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1.0 Introduction

Effects of economic recession usually make people increasingly recourse to the use of collateral as a way of managing credit risks. This practically occurs in transactions that are based on organised securities and derivatives markets and for financial transactions that are privately negotiated such as forward foreign exchange transactions. It is also true of securities settlement systems as well as true for payment systems. A collateral arrangement broadly means "an arrangement under which one party (the collateral giver) delivers some form of property, typically securities and/or cash, to another party (the collateral taker) and agrees that the collateral taker may use that property, in the event of a default by the collateral giver, to satisfy outstanding obligations of the collateral giver to the collateral taker."⁵²

Generally, the purpose of collateral is to meet some commercial customs, national practices which benefit the banking systems. According to the World Bank studies, there are many reasons, depending on a country, for collateral requirement.⁵³ This creates doubt as to whether the choice of collateral is the choice of the borrower or creditors. Economic transitions of many countries of the world, show that collateral provision is important in order to induce early-stage development.⁵⁴ Nevertheless, collateral provision can be seen as a sanction which encourages compliance with contract by the debtor.

Based on the European Bankruptcy Convention and previous efforts of the European communities, there are serious attempts by European states to harmonise the insolvency laws. Although this is a daunting task for the states, the efforts are beginning to yield some results even though not without some challenges. The efforts have led to the adoption of the Uniform Commercial Code (UCC). Before the adoption of the UCC, creditors that repossessed collateral had inherent duties to be reasonable and preserve the collateral and exercise some good faith in the disposal and sale of the repossessed properties.⁵⁵

Repossession usually arises in a situation of bankruptcy where the debtor has defaulted in making the payment after the due date thereby enabling the creditor to repossess the collateral property.⁵⁶ Up to fifty states have now adopted sections 9-207(a) and 9-610(a)-(b), of the

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⁵² See International Swaps and Derivatives Association Inc., Collateral Law Reform Group, *Collateral Arrangements in European Financial Markets: The Need for National Law Reform*, 2000, at 2-3. Available at: www.isda.org/c_and_a/pdf/NeedLawReform.pdf [accessed on 11 July, 2014].

⁵³ See World Bank, 1989 *World Bank Dev. Rep.* (1989); 2002 *World Bank Dev. Rep.* (2002); Yoram Keinan, *The Evolution of Secured Transaction's Background Study for World Development Report 2002*, 2001.

⁵⁴ Rainer Haselmann, Katharina Pistor & Vikrant Vig, *How Law Affects Lending* (Colum. L. Econ. Working Paper No. 285, 2005); Maurice Dobb, *Studies In The Development Of Capitalism*, 1947; Michael Flinn, *Origins Of The Industrial Revolution*, 1966, 52-53; Naomi R. Lamoreaux, Margaret Levenstein & Kenneth L. Sokoloff, *Financing Invention during the Second Industrial Revolution: Cleveland Ohio 1870-1920*, 27-30 (Nat'l Bureau of Econ. Res. Working Paper No. 10923, 2004; Roy Goode, *Commercial Law* 3rd ed. 2004, at 586. Larry Neal, "The Finance of Business during the Industrial Revolution", in Roderick Floud & Deirdre McCloskey eds., *The Economic History Of Britain Since 1700*, 1, 151, 1994; Ronald Max Hartwell, *The Industrial Revolution And Economic Growth*, 1971.

⁵⁵ See Mary B. Spector, *Tenants' Rights*, "Procedural Wrongs: The Summary Eviction and the Need for Reform," (2000) 46 *Wayne L. Rev.* 135, 190-91.

⁵⁶ See Barkley Clark, "Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default," (2000) 4 *N.C. Banking Inst.* 129, 136-39; Lawrence R. Ahern, III, "Workouts" Under Revised Article 9: A Review of Changes and Proposal for Study," (2001) 9 *Am. Bankr. Inst. L. Rev.* 115, 116-18.

UCC,⁵⁷ which deals with the creditor's duties in dealing with collateral that he possesses for preservation and reasonable disposal.⁵⁸ Despite the relative straightforwardness of the provisions of the UCC, there have been inconsistencies and uncertainties in the application of the provisions in terms of the reasonableness standard implicit therein.⁵⁹ Due to perhaps the recent economic down turn, the following analysis will reveal a secured party's duties under sections 9-207(a) and 9-610 individually thereby showing the inconsistencies in many jurisdictions.⁶⁰ The discrepancies in applying these UCC provisions cause uncertainty in its applications.⁶¹ The discrepancies in this period of economic downturn.⁶² Given the high rate of defaulters during the economic down turn, valuation of collateral becomes more difficult due to reduced demand.⁶³ So, collateral with an established market is much easier to value.⁶⁴ More so, economic down turn can and indeed shapes legal outcome in its application to the UCC provisions against its design to promote certainty and uniformity thereby avoiding unnecessary business risks.⁶⁵ These

⁵⁷ John Lucas, Comment, "The Article 9 Buyer's Seller Rule & the Justification for Its Harsh Effects," (2004) 83 *Or. L. Rev.* 289, 289 (asserting that all fifty states adopted the Article 9 revisions in July 2001).

⁵⁸ Section 9-207, "Rights and Duties of Secured Party Having Possession or Control of Collateral," states that: (a) [Duty of care when secured party in possession.] Except as otherwise provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed. U.C.C. S. 9-207(a) (2005). Section 9-610, "Disposition of Collateral after Default," states that: (a) [Disposition after default.] After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing. (b) [Commercially reasonable disposition.] Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms. U.C.C. S. 9-610(a)-(b) (2005).

⁵⁹ Margit Livingston, "Survey of Cases Decided Under Revised Article 9: There's Not Much New Under the Sun," (2003) 2 *Depaul Bus. & Com. L.J.*, 47, 78-79, 92-95 (exploring the implications of sections 9-207 and 9-610 in case law articulating the duties of a creditor in possession of collateral).

⁶⁰ *Ibid.*

⁶¹ Sections 9-207 and 9-610 in state and federal case law.

⁶² See *Hotels' Debt-Service Coverage, Value to Decline in 2009*, Mortgage Banking, Mar. 2009, at 89, 89-90; Hugh Larratt-Smith & Jim Gagan, "The Bicycle Theory of Management: Things Sure Get Wobbly When the Bicycle Slows Down," (2009) *Secured Lender*, at 25, 26-27; Leonard I. Nakamura, "Lessons on Lending and Borrowing in Hard Times," (1991), *Bus. Rev.*, July at 13-16.

⁶³ See Keith Sharfman, "Valuation Averaging: A New Procedure for Resolving Valuation Disputes," (2003) 88 *Minn. L. Rev.* 357, 372-77 (explaining the intricacies of new valuation techniques relevant to bankruptcy proceedings); Marjorie Chertok & Warren E. Agin, "Restart.com: Identifying, Securing and Maximizing the Liquidation Value of Cyber-Assets in Bankruptcy Proceedings," (2000) 8 *Am. Bankr. Inst. L. Rev.* 255, 263-65 (emphasizing the importance of consistent valuation in assessing intangible assets such as intellectual property). *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173, 174-75 (1st Cir. 1989) (describing a security agreement in which light fixture inventory served as collateral); *Ray v. City Bank & Trust Co.*, 358 F. Supp. 630, 634 (S.D. Ohio 1973) (noting the various descriptions of and narrow uses for hydraulic raising rams pledged as collateral); Patrick Hosmann, Jr., "Market Viewpoint: Patrick Hosmann, Jr., Vice President, Southern Cross Aviation," (2009) *LLC, Bus. & Com. Aviation*, at 88.

