

## TOWARDS A CENTRALIZED PERFECTION SYSTEM FOR CROSS-BORDER RECEIVABLES FINANCING\*

STEVEN L. SCHWARCZ\*\*

### 1. INTRODUCTION

Receivables potentially constitute the single largest category of assets transferred in cross-border financing transactions. Being intangible, however, their transfer is not physically apparent. Because the problem of evidencing, or perfecting, these transfers has been addressed in various ways by different countries, there is no international perfection standard. This lack of a standard deters the growth of receivables financing, which in turn impedes economic development. Recently, however, the United Nations Commission on International Trade Law ("UNCITRAL") drafted a Convention on Assignment in Receivables Financing (the "Convention")<sup>1</sup> to regulate cross-border receivables transactions. The Convention provides for an optional registration system for perfection.<sup>2</sup> I use empirical evidence and historical analogy to argue that it is in the interest of the countries that become parties to the Convention to opt for that system.

It has been noted that "in developed countries the bulk of corporate wealth is locked up in receivables."<sup>3</sup> As the economy

---

\* Copyright© 1999 by Steven L. Schwarcz.

\*\* Professor of Law, Duke University School of Law, and Faculty Director, Duke University Global Capital Markets Center. E-mail: schwarcz@law.duke.edu. The author thanks Spiro V. Bazinas, Neil B. Cohen, Heywood W. Fleisig, Alejandro M. Garro, and the participants in the Roundtable Symposium on Cross-Border Secured Financing at the University of Pennsylvania Law School for helpful comments on a draft of this Article. Thanks also to Adam Ford, Mohamed Sarhan, and Michael Treisman for research assistance.

<sup>1</sup> See *Draft Convention on Assignment in Receivables Financing*, U.N. GAOR Int'l Trade Law. Comm., 28th Sess., U.N. Doc. A/CN.9/WG.II/WP.96 (1998) [hereinafter *Convention*].

<sup>2</sup> See *id.*

<sup>3</sup> Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 552 n.213 (1999) (quoting Memorandum from the United Nations Commission on International Trade Law, Summary of UNICITRAL's work on Assignment in Receivables Financing (summer 1997)).

becomes globalized, this wealth increasingly is unlocked by transferring receivables across national borders.<sup>4</sup> In this Article, I analyze how those transfers can be made more efficient, especially in light of the Convention.<sup>5</sup>

My analysis (Section 4) proceeds in three parts. In Section 4.1, I briefly describe receivables financing, focusing on its increasingly dominant form, securitization.<sup>6</sup> In Section 4.2, I examine the potential impact of the Convention and in Section 4.3, I use empirical evidence and historical analogy to demonstrate the benefits of a centralized registration system for perfection.

## 2. INTRODUCTION TO RECEIVABLES FINANCING AND SECURITIZATION

Receivables financing<sup>7</sup> has experienced remarkable growth over the past two decades, partly because receivables are self-liquidating and are an excellent short-term source of cash.<sup>8</sup> Perhaps the oldest and most basic form of receivables financing is factoring, in which companies—traditionally those in the textile and

---

<sup>4</sup> See Steven L. Schwarcz, *The Universal Language of Cross-Border Finance*, 8 DUKE J. COMP. & INT'L L. 235, 236-37 (1998) [hereinafter *Universal Language*].

<sup>5</sup> This Article uses the Convention's terminology, referring to the obligor of a receivable as its debtor. Readers should be careful to distinguish this usage from the UCC's use of the term "debtor" to mean an assignor of receivables.

<sup>6</sup> Article 5(d) of the Convention defines receivables financing as "any transaction in which value, credit or related services are provided in the form of receivables [and therefore to include] factoring, forfaiting, securitization, project financing and refinancing." *Convention, supra* note 1 art. 5(d). Although the Convention does not appear to define the term receivables, I use that term to include any financial asset that, by its terms, converts into cash within a finite period of time. Examples include accounts receivable, chattel paper, instruments, lease rentals, franchise and license fees, and other rights to or expectations of payment. See generally *Issuers of Asset-Backed Securities*, 17 C.F.R. § 270.3a-7(b)(1) (1999) (containing a similar definition).

<sup>7</sup> Receivables financing is a subset of secured financing, and it is beyond this Article's scope to question secured financing. For a debate on that issue, compare Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996) (arguing that giving full priority to secured financing is inefficient), with Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425 (1997) (arguing not only that secured financing is efficient, but that securitization and other "non-recourse" forms of secured financing are particularly valuable).

<sup>8</sup> See generally PETER H. WEIL, PRACTISING LAW INSTITUTE, *ASSET-BASED LENDING: A PRACTICAL GUIDE TO SECURED FINANCING* (2d ed. 1992).

apparel industries— raise money by selling their accounts receivable at a discount to finance companies, called “factors.”<sup>9</sup> The company usually assumes all risk of non-payment of the accounts except for the account debtor’s inability to pay.<sup>10</sup>

Another form of receivables financing is asset securitization. Touted as “by far the most rapidly growing segment of the U.S. credit markets,”<sup>11</sup> asset securitization increasingly is becoming a major part of foreign credit markets as well.<sup>12</sup> In a typical securitization, a company sells rights in receivables to a special purpose vehicle (“SPV”). The SPV, in turn, issues securities to capital market investors and uses the proceeds of the issuance to pay for the receivables.<sup>13</sup> The investors, who are repaid from collections of the receivables, buy the securities based on their assessment of the value of those assets. Because the SPV (and no longer the company) owns the receivables, their investment decision often can be made without concern for the company’s financial condition. Thus, viable companies that otherwise cannot obtain financing because of a weakened financial condition can now do so. Even companies that otherwise could obtain financing will now be able to obtain lower-cost capital market financing.<sup>14</sup>

---

<sup>9</sup> See *id.* at 179.

<sup>10</sup> Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J. L., BUS. & FIN. 133, 144 (1994) [hereinafter *Alchemy*] (quoting PETER H. WEIL, FACTORING IN ASSET BASED FINANCING: A TRANSACTIONAL GUIDE § 27.01[1] (Matthew Bender ed., 1985)).

