

# Penn State Journal of Law & International Affairs

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Volume 4  
Issue 1 *Seventeenth Biennial Meeting of the  
International Academy of Commercial and  
Consumer Law*

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December 2015

## The Role of Party Autonomy in the Enforcement of Secured Creditor's Rights: International Developments

Anna Veneziano  
*University of Teramo*

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ISSN: 2168-7951

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### Recommended Citation

Anna Veneziano, *The Role of Party Autonomy in the Enforcement of Secured Creditor's Rights: International Developments*, 4 PENN. ST. J.L. & INT'L AFF. 333 (2015).  
Available at: <https://elibrary.law.psu.edu/jlia/vol4/iss1/15>

*The Penn State Journal of Law & International Affairs* is a joint publication of Penn State's School of Law and School of International Affairs.

**THE ROLE OF PARTY AUTONOMY IN  
THE ENFORCEMENT OF SECURED  
CREDITOR'S RIGHTS: INTERNATIONAL  
DEVELOPMENTS**

*Anna Veneziano\**

INTRODUCTION

The need to provide sound and clear rules regarding the enforcement of a secured creditor's rights upon the debtor's default is expressly recognized in the most recent international instruments dealing with secured transactions. Such instruments all contain a well-developed and specific regulation of enforcement measures, applicable (also) outside insolvency proceedings. While additional steps may be required to exercise said rights when qualified third parties are involved (e.g., perfection requirements), or other rules may have to be applied to determine the outcome of conflicts among holders of conflicting proprietary interests on the same collateral, the existence of a security agreement is generally sufficient to trigger the application of the rules on enforcement.

In this paper, I will look at uniform law texts regarding this topic, with a view to assess whether it is possible to detect common directions and to understand the reasons for any divergent approach. The term 'uniform law' is used here to refer to a variety of instruments, be they hard law or soft law as well as global or regional. In particular, I will focus on three well-known examples that are representative of

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\* The Author is Professor of Comparative Law at the University of Teramo (Italy) and Professor of European Property Law at the University of Amsterdam. She is currently serving as Deputy Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT). The opinions expressed in the present paper do not purport to reflect an official position of UNIDROIT.

such a variety: (a) the Cape Town Convention on International Interests in Mobile Equipment<sup>1</sup> and its Aircraft Protocol<sup>2</sup> (as an example of a highly successful<sup>3</sup> hard law text with global application but in a very specialized sector,<sup>4</sup> which creates an autonomous international interest recognized and enforceable in contracting States);<sup>5</sup> (b) the UNCITRAL Legislative Guide on Secured

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<sup>1</sup> Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285 [hereinafter Cape Town Convention]. The text of the Convention in English is available at <http://www.unidroit.org/instruments/security-interests/cape-town-convention>.

<sup>2</sup> Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Nov. 16, 2001), available in English at <http://www.unidroit.org/english/conventions/c-main.htm> [hereinafter Aircraft Protocol]

<sup>3</sup> Until now as many as sixty-nine States around the world have ratified or otherwise acceded to the Cape Town Convention, while sixty-one States have adhered to the Aircraft Protocol (the Protocol entered into force in 2006). UNIDROIT, *Status - Convention on International Interests in Mobile Equipment (Cape Town, 2001)* (December 3, 2015), <http://www.unidroit.org/status-2001capetown>; UNIDROIT, *Status - Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (December 3, 2015), <http://www.unidroit.org/status-2001capetown-aircraft>. The European Union has also acceded to the Convention and the Aircraft Protocol as a Regional Economic Integration Organization, thus permitting (but not imposing) ratification by Member States. See ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT, OFFICIAL COMMENTARY 142 et seq. (3d ed. UNIDROIT, 2013). Furthermore, the International Registry for Aircraft Equipment (operated under the supervision of International Civil Aviation Organization (ICAO) by Aviareto has reached more than 500,000 entries since its establishment in 2006. SITA, *Aircraft Equipment Registry Passes Half Million Milestone* (Oct. 9, 2014), <http://www.sita.aero/content/Aircraft-equipment-registry-passes-half-million-milestone>.

<sup>4</sup> Two additional Protocols to the Cape Town Convention, the 2007 Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Rail Protocol) and the 2012 Protocol on Matters Specific to Space Assets (Space Protocol) were approved but have not yet entered into force.

<sup>5</sup> The Cape Town Convention and the Aircraft Protocol were jointly approved by UNIDROIT and ICAO on the basis of a project drafted within UNIDROIT. See GOODE, *supra* note 3, at 13 et seq. (describing the nature and purpose of the Convention system).

