

Updating the Framework for Asset Security in France: The Reforms of 2006

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Security is the lynch-pin of the commercial arrangement. The development of security in order to protect the creditor's interest is often related to the underlying varieties of property that exist and to how legal systems make available arrangements by which interests in property or their equivalent are given to creditors so as to enable the choice of whether to reclaim the indebtedness due in the form of a physical asset or a sum of money. This provides greater certainty than would the mere enforcement of a claim *in personam* against the debtor and is often used as an adjunct to or instead of this type of claim. The use of security serves to promote the security-holding creditor to a better position in relation to claims over the debtor's assets than would be the position of other creditors. This is a particular concern in insolvency when the value of the underlying assets is unlikely to be sufficient to meet all claims against the debtor and the creditor doted with security is thus allowed to obtain enforcement of its rights over assets in priority to other creditors.¹ Although there is a view that the granting of security is not wholly efficient and may lead to a misallocation of resources,² the general consensus is that security serves to 'enhance the probability of repayment'.³ Thus, the underlying basis on which most reforms in security law are undertaken is the assumption that a good security regime increases the likelihood of credit at low interest rates and costs, thus serving to benefit those who are able to take advantage of it to obtain credit and thus capital for economic activities.⁴

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¹ See, for an illustration of the literature in this area, Bridge, M and Stevens, R (eds) (2001) *Cross-Border Security and Insolvency* Oxford University Press, the numerous references to security and the position of secured creditors in Gromek-Broc, K and Parry, R (2006) *Corporate Rescue: An Overview of Recent Developments* (2nd ed) Kluwer Law International, and the cross-referencing to insolvency in Kieninger, E-M (ed) (2004) *Security Rights in Movable Property in European Private Law* Cambridge University Press. The role of asset security in insolvency proceedings is recognised in many modern texts, including Principle 7 of the G22 Key Principles and Features of Effective Insolvency Regimes 1998, Principle 3 of the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems 2001, Principle 9 of the Principles of European Insolvency Law 2003, Recommendations 3-4, 50-51, 88, 100, 188-89 of the UNCITRAL Legislative Guide on Insolvency Law 2004 and Principles A1-A5 of the World Bank-IMF Joint Initiative on Creditor Rights and Insolvency Standards 2005.

² See Hudson, J (1995) 'The Case against Secured Lending' 15 *International Review of Law and Economics* 47.

³ See Kieninger, E-M (2004) 'Introduction: Security Rights in Movable Property within the Common Market and the Approach of the Study' ch 1 in Kieninger *Security Rights in Movable Property* supra n 1 at 7.

⁴ *Id* at 8.

In France, asset security rules were incorporated alongside contract law and property rules in the Civil Code of 1804. This created the framework, which has largely governed the creation of security interests in the two intervening centuries until the reforms that took place in 2006. It is the purpose of this article to look at the original rules in the Civil Code and at how these were perceived as no longer matching the prevailing needs of commercial reality, resulting in the development of a diversity of modern security arrangements.

The evolution of the French security regime must also be set against the background of globalisation, in which the formation of the Internal Market in the European Union, of which France was a founding member, has brought about cross-border provision of finance and competition for capital. These factors, allied to the phenomenon of competition between jurisdictions and legal systems providing asset security, have resulted in external and internal pressures being brought to bear on the French system for changes to occur so as better to provide for the needs of the users of the system. In addition, adverse comparisons made between the French legal system and its perceived direct competitors, the Anglo-American legal system(s), have led to questions being asked about the nature of French law and whether it is able to compete effectively in a global market for justice. This has had the result of placing even greater pressure on the system to ensure that reforms are particularly adapted to the competition between systems and that modernisation efforts are clearly geared towards enhancing systemic efficiency and user-friendliness. France is a particularly important example of this phenomenon, given that its legal framework has been directly applicable in or has influenced the formation of laws of a considerable number of jurisdictions worldwide. Thus, it is also the purpose of this article to understand the impact of the changes that have been introduced in 2006 and to gauge whether, as a result of these reforms, there now exists an adequate framework for enabling the financing needs of French businesses and whether these changes may serve as useful models for other members of the French legal family.

SECURITY IN THE FRENCH CONTEXT: THE 'ANCIEN RÉGIME'

Traditional Views of Property and Security in France

It has been said that the French law of property, as set out in the Civil Code of 1804, is based on the concepts of Roman law, which matches the needs of a predominantly agricultural society. At the time the Civil Code was promulgated, France, in the aftermath of a revolution that was a costly and resource-consuming exercise, could be said to have reverted to a largely agricultural-based society, with the fruits of the Industrial Revolution not reaching its shores till after the conclusion of the various Continental wars. Thus, in a society in which 90 per cent of property consisted of land and various interests in land, the terminology and framework of security were couched in the language of the period. This can be clearly seen in an early translation of the 1804 version which displays a similar stylistic use of language, seemingly archaic to modern readers. This translation is instructive because a comparison between its text and the regular annual productions of updated versions of the Civil Code by publishers such as Dalloz or Litec, often accompanied by references to case law and

commentary, reveals that this section of the text has little changed in two centuries.⁵ The same cannot be said of the remainder of the Civil Code, whose body has ‘suffered so many interferences and challenges’ over the time since its enactment.⁶

However, the need for ascertaining control over physical property, inherent in the 1804 text, has itself changed in two major ways. First, property is more likely to comprise non-agricultural holdings and the needs of owners of these diverse varieties of property are not akin to those of traditional landowners. Second, ‘property’ has considerably enlarged its definition to encompass more intangible types, including intellectual property and other similar incorporeal rights. In addition, the role of the state has, according to some commentators, changed from guaranteeing private ownership of property to itself owning and controlling property as well as its exploitation and use. For example, the phenomenon of public goods provision is well known to analysts of competition law. It may be thought, therefore, that the Civil Code and its definitions of property no longer match the needs of the society to which France has evolved, a society that is now experiencing the effects of globalisation and competition on a worldwide scale. Although it is possible that some adaptation of old concepts may be made to instances of novelty, it is often the case that reuse of terminology or the extension of concepts through judicial exposition are exercises in sustaining a fiction beyond its capacity. In most instances, new legislation is desirable despite an often held orthodox view as regards the Civil Code that prevents wholesale change without strong government will, reflected in public support. Although the first is reflected in the way the reforms of 2006 have been carried out, it will be interesting to see whether the changes that have ensued will attract the support of users of the asset security framework.

As noted above, the terminology and framework prior to the most recent changes appeared still to be couched in the language of the early 19th century and values of security were firmly linked to the ownership and enjoyment of real property interests of that period. Although, in principle, the rights of a creditor vis-à-vis the debtor, where these are secured against property, were considered to be in the nature of personal rights, their nature could be equated to those existing in real property. Thus, although these rights were often dealt with as part of the section of the Civil Code that talked of special contracts, they needed to be registered and comply with the type of notice requirements more often found in the context of land so as to be fully effective against third parties. An example was to be found in the case of leases, which because of their incidence on land came close to being interests in land, especially in the agricultural and business contexts. Security in France prior to the recent changes could be classified as divided into traditional security rights and modern types of security, the latter created as a result of an acknowledgement that traditional rights were not flexible enough to deal with the volume of business transacted by companies in the modern age and the impact of their trading on consequent financing needs. As shown below, modern security devices were often created outside the Civil Code context as a result of specific legislation addressing the needs of particular commercial sectors.

⁵ See A Barrister of the Inner Temple (1999 reprint) *Code Napoleon or the French Civil Code* Beard Books.

⁶ See Markesinis QC, B (2005) ‘The Enduring (Double) Legacy of the Code Napoleon’ 121 *Law Quarterly Review* 80 at 84.

