



Prof. Dr. Tajti Tibor

## Post-1990 Secured Transaction Law Reforms in Central and Eastern Europe

### 1. Introductory Caveats

#### 1.1. The Aims and Goals of the Paper

This paper aims to cast a light on the post-1990 secured transactions reforms in Central Europe and a number of other European countries in the light of the main novelties of the new Hungarian Civil Code<sup>1</sup> (hereinafter: new PTK), which represent already the third major revamping of this field of law in the past two decades. The idea is not to rank the countries but rather to assess the present phase of Hungarian law based on its comparison with the observed countries' achievements. This exercise is, however, not only of theoretical and cognitive importance: it has been recognized by most of these countries that an efficient secured transactions system is not just one of the tokens of economic growth but also a tool for attracting foreign investment.

The ensuing comparison will try to highlight in particular the commonalities as well as the idiosyncratic solutions of the targeted jurisdictions focusing on four main broader areas of key importance for secured transactions laws. These would be, *first*, secured transactions laws in the narrower sense and generally the post-1990 secured transactions of the region. Then, *secondly*, acquisition financing<sup>2</sup> with particular focus on

leasing and retained title-based contracts (ROT). As it is known, in Hungary sales combined with ROT qualify as one type of the so-called 'fiduciary security contracts' (*"fiduciáris biztosítékok"*), which were up to the new PTK categories separate from charges.<sup>3</sup> It deserves mention that leasing and consignment, quite tellingly, are looked upon as *'deemed-security interests'* in Canada and elsewhere.<sup>4</sup> *Thirdly*, the more daring attitude to out-of-court enforcement of security interests (*"bírósági végrehajtáson kívüli érvényesítés"*) of the new PTK requests special attention and therefore also a look at the related developments in the countries analyzed. *Fourthly*, where appropriate data is available, the fate of the local equivalents of the English floating charge – nominated in Hungary as the property encumbering charge (*"vagyont terhelő zálogjog"*) – will be commented as well. The new PTK, as it will be explained below, introduced radical changes in respect of the device as well. Naturally, the systems differ in many other respects yet the selected criteria could serve not just to provide the reader with a succinct synopsis of developments but to adjudge where has any one of the targeted systems reached so far.

#### 1.2. The Unitary Model as the Benchmark

Taking the Unitary Model, the prototype of which UCC Article 9 (hereinafter: UCC Art. 9), as the benchmark for

<sup>1</sup> The text of the new Hungarian Civil Code is available in Hungarian at [http://ptk2013.hu/wp-content/uploads/2013/03/uj\\_ptk\\_szov.html](http://ptk2013.hu/wp-content/uploads/2013/03/uj_ptk_szov.html). As it is well-known, the Code was passed in the Hungarian Parliament on the 11 February 2013 and it is foreseen to step into force on the 15th of March 2014.

<sup>2</sup> See, e.g., DCFR Article X.-1:103 which lists the most typical types of acquisition finance, i.e., retained ownership by seller under a contract of sale, financial leasing and consignment.

<sup>3</sup> See, e.g., Polgári jogi kodifikáció, vol. 6, Nos. 1-2 (2004) in which more articles was devoted to fiduciary security transactions. Thus, for an comparative overview see Csizmadia Norbert, Tulajdon mint biztosíték? [Ownership as Security?] Id. at 3-23; Zsolt Lajer & László Leszkoven, A bizalmi (fiduciáris) biztosítékokról [On the Fiduciary

Securities], Id., at 23-33 and István Gárdos and Péter Gárdos, Van-e a fiduciáris biztosítékoknak helyük a magyar jogban? [On the Legitimacy of Fiduciary Securities in Hungarian Law?], Id., at 33-47.

Note that US law knows not for a separate nominated category of 'fiduciary securities.' For the American Unitary Model the basic principle is that all contracts relying on retained – title (equivalent of civil law retained ownership) are treated as secured transactions due to the Model's functional approach (i.e., name of contracts is disregarded and preference is given to the economic nature).

<sup>4</sup> See, e.g., Jacob S. Ziegel, Benjamin Geva and R.C.C. Cuming, Commercial and Consumer Transactions – Cases, Text and Materials, vol. III – Secured Transactions in Personal Property, Suretyships and Insolvency (Emond Montgomery, Toronto, 1995), at 63.

this work dictated by two main factors. On the one hand, all the hereinafter discussed reforms have departed, directly or indirectly, from this model. Given that it rests on the so-called ‘unitary concept of security interests’ – i.e., functional approach extending the reach of the system to all transactions serving as a security – it will be referred to also as the ‘**Unitary Model**’ or the ‘**Unitary System**.’ One may refer to it by the phrase ‘**Unitary Group**’ as well because the system has spread by now not only to the common law jurisdictions of Australia, the provinces of Canada (including even to the civilian jurisdiction of Quebec) or New Zealand but has appeared also in Europe enshrined in Book IX of the idiosyncratic, code-like soft law instrument named the Draft Common Frame of Reference (DCFR). It ought to be added as well that this model served also for the secured transactions reform team of the European Bank for Reconstruction and Development (EBRD) which has played a key role in numerous countries to be taken a look at herein; including Hungary with the conference held exactly in Budapest in 1992 setting the ball into rolling.<sup>5</sup>

On the other hand, it ought to be recognized as well that the new PTK’s solutions more resemble those of the Unitary Model – or that of Book IX of the DCFR – than the earlier similarly common law-inspired versions from 1996 or 2000. This applies primarily to the addition of the registration of financial leasing<sup>6</sup> and factoring<sup>7</sup> contracts in the charge register as well as the opening of the doors to out-of-court enforcement wider. In other words, it was at least recognized that retained title in leasing or sales contracts, as well as factoring, require public notice equal to security interests (charges) on

movables. It ought to be also noted that a visible bigger number of provisions on enforcement of security interests was also added, what is another proof of rapprochement; including much more detail on the most dangerous self-help device: self-help repossession.<sup>8</sup>

As a preliminary point, thus, one may claim that even though no Central European countries has fully embraced the Unitary Model, elements, if not segments, of it have, indeed, been transplanted making them resemble even with such geographically remote jurisdictions as Australia – the latest member to join the Unitary Group.<sup>9</sup> Unfortunately, the solutions on many key issues differ prohibitively yet on others significant resemblance could be detected. For example, the operation of the newly erected charge registers was entrusted to significantly varying types of bodies. If the DCFR’s vision on the common pan-European charge register is to materialize, this would undoubtedly be a serious obstacle.<sup>10</sup> While filling gaps and elimination of inconsistencies admittedly requires legislative action, or at least remedying by courts, the too frequent amendments of secured transactions law – characteristic to the overwhelming part of the region – do not help businesses and economy either. The new PTK’s parting with the specifically *nominated*<sup>11</sup> ‘property encumbering charge’ (“*vagyont terhelő zálogjog*”) – presumably influenced by German law not knowing for such comprehensive security device<sup>12</sup> – might turn out to be a very telling example of that, if not of a mistake made.

<sup>5</sup> See Jan-Hendrik Röver, An Approach to Legal Reform in Central and Eastern Europe: the European Bank’s Model Law on Secured Transactions, *European Journal of Law Reform*, vol. 1, No. 1-2 (Kluwer, 1999), 119, at 123.

<sup>6</sup> See 6:410 § of the new PTK.

<sup>7</sup> See 6:406 § of the new PTK.

<sup>8</sup> § 5:132 of the new PTK.

<sup>9</sup> See, e.g., Tibor Tajti, Testing the Equivalence of the New Comprehensive Australian Personal Property Securities Act, its Segmented European Equivalents and the Draft Common Frame of Reference, 24 *Bond Law Review* 85148 (June 2012); available also electronically at < <http://epublications.bond.edu.au/blr/vol24/iss1/4/>>.