Transactions<sup>6</sup> (as an example of a policy-oriented soft law instrument with global scope of application, primarily addressed to national legislators considering a reform of their general domestic secured transaction laws);<sup>7</sup> (c) Book IX of the Draft Common Frame of Reference on a European Private Law (DCFR)<sup>8</sup> (as an example of a regional soft law instrument on secured transactions in general, developed within the DCFR European academic project, which creates an autonomous European security right with cross-border enforceability).<sup>9</sup>

There are other examples of uniform law texts concerning secured transactions that emphasize the importance of enforcement measures, but they will not be specifically analyzed here.<sup>10</sup>

## I. COMMON TRENDS IN THE RULES ON ENFORCEMENT OF

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<sup>6</sup> U.N. COMM. ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V.12 (2010) [hereinafter UNCITRAL Legislative Guide].

<sup>7</sup> On the nature and purpose of the UNCITRAL Legislative Guide, see Spiradon V. Bazinas, *The utility and efficacy of the UNCITRAL Legislative Guide on Secured Transactions*, in AVAILABILITY OF CREDIT AND SECURED TRANSACTIONS IN A TIME OF CRISIS 133 et seq. (Orkun Akseli ed., 2012).

<sup>8</sup> *Book IX - Proprietary Security in Movable Assets*, in PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), 5389 et seq. (Christian von Bar et al., eds. 2009) [hereinafter Book IX DCFR]. Book IX DCFR was prepared by a team led by U. Drobnig and was subsequently approved within the DCFR project by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group).

<sup>9</sup> On the nature and purpose of the DCFR, see *Introduction*, in PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, DRAFT COMMON FRAME OF REFERENCE (DCFR), 1 et seq. (Christian von Bar et al., eds. 2009).

<sup>10</sup> For an additional example, see the Model Law on Secured Transactions (1994 and 2004) of the European Bank for Reconstruction and Development (EBRD), which provides a basic framework for domestic legal reform tailored to transition economies: "The Model allows the person taking security to enforce the charge immediately after a failure to pay the secured debt. . . It is vital that appropriate provisions on enforcement be included. Without a clear right to enforce, the charge-holder is deprived of his remedy and a charge becomes valueless." MODEL LAW ON SECURED TRANSACTIONS: PART IV – ENFORCEMENT AND TERMINATION, EBRD, at art. 22-30 (1994, 2004) [hereinafter EBRD Model Law].

## SECURED CREDITORS' RIGHTS

Not surprisingly, due to the different nature, purpose, and particularly the different scope of application of the international instruments that are considered, the legal regime of enforcement that they provide cannot be the same. I believe, however, that it is possible to find a number of elements that are common and point to a convergence in the international approach to the topic. In line with the general theme of the International Academy of Commercial and Consumer Law (IACCL) conference, the analysis will center on the role played by party autonomy and the mechanisms used to control it. Thus, I will not offer a systematic description of the respective legal regimes of enforcement, but will specifically focus on examples of common trends (and any divergences) that relate to the scope of parties' self-regulation and its limitations.

By way of a more general observation, each of the above-mentioned texts begins with the assumption that clear and predictable rules regarding secured creditors' enforcement rights are advantageous for all parties involved, and that an easy, less costly, and speedy implementation of such rights is a key element for a well-functioning secured transactions system.<sup>11</sup> It may facilitate (cross-border) financing with better conditions, since the likelihood of obtaining recovery in case of default may well be one of the factors influencing creditor's decisions in this respect. Furthermore, the backdrop of an efficient, rapid, and cost-effective system of recovery will also be important to shape parties' willingness to avoid formal insolvency proceedings through cooperation by entering into out-of-court arrangements

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<sup>11</sup> "The availability of adequate and readily enforceable default remedies is of crucial importance to the creditor, who must be able to predict with confidence its ability to exercise a default remedy expeditiously." GOODE, *supra* note 3, at 58. Similarly, the efficient enforcement of secured creditors' rights is listed among the key objectives of a modern secured transactions regime in the UNCITRAL Legislative Guide: "A security right will . . . have little value to a secured creditor unless it can be enforced effectively and efficiently. A modern secured transactions regime will include procedures that precisely describe the rights and obligations of grantors and secured creditors upon enforcement." UNCITRAL Legislative Guide, *supra* note 6, at § 56. The need for speedy and cost-effective enforcement is also the underpinning principle of Chapter 7 of Book IX DCFR and its preference towards extra-judicial enforcement. Book IX DCFR, *supra* note 8, at 5618.

(which are often considered an advantageous alternative, especially in the case of cross-border transactions).