⁶⁴ See *First State Bank v. Hallett*, 722 S.W.2d 555, 555-56 (Ark. 1987) (outlining a default leading to the repossession of a debtor's truck as collateral to secure a loan); leads to a more straightforward assessment of the adequacy of the secured party's preservation and disposal of collateral. Daniel J. Bussel & Kenneth N. Klee, "Recalibrating Consent in Bankruptcy," (2009) 83 *Am. Bankr. L.J.* 663, 734 (arguing that bankruptcy law must become "transformative" amidst "The Great Recession of 2008-2009"); Anna Gelpert, "Financial Crisis Containment" (2009) 41 *Conn. L. Rev.* 1051, 1056 (asserting that traditional valuation tools become "inadequate" during times of deep economic decline).

⁶⁵ Valerie Combs, "The Law of Intermediated Securities: U.C.C. Versus UNIDROIT," (2006) 58 *Ala. L. Rev.* 399, 403-04 (discussing the risk minimization impetus behind the UCC and its amendments); Christian A. Johnson, "Derivatives and Rehypothecation Failure: It's 3:00 P.M., Do You Know Where Your Collateral Is?," (1997) 39

predictable economic cycles, do not ameliorate the valuation ambiguities that taint cases concerning the sale or conservation of unique collateral.

Against the above backdrop, this paper is intended to critically evaluate the legal framework for the use of collateral in Europe. To achieve this objective, the paper will analyse Article 9 of the Uniform Commercial Code in relations to economic recession. It also examines the legal impediments to efficient and effective use of collateral in Europe.

2.0 The Legal Framework for the Use of Collateral in Europe

In analysing the legal framework, efforts will be made in this segment to discuss the secured party collateral preservation duties, the standard of commercial reasonableness, the Importance of industry practices and economic factors, and bankruptcy implications all contained under Article 9 of the Uniform Commercial Code.

2.1 Article 9 of the Uniform Commercial Code and Economic Recession

Although the 2001 revisions of the UCC 1972 were aimed at creating uniformity and removing uncertainties in its application, the revisions have little or no impact on Article 9.⁶⁶ So, the pre-2001 case laws on section 9-504 remain relevant to the present analysis of section 9-610.⁶⁷

2.1.1 Secured Party Collateral Preservation Duties: Section 9-207

The key provision which is central to the creditor's self-help remedies upon the borrower's default is section 9-207. The section generally requires the creditor to take reasonable care of the asset after taking possession of it in order to preserve its value.⁶⁸ This task is usually difficult to comply with in cases of unique collateral like the large specialised machinery, or collateral that cannot be conveniently preserved or stored due to its physical nature.⁶⁹ More so, the party's duties becomes more complex and uncertain when financial assets are pledged as collateral and trigger section 9-207 as a result of repossession.⁷⁰

In some situations, a creditor breaches of section 9-207 by physically neglecting collateral after a secured party has possessed it upon default.⁷¹ The duty to preserve in this circumstance does not oblige the secured party to act in the best interest of the debtor while the secured party still possesses the collateral.⁷² The relationship between the duty of a secured party to preserve financial assets in his possession may have a direct bearing on assessing risk in international business transactions, where business decisions become more difficult to analyse when a third

Ariz. L. Rev. 949, 972-74 (identifying the role of Revised Article 9 provision including section 9-207, in minimizing lender risk); Aaron J. Wright, Note, "Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine," (2005) 26 *Cardozo L. Rev.* 2183, 2203-04 (arguing that risk minimization persists "even in the face of the economy's cyclical booms and depressions").

⁶⁶ Douglas W. Arner, Charles D. Booth, Paul Lejot, & Berry, n. 22.

⁶⁷ *Ibid.*

⁶⁸ U.C.C. § 9-207(a) (2005) (prescribing the duty of reasonable care for a creditor in possession of collateral upon default); see also Clark, *supra* note 2, at 170-71 (explaining repossession as a creditor self-help remedy under Article 9).

⁶⁹ See *Ray v. City Bank & Trust Co.*, 358 F. Supp. 630, 634 (S.D. Ohio 1973) (identifying hydraulic oil drilling machinery as pledged collateral).

⁷⁰ See *Chain Tech., Inc. v. Fleet Nat'l Bank*, 293 B.R. 299, 302-04 (Bankr. D. Conn. 2003) (explaining a complex consignment agreement between a debtor, a gold refiner, and creditors); *In re MJK Clearing, Inc.*, 286 B.R. 109, 115-16 (Bankr. D. Minn. 2002).

⁷¹ See, e.g., *United States v. Baus*, 834 F.2d 1114, 1116 (1st Cir. 1987) (noting that a creditor in possession of collateral failed to prevent vandalism and theft); *Ray*, 358 F. Supp. at 638 (finding "ample evidence" of a wrongful attachment and a breach of creditor duties with respect to repossessed machinery). 652 (N.Y. App. Div. 1991) (describing the creditor liability arising out of the sale of an electric company's equipment and its additional assets).

⁷² *Harris v. Key Bank Nat'l Ass'n*, 193 F. Supp. 2d 707, 716-17 (W.D.N.Y. 2002) (finding that the secured party bank was not obligated to act in the debtor's best interest in preserving the value of the promissory note pledged as collateral and reasoning that the bank did not have a primary fiduciary relationship to the debtor because "it would be absurd to think that Key Bank could never take its own interests into account").

party takes control of the collateral.⁷³ Besides, even though breach of the duty of preservation of a secured party's may be obvious, quantifying the damages may be difficult during bad economic conditions.⁷⁴ Disputes in respect of section 9-207 usually arise as a result of avoidable administrative error that easily had the secured party engaged in adequate oversight of the repossession process.⁷⁵ *Ray v. City Bank & Trust Co.*⁷⁶ presents an instance (describing a security agreement involving loan securities and additional liquid assets that declined in value after the 2001 stock market decline); *Segovia v. Equities First Holdings, LLC*, No. 06C-09-149 JRS, 2008 WL 2251218, at 5-8 (Del. Super. Ct. May 30, 2008) (outlining a pledged stock agreement serving as collateral and the effect of a subsequent sale on a security agreement); *Barclays Bank v. Heady Electric Co.*, 571 N.Y.S.2d 650, instance of a lack of secured party supervision, wherein the Sheriff's Office noticed and attached the wrong piece of machinery.⁷⁷ This mistake was not discovered for a period of one year, during which time the machinery was vandalised and eventually sold for scrap at a significantly reduced cost.⁷⁸ The *Ray* court held that the secured party totally failed "to act in a commercially reasonable manner."⁷⁹ Equally, in *United States v. Baus*,⁸⁰ the secured party negligently failed properly to take proper care of collateral under section 9-207 by leaving the collateral in an unsafe warehouse for almost two years.⁸¹ In contrast to *Ray*, the scope of the repossession was proper in *Baus*, yet the Economic Development Administration, the government agency that guaranteed the loan, allegedly breached its obligation to preserve the value of the collateral in its possession.⁸² The collateral in *Baus*'s case were the debtor's plant, equipment, machinery, and inventory situated in Puerto Rico.⁸³ The collateral in the debtor's plant was stolen and vandalised during the ensuing delay in selling the remaining inventory leading to an approximate 88% decline in the value of the debtor's inventory.⁸⁴ It was asserted that an administrative delay in foreclosing the property encouraged the vandalism and theft of the collateral). First Circuit court in *Baus* found it "likely" that the government guarantor had breached its duties under section 9-207 and numerous other provisions with respect to the collateral.⁸⁵ But, the First Circuit later reversed and remanded the case to the district court in order to completely determine the validity of the debtor's allegations that the secured party guarantor substantially breached its duty of commercial reasonableness.⁸⁶ *Baus* and *Ray* are two common main instances that arise when a

⁷³ See *Am. Express Int'l Banking Corp. v. Sabet*, 512 F. Supp. 463, 464-65, 468 (S.D.N.Y. 1980) (exploring the creditor's defense based on expropriation after the Iranian government expropriated the debtor corporation's assets as part of the 1979 revolution in Iran, which in part precipitated the creditor's claims).