<sup>10</sup> See DCFR Article IX.- 3:301 on the European register of proprietary security.

<sup>11</sup> To be sure, contrary to the earlier versions of the PTK, the term property encumbering charge is not used anymore. This may be interpreted that this security device – after more than a decade of struggle with its domestication – was eliminated from the Hungarian legal regime. However, the Ministerial Reasoning suggests a less drastic outcome:

“giving up of the separate regulation of the nominated property encumbering charge, but it keeps its useful function ...” Namely, as the reasoning continues, the object of charge can still be determined by description and it could be assets that shift during the existence of the charge; though with the exception of immovables and publicly registered assets. See, e.g., Ferenc Petrik and András Pomeisl, *Polgári jog – Dologi jog*, in: György Wellmann (ed.), *Az új Ptk. Magyarázata* (HVG-Orac, 2013), at 143. In my opinion, this volte face is a clear mistake that will cause numerous problems in business life, from unpredictability, conflicting interpretations through the transaction costs that will cause.

Unfortunately, nothing has been clarified any further – in the meantime by the Ministry of Justice drafted (March 2013) – White Book on the Legislative and Implementation Conducting Tasks Connected to the Stepping into Force of the new Civil Code (“*Az új polgári törvénykönyv hatálybalépésével összefüggő jogalkotási és jogalkalmazást segítő feladatokról*”) either. See the White Book at 15.

<sup>12</sup> None of the commentaries seems to indicate what was the concrete reason for discarding the Hungarian version of the

### 1.3. Terminology Caveats

Besides the complexity of secured transactions law itself, two main reasons make terminology in the context of this branch of law – especially in comparative works like this – a particular problem: first, the variations inherent to the covered national laws, and secondly, the existence of legal categories or terms in common laws (which serve as the model for reforms) for which no exact equivalents are offered by civil laws. Let us give a few examples by perusing the key terms employed in this paper.

First and foremost, the central category of secured transactions law itself is named differently already by the various English speaking common laws. For UCC Article 9 the key term is ‘**security interest**,’ which is known also by the others though for English law ‘**charge**’ is of higher importance. Obviously this is why the EBRD, a UK-based organization, has opted for the latter. Herein, the two will be used interchangeably.

Another potential source of misunderstandings is that lawyers trained in the civilian tradition tend to identify the category primarily by the term ‘**pledge**.’ This is so because in the hierarchy of the civil laws’ [dogmatic] system the tandem of pledge-mortgage is in the center. As opposed to that, *five terms* are offered by English legal terminology (i.e., **pledge, mortgage, lien, security interest and charge**) in lieu. One has to add though related to that that the priorities of these terms, as hinted at in the previous paragraph, differ from country to country. The high priority the term pledge enjoys among English speakers in civilian jurisdictions is due that, even if *sensu strictissimo* not accurate,<sup>13</sup> when translating the local reform laws the designation ‘**registered pledge**’ was resorted to by some countries’ drafters (e.g., Poland). Moreover, while the English terms of ‘pledge’ and ‘mortgage’ are widely known amongst lawyers coming from non-English speaking jurisdictions, the other

alternatives offered by common laws do not ring the bell unless one is genuinely familiar either with US legal terminology and secured transactions law or with the secured transactions project of the EBRD.

The completely distinct treatment of acquisition finance transactions (best example being leasing) by most of the jurisdictions analysed here add a further uncertainty to the picture because in these jurisdictions the terms ‘pledge,’ ‘charge,’ ‘mortgage,’ or ‘security interest’ do not extend to these devices. The new PTK is again a good example of such system thinking: even though financial leasing has now been subjected to registration in the charge registry, it is regulated in Book VI on obligations including the duty to register.<sup>14</sup> In other words, dogmatically leasing, for example, belongs to the law of obligations and the departure with its subjection to registration is obviously something foreign to the presently dominant conceptions. Yet as we have opted for the Unitary Model as the benchmark for our comparisons – to which leasing and contracts with ROT do create security interests – herein it will be presumed that leasing and kin transactions are as well security interest-creating secured transactions. And eventually the new PTK has now subscribed to that view as well.

Finally, the reader is well-advised also to always be attentive of the terminology distinctions that exist even among the common laws themselves. To give a perfect example: while for US lawyers the branch of law being in the center of our elaboration is known as ‘secured transactions,’ for Australians, Canadians, and especially for English lawyers the equivalent is ‘**personal property security law**.’ Moreover, as the City of London has prevented the taking over of the Unitary Model for the umpteenth time, in the UK personal property law does not include acquisition finance devices. Needless to say, the terminology distinctions have their own justifications. For example, as in German law no compact self-standing secured transactions law exists but the

floating charge (or floating lien as known in the US), either in its entirety, or only in its nominated form. As the DCFR was one of the sources of inspiration for the drafters of the new PTK – the relevant part of which (Book IX) was clearly shaped with respect to floating security by German law – one may legitimately speculate that the DCFR and through that German scholars’ are due these changes in Hungary. The position of German scholars on floating charge, on the other hand, are best expressed by the leading German expert of private law, Ulrich Drobnig, who said that “... the [floating charge] is difficult to justify because in its original, unabridged form ... tends to give total control over the debtor’s estate to the secured creditor. [Thus, German scholars] have come to the conclusion that its disadvantages and risks are greater than its utility. Moreover, the same

results can easily be achieved by recourse to the ordinary means of security.” Quoted from Ulrich Drobnig, Basic Issues of European Rules on Security in Movables, in: John de Lacy (ed.), Personal Property Security Law – Comparative Perspectives 444 (Routledge-Cavendish, London – New York, 2010), at 454.

<sup>13</sup> Strictly speaking, in English legal terminology (no matter which common law jurisdiction is spoken of) the term ‘pledge’ is limited to possessory security devices. As Black’s Law Dictionary reads: “[Pledge is a] bailment or other deposit of personal property [i.e., movable] to a creditor as security for a debt or obligation.”

<sup>14</sup> Financial leasing (“pénzügyi lízingszerződés”) is in Chapter LVI, §§ 6:409 through 6:415 of Book VI on Obligations. The duty to register such contracts is provided by § 6:410.

various security devices exploiting movables, rights and claims are scattered over more fields of law, readers interested should look for books titled ‘law of security devices’ (“*Recht der Kreditsicherheiten*”)<sup>15</sup> to find the equivalents; a pattern to be followed also in the context of many other Continental European systems.

## 2. Synopsys of Post-1990 Secured Transactions Reforms

### 2.1. Austria and Germany

Although the two systems naturally differ, in addition to having a quite similar credit security laws on movables, their common denominator is that none of them has thought so far seriously of reforms of this branch of law. Germany continues to be mentioned as the **anti-thesis** of the Unitary Model given that its security devices – with the exception of possessory pledge and some specific asset types (e.g., ships and aircraft) – are not subject to registration or any other kind of perfection (i.e., provision of public notice); they are latent (secret) securities.<sup>16</sup> Otherwise, the famous German “*kautelarische Sicherheiten*” are, indeed, routinely used both by banks and suppliers; the first exploiting primarily the extended and expanded versions of security transfers (“*Sicherungsübereignung*”) as well as of the security assignment (“*Sicherungsabtretung*”), and the latter the similarly advanced forms of retained ownership (“*Eigentumsvorbehalt*”). Hungary and many other CEE reform countries by opting for the common law-inspired model presuming registration have actually parted with the German approach which tolerates the above exception – i.e., the existence of latent security interests – to the basic policy choice concerning ostensible

ownership (false wealth): i.e., security interests are valid only if public notice is provided on their existence by some recognized means (e.g., transfer of possession over the collateral or versions of registration with a public register). The new Hungarian Civil Code’s subjection of the so-called ‘fiduciary securities’ to registration with the charge register denote a further meaningful parting with the model.<sup>17</sup>

Needless to say, especially the position of German law is crucial from the perspective of the future of European secured transactions laws. Because of this it is not just

the meaningfully changed position of leading German experts – in particular that of Ulrich Drobnig – but the almost complete volte face in Book IX of the DCFR that deserve special attention. As the DCFR is in a sense what leading experts recommend for Europe (i.e., *de lege ferenda*) and given the leading position of German scholars in its drafting, Book IX of the DCFR may be taken as a sign of the loosened position of German academe – though not necessarily also of banks and businessmen. Drobnig himself, though only in his most recent writings, admitted that the German system has serious drawbacks over the Unitary Model. Moreover, “[t]he only way to overcome the diverse forms of security found in the EU states and the discrepancies between these forms, is to adopt the American approach found in Article 9 of the [UCC].”<sup>18</sup> However, according to the latest IFC Doing Business Report from 2012, nothing suggests that Germany will embark on common law-inspired reforms any time soon; quite to the contrary.<sup>19</sup>

<sup>15</sup> See, e.g., Peter Bülow, *Recht der Kreditsicherheiten* (C.F. Müller Verlag, München).