The enhancement of parties' self-regulation is one of the mechanisms that is put into place to achieve the result of ensuring a rapid and less costly enforcement of creditors' rights. Strengthening the role of parties' autonomy is indeed one of the most evident traits in all three instruments that are considered here. At the same time, there is still the need to find a good balance between party autonomy on the one hand, and the protection of various interests, those of the debtor but also of third parties, on the other hand. It is in the balance of such different interests that the three instruments diverge, which in my view (at least partly) is justified in light of the difference in their respective scope of application.

#### A. The Enhancement of Party Autonomy and its Role(s)

Parties' self-regulation is reinforced by limiting the impact of mandatory formal proceedings (such as the need for a court decision before enforcement or the imposition of a formal procedure like a public sale). Thus, all three instruments favor extra-judicial enforcement, which is considered an option that should always be available to the creditor<sup>12</sup> if agreed upon in the contract or at some other point in time,<sup>13</sup> or unless otherwise provided by the parties.<sup>14</sup> Moreover, the creditor, if all required conditions are met, can exercise a wide array of out-of-court measures, including using the value of the collateral other than by selling it and being satisfied with the proceeds (e.g., lease the collateral or collect or receive any income of profits

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<sup>12</sup> See UNCITRAL Legislative Guide, *supra* note 6, at 283-84, recommendation 142. "[I]n order to maximize flexibility in enforcement and thereby to obtain the highest possible price upon disposition, creditors should have the option of proceeding either judicially or extra judicially when enforcing their security rights."

<sup>13</sup> See Cape Town Convention, *supra* note 1, at art. 8(1); GOODE, *supra* note 3, at 278. For the additional layers of complexity of the Cape Town Convention system that derive from the interplay between main Convention, asset-specific Protocols, States' power to issue declarations, and market incentives; see *infra* p. 10.

<sup>14</sup> See Book IX DCFR, *supra* note 8, at Art. IX-7:103(1). "Unless otherwise agreed, the secured creditor may carry out extra-judicial enforcement of the security right". Chapter 7:217 makes it clear that the creditor retains the option to make recourse to judicial enforcement.

arising from the management of the encumbered asset).<sup>15</sup> Furthermore, even within court proceedings there is a preference for speedy relief measures,<sup>16</sup> though this point is not emphasized in the same way in each text due to their different nature and scope of application.<sup>17</sup> Therefore, there is a degree of uniformity at least in the general approach chosen by all three instruments.

If we turn from the general to the particular, however, we must take a series of additional factors into account. We will focus here on some factors that show that the role played by party autonomy is more complex than may appear at first sight.

The first important element to be considered is that a decision on the default rule (i.e., the rule applicable “unless otherwise agreed”) may change the purpose of allowing a contrary agreement between the parties. Book IX DCFR can be used as a good example in this respect, since party autonomy is present in several provisions but does not always play the same role. The principle underlying the whole Chapter on enforcement is that its rules are mandatory, unless otherwise provided within the text.<sup>18</sup> Several provisions allow for an express derogation by the parties, but said derogation fulfills different purposes. For instance, as mentioned above, the commercial creditor may generally exercise extra-judicial enforcement, unless exclusive

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<sup>15</sup> Cape Town Convention, *supra* note 1, at art. 8(1); UNCITRAL Legislative Guide, *supra* note 6, at 312, recommendation 141; Book IX DCFR, *supra* note 8, at Art. IX-7:207.

<sup>16</sup> See UNCITRAL Legislative Guide, *supra* note 6, at 311, recommendation 138. The possibility to obtain, in particular, *advance speedy relief* by courts pending final determination of a dispute is one of the cornerstones of the Cape Town Convention and Aircraft Protocol’s enforcement system, as provided in Art. 13 Convention and Art. X Protocol. See *supra*, Cape Town Convention, note 1, and *Aircraft Protocol*, *supra* note 2.

<sup>17</sup> In particular, Chapter 7 of Book IX DCFR expressly focuses on *extra-judicial enforcement*, leaving court enforcement proceedings to national law. See Book IX DCFR, *supra* note 8, at Cmt. A to Art. IX-7:101. Thus, Book IX does not attempt to lay down rules for judicial enforcement. It does, however, stress the need for an expeditious court decision on a recourse against an enforcement measure or against resistance to an enforcement measure. *Id.* at 7:104. The same approach regarding judicial supervision of enforcement when a conflict arises is found in the UNCITRAL Legislative Guide. UNCITRAL Legislative Guide, *supra* note 6, at 280, § 19, and recommendation 137.

