved by using a general security registry; (b) EBRD *Core principle* 8, which recommends the implementation of an effective system to publicise the existence of the security device (charge); and (c) the OAS *Model law*, which assumes that transparency will be promoted where there are clear requirements for publicity as well as standardised documentary and registry requirements. These key policy objectives are more specific, and the corresponding fundamental principles contain much of the same principles as the key policy objectives. Accordingly, the

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42 See the strict interpretation of this requirement in *Ikea Trading und Design AG v BOE Bank Ltd* 2005 2 SA 7 (SCA).

43 This would be security in all the debtor's assets.

44 This is the recommended standard in the UNCITRAL instruments. See recommendation 14(d) of the UNCITRAL *Guide* and art 9 of the UNCITRAL *Model law*.

45 See the reference to "corporeal movable property" in s 1(1) of the SMPA.

fundamental principles that correspond to the aim to establish a method of publicity that facilitates transparency include: (a) the UNCITRAL *Guide*'s recommendation that a general security register needs to be established; (b) the EBRD *Model law*'s requirement that registered charges ought to be registered in a public charge register; and (c) the OAS *Model law*'s recommendation that a general security rights register should be established with uniform rules that apply to all security devices.

In other words, an essential consideration for the reform of the South African secured transactions law framework entails establishing a publicity method that is not unnecessarily cumbersome, and that would provide sufficient notice to third parties. Essentially, a functional registry is a foundation on which the implementation of the recommended framework will stand or fall.

A practical issue associated with special notarial bonds under the SMPA concerns the cumbersome registration process presently used to constitute this non-possessory real security right. The creation process is cumbersome because the procedure to register the notarial bond is still paper-based and potentially takes an unnecessarily long time to complete due to the number of examiners required to assess the legal validity of the bond document.[46] Also, it is not ideal for security rights in movable property to be registered in the same system that has as its primary focus the registration of deeds pertaining to immovable property.

Therefore, it is arguable that a new general registry dedicated to security rights in movable property should be established in South Africa. In our view, the registration system should ideally adopt the approach of transaction filing, since it is crucial that registration should provide clear proof that the security rights exist. This means that more would be required than mere notice that there may be a security right, as would be the case with notice filing (recommended in the UNCITRAL instruments), whereby notice merely provides a warning that a security right potentially exists. Also, it would be ideal for the new register to be widely accessible and completely electronic. However, it is no doubt necessary to undertake a detailed study of the registration aspect and to thoroughly investigate how such a system should operate in the South African context.

3 3 Effective enforcement measures

Concerning the question whether enforcement measures are effective, the relevant key policy objectives include: (a) recommendation 1(h) of the UNCITRAL *Guide*, which mentions that the secured creditor's right must be enforced efficiently; (b) EBRD *Core principle* 4, which also suggests that a framework must have efficient enforcement measures; and (c) the OAS *Model law*, which is more detailed and assumes that a framework will improve the efficiency of the enforcement process if enforcement is quick while also protecting the interests of the debtor. The key policy objectives pertaining to enforcement in all the instruments are phrased in a general manner and broadly requires that efficient

46 However, this may change in the foreseeable future. The Electronic Deeds Registration System Act 19 of 2019 was signed into law and will become effective on a date to be proclaimed (see *GG* 42744 of 03-10-2019). The purpose of the new system is to allow the electronic processing, preparation, and lodgement of documents with the Registrar of Deeds.

enforcement measures should be implemented. However, the fundamental principles concerning enforcement contain more detail on whether enforcement should take place through extrajudicial enforcement or through other judicial proceedings.

The fundamental principles that correspond to the question whether enforcement measures are effective include: (a) the UNCITRAL *Guide*'s recommendation that, while both judicial and extrajudicial enforcement should be possible, the ideal outcome is to completely exclude court involvement; (c) the EBRD *Model law*'s preference for extrajudicial enforcement, but without requiring consent from the debtor or any court involvement (thus bordering on self-help); and (3) the OAS *Model law*'s recommendation to use expedited judicial proceedings to take possession of the collateral, without any option of extrajudicial dispossession.

