Index

AAOIFI Standard for Islamic banking and finance 100, 108–109, 111, 119, 123, 125–128, 129

Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) see AAOIFI Standard for Islamic banking and finance

accounts receivable

assignments 224–225, 232, 393–394, 405
debtor rights and 336
legislative basis for assigning 213
pledges over 382–383
removing condition of prescribed form of the assignment 231–232
see also factoring

acquisition financing, UNCITRAL Guide on 50–52, 78

Actionstrength v International Glass Engineering 465–466

ADI accounts see authorized deposit-taking institutions (ADIs)

administrative receivers 71, 241–242, 245

adverse selection 217

Africa, policies towards women 139, 143

Africa Charter on Human and People’s Rights on the Rights of Women in Africa 137

agricultural credit

background 167–170

Brazilian experience 171–173, 193–211
collateral management 186–191
commodity exchanges and price risk management 174–176
credit cycle from bank’s perspective 170–171
credit cycle from farmer’s perspective 170

insurance against catastrophic economic loss 173–174

objectives for country systems 169

reliable warehouse receipts 176–183

Agriculture Product Certificate (Brazil) see Cédula de Produto Rural (CPR)

Aircraft Protocol see Cape Town Convention on International Interests in Mobile Equipment

ancillary (accessory) security rights 242–243

Andrighi, Nancy, ruling for Brazilian Higher Court of Justice on CPR 202

assets

encumbered 36–49, 56, 60, 265, 276, 280, 346

enhancing rules applicable to certain types of 397

granted as a security 392–394

identifiable 468

security rights in intangible 55

two distinct sets in Islamic finance 106

see also future assets; security interests/rights; individual types of assets

assignment

electronic 231–232

clauses, effects of bans 230–231

factoring and 224–225, 227–230

notification of 232

Assunção, Juliano J. 17, 19, 22, 23

attachment requirements in Shari’ah 121–122, 123

auctions, public

sales as enforcement 301, 312, 314, 361, 377, 385, 413, 435

Australia

ADI accounts 338

bank accounts 333

flawed asset arrangement 328

perfection of security interests 341–344, 345

487
authorized deposit-taking institutions (ADIs) 338, 344
automatic control 344–345
bad debt collection vs. factoring 217
bank accounts
definitions under secured transactions law 329–336
funds as collateral 326–329, 336–341
options for legislation 352–353
perfection of security interests 341–352
pledges of rights (Russia) 90–91, 369–370
pledges over (Morocco) 397
ranking in Romania 411–412
UNCITRAL Guide on 342
bank capital requirements 298–299
Bank Recovery and Resolution Directive (BRRD) 325
bankruptcy see insolvency
cash collateral 289–291, 297, 300, 316, 326–327, 340, 350
cash flow importance to SMEs 213–214, 233
Beijing Platform for Action 137
Belgium flexible approach to future claims 228
insolvency law reform 11
Berkowitz, Daniel 13
best practices, principles for secured transactions reform 378–379
bilateral master agreements 287
Bills of Sale Acts 423–426
BIS see Department for Business, Innovation and Skills (BIS) (UK)
Bitcoin as unperfected security interest 332
blocked accounts 345–347
book-entry securities 291, 322
Brazil agricultural production 193–194
court interpretation of CPR 201–203, 209
CPR as collateral instrument 205–206
financial instruments for agricultural credit 171–173, 194–198
new bankruptcy law 16–17, 22
BRRD see Bank Recovery and Resolution Directive (BRRD)
cadastral survey system see survey systems for land titling and recordation
Canada
ADI accounts 338
crop insurance program 174
perfection of security interests 341, 342, 349
PPSA on assignment clauses 231
Cape Town Convention on International Interests in Mobile Equipment 73–75, 91, 340, 372
capital adequacy rules applied to factoring 222
Casablanca Finance City (CFC) 375, 376
cash, definitions 330, 444
cash collateral 289–291, 297, 300, 316, 326–327, 340, 350
Frederique Dahan - 9781781001844
Downloaded from Elgar Online at 12/22/2018 09:25:27PM via free access

Index 489

in project finance 237, 239, 252
re-routing to creditors 369
CEDAW see Convention on the
Elimination of All Forms of
Discrimination Against Women
(CEDAW)
Cede & Co. 278
Cédula de Crédito Rural (CCR) 194–195
Cédula de Produto Rural (CPR) 198–211
Cédula de Produto Rural Financeira
(financial CPR) 203–204
central securities depositaries (CSD) 291
certainty
importance to financial markets 325
see also uncertainty

certificates of deposit 335
charged assets
appropriation requires court order 313–314
creditor control of 475
equity of redemption 227
in ideal security law 480–481, 483, 484
proceeds 126–127
under Shari’ah 115–118, 125–131
see also marhoun (charged property)
subject to rahn
charged property see charged assets
charge instruments 71, 433, 435, 436–437, 438
see also financial instruments;
functional security instruments;
negotiable instruments
charges
company 422–424, 426, 432–433, 451, 461
equitable 464
second and subsequent liens under
Shari’ah 125–126
see also floating charges; pledges;
security interests/rights
Chile
insolvency law not reformed 22
restrictions on married women’s
property rights 139
China
collateral management possibilities 191
property law reforms 13, 22, 146–147
qualifications for collateral
indemnity platform 191
City of London Law Society (CLLS) 446, 451–453
Civil Code reform see Romania; Russia
clearing arrangements as form of
financial collateral arrangement 288
CLLS see City of London Law Society
(CLLS)
close-out netting
basis for 322
in FCAD 76, 297, 298–302, 304–305, 309, 314, 316, 318, 321
in Romania 418–419
in US 307
CMCs see collateral management
companies (CMCs)
collateral
arrangements and the financial
markets 286–298
Brazil’s CPR as collateral instrument
205–206
developing countries 135–136
European regime for financial
collateral arrangements 298–324
immovable property preferred 262,
284–285
includes cash, financial instruments,
and credit claims 310
in EBRD Model Law 70
in English law 441–449, 475–477
in Romania’s laws 403, 409, 413,
415, 416–419
management an evolving function in
agricultural and SME credit
186–191
restrictions of types of assets serving
as 68–69
seizing as last resort 260–261