<sup>11</sup> Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 24 (1996).

<sup>12</sup> See Symposium, *International Issues in Cross-Border Securitization and Structured Finance*, 8 DUKE J. COMP. & INT’L L. 229 (1998) [hereinafter *Cross-Border Symposium*]. For an introduction to the fundamental legal principles of cross-border securitization and finance, see generally *Universal Language*, *supra* note 4.

<sup>13</sup> For authorities on securitization, see generally TAMAR FRANKEL, SECURITIZATION: STRUCTURED FINANCING, FINANCIAL ASSETS POOLS, AND ASSET-BACKED SECURITIES (1991 & Supp. 1999); JASON H.P. KRAVITT, THE SECURITIZATION OF FINANCIAL ASSETS (1996); STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION (2d ed. 1993); Christopher W. Frost, *Asset Securitization and Corporate Risk Allocation*, 72 TUL. L. REV. 101 (1997); Claire A. Hill, *Securitization: A Low-Cost Sweetener for Lemons*, 74 WASH. U. L.Q. 1061 (1996); *Alchemy*, *supra* note 10.

<sup>14</sup> For an explanation of the relationship between securitization and factoring, see *Alchemy*, *supra* note 10, at 144-46 (noting that the differences between factoring and securitization begin to blur where SPVs borrow funds from non-capital market sources instead of issuing securities or where factors issue capital market securities).

Securitization has an increasingly international focus, in part because companies that wish to raise funds from capital markets may not be located in countries with established capital markets or may be located in countries with developing capital markets that lack the depth of developed markets in other States. In order to access capital market funding, those companies will have to structure deals that cross their national borders.<sup>15</sup>

Finally, an increasingly common variant of receivables financing is project finance. This involves the financing of development, construction, and operation of such capital-intensive facilities as power plants, oil and gas pipelines, transportation systems, mining facilities, and industrial and manufacturing plants.<sup>16</sup> The key is that these projects must be expected to generate revenues sufficient to repay the financing.<sup>17</sup> In the construction phase of the project, financing is usually raised by secured borrowing, with equity provided by general or limited partnerships. After the project's completion, permanent financing is raised in various ways, including secured borrowing or leveraged leasing.<sup>18</sup>

Recognizing that a growing segment of the world's money is locked into receivables,<sup>19</sup> and realizing the possibilities for economic growth by unleashing that wealth, UNCITRAL has undertaken a project to simplify cross-border receivables financing and reduce its cost.<sup>20</sup> UNCITRAL's work to that end has focused on drafting the Convention.

### 3. THE IMPACT OF UNCITRAL'S PROPOSED CONVENTION

Although this Article focuses on the Convention's optional registration system for perfection, there is no doubt that, even absent a registration system, the Convention would still bring a significant measure of commercial uniformity to cross-border re-

---

<sup>15</sup> See *Universal Language*, *supra* note 4, at 236-37.

<sup>16</sup> See Daniel R. Bedford et. al., *Project Financing*, C749 A.L.I.A.B.A 177, 181 (1992).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See Spiro V. Bazinas, *An International Legal Regime for Receivables Financing: UNCITRAL's Contribution*, 8 DUKE J. COMP. & INT'L L. 315 (1998).

<sup>20</sup> UNCITRAL's Working Group on International Contract Practices ("Working Group") first began work on receivables financing in 1995. See *id.* at 316.

ceivables financing, thereby enhancing its viability and reducing its cost. Set forth below are a few brief examples.

*Future Receivables.* Receivables financing, especially securitization, increasingly depends on the assignment of future receivables, such as franchise or license fees. Yet, foreign law is often unsettled as to whether or not to allow the assignment of receivables not yet in existence. The Convention would clarify that future receivables may be assigned.<sup>21</sup> Moreover, the Convention would validate the assignment of receivables in bulk, without the need to identify individual receivables, so long as "the receivables . . . can be identified [as receivables] . . . to which the assignment relates."<sup>22</sup>

*Commingling.* A significant risk in receivables financing is that the mixing or "commingling" of collections of assigned receivables with the assignor's own funds may appear inconsistent with the assignee's interest. The assignee could then lose its right to those collections. The Convention would eliminate this risk.<sup>23</sup>

*Contractual Restrictions.* Sometimes the agreement pursuant to which the receivables are created prohibits their assignment. For example, leases and licenses sometimes prohibit assignment of the underlying receivables even though the debtor would not be harmed by the assignment of rights. An assignee would then be deterred from engaging in receivables financing because of the fear of liability, litigation, or the possible ineffectiveness of the assignment. The Convention permits assignments notwithstanding the prohibition.<sup>24</sup> However, the Convention still may protect

---

<sup>21</sup> Article 10(2) of the Convention provides that "[a]n assignment may relate to existing or future . . . receivables, and to parts of or undivided interests in receivables." *Convention, supra* note 1, art. 10(2). Article 9(2) clarifies that a new writing is not required to be entered into for each receivable when it arises. *See id.* art. 9(2).

<sup>22</sup> *Id.* art. 10(1)(b).

<sup>23</sup> Article 17(2)-(3) of the Convention provides that "if payment is made to the assignor . . . [or to] another person, including . . . a creditor of the assignor or the insolvency administrator, the assignee has a right in whatever is received by that person." *Id.* art. 17(2)-(3). Article 16(1) also would lessen the likelihood that commingling would occur, by authorizing the assignor or assignee to notify the debtor to pay the assignee directly: "[T]he assignor or the assignee or both may send the debtor notification of the assignment and request that payment be made to the assignee." *Id.* art. 16(1).

<sup>24</sup> Article 12(1) of the Convention provides that "[a] receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor limiting [assignment] . . ." *Id.* art. 12(1).

debtors who would be harmed by the assignment. Although the assignee is *not* liable to debtors for breach of contract, the assignor may be liable depending on the applicable national law.<sup>25</sup> The Convention also protects debtors by clarifying that the assignment of receivables does not increase their burden.<sup>26</sup>

*Preferential and Fraudulent Transfers.* Bankruptcy and insolvency laws often seek to assure equality of distribution of a company's estate and sometimes seek to rehabilitate troubled companies. The Convention does not cover this directly, but it does generally specify the choice of insolvency law would apply.<sup>27</sup> This allows the parties to a receivables financing to better understand their rights by consulting insolvency counsel who are experts in that law.