<sup>16</sup> Thus, the quite critical article written by a German attorney in 1996 remains valid up until today. See Jens Hausmann, the Value of Public-Notice Filing under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property, 25 *Georgia J. Int’l and Comp. Law* 427 (1996). His conclusions are getting to the essence of the point: “... the public-notice fi ling system under U.C.C. Article 9[...] established more certainty and predictability among competing creditors [though] this advantage has its price [given that] secured creditors face the risk of failing to comply [and] [...] [t]he question of proper fi ling gives rise to a significant volume of litigation, especially in bankruptcy settings where the trustee often challenges the adequacy of a particular fi ling. [...] The creditors under the German system do not incur the same costs, but they must depend on the debtor’s representations regarding the existence of prior securities without being able to verify [that.]” *Id.*, at 475.

<sup>17</sup> See § 6:216(4) of the new PTK for the subjection of ROT on movables to registration and the consequences of the failure

to do that. It is also a novelty that compared to the earlier version of the PTK now ROT on immovables has to be entered to be valid against third parties. In case of other types of fiduciary securities – i.e., pre-emption (“*elővételi jog*”), repurchase (“*visszavásárlási jog*”) and option to buy or sell (“*vételi és eladási jog*”) – § 6:226(2) now as well subjects all of them to registration as a precondition of validity against third parties. Subjection to registration with the registry of charges is a novelty of the new PTK. See Gábor Gadó, Anita Németh and Ágnes Simkó Sáriné, *Ptk. Fordítókulcs – Oda-Vissza* (HVG-Orac, Budapest, 2013), at 329-330.

<sup>18</sup> See Ulrich Drobnig, *Basic Issues of European Rules on Security in Movables*, in: John de Lacy (ed.), *Personal Property Security Law – Comparative Perspectives* (Routledge-Cavendish, London – New York, 2010), at 452.

<sup>19</sup> The mentioned June 2012 IFC Doing Business Report – focusing on access to credit and with it secured transactions reforms – succinctly states that “Germany made access to finance more difficult by decreasing secured creditors’ rights during reorganization procedure.” Material available at: <<http://www.doingbusiness.org/data/explortopics>

## 2.2. Slovenia

Slovenia's post-1990 history was exemplary until 2013 because it was in the position to profit from the relatively advanced economy inherited from Yugoslavia and the Austro-Hungarian Monarchy. As in the former Yugoslavia it was the most west oriented republic, it had quite a number of successful enterprises that had enjoyed a monopolistic position in the former common state of southern Slavs.<sup>20</sup> Largely as a result of that, though to a great extent also under the unabating strong influence of German and Austrian laws, Slovenians have failed to step on the path of secured transactions law reforms. It remains to be seen whether their stance will change as Slovenia has faced a sovereign debt crisis of its own in the first half of 2013, systemic economic and legal problems have come to the surface. Namely, improperly answered legal issues abound even in the context of such earlier booming industrial sectors as leasing<sup>21</sup> or factoring, which could be linked to secured transactions law.

## 2.3. Croatia

The Balkan wars of the 1990s have somewhat postponed the arrival of the secured transactions reform winds to Croatia as well. If compared to Hungary, however, this factor is due that while the new Hungarian Civil Code denotes the third meaningful revamping of secured transactions law, Croatia is still somewhere in the first or perhaps in its second phase of evolution. Yet the arrival of common law-inspired elements of secured transactions law was not prevented by the fact that for Croatia the top model jurisdiction is still Germany and to

a lesser extent Austria – systems otherwise steadfastly resistant to influences from common law. Though it would be mistaken not to realize that the clash of the two differing approaches to law do take their toll especially when the new legal institutions – such as the floating security – reach Croatian judges trained in the continental European tradition.

In such a mixed milieu has Croatia enacted in 2006 its first modern secured transactions act – entitled the *Law on the Registry of Court and Public-Notary Security Interests on Movable and Rights*.<sup>22</sup> This law is quite far reaching because it has introduced not just a local version of the English floating charge<sup>23</sup> but made subject to registration also retained ownership (though only if valid more than a year) and the lookalikes of negative pledge covenants.<sup>24</sup> Needless to say, a special registry was erected specifically for this purpose which is maintained by the Financial Organization (FINA), a state-owned entity providing also other services.<sup>25</sup> FINA has registry offices in all major cities and towns of Croatia, accepts entry both in hard copy and electronic form from Monday through Friday between 8:00 and 15:00 hours and charges fees for the related services.<sup>26</sup>

A separate Act on Leasing – “*Zakon o lizingu*” – was passed in the same year.<sup>27</sup> The act is a combination of prudential and rules on the leasing contract itself. Yet another agency, the Croatian Agency for the Supervision of Financial Services (HANFA), is entrusted with the maintenance of the registry of leasing organizations and

/gettingcredit/reforms >; last visited on 26 June 2013. Needless to say, as IFC just as the World Bank looks at the world from a position that takes US law as the benchmark; the opinion of Germans might not fully correspond. Though German empirical data are lacking.

<sup>20</sup> E.g., Gorenje (household appliances and personal electronics), Krka and Lek (pharmaceuticals), Elan Line (sports equipment), Tomos (motor vehicles), Mercator (supermarket), or Sava Tires.

<sup>21</sup> See Pavle Flere, *Leasing in Slovenia – the Fastest Growing Financial Service Industry notwithstanding the Discrepancy between Theory and Practice*, in: Stefan Messmann & Tibor Tajti (eds.), *The Case Law of Central and Eastern Europe – Leasing, Piercing the Corporate Veil and the Liability of Managers & Controlling Shareholders, Privatization, Takeovers and the Problems with Collateral Laws* (European University Press, Bochum- Germany, 2007), at 362-378.

<sup>22</sup> In Croatian: “*Zakon o registru sudskih i javnobilježničkih osiguranja tražbina vjerovnika na pokretnim stvarima i pravima*.” Published in Official Gazette of the Republic of Croatia No. 121/05. Text in Croatian available at <

<http://www.zakon.hr/z/276/Zakon-o-Upisniku-sudskihi-javnobilje%C5%BEi%C4%8Dkih-osiguranjatra%C5%BEbina-vjerovnika-na-pokretnim-stvarima-ipravima> >.

<sup>23</sup> See article 38(1) of the Act on “*lebdeće založnopravno osiguranje*” or floating charge.

<sup>24</sup> See article 6(1) – 7 for retained ownership (“*pravo vlasništva na pokretnini koje je zadržano na temelju ugovora, ako je njegovo trajanje duže od jedne godine*”) and article 6(1) – 5 for negative pledge covenants (“*mjere zabrane otuđenja ili opterećenja predmeta osiguranja*”).