Frederique Dahan - 9781781001844
Downloaded from Elgar Online at 12/22/2018 09:25:27PM
via free access
490  Research handbook on secured financing in commercial transactions

specific identification of assets given
70–71
see also cash collateral; property;
Shari’ah-compliant collateral
security regimes; women’s
access to secured finance
collateral management companies
(CMCs) 178, 187, 189
Collateral Trust Corporation (CTC) see
Lawrence Warehouse Company/
Collateral Trust Corporation
(CTC)

Collier v Wright 454
Colombia, perfection of security
interests 337, 341, 342, 347
commodity exchanges critical to flow of
agricultural credit 174–176
Companies Acts 422–423, 424,
429–432, 449
Companies House 80, 429–430, 432,
436, 439, 440, 459, 461
competitiveness of SMEs 215–216
conclusive certificate 431–432, 477
conditional sales 86, 259–260, 405,
425, 478
conflict of laws 52–54, 59, 296
consensus, UNCITRAL Guide based on
international 61
constructive notice of registered matters
437–438
constructive possession, AAOIFI
Standard 123
consumer protection
English law 425–426
legislation on encumbering bank
accounts 333–334
contracts
English law 453–455, 457–458, 464,
465–472
risk structuring by contractual
arrangements 237–238
control
perfection of security interests in
bank accounts and 332, 337,
339, 341–347, 349–350
possession of financial collateral vs.
441–449
registration vs. 351–352, 353,
475–477
Romanian bank accounts 412
Convention and Directive models 76
Convention on International Interests in
Mobile Equipment see Cape Town
Convention on International
Interests in Mobile Equipment
Convention on the Assignment of
Receivables in International Trade
231
Convention on the Elimination of All
Forms of Discrimination Against
Women (CEDAW) 137, 149, 152
core principles
for financial collateral arrangements
303
for mortgage laws 249
for secured transactions law 27, 70,
271
corporate lending vs. project finance
236–237
costs
cost effectiveness of Romanian Law
99/1999 406
of credit as effect of creditor rights
reform 15–20, 23, 45
of perfection through control
agreements 347
of registration in Romania 415–416
Council for Codification and
Improvement of the Civil
Legislation (Russia) 359–360
counterparty scope in FCAD see
persons qualifying as parties to
collateral arrangements
courts
in Shari’ah compliant regimes 99,
101–103, 115–116, 119, 123,
126
interpretation of CPR (Brazil)
201–203, 209
on assigning future claims
228–229
CPR see Cédula de Produto Rural
(CPR)
creation see proprietary interests/rights;
security interests/rights
credit
access for Romanian companies 407
accessing in Morocco and MENA
countries 151, 374–375, 399–402
domestic credit provided by banking
sector 14
enhancing SME access to finance
215–216
insolvency procedures and 9
instruments used for Brazilian
agricultural financing 194–198
risk in collateral arrangements
298–299, 320–321
women’s access to commercial loans
158
see also agricultural credit; costs;
creditor rights reform; secured
transactions law; small and
medium enterprises (SMEs)
creditor rights reform
balance between creditors and
debtors in Romania 48–49, 407, 419
costs of credit and 15–20
credit access as effect of 13–14,
20–25
insolvency law and 25, 56–57, 64–65,
263
job preservation and 10–11
methodological issues for empirical
studies 6–7
returns to creditors and 8–10
security for multiple creditors
368–369
credit support annexes (CSAs) by ISDA
295–296
credit unions 334
crop insurance 173–174
crop liens 185
cross-border trade
collateral arrangements 298
encouragement of 68, 73–76, 95
cross-country studies
domestic credit provided by banking
sector 14
inheritance rights and women’s credit
access 141–142
insolvency law and credit 16, 22
of creditor right efficacy 6–7
weaknesses 20, 25
CTC see Lawrence Warehouse
Company/Collateral Trust
Corporation (CTC)
curtain principle 269, 270–271
Davey Committee, reform
recommendations for Companies
Act 1900 423–424
Davydenko, Sergei A. 16
debt finance see creditor rights reform;
secured transactions law
debtors
administrative freezes on assets 328
balance in reforms between creditors
and 48–49, 342, 347, 353, 370,
407, 419, 484
location of grantor and law applicable
55–56
registration of security interests
granted by non-corporate
424–426
security interests in bank accounts
326–329, 336–337, 340–341,
343–348, 350–353
Debt Recovery Tribunals (India) 18
deeds registry systems
inefficiencies 278–282
title registration vs. 267–269, 271,
273
default
appropriation of securities following
313–314
in project finance 239–241
priority and 483
rules in Shari’ah-compliant collateral
security regimes 109, 112, 113,
128–129
see also enforcement; insolvency
defensive/negative function of security
244–249
dematerialised securities 290
Department for Business, Innovation
and Skills (BIS) (UK) 433, 435
deposit accounts 330, 351
De Soto, Hernando 135
developing countries see agricultural
credit; land registry and titling
systems; small and medium
enterprises (SMEs); women’s
access to secured finance;
individual countries by name
development finance institutions,
failure to support SMEs 255–256
Dewaelheyns, Nico 11
Diamond Report, recommendations for
reform 429–432
difference in difference methodology 7,
17–18
direct agreements 239–240, 245
discounting of agricultural loans
172–173
disparity/gap analysis (ISDA report)
301–302
dispossession requirement 381–382,
445
see also risk
Djankov, Simeon 20, 21
Doing Business Report – Legal Rights
Index for Getting Credit
(Morocco) 401–402
DRTs see Debt Recovery Tribunals
(India)
due diligence
immediate advance of funds and 439
in relation to CPRs 208–209
see also possession
EBRD (European Bank for
Reconstruction)
Expansion Countries 97–100, 212,
217, 218
eight countries in light of single
framework objectives 81–95
Model Law 66, 69, 70, 249, 337–338,
340
role in Russian reforms 360
see also individual countries by name
economic benefits as justification for
reform 63, 66–67
Ecuador, restrictions on married
women’s property rights 139
efficiency
in acquisition financing 50–52
flexibility in Morocco 378
of notice-based registration 40–44
reforms in Colombia’s insolvency
law and 11
undermined by fragmented laws 31,
32
see also simplicity
electronic documentation
assignment of accounts receivable
231–232
Cape Town Convention 372
certificates of deposit 335
England 433
MERS 277–282
Morocco 397–398
registration of securities 43, 290–292
Rome 405–406, 408–412,
415–416, 419
Russia 366–368
security financial collateral
arrangements 311
see also registration
effective acceptance market 172–173
emerging markets see agricultural
credit; individual countries by
name
Eminence Property Developments v
Heaney 455
enforcement
by courts applying Shari’ah
principles 119
effects on credit access and costs
23–24
enforceability of financial collateral
arrangements 296, 313–314
England 459–460
function of security 243–244
in Morocco’s existing regime
376–377
judicial vs. extra-judicial 47–49
notification requirements 399
of bank’s rights prohibited for special
accounts 334
of contracts 453–455, 469
of perfected security interests
351–352
Index