From a South African perspective, the question is whether the current enforcement measures are the most efficient options, with due regard to the Constitution.[47] South African law contains a strong aversion to self-help in respect of enforcement measures,[48] while the debates surrounding whether *parate executie* clauses in pledge agreements are valid have also received much consideration.[49] The EBRD *Model law* and the OAS *Model law* recommend enforcement measures that are at the opposite ends of the spectrum. On the one hand, the EBRD *Model law* suggests that the charge holder (creditor) should be empowered to take possession of the encumbered property without the consent of the debtor or any court intervention. Conversely, the OAS *Model law* recommends that the creditor ought to be empowered to take possession, subject to first acquiring an attachment order. However, the attachment order recommended by the OAS *Model law* is obtained after following an *expedited judicial* enforcement proceeding.

Allowing the self-help recommended by the EBRD *Model law* will go against the abovementioned aversion to self-help in South Africa. Thus, the possibility to use expedited judicial enforcement measures, recommended under the OAS *Model law*, is arguably the preferable recommendation because it allows efficient enforcement while guarding against self-help. Accordingly, lawmakers should investigate whether an expedited judicial process can be implemented within the confines of the current South African civil procedure law; if not, changes would have to be made in that respect. Moreover, within the South African context, *parate executie* corresponds to the concept of extrajudicial disposition, which should remain acceptable as long as the debtor consents at the appropriate moment.

4 CONCLUSION

The last time that a relatively comprehensive official investigation into the law of security rights in movable property was conducted in South Africa was in the

47 Constitution of the Republic of South Africa, 1996, specifically s 34 (right of access to courts).

48 The general aversion to self-help is illustrated by cases like *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) and *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 6 SA 596 (CC).

49 See the summary of Brits "Pledge of movables under the National Credit Act: Secured loans, pawn transactions and summary execution clauses" 2013 *SA Merc LJ* 555–577.

1980s and early 1990s, which culminated in the SALC *Report* of 1991 and the enactment of the SMPA in 1993. As important as the changes brought about by the latter were, the SMPA entailed a rather moderate development. Although the SMPA provided for the creation of a non-possessory pledge via special notarial bonds registered in compliance with the requirements of the Act, it did little more than to expand the system that previously applied in the former Natal Province[50] to the rest of the country. Furthermore, the legislature was quite conservative in its restrictive formulation of the SMPA, most notably with reference to the strict requirement on how bonded movables should be described for registration to have the desired effect. At that time, it might have been appropriate to develop the law incrementally, with small steps in the right direction. However, the problem is that almost no further steps had been taken in the almost three decades since.

Therefore, the time has come to embark on a fresh evaluation of the current South African legal framework regarding security rights in movable property. This time around, a law reform initiative will have the benefit of considerable global developments to consult and learn from. Although the law reform project can take inspiration from other domestic legal frameworks, such as Belgium, Scotland and other African countries, South African policymakers need not be limited by such a traditional (horizontal) legal comparative approach. Instead, principles derived from multiple international and regional soft-law instruments, can fruitfully serve as benchmarks to assist in reforming the South African framework – thus using a vertical comparative approach. In this article, we have attempted to set the scene for such a study in the South African context.

With reference to three soft-law instruments, one international and two regional, this article illustrates an approach that can be followed, specifically by drawing on the so-called "key policy objectives" and "fundamental principles" of these instruments to arrive at a list of aspects that ought to be considered when a law reform project in South Africa is undertaken in future. By way of illustration, we briefly discussed three of the identified aspects, not to conduct an exhaustive study and/or make firm recommendations as such, but instead to show how the vertical comparative approach could allow a domestic system like South Africa to incorporate globally accepted objectives and principles, while remaining sensitive to local preferences and traditions.

50 See the Notarial Bonds (Natal) Act 18 of 1932.