Traditional Security Rights as Financing Tools

The protection of assets by the use of security was always of course intended to guarantee the debt owed to the creditor. In the classical French system, as codified in 1804, there are two varieties of security traditionally used by creditors to preserve their interests over particular assets belonging to their debtor and which are commonly found as a means of assisting business lending. These were the hypothec, commonly found in cases of specific protection of real property interests, and the charge, which applies to all varieties of property. Both these institutions bore some resemblance to their counterparts in antiquity, the *hypotheca* and *pignus*. However, the difference between these institutions was the issue of possessory rights, *hypotheca* being non-possessory in nature, while *pignus* involved delivery to the creditor as the emblem of the guarantee under the security created, although both could apply indifferently to real or personal property.⁷ As shown below, the cleavage between the French equivalents is different, the hypothec now being restricted to real property. Over and above these security methods, personal guarantees were also commonly found as a method of adding to the security enjoyed by the creditor. These will be dealt with below in the order they appeared in the Civil Code.

Personal Security: Guarantees

In its pre-2006 wording, the Civil Code defined the guarantor as the person who agreed to bear the risk of the debt in case the debtor defaults.⁸ A guarantee could only relate to an obligation that was considered as valid in the eyes of the law and could not exceed the total amount of the debt owed by the debtor, nor could it involve any conditions not otherwise imposed on the debtor. If the guarantee were nevertheless for an amount in excess of the principal obligation, the guarantor could not be held liable for the excess. A guarantee could be for an amount less than the total debt, in which case lesser conditions could be imposed on the guarantor.⁹ A guarantee could also be made without knowledge of the debtor, although it needed to be made express, normally by being reduced to writing.¹⁰ There existed a relatively clear framework of rules which governed contributions, the right to demand damages if the debtor occasioned loss beyond that naturally consequent on the guarantee, subrogation of rights and rules against double recovery.¹¹ As a financing tool, it was considered ancillary to both hypothecs and legal charges as it merely boosted the initial security, although the existence of guarantees was also noted as an important factor in prompting creditors to extend financing.

⁷ See Zwalve, W (2004) 'A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods' ch 2 in Kieninger *Security Rights in Movable Property* supra n 1 at 40.

⁸ Civil Code (pre-2006 wording) Article 2011. Zwalve 'A Labyrinth of Creditors' supra n 7 at 48 notes the importance of personal guarantees as an alternative to security of a proprietary nature.

⁹ Civil Code (pre-2006 wording) Articles 2012-13.

¹⁰ Id Article 2015.

¹¹ Id Articles 2028-33.

In rem Security: The Charge¹² and the Hypothec¹³

The charge was conceived as a variation on the classical pledge, inherited from Roman law.¹⁴ In its pre-2006 wording, it was defined as being a security created by a deed in which the debtor provided a specified asset to the creditor as security for his debt.¹⁵ It gave the creditor the right to be paid out of proceeds resulting from the use of the property, in preference to other creditors.¹⁶ The effectiveness of this type of charge was subject to it being created by deed, which needed to contain details of the property subject to the charge.¹⁷ Where the charge applied to incorporeal property, this deed needed to be the subject of express notification to the debtor. Acceptance could be signified by means of reference to the charge in another document.¹⁸ The effectiveness of a legal charge was subject in many instances to physical transfer of the property to the creditor or to a bailee, who held it on behalf of the creditor,¹⁹ although in practice there was no strict requirement for the debtor to be dispossessed of the asset over which security was enjoyed if registration was available as an alternative to alert third parties to the existence of the security.²⁰ Thus, it was an instrument which was found widely and was also available for the creation of security over debts.²¹ Nevertheless, it was a cumbersome instrument, which had to relate to a specified asset subject to the security. This entailed the creation of a number of separate charges if assets fell into distinct types of property or came into existence at different times.²²

The hypothec was defined as being a physical right over real property which covers an obligation contracted by the debtor, which may be transferred with the property.²³ A hypothec could be created by operation of law, by a decision of a court or by agreement between the parties.²⁴ A hypothec could only be taken out over property which could be subject to sale as part of a commercial transaction. It could also be taken out over a right of

¹² *Nantissement*, of which there are two varieties: *gage* for movables and *antichrèse* for immovables. Although the French and English institutions of the pledge are similar varieties of possessory security, the use of the term charge is preferred to pledge by some authors, including Gdanski, G (2001) 'Taking Security in France' ch 5 in Bridge and Stevens, *Cross-Border Security and Insolvency* supra n 2. However, the English institutions of the pledge and the charge are distinguishable from each other by their respective common law and equitable origins.

¹³ *Hypothèque*.

¹⁴ See Drobnig, U (2004) 'Security Rights in Movables' ch 40 in Hartkamp A and Hesselink, M (eds) *Towards a EU Civil Code* Kluwer at para 2.2.

¹⁵ Civil Code (pre-2006 wording) Article 2071.

¹⁶ Id Article 2073.

¹⁷ Id Article 2074.

¹⁸ Id Article 2075.

¹⁹ Id Article 2076. Zwolve 'A Labyrinth of Creditors' supra n 7 at 47-48 notes that the practice of constructive (or token) delivery of possession that was used to palliate the difficulties involved in depriving the debtor of the use of the asset through substantive (or physical) delivery was explicitly rejected by the Civil Code and queries why this was not more resisted by both financial institutions and business users.

²⁰ Id Article 2075, which was, although it applied uniquely to incorporeal movables, not deemed suitable for the creation of charges over accounts receivables (Gdanski 'Taking Security in France' supra n 12 at 68-69).

²¹ Civil Code (pre-2006 wording) Article 2081.

²² See Watt, B (1996) 'The Spirit of Insolvency in France' 7 *International Company and Commercial Law Review* 266 at 271, who reports that the Eurotunnel project required separate securities over rolling stock, bank accounts, intellectual property rights, receivables and equity in subsidiaries.

²³ Civil Code (pre-2006 wording) Article 2114.

²⁴ Id Articles 2116-17.

enjoyment attaching to that property.²⁵ Hypothecs would normally rank among themselves according to the date on which they were registered; if registered on the same date they ranked according to the date of the contracts creating them.²⁶ The limitations of the hypothec were that it was to be found exclusively in the real property context and was limited to property already in existence, as hypothecs may not be created over future assets.²⁷ In addition, the costs, in terms of notarial fees, taxes and registration fees, were quite high.²⁸ Thus the availability of the hypothec as a financing tool was generally restricted to those debtors with a pre-existing and substantial asset base including elements of real property.

Modern Security Techniques

The difficulties with traditional security devices related, in the case of the hypothec, to the limitation to real property already in existence and, in the case of the charge, to the need to specify the particular assets to which the charge related and the unavailability of a non-possessory variety. Given the absence of a generic charge which could relate to the totality of assets, it might be argued that French business was considerably hampered in its ability to raise finance adequately, although Zwolve suggests that the availability of personal guarantees was more important in the context of financing sole traders and partnerships, the pressure for non-possessory security interests in fact not arising until after the advent of the 'modern business corporation'.²⁹ Nevertheless, an early law provided a partial solution to the problem by allowing the grant of a charge over the goodwill of the business.³⁰ However, the definition of goodwill was limited to the company name and trademark, furniture and machinery, client lists and any intellectual property rights, including copyright, industrial designs and patents, associated with the business.³¹ Other non-possessory charges were also available for an eclectic list of assets, the result of individual laws addressing the financing needs of particular business sectors, including for automobiles, agricultural equipment and crops (including wine), goods for the hospitality and hotel industry, industrial equipment, warehoused goods, industrial raw materials and products, petroleum products, films and software exploitation rights.³² Charges over shareholdings (share accounts and fractional ownership interests)³³ were also introduced in a law in 1983, which permitted a streamlined procedure for the recording of charges on a register in relation to share accounts, but did not alter the requirements for notification of charges to the company as far as fractional ownership interests were

²⁵ Id Article 2118.