⁷⁴ See *Stead v. United States*, 419 F.3d 944, 947-48 (9th Cir. 2005) (explaining that the IRS payment timing rules were relevant to the lost record of a payment against a tax levy); *Baus*, 834 F.2d at 1119-20 (recounting situations where, though damage determination was final, claims arising out of improper foreclosure proceedings remained at issue); *Segovia*, 2008 WL 2251218, at 17-18 (analyzing the damages calculation based on the decreased value of the pledged stock and the timing of default).

⁷⁵ See, e.g., *Stead*, 419 F.3d at 946 (summarizing the bank and the debtors' lack of adequate records of the transfer of funds to the IRS to satisfy a tax levy).

⁷⁶ *Ray*, 358 F. Supp. 630.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* (finding the bank liable for a breach of common law duties and obligations under section 9-207).

⁸⁰ *Baus*, 834 F.2d 1114.

⁸¹ *Ibid.*

⁸² *Ibid.* (summarizing the basis for the debtor's allegations of breach of the secured party's duties arising under sections 9-504, 9-207, 9-307, and 9-507 and stating that these claims arose out of the delay in foreclosing on the debtor's right of redemption upon a final sale of the collateral).

⁸³ *Ibid.*

⁸⁴ *Ibid.* at 1116-17 (explaining that \$100,000 of the debtor's inventory netted just \$12,131 after the expenses of the sale were taken into account following the delay).

⁸⁵ *Ibid.* at 1127-28.

⁸⁶ *Ibid.*

debtor becomes insolvent upon default or he enters bankruptcy proceedings.⁸⁷ Also, section 9-610 further defines the secured party's duties with respect to collateral.⁸⁸ What is of paramount importance in liquidation and disposal is the market conditions and valuation.

2.1.2 The Commercial Reasonableness Standard under Section 9-610

A detailed procedure of a creditor who possesses the collateral or secured party that wants to sell the collateral is provided for in Section 9-610.⁸⁹ Usually, a secured party auctions or sells the collateral in order to recover substantial part or all of his investment. This remedy was widely used due to an increased volume in debtor default during economic recession.⁹⁰ The courts have supported the ambiguous concept of commercial reasonableness.⁹¹ This commercial reasonableness standard highly depends on the facts and surrounding economic climate of a given situation.

Similarly, the sale of unique collateral presents another complexity in assessing, based on a creditor's violation of section 9-610, potential debtor damages.⁹² The reason is that the secured party creditor does not usually have the market expertise needed to sell unique collateral for an amount that will be reasonably fair to the debtor.⁹³ Also, intrinsically unique collateral does not usually have an established market leading to inadequate value that is indeed ascertainable through outside objective measures.⁹⁴ On the contrary, cases that involve the repossession and sale of motor vehicles hardly involve disputes as to whether the collateral sale price was reasonable because of the availability of reliable sale benchmarks.⁹⁵ Nevertheless, the bulk of

⁸⁷ The Bankruptcy Code and Article 9.

⁸⁸ Section 9-610.

⁸⁹ See U.C.C. S. 9-610).

⁹⁰ Jose Gabilondo, "Leveraged Liquidity: Bear Raids and Junk Loans in the New Credit Market," (2009) 34 *IOWA J. CORP. L.* 447-504 (observing the increase in corporate defaults following the recession beginning in mid-2007 coinciding with a "general worsening of the corporate sector"); Steven L. Schwarcz & Gregory M. Sergi, *Bond Defaults and the Dilemma of the Indenture Trustee*, (2008) 59 *Ala. L. Rev.* 1037, 1039-40 (summarising global trends in default rates in differing approaches to section 9-610)

⁹¹ See Benjamin N. Henszey, "A Secured Creditor's Right to Collect a Deficiency Judgment Under UCC Section 9-504: A Need to Remedy the Impasse," (1976) 31 *Bus. Law.* 2025, 2026-31 (outlining four approaches courts have taken toward creditors attempting to recoup deficiencies, including (1) entirely barring the deficiency; (2) allowing the deficiency but requiring the debtor to prove its loss; (3) presuming that, at a minimum, the collateral is worth the amount owed; and (4) making the deficiency subject to set-off under section 9-507(1)).

⁹² See *Segovia v. Equities First Holdings, LLC*, No. 06C-09-149-JRS, 2008 WL 2251218, at 2-3 (Del. Super. Ct. May 30, 2008) (detailing a complex pledged stock agreement as collateral and discussing the sale process); *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 417-18 (S.D.N.Y. 2002) (explaining a secured financing arrangement where debtors pledged over \$10.3 million in fine European artwork); *Poti Holding Co., v. Piggott*, 444 N.E.2d 1311, 1312 (Mass. App. Ct. 1983) (summarizing the defendant debtor's argument that there was no readily ascertainable fair market value for the insulating machinery serving as collateral). In *Piggott*, the court ultimately concluded that even though the collateral sale was not commercially reasonable, the secured party creditor sold the collateral at fair market value. *Piggott*, 444 N.E.2d at 1314.

⁹³ See *Davis*, 247 F. Supp. 2d at 420-21 (discussing the defendant debtors' allegations that the creditor undervalued fine decorative art prior to sale); *Piggott*, 444 N.E.2d at 1312 (identifying sources for determining fair market value, such as admissions of fact and party testimony).

⁹⁴ See *Davis*, 247 F. Supp. 2d at 420 (relying on deficiency owed on note rather than value of artwork collateral to establish outstanding debtor liability); *Chem. Bank v. Haseotes*, No. 93 Civ. 2846, 1994 WL 30476, at 1-2 (S.D.N.Y. Feb. 1, 1994) (summarizing the facts surrounding the foreclosure sale of ocean tankers pledged as collateral); *Whitney Nat'l Bank v. Air Ambulance*, 516 F. Supp. 2d 802, 809-10 (S.D. bondholder context); Moody's Investors Serv., Special Comment: Corporate Default And Recovery Rates, 1920-2006, at 4 (Feb. 2007), available at http://www.moody.com/cust/content/Content.ashx?source=StaticContent/Free%20Pages/Regulatory%20Affairs/Documents/default_and_recovery_rates_02_07.pdf accessed on 11 July, 2014 (predicting potential tenfold increase in cumulative default rates should recession continue to worsen).