<sup>25</sup> The website of FINA is at < <http://www.fi.na.hr> > with English pages.

<sup>26</sup> The tariff is at < <http://zaloznaprava.fi.na.hr/Upisnik.htm> >; last visited on 18 June 2013. For example, for the registration of the ‘main entry’ up to twenty assets encumbered is 250 kunas or 33.48 Euros. Getting of a copy from the registry (directly from the office) costs 30 kunas or 4.0176 Euros.

<sup>27</sup> Published in Official Gazette No. 135/06. Text in Croatian available at < <http://www.zakon.hr/z/256/Zakon-o-leasingu> >.

leasing objects<sup>28</sup> - in addition to monitoring of the capital markets, insurance companies and pensions.

Self-help repossession or generally out-of-court enforcement is in principle only in exceptional situations tolerated in Croatia as well. Though, perhaps the more precise formulation would be that the new detailed regulation of out-of-court enforcement known to the new Hungarian Civil Code is not yet part of the Croatian legal system. However, similarly to Hungary, out-of-court collection has gradually become something officially not spoken of but increasingly practiced. Moreover, one could legitimately speculate that the accession of Croatia to the EU on the 1<sup>st</sup> of July 2013 will demolish even the existent shields before the entry of such European international private firms specialized to debt collection – like the

Swedish 'Intrum Justitia' or the German 'EOS-Group.'

#### 2.4. Bosnia and Herzegovina (BiH)

The inherited political ills and the economy brought to the abyss are attributable that in BiH the rule of law is amongst the lowest in the region. This includes significant discrepancy between written and living laws as well as corruption in the banking sector and in lending; the latter being a much bigger problem than in the other post-Yugoslav countries.<sup>29</sup> This a priori affects any value judgment on the system introduced with the assistance of USAID and EBRD. Formally thus BiH is no different from most of the region's countries: the USAID Pledge Registry Reform starting in 2002 ended with the passage of the new nation-wide Framework Law on Registered Pledges in 2004<sup>30</sup> that replaced the earlier sub-national laws<sup>31</sup> and was coupled with the erection of a new registry maintained by the common Ministry of Justice

(in operation since 2005). The act is perhaps more resembling American law than those of the others discussed herein (perhaps with the notable exception of first generation Romanian laws). For example, interestingly it also extends to leases though separate act exists on financial leases.<sup>32</sup>

The reality is less rosy than what the mechanical listing of these acts and achievements may suggest, though quality data are lacking. For example, search of the register via Internet is problematic.<sup>33</sup> A telling indirect proof relates to the relatively high suicide rates committed because of incapability to pay typically as a guarantor (i.e., direct and joint liability or "*solidarna odgovornost*"). Namely, banks resort instead of enforcement on the collateral to chasing the third party guarantors because the chances of getting paid are considerably higher that way. In other words, banks do not trust the new secured transactions system. Even though no exact quantitative data are available on the percentage of contracts to which guaranty (or suretyship) has been added (be it BiH, or other country of the CEE), it may be legitimately claimed that in those countries of CEE which have acceded to the EU in the meantime the role of personal securities has decreased. The relative decline of the use of suretyships and guaranties seems to have been the case, for example, in Hungary during the few years preceding the 2008 global financial crisis.<sup>34</sup>

#### 2.5. Montenegro

Not unheard of in the region, but unfortunately Montenegrin secured transactions law fell prey to the whim of western experts each promoting its own version of law. This was first primarily the German Agency for Technical Cooperation (GTZ) during the 1990s and later

<sup>28</sup> The website of HANFA ("Hrvatska agencija za nadzor financijskih usluga") is at < <http://www.hanfa.hr> >. On the 18th of June 2013 altogether twenty-four leasing organizations were registered with HANFA, mainly affiliates of universal banks. See at < <http://www.hanfa.hr/index.php?ID=0&LANG=HR&AKCIJA=1006> >.

<sup>29</sup> For various sources proving that and for an analysis of the repercussions of this specific form of malady see the master's thesis of Stjepko Čordaš entitled the Impact of Secured Transaction Reform on Corruption in Lending: Incorporating Pillars of UCC Article 9 to Bosnia and Herzegovina, available electronically at < [www.etd.ceu.hu/2012/cordas\\_stjepko.pdf](http://www.etd.ceu.hu/2012/cordas_stjepko.pdf) >; last visited on 14 June 2013.

<sup>30</sup> Known also as the 'Framework Pledge Law' (with emphasis on framework) because it was passed on the level of the common states and not on the level of the constituent entities. As such it represents an exception to the basic rule according to which property law is in the jurisdiction of the sub-national entities (i.e., Federation of BiH, Republika Srpska and Brcko). See the USAID document BiH's Pledge Registry Project's Securing Finance Reform from FS Series

No. 10 at < <http://egateg.usaid.gov/resources/535> >; last visited on 14 June 2013.

<sup>31</sup> E.g., the Law on Registered Pledges on Movable and Membership Shares of Republika Srpska "Zakon o registrovanim zalozama na pokretnim stvarima i članskim udelima" which was passed in 2000 and allegedly has not been revoked even after the passage of the common framework act. See Renuka Kukanesen's Report on BiH (Wolff Theis) available at < <http://www.ifl.r1000.com/pdfs/Directories/3/Bosnia.pdf> >; last visited on 14 June 2013.

<sup>32</sup> English text available at < <http://www.ebrd.com/downloads/legal/core/bosnials.pdf> >; last visited on 14 June 2013.

<sup>33</sup> The website – working allegedly only with Internet Explorer – is at < <http://www.reg-zaloga-bih.gov.ba> >. On 14 June 2013 I was not in the position to access the website notwithstanding of multiple attempts.

<sup>34</sup> See, e.g., Tibor Tajti, Chapter on Hungary, in: Aurelia Colombi Ciacchi and Stephen Weatherill (eds.), *Regulating Unfair Banking Practices in Europe: the Case of Personal Suretyships* 303-339 (Oxford University Press, 2010).

the EBRD. As one may conclude, the constant redirection of development did no good as the new system simply had no time to properly set a foothold in the country. As the country was until 2000 the hostage of the Serbian Milosevich regime, then until its independence in 2006 constitutional and political issues were at the forefront, reform of commercial laws has been of lesser importance. Without the pressure and financial support of international organizations, in other words, even the meagre amelioration of secured transactions would have never taken place. The continued economic problems of the otherwise quite small economy have constricted credits and spreading of leasing contracts. Thus, while one could bump into signs on ‘leasing’ or kin transactions in Budapest easily, that might not be the case in Podgorica or in other larger cities and towns of Montenegro.

Similarly to Serbia, the first modern secured transactions law was passed and with it a brand new registry for security interests was first erected in Montenegro in 2002; the operation of which was entrusted to the Commercial Court of the Capital Podgorica.<sup>35</sup> In the lack of quality hard data and related publications one cannot properly evaluate what has been concretely achieved though the few empirical data are less than encouraging. The EBRD regional surveys do confirm this to certain extent though these analyses are based on empirical data the quality of which is doubtful – though not only with respect to Montenegro only.<sup>36</sup> At

any event, similarly to BiH, one should reckon with a substantial gap between written and living laws, an appropriate though indirect indicator of what is the fact that the percentage of non-performing loans is among the highest here if compared to CEE.<sup>37</sup>

## 2.6. Serbia

Meaningful changes ensued in Serbia only after the fall of the Milosevich regime in 2000.<sup>38</sup> Soon thereafter the Law on Registered Security Interests in Movables was enacted in 2003<sup>39</sup> (was revamped in 2011)<sup>40</sup> with what chattel mortgage (or ‘registered pledge’) and a very rudimentary form of floating charge has been introduced. In the same year, the Law on Financial Leasing<sup>41</sup> was passed as well (also revamped in 2011), which subjected the new-fangled leasing companies to prudential regulation in addition to regulating some aspects of leasing contracts themselves – including registration of leasing contracts.<sup>42</sup> A separate agency was formed for operating the registries both on registered pledges and on leasing contracts, as well as quite a number of other types of databases, in 2005.<sup>43</sup> While leasing has become quite popular in Serbia, the use of registered pledges is less encouraging. Thus, similarly to the other countries in the region, it would be mistaken to claim that the reform of the field has reached its end.