²⁶ Id Article 2134.

²⁷ Id Article 2130. Zwolve 'A Labyrinth of Creditors' supra n 7 at 47 notes the express restriction in the Civil Code of the application of the hypothec to immovables, a development that was replicated elsewhere in Europe.

²⁸ See Gdanski, 'Taking Security in France' supra n 12 at 61.

²⁹ Zwolve 'A Labyrinth of Creditors' supra n 7 at 48.

³⁰ *Fonds de commerce*.

³¹ Article 9, Law of 17 March 1909. Zwolve 'A Labyrinth of Creditors' supra n 7 at 48 suggests that the transfer or pledging of bills of lading in the Netherlands served as inspiration for the development of non-possessory security interests in France.

³² See Drobniq, U (1998) 'Secured Credit in International Insolvency Proceedings' 33 *Texas International Law Journal* 53 at 58; Kieninger, E-M (1996) 'Securities in Movable Property in the Common Market' 4 *European Review of Private Law* 41.

³³ Share accounts exist in *sociétés anonymes* and *sociétés par actions*, while fractional ownership interests exist in the case of *sociétés à responsabilité limitée*.

concerned, leading to the retention of a cumbersome and costly process for companies generally. Professor Kieninger has suggested that the use of legislation in this area has hindered the development of a general non-possessory security interest in practice, as evidenced by case law denying the effect of such interests.³⁴

Various means were used over the years to address the deficiencies in the availability of security, notably through the technique known in French as ‘debt-mobilisation’.³⁵ This refers to the use of debts to which the company is or becomes entitled as a species of security against other loans granted usually by financial institutions. The use of a legal charge backed by a debt has already been mentioned. Other techniques were also developed. Thus there was the use of bills of exchange guaranteeing payment at a fixed date as consideration for loans, the use of rediscounting by banks, the issue of bills by banks backed by debt and assignment of debt.³⁶ In this last example, although the transfer of receivables to a third party was permitted, it was limited to instances where the debt was itself guaranteed by a hypothec or charge created over immovables. In addition, there was a complicated procedure which involved using the services of a notary public and the execution of deeds. As a species of financing, with the costs frequently outweighing any advantage, it rapidly lost popularity.

The Move to Receivables Financing

The needs of business were not really served until the early 1980s, when concerted lobbying by financial institutions and businesses inspired the government to produce a law, sponsored by Senator Dailly and which ever since has been referred to by his name.³⁷ The law stated as its purpose the facilitating of credit to business and contained in 16 relatively succinct articles a framework that has astonished commentators by the remarkable success it has experienced in the French business context. In brief, the law allowed any financial institutions to have made in their favour and delivered a document of title,³⁸ which would entitle the institution to any debt owed by a third party to the debtor. Debts which were certain in amount and due, even if at a later date, could be assigned. Debts owed under an executed deed could also be transferred even if amounts were yet to be determined. The document of title had to include certain details prescribed by law. These were to permit the identification of the parties and the debts to which the document related, for example by incorporation of references to invoices, bills or other documents, as well as details of the due date and amounts. These elements were to be provided in writing, including by means of electronic technology. Failure to include these details was strictly sanctioned as the law rendered any purported transfers void and ineffective. Transfer of the debt made this the property of the creditor institution. In addition, unless stated otherwise in the contract, the signatory to the transfer became automatically a guarantor for the amount

³⁴ Kieninger ‘Securities in Movable Property in the Common Market’ supra n 32 at 44-45.

³⁵ *Mobilisation des créances*.

³⁶ Decree-Law of 25 August 1937, Title III of Ordinance 67-838 of 28 September 1967, Law 69-1263 of 31 December 1969 and Law 76-519 of 15 June 1976.

³⁷ Loi Dailly (Law 81-1 of 2 January 1981), as amended by Law 84-46 of 24 January 1984 and now incorporated in the Monetary and Financial Code.

³⁸ *Bordereau*.

due. Further endorsements or transfers could be operated, but only for the benefit of other credit institutions.

Once the document was signed, it bound the parties and was effective as against third parties.³⁹ The original debtor could not modify any rights attached to the debt which was the subject of the transfer. With the transfer, any security or guarantee attached to it was automatically transferred for the benefit of the financial institution. The creditor institution had the right to prevent the third party from paying into the hands of the original debtor, provided that notice of the transfer had been given in the prescribed form. Once this was done, payment could only be made to the creditor and the third party was not deemed to have discharged his debt unless he did so. The third party could acknowledge the transfer and sign a deed accepting the assignment. However, he lost any rights which could have been exercised against the debtor personally, unless he could bring proof that the creditor institution had acted deliberately in a way contrary to the third party's interests. One last point of note about the law was that it permitted creditors to issue instruments on the back of receivables designed to allow the assignment of a part of the eventual proceeds. This technique allowed for wider participation in the financing operation and spread the risk attendant by regenerating cash flow for the credit institution. Assignments under this law were very commonly found and the use of the technique was widespread, subject to the limitations inherent in its structure.

Despite the advances made by the introduction of the *Loi Dailly*, it remains notable that, prior to the recent changes, the French system for asset security prompted Professor Wood, when creating a jurisdictional classification on the basis of perceived hostility or sympathy to security, to place France at the most hostile end of the scale, together with Austria and Italy.⁴⁰ This view has been echoed by others, such as Professor Drobnig, who also lists France last in his analysis of creditor-friendly countries.⁴¹ It is thus not surprising that the antiquity of the system for asset security in France prompted a number of calls for serious consideration of reforms. However, it was not until the occasion of the bicentenary of the Civil Code that a fresh impetus was given to this process.

MOVES TOWARDS REFORM

The Legacy of the Civil Code

Speaking to a colloquium organised as part of the bicentenary celebrations, the then President Jacques Chirac gave an address to an audience that included representatives from other jurisdictions of the French legal family lauding the codification of 1804 as a 'political act of real historical import'.⁴² He stressed the cohesion produced by a codification that replaced a diversity of laws with a single clear and accessible text that incidentally served to spread Revolutionary values, including equality and secularism (*laïcité*), throughout society.

³⁹ *Opposabilité* is a feature of French law that subjects validity as regards third parties to, usually, some form of notice or registration. Failure to comply does not necessarily affect the parties' rights under the contract, but may hinder their enforcement against assets in the hands of third parties.

⁴⁰ See Wood, P (1995) *Comparative Law of Security and Guarantees* Sweet and Maxwell at para 1-7.

⁴¹ Drobnig 'Secured Credit in International Insolvency Proceedings' supra n 32 at 55.

⁴² Speech at Colloquium at the Sorbonne on 11 March 2004, available through the Elysée website at www.elysee.fr/elysee/root/bank/print/2597.htm (last viewed 24 July 2007).