*Perfection and Priority.* Perfection is the term sometimes used to describe protection of an assignee's interest in transferred assets as against the assignor's creditors and insolvency administrator. Because receivables are intangible, there is nothing physical to transfer. Hence, the transfer of receivables may require additional steps, such as notifying debtors on the receivables of the transfer, to become effective. These steps, however, sometimes can be onerous and costly, thereby discouraging receivables financing.<sup>28</sup>

Priority refers to the ranking of multiple claims against a transferred asset. In a receivables financing context, the assignee usually wants its claims against the transferred receivables to be superior in ranking to any third-party claims, including that of the assignor's trustee in bankruptcy as well as claims of other assignees from the same assignor.<sup>29</sup> Priority is generally accorded to the first assignee to perfect, under a rule sometimes referred to as

---

<sup>25</sup> Article 12(2) of the Convention states that "[n]othing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of an agreement . . . but the assignee is not liable to the debtor for such a breach." *Id.* art. 12(2).

<sup>26</sup> Thus, Article 7(1) of the Convention provides that "assignment [has no] . . . effect on rights and obligations of the debtor." *Id.* art. 7(1).

<sup>27</sup> Article 24(2) of the Convention provides that priority between an assignee of receivables and the assignor's insolvency administrator, is governed by the law of the country where the assignor is located. *See id.* art. 24(2).

<sup>28</sup> However, even where no additional steps are required, receivables financing may be discouraged. In Germany, for example, although no additional steps are needed, assignees have no publicly available means of ascertaining priority. *See infra* notes 29-44 and accompanying text.

<sup>29</sup> *See Universal Language, supra* note 4, at 241.

“first in time, first in right.”<sup>30</sup> In international transactions, the term priority sometimes is used to include the concept of perfection, because one cannot have priority unless one has perfected.

Without a system for making transfers of receivables publicly ascertainable, receivables financings are discouraged because assignees will not be able to determine their priority at the time of the transfer. The Convention proposes an optional registration system that could be used to provide such notice.<sup>31</sup> Under that system, “[a]s between assignees of the same receivables from the same assignor, priority is determined by the order in which certain information . . . is registered under this Convention, regardless of the time of [the] transfer of the receivables.”<sup>32</sup> A limitation, however, is that in the current draft of the Convention this registration system is optional, not mandatory.<sup>33</sup> Hence, different States could adopt different perfection procedures, and the uniformity of a common registration system would not be achieved. Without a common registration system, assignees of receivables may be unable to search filing records to determine whether those receivables previously were assigned to others. The assignee then cannot ascertain through publicly available information the priority of its rights in the receivables, and therefore may be

---

<sup>30</sup> See, e.g., U.C.C. § 9-312(5). See also ALAN SCHWARTZ & ROBERT E. SCOTT, *COMMERCIAL TRANSACTIONS, PRINCIPLES AND POLICIES* 664-65 (2d ed. 1991) (providing a critique of this rule).

<sup>31</sup> Many of the “specific features” of the Convention’s registration system are still unresolved, however. See Electronic Mail from Spiro Bazinas to Steven L. Schwarcz 1 (May 3, 1999) (on file with author) [hereinafter Electronic Mail, Bazinas]

<sup>32</sup> *Convention*, *supra* note 1, art. 34. This rule contrasts with a rule that would determine priority by the time of transfer of the receivables, which is not always ascertainable.

<sup>33</sup> Even absent a registration system, it should be noted that the Convention’s rules on perfection and priority would increase clarity by specifying the choice of law for determining priority. Because receivables are intangible and not located in any given jurisdiction, the law of the assignor’s jurisdiction logically would be expected to govern perfection; the Convention so provides in Article 23(1): “Priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located.” *Id.* art. 23(1). The Convention also recognizes contractual subordination, or changing of relative priority. Article 23(2) provides that “conflicts of priority may be settled by agreement among competing assignees.” *Id.* art. 23(2). This provides the flexibility to introduce commercially important securitization structures, such as master trusts, in which different classes of investors in the SPV’s securities could contract for different priority at different times. See *id.* art. 23(1)-(2).

forced to rely on representations of the assignor. Assignors that are insufficiently capitalized to back up their representations therefore may find it difficult to engage in a receivables financing.

Why is the Convention's proposed registration system merely optional? Concerns over registration have been expressed in the working group responsible for drafting the Convention, such as that registration could violate privacy and confidentiality or could negatively affect competition.<sup>34</sup> However, some believe these concerns may be more speculative than real.<sup>35</sup>

I am not competent to judge whether, politically, making registration mandatory would be a preferable strategy over the Convention's optional approach. In the former case, some States might refuse to become signatories to the Convention, but those that do would gain its full benefit; in the latter case, more States would become signatories to the Convention, but those not opting for registration would lose the Convention's most significant benefit. I next attempt to demonstrate that it is in each State's interest to opt for registration.

#### 4. ANALYSIS

##### 4.1. *A Centralized Registration System is Needed*

Few would dispute the desirability of having uniform laws govern cross-border commercial transactions such as receivables financing. Inconsistencies between the laws of different States can

---

<sup>34</sup> See generally *Report of the Working Group on International Contract Practices on the Work of its Twenty-Ninth Session*, U.N. GAOR, Int'l. Trade Law Comm., 32nd Sess, Paragraphs 18-44, U.N. Doc. A/CN.9/445 (1999); Electronic Mail, Bazinas, *supra* note 31. Those States with their own registration systems could also find their systems replaced, jeopardizing internal jobs and revenue production. In that context, a possible compromise might be to allow States the option of retaining their own registration systems, to which the Convention's choice of law rule would point. See *infra* note 98 and accompanying text (explaining that the U.S. perfection system works this way under Article 9 of the UCC).