⁹⁵ See, e.g., *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492, 494-95 (Iowa 1977) (noting that the sale price of vehicles pledged as collateral was not in dispute on appeal); *Consumer Fin. Corp. v. Reams*, 158 S.W.3d 792, 795 (Mo. Ct. App. 2005) (explaining that the only issue on appeal was the reasonableness of notice of sale of the automobile rather than the sale price); *Tex Star Motors, Inc. v. Regal Fin. Co.*, 246 S.W.3d 745, 751-52 (Tex.

case laws defining secured party duties under section 9-610 involve motor vehicles as collateral.⁹⁶

A wise secured party is required to fully comply with section 9-610, in situation where he does not reside near the location of the collateral, he delegates a third party to sell the collateral.⁹⁷ This method, though commercially effective, can increase liability for the secured party, particularly in situations where the creditor relies on local officials in foreign jurisdictions to seize the assets and conduct the auction.⁹⁸ In the case of *Chemical Bank v. Haseotes*,⁹⁹ involving the sale of four ocean tankers, presents an instance of this situation.¹⁰⁰ In *Haseotes*, the sale of vessels pledged as collateral allegedly violated local mortgage laws, section 9-610, and the security agreement between the parties.¹⁰¹ Given the mobility of the ocean vessels that were pledged as collateral, this provision of the security agreement exposed the creditor bank to increased legal and business risk.¹⁰² But, the U.S. District Court for the Southern District of New York focused on the market value of the collateral and the creditor bank's thorough process in advertising and conducting the sale in a foreign jurisdiction in finding that the creditor met its burden to demonstrate commercial reasonableness under section 9-610.¹⁰³ So, in spite of the inconsistent market conditions and the remote location of the collateral, the creditor bank was able to prevail on its motion to dismiss.¹⁰⁴ Likewise, in *Whitney National Bank v. Air Ambulance*,¹⁰⁵ the secured party found itself in a complex situation where, after the debtor had defaulted on its loan agreement, the debtor additionally violated the security agreement by not maintaining Federal Aviation Administration airworthiness certificates on the aircraft pledged as collateral.¹⁰⁶ The debtor therefore impaired the value of the collateral by its own conduct; the creditor, Whitney, responded in kind by informing the debtor of its intention to conduct a private sale of the collateral under the security agreement.¹⁰⁷ The creditor bank later exercised its right of foreclosure and hired an auctioneer to conduct the sale of the aircraft.¹⁰⁸ The auctioneer

App. 2008) (expounding on the basis for a creditor's commercial reasonableness in foreclosing on automobile inventory based on industry sales practices). In *Betts*, the court relied on an Iowa statute adopting section 9-610 (formerly section 9-504) in making its determination as to the commercial reasonableness of the creditor's foreclosure of the debtor's right of redemption through sale. *Betts*, 251 N.W.2d at 496 (citing IOWA CODE § 554.9504(3)).

⁹⁶ See, for instance *First State Bank v. Hallett*, 722 S.W.2d 555 (Ark. 1987); *Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244 (Del. 2009); *Betts*, 251 N.W.2d 492; *Camden Nat'l Bank v. St. Clair*, 309 A.2d 329 (Me. 1973); *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978).

⁹⁷ See *Whitney Nat'l Bank*, 516 F. Supp. 2d at 809-10 (describing the process wherein a creditor advertised the sale of aircraft collateral in trade publications and responded to inquiries with bid packages); see also *Piggott*, 444 N.E.2d at 1312-13 (laying out factors relevant to the commercial reasonableness determination regarding an auctioneer's sale of equipment collateral). The creditor in *Piggott*, like the creditor in *Whitney National Bank*, relied on the process of advertising in trade journals and responding to bids via correspondence where a live public auction of large unwieldy collateral was not possible. *Piggott*, 444 N.E.2d at 1312-13.

⁹⁸ *Haseotes*, 1994 WL 30476, at 2 (outlining a process requiring a creditor to rely on the South African Court Registrar to conduct a foreclosure sale on ocean tankers).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* (holding that the plaintiff creditor met its burden in showing commercial reasonableness despite the debtor's contentions that the notice of and venue for the sale were insufficient).

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* (describing the Greek and South African courts' involvement in execution of a foreclosure sale).

¹⁰³ *Ibid.* (concluding that the plaintiff bank met its burden to establish commercial reasonableness in the disposal and sale of the collateral upon default).

¹⁰⁴ *Ibid.* (finding for the plaintiff bank on all counts).

¹⁰⁵ *Whitney Nat'l Bank v. Air Ambulance*, 516 F. Supp. 2d 802 (S.D. Tex. 2007).

¹⁰⁶ *Ibid.* at 806-08. See also Anthony G. Eonas And Erin M. Secord "Exploring the Creditor's Duty of Reasonable Care Under UCC Article 9 Amidst Recession and Revision" (2010) 89 *Oregon Law Review*, 623-644.

¹⁰⁷ *Ibid.* at 809.

¹⁰⁸ *Ibid.* at 809-10.

advertised the sale in four aviation trade journals and sent out over 500 e-mails and 100 bid packages to potential buyers.¹⁰⁹ The auction produced 22 bids for the various aircraft, yet the debtor's deficiency remained at over \$4.8 million after the sales had taken place.¹¹⁰ The U.S. District Court for the Southern District of Texas relied on the sturdiness of the auction process to grant Whitney's motion for partial summary judgment on the remaining deficit.¹¹¹ The cases of Haseotes and Whitney National Bank therefore underscores the importance of engaging in a robust auction process for unique collateral under section 9-610 in order to minimise risk in light of mitigating circumstances and the potential for market uncertainty. An analysis of case laws therefore shows that despite the fact that Article 9 was intended to provide self-help remedies for secured parties upon the debtor's breach of the security agreement, there is paucity of case laws.¹¹² More so, judicial decisions which interpret sections 9-207 and 9-610 largely depends on the facts and circumstances of each case. The decisions are mostly dependent on the nature of the collateral and the secured party's behaviour when compared with standard practices of the industry.¹¹³ With regard to unique collateral like ocean tankers, oil rigs, and airplanes, it seems difficult to define the industry practices due to the limited size of the market for the kind of items.¹¹⁴ Yet, courts are required to take into account the relevant industrial practices in determining whether the secured parties properly preserved collateral and behaved in a commercially reasonable way in selling the collateral.¹¹⁵ The economic recession presents additional dimension to identifying patterns and trends in the case law through its effect on the valuation of collateral.¹¹⁶ Nevertheless, courts do not generally make clear references to economic elements in their thinking beyond entrenched legal rules and guidelines for proving damages.¹¹⁷ The provisions that follow support this trend and show the features of the collateral, as against external economic forces, drive determinations of commercial reasonableness under sections 9-207 and 9-610.¹¹⁸ Analysis of section 9-207 cases from the perspective of economic factors and industrial practice shows that cases can be divided into: pre-2001 cases and post-2001 cases.¹¹⁹ This grouping is

¹⁰⁹ *Ibid.* at 809.

¹¹⁰ *Ibid.* at 809–10.

¹¹¹ *Ibid.* at 817.

¹¹² See Berkley Clark, "Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default," (2000) 4 *N.C. Banking Inst.* 129, 136–39, 170–71 (exploring the self-help remedies available to secured parties under Article 9); Livingston, Margit Livingston, *Survey of Cases Decided Under Revised Article 9: There's Not Much New Under the Sun*, 2 *DePaul Bus. & Com. L.J.* 47, 78–79, 92–95 (2003) 61 (observing that "courts have decided just a few cases under Revised Article 9 that deal directly with attachment and perfection issues").

¹¹³ See, e.g., *Chem. Bank v. Haseotes*, No. 93 Civ. 2846, 1994 WL 30476, at 4 (S.D.N.Y. Feb. 1, 1994) (concluding that the secured party conformed with acceptable industry practice in carrying out the auction and sale process); *Tex Star Motors, Inc. v. Regal Fin. Co.*, 246 S.W.3d 745, 751–52 (Tex. App. 2008) (relying on automobile sales industry practices to assess the commercial reasonableness of the secured party's conduct); *Whitney Nat'l Bank*, 516 F. Supp. 2d at 817 (comparing the secured party's conduct to industry practices in selling the aircraft collateral).

¹¹⁴ See *Haseotes*, 1994 WL 30476, at 2 (summarizing the facts leading up to the default on a loan secured by ocean tankers); *Ray v. City Bank & Trust Co.*, 358 F. Supp. 630, 634 (S.D. Ohio 1973) (describing the oil-drilling machinery attached as collateral); *Whitney Nat'l Bank*, 516 F. Supp. 2d at 806–08 (explaining that the security agreement involved aircraft pledged as collateral).