<sup>18</sup> Book IX DCFR, *supra* note 8, at Art. IX-7:102.

recourse to a court or other competent authority is agreed in the contract.<sup>19</sup> On the other hand, a private sale by the creditor is only admitted if parties stipulate otherwise (or if a published market price for the collateral exists).<sup>20</sup>

In these two examples, party autonomy serves divergent purposes. In the first case, a higher degree of formality in the proceedings may be imposed by modifying the default rule; in the second instance, the contrary agreement allows the creditor to exercise an additional remedy.<sup>21</sup> Failing such an agreement, the default rule does not allow that particular remedy (or it does so only if specific requirements are met). It must be pointed out that bargaining to exclude a default rule presupposes that the debtor be in a position to accept, or reject, the contrary agreement. The situation is clearly different where the instrument applies in a highly specialized and professionalized market (as in the case of aircraft financing, for example) or more generally (thus, in Book IX DCFR consumers are always entitled to court proceedings, unless they agree to extra-judicial enforcement after default, and are subject to additional safeguards, see Section III, *infra*).

Another element that should be mentioned is the degree of formality that is required of the “contrary agreement” between the parties. For example, parties’ agreement on the exercise of extra-judicial remedies under the Cape Town Convention need not be in writing, nor should it refer specifically to the Convention’s provisions or specific remedies.<sup>22</sup> On the other hand, a pre-default agreement on appropriation of encumbered assets by the creditor under Article IX-7:105 DCFR will need to be more formal since parties are obliged to indicate a method which allows for a ready determination of a reasonable market price. Failing such an indication, the agreement is

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<sup>19</sup> *Id.* at Art.IX-7:103(1).

<sup>20</sup> *See id.* at Art.IX-7:211(2).

<sup>21</sup> In particular, when a published market price for the collateral exists, *see id.* at Art. IX-7:211(2).

<sup>22</sup> GOODE, *supra* note 3, at 280 (“an agreement in general terms, for example, ‘all remedies under the Convention,’ suffices. . . . [S]uch terms would cover remedies under the Protocol as well as under the Convention.”).



void, unless the collateral is a fungible asset that is traded on a recognized market with published prices.<sup>23</sup>

The different nature of the instrument gives rise to interesting additional layers of complexity in the case of the Cape Town Convention system, that is, a multilateral treaty approved in a diplomatic Conference<sup>24</sup> with participation of States' representatives and later subject to ratification by States. Following a widely used technique, in order to reach international consensus within the formal setting of the diplomatic Conference, the possibility for contracting States to opt out of specified provisions through a declaration<sup>25</sup> was introduced. With particular regard to enforcement, according to the main Convention contracting States must make a declaration for or against extra-judicial enforcement as default rule,<sup>26</sup> and may make additional declarations in relation to the applicability of specific enforcement measures.<sup>27</sup>

This balance was already modified by the Aircraft Protocol<sup>28</sup> where some of the Convention rules on enforcement were displaced,

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<sup>23</sup> Book IX DCFR, *supra* note 8, at Art.IX.-7:105(1) and (2).

<sup>24</sup> Or better said, diplomatic Conferences, since the Aircraft Protocol was approved together with the main Convention in Cape Town in 2001 whilst the other two Protocols, Rail and Space, were separately approved, respectively, in Luxembourg in 2007 and in Berlin in 2012.

<sup>25</sup> The Cape Town Convention does not contain the classical "reservations," but introduced "declarations" that allow for more flexibility and choices regarding their content. *See generally* ROY GOODE, HERBERT KRONKE, EWAN MCKENDRICK, *TRANSNATIONAL COMMERCIAL LAW* 418-419 (2d ed. 2015).

<sup>26</sup> Article 54(2) requires a contracting State to declare whether or not any remedy, which under the Convention does not require application to the court, is to be exercisable only with leave of the court. It is a mandatory declaration.. Cape Town Convention, *supra* note 1, at art. 54(2).

<sup>27</sup> For example, lease of collateral is permitted unless a contracting State declared that the charge (debtor) shall not grant a lease of the object while it is situated within or controlled from that State's territory. *Id.* at art. 8(1)(b), 54(1).

<sup>28</sup> For the enforcement provisions in the Rail and Space Protocols, see ROY GOODE, *CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND LUXEMBOURG PROTOCOL THERETO ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK*, OFFICIAL COMMENTARY 71 et seq. (2d ed., UNIDROIT, 2014); ROY GOODE, *CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO SPACE ASSETS*, OFFICIAL COMMENTARY 189 et seq. (UNIDROIT, 2013).

additional specific remedies were introduced (in particular, deregistration and export and physical transfer of the aircraft object from the territory where it is situated) and a mechanism of opting in specific provisions was chosen.<sup>29</sup> The modification went in the direction of allowing increased predictability and a greater scope for parties' self-regulation both outside and within court proceedings.