<sup>35</sup> See, e.g., Electronic Mail from Alejandro Garro to Steven L. Schwarcz 1-2 (May 2, 1999) (on file with author) (observing that "much of the concerns are raised by speculation, rather than informed opinions as to the impact that a mandatory international registration system would bring about," and comparing the aviation industry's proposed international registration system for security interests in aircraft pursuant to a protocol to the International Institute for the Unification of Private Law's ("UNIDROIT") Convention on Security Interests in Mobile Equipment).

make "commercial practice uncertain, time-consuming, and expensive."<sup>36</sup> The problem, at its simplest, is twofold: an assignee of receivables from a foreign assignor may not know which State's law governs perfection; furthermore, if the law of the assignor's State applies, the assignee's rights would be subject to the vagaries of that foreign law.<sup>37</sup>

The Convention would solve the first problem by making the law of the assignor's State govern perfection.<sup>38</sup> Although it does not necessarily solve the second problem, it does attempt to do so by providing an optional registration system for perfection.<sup>39</sup> If, therefore, the assignor's State has opted to adopt that system, perfection would be accomplished through registration.

There is, however, another layer to the perfection problem—a layer that is exacerbated by cross-border transactions, but that could arise even in a purely domestic transaction. If the assignor's State neither has adopted the Convention's registration system nor enacted a domestic registration system for perfection, the assignee would be unable to ascertain the priority of its interest in the transferred receivables. The following examples demonstrate this potential problem.

Without some form of public registration, a system can establish perfection, but cannot unequivocally be used to ascertain priority. First, consider a wholly domestic transfer in which an assignor assigns a given receivable to an assignee in the same State. If receivables transfers are not recorded, the assignee has no objective way of determining whether that receivable was previously transferred to a third party.<sup>40</sup> Likewise, unless the assignor discloses it, the assignee of a subsequent transfer by the assignor of that receivable has no way of learning of the first transfer.

The situation becomes even more complicated for cross-border transfers. Consider a simple receivables transfer between

---

<sup>36</sup> Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rulemaking Process of Private Legislatures*, 29 GA. L. REV. 909, 940 (1995).

<sup>37</sup> The assignor therefore may need to retain foreign counsel to be certain of its rights.

<sup>38</sup> See *supra* note 33 (referring to Article 23(1) of the Convention, which provides that "[p]riority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located").

<sup>39</sup> See *supra* text accompanying notes 31-33.

<sup>40</sup> Such a prior transfer might have been made, for example, through the assignor's fraud or mistake.

parties in two States, both of which have adopted the Convention but only one of which—the assignee's State—has opted for the Convention's registration system. Perfection and priority would be governed by the law of the assignor's State.<sup>41</sup> However, unless the assignor's State has a domestic registration system, the assignee would have the same difficulty ascertaining priority as described in the preceding paragraph.

The greater the number of transfers, the potentially more difficult the problem. Consider, for example, receivables transfers among parties in three States, and assume that States 1 and 3 have adopted the Convention and its registration system, but State 2 has adopted neither. Although it might appear that the priority in receivables transferred between States 1 and 3 would be governed by the Convention's registration system, that result does not necessarily follow. For example, an assignor in State 1 could make a transfer of its receivables to an initial assignee in State 2. If that assignee perfects under its domestic law,<sup>42</sup> it would reasonably expect to have priority as to those receivables. Later, however, the assignor either fraudulently or mistakenly could transfer all or a portion of the same receivables to a subsequent assignee in State 3. If the subsequent assignee searches the international registration system, sees no prior recording as to those receivables, and then perfects the transfer in accordance with international registration procedures, the subsequent assignee would reasonably expect to have priority rights in those receivables. Thus, there is a conflict of priority between the rights of the initial assignee and the subsequent assignee.

Tinkering with the system—for example, restricting international registration to cross-border transfers of receivables—would also fail to solve the problem. Consider an assignor in State 1 that makes a domestic transfer of receivables to an initial assignee in the same State. If the initial assignee perfects this transfer under domestic law, that assignee would reasonably expect to have priority as to those receivables. Later, however, the assignor either fraudulently or mistakenly could transfer all or a portion of the same receivables to a subsequent assignee in State 3. If the subsequent assignee searches the international registration system, sees

---

<sup>41</sup> See *supra* note 33.

<sup>42</sup> This assumes that the conflicts law of State 2 points to that State's domestic law for perfecting transfers to in-State assignees.

no prior recording as to those receivables, and then perfects this cross-border transfer in accordance with international registration systems procedures, the subsequent assignee would reasonably expect to have priority rights in those receivables. Again, a conflict of priority exists between the rights of the initial assignee and the subsequent assignee.

The same dilemma arises when the first assignment is international. Consider an assignor in State 1 that transfers receivables to an initial assignee in State 3. If the initial assignee perfects this cross-border transfer in accordance with international registration procedures, it would reasonably expect to have priority rights in those receivables. Later, however, the assignor, either fraudulently or mistakenly, could transfer all or a portion of the same receivables to a subsequent assignee in State 1. If the subsequent assignee follows the domestic procedures for ascertaining priority, sees no prior transferee, and then perfects this domestic transfer in accordance with the domestic law of State 1, the subsequent assignee would reasonably expect to have priority rights in those receivables. Once again, there is a conflict of priority between the rights of the initial assignee and the subsequent assignee.

Other tinkering approaches would equally fail to solve the problem. For example, registration could not be limited to transfers of international receivables, i.e., those having foreign debtors, because international receivables are often transferred domestically.<sup>43</sup> Consider an assignor in State 1 that makes a domestic transfer to an assignee in State 1 of international receivables of a debtor in another State. The way out of this morass is for all States, or at least those with companies needing access to the liquidity provided by receivables financing, to adopt a centralized registration system for perfection.<sup>44</sup>

I next examine empirical studies showing that centralized registration is not only the most effective domestic perfection sys-

---

<sup>43</sup> Indeed, the same receivables, irrespective of the location of the debtors, could be transferred domestically one day and internationally the next, or vice versa.