escrow accounts 334–335, 371
Europe
country policies on notification 232
current practices of factoring 221–224, 230
European Bank for Reconstruction and Development (EBRD) see EBRD (European Bank for Reconstruction)
European Directive 2011/7/EU on late payments 216
European Union (EU)
Green Paper on Shadow Banking 223
guarantee programmes for SMEs 215
models for assessing non-bank financial entities 223–224
need for collateral law reform 289, 298–302
see also Bank Recovery and Resolution Directive (BRRD); Financial Collateral Arrangements Directive (FCAD)
Expansion Countries see EBRD (European Bank for Reconstruction)
export finance lines 197
export/international factoring vs. domestic 219–220
extra-judicial enforcement
definition 4–5
Germany 243
insolvency 460, 483–485
Morocco 385, 398–399
no restriction on avoiding insolvency proceedings 22
Russia 361–362, 370–371
UNCITRAL Guide on 47–49
factoring
background 212–213
contractual basis 224–233
enhancing legal regimes 217–221
policy alternative for SME financing 216
potential with public support 233–234
question of regulation 221–224
fairness and regime harmonization 76–81
false wealth 309–310
family law, and discrimination against women 138–147, 156–159
FCAD see Financial Collateral Arrangements Directive (FCAD)
FCARs see Financial Collateral Arrangements (No 2) Regulations 2013 (FCARs)
Federal National Mortgage Association (Fannie Mae) 278
Federal Notary Chamber (Russia) 365–366
field warehousing 178, 187–189
filing see notice-filing systems; registration
financial collateral see collateral
Financial Collateral Arrangements (No 2) Regulations 2013 (FCARs) 319, 441–449, 475–476
Financial Collateral Arrangements Directive (FCAD) arrangements within scope of 308
as model for law reform outside Europe 323–324
BRRD and 325
close-out netting 76, 297, 298–302, 304–305, 309, 314, 316, 318, 321
common features 304–311
definitions relating to bank accounts 330, 332
English law interpretations 441, 448, 475–476
financial collateral under control of collateral taker 343
harmonization and 75–76
implementation by Romania 416–419
operation of European regime in practice 318–324
opt-out provisions 303, 309, 319–320
perfection of security interests 343
security financial collateral arrangements 311–315
title transfer financial collateral arrangement 315–318
twin-track approach 302–303
Financial Collateral Ordinance (Romania) 416–419
financial crisis (2008)
criticism of safe harbour provisions since 307
factoring initiatives and 217–218
impact on project and PPP finance 250–253
regulatory focus on re-hypothecation since 320–321
trend for greater use of collateral since 324–325
financial instruments
Brazil 171–173, 194–198
use as collateral 289–291, 310, 313, 332, 414, 447, 476
Financial Services Action Plan (European Commission) 299
“Financing SMEs and Entrepreneurs 2013” 214
fixed charges/securities 245, 259, 261, 427, 459
see also floating charges
flawed asset approach 318, 322, 328–329, 352
flexibility
flexibility in UNCITRAL Guide and 30–33, 61
in Brazil’s laws 195
in English law 422
in Mongolia’s laws 89
in Morocco’s laws 378
in Poland’s laws 84
in Romania’s laws 85, 88, 404, 409
in Russia’s laws 91–92
in secured transactions law 67, 70–73, 232–234, 465–467
in UNCITRAL Guide 30–33, 37, 40–44, 50–52, 57–60, 61
innovation in UNCITRAL Guide and 57–60
of the floating charge in England 480
predictability in priority and enforcement 44–47
transparency in UNCITRAL Guide and 38–44
floating charges
as tool for project finance 240–242
as useful and flexible instrument 146, 158
crystallisation of 70–71, 72, 407, 410, 430
exempt from registration 448
FCARs and 319, 442, 443, 446
fixed securities vs. 80, 427, 436, 459–460, 461–463, 480
in English law 46, 70, 72–73, 240–242, 311, 480
insolvency and 460–462
pledge over ongoing business vs. 383
possession or control of charged assets and 476–477
reform and English insolvency law 427
universalities in Romania 405, 407, 410
forecasting, project finance and 251
foreclosures, mortgage ownership uncertainty prevented 280–281
formalities
for collateral arrangements 304, 309–310, 312–313, 322
problem with formalities 465–466
see also registration
formal vs. customary rights for women 137, 140, 142–145, 148–149, 150, 152–156
fragmentation and secured transaction laws 34–35
France
deed registration 268
impact of insolvency laws on cost of secured finance 16
legal system and reform in Morocco 379–381
limited acceptance of framework objectives 80–81
no clear priority rules 389
secured transactions law reform 378–379
fraud
CPR as choice of fraud schemes 210
fraudulent assertion risk 445, 447–448
prevention 348
see also Statute of Frauds 1677
freedom
as principle of good security law 78–79, 378, 394–395, 452, 464, 467–472
limits on contractual 69, 90, 467–468
of contract vs. freedom of property 230
to create a security carries duty to inform 479–481
to determine parameters of assignment 228
Funchal, Bruno, 16–17
functional approach 33–36, 66, 76–80, 94–95, 323, 391, 408
considered in Mongolia 88–89
diluted in Romania 86–87
functional security instruments 239–240, 243–249
fungible assets 71, 294–295, 314, 316–317, 379
future assets 393, 404–405, 480–481
G-20, reform of OTC derivatives market 324
Gamboa-Cavazos, Mario 8–9
Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes 200–201
Geneva Securities Convention 60–61, 323
Germany
approach to factoring 228–229
factoring regulated without capital adequacy requirement 222
Banking Act on factoring 218
impact of insolvency laws on cost of secured finance 16
ownership of secured debt 242–243
Ghana, policies towards women 134–135, 140, 157
Giné, Xavier 11
goods in circulation, pledge over 393
Research handbook on secured financing in commercial transactions