Referring to Napoleon's intention that the code should be reviewed at regular intervals, the President asked whether the code should be modernised, given that parts of it, notably family law, had been rewritten to take into account changes in society and morality. In the area of contract law and private property, the President acknowledged the role these 'institutions' play in the development of modern society, and said that technological progress and the rise of globalisation underlined the importance of ensuring that these tools remain up to date. For that reason, addressing in particular the Garde des Sceaux,⁴³ then Dominique Perben, the President called upon the government to carry out reforms to contract law and asset security within five years, noting that the Garde des Sceaux had already taken the initiative to set up a working group of academics and practitioners in September 2003 to discuss reforms to asset security, chaired by Professor Michel Grimaldi of Université Panthéon Assas (Paris II).⁴⁴ In this context, it is also interesting to note that the emphasis in modern times has firmly moved towards contractual and 'commercial' matters, given Professor Markesinis' observation that the attention within the original codification debates was overwhelmingly focused on family law, including succession rules.⁴⁵

Competition between Systems

The reasons for this call can be understood by the reference made later in the address when the President considered the case for ensuring the perennality of French law in the face of competition between differing legal orders at European and global levels. In reality, he was referring to the competition caused by the perceived predominance of what the French (curiously) call 'Anglo-Saxon' law which is felt notably in the field of international commercial transactions.⁴⁶ Professor Markesinis also alludes to this effect when suggesting that the French law of obligations (contract and tort) retained, certainly throughout the 19th century, a 'strong domestic [...] flavour, reflecting the inferior position of France in international trade'.⁴⁷ 'Anglo-Saxon' law, the President said, is noted for the increasing analysis of law through economic eyes, although he chided it for the apparent lack of concern for 'a moral dimension to law and [French] preoccupations in relation to social justice'. Without rejecting the values of the 'Anglo-Saxon' system, the President nevertheless wants a balanced legal system that takes all values, including economic ones and issues of fairness and justice, into account. This, he said, will see French law continue to play a role in leading the family of civil law countries.⁴⁸

To that end, he announced that a foundation would be set up to ensure the work already engaged in by legal professionals overseas would allow French-inspired laws to play a part in the regulation of international commerce. The formation of the *Fondation pour le droit continental*⁴⁹ was officially announced on 1 March 2006 by Pascal Clément,

⁴³ Literally 'Keeper of the Seals', the official title of the Minister for Justice.

⁴⁴ Reference is also made to a working group set up to suggest reforms to the law of obligations chaired by Professor Catala.

⁴⁵ Markesinis 'The Enduring (Double) Legacy of the Code Napoleon' supra n 6 at 82.

⁴⁶ The term 'Anglo-American' is preferred by those commentators that look to the common origins of the legal systems of England and the United States.

⁴⁷ Markesinis 'The Enduring (Double) Legacy of the Code Napoleon' supra n 6 at 82.

⁴⁸ A survey of the countries to which this could apply may be seen in ch 8, 'The Reception of the Code Civil' in Zweigert, K and Kötz, H (1987) *An Introduction to Comparative Law* (trans. Weir, T) Oxford University Press.

⁴⁹ Literally 'Foundation for Continental Law', but entitled the 'Civil Law Initiative' in official materials.

Dominique Perben's successor. The stated aims of the foundation are to respond to the challenges of globalisation, in particular by promoting the values of the Romano-Germanic system of law and enhancing the attractiveness of the continental model in the face of competition from common-law principles and rules.⁵⁰ A particular and immediate challenge for the foundation is to respond, as the Garde des Sceaux strongly suggests is necessary, to the 'unjust caricatures and attacks' experienced by French law, notably as a result of the contents of the World Bank Report on Doing Business, which presented a number of aspects within French law, including the availability (or otherwise) of security devices, as impediments to commercial organisation and activity.⁵¹

It is easy to see the attractiveness of the way the unitary security device in Article 9 of the American Uniform Commercial Code functions for security in movables,⁵² when compared to the disperse security regime in France, and understandable that the French may be concerned about competition from this model, particularly in light of its expansion across the world. For example, Article 9-type laws have been adopted in a number of jurisdictions, including Australia, New Zealand and many of the Canadian provinces,⁵³ while certain of its principles, including that of publicity, have influenced the re-drafting of provisions within other security regimes.⁵⁴ The implicit recognition of the Article 9 model in the European Bank of Reconstruction and Development's Model Law on Secured Transactions 1994, on which recent reforms in some East European countries have been based, as well as on the United Nations Convention on the Assignment of Receivables in International Trade 2001⁵⁵ and the UNIDROIT Convention on International Interests in Mobile Equipment (or Cape Town Convention) 2001⁵⁶ appear to signal moves towards the acceptance of this model as reflective of an international standard.⁵⁷ In fact, papers delivered at the International Bar Association's Committee E&Q session on 26 May 2000 discussed the compliance of the regimes in a number of jurisdictions (including France) with the EBRD Core Principles on Secured Transactions 1994, underlining the influence the Article 9 regime potentially has in further developments in this field. With this in mind,

⁵⁰ See the Civil Law Initiative website at www.fondation-droitcontinental.org (last viewed 24 July 2007).

⁵¹ The report is available via a dedicated website set up by the World Bank at www.doingbusiness.org (last viewed 24 July 2007). Interestingly, the OHADA group, representing countries in Central and West Africa, mostly falling within the civil law family, are also unconvinced by the characterisations in the report and are seeking to respond to its criticisms, for which see the *Lettres d'Information* of 16 and 27 February and 20 July 2007, copies available through the OHADA website at www.ohada.com (last viewed 24 July 2007).

⁵² See Sigman, H (2004) 'Security in Movables in the United States — Uniform Commercial Code Article 9: A Basis for Comparison' ch 3 in Kieninger *Security Rights in Movable Property* supra n 1; Broude, R (2001) 'Secured Transactions in Personal Property in the United States' ch 4 in Bridge and Stevens *Cross-Border Security and Insolvency* supra n 1.

⁵³ See Cuming, R (1997) 'The Internationalization of Secured Financing Law: The Spreading Influence of the Concepts UCC, Article 9 and its Progeny' ch 22 in Cranston, R (ed), *Making Commercial Law Essays in Honour of Roy Goode* Oxford University Press; Cuming, R (1996) 'Article 9 North of 49°: The Canadian PPS Act and the Quebec Civil Code' 29 *Loyola Law Review* 971; Duggan, A (1996) 'UCC Influences on the Development of Australian Commercial Law' 29 *Loyola Law Review* 991.

⁵⁴ See Van Erp, S (2003) 'Globalisation or Isolation in New Dutch Property Law? The New Civil Code of the Netherlands and the New Civil Codes of the Netherlands Antilles and Aruba Compared' 7 *Electronic Journal of Comparative Law* s 3, copy available at www.ejcl.org/75/art75-2.html (last viewed 24 July 2007).

⁵⁵ Not yet in force. See convention website at www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables.html (last viewed 24 July 2007).

⁵⁶ In force 1 April 2004. See convention website at www.unidroit.org/english/conventions/mobile-equipment/main.htm (last viewed 24 July 2007).

⁵⁷ Sigman 'Security in Movables in the United States' supra n 52 at 54.

the moves towards initiating reforms can be seen as reflecting a modernisation imperative in the face of globalisation and the apparent permeation of a competing legal culture. However, it was by no mean certain that the model France would choose in reforming its law would rely on the Article 9 archetype, given the resistance that has been seen in some French law-inspired jurisdictions, such as Quebec⁵⁸ and the OHADA member states.⁵⁹

INITIATING THE REFORM PROJECT

The Codification Background

The updating process represented by the efforts of the Grimaldi working group must be set against the background of the general programme of renovation the French government has set itself since at least 1989, when it began a re-examination of the corpus of the legal codes derived predominantly from the great Napoleonic texts of the first wave of codifications in 1801-08 (including the Civil and Commercial Codes) as well as from later codifications bringing together legal texts in different fields. Although some preparatory work was done, the government only began to step up its revision work following the submission of a draft law to Senate in late 1998, debated in 1999.⁶⁰ The contents of the explanatory memorandum attached to this draft text stated that the government was anxious to make progress on the process of re-codification of laws it had begun in 1989 and in which considerable delay had already occurred. While the government recognised that the proper role of Parliament was to scrutinise and adopt such legislative measures, the amount of legislation already programmed for that session and likely to be programmed for later sessions made this task well nigh impossible. It proposed that it should enact in the form of ordinances those re-codified texts already adopted by the Council of Ministers and submitted to Parliament as well as those under scrutiny by the Higher Commission for Codification (Commission supérieure de codification) and the Council of State (Conseil d'Etat).⁶¹ These would include a number of major codes in the areas of education, public health, administrative justice, environmental law and finance as well as a renovated Commercial Code.⁶² The 1998 draft text sought Parliamentary approval for this legislative step with the timetable it contained providing that the government would promulgate ordinances adopting the various codes within six to twelve months of the draft law being passed by Parliament. Approval would still be needed in the form of ratification by Parliament and, to this end, further draft ratification laws would be laid before the legislative bodies within two months of the relevant ordinance appearing.⁶³

⁵⁸ See Brierly, J (1992) 'The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Quebec' 42 *University of Toronto Law Journal* 484.