<sup>44</sup> Even the registration system proposed by the Convention does not go as far as it theoretically should because it covers only assignments of international receivables—those in which the assignor and debtor are located in different States—and international assignments of receivables—those in which the assignor and assignee are located in different States. See *Convention, supra* note 1, arts. 1(a), 3. The author shows above, however, that a rational perfection and priority system should cover the assignments of all receivables.

tem, but it will raise a State's gross domestic product by increasing corporate access to credit. Thereafter, I discuss the increasing number of civil and common law States that recently have adopted centralized registration systems. Finally, I show by analogy that the development of centralized registration in the federal system of the United States provides compelling evidence in favor of a cross-border registration system.

#### 4.2. *Empirical Evidence Supports Centralized Registration*

##### 4.2.1. *Evidence from Empirical Studies*

Empirical studies by the Center for the Economic Analysis of Law (the "Center") confirm the importance of a registration system, even for domestic transfers of receivables.<sup>45</sup> The Center studied how inadequate legal frameworks in three States—Guatemala, Nicaragua, and Romania—limited access to credit. In Guatemala, for example, there was no registration system for perfection of receivables transfers. The absence of such a system was a key constraint on economic development: "Compared to a borrower who cannot offer good collateral, a borrower with such collateral can expect to get six to eight times more credit. . . ."<sup>46</sup> A registration system, however, would encourage the extension of credit by enabling lenders to ascertain their priority:

By encumbering as collateral [their] portfolios of accounts or small loans, businesses could obtain the cash necessary to purchase more inventories and generate even more sales. Where such financing is possible, it permits credit to expand rapidly in response to the needs of the business. . . . Accounts receivable are often the only unencum-

---

<sup>45</sup> See *infra* notes 46, 47, and 56 and accompanying text. These studies are empirical in that they rely on numerous field interviews.

<sup>46</sup> Heywood W. Fleisig & Nuria de la Peña, *Guatemala: How Problems in the Framework for Secured Transactions Limit Access to Credit* (Nov. 1998) <<http://www.ceal.org>>. [hereinafter *Guatemala*]. The study further observed that "[t]he problem of the limited access to credit has been recognized everywhere as constraining growth and aggravating poverty." *Id.* at 2.

bered floating assets that a [business] has available to secure a loan for working capital.<sup>47</sup>

Productivity per worker gains when farms and businesses can profitably hold larger inventories . . . .<sup>48</sup>

Under Guatemalan law, the assignment of receivables is perfected by notification of debtors. That approach, however, not only was found to be “costly because it requires notifying each account debtor,” but the system is also risky. “There is no requirement that all transfers of accounts be registered in a public registry to prevail in collecting against the accounts.”<sup>49</sup> Therefore, “[t]he whole secured transactions framework becomes more risky because potential lenders cannot easily discover all existing claims in collateral . . . .”<sup>50</sup>

The study found that the absence of centralized registration was the most significant explanation for why credit was limited. Adjusting for inflation, Guatemalan borrowers, if they are offered loans at all, pay thirty-three to thirty-eight percentage points higher interest than U.S. borrowers on equipment loans.<sup>51</sup> Of that additional cost, “[a]bout 4.34 percentage points arise from macroeconomic uncertainty, 1.76 percentage points arise from the greater bank spreads, and the balance arises from the extra risk of equipment lending in the Guatemalan framework for se-

---

<sup>47</sup> *Id.* at 14. Accord, Heywood W. Fleisig & Nuria de la Peña, *Nicaragua: How Problems in the Framework for Secured Transactions Limit Access to Credit* (Feb. 1998) <<http://www.ceal.org>> [hereinafter *Nicaragua*].

<sup>48</sup> *Guatemala*, *supra* note 46, at 43 (contrasting “[a] secured transaction system that directs credit away from more rapidly growing businesses and toward slower growing businesses [which] is not the system that will promote the most economic growth.”).

<sup>49</sup> *Id.* at 14.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> *See id.* at 29. Although these data relates to equipment loans, I would expect approximately the same interest rate differential to apply to loans secured by receivables because the perfection and priority problem is similar.

cure[d] transactions.”<sup>52</sup> Therefore, twenty-seven to thirty-two percentage points of Guatemala’s interest rate cost “arises entirely from the laws and legal procedures that govern lending against movable property.”<sup>53</sup> By way of comparison, the Center’s study of Nicaragua found that twenty to twenty-five percentage points of interest rate cost was attributed to defects in that State’s framework for secured transactions.<sup>54</sup> The study also reported that “[u]nder a variety of simplifying assumptions [reform of the legal framework for secured transactions in Argentina and Bolivia] could raise Argentine GDP by 6% to 8%” and could raise Bolivian GDP by 3% to 9%.<sup>55</sup>

The Center’s studies of the legal frameworks for secured transactions in Romania and Nicaragua found similar problems caused by the absence of centralized registration systems for perfection.<sup>56</sup> The studies also reported that these problems have been observed in other civil law States such as Argentina, Mexico,

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* The absence of centralized registration is, of course, only part of the reason for this cost, but probably the most significant part. *See supra* text accompanying note 46 (noting that the absence of centralized registration is the most significant explanation for why credit is limited).

<sup>54</sup> *See Nicaragua, supra* note 47, at 27. Again, the absence of centralized registration is only part of the reason for this cost, but probably the most significant part. *See supra* note 46.

<sup>55</sup> *Guatemala, supra* note 46, at 44. Subsequent studies by the Center for the Economic Analysis of Law indicate the same or even larger gain in GDP. *See* Electronic Mail from Heywood W. Fleisig to Steven L. Schwarcz (May 6, 1999) (on file with the author).