Gorringe v Irwell India Rubber and Gutta Percha Works 474

Government National Mortgage Association (Ginnie Mae) 278

grantors
  professional 393
  protecting 34, 37, 44
  see also debtors

Gray v G-T-P Group Ltd 443–446, 476

guarantees
  bank vs. independent 372
  indemnities vs. 455, 458
  problem with formalities 465–466
  protections for guarantors 469

Guatemala, perfection of security interests 337

The Hague Conference of Private International Law 60–61

Hague Securities Convention 324

Hanafi see madhahib (schools of Islamic jurisprudence)

Hanbali see madhahib (schools of Islamic jurisprudence)

Harman, LJ, Yeoman Credit v Latter 455

harmonization
  considerations for Morocco 94–95
  in Mongolia’s legal framework 88
  in Romania’s legal framework 86–87
  in Russia’s legal framework 91

Shari’ah law and 115–116, 121
  hedging, CPR as hedging instrument 206–207
  hire purchase transactions 425, 426
  Honduras, perfection of security interests 337, 342–343, 345, 347


ijara, bifurcated and single tranche structures 104–107

immobilised securities see intermediated securities

immoveable property
  description in registry system 276–277
  mortgages over (Romania) 408, 414, 415–416
  movable property vs. 70, 115
  preferred for collateral in all economies 261–262, 284–285
  see also inheritance laws;
    mortgage-backed securities;
    mortgages; property indemnity
  guarantees vs. 455, 458
  obligations, AAOIFI Standard 119, 180–181
  obligations, collateral management 189–191
  obligations, warehouse receipt law 180–181
  indexing of registration information 43

India
  creditor rights reform 18–19, 23–24
  crop insurance program 174
  inheritance law reform 142
  indirectly held securities see
    intermediated securities
  indivisibility principle 394
  informal sector see micro, small and medium-sized enterprises (MSMEs)
  inheritance laws 137–142, 148–154, 157
  input distributors and barter transactions 205
  insolvency
    ‘anti-deprivation principle’ 457
    extra-judicial enforcement 483–485
    factors vs. secured lenders 223
    financial collateral arrangements and 296–297
    law and credit access 3–5, 7–11, 20–25
    law and credit costs 15–20
    law and creditor rights reform go together 25, 56–57, 64–65, 263
    law and law of secured transactions 56–57, 458
Index 497

law on fixed and floating charges 461–463
protection of financial collateral arrangements 304–307
Russian Bankruptcy Law 357–358, 359
UNCITRAL Guide’s interests in 46, 56–57
US Bankruptcy Code 246
see also default insurance
insurance principle 269–270
multi-peril for crops 173–174
Insurance Company of North America (INA) 188
insurance principle 269–270
intellectual property, security rights in 37, 57–60
intention, importance in contracts 456, 464, 467, 471, 474, 477, 480, 481
interest in Islamic finance 104, 106
interest rates see costs
intermediated securities 289–291, 296, 445
‘Internal Ratings-based (IRB) Approach’ 251–252
International Factors Group (IFG), 2014 Model Factoring Law 218, 229, 231
International Institute for the Unification of Private Law (UNIDROIT)
Convention on International Factoring 218, 229–230, 231
Convention on the Assignment of Receivables in International Trade 249
UNCITRAL coordination with 60–61
International Organization of Securities Commissions (IOSCO)
BCBS-IOSCO policy framework 316, 325
Margin requirements for non-centrally cleared derivatives 324–325
International Swaps and Derivatives Association (ISDA) see ISDA