The latest related development is that notwithstanding of the closeness of the Balkan wars of the 1990s, Serbia was courageous enough to allow privatization of collection of public debts in 2011<sup>44</sup> (the work of private

<sup>35</sup> The text of the Act in Montenegrin language is available at the website of the Registry at < <http://www.rzcg.gov.me/Zakon.htm> >; last visited on 14 June 2013.

<sup>36</sup> See, e.g., *Enforcing Secured Transactions in Central and Eastern Europe: An Empirical Study*, downloadable from <http://www.ebrd.com/downloads/legal/secured/enf.pdf>; last visited on 14 June 2013.

<sup>37</sup> See the EBRD Country Report 2012 on Montenegro, page 2 at <<http://www.ebrd.com/downloads/research/transition/assessments/montenegro.pdf>>; last visited on 12 June 2013.

<sup>38</sup> The exact date is the 5th of October 2000 generating the label of ‘5 October Overthrow.’

<sup>39</sup> Title in original “Zakon o založnom pravu na pokretnim stvarima upisanim u registar” [in English: Law on Registered Security Interests on Movables]. See Slobodan Doklešić and Zoltán Víg, *Enforcement of Contracts in Serbia*, in: Stefan Messmann & Tibor Tajti (eds.), *The Case Law of Central and Eastern Europe – Enforcement of Contracts* (European University Press, Bochum-Germany, 2009), at 905 et seq. Note that similarly to rest of CEE the new security interest subject to registration in a public registry is translated to Serbian language as ‘registered pledge’ (contrary to possessory pledge) and terms like ‘security interest,’ or ‘lien’ are largely unknown and no

special equivalent terms exist for them in Serbian legal terminology.

<sup>40</sup> The Serbian language texts of all the acts for which the registries are maintained by the Serbian Business Registers Agency could be downloaded from the website of the Agency at < <http://www.apr.gov.rs/%D0%9F%D1%80%D0%BE%D0%BF%D0%B8%D1%81%D0%B8.aspx> >.

<sup>41</sup> Text of the act in English is available at < <http://www.apr.gov.rs/Portals/3/Zakoni/Law%20on%20financial%20leasing.pdf> >; last visited on 14 June 2013.

<sup>42</sup> Id. at 912.

<sup>43</sup> The English pages of the Serbian Business Registers Agency [Agencija za privredne registre] is at < <http://www.apr.gov.rs/eng/Home.aspx> >. Besides the mentioned two, almost all other business-type registries are maintained by this single agency, including the companies registry, bankruptcy estates, non-profits, financial statements, court prohibitions.

<sup>44</sup> The novelty was introduced via amendment of the Act on Enforcement [*Zakon o Izvršenju i Obezbeđenju „Službeni Glasnik RS” or Official Gazette Nos. 31/2011 and 99/2011*]. Section 11(8) of the Act defines the private bailiff („Izvršitelj”) as “a natural person who is appointed by the Minister of Justice to undertake, in the status of a government official, enforcement actions within the limits of

bailiffs beginning in 2012) – which have produced quite commendable results already in 2013. Out-of-court enforcement is also resorted to by banks irrespective that legally it is not fully clear what the qualification and thus treatment of such actions is under the law. Similarly to other countries of the region, reports on such practices come from under the pen of only investigative journalists rather than courts or legal scholars.

## 2.7. Romania

What makes Romania peculiar is that here the reform ball was set into rolling directly by experts from the US through the USAID notwithstanding that the country has traditionally modelled itself primarily after French law. Consequently, contrary to the cautious approach characterizing Hungary, Romanians have quite boldly and to certain extent uncritically taken over American solutions. The resulting Law No. 99/1999 on Security Interests in Movable Property has not become, however, a full success though the initial data, at least according to USAID itself were impressive.<sup>45</sup> In fact, its “*most American*” part on self-help repossession was repealed by the new Civil Code that had stepped into force on 1 November 2011.<sup>46</sup> The rest of it was kept in a form more fitting continental European drafting traditions. One could thus say that due to this backpedalling Hungarian and Romanian secured transactions laws resemble more than earlier.

As in other reform countries, a new registry system – the Electronic Archive<sup>47</sup> – was erected for the novel security interests the operation of which unfortunately

was entrusted to more bodies: the Ministry of Justice and to various organizations that act as licensed registrars (i.e., Chamber of Public Notaries and the Chamber of Commerce).<sup>48</sup> Leasing on movables is also subject to registration in these Archives. The fees payable for registrations are fixed by a separate ministerial order and for a simple entry thirty lei (roughly seven Euros) are charged. Yet Romania deserves mention in particular for two of its innovations: *first*, related to its regime on leasing of motor vehicles, and *secondly*, for introduction of self-help – in particular self-help repossession. As far as the first of these novelties is concerned, similarly to much of Central Europe, leasing became a popular business form in Romania especially in financing acquisition of motor vehicles (by both consumers and businesses) already in the 1990s. Thus, the first Government Ordinance No. 51/1997 on Leasing Transactions and Leasing Companies has already in 1997 imposed prudential rules on the industry;<sup>49</sup> for rules on the contract of leasing itself – as irrespective of the Ordinance the contract remained innominate – resort to the Civil Code was a must. Yet perhaps the most curious yet commendable related solution was designation of different registration plates for cars under leasing to provide adequate public notice.<sup>50</sup>

The saga of self-help in Romania deserves attention for another reason. Namely, the above-mentioned Law No. 99/1999 has virtually unreservedly taken over the self-help related solutions of UCC Article 9.<sup>51</sup> Here, it ought

*the enforcement decree as well as to undertake other actions for which he is empowered based on this Act.”*

<sup>45</sup> According to the publication Rural Finance, issue No. 5, of year 2006, the reforms “*drastically expanded credit*” already in the first year of 2000, when about 65.000 fi lings were made, what increased to about 200.000 per annum in the pre2006 period. Based on this “*Romania offered more secured transactions loans than the rest of the Balkan nations combined in 2005.*” for example. See at < [http://www.ruralfinance.org/fileadmin/templates/rflc/documents/1178542504278\\_RAFI\\_Note\\_5.pdf](http://www.ruralfinance.org/fileadmin/templates/rflc/documents/1178542504278_RAFI_Note_5.pdf) >; last visited on 27 June 2013. It is not known though it would be interesting to know how these figures have changed after the spillover effects of the 2008 financial crisis reached the region and heavily affected all the countries analyzed herein.

<sup>46</sup> The text of the new Civil Code – only in Romanian language – is available at < <http://www.mj.romarhiva.ro/webarchive/index.htm> >. The part on security interests on goods is in Book V on Obligations, title XI on in rem securities, sections 2323 - 2499. The part on self-help was repealed by Art. 230, letter u/ of Law No. 71/2011 – the law setting into force of the new Civil Code of Romania.

<sup>47</sup> Website of the Archive [“*Arhiva Electronică de Garanții Reale Mobiliare*”] is at < <http://www.mj.romarhiva.ro/webarchive/index.htm> > though with no English pages.

<sup>48</sup> See EBRD, *Commercial Laws of Romania – An Assessment by the EBRD* (March 2012), at 16. The document is available electronically at < <http://share.pdfonline.com/cd87705611fd41a49e65db259be80909/Country%20Law%20Assessment.pdf> >; last visited on 18 June 2013. For the list of authorized operators see < <http://www.mj.romarhiva.ro/webarchive/index.htm> >.