<sup>56</sup> In Nicaragua, for example, “[p]erfection rules do not call for registries that provide for a public and inexpensive means of finding out whether prior encumbrances in collateral exist. The rules for the priority of secured lenders do not clearly rank interests in collateral.” *Nicaragua, supra* note 47, at 2. As a result, “secret priorities create substantial risks to other potential lenders and thereby limit the usefulness of the secured transaction framework.” *Id.* at 19. Indeed, “[a]ccounts receivable and chattel paper had no value as collateral for loans.” *Id.* at 16. These problems even overcame attempts by the Nicaraguan government to stimulate agricultural credit by setting up a system “that would disburse through private for-profit institutions. . . . Private lenders, in [this] framework . . . took great care to disburse only where loans could be collected. However, in most cases this improvement in [lending] efficiency took place at the expenses of reaching the target groups [which had] even less access to credit.” *Id.* at 3. Likewise, in Romania, in which perfection requires notification of debtors, no borrowing credit is given based solely on accounts receivable collateral. *See* Nuria de la Peña & Heywood W. Fleisig, *Romania: How Problems in the Framework for Secured Transactions Limit Access to Credit* (Sep. 1998 discussion draft) <<http://www.ceal.org>> [hereinafter *Romania*].

Uruguay, Bolivia, Honduras, and El Salvador as well as in common law States such as Bangladesh, India, and Pakistan.<sup>57</sup>

These empirical studies are not merely academic. An increasing number of States have been adopting centralized registration precisely for the reasons noted by the studies: to improve their economy by increasing access to lower-cost credit. I set forth the following five examples: Japan, Poland, and Hungary, which are from civil law systems; and Canada and Australia, which are from common law systems.

#### 4.2.2. *An Increasing Number of States Have Been Adopting Centralized Registration*

Japan adopted a centralized registration system in 1998. Previously, perfection required notification of debtors, which was a significant impediment to securitization.<sup>58</sup> To encourage and lower the cost of securitization, a new law was adopted allowing constructive notice by registration:<sup>59</sup> “if the claim assignment is registered in a claim assignment registration file, it shall be regarded, in relation to a third party, that notice . . . is given to the debtors [on the date of registration], as provided for under Article 467 of the Civil Code.”<sup>60</sup> The priority rule therefore is first in time, first in right.<sup>61</sup>

---

<sup>57</sup> See *Nicaragua*, *supra* note 47, at 5. See also Boris Kozolchyk, *The Basis for Proposed Legislation to Modernize Secured Financing in Mexico*, 5 U.S.-MEX. L.J. 43 (1997) (discussing the need for a centralized registration system for perfection of security interests in Mexico). Kozolchyk claims that without such a “system of registration for security interests,” commercial credit will not be accessible for “small and medium-sized Mexican [enterprises].” *Id.* at 47-48. As a result, Mexico is in the process of considering legislation which would create a centralized registration system. *Id.* at 50-52.

<sup>58</sup> See Roy B. True, *New Developments in Japanese Asset Securitization: Open the Floodgates* (visited Mar. 31, 1999) <<http://www.tuj.ac.jp/law/asset-sec.html>>.

<sup>59</sup> Saikenjyoto no Taikoyoken ni kansuru Minpo no Tokureito ni kansuru Horitsu [The Law Prescribing Exceptions, etc. to the Civil Code Requirements for Setting Up Against a Third Party to an Assignment of Claims], Law No. 104 of 1998 (effective October 1, 1998). Registration would be deemed to constitute notification. The author thanks Japanese attorney Makoto Isshiki, LL.M., 1999 Duke University School of Law for assistance in interpreting this law.

<sup>60</sup> *Id.* art. 2(1).

<sup>61</sup> Some confusion could arise when perfection first occurs through actual notification, as opposed to registration.

In 1996, the Polish Parliament enacted a new secured transactions law that substitutes registration for a physical pledge in order to achieve perfection.<sup>62</sup> Under that law, a security interest, referred to as a "registered pledge," may be granted in moveable assets and in assignable rights, such as receivables.<sup>63</sup> The security interest is perfected when registered in the appropriate district commercial court.<sup>64</sup> Moreover, the law changes the old possessory priority rule of last in time, last in right<sup>65</sup> to a first in time, first in right rule based on the timing of registration.<sup>66</sup> The rationale for the law was that "a reliable universal registering system is *sine qua non* for the banks to proceed with a responsible credit policy."<sup>67</sup>

In 1996, the Hungarian Parliament enacted a new secured transactions law.<sup>68</sup> Under that law, a security interest, referred to as a lien, may be granted in moveable things and in transferable rights or claims.<sup>69</sup> The security interest is perfected when registered in a registry kept with the Hungarian National Chamber of Notaries Public.<sup>70</sup> The priority rule is based on first in time, first in right.<sup>71</sup>

---

<sup>62</sup> See Ustawa o zastawie rejestrowym i rejestrze zastawów [Law on Registered Pledge and Pledge Register] Dz. U. Nr 149, poz. 703 [Journal of Law No. 149, item 703] (Pol.) (enacted December 6, 1996 and later amended in 1997 and 1998); Tomasz Dabrowski, *Poland's New Security Instrument—Registered Pledge*, 8 SURV. E. EUR. L. 1, 8 (1997).

<sup>63</sup> See Dabrowski *supra* note 62.

<sup>64</sup> See *id.*

<sup>65</sup> Even in the U.S., perfection of possessory security interests would follow this rule because a prior pledgee that no longer possesses the collateral would be unsecured. See U.C.C. § 9-305 (1995) (providing that perfection by possession "continues only so long as possession is retained.").

<sup>66</sup> See Dabrowski, *supra* note 62, at 8 (noting that under prior law, a subsequent pledge would prevail over a prior pledge, absent bad faith).

<sup>67</sup> Lech Choroszuca, *Secured Transactions in Poland: Practicable Rules, Unworkable Monstrosities, and Pending Reforms*, 17 HASTINGS INT'L & COMP. L. REV. 389, 409 (1994); see also *id.* at 423 (arguing that this law will help "provide for stability and predictability in commercial lending transactions").

<sup>68</sup> CODE CIVIL [C.CIV.] act XXVI (Hung.). The author thanks Hungarian attorney Szilvia Horvath, LL.M., 1999 Duke University School of Law, for assistance in finding and interpreting this law and the related Ministry of Justice comments.