The evolution of the system, however, did not stop with the approval of the treaties but was further influenced by the relevant credit market. Under the Organization for Economic Co-operation and Development (OECD) Aircraft Sector Understanding,<sup>30</sup> a reduced fee or interest rate for export credit may be applied if a contracting State to both the Convention and the Aircraft Protocol has made so-called "qualifying declarations," among which the declarations with respect to enforcement measures are counted. In particular, a State may qualify if it either adheres to the default provision on extra-judicial enforcement or it opts in to the Aircraft Protocol rules regarding advance relief measures during court proceedings. This development shows that, when a uniform law text applies to a specialized, highly sophisticated, and integrated market and has the potential to trigger economic benefits for both creditors and debtors, subsequent market incentives may indirectly influence contracting States' decisions and as a consequence the international regulation in the field.

#### B. A Shift from Traditional Control Mechanisms to Ex-Post Evaluation and Transparency Rules

As noted earlier, while all three instruments considered give more weight to party autonomy, rules protecting the debtor and/or other parties are not abandoned. The tendency, however, is to reduce the impact of certain traditional remedies that are perceived to be inefficient or unnecessary. The shift towards out-of-court enforcement as opposed to mandatory formal proceedings was already mentioned. Additionally, control mechanisms that work ex ante through the

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<sup>29</sup> For a detailed overview of the enforcement provisions in the Aircraft Protocol and their relation to the main Convention, see GOODE, *supra* note 3, at 447 et seq.

<sup>30</sup> Organization of Economic Co-operation and Development (OECD), Aircraft Sector Understanding on Export Credits for Civil Aircraft, TAD/ASU(2011)1 (Aug. 31, 2011).

sanction of invalidity of parties' agreement are restricted in their application. This is true, for example, if we look at the well-known prohibition of *pactum commissorium* (typically found in civil law jurisdictions).<sup>31</sup> Such a development is hardly surprising in light of the fact that even the most traditionally oriented national laws in this respect show a clear tendency to move away from a strict interpretation of this requirement, and this appears not only in very specialized areas, such as financial collateral,<sup>32</sup> but even generally.<sup>33</sup>

It is probably more relevant to see how the need to balance competing interests (with particular regard to interests of third parties) is pursued through alternative and more modern means. The mechanisms that can be found in all three instruments are fourfold: (1) reliance on parties' agreement (as noted above, the exercise of specific remedies may be subject to the contract expressly allowing them and sometimes to additional limitations and conditions); (2) use of ex-post evaluation of the exercise of all enforcement rights; (3) transparency provisions introducing information duties; and (4) upholding of the traditional principle of avoiding creditor's enrichment.

As to the shift to ex-post evaluation, all three instruments expressly refer to the parameter of 'commercial reasonableness' (or other general standard) to achieve a fair realization value when self-help measures are executed. The Cape Town Convention states that

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<sup>31</sup> See Book IX DCFR, *supra* note 8, at Art. IX.-7:105, according to which a pre-default agreement on appropriation of encumbered assets is void, unless the encumbered asset is a fungible asset that has a published price or parties agree in advance on some method to ensure objectivity of evaluation. For a brief justification of this rule, see *Book IX*, *supra* note 8, at 5622. According to the Cape Town Convention, however, an agreement whereby ownership is vested in the creditor cannot be made in advance of default, but only after default and at the conditions set forth in Article 9 Convention. GOODE, *supra* note 3, at 283. Article 11 Convention, however, leaves the parties free to determine what constitutes "default" under their agreement. Those rules do not apply to retention of title devices. See *infra* at section II(C).

<sup>32</sup> For E.U. member States, this results from the implementation of the Financial Collateral Directive. See Council Directive 2002/47, 2002 OJ (L 168) 43 (EC) as amended by Council Directive 2009/44, art. 4, 2009 OJ (L 146) 37 (EC).

<sup>33</sup> See CODE CIVIL [C. CIV.] art. 2348 (Fr.) as modified by the 2006 French secured transactions' law reform, which considers such agreements valid. For commentary, see LAURENT AYNES & PIERRE CROCQ, DROIT CIVIL: LES SURETES, LA PUBLICITE FONCIERE 239 et seq. (4th ed. 2009).

any out-of-court remedy of a secured creditor “shall be exercised in a commercially reasonable manner.”<sup>34</sup> The UNCITRAL Legislative Guide recommends that national legislators “provide that a person must enforce its rights and perform its obligations under the provisions on enforcement in good faith and in a commercially reasonable manner.”<sup>35</sup> According to Article IX.-7:103(4) DCFR, “enforcement must be undertaken by the secured creditor in a commercially reasonable way.” Once again, however, the different role played by party autonomy bears an influence on how the same principle is concretely applied. Thus, according to the Cape Town Convention, a remedy exercised in conformity with the security agreement will be deemed commercially reasonable unless the contractual provision is “manifestly unreasonable.” The benchmark for the standard of conduct is therefore parties’ self-regulation, interpreted against the background of international practice.<sup>36</sup> On the other hand, according to the UNCITRAL Legislative Guide, the recommended general standard of conduct should be mandatory and not subject to unilateral waiver or contrary agreement at any time,<sup>37</sup> while Book IX DCFR puts more emphasis on good faith by requiring that creditors exercise enforcement measures, as far as possible, in cooperation with the security provider and any third party.