IOSCO see International Organization of Securities Commissions (IOSCO)
ISDA (International Swaps and Derivatives Association)
English CSA 295–296, 305
Master Agreements 293–294
New York CSA 295
Islamic finance see Shari’ah-compliant collateral security regimes
Italy
assignment of future claims 228
corporate insolvency law 18
job preservation due to creditor rights reform 10–11
Judicature Acts of 1873 (England) 21–422
judicial sale procedure 399
Kenya, policies towards women 133–134, 135, 140, 142–143
Kyrgyz Republic, women’s access to secured finance 147–149, 152–157
Landmark National Bank v. Kesler 280
land registry and titling systems 267, 269–273, 278–279, 280, 431–432
relationship with mortgage-backed securities 277–283
systems for developing economies 263–273
women’s access to secured finance 136
women’s access to secured finance and 143–145, 156–158
last resort financing vs. factoring 217
late payments 213–214, 216, 234, 236
Research handbook on secured financing in commercial transactions

Latvia
- Commercial Code on factoring 218
- insolvency and credit levels 8
law see creditor rights reform; legal frameworks; secured transactions law; women’s access to secured finance; individual types of law

Law Commission, recommendations for reform 427, 451
Law of Property (Miscellaneous Provisions) Act 1989 466
Lawrence Warehouse Company/ Collateral Trust Corporation (CTC) 187–189
leases, financing 31, 34–36, 39, 50, 259–260, 263, 391, 479
Legal Transition Programme (LTP) 97–100
legislation see regulation; individual types of law
Legislative Guide to Secured Transactions see UNCITRAL Guide
Re Lehman Brothers International (Europe) case 320–321, 443, 447–448, 476
liabilities, securing only monetary obligations 480–481
license rights 60
liens
- conflicts between beneficiaries of CPR and court 209–210
- equitable 473
- fiduciary 207
- on deposit accounts 334
- over growing crops 185, 208
- property lien registration in OIC jurisdictions 116
second and subsequent 125–126, 180, 209
statutory 388–389, 391, 395–396
tax lien claimants 177
warehouseman’s lien rights 181
see also floating charges; rahn (Shari’ah-compliant regimes)

liquidity
- issues for agricultural credit 168, 171–173, 176, 192, 200, 207, 210
- issues for SMEs 213–214, 216, 217, 223, 234
- issues in project finance 251
shortfalls eased by credit lines 13
loans
- extensions and guarantees 215
- outcomes as effect of creditor rights reform 12–13
- pricing see costs
location of grantor determines law to be followed 55–56
lockbox structures 127

Macnaghten, Lord, on intention vs. form 466–467

madhahib (schools of Islamic jurisprudence)
- on marhoun 119–124
- on proceeds 126
- on rahn 107–118
- on securing underlying debt 118–119
- variations in interpretations 101–103, 130–131

Malawi
- perfection of security interests 341, 342, 345
PPSA on bank accounts 333
Maliki see madhahib (schools of Islamic jurisprudence)
Malta, assignment of future claims 228
management function of security 245
margin
- extensive 15–20
- intensive 20–25
- use of term 286
see also collateral
margin lending agreements 288

Margin requirements for non-centrally cleared derivatives 324–325
marhoun (charged property) subject to rahn 119–124, 128–129
mark-to-market collateral arrangements 291–292, 301, 305–306, 312
Index 499

notice-filing registration system for
registration in England 423–424
secured transactions in Romania 87,
407–416
three registry systems in US 280–282
motor vehicles, credit for 116, 259, 282,
425
movable assets see movable property
movable property
all types included in UNCITAL
definition 33–34, 65
Cape Town Convention 73–75
immovable property vs. 70, 115
in Romania’s reforms 85–87,
407–408, 413–414, 416
register desired by Russian banking
community 365–366
registrations not needed for tangible
assets 473
restrictions on use as security
382–384, 391–392
SME access to credit and 255–264
women’s access to secured finance
and 135, 145–147, 158–159
see also collateral; pledge laws
MSME see micro, small and
medium-sized enterprises
(MSMEs)
nantissement de fonds de commerce
93–94
negative function of security see
defensive/negative function of
security
negotiable instruments
priority of a security right in 47, 55
third-party effectiveness of a security
right 40
see also Cédula de Produto Rural
(CPR)
nemo dat quod non habet principle 265,
270–271, 274, 282, 426
Nepal, formal vs. customary land rights
145
Netherlands, assignment of future
claims 228