<sup>49</sup> See Ileana M. Smeureanu, *Good News from Romania: the Leasing Market is Expanding*, in: Stefan Messmann & Tibor Tajti (eds.), *the Case Law of Central and Eastern Europe – Leasing [...]* (European University Press, Bochum-Germany, 2007), at 271.

<sup>50</sup> *Id.* appendix at 295-297 or wikipedia’s page on vehicle registration plates of Romania at < [http://en.wikipedia.org/wiki/Vehicle\\_registration\\_plates\\_of\\_Romania](http://en.wikipedia.org/wiki/Vehicle_registration_plates_of_Romania) >; last visited on 18 June 2013.

<sup>51</sup> See Klaudia Fabián, Alexandra Horváthová, Catalin Gabriel Stănescu, *Is Self-Help Repossession Possible in Central Europe*, 4 Duke J. of Eurasian Law 83. Paper available also



to be clarified that the US solution puts the secured creditor into a strategically much more powerful position than what would be the case under the new Hungarian Civil Code and its rules on out-of-court realization of security interests. This is to be attributed primarily to the institute of self-help repossession which – contrary to the Hungarian solution – does not rely on the cooperativeness of the debtor but allows repossession even in the lack of it. The only limitation is that the process of repossession must not be commenced or it must be stopped if that would lead to breach of the peace.<sup>52</sup> As in the Anglo-Saxon systems repossession is normally undertaken by professionals („*repossession-industry*” vagy „*repo-man*”), these do know how not to cross the Rubicon.

Now, if adjudged solely based on the said act, one might get the impression that Romania has opened the doors to self-help the widest in this respect in the region. Taking a look at what the country's courts have been thinking on the novelty would, however, be sobering because the Romanian Constitutional Court declared the amendment that would have allowed complete bypassing of courts in the enforcement of security interests unconstitutional.<sup>53</sup> In the end, thus, Romania's recent brief history of self-help has been quite hectic, with considerable divergence between written and living law yet notwithstanding the Constitutional Court's position out-of-court repossessions and other forms of private debt collection are far from being unheard of – similarly to Hungary or other countries of the region. At any event, as even court enforcement with presence of bailiffs could involve “*violent incidents going as far as direct and brutal clashes between the debtors and police forces,*”<sup>54</sup> it would be too far reaching to speak of a successful transplantation

of the law on self-help repossession from UCC Article 9. When browsing the reports of EBRD, USAID or other international organizations – sometimes radiating with unfounded optimism – the above should not be forgotten either.

## 2.9. Ukraine

Ukraine forged its first modern secured transaction laws primarily with the assistance of Canadians, moreover with a meaningful impact of the law of Quebec. As Macdonald, who after having served as an expert turned into a reform-sceptic, put it “*a variation on the Quebec framework was adopted.*”<sup>55</sup> For example, lease (leasing) is also covered by the system, what is an emblematic mark clearly attributable to influence stemming from Canada and the US. In the opinion of the EBRD, “[d]espite some confusion and uncertainty (not unusual in transition economies), these changes have largely been positive.” Though it mildly admitted as well that due to the 2008 global financial crisis “*the weaknesses that exist in the institutions surrounding debt enforcement*”<sup>56</sup> became visible.

That the new system is not to be apostrophized unreservedly a full success could be concluded already from the abundance of varying types of laws that regulate the field, some even overlapping or conflicting.<sup>57</sup> This claim stands notwithstanding that a special act – the Law on Securing Creditors' Claims and Registration of Encumbrances – was enacted in 2004.<sup>58</sup> As it usually happens with fragmented laws, gaps and inconsistencies inevitably arise; what is well illustrated with the myriad problems the newcomer leasing contracts encountered in Ukraine.<sup>59</sup> One may also wonder whether the continued

via the SSRN network, reference was made to page 7 of the SSRN version.

<sup>52</sup> Section 9-609 of UCC Article 9 read: after default the secured creditor may repossess the collateral either pursuant to a judicial process or without that. However, in the latter case „[a] secured party may proceed ... if it proceeds without breach of the peace.” UCC does not define what qualifies as breach of the peace but leaves that to the courts.

<sup>53</sup> Reference was made to the 458/2009 decision of the Romanian Constitutional Court. For a related discussion see *Id.*

<sup>54</sup> See Ileana M. Smeureanu & Florentin Giurgea, *Enforcement of Contracts in Romania*, in: Stefan Messmann & Tibor Tajti, *the Case Law of Central and Eastern Europe – Enforcement of Contracts* (European Univ. Press, Bochum-Germany, 2009), at 727.

<sup>55</sup> See Roderick A. Macdonald, *Transnational Secured Transactions Reform: Book IX of the Draft Common Frame of Reference in Perspective*, vol. 17, No. 4, *Zeitschrift für Europäisches Privatrecht* 745-782 (2009), at 760.

<sup>56</sup> See EBRD, *Commercial Laws of Ukraine – An Assessment by the EBRD* (March 2011), at 16. Document downloadable from < <http://www.ebrd.com/downloads/sector/legal/ukraine.pdf> >; last visited on 29 June 2013.

<sup>57</sup> The sources regulating leasing range from the Civil Code (2003) through such programmatic and politically tainted specific regulatory instruments as the Ordinance of the President of Ukraine ‘On Additional Measures Aimed at further Development of Leasing in the Agricultural Sector of the Economy’ from 2001. See, e.g., Leonila Guglya, *Ukrainian Leasing: the Search for the Right Way to Go*, in: Stefan Messmann & Tibor Tajti, *the Case Law of Central and Eastern Europe – Leasing, Piercing the Corporate Veil* [...] 378 (Eur. Univ. Press, Bochum-Germany, 2007), at 385.

<sup>58</sup> The unofficial English translation of the text of the Act is available at <<http://www.ebrd.com/downloads/legal/core/ukrainel.pdf>>; last visited on 15 June 2013.

<sup>59</sup> For a list see Leonila Guglya, *Ukrainian Leasing: the Search for the Right Way to Go*, in: Stefan Messmann & Tibor Tajti, *the Case Law of Central and Eastern Europe – Leasing*,

popularity of penalties as a contractual security device in the country is still only a well-known remnant from socialism or the prohibitive costs and risks associated with the new secured transactions system are frightening off businessmen from resort to it?<sup>60</sup>

As far as the registry system is concerned, the Ukrainian solutions are neither a mere replica of the patterns employed by others, nor are examples of businessfriendliness. On the one hand, the *State Register for Registration of Encumbrances on Movable Property* is an integrated and computerized database into which data on creation, changing and termination of charges is to be entered.<sup>61</sup> Or, in this respect it does not differ from the systems in other countries of the region. The issue is that – even though as a principle the data are open to the public – access to the registers is indirect: i.e., only certified bodies are entitled to provide data to inquirers (now, public notaries, certain private notaries and the state enterprise “Information Center” of the Ministry of Justice of Ukraine). While the fee payable for an application submitted to a governmental body is fixed by law to about five USD, if private certified bodies are turned to the amounts may be higher as these are not capped by law. The excerpt from the registry per the law should be issued in two days though in reality that may not be the case. The other avenue is to apply to become a certified data-provider by contracting with the “Information Center” and by paying a special price for that.