With regard to transparency, there is a tendency to introduce information duties of the secured creditor toward the debtor and specific third parties (particularly, other secured creditors).<sup>38</sup> It should

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<sup>34</sup> Cape Town Convention, *supra* note 1, at art. 8(3).

<sup>35</sup> UNCITRAL Legislative Guide, *supra* note 6, at 310.

<sup>36</sup> “The phrase ‘manifestly unreasonable’ is a signal to courts that they should not lightly disturb the bargain made by the parties. Established commercial practice is relevant to whether a provision in a security agreement is ‘manifestly unreasonable’. A provision that is in line with accepted international practice will normally be regarded as not manifestly unreasonable”: GOODE, *supra* note 3, at 280.

<sup>37</sup> UNCITRAL Legislative Guide, *supra* note 6, at 311.

<sup>38</sup> See e.g., Cape Town Convention, *supra* note 1, at art. 8(4) (reasonable prior notice in writing to specified interested persons); UNCITRAL Legislative Guide, *supra* note 6, at recommendation 149 (on the creditor’s duty to give notice of its intention to exercise extra-judicial sale, granting of lease or license or other disposal of the collateral); Book IX DCFR, *supra* note 8 at Arts. IX.-7:208 to 7:210 (notices of extra-judicial disposition). A brief overview of the rules on notices in Book IX is provided in Comment A to Art. IX.-7:107. Book IX DCFR, *supra* note 8, cmt. A to Art. IX.-7:107.

be noted that the cost-effectiveness of such rules will depend on the degree of the formalities that are imposed for the notice.<sup>39</sup> In this respect, the Cape Town Convention's language ("reasonable prior notice in writing") is less exacting than the regime suggested in the UNCITRAL Legislative Guide or envisaged in Book IX DCFR, both of which impose more precise time, content, and language constraints.<sup>40</sup>

Another element worth considering is that the functionality of the notice system is strictly related to the existence of a public electronic registry based on a notice-filing approach (according to which a statement containing select information as to creditor, debtor and collateral should be filed in a publicly accessible registry for the purpose of ensuring that the security right is effective as against other secured creditors, execution creditors, and the administrator of debtor's insolvency). Such a general policy choice is made in all three instruments<sup>41</sup> and permits a clearer identification of the most relevant third parties to which the notice should be given.<sup>42</sup>

Another protection mechanism is the avoidance of enrichment. The question is whether, should there be any surplus from the sale or alternative use of the value of the collateral, it should return to (other lower ranking creditors and finally to) the debtor. All three instruments clearly retain this solution.<sup>43</sup> A different regime is introduced, however, for those transactions that are based on retention

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<sup>39</sup> "The law should provide rules ensuring that the notice . . . can be given in an efficient, timely and reliable way so as to protect the grantor or other interested parties, while, at the same time, avoiding having a negative effect on the secured creditor's remedies and the potential net realization value of the encumbered assets." UNCITRAL Legislative Guide, *supra* note 6, at recommendation 150.

<sup>40</sup> *See id.* at recommendation 151(b); Book IX DCFR, *supra* note 8, at Art. IX.-7:210.

<sup>41</sup> Cape Town Convention, *supra* note 1, at Chapter IV; UNCITRAL Legislative Guide, *supra* note 6, at 110 et seq.; Book IX DCFR, *supra* note 8, at ch. 3.

<sup>42</sup> Interestingly, the EBRD Model Law provides that the enforcement notice to the debtor (which has to contain specific information) must be registered in the Charges Registry as supplementary information to be effective. See EBRD Model Law, *supra* note 10, at arts. 22.2, 22.4, and 33.

<sup>43</sup> *See* Cape Town Convention, *supra* note 1, at arts. 8(5) and (6); UNCITRAL Legislative Guide, *supra* note 6, at recommendation 152 (distribution of proceeds of disposition of an encumbered asset); Book IX DCFR, *supra* note 8, at Art. IX.-7:215 (distribution of proceeds of extra-judicial enforcement).

of title instead of consisting in the creation of a limited security right or the transfer of collateral by way of security, which topic will be now discussed.