Frederique Dahan - 9781781001844
Downloaded from Elgar Online at 12/22/2018 09:25:27PM
via free access
netting legislation and agreements 305
see also close-out netting
New Zealand, ADI accounts 338
Nigeria, strict requirements for collateral 145–146
nominal accounts 371–372
non-land secured interests see movable property
non-linearity of reform 96
non-performing loans (NPL) 8, 224
non-possessory, registered security 191
non-possessory security regimes
challenging the principle of specificity 71–72
for agricultural credit 185
in Morocco 93, 381–382, 384–385
in movable assets 275
in Romania’s reforms 403–404, 406
not always permitted for movable property 257
publicity for 385, 388
North America, soft field warehousing 187–188
notice-based filing systems 40–44, 273–274
notice-filing systems for mortgages 273–277
MERS 277–282
not needed for immovable property 265, 273–277, 283
transaction filing vs. 477–478
NPL see non-performing loans (NPL)
numerus clausus principle 69
OAS see Organization of American States (OAS)
OECD Scoreboard 214
off-balance sheet financing 251
OHADA (Organisation for Harmonisation of Business Law in Africa)
need for securities legislation 185
reforms 378–379
OIC see Organisation for Islamic Cooperation (OIC)
opt-out provisions in FCAD 303, 309, 319–320
Organisation for Harmonisation of Business Law in Africa see OHADA (Organisation for Harmonisation of Business Law in Africa)
Organisation for Islamic Cooperation (OIC) 98–99
Organization of American States (OAS) Model Law on Secured Transactions 337, 349
out-of-court procedures see extra-judicial enforcement
outright interests vs. security interests 463, 472, 478, 483
outright transactions 476
over-the-counter derivatives transactions see OTC derivatives market
ownership rights 77–78, 265, 269, 275–277, 279–280, 282, 283
evidenced by possession 274
legal vs. beneficial 242
see also property rights
Papua New Guinea, access to finance 133
parallel debt mechanism 414
pari passu principle 64–65, 73, 79, 129
particulars
accuracy of 429–432
registration of 436–437
parties to collateral arrangements 308–309
perfection of security interests 351
in bank accounts 337–338, 341–353
of rahn by possession 123
Romania 406, 407, 418
performance risk management 174–176
Personal Property Security Act (PPSA) see PPSA regimes
personal property security laws 333
deficiencies of traditional 296–298
England 426–427
financial collateral arrangements and 292–294
see also movable property
persons qualifying as parties to collateral arrangements 308–309, 319
Peru, land titling for women 143
Philippines, restrictions on married women’s property rights 139
piecemeal reform 284, 421, 427–428, 440–441, 449–450
pignus see pledges, possessory
pledged assets 84, 140, 364, 370–371, 381, 384, 392, 393, 394–395, 398–399
see also charged assets
pledge laws
Poland (1996) 82–83
Russia 358–359, 361–368, 373
pledges
irregular 317–318
Morocco 381–384, 386, 388, 394
negative pledge clauses 239, 430, 435 of rights under bank account
agreements 369–370
over goods in circulation 393
possessory 69, 338–339
see also charges; non-possessory security regimes; security interests/rights
Poland, secured transaction law reform 82–85
possession
due diligence in ascertaining 274, 275, 279, 282
problems with definitions 441–449
poverty, land titling and 264
PPP (public private partnership) see project finance
PPSA regimes
assignment clauses 231
control vs. registration 475–477
different regimes for personal and real property 456–457
flawed asset arrangement 328, 333
perfection by control and registration 338, 341–344, 345, 349
registration filing approaches 477–478
restrictions on transfers 469–470
security interests and bank accounts 333
preferential claims 46, 395
price, determination for settling CPR 204
price risk management 174–176
priority function 244
priority rules
distinguishing “priority” from “enforcement” 54–55
“first to publicize” rule 274
for creditors’ pledges (Russia) 358, 362, 367, 368, 369, 372
for security interests in bank accounts 342–343
in ideal security law 483
in Morocco 388–389, 395–396
in Romania’s laws 86–87, 406, 411–412
integrated into legislation 275
in warehouse receipt law 185
perfection mechanisms and 349–350
registration of transactions as potential point 479
UNCITRAL Guide on 35, 44–47, 51
waivers allowed by Saudi law 125–126
proceeds
bank accounts as 336–337, 340–341
distribution 49
limits on sharing with non-secured creditors 362
of charged assets in Shari’ah 126–127
of mortgaged assets in Romania 410
UNCITRAL Guide on 38, 47
project finance
after the financial crisis 250–253
definitions 235–238
functions of security in 243–249, 253–254
levels of lender intervention 245
Russia 371
security in context of PPP financing
and 238–240
security structures 240–243
promissory notes, CPR parallel with
200–201
property
English statutory rules limited to
certain types 426–427
marital regimes 138–141
movable vs. immovable 70, 115
rahn applicable to real and personal
99–101
security interests in bank accounts
and 335–336
SME loans guaranteed by owner’s
residential 262–263, 264, 265,
282
tangible, and possession 441–442,
444, 473, 481
value on secondary market 283
see also assets; immovable property;
marhoun (charged property)
subject to rahn; mortgages;
movable property
property rights
ascertaining clear title in transfer of
265, 267–269, 275
cumbrances should be recorded in
same system 281–282
limits of freedom of contract and 468
pledged property and 367
reform in China 11, 22
women’s access to secured finance
and 137–147
see also ownership rights
proprietary interests/rights
English law 229
in project finance 237, 239, 242–248
limited for collateral taker 294
part of traditional secured
transactions 77
reliance on national laws to govern 74
retention by vendor or lessor 259–260
Russia 464, 468, 479
unsecured claims vs. 316–317
publicity requirements 275
English law 423, 425
Morocco 385, 388, 397–398
Romania 404, 411–412
see also registration
corporate private partnership (PPP) see
project finance
public sector debt 327
purchase money security interest
(PMSI) 23, 186, 349–350
‘quasi-security’ arrangements 79, 287,
288–289, 308, 478–480
Quebec approach vis-à-vis functional
approach 79
rahn (Shari’ah-compliant regimes)
99–101, 107–124, 126–127,
130–131
ranking see priority rules
receipt and possession of marhoun,
three conditions 122–123
receivables see accounts receivable
Receivables Convention 28, 31–32, 34,
54
receivership 4–5, 8–11
recharacterisation
of transactions not required by
English law 470–472
risk 317–318, 322
recourse
factoring as true sale or secured
transaction 225–227
in project finance 237, 239
or non-recourse factoring 219
reform see individual types of reform
registration
Brazil 208–209
conditional sales and financing leases
259–260
designing as collateral security
system 115–118, 131
England/UK 424–426, 429–432,
433–441
Morocco 93–94, 379, 384–388
non-registration of securities and
472–480, 482–483
perfection of security interests in
bank accounts and 341, 342,
343, 347–349, 350–353
priority rules and 463–464
Romania 405, 410–411, 415–416
Russia 365–368
see also charges, company; electronic
documentation; notice-based
filing systems
regulation
legislative options for security
interests in bank accounts
352–353
of factoring services 217–218,
221–224
of warehouse operations 176–179,
182–183
re-hypothecation of collateral 294, 321
relevant financial obligations 306, 308,
310–311, 315–316, 319–320
reorganization frameworks in
insolvency systems 21, 57
repo see repurchase transactions
repudiation, test of 456
repurchase transactions 295
reserve requirements, relaxation of 169,
172–173
Resolving Insolvency Indicator 20–21
resource factoring 225–227
restructuring
of project companies or loans
245–248
of securities 245, 246–247, 248
retention-of-title rights/sales see title
retention
returns to creditors as ex post effect of
creditor rights reform 8–10
reverse factoring 220–221
rights
of warehouse receipt holders
179–181
right of use 313, 317, 320–321
right to payment 336, 338
see also creditor rights reform;
ownership rights; property
rights; proprietary interests/rights; security interests/rights;
women’s access to secured
finance
risk
agricultural 170, 173–174, 204–205
commodity exchanges and
management of price and
performance 174–176
CPR as mitigating mechanism 205
factoring poses no systemic 223
foreign exchange 198, 219–220
in project finance 236–238, 239, 243,
251–252, 253
in SME lending 260–262, 264,
284–285
insurance and indemnity funds 181
in warehousing 179–180, 182, 185,
188
profile for vendor credit 260
see also credit; fraud; invisibility risk;
recharacterisation
Rodano, Giacomo 18
Romania
Financial Collateral Ordinance
416–419
Law 99/199 85–86, 404–407, 419
New Civil Code 86–88, 407–416,
419–420
Old Civil Code and Commercial
Code 403–404
Russia
Civil Code reform 90–92, 357–359,
363–371, 373
further modernization of financial
sector 371–373
objectives for reform 90–92
Pledge and Mortgage laws 358–359,
361–362
stakeholders 359–360
Rwanda, policies towards women 141,
142, 143
safe harbour provisions 307–308, 320
sales, conditional see conditional sales
SARFAESI Act of 2002 (India) 18,
23–24
Saudi Arabia
default, proposed law 129
Hanbali madhhab predominant 103
priority waivers allowed 125–126
Shari’ah as paramount law of the land 102
Schuldanerkennen 243
Scott, Jonathan A. 15, 17
Scottish system consistency of 2013 English reforms with 433
registration as requirement for creation of a security 463–464
determining ownership of immovable property 277
disadvantages of notice-filing 477–478
Russian pledge register database 367–368
sufficiency of information 41–42, 270, 272, 274, 474, 482
unregistered charges and 463, 483
see also electronic documentation secondary market 264, 277, 283 secured claims 16, 46, 316, 362, 391, 398 see also secured debt secured debt conditions established by madhahib 118–119 ownership in Germany 242–243 pledged property (Russia) 364–365 secured transactions definition 62 factoring and 219, 226 secured transactions law
bank accounts expressly excluded from 333–335, 337–339
characteristics of an ideal code 480–485
conditional sales and financing leases 259–260
definition 62–65
experience in EBRD region 81–95
four principles or objectives 67–68, 378, 452, 480
project finance and 235–254 reforming all related laws together 263 reform to use movable assets as collateral 145–147, 158–159 Shari’ah-compliant collateral security regimes 97–131 SME access to credit and 255–264, 282–285
women’s access to secured finance 132–159 see also agricultural credit; creditor rights reform; security interests/rights; single framework; UNCITRAL Guide; individual countries by name securitization transactions Brazil 207
Islamic finance 98–99
security devices comprehensive coverage in legislation 35–36, 39 flexibility needed for pre- and post-harvest finance 184–186