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ See *United States v. Baus*, 834 F.2d 1114, 1125 (1st Cir. 1987) (describing the creditor's failure to safeguard collateral in its possession); *Whitney Nat'l Bank*, 516 F. Supp. 2d at 817 (comparing the creditor's sale of aircraft to industry practices).

¹¹⁸ See *infra* Part II.A–B (observing patterns in case law and noting courts' emphasis on industry practices and the nature of collateral).

¹¹⁹ The section 9-207(a) cases decided prior to 2001 in Group One include *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173, 174–75 (1st Cir. 1989) (summarizing a secured financing agreement where the light fixture store served

adequately supported by.¹²⁰ The economic contextual facts based on the post-9/11 downturn in 2001 and 2002 and the "Great Downturn" of 2008 and 2009 supports this division by the adopting the Revised Article 9 in July 2001.¹²¹ Nonetheless cases decided before 2001 may have been decided during a period of economic recession, the international implications of the recessions, together with the more and more complex structure of secured financing supports this classification.¹²²

One more important dimension to section 9-207(a) case law is the different interpretation given to commercial reasonableness for cases that involved unique personal property, like specialised manufacturing equipment, and cases in which financial instruments were used as collateral.¹²³ But only two post-2001 cases involved financial instruments, as nearly all of the cases decided prior to 2001 involved more tangible, unique collateral.¹²⁴ This may show the larger trend toward a growing role of complex financial assets in secured transactions.¹²⁵ The financial assets can experience wide variation in their value, during times of economic recession, as in *Segovia* and *Harris* where mismanagement of financial assets pledged as collateral in part resulted to the lawsuits.¹²⁶ In both cases, it can be said that the timing of

as collateral), *Baus*, 834 F.2d at 1116 (describing a security agreement involving the debtor's factory in Puerto Rico), *American Express International Banking Corp. v. Sabet*, 512 F. Supp. 463, 464 (S.D.N.Y. 1980) (explaining the facts of a case in which the Iranian government expropriated a debtor's corporate assets as collateral), *Ray*, 358 F. Supp. at 634 (detailing the attachment process for oil rig collateral), and *Barclays Bank v. Heady Electric Co.*, 571 N.Y.S.2d 650 (N.Y. App. Div. 1991) (assessing a secured party's liability arising out of the sale of electric company assets).

¹²⁰ See Bussel & Klee, supra note (defining the parameters of the "Great Recession" to be 2008 to 2009).

¹²¹ See, e.g., Lucas, (observing that all fifty states adopted the Revised Article 9 in July 2001); Livingston, at 47–49 (touting the advantages of the 2001 revisions to Article 9). See also Lawrence R. Ahern, III, "Workouts" Under Revised Article 9: A Review of Changes and Proposal for Study," (2001) 9 AM. Bankr. Inst. L. Rev. 115, 116–18 (exploring the impact of the 2001 Article 9 revisions).

¹²² See notes 8–10, 14 and accompanying text (chronicling the effects of the recession on valuation and secured transactions).

¹²³ Compare *Baus*, 834 F.2d at 1116 (explaining the scope of a security agreement pertaining to inventory, equipment, and a plant as collateral), and *Ray*, 358 F. Supp. at 634 (parsing through facts involving attachment of oil rigs as collateral), with *Segovia*, 2008 WL 2251218, at 5–8 (delving into complex details behind the financial assets serving as collateral for various loan agreements), and *In re MJK Clearing, Inc.*, 286 B.R. at 115–16 (detailing the terms of a multifaceted transaction where loan securities and other liquid assets served as collateral).

¹²⁴ See cases such as *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173, 174–75 (1st Cir. 1989) (summarizing a secured financing agreement where the light fixture store served as collateral), *Baus*, 834 F.2d at 1116 (describing a security agreement involving the debtor's factory in Puerto Rico), *American Express International Banking Corp. v. Sabet*, 512 F. Supp. 463, 464 (S.D.N.Y. 1980) (explaining the facts of a case in which the Iranian government expropriated a debtor's corporate assets as collateral), *Ray*, 358 F. Supp. at 634 (detailing the attachment process for oil rig collateral), and *Barclays Bank v. Heady Electric Co.*, 571 N.Y.S.2d 650 (N.Y. App. Div. 1991) (assessing a secured party's liability arising out of the sale of electric company assets). The section 9-207(a) Group Two cases, which were decided after 2001, include *Stead v. United States*, 419 F.3d 944, 947–48 (9th Cir. 2005) (explaining a secured transaction involving an IRS tax lien), *Harris v. Key Bank National Association*, 193 F. Supp. 2d 707, 716–17 (W.D.N.Y. 2002) (exploring the secured party's duty to preserve the value of the promissory note collateral), *Chain Technology, Inc. v. Fleet National Bank (In re Handy & Harman Refining Group, Inc.)*, 293 B.R. 299, 302–04 (Bankr. D. Conn. 2003) (summarizing a consignment transaction where the debtor gold refiner's inventory and assets served as collateral), *Ferris, Baker Watts, Inc. v. Stephenson (In re MJK Clearing, Inc.)*, 286 B.R. 109, 115–16 (Bankr. D. Minn. 2002) (describing the collateral as loan securities and other liquid assets), and *Segovia v. Equities First Holdings, LLC*, No. 06C- 09-149-JRS, 2008 WL 2251218, at 5–8 (Del. Super. Ct. May 30, 2008) (identifying a pledged stock agreement as collateral). (identifying only two cases, *Stead* and *Chain Technology*, involving tangible personal assets in Group Two (post-2001 cases)).

¹²⁵ See generally Livingston, at 61, 94–95 (asserting that the 2001 revisions to Article 9 had a minimal observable impact on case law).

¹²⁶ See *Harris v. Key Bank Nat'l Ass'n*, 193 F. Supp. 2d 707, 710 (W.D.N.Y. 2002) (explaining the basis of the plaintiff's claim that the secured party impaired the value of promissory note collateral in violation of section 9-207(a)); *Segovia*, 2008 WL 2251218, at 9 (summarizing the basis of the plaintiff's claims against a secured party in conjunction with alleged mismanagement of the financial assets pledged as collateral).

attachment and secured party takeover of the collateral was critical to the case outcome.¹²⁷ Despite the courts lengthy discussion on the methods for assessing economic damages and defining the secured party's rights to transfer the collateral upon default, the courts did not make reference to larger economic conditions in making its holding.¹²⁸ This shows that the collateral type is more critical to the outcome of an Article 9 case than the economic situation in which the case arose.¹²⁹ Yet, the state of the overall economy in which the transaction arose is relevant notwithstanding the importance of the individual features of the collateral in determining whether the secured party in possession of the collateral complied with its duties under section 9-207(a).¹³⁰

2.1.3 The Importance of Industry Practices and Economic Factors in Section 9-610 Cases
In analysing the significance of industrial practices, and economic factors, section 9-610 cases can be divided into: pre-2001 and post-2001.¹³¹ In disparity to the section 9-207 cases, claims which involve alleged section 9-610 breaches with regard to the possession and sale of automobiles constitute a considerable number of relevant section 9-610 cases.¹³² Due to the well-established market nature of automobiles and easy ascertainable pricing, this classification of cases may not be considered because of the inherent differences between cases involving unique collateral and those of automobiles.¹³³

¹²⁷ See Harris, 193 F. Supp. 2d at 710 (recounting the debtor's allegations that the timing and nature of a transfer of promissory note collateral constituted a violation of the secured party's duties); Segovia, 2008 WL 2251218, at 18-19 (detailing the basis of a conversion claim based on improper control and preservation of collateral).