C. A Differentiated Regime for Enforcement of Retention of Title Devices

In all the international instruments considered, the policy decision was taken to include within their general scope of application not only security rights on movables granted by the debtor to the creditor, but also transactions where title to the collateral is retained by the financier (e.g., a conditional sale or a leasing agreement). In principle, such transactions are subject to the same basic legal framework that governs the more traditional limited rights in rem.<sup>44</sup> In relation to a few specific issues, however, different rules (may) apply.

An exception shared by all three instruments is found in enforcement. The creditor (seller or lessor) is not accountable for any surplus and may terminate the agreement upon debtor's default and take possession or control of the collateral as a full owner, without being subject to all conditions and limits that are envisaged for a secured creditor in general<sup>45</sup>

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<sup>44</sup> For the Cape Town Convention, see GOODE, *supra* note 3, at 267 (“Most of the . . . provisions of the Convention apply to all three forms of agreement [security agreement, conditional sale and lease].”). The UNCITRAL Legislative Guide recommends an integrated scheme, giving national legislators the option between a unitary and non-unitary approach to acquisition financing. UNCITRAL Legislative Guide, *supra* note 6, 57 et seq., § 111 et seq. Even under the latter approach, however, most of the rules applicable to security rights are extended to retention of title devices. Finally, see Art. IX. – 1:104 DCFR and Comment A, Book IX DCFR, *supra* note 8, at 5401 (“the regime of retention of ownership devices, while partly autonomous, is in most respects identical with that for security rights.”).

<sup>45</sup> See Cape Town Convention, *supra* note 1, at art. 10; See also Art. IX.-7:301 DCFR. Concerning the Cape Town Convention, it must be noted that the qualification of an agreement as “retention of title” or “lease” for the purposes of Article 10 is left to the applicable domestic law, so that in those legal systems where such devices (or specific types of such devices) are qualified as security rights Article 10 would not apply. GOODE, *supra* note 3, at 267 et seq. The UNCITRAL Legislative Guide, on the other hand, suggests that acquisition finance devices (a functional category including retention of title devices) be subject to the same regime that is applied to non-acquisition finance devices, but allows for deviations “to the extent

It is interesting to note that this specific derogation from the general rules is not justified on the basis of the economic function of the device as acquisition financing tool (otherwise it would apply to all agreements pursuing the same function regardless of which party holds title in the collateral).<sup>46</sup> It expressly relies on the *formal structure* of the agreement.<sup>47</sup> While this solution may have had the purpose of making the inclusion of retention of title less objectionable in the eyes of European jurists and/or governmental representatives, it raises doubts as to whether the justification for a different treatment based on the formal structure of the transaction only is sufficiently well founded. This all the more so because recent reforms in national secured transaction laws opted for the application of a functional approach in this respect.<sup>48</sup>

## II. CONSUMER PROTECTION AND PARTY AUTONOMY

Another interesting issue with regard to the role of party autonomy in the enforcement of creditor's rights arises when one of

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necessary to preserve the coherence of the regime applicable to sale and lease" (UNCITRAL Legislative Guide, *supra* note 6, 380-381, recommendation 200).

<sup>46</sup> Which is what is envisaged for another important exception to the general rules contained in both the UNCITRAL Legislative Guide and in Book IX DCFR is the special priority (so-called "super-priority") as against previously registered security rights on the same collateral, granted to all acquisition finance devices regardless of their formal structure. *See* UNCITRAL Legislative Guide, *supra* note 6, at 377, recommendations 187-188; Art. IX. – 4:102 DCFR.

<sup>47</sup> For the Cape Town Convention, *see* GOODE, *supra* note 3, at 66 ("The provisions are much simpler because in contrast with the chargee, who has merely a security interest, the conditional seller or lessor retains full rights in the equipment."). *See also* Book IX DCFR, *supra* note 8, at 5664, cmt. A to Art. IX. – 7:301 DCFR ("The chief reason why the special features of retention of ownership become relevant in this area is that, since the seller, supplier or lessor as secured creditor had retained ownership, it had remained the owner of the supplied assets."). A more thorough treatment of this issue is found in the UNCITRAL Legislative Guide, *supra* note 6, at 367 et seq., §§ 188-196, where the respective merits of a unitary and non-unitary approach to retention of title devices, as well as the need to preserve a functionally integrated approach whichever choice is made are discussed with specific regard to enforcement.