⁵⁹ See JurisInternational Presentation on the OHADA Uniform Law on Securities of 17 April 1997, copy available at www.jurisint.org/ohada/pres/pres.04.en.html (last viewed 24 July 2007).

⁶⁰ Senate Draft Law 438, dated 13 October 1999.

⁶¹ The government based its proposals on the power contained in Article 38 of the French Constitution.

⁶² This last text eventually made its appearance annexed to Ordinance 2000-912 of 18 September 2000 and published in the Official Journal on 21 September 2000.

⁶³ This did not always happen, with the Commercial Code only obtaining approval through the adoption of Article 50, Law 2003-7 of 3 January 2003, passed to reform insolvency practice, while a number of the other codes were only ratified by means of Article 31, Law 2003-591 of 2 July 2003.

Parliament subsequently approved the draft law in late 1999.⁶⁴ Despite a challenge on grounds of unconstitutionality, the argument being that delegation of the power to legislate could not be made to the government by this method, the Constitutional Court issued a decision upholding the law, which was in part motivated by the fact that the government had agreed to codify the texts based on the existing law, using the *droit constant* principle,⁶⁵ thus avoiding the possibility of accusations that it was using this method to legislate by stealth and thus usurp the proper function of Parliament.⁶⁶ The way was thus made clear for the government to finalise its work on the re-codification process with the first renovated codes appearing in mid-2000. With the success of this process ensured, the government has continued to introduce texts putting forward measures authorising codification, including draft laws in 2003, 2004 and 2006.⁶⁷ It was the first of these, the 2003 draft, which contained an Article 21 (26 in the enacted version) that authorised the adoption by ordinance of rules to simplify the process by which the creation of a charge over goodwill of a commercial or craft business (*fonds de commerce ou artisanal*) could take place. Presented as a measure to simplify company law rules, the ordinance would have made the discharge of the registration of security possible by a deed as its creation would have been. This appears to have been the first point at which an element of the overall asset security framework was the subject of special consideration. However, later the same year, concerns about the position of guarantors appeared to prompt reforms.⁶⁸ Nevertheless, the impact of these partial reforms appears to have been overtaken by the appointment that same year of the Grimaldi working group, whose remit was to consider reform of the totality of the rules relating to security.

Completing the Reform: The 2006 Ordinance

The Grimaldi working group presented its final report on 31 March 2005 to Dominique Perben.⁶⁹ The report predicated the basis for legislative reform of the framework on the introduction of a new Book IV in the Civil Code specifically addressing security issues and regrouping provisions currently spread across different parts of the Civil Code. The reforms would also repatriate asset security rules contained in texts such as the Monetary and Financial Code and other asset-specific regimes, for example that dealing with security over vehicles.⁷⁰ This would be in order to make the Civil Code framework coherent and accessible to would-be debtors and creditors alike. The overall framework

⁶⁴ Law 99-1071 of 16 December 1999.

⁶⁵ Akin to how the technique of consolidation is used in English law as a method for attracting the benefit of the abbreviated process for enactment in the Consolidation of Enactments (Procedure) Act 1949.

⁶⁶ Decision 99-421 DC of 16 December 1999.

⁶⁷ The first two are now Law 2003-591 of 2 July 2003, noted above, and Law 2004-1343 of 9 December 2004, while the last remains at draft stage as Senate Draft Law 412, introduced into Parliament on 30 June 2006 for the purposes of proceeding to further codifications as well as the ratification of ordinances already enacted under the 2004 law.

⁶⁸ Article 87, Law 2003-706 of 1 August 2003 reinforces provisions in the Consumers' Code obliging creditors to supply precise information and details regarding the debt, thus improving the situation of guarantors.

⁶⁹ Two other commissions, conducted by the Inspectorate-General of Finances (with the assistance of the General Council of Bridges and Roads and the Inspectorate-General of Judicial Services) respectively examined the issues of reverse mortgages/equity release plans and general mortgage-based credit, reporting in June and November 2004.

⁷⁰ Decree 53-968 of 30 September 1953.

would be modernised with key definitions being supplied as well as by the introduction of new types of security developed through practice. The articulation of security law with insolvency law would also be strengthened by a specific article applying security rules to the situation of insolvent debtors unless expressly excluded by provisions of texts dealing with insolvency, currently contained in Book VI of the Commercial Code.

With the completion of the reforms in mind, the Government decided to include a clause authorising enactment by ordinance within a draft law titled 'trust and modernisation in the economy' that was presented to the National Assembly shortly after the production of the report.⁷¹ This text was an omnibus piece of legislation, containing proposals to improve the legal environment for business, enhance available financial tools (hence the need to reform security devices), boost investor confidence and allow for financial growth through ameliorating savings potential. Article 6 of the text was widely drafted in order to permit the government: (i) to reform the rules relating to guarantees, charges, privileges (priority interests) and hypothecs with view to greater flexibility and efficiency as well as ease of creation; (ii) to modify other provisions dealing with assignment, subrogation and novation of contracts; (iii) to bring within the text of the Civil Code the rules relating to retention of title clauses; (iv) to introduce into the same text existing models in practice covering the use of letters of intention and comfort as well as autonomous guarantees; (v) to reform the rules on forcible expropriation and enforcement orders and, finally; (vi) to carry out consequent reforms to other texts necessary in light of the main reform proposals. Nine months would be given for the relevant ordinances to appear with only the consequent amendments of other texts being subject to a 12-month maximum, ratification laws for each ordinance being laid before Parliament three months after the appearance of the texts.

This ambitious menu appeared to go well beyond the possible scope of legislation by ordinance, leading a report on the proposals, despite overall support for the nature of the reforms, to recommend greater detail in the drafting so as to place precise limits on the government's ability to legislate.⁷² The effect of the changes to the text, supported by the corresponding Senate report,⁷³ can be seen in the final version.⁷⁴ The first five of the six operative paragraphs of the article are qualified as follows: paragraph (ii) completely disappears, on the grounds that its subject matter was not dealt with by the Grimaldi report and that separate proposals needed to be produced; while in order perhaps not to disturb the numbering, paragraph (i) is divided into two sections with its content considerably limited to, on the one hand, introducing a charge over business stock,⁷⁵ simplifying the constitution of security over movables and permitting charges over movables without dispossession (*gage sans dépossession*) and, on the other hand, improving the functioning of charges over immovables (*antichrèse*) and developing mortgage-based credit instruments, the two mentioned being the tack-on mortgage (*hypothèque rechargeable*) and the American-inspired reverse mortgage (*prêt viager hypothécaire*). Paragraph (iii) explicitly subjects the inclusion of retention of title rules to codification under the *droit constant* principle, while paragraph (iv) is circumscribed by definitions being provided for the devices being

⁷¹ National Assembly Draft Law 2249, dated 13 April 2005.

⁷² National Assembly Report 2342, dated 25 May 2005.

⁷³ Senate Report 438, dated 29 June 2005.

⁷⁴ Article 24, Law 2005-842 of 26 July 2005 (Law of 2005).