Frederique Dahan - 9781781001844
Downloaded from Elgar Online at 12/22/2018 09:25:27PM via free access
creation 54–55, 404–405, 459, 480–483
after searching registry 275
in Romania 404–405, 410–411
in Scotland 463–464
in UNCITRAL Guide 36–38, 54, 57–60
distinguishing “priority” from “enforcement” 54–55
forms of sale economically equivalent to 479
in bank accounts 326–353
Morocco’s many codes and laws 380–381
outright interests vs. 463, 472, 478, 483
registration in Morocco 385–388
secured lenders vs. equity investors 248–249
title finance vs. 75–76
transfer and sharing 396–397
treating real and personal property differently 456–457
UNCITRAL definition 33–34, 53
see also bank accounts; charged assets; charge instruments; charges; mortgages; pledges; secured transactions law
separateness requirements in Shari’ah 121–122, 123
Serbia, Late Payment Act 216
set-off
contractual 297, 300–301
definition 328
right of 334, 343–344, 349, 351
Settlement and Finality Directory (EU) 299
SFT see security financing transaction (SFT)
shadow banking 223
Shafi’i see madhahib (schools of Islamic jurisprudence)
Shari’ah-compliant collateral security regimes
background 97–101
charged assets and registration 115–118
conditions of secured debt 118–119
consequences of a valid rahn 107–115
direction of initial reform efforts 130–131
proceeds of charged assets 126–127
property subject to 119–124
second and subsequent liens and debt 125–126
secular legal context 101–107
termination and remedies 114, 127–129
see also individual countries by name
silent factoring 220, 232
simplicity
as principle of good security law 452, 453–465
in English law 480
in Morocco and 93, 378
in Mongolia and 89
in Poland and 84
in Romania and 85, 87
in Russia and 90, 91
in secured transactions law 36–38, 67, 68–70, 95, 273, 378
of Brazil’s CPR 199, 205
of single regime applicable to all assets 391
single framework
definition 65–66
objectives achieved by EBRD countries 81–95
objectives for adopting 67–81, 95–96
Sistema Nacional de Crédito Rural (SNCR) 195–197
small and medium enterprises (SMEs)
factoring for improving access to finance 212–234
financing, secured transactions law and risk appetite 255–285
function of collateral management in SME and agricultural credit 186–191
lack of credit access in Morocco 375, 380
see also agricultural credit; micro, small and medium-sized enterprises (MSMEs)
506 Research handbook on secured financing in commercial transactions