<sup>69</sup> See *id.* § 252(1).

<sup>70</sup> See *id.* § 260(2)).

<sup>71</sup> See *id.* § 263(2)) (stating that "if the same object under lien is encumbered by several liens, . . . the right of satisfaction shall be due to the lienors in

Canada's perfection scheme, by contrast, has been adopted province by province over the past two decades in an attempt to modernize personal property security laws.<sup>72</sup> The Canadian scheme follows the Uniform Personal Property Security Act (the "PPSA"), "[a]n indispensable feature of [which] is the registry system that is at the core of the priority structure of the Act."<sup>73</sup> Section 25 of the PPSA provides that registration of a financing statement perfects a security interest in collateral<sup>74</sup> and Section 43 establishes a first in time, first in right priority rule, based on the timing of registration.<sup>75</sup> At least one commentator noted that the "PPSA's have been an unqualified success. There are very few Canadians who have any interest in returning to the systems they displaced."<sup>76</sup>

Finally, Australia has a national system for recording security interests, referred to as "charges," that are granted by companies.<sup>77</sup> The priority rule is first in time, first in right, according to the timing of registration.<sup>78</sup>

In short, empirical studies by the Center for the Economic Analysis of Law show that centralized registration increases the

---

the order of the inception of their respective liens, [inception being determined by the time of registration).

<sup>72</sup> See generally Ross Buckley, *Personal Property Security Law in Canada: The Revolution Is Nearly Complete*, 72 AUSTL. L.J. 918 (1998) (describing this new legal regime, which has been adopted by all the common law provinces of Canada other than Newfoundland, where the bill is now pending, and observing that a parallel conceptual regime has been adopted by the civil law province of Quebec). The Canadian regime appears to be closely patterned on UCC Article 9. *Id.* at 919. It even deems "sales of accounts and chattel paper to be security agreements, principally to avoid difficult problems of distinguishing between transactions intended for security and those not so intended." *Id.*

<sup>73</sup> *Id.* at 918.

<sup>74</sup> See UNIF. PERSONAL PROPERTY SEC. ACT § 25 (Uniform Law Conference of Canada Consolidated Statutes 1983) [hereinafter "PPSA"]

<sup>75</sup> PPSA § 43(2) provides that "[r]egistration of a financing statement is effective from the time assigned to it in the office of the registry." PPSA § 35(1)(a) further provides that "priority between perfected security interests in the same collateral is determined by the order of the occurrence of the . . . registration of a financing statement . . ." *Id.* § 43(2).

<sup>76</sup> Buckley, *supra* note 72, at 923. See also *id.* at 918 (observing that "[t]here is little dissent now that the legislation has met and surpassed the objectives of its proponents").

<sup>77</sup> See Corporations Act, 1989, § 262 (Austl.). The author thanks Australian attorney, Matthew Symon, LL.M 1999, Duke University School of Law, for assistance in finding and interpreting this law.

<sup>78</sup> See *id.* § 280(1).

availability of credit and reduces its cost. An increasing number of civil and common law States have recently voted with their feet in agreement, adopting centralized registration systems.<sup>79</sup> States that oppose centralized registration therefore may wish to re-think whether their opposition is justified.

I next argue that the evolution of perfection and priority rules in the United States further underscores the value of centralized registration. I analogize the federal system of the United States, under which each state had its own law governing perfection, to the international scheme today under which each sovereign State has its own perfection law.<sup>80</sup>

4.3. *The Development of Centralized Registration in the Federal System of the United States Provides Compelling Evidence in Favor of a Cross-Border Registration System*

The UCC governs, among other things, the perfection and priority of the transfer of receivables between parties in different states in the United States. It reflects almost a century of experimentation by those states to try to reach the most efficient and effective perfection system. Thus, an analysis of the events leading up to the UCC's adoption may shed light on the cross-border receivables perfection debate. Historically, receivables financing in the United States had its roots in traditional factoring, in which "typically the assignee (or factor) notified the account debtor that the account had been assigned to him and directed that payments be made to him and not to the assignor."<sup>81</sup> Begin-

---

<sup>79</sup> The process of adoption continues. In New Zealand, for example, a new Personal Property Securities Bill based on the Canadian PPSA is at the select committee stage, and submissions are currently being heard. Although some believe it will be enacted in 2000, the timing is uncertain. See Electronic Mail from Steve Flynn, attorney with Simpson Grierson and member of the New Zealand Law Society committee that reviewed this Bill, to Andrew McNee, LL.M., 1999 Duke University School of Law (Apr. 7, 1999) (on file with author).

<sup>80</sup> I realize, of course, that analogies are useful but not necessarily definitive. Compare RICHARD A. POSNER, *OVERCOMING LAW* 519 (1995) (arguing that "[a]nalogies can be suggestive, even illuminating" but might not be sufficiently on point by reason of different facts or policies) with Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (arguing that an analogy is most useful when the right outcome cannot be derived from theory alone).

<sup>81</sup> 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 8.1, at 251 (1965).

ning in the 1930's, however, a new form of receivables financing arose under which "account debtors were no longer notified of the assignment and continued to make payments to their original creditor, the assignor."<sup>82</sup> By the 1950's, receivables financing was split between non-notification receivables financing and traditional factoring.<sup>83</sup>

These forms of receivables financing created practical and legal problems, some practical and some legal. As a practical matter, because:

there is no evidence of the claim which can be symbolically treated as the claim itself and thus transferred in possession [such as would be the case for a negotiable instrument], the problem of priorities early became and long remained a matter of controversy and a thorn in the judicial flesh.<sup>84</sup>

Assignees of receivables bore the risk that the assignor would assign (or perhaps already had assigned) the same receivables to another assignee.