⁷⁵ This particular charge being expressly required by Parliament to be enacted in the Commercial Code.

integrated. Finally, paragraph (v) is limited by the purpose of the reforms being stated so as to produce a better distribution of the product of sale under judicial supervision and to promote disposals of assets by agreement (*vente amiable*).

With the enabling text in place, the Garde des Sceaux was able to state in the closing address to a conference in late 2005 that the reforms to asset security rules (as well as other reforms to rules on raising equity, electronic contracts and signatures, insolvency law, arbitration, and proposed changes to contract law and the rules on prescription) all formed part of an overall ambition to modernise the French legal model and to promote its use at the international level.⁷⁶ Finally, in conjunction with the Minister for the Economy, then Thierry Breton, the Garde des Sceaux presented the final outline of reforms in a draft ordinance to the Council of Ministers on 22 March 2006, which was enacted the following day.⁷⁷ However, as will be mentioned, there are differences between the Grimaldi proposals and those contained in the final draft, the more important of which are highlighted below.

The Reform Structure: Retaining Diversity

The first major difference between the various proposal stages is how the reforms are organised. Although the government accepted the recommendation for a new Book IV, which allows for the improved display and location of asset security provisions covered by some 205 articles, the suggestion that other security devices would be repatriated was not followed in its entirety, despite the provisions on security over vehicles being integrated in the section dealing with charges.⁷⁸ In fact, the provisions of the *Loi Dailly* and charges over financial instruments remain in the Monetary and Financial Code, while many of the other sector-specific devices remain untouched. Furthermore, the intention that the Civil Code should provide for complete coverage of asset security is denied effect by some of the recommended innovations being placed within other texts, such as the Commercial Code or the Consumers' Code. In addition, leaving the range of devices potentially incomplete, the scope of the Grimaldi working group was limited at the outset by removing the question of fiduciary transfers (*fiducie-sûreté*) from its remit, given that the government was intent on setting up a separate working group to consider trust (*fiducie*) matters generally.⁷⁹ Finally, and of major concern, the apparent lack of co-ordination between the work in parallel of the Grimaldi working group and the then projected reforms of insolvency law, given the close connexion, seems inexplicable.⁸⁰ The Ordinance of 2006 in fact introduces a provision stating that asset security rules do not prevent the application of insolvency rules in the

⁷⁶ Closing address on 16 November 2006 to a conference titled 'Paris: Place de droit', available through the Ministry of Justice website at www.justice.gouv.fr/discours/d161105.htm (last viewed 24 July 2007)

⁷⁷ Ordinance 2006-346 of 23 March 2006 (Ordinance of 2006).

⁷⁸ These are the subject of specific mention in Articles 2351-53, Civil Code (references in this section to articles are to the post-Ordinance of 2006 numbering and/or rewording). Entry into force of these provisions has been delayed, although at the very latest it must take place by 1 July 2008.

⁷⁹ See Ancel, M-E (2006) 'Recent Reform in France: The Renaissance of a Civilian Collateral Regime' paper delivered at EBRD-World Bank Conference on Collateral Reform and Access to Credit (9 June 2006) at 5-6, copy available through EBRD website at www.ebrd.com/country/sector/law/st/new/develop/workshop/ancel.pdf (last viewed 24 July 2007).

⁸⁰ See *id* at 5; Le Corre, P-M (2007) 'Les incidences de la réforme du droit des sûretés sur les créanciers confrontés aux procédures collectives' 1185 *JCP La Semaine Juridique, Ed E* 24 at 24.

context of such proceedings.⁸¹ This provision falls within an opening section repeating pre-existing rules on the notion of security as obligation as well as the *pari passu* principle,⁸² which are also joined by a new article incorporating express mention of the conditions under which retention of goods or title is available as a security right.⁸³

Substantive Reforms I: Personal Security

It is perhaps in the area of personal security that the influence of the Grimaldi working group is least felt. Its proposals would have notably reformed the system of personal guarantees, which would be headed by a definition of the guarantee as a contract by which the guarantor is obliged to pay the debtor's debt in case of default. The situation of guarantees through constitution of security would be clarified by limiting the creditor's right to recovering solely the object secured. Concerns about the position of guarantors, the subject of reforms just before the working group first met,⁸⁴ led the Grimaldi report to recommend reinforcement of the conditions for the creation of guarantees, notably by requiring the guarantor to insert the amount of the debt in any document produced by the creditor as evidence of his understanding of the extent of the obligation being incurred. New rules would also oblige creditors to furnish on an annual basis a statement of the obligation, the amount remaining due from the debtor as well as a specific notice of the guarantor's right to revoke the agreement. However, these rules would only benefit parties providing guarantees on a personal basis and would normally exclude professional guarantees and corporate guarantees furnished by directors. The guarantee agreement could also be reviewed by the court where the obligation is manifestly disproportionate to the guarantor's income or assets and any recovery would be limited to the amounts set out in the Consumers' Code.⁸⁵ However, because of the changes to the Law of 2005 between its introduction and enactment, in order to limit within proper bounds the government's capacity for legislation by ordinance, reforms to personal guarantees were abandoned.⁸⁶

Nevertheless, following some of the report's recommendations, newer types of personal security found in practice have now been given legislative status. This principally affects the autonomous guarantee, which the report defined as the commitment, in relation to another obligation, to pay a certain sum on demand or according to the terms of the agreement. It would, however, be restricted to obligations other than consumer debts and property loans mentioned in the Consumers' Code and would be limited in its scope in the case of guarantees in the context of property leases. The report also mentioned the letter of intention, defining it as 'a promise to do or to abstain whose purpose is to support the

⁸¹ Civil Code Article 2287. The Grimaldi working group would have created the presumption that asset security rules would apply unless the insolvency law had rebutted this expressly.

⁸² *Id* Articles 2284-85 (formerly Articles 2092-93).

⁸³ Complying with para (iii) of Article 24, Law of 2005. The language of the Article is in slightly different terms from that set out in the report. See also Civil Code Articles 2367-72.

⁸⁴ See above n 68.

⁸⁵ This concept does, however, appear in Commercial Code Article L. 650-1 which subjects the immunity otherwise enjoyed by financial lenders against an accusation of 'improper support' (*soutien abusif*) to three exceptions, of which obtaining a disproportionate guarantee for credit advanced is one.

⁸⁶ The provisions, identical in all respects to the pre-2006 position, appear as Civil Code Articles 2288-320 (formerly Articles 2011-43).

debtor in the performance of his obligation towards a creditor'. The terms of the report for both these devices have been fully translated into legislation.⁸⁷

Substantive Reforms II: *In Rem* Security

Reforms in relation to security *in rem* appear to have been more extensive in practice, though there are still discrepancies between the recommendations and the contents of the Ordinance of 2006. The Grimaldi report recommended that the definitions of the various types of security available should be set out subject to an overarching requirement that they be interpreted strictly by the courts. Furthermore, the priorities between security types would be clarified, particularly with respect to the ranking of items within the categories of general priority interests (*privilèges généraux*) and super-priority interests (*privilèges spéciaux*), and the articulation between the various categories of priority interests and security over movables or immovables, all of which have now seen enactment.⁸⁸

Furthermore, in relation to charges, there has been an important change involving a re-definition of terminology, under which the *gage* is no longer a sub-set of the *nantissement* and used for movables alone.⁸⁹ The term *gage* will now be used for the charge over tangible movables, while the term *nantissement* is reserved for a charge over intangible movables.⁹⁰ The provisions governing the *antichrèse* move unchanged in substance to the section dealing with security over immovables. This represents a new shift in the cleavage between the institutions when compared to both the Roman law and pre-2006 Civil Code positions. The Grimaldi report also recommended that the general regime for charges over movables be reformed by permitting the constitution of security over future assets and over collections of assets, similar in concept to the floating charge, which would allow the debtor to substitute assets where, for example, the charge is created over renewable business stock.⁹¹ In addition, the report recommended the charge be extended to include the situation where the debtor does not dispossess himself of the property secured, making it a more flexible instrument. The inspiration for this move is attributed partly to Article 9 of the American Uniform Commercial Code and partly to a similar development in Québec called the *hypothèque mobilière* (hypothec on movables). The result of the creation of this security instrument is to enable the same good to be charged to a number of creditors, although new rules will subject this type of legal charge to the requirements of writing and publicity so as to put third parties on notice, and a registration system similar to that in force in Québec is envisaged.⁹² The Grimaldi report suggested the maintenance of the existing prohibition on accelerated loan recovery procedures (*clause de voie parée*), but would remove that on the forfeiture clause (*pacte commissaire*), subject to the production

⁸⁷ Civil Code Articles 2321-22, while Ordinance of 2006 Articles 39 and 53 operate the prohibitions and restrictions mentioned in the case of the autonomous guarantee.