### 2.10. Slovakia

Perhaps the Slovakian developments and solutions seem to have been the closest to the Hungarian ones in the region concerning quite a number of issues (in particular the features of the new charge register, as well as treatment of leasing and self-help) – *until the passage of the new Hungarian Civil Code*. This is to be attributed to a great extent to the fact that both countries opted for the EBRD model as guidance for reforms. For example, the new charge law introduced by the 2002 amendments of

the Slovak Civil Code<sup>62</sup> did not extend to leasing. Moreover, the operation of the new centralized and computerized charge register – starting on 1<sup>st</sup> of January 2003 – was also entrusted to the Chamber of Public Notaries.<sup>63</sup> Another similarity is that – contrary to more jurisdictions of the region that had introduced the common law-inspired novelties by a *lex specialis* – the Slovak lawmakers were reluctant to disrupt the dogmatic (systemic) unity of charge law. Consequently, now in both countries charges on immovables and movables are regulated side by side as part of the same chapter of the civil codes.

As already mentioned, leasing contracts are still *innominate* and are not subsumed under the charges system so far in Slovakia; similarly to the period preceding the enactment of the new Civil Code. Thus, in deciding related disputes courts apply by analogy the provisions on either sales or rent contracts what – given the meaningful size of the leasing market – may not be the best option as it generates unpredictability. In other words, the Slovak law looks on leasing contracts as the old Hungarian Civil Code used to do.<sup>64</sup> One may, however, speculate that it is only matter of time when Slovakia will also take the steps already taken by the new Hungarian PTK: i.e., morph the leasing into a nominate contract and subject it to registration.

Notwithstanding the EBRD guidance and through that the influence of common laws, Slovakia was reluctant to transplant much related to the self-help prong of secured transactions law. As Slovak law at the moment has no such detailed and innovative regulation on self-help as the one introduced by the new Hungarian PTK, – if positive law is consulted only – this legal institution is equally minimalist as the one of known in Germany, Austria and other Continental European systems and is limited to defence of possession. According to this conception, self-help is limited to fending off imminent threat to possession only but hardly allowing repossession of the collateral (object of charge) either by the secured creditor

*Piercing the Corporate Veil [...]* 378 (Eur. Univ. Press, Bochum-Germany, 2007), at 380.

<sup>60</sup> For a discussion on the role of penalties in Ukraine and the linked trends see Leonila Guglya and Oleksiy Kononov, *Enforcement of Contracts in Ukraine*, in: Stefan Messmann & Tibor Tajti, *the Case Law of Central and Eastern Europe – Enforcement of Contracts* 962-1077 (Eur. Univ. Press, Bochum-Germany, 2007), at 1034 *et seq.*

<sup>61</sup> Resolution of the Cabinet of Ministers of Ukraine on Procedure for the Maintenance of the State Register on Charges over Movable Property (2004) is available at <<http://zakon4.rada.gov.ua/laws/show/830-2004-п>>; last visited on 27 June 2013.

<sup>62</sup> Charges are primarily regulated in articles 151a to 151md of the Civil Code as amended by Act No.526/2002 Coll.

<sup>63</sup> See the website of the registry – with English (and some Hungarian) pages – at <<http://www.notar.sk/%C3%9Avod/Not%C3%A1rskecentr%C3%A1lneregistre/Z%C3%A1lo%C5%BE%C3%A9pr%C3%A1va.aspx>>. The Charges Register is regulated by Act No. 323/1992 Coll. as amended by Acts Nos. 232/1995 Coll., 397/2000 Coll., 561/2001 Coll. and 526/2002 Coll. and by Decree No. 607/2002 Coll.

<sup>64</sup> See, e.g., Peter Jedinák, *Leasing in the Czech and the Slovak Republic*, in: Stefan Messmann & Tibor Tajti (eds.), *the Case Law of Central and Eastern Europe – Leasing [...]* 206 (Eur. University Press, Bochum-Germany, 2007).

himself or by a third party professional. The new Hungarian PTK also knows for this basic principle<sup>65</sup> and for the right to such possessory self-defense<sup>66</sup> but also provides for explicit exceptions: i.e., the new PTK's hinted at detailed regulations on out-of-court repossession of collateral which seem to be lacking in Slovakia for the time being.<sup>67</sup> Various forms of private debt collection not involving involvement of courts is, however, already part of Slovak business life.<sup>68</sup>

### 2.11. Poland

While Hungary only planned to enact its common law-inspired law on chattel mortgages before the WW II, Poland reached to the point of enacting it in 1939. However, then due to the World War II and the subsequent credit-hostile environment of socialism, the new system was not been given chance until the fall of the Berlin Wall and redirection towards capitalism. The new era began in Poland with the passage of its Registered Pledge Act<sup>69</sup> (also the year of the first amendment of the Hungarian Civil Code) and ever since Poland is among the leaders in the entire CEE region based on most of the parameters used for measuring the success of secured transactions reforms. Contrary to Hungary, for example, the number of entries has not subsided during the last few years. The Polish system has its own defects though starting from the conflict of the registration-based 'registered pledge' and the German non-registrable ones (a problem causing unease in Hungary as well for a few years past up to the arrival of the new Civil Code).<sup>70</sup> Yet a greater obstacle was created by a solution imposed by the Ministry of Justice, which – worrying for financing of courts – imposed the requirement that each registration with the charge register must be "blessed" by a judge, inevitably prolonging and making the process of registration unnecessary complicated.<sup>71</sup>

In Poland, leasing contracts are equally popular especially in the context of motor vehicle financing due to some tax incentives though it has entered the real property financing market as well. Legally leasing remains isolated from 'registered pledges.' The only major novelty is that it became a nominate contract in 2000 by adding provisions on it to the Civil Code (Chapter XVII).

Nothing particular could be said about out-of-court enforcement because, similarly to the overwhelming part of the region's countries, the Polish private law's concept of self-help is also limited to self-defense of possession. The reality, as elsewhere, however, is different from what the few provisions on self-defense of possession suggest. For example, the Polish may legitimately brag that they already have a genuinely international private collection company – named „Kruk”<sup>72</sup> – what deserves mention here notwithstanding that for the time being the services of self-help repossession are not listed by the company. The interesting addendum in that respect is that the issue of private collection has reached already the Polish Constitutional Court which in 2004 ruled on its constitutionality and concluded that “*the creditor is not allowed by law to enforce his claim by his own actions; he must turn to a court bailiff instead.*”<sup>73</sup>

### 2.12. Lithuania

Lithuania also passed a *lex specialis* and erected a registry – the Central Mortgage Office<sup>74</sup> – following EBRD support and guidance in 1997 and 1998 respectively.

However, Norwegian experiences with running charge registers were resorted to as a source of inspirations;<sup>75</sup> presumably also because of the interests and strong presence of Scandinavian financial organizations in the Baltic. Although EBRD ranked the new system as one of

<sup>65</sup> See new PTK 1:6 § providing for the enforcement of rights provided by the Code through courts as the basic rule.

<sup>66</sup> New PTK 5:5§ and 5:6§.

<sup>67</sup> It ought to be noted that, for example, the Commentary edited by György Wellmann mentions no linkage between the basic principle providing for court enforcement of rights from the Civil Code in 1:6§ and 5:132§ - which in the part devoted to secured transactions foresees the possibility of self-help repossession of the collateral.

<sup>68</sup> See Klaudia Fabián, Alexandra Horváthová, Catalin Gabriel Stănescu, *Is Self-Help Repossession Possible in Central Europe*, 4 Duke J. of Eurasian Law 83. Paper available also via the SSRN network, reference was made to page 5 of the SSRN version.

<sup>69</sup> See Krzysztof Kaźmierczyk and Filip Kijowski, *Enforcement of Contracts in Poland*, in: Stefan Messmann & Tibor Tajti (eds.), *the Case Law of Central and Eastern*

*Europe – Enforcement of Contracts* (Eur. University Press, Bochum Germany, 2009), at 607 *et seq.*

<sup>70</sup> *Id.* at 609.