¹²⁸ See Harris, 193 F. Supp. 2d at 715-18 (applying relevant provisions of Article 9 to define the secured party's rights in possession of collateral without discussing economic conditions); Segovia, 2008 WL 2251218, at 23-24 (engaging in a lengthy discussion of direct and punitive damages without consideration of the larger economic context).

¹²⁹ See Harris, 193 F. Supp. 2d at 717-18 (finding that the secured party bank did not violate its duties with respect to promissory note collateral as a result of assignment); Segovia, 2008 WL 2251218 (examining the value of various stock assets in calculating damages).

¹³⁰ See *Chem. Bank v. Haseotes*, No. 93 Civ. 2846, 1994 WL 30476, at 4 (S.D.N.Y. Feb. 1, 1994) (discussing the absence of a secured party's duty to hold collateral until economic conditions improved in exercising the right of possession and disposal and stating that "[the secured party] was under no duty to risk throwing good money after bad in the hope that a previously volatile market would rebound to the benefit of Defendants"); supra notes 8-10, 14 and accompanying text (identifying secondary sources emphasizing the importance of larger economic conditions on valuation in transactions involving secured financing).

¹³¹ The cases decided prior to 2001 in the section 9-610 Group One include *Haseotes*, 1994 WL 30476, at 2 (identifying the collateral as oil tankers located in Greece and South Africa), and *Poti Holding Co. v. Piggott*, 444 N.E.2d 1311, 1312 (Mass. App. Ct. 1983) (explaining that insulating machinery served as collateral). The section 9-610 Group Two cases consist of *Whitney National Bank v. Air Ambulance*, 516 F. Supp. 2d 802, 809-10 (S.D. Tex. 2007) (exploring whether a post-default sale of aircraft pledged as collateral was commercially reasonable), and *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 417-18 (S.D.N.Y. 2002) (noting that the collateral at issue consisted of \$10.3 million in European artwork).

¹³² See for instance *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492, 494-95 (Iowa 1977) (noting that the sale price of vehicles pledged as collateral was not in dispute on appeal); *Consumer Fin. Corp. v. Reams*, 158 S.W.3d 792, 795 (Mo. Ct. App. 2005) (explaining that the only issue on appeal was the reasonableness of notice of sale of the automobile rather than the sale price); *Tex Star Motors, Inc. v. Regal Fin. Co.*, 246 S.W.3d 745, 751-52 (Tex. App. 2008) (expounding on the basis for a creditor's commercial reasonableness in foreclosing on automobile inventory based on industry sales practices). In *Betts*, the court relied on an Iowa statute adopting section 9-610 (formerly section 9-504) in making its determination as to the commercial reasonableness of the creditor's foreclosure of the debtor's right of redemption through sale. *Betts*, 251 N.W.2d at 496 (citing IOWA CODE

554.9504(3)) (identifying section 9-610 cases where automobiles were pledged as collateral). *First State Bank v. Hallett*, 722 S.W.2d 555 (Ark. 1987); *Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244 (Del. 2009); *Betts*, 251 N.W.2d 492; *Camden Nat'l Bank v. St. Clair*, 309 A.2d 329 (Me. 1973); *Wilkerson Motor Co. v. Johnson*, 580 P.2d 505 (Okla. 1978).

¹³³ *Ibid.*

Usually, section 9-610 automobile cases relate to claims of inadequate notice, which, though relevant to a secured party's duties under section 9-610, regularly has little to do with economic situations.¹³⁴ Unlike the two classifications of section 9-207(a) cases, which showed different nature of the collateral in terms of uniqueness, both classifications of section 9-610 cases relate to personal property pledged as collateral that lacks a true public market.¹³⁵ The collateral in both section 9-610 classifications ranges from airplanes to rare artwork, specialised machinery, and ocean tankers.¹³⁶ Besides, the section 9-610 cases depend largely on an analysis of industrial practices in determining whether the secured party's sale was really commercially reasonable.¹³⁷ Although application of industrial practices to selling large items such as airplanes and ocean tankers may lead to a well-considered court decision in commercial reality, this method can simply undermine the UCC intended certainty benefits that the UCC.¹³⁸ Moreover, risk and transactional costs tend to increase when certainty is compromised in business transactions.¹³⁹ Thus, this ancillary effect of courts' attempts to deliver well-thought decisions apposite for each case really makes the duty of commercial reasonableness in the section 9-610 cases fuzzy and unpredictable.¹⁴⁰ More so, explanation on the right of set-off in

¹³⁴ See, for instance *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492, 494-95 (Iowa 1977) (explaining that the reasonableness of the sales price of the vehicle collateral was not at issue); *Consumer Fin. Corp. v. Reams*, 158 S.W.3d 792, 795 (Mo. Ct. App. 2005) (narrowing the issue on appeal to the reasonableness of the notice given to the debtor prior to the sale); *Tex Star Motors, Inc. v. Regal Fin. Co.*, 246 S.W.3d 745, 751-52 (Tex. App. 2008) (discussing the statutory requirement of commercial reasonableness).

¹³⁵ Compare cases such as *Lamp Fair, Inc. v. Perez-Ortiz*, 888 F.2d 173, 174-75 (1st Cir. 1989) (categorizing section 9-207(a) cases based on date and observing differences in the types of collateral involved) with cases such as *Greece and South Africa*, and *Poti Holding Co. v. Piggott*, 444 N.E.2d 1311, 1312 (Mass. App. Ct. 1983) (explaining that insulating machinery served as collateral). The section 9-610 Group Two cases consist of *Whitney National Bank v. Air Ambulance*, 516 F. Supp. 2d 802, 809-10 (S.D. Tex. 2007) (exploring whether a post-default sale of aircraft pledged as collateral was commercially reasonable), and *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 417-18 (S.D.N.Y. 2002) (noting that the collateral at issue consisted of \$10.3 million in European artwork) (grouping section 9-610 cases involving tangible personal property pledged as collateral).

¹³⁶ See cases like *Greece and South Africa*, and *Poti Holding Co. v. Piggott*, 444 N.E.2d 1311, 1312 (Mass. App. Ct.

1983) (explaining that insulating machinery served as collateral). The section 9-610 Group Two cases consist of *Whitney National Bank v. Air Ambulance*, 516 F. Supp. 2d 802, 809-10 (S.D. Tex. 2007) (exploring whether a post-default sale of aircraft pledged as collateral was commercially reasonable), and *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 417-18 (S.D.N.Y. 2002) (noting that the collateral at issue consisted of \$10.3 million in European artwork).

¹³⁷ See *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 422 (S.D.N.Y. 2002) (citing the customary sales procedures in auctioning artwork as relevant to assessing commercial reasonableness under section 9-610); *Chem. Bank v. Haseotes*, No. 93 Civ. 2846, 1994 WL 30476, at 4 (S.D.N.Y. Feb. 1, 1994) (relying on industry practice in auctioning tankers in finding that the secured party carried out a reasonable sale); *Poti Holding Co. v. Piggott*, 444 N.E.2d 1311, 1312-13 (Mass. App. Ct. 1983) (focusing on "the normal commercial practices in disposing of collateral of this type" in assessing commercial reasonableness of a sale under section 9-610); *Whitney Nat'l Bank v. Air Ambulance*, 516 F. Supp. 2d 802, 817 (S.D. Tex. 2007) (considering the secured party's conduct in a sale of aircraft collateral in comparison to industry practice).

¹³⁸ See *Piggott*, 444 N.E.2d at 1313 (observing "the lack of precision" in defining commercial reasonableness under section 9-610).