⁸⁸ Civil Code Articles 2330 to 2332-3.

⁸⁹ See above n 12.

⁹⁰ Civil Code Articles 2333 and 2355 respectively.

⁹¹ This is taken into account in the Articles noted immediately above which incorporate the same definition, stating that the security may be taken out over 'a movable good or collection of movable goods, present or future'.

⁹² Civil Code Articles 2336-37 now impose the formality requirements.

of an expert valuation.⁹³ The forfeiture clause is, however, unavailable where the contract involves consumer lending.⁹⁴

Although accepting the above proposals, in relation to charges of the non-dispossession variety the Ordinance of 2006 does go further than the Grimaldi report, which only considered business stock as an example of a collection of assets capable of being subject to a charge, in creating within the Commercial Code a special *gage sans dépossession* to apply solely to business stock and which may only be used to guarantee lending to businesses by authorised credit institutions.⁹⁵ The report also recommended that the framework for charges over debts should be updated and an extension to cover physical money in dedicated bank accounts introduced. Similarly, charges over financial instruments would be included for the first time in the Civil Code and would also be modernised by defining when the charge becomes effective to put third parties on notice. The first of these suggestions has seen enactment through the Ordinance of 2006,⁹⁶ while the latter proposal in relation to financial instruments remains governed by the provisions of the Monetary and Financial Code. The location of security devices in texts outside the Civil Code adds to the fragmentation noted earlier.

The situation of security *in rem* in relation to immovables is also improved. The Grimaldi report recommended the enactment in statutory form of recent French practice, accepted by the courts, of the *antichrèse-bail* (lease-charge), where the creditor is able, while enjoying the fruits of the property, to grant occupation rights to a third party or the debtor himself.⁹⁷ Furthermore, recommendations would enhance hypothec rules in a number of ways, including by replacing the super-priorities enjoyed by vendors with statutory hypothecs and permitting the creation of hypothecs as security to cover future lending subject to some evidential restrictions. The first set of proposals was not within the scope of the authorisation provided by the Law of 2005 and thus failed to make it into law. However, hypothecs covering future lending are now permitted.⁹⁸ What may be difficult for a common-law observer to understand is that hypothecs of future interests are heavily circumscribed in their use even after the 'enlargement of [their] field of application' in the Ordinance of 2006.⁹⁹ Other improvements, however, do assist, including the extension of the maximum period of registration of the security interest to 50 years,¹⁰⁰ simplification of the rules for removing the registration notice and,¹⁰¹ as also recommended in the Grimaldi report, the statutory definition of subrogation and concession of priority.¹⁰² Of interest to

⁹³ Id Articles 2348 and 2365. See Le Corre 'Les incidences de la réforme' supra n 80 at 27, who suggests this rule may come into conflict with the insolvency prohibition on the payment (except by way of authorised distribution) of pre-commencement debts. Nevertheless, this exception has a certain vintage, being analogous to the *pactum Marcianum* authorised in Justinian's Digest (D.20.1.16.9).

⁹⁴ Ordinance of 2006 Article 37, inserting a new paragraph into Consumers' Code Article L. 311-32.

⁹⁵ Id Article 44, creating Commercial Code new Articles L. 527-1 to 527-11. See above n 75.

⁹⁶ Civil Code Articles 2355-66.

⁹⁷ Id Article 2390.

⁹⁸ Id Article 2422.

⁹⁹ Id Articles 2419-20. See Simler, P (2006) 'La réforme du droit des sûretés' 1559 *JCP La Semaine Juridique, Ed E* 662 at 665.

¹⁰⁰ Civil Code Article 2434.

¹⁰¹ Id Article 2441.

¹⁰² Id Article 2424.

creditors, the prohibition on the forfeiture clause has also been lifted for immovables, the exception being in the case of property constituting the debtor's principal home.¹⁰³

The interest of reforms to *in rem* security, in particular, is the introduction of new security devices. In light of the commissions conducted by the Inspectorate-General of Finances, the Grimaldi working group considered proposals to introduce new hypothec types, the first being the tack-on mortgage (*hypothèque rechargeable*),¹⁰⁴ which would avoid fresh security for further lending becoming necessary and enhance the priority status of lenders.¹⁰⁵ Interestingly, the tack-on mortgage would be able to benefit lending from other creditors, who would enjoy parity of priority. The use of the tack-on mortgage would be subject to the use of a clause in the mortgage deed specifically authorising security for future loans and itself the subject of publicity requirements, while it would also be necessary for a fresh contract to be used for any later advances and for this also to be subject to certain measures of publicity. A further hypothec type was the American-inspired reverse mortgage (*prêt viager hypothécaire*), a type of equity release plan, to cover lending with recovery being delayed till the mortgagor's death or sale of the property. Although the working group was a little sceptical about such plans, given the risk of over-indebtedness affecting debtors of advanced age and leaving little by way of inheritance,¹⁰⁶ the government was keen on their introduction to raise the rate of home-ownership for the young by facilitating access to hypothecs, to develop consumer credit and consequent economic growth through consumer spending, and to resolve the financial difficulties of the elderly.¹⁰⁷

As a result, both these devices are now part of the arsenal of security instruments available for financing needs. However, the location of the reforms leaves something to be desired, since references to the tack-on mortgage appear three times: in the Civil Code, where it is authorised,¹⁰⁸ in the Consumers' Code, where its use is subject to certain rules in the case of consumer lending,¹⁰⁹ and in the Commercial Code, where lending to individuals exercising professional activities is covered by the rules of the Consumers' Code, where the property secured is a principal residence.¹¹⁰ The reverse mortgage, on the other hand, appears only once, but in the Consumers' Code.¹¹¹ Nevertheless, in the wake of the security reforms, certain steps have been taken to make the use of the devices more attractive. These include reducing notarial fees for the creation of security instruments,¹¹² reducing registration fees for hypothecs,¹¹³ defining the maximum rate of interest for

¹⁰³ Id Article 2459. See above n 94.

¹⁰⁴ Le Corre 'Les incidences de la réforme' supra n 80 at 27 is of the view that tacking might possibly infringe the transactional avoidance rules if the tacking occurred during the nullity period (*période suspecte*).

¹⁰⁵ There is, however, the issue of the disproportionate guarantee formed by such a hypothec if it were constituted for a sum in excess of the original loan amount precisely in order to permit the tacking of future advances (see above n 85).

¹⁰⁶ The seriousness with which the French take the issue of inheritance may be seen in the institution of the heirs' portion, limiting the freedom of testators to devise a specified proportion of personal assets.