<sup>48</sup> For the 2013 reform in Belgium, *see* ERIC DIRIX, LA RÉFORME DES SÛRETÉS RÉELLES MOBILIÈRES 11 et seq. (2013) (in relation to both sales with retention of title and leasing). *See also* CODE CIVIL [C. CIV] art. 2371(2) (Fr.); AYNÈS & CROCQ, *supra* note 31, at 375 et seq.

the parties is a consumer, or is more generally qualified as a “weaker” party entitled to a stronger protection. The question is here to what extent general rules favorable to a wider application of parties’ self-regulation should be modified to take this situation into account. It must be pointed out that for two of the instruments that we considered this question is either irrelevant or has only marginal importance. It goes without saying that the scope of application of the Cape Town Convention implies a high level of sophistication of all professional parties involved. As to the UNCITRAL Legislative Guide, although it includes many forms of consumer transaction, it is not intended to override consumer-protection laws or to elaborate consumer-protection policies, and defers to national law on this matter.<sup>49</sup>

On the other hand, the scope of application of Book IX DCFR is not limited to professional parties but extends to consumers. In this regard, however, the drafters expressly downplayed the importance of specific consumer protection in the field of secured transactions as opposed to that of personal security. In fact, there are only a few special rules on consumers in the whole Book.<sup>50</sup> If we look at enforcement, the most interesting aspect is that parties’ autonomy is not entirely excluded but still plays a relevant role. Thus, a security right over an asset of a consumer can only be enforced by a court or another competent authority, but after default the consumer security provider can agree to extra-judicial enforcement.<sup>51</sup> Further, a pre-default agreement on appropriation would be void even if the parties agreed in advance on an objective evaluation method, but it is still possible when the encumbered asset is a fungible asset traded on a recognized market with published prices.<sup>52</sup> All other rules of the Chapter apply to

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<sup>49</sup> “To the extent that a rule of the regime envisaged in the Guide conflicts with consumer protection law, the Guide defers to consumer protection law. States that do not have a body of law for the protection of consumers may wish to consider whether the enactment of a law based on the recommendations of the Guide would affect the rights of consumers and would thus require the introduction of consumer protection legislation.” UNCITRAL Legislative Guide, *supra* note 6, at 34, § 11. *See also id.* at recommendation 2(b).

<sup>50</sup> *See* Book IX DCFR, *supra* note 8, Comments to Art. IX.–2:107.

<sup>51</sup> *Id.* at Art. IX.–7:103(2).

<sup>52</sup> *Id.* at Art. IX.–7:105 (1)-(3).



consumers with no differentiation, except for a more stringent provision on advance notice of enforcement.<sup>53</sup>

#### CONCLUSIONS

When looking at the above-mentioned general common tendencies in uniform law as regards enforcement measures, one should consider that the rules on enforcement contained in international instruments are embedded in a more general unitary architecture that simplifies and rationalizes the entire regulation of secured transactions. In other words, in each of the three examples such rules form part of a coherent reform strategy that strives towards both greater clarity and efficiency. The trend towards a simplification and rationalization of enforcement proceedings for security rights is, however, convincing in its own right, also independently of a more general reform of secured transactions law, and should be welcomed. A look at the most recent legislative interventions in Europe seems to confirm that the availability of a more predictable system, and less costly and swifter extra-judicial enforcement measures as well as of alternative mechanisms for the creditor to realize the value of the collateral is perceived as an important element of any well-functioning secured transactions regime, however structured.

But consider that the effectiveness on any enforcement measure in a given jurisdiction should be strongly linked to the rules of general procedural law and the administration of justice. It may also be connected to the role played by, and the effect given to, extra-judicial settlements and/or alternative dispute resolution mechanisms. It would not be realistic, nor even appropriate, to try to reach full harmonization through an instrument concerning secured transactions. I would surmise that the more specialized and circumscribed the regulation, the easier it is to accept rules that introduce changes not only to enforcement proceedings in general, but also to judicial proceedings (such as advance relief remedies for the creditor) in particular, provided that a cost-benefit analysis gives a positive result. In devising a general regime with wider application, the approach should be more cautious (as shown by the different solutions that are found in the examples of Cape Town Convention and Aircraft

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<sup>53</sup> *Id.* at Art. IX.-7:107.

Protocol on the one hand, and the UNCITRAL Legislative Guide and Book IX DCFR on the other hand).

Furthermore, I believe that more thought should be given to the question of how to treat retention of title devices in enforcement, and especially as to whether a differentiated regime would be appropriate. If retention of title devices were to be included in an instrument on secured transactions, a differentiated treatment solely on the basis of the formal structure of the agreement would not, in my opinion, be sufficiently justified.

I would finally suggest that the question of whether, and to what extent, consumer transactions should be subject to a special regime, as regards enforcement, deserves thorough consideration.