¹³⁹ See *Hotels' Debt-Service Coverage, Value to Decline in 2009*, MORTGAGE BANKING, Mar. 2009, at 89, 89-90 (examining the decline in the hospitality industry amidst a larger economic decline); Hugh Larratt-Smith & Jim Gagan, "The Bicycle Theory of Management: Things Sure Get Wobbly When the Bicycle Slows Down," 2009 *Secured Lender*, at 26-27 (illustrating the impact of the economic decline through the record decreases in the commodities market); Leonard I. Nakamura, "Lessons on Lending and Borrowing in Hard Times," *Bus. Rev.*, July/Aug. 1991, at 13, 16 (recounting the negative impact on valuation of unique collateral, such as oil rigs, during the recession of the late 1980s).

¹⁴⁰ Compare *Piggott*, 444 N.E.2d at 1312 (affirming that the plaintiff secured party's conduct in auctioning wiring machinery was not commercially reasonable despite the robust public auction process), with *Haseotes*, 1994 WL 30476, at 2, 4 (concluding that the sale of collateral was commercially reasonable despite auctions in disparate

the 2001 revisions to Article 9 have had little or no impact on section 9-610 cases.¹⁴¹ Theoretically, the common law right of set-off, together with a focus on industrial practices, produce case decisions that are well aligned with commercial realities.¹⁴² Another self-help device available to parties in disputes over collateral valuation or the effect of the secured party's breach of the duty of commercial reasonableness is the right of set-off.¹⁴³ There are however few cases of parties using the right of set-off as a self-help remedy when there is a breach of the secured party's duties under section 9-610.¹⁴⁴ Nevertheless, given the dramatic upsurge in bankruptcy cases in the wake of economic turmoil, self-help remedies will continue to be relevant as parties seek to minimize the costs of transaction and litigation.¹⁴⁵ Lastly, more trends may emerge to create more certainty in the jurisprudence of this area of the law due to the continued dramatic increase of cases amidst debtor defaults concerning intricate collateral assets.¹⁴⁶

2.1.4 Bankruptcy Implications of Section 9-207 and Section 9-610 Case

There are common bankruptcy cases in which debtor claims against creditors in possession of collateral.¹⁴⁷ The reason is perhaps because bankruptcy usually triggers a default of a security

locations such as South Africa and Greece). In *Piggott*, the auctioneer notified over 200 parties of the sale of the equipment collateral and placed advertisements in several newspapers, including *The Wall Street Journal*. *Piggott*, 444 N.E.2d at 1312-13. Similarly, in *Haseotes* the auctioneer complied with the generic advertising requirements of a public sale under section 9-610 but secured only twenty bidders for the ocean tankers, and this sale was deemed commercially reasonable. *Haseotes*, 1994 WL 30476, at 2, 4.

¹⁴¹ See *Livingston*, supra 102 at 84-85 nn.305-06 (observing that the former Article 9 left open issues of set-off as a self-help remedy, which were closed by the 2001 revisions);

¹⁴² See cases such as *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 422 (S.D.N.Y. 2002) (citing the customary sales procedures in auctioning artwork as relevant to assessing commercial reasonableness under section 9-610); *Chem. Bank v. Haseotes*, No. 93 Civ. 2846, 1994 WL 30476, at 4 (S.D.N.Y. Feb. 1, 1994) (relying on industry practice in auctioning tankers in finding that the secured party carried out a reasonable sale); *Poti Holding Co. v. Piggott*, 444 N.E.2d 1311, 1312-13 (Mass. App. Ct. 1983) (focusing on "the normal commercial practices in disposing of collateral of this type" in assessing commercial reasonableness of a sale under section 9-610); *Whitney Nat'l Bank v. Air Ambulance*, 516 F. Supp. 2d 802, 817 (S.D. Tex. 2007) (identifying cases where the assessment of commercial reasonableness by comparison to industry standards was central to the holding).

¹⁴³ See U.C.C. S. 9-109(d)(10) (2000) (clarifying that Article 9 does not apply to the common law right of set-off but creating two exceptions: (1) section 9-340 applies to recoupment against deposit accounts, and (2) section 9-404 applies to defenses or claims of the account debtor).

¹⁴⁴ See *Am. Express Int'l Banking Corp. v. Sabet*, 512 F. Supp. 463, 468, 471 (S.D.N.Y. 1980) (discussing the application of the right of set-off in a lawsuit following an expropriation of collateral by the Iranian government); *Marine Midland Bank v. CMR Indus., Inc.*, 559 N.Y.S.2d 892, 898 (N.Y. App. Div. 1990) (construing the right of set-off as applicable to damages from an improper disposal of collateral). Valerie Combs, "The Law of Intermediated Securities: U.C.C. Versus UNIDROIT," (2006) 58 *Ala. L. Rev.* 399, 403-04 (discussing the risk minimization impetus behind the UCC and its amendments); Christian A. Johnson, "Derivatives and Rehypothecation Failure: It's 3:00 P.M., Do You Know Where Your Collateral Is?," (1997) 39 *Ariz. L. Rev.* 949, 972-74 (identifying the role of Revised Article 9 provisions, including section 9-207, in minimizing lender risk); Aaron J. Wright, "Note, Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine," (2005) 26 *Cardozo L. Rev.* 2183, 2203-04 (arguing that risk minimization persists "even in the face of the economy's cyclical booms and depressions")

¹⁴⁵ See Valerie Combs, "The Law of Intermediated Securities: U.C.C. Versus UNIDROIT," (2006) 58 *Ala. L. Rev.* 399, 403-04 (discussing the risk minimization impetus behind the UCC and its amendments); Christian A. Johnson, n. 134 (identifying the role of Revised Article 9 provisions, including section 9-207, in minimizing lender risk); Aaron J. Wright, *Ibid* (arguing that risk minimization persists "even in the face of the economy's cyclical booms and depressions") and accompanying text (analyzing valuation and business risk amidst periods of economic decline and increased bankruptcy filings).

¹⁴⁶ See *Piggott*, 444 N.E.2d at 1313 (observing "the lack of precision" in defining commercial reasonableness under section 9-610).

¹⁴⁷ See *Chain Tech., Inc. v. Fleet Nat'l Bank*, 293 B.R. 299, 306 (Bankr. D. Conn. 2003) (denying the debtor's allegation that the secured party failed to preserve the collateral post-petition under section 9-207); *In re MJK Clearing, Inc.*, 286 B.R. 109, 121-22 (Bankr. D. Minn. 2002) (finding that the commingling of fungible assets did not violate the secured party's section 9-207(a) obligations in bankruptcy).

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agreement, which then enables the creditor to use the self-help remedy of section 9-207, provided that such action is permissible under the Bankruptcy Code.¹⁴⁸ Therefore, any creditor that intends to exercise its right of repossession of collateral must take into account not only provisions of Article 9 exceptions to section 9-207 but also the provisions of the Bankruptcy Code that might bar or be relevant to the action.¹⁴⁹ Moreover, in bankruptcy proceedings, valuation is usually the hallmark of the battle between secured and unsecured parties.¹⁵⁰ Accordingly, interpreting the reasonable duty of preservation under section 9-207 may take a center stage.¹⁵¹ In fact, a secured party's conduct in preserving collateral may easily lead to the payment or nonpayment of parties with lesser priority when the bankruptcy estate is eventually liquidated.¹⁵² Also, given the predisposition of courts to compare the sale price to the fair market value as one of the section 9-610 factors, valuation becomes a vital consideration in determining what amounts to commercial reasonableness under section 9-610.¹⁵³ Hence, a difference in valuation techniques can simply lead to the near full payment of secured creditors to the disadvantage of unsecured creditors.¹⁵⁴ Although issues of a consideration of priority falls beyond the scope of this analysis, a secured party's duty under section 9-610 has broad implications for the bankruptcy estate because the sale of collateral fixes its value and permits potential payments to creditors.¹⁵⁵ The interdependent nature of secured transactions and the Bankruptcy Code is demonstrated in disputes arising from Article 9 which are commonly decided as part of bankruptcy proceedings.¹⁵⁶

¹⁴⁸ See Barkley Clark, "Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default," (2000) 4 *N.C. Banking Inst.* 129, 136–39, 145–46 (explaining the self-help provisions of section 9-207, including the secured party's duty of reasonable care with respect to collateral); Ahern, n. 111 (explaining the interconnectedness between Article 9 and the Bankruptcy Code in post-default remedies).