¹⁰⁷ See speech by Thierry Breton on the Reform of Asset Security Law (22 March 2006), copy available through Ministry of Justice website at www.justice.gouv.fr/discours/d220306c.htm (last viewed 24 July 2007).

¹⁰⁸ Civil Code Article 2422.

¹⁰⁹ Ordinance of 2006 Article 40, creating Consumers' Code Articles L. 313-14 to 313-14-2.

¹¹⁰ Id Article 43, creating Commercial Code Article L. 526-5.

¹¹¹ Id Article 41, creating Consumers' Code Articles L. 314-1 to 314-20.

¹¹² Decree 2006-558 of 16 May 2006.

¹¹³ Decree 2006-729 of 22 June 2006.

reverse mortgages,¹¹⁴ permitting tax exemptions for registration fees in connection with changes to mortgage deeds¹¹⁵ and, finally, defining the calculation for repayments of reverse mortgages.¹¹⁶ There is already evidence to suggest that, as early as October 2006, the tack-on mortgage was being offered by financial institutions, while the reverse mortgage was expected to come into use in spring 2007 once lenders had worked out how to operate them effectively.¹¹⁷ It would appear that, if the trend noted above continues, there will have been a genuine amelioration of the conditions under which the security devices are intended to operate and that users of the security framework are benefiting from their coming into use.

SUMMARY

A number of conclusions may be drawn from the above analysis. It may be said, first, that the French law of property is still firmly linked to the values associated with real property. If this view is the correct one, then it follows that security and the protection of creditors' interests is similarly imbued with notions more properly associated with land and real rights and remains so despite the changing needs of business. This can be contrasted with the approach also taken in the common law where the institutions of the trust, floating charge and receivership, although deriving from original ideas associated with land law, have been reused in innovative and creative ways. What is certainly true is that businesses in France experience annual statistics of failure which are alarming.¹¹⁸ Some of these failures are a result of the ordinary risks of business, whether micro- or macro-economic. Some, however, have undoubtedly occurred because of the difficulties faced by French business in securing adequate finance through appropriate security being available. Arguably, French law has lacked a certain flexibility to adapt financing techniques in an often very conventional business setting, dictated for the most part by the orthodoxy of the security regime itself as well as the attitudes of institutional lenders. There was undoubtedly a profound impact on business at large and the level of entrepreneurship, and a consequent effect on the competitiveness of the French economy as a whole, all factors that were adversely commented upon in the World Bank's assessment of the business environment in France.¹¹⁹ Consequently, the move towards reforms initiated in 2004 was timely.

The recommendations made in the Grimaldi report covered many major points that served to update the framework for security interests in France. It is notable that part of the underlying reason for the proposals was the desire to enhance the attractiveness of French law through modernisation. The recommendations, although only partially enacted, were designed to succeed by making security interests easier to constitute and operate in France, but did not appear to go as far as to adopt the very wide flexibility of their counterparts

¹¹⁴ Arrêté of 24 August 2006.

¹¹⁵ Law 2006-1666 of 21 December 2006 (Finance Law of 2007).

¹¹⁶ Decree 2006-1540 of 6 December 2006.

¹¹⁷ See Press Statement dated 8 December 2006, available through the Ministry of Finance website at www.minefi.gouv.fr/fonds_documentaires/archives/communiqués/2006/c0612082.php (last viewed 24 July 2007).

¹¹⁸ This and many other factors have prompted the revisions to insolvency law, which have seen the introduction of an anticipatory rescue procedure in Law 2005-845 of 26 July 2005 (amending Book VI of the Commercial Code).

¹¹⁹ See above n 51.

in other systems. In fact, although the influence of the Anglo-American system can be felt and, indeed, was acknowledged in the Grimaldi report a number of times (the Article 9-framework influence on the general charge and the American antecedents for the tack-on and reverse mortgages), what resulted as reforms owe more to an intrinsically French methodology. This is what Ancel calls a 'renaissance' that is able to rely on its 'civilian heritage', all the while constructing a 'more efficient and credit-oriented secured transactions law'.¹²⁰ Nevertheless, the Grimaldi report does recognise the need to accord to creditors the right forms of security in order to assist in the financing needs of the debtor. Furthermore, the underlying assumption behind a number of the new security devices, particularly the tack-on and reverse mortgages, is that they will allow debtors to liberate capital in order to facilitate spending, which in turn might stimulate growth.¹²¹

However, despite major criticism of the rule, the Grimaldi report does not recommend the removal of the restriction in Article 2128 of the Civil Code,¹²² which states that contracts entered into abroad may not constitute a hypothec over assets situated in France unless specific legislation or a treaty provide otherwise, thus preserving the notarial monopoly on constituting security in land.¹²³ This could be seen as a further stumbling block, in addition to the many lacunae that have been identified in the ultimate shape of the reforms. There are some early views on the reforms, in which opinion is divided among commentators as to their overall utility. Simler suggests that, with the exception of the few innovative devices introduced into French law, the project had nothing of the 'revolutionary' about it, since the reforms took place within the closely guarded limits authorised by the Law of 2005 and failed to address the substantive content of the existing security framework.¹²⁴ Ancel suggests the tidying up process and creation of a special place within the Civil Code serve to 'display' the devices for domestic and foreign users, but fails to address the underlying complexity of the security regime.¹²⁵ Nevertheless, he feels able to suggest that the reforms can be used as examples by other jurisdictions that are members of the French legal family and that any 'shortcomings' are explicable by reference not to any defect in the civilian legal tradition, but to the political imperatives that underlie the text.¹²⁶

In the final analysis, what has been enacted, although it did not wholly reflect the recommendations of the Grimaldi report, will do much to bring the French security framework into the modern era of international commerce. Nevertheless, the work of the legislator is not to be considered as finished and it may legitimately be suggested that the modernising work should continue. This is particularly true in light of other developments,

¹²⁰ Ancel 'Recent Reform in France' supra n 79 at 3.

¹²¹ The recent experience in the United Kingdom of multiple interest rate rises in order to cool down the economy with the concomitant rise in mortgage defaults and personal bankruptcy levels might all be lessons the French would do well to learn from and avoid (if at all possible).

¹²² Now renumbered Civil Code Article 2417.

¹²³ Criticisms of this provision are outlined in Matos, A-M (2004) 'L'article 2128 du Code civil' 7 *Revue Lamy droit civil* at 49, a copy of which may be seen at www.bicentenaireducodecivil.fr/publications/Matos3_Lamy.htm (last viewed 24 July 2007). Interestingly, the new Garde des Sceaux, Rachida Dati, appointed on 18 May 2007, enters office at a time when the French government is resisting European Commission proposals aiming to open up the profession of notary to access by citizens of other European Union member states. (Statement of 18 July 2007, available at the Ministry of Justice website at www.justice.gouv.fr/index.php?rubrique=10030&article=12862 (last viewed 24 July 2007)).

¹²⁴ Simler 'La réforme du droit des sûretés' supra n 99 at 665-66.

¹²⁵ Ancel 'Recent Reform in France' supra n 79 at 4.

¹²⁶ Id at 3.

which have seen the agenda for reform move to the European and international levels and which have had or will have a part to play in the development of the law relating to asset security, including work being explored by the European Union in the field of security interests (the 'Euro-Hypothec'¹²⁷ as well as the creation of a common European Contract Law (and possibly a European Civil Code).¹²⁸ These texts and others to come will undoubtedly need to be considered in the context of any future reform initiatives in France. In the interim, it is inevitable that the reforms, as they stand, will be assessed in light of whether they meet the challenges posed by the presence of other competing security regimes on the international market.

¹²⁷ See dedicated website at www.eurohypothec.com/ (last viewed 24 July 2007).

¹²⁸ See Hartkamp, A et al (eds) (2004) *Towards a European Civil Code* (3rd ed) Kluwer Law International.