In response, different states established different rules to try to address the priority problem posed by receivables financing. Indeed, "[i]n few [other] common law areas did so many diverse rules establish themselves or so long and so inconclusively contend among themselves for supremacy."<sup>85</sup> For example, certain states, such as New York, followed the rule that perfection is effectively achieved by "policing" the sold receivables through monitoring and collecting the payments thereon.<sup>86</sup> The cost and expertise needed to comply with this rule made non-notification receivables financing "the exclusive preserve of the sales finance

---

<sup>82</sup> *Id.* (describing this new form of factoring as "non-notification" or "indirect collection" receivables financing).

<sup>83</sup> *See id.*

<sup>84</sup> 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 25.6, at 670 (1965).

<sup>85</sup> *Id.*

<sup>86</sup> *See Benedict v. Ratner*, 268 U.S. 353 (1925) (finding an unpoliced transfer of receivables fraudulent under New York law as against creditors of the assignor).

companies . . . [and] larger banks.”<sup>87</sup> Other states followed the English rule of *Dearle v. Hall*<sup>88</sup>— a rule similar to that which prevails in many foreign countries even today<sup>89</sup>— “under which, as between successive assignees of the same claim, the one who first notifies the [account] debtor of his assignment prevails, even though his assignment is the later in time.”<sup>90</sup>

These problems were compounded in interstate transactions. Say, for example, an assignor in New York, which followed the policing rule, transferred receivables to an assignee in Pennsylvania, which followed the debtor notification rule. To ensure perfection, the parties might have to comply with both rules, thereby duplicating cost and effort.

These issues came to a head when the United States Supreme Court held that because the failure to notify debtors prevented perfection of the transfer in states that followed *Dearle v. Hall*, the assignor’s trustee in bankruptcy could have avoided the unperfected transfer.<sup>91</sup> This caused great uncertainty in the receivables financing community. In response, “the majority of states enacted statutes [that] were designed to preserve non-notification financing.”<sup>92</sup>

This led to a heated debate as to the best method of perfection, with different states experimenting with differing approaches.<sup>93</sup> Business interests argued that transfers of receivables should be automatically deemed to be perfected, because they were concerned that their credit “would be adversely— even disastrously— affected if [their] creditors learned that [they were] as-

---

<sup>87</sup> 1 GILMORE, *supra* note 81, § 8.1, at 252; *see also id.* § 8.3, at 260-61 (describing the “assignee’s unremitting supervision of the assignor’s enterprise” that constituted “policing” to comply with *Benedict*). This rule still created problems, however, where assignors were the more competent party to monitor and enforce collections for the account of the assignee.

<sup>88</sup> 3 Russ. 1, 38 Eng. Rep. 475 (Ch. 1828). Professor Gilmore refers to an estimate that “6 states and the District of Columbia definitely followed [this] rule, 7 states probably followed [this] rule, [and] 10 states were in extreme confusion as to which rule they followed.” 1 GILMORE, *supra* note 81, § 8.6, at 273 n.8.

<sup>89</sup> Indeed, research by the Center for the Economic Analysis of Law indicates that this rule is seen in both common and civil law countries. *See supra* text accompanying notes 55-56.

<sup>90</sup> 1 GILMORE, *supra* note 81, § 8.6, at 273.

<sup>91</sup> *See Corn Exch. Nat’l Bank & Trust v. Klaunder*, 318 U.S. 434 (1943).

<sup>92</sup> 1 GILMORE, *supra* note 81, § 8.1, at 253.

<sup>93</sup> *See id.* § 8.7, at 274 *et seq.* (discussing the debate among states).

signing [their] accounts.”<sup>94</sup> Others argued for a registration system. The experience of states that chose a registration system showed that registration would not adversely affect, but would increase, the availability of credit: “[o]nce filing statutes had been passed in a few states, the argument that a public record of assignments would destroy business credit became more difficult to make. . . . In the final count, filing statutes considerably outnumbered [automatic perfection] statutes.”<sup>95</sup>

The subsequent promulgation of the UCC, in 1953, resolved these issues for all interstate (as well as intrastate) transfers. It followed the lessons learned from the state debate, adopting a centralized registration system<sup>96</sup> and rejecting the requirements of policing and debtor notification.<sup>97</sup> This registration system gave “other creditors the opportunity to ascertain from public sources whether property of their debtor [here, in the UCC sense, meaning the borrower] or prospective debtor is subject to secured claims.”<sup>98</sup> As a result, interstate receivables transfers have been greatly facilitated, while their cost has been significantly lowered. I recognize, of course, that the U.S. experience with the UCC and registration does not necessarily compel the conclusion that foreign states with fundamentally different legal, economic or cultural systems also should adopt centralized registration. Nonethe-

---

<sup>94</sup> *Id.* § 8.7, at 275.

<sup>95</sup> *Id.*

<sup>96</sup> The UCC registration system is not, however, centralized in an orthodox way. Rather, each state maintains its own centralized registration system, and choice of law rules determine which state’s system will apply to a particular transfer. See U.C.C. § 9-103 (1995). My suggested compromise of allowing states the option of adopting (or retaining) their own centralized registration systems, subject to the Convention’s choice of law rule that points to the perfection system of the assignor’s State, would follow that approach. See *supra* note 34.

<sup>97</sup> See *id.* (explaining that “[b]y the time Article 9 of the [Uniform Commercial] Code came to be drafted, it was a foregone conclusion that, with respect to receivables, it would be a filing statute and not even the most violent advocate of [automatic perfection] made more than a pro forma protest for the record”).

<sup>98</sup> Official Comment No. 3 to U.C.C. § 9-205 (1995) (further explaining that “[t]he repeal of the Benedict rule under this section [9-205] must be read in light of these [filing] provisions”); accord U.C.C. § 9-205 (providing that “[a] security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral . . . or to collect or compromise accounts or chattel paper . . .”).

less, the U.S. experience is persuasive in the absence of evidence to the contrary.

## 5. CONCLUSION

Empirical evidence and historical analogy demonstrate the benefits of a centralized registration system for perfection of receivables financing. It increases corporate access to lower cost credit, which in turn increases a State's gross domestic product. Absent such a system, receivables financings are discouraged because assignees may be unable to know their priority. Therefore, it appears to be in each State's interest that the Convention provides, and that each State opts for, centralized registration.