¹⁴⁹ See Ahern, n. 111 (connecting Article 9 to the Bankruptcy Code).

¹⁵⁰ See Keith Sharfman, "Valuation Averaging: A New Procedure for Resolving Valuation Disputes," (2003) 88 *Minn. L. Rev.* 357, 372–77 and accompanying text (discussing the critical importance of valuation in bankruptcy).

¹⁵¹ See *Chain Tech., Inc. v. Fleet Nat'l Bank*, 293 B.R. 299, 306 (Bankr. D. Conn. 2003) (denying the debtor's allegation that the secured party failed to preserve the collateral post-petition under section 9-207); *In re MJK Clearing, Inc.*, 286 B.R. 109, 121–22 (Bankr. D. Minn. 2002) (finding that the commingling of fungible assets did not violate the secured party's section 9-207(a) obligations in bankruptcy). accompanying text (identifying cases where debtors claimed that secured parties breached the duty of reasonable care under section 9-207).

¹⁵² Ahern, n.111, at 117. Understandably, creditors of bankrupt debtors often feel like restaurant patrons who not only hate the food, but think the portions are too small. To press the analogy, they also don't like having to wait in line for a table, possibly being seated only to find out the kitchen has just closed. The bankruptcy court is a little like a soup kitchen, ladling out whatever is available in ratable portions to those standing in line; nonetheless, scarcity begets innovation in the hungry creditor's quest to get a little more than the next fellow. *Id.* (quoting *In re Omegas Grp., Inc.*, 16 F.3d 1443, 1445 (6th Cir. 1994)).

¹⁵³ U.C.C. Section 9-610(b) (2005) (requiring commercial reasonableness in "[e]very aspect of a disposition of collateral"). Though sales price alone is insufficient to establish commercial reasonableness under section 9-610, "a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable." U.C.C. § 9-610 cmt. 10 (2002).

¹⁵⁴ See Ahern, n.111, (painting an analogy illustrating the scarcity of resources in bankruptcy).

¹⁵⁵ See Keith Sharfman, "Valuation Averaging: A New Procedure for Resolving Valuation Disputes," (2003) 88 *Minn. L. Rev.* 357, 372–77 (explaining the intricacies of new valuation techniques relevant to bankruptcy proceedings); Marjorie Chertok & Warren E. Agin, "Restart.com: Identifying, Securing and Maximizing the Liquidation Value of Cyber-Assets in Bankruptcy Proceedings," (2000) 8 *Am. Bankr. Inst. L. Rev.* 255, 263–65 (emphasizing the importance of consistent valuation in assessing intangible assets such as intellectual property).

and accompanying text (emphasizing the importance of valuation in bankruptcy proceedings).

¹⁵⁶ See *Chain Tech., Inc. v. Fleet Nat'l Bank*, 293 B.R. 299, 306 (Bankr. D. Conn. 2003) (denying the debtor's allegation that the secured party failed to preserve the collateral post-petition under section 9-207); *In re MJK Clearing, Inc.*, 286 B.R. 109, 121–22 (Bankr. D. Minn. 2002) (finding that the commingling of fungible assets did not violate the secured party's section 9-207(a) obligations in bankruptcy) and accompanying text (analyzing bankruptcy cases involving claims of a breach of a secured party's duty under Article 9).

3.0 Legal Impediments to the Efficient and Effective Use of Collateral

It can be said from the above that there are quite a lot of legal obstacles to the effective and efficient use of collateral amongst financial market participants, operating on a transnational basis. Some of the legal impediments are enumerated below:

- a) Cumbersome and unrealistic rules for creating, "perfecting", maintaining and enforcing a pledge or other form of security interest in securities or cash transferred as collateral ("pledge collateral"). In many jurisdictions, there are legal restrictions on the use of pledge collateral by a holder of that collateral, including the possibility that any such use of the collateral endangers the security interest;¹⁵⁷
- b) There are uncertainties concerning the enforceability of title transfer based collateral arrangements ("title transfer collateral"), including the risk of the arrangement being recharacterised as a form of security interest (that is, as pledge collateral);¹⁵⁸
- c) There are also uncertainties under existing conflict of laws rules as to the substantive law that applies to a collateral arrangement for purposes of creation, perfection, maintenance and enforcement of the arrangement, including the possibility that the laws of different jurisdictions could apply for different purposes and the possibility of conflict and inconsistency amongst those jurisdictions as to which law applies;¹⁵⁹
- d) The title transfer of collateral arrangements is vulnerable to the rights of third parties, such as attaching creditors of the collateral giver and assignees;¹⁶⁰
- e) With regard to collateral arrangements that are subject to daily adjustment on a market-to-market basis, there is an uncertainty as to the enforceability of "top-up" deliveries of collateral due to preference and related rules of insolvency.¹⁶¹

4.0 Conclusion

From the foregoing discussion, the legal frameworks on the use of collateral in many jurisdictions of Europe are inadequate owing to its complexity, inconsistency, impracticability. This is particularly the case as the Uniform Commercial Code has been adopted in Europe. This has accordingly led to uncertainties concerning the effectiveness of the intended protection. The resultant effect of this are increased risks and costs, and inefficiency in global financial markets. So, given the complex, diverse and uncertain nature of many national legal frameworks on creditors' rights, property, contract and insolvency, States need to take more practicable steps in order to reform their laws thereby ensuring an efficient, effective and justly balanced legal framework for collateral arrangements.

In Europe, despite the seeming straight-forwardness of the asset path of sections 9-207 and 9-610 of the UCC, the duties of reasonable care and commercial reasonableness in disposal remain ambiguous. Precisely, these duties, with regard to seizure, default, storage, and sale or use, largely depend on the nature of the collateral. The different categorisation of asset requires a lot of skills, expertise, knowledge, and facilities to avert secured party liability. This concern is mostly obvious with regard to debt resolution based on a breach of the secured party's duty of reasonable care or commercial reasonableness. Also, the corporate Attorney or legal expert's risks assessment is increasingly complex due to the intricacy of considerations in analysing sections 9-207 and 9-610 cases, with regard to the collateral type and the potential for economic situations to influence the outcome of the case. Although the case law on the UCC provisions is in its relative embryonic stages, it can be said that the nature of the collateral itself, coupled

¹⁵⁷ For details on this, see International Swaps and Derivatives Association Inc., Collateral Law Reform Group, *Collateral Arrangements in European Financial Markets: The Need for National Law Reform*, 2000, at 2-3. Available at: www.isda.org/c_and_a/pdf/NeedLawReform.pdf accessed on 11 July, 2014.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

with industrial practices, form the foundation of the many cases in this area. So, economic circumstances take on an ancillary importance. The specific nature of secured transactions concerning creditor possession and the sale of collateral upon default will certainly persist; yet as more cases arise, the definition of commercial reasonableness that is implied in both section 9-207 and section 9-610 will be more clearer. In the interim, it would be wise for practitioners in this area to be mindful of these concerns in assessing the legal and business risks of these transactions in the midst of the slow pace of global economic recovery.