South Africa, end of legal discriminatory inheritance practices 137
special purposes 236, 334
specificity, principle of 71–72, 93, 382
standard form collateral documents (ISDA) 293–294
Statute of Frauds 1677 454–455, 458, 465
step-in regimes 242, 245
’substance over form’ 471
substitution of pledged assets 394
sukuk (securitizations) 98–99
‘Supervisory Slotting Criteria for Specialized Lending’ (Basel II) 239–240, 252
supply chain finance see reverse factoring
survey systems for land titling and recordation 266–267, 271–272, 282
SwapClear 288
swaps market 292–293
Sweden, creditor rights reform 19–20, 22
syndicated lending
Morocco 389
Romania 414–415
Russia 368, 372
Tanzania
access to finance 133
informal sector 135, 158
women’s local representation 143
taxes
incentives 169, 171, 197
title transfer financial collateral arrangements and 297
treating bank and non-bank factors equally 233
termination
of rahn 127–129
of security interests in Romania 415, 418–419
Thailand, formal vs. customary land rights 144
third parties
Australian PPSA on contracts with ADIs 344
conflict of law issues in Romania 407
deeds registry systems and 268
distinguishing effectiveness from security right creation 31–32, 54
invisibility risk and 445
limits of freedom of contract and 468, 470
limits on collateral taker 294
negative security function and 246, 247
perfection mechanisms and 342–347, 349–353
ranking of pledgeholders and 367
rights ignored in rahn-based regimes 125
UNCITRAL Guide on effectiveness 38–44
validity of CPR requires registration 208–209
see also electronic documentation; transparency; warehouse receipts
time limits for registration 51, 439–440, 463–464, 473
title devices 39, 45, 50–51, 434
title retention 35, 50, 78, 478
title transfer financial collateral arrangement 286
top-up and return deliveries of collateral 291, 301, 302, 306, 322
Torrens-based systems 271, 272, 277, 282
tracing rules for proceeds 340–341
trading companies, CPR and commercial transactions with 204–205
transaction filing 477–478
transfers of assets
impact on registration effectiveness 43
negotiation, assignment or novation 345
restrictions on 469–470
rules in Morocco 389, 396–397
transparency
as principle of good security law 452, 468, 471, 472–480
fairness in secured transaction law and 76–81
in taking and enforcement of security 378
lack of publicity in Mongolia 88
through registration 434, 435, 480
UNCITRAL Guide on 30–33, 38–40, 46
see also publicity requirements; registration; third parties
trilateral control agreements including banks 345–346
UCC 9 see Uniform Commercial Code (UCC)
Uganda, policies toward women 140, 142, 143
uncertainty
caused by three registry systems 280–281
conflict of laws rules and 296
court interpretation of CPR 201–203
of recharacterisation approach 318, 471
of Shari’ah court outcomes 99
of title transfer collateral arrangements 289
regarding assignment agreements 228–229
regarding scope of registration 434–435
see also certainty
uncertified securities 290
UNCITRAL Guide
applicable law: guide within the Guide 52–56
complementary publications 249–250
concept 30–33
coordination with texts of other organizations 60–61
documents built upon 27–28
influence on secured transaction law reform 26–61
model for secured transactions in movable property 273–274
objectives 26–27, 64, 65–66, 256–257
on security interests in bank accounts 327–328, 330–332, 336, 342, 348–349, 350
Supplement on security rights in intellectual property 57–60
use in harmonizing legislation around world 28–29
UNIDROIT see International Institute for the Unification of Private Law (UNIDROIT)
Uniform Commercial Code (UCC)
Article 8
uncertified securities 290
Article 9
achievement of single framework objectives 80
as inspiration for Romanian reforms 404
banks and bank accounts 330–331, 336–339
collateral 338–339
field warehousing 187–188
mortgage sales contradicts Article 3 on 279–280
movable property 77, 146, 256–257
not a code but a model law 290
outright sales of receivables as security interests 225–226
perfection mechanisms 185, 342
security interests in bank accounts 327
unitary approach
in Romanian Civil Code 87
non-unitary approach vs. 33–36, 51–52, 54, 70, 78, 79
United Kingdom
impact of insolvency laws on cost of secured finance 16
Married Women’s Property Act 1882 (MWPA) 140, 141
no regulation of factoring 221–222
508 Research handbook on secured financing in commercial transactions

see also English law

United Nations
Commission on International Trade Law see UNCITRAL Guide
Convention on the Assignment of Receivables in International Trade 231

United States
approach to factoring 226, 229
Bankruptcy Code of 1978 15, 246
Equal Credit Opportunity Act/
Women’s Business Act 137
perfection of security interests 338–339, 341, 342
registration filing approaches 277–282, 477–478
see also Uniform Commercial Code (UCC)
universality of assets
collateral over 72
Romania 85, 87, 405, 407, 409–410
‘using property’ indicator 138–139
usufruct in Shari’a compliant regimes 110–111, 116–118

valuation
of enterprises 260–261
of securities 314–315
vendor credit vs. bank credit 259–260

Vietnam, formal vs. customary land rights 145
Vig, Vikrant 19, 23–24, 25
Von Lilienfeld-Toal, Ulf 18–19

warehouse receipts 176–183, 203–204, 373, 405
see also field warehousing
Williams v Roffey Bros. 454
women’s access to secured finance
background 132–136
case studies on impact of family law on 147–156
suggestions for policy and law makers 156–159
working capital 213–214, 215, 233

World Bank
Doing Business Report 20–21, 66
secured transactions in movable property 255–256
‘Women, Business and the Law’ 138–139, 141
World Development Indicators 13–14

Yeoman Credit v Latter 455
Zambia, discriminatory inheritance laws 140