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Securities Dominance – Once and Forever?

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• Reasons to like Security

Greater Protection

Priority (including Legal over Equitable)

Carving Out (separate secured and general pools)

Over-Securing

In Rem Right (access to object or equivalent)

Tracing into 3P Hands



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- **Reasons to not like Security**

Costs (Imputed to Debtor)

Loss of Priority (Equitable (Moveable) Charges Subordinated): *Re Spectrum Plus*;
(Statute): s176A IA 1986

Negative Pledge Clauses Ineffective

De Jure Merger of Pools (IPs/Courts retaining collateral)

De Facto Merger of Pools (*Quistclose*)

Tracing Difficult

Breach of *Pari Passu*



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- **More reasons to be sceptical**

Why shall security empower the creditor to control the debtor? → after all, control allows to (ab?)use an insolvency proceeding as a tool for a take-over (loan-to-own-strategies)

Why shall a secured creditor have a say in a restructuring? → after all, security is good for ranking but in case of restructuring ranking plays no role (liquidation is asset-related; restructuring is claim-related)



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- **Path Dependency?**

Security is Ancient/Good/Effective

The View of the International Institutions:

- Access to Finance Enabled

- Registration Systems instituted

- Collateralisation of Assets promoted

Reforms to Asset-Security Frameworks Prevalent

Competition between Civil/CL/US Methodologies



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- “Alternative” Strategies/Adjustments

- Write-Offs/Tax Breaks

- Higher Interest/Punitive Conditions

- Personal Guarantees

- Mostly, in addition to conventional in rem security

- Only “true” adjustments:

- restrictions on types of collateral

- delays to enforcement/recovery

- subordination



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- Real “Alternatives”

Reconceptualising Ownership: no more *meum et tuum* (→ cf. the medieval dominium directum vs. dominium utile (and its re-appearance in German Eigentum vs. Anwartschaft)

e.g. Islamic Finance Model:

shared investment/risk: *musharakah* (joint investment); *murabaha* (agreement as to cost and markup: i.e. shared profits from increase in values), but *riba'* (no excessive interest)

influenced trusts law; “clogs and fetters”; equity of redemption etc.

Note as a modern tendency: the increasing amount of crypto assets is anyway beyond the traditional dichotomy of *meum et tuum* – after all, the exclusivity of ownership and use of goods (res) in the Roman law sense does generally play no role in this new law of “property”



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- ## The Way Forward

Is conventional security here to stay?

No harmonised treatment of security or priorities (creates comparative advantages and “forum-shopping”; also ties security types/availability to sources of credit, hence preference for US/CL)

But: new assets, new models?

Subjection of crypto-assets to property/security rules problematic

EU Expert group idea → “inactivated security interests (ISI) system” in which non-adjusted creditors have priority over adjusted creditors. The latter are, thereby, closer to investors or shareholders and have, thus, to take the creditworthiness examination seriously! Idea of an optional company regime.



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