<sup>71</sup> See John A. Spanogle, *Secured Transactions Law in Eastern Europe: the Polish Experiences as an Example*, 31 T. Jefferson L. Rev. 279 (March, 2009), at 288. Article downloadable from < <http://www.tjeffersonrev.org/sites/tjeffersonrev.org/files/31-02-02-Spanogle.pdf> >; last visited on 14 June 2013.

<sup>72</sup> A cég honlapja: < <http://www.kruk.eu> >.

<sup>73</sup> See Kaźmierczyk and Kijowski, at 592, note 70 *supra*.

<sup>74</sup> Website – with English language pages – is at < <https://www.hipotekosistaiga.lt/index.php?-919321986> >.

<sup>75</sup> See Andrius Smaliukas, *Reform of Security over Movables in Lithuania: the Second Stage*, in: *Law in Transition 19* (EBRD, 2004), at 21. Downloadable at < <http://www.ebrd.com/downloads/research/law/lit041.pdf> >; last visited on 14 June 2013.

the best ones in the region, soon it was realized that the law needs to be revamped. This ensued in the form of a new Civil Code of 2001 – replacing also the specific act – and the 2003 new Code of Civil Procedure. The registry created initially for registration of mortgages only was also expanded. The reform excluded judges from the registration process as well to speed up the process.<sup>76</sup> The respective provisions of the Civil Code were amended in 2011.

As far as the enforcement is concerned, Lithuania faced similar problems as the region's other countries. For example, the inefficiency of the court bailiff system was a major problem. To remedy this, Lithuania privatized the bailiff services similarly to Hungary and other countries of the region.<sup>77</sup> Irrespective of this, however, a relatively strong local private debt collection sector had emerged. According to some unofficial sources, the importance of these has decreased solely after the possibility of truncated (summary) trials was introduced a few years ago.

Finally, leasing has been one of the most widely used newcomer contracts in Lithuania in the post 1900-period as well.<sup>78</sup> It was transformed into a nominated contract by the Civil Code of year 2000, which conditioned the validity of the retained ownership in leasing and other contracts containing retained ownership by registration with the *Register of Contracts* – a database added to the portfolio of the Central Mortgage Office in 2002.<sup>79</sup> It is interesting that issues like – what is the relationship of the sales and the leasing agreement when the lessor acquires the asset from a third person – have reached the Lithuanian Supreme Court even after leasing has become nominated.<sup>80</sup>

### 3. The New Hungarian Civil Code in the Light of the Developments in the Region

#### 3.1. Out-of-court Enforcement and Self-Help Repossession

A fact: an important token of the efficiency of the Unitary Model is self-help. As it was suggested above, one could say that the new Hungarian Civil Code's solutions are milder variants of the Unitary Model's self-help rules, which additionally were adjusted to local circumstances; though the rapprochement is

unquestionable. To properly understand what this more concretely means the following ought to be borne in mind.

*First*, because of differences in the meaning, those English or Hungarian terms which otherwise suggest sameness or resemblance might be misleading. For example, although the English 'self-help' may be referred to by the Hungarian phrase of – in literal translation: '*out-of-court [execution] enforcement*' – used by the new Civil Code, the two provides the secured creditor with radically different arsenal of rights and entitlements. Likewise, albeit the local Hungarian kin of the Unitary Model's (English term of) '*self-help repossession*' – in literal translation: '*right to the possession of the collateral*'<sup>81</sup> – the Hungarian term is incapable of reproducing the content of its kin. Naturally, these caveats apply *mutatis mutandis* also to the relation of English and other local languages. *Secondly*, the reason because of why terminology issues have been again raised is that the clarification of the exact meaning of key terms in the compared laws may bring to the surface also questions related to the content. Let us illustrate this with two points on the pivotal building block of out-of-court enforcement of security interests, self-help repossession or its Hungarian conditional equivalent of '*right to the possession of the collateral*.'

On the one hand, it seems that the drafters of the new Hungarian Civil Code have failed to properly set the relationship of self-help repossession (new PTK 5:132§) and the right of lawful possessors to "*self-defense*" or the right to protect their possessions without resort to courts (5:5§és 5:6§). The lack of a specific provision on that, however, suggests that the drafters saw no reason for worry. A number of questions may be formulated related to the formulation of the new PTK yet as the confines of this paper do not allow us to discuss this issue in detail, we have no other option here but to leave the deciphering of the intricacies of this relationship to Hungarian courts.

*The other*, more interesting aspect relates to speculations on what the presumptions of the drafters were (if any). On the one hand, the new rules seem to rest on the presumption that *most* debtors would be willing to surrender the collateral *voluntarily* once they receive the

<sup>76</sup> See the Central Mortgage Office's page describing the history and functions of the register at < <https://www.hipotekosistaiga.lt/index.php?-1814436437> >.

<sup>77</sup> See Lina Aleknaite, *Enforcement of Contracts in Lithuania*, in: Stefan Messmann & Tibor Tajti, *the Case Law of Central and Eastern Europe – Enforcement of Contracts* (Eur. Univ. Press, Bochum-Germany, 2009), at 353.

<sup>78</sup> For the analysis of the history of leasing and the related court cases see Lina Aleknaite, *Leasing in Lithuania*, in: Stefan Messmann & Tibor Tajti (eds.), *the Case Law of Central and*

*Eastern Europe – Leasing, Piercing the Corporate Veil and the Liability of managers & Controlling Shareholders, Privatization, Takeovers and the Problems with Collateral Laws* (European University Press, Bochum- Germany, 2007), at 240 -263.

<sup>79</sup> See the related English pages of the Office at < <https://www.hipotekosistaiga.lt/index.php?1698650097> >.

<sup>80</sup> See Aleknaite, at 251, in the book cited in footnote 79 above.

<sup>81</sup> New PTK 5:132§.

request of the secured creditor.<sup>82</sup> As there is no rule on what happens if that is not the case, it may be assumed that – instead of providing a test or a guidance – the Civil Code direct parties to courts.

On the other hand, one may speculate as well that the drafters' presumption related to self-help repossession of the collateral was also that repossessors (i.e., either the secured creditor himself or his professional agents – the repossession companies) likewise tend to act in good faith and that their practices – as the normally strategically more powerful parties – could properly be controlled by imposing the vague standard of 'commercial reasonableness' ("kereskedelmi ésszerűség").<sup>83</sup> What the experiences of common laws, especially of the US, with self-help repossession show, however, is that the frequency of abuses increases substantially once professionals appear on the market. This was necessary in addition to the long line of refined court precedents that have tried to give as exact as possible content to the 'without the breach of peace' standard of UCC Article to fix the borderline between legal and illegal repossession practices. In brief, the more than two centuries of US experiences with repossession suggest that reality is not that idyllic as presumed by the new PTK.

Notwithstanding the risks the differing terminology may cause, however, certain conclusions may readily be drawn based on the above related to the present position of the region on enforcement of security interests. First and foremost, the region's systems remain very reluctant to admit that *controlled* channelling of the enforcement of security interests on personal property (i.e., movables, rights and claims) towards the out-of-court avenue is inevitable. The new Hungarian Civil Code perfectly illustrates this even though the advancements made by it related to out-of-court enforcement are meaningful.

Another common denominator is that almost everywhere there is a clear tension between what written law says on self-help and the reality. Unfortunately, it is only the reports of investigative journalists<sup>84</sup> that reveal that banks and some industries (typically the large telecommunications companies) already quite routinely bypass courts and even the privatized bailiffs (in Hungary known as "önálló bírósági végrehajtó"). Further, it was sobering in Hungary – more indicia suggest that it was so

elsewhere, too – to realize that similarly to most other Member States of the EU, *Intrum Justitia* or the German *EOS Group*'s local affiliates and local private collection enterprises have gained a solid foothold by now and have become part of the lives of Hungarians. Romanian developments are instructive for another reason: they testify that opening the doors completely to self-help is not riskless in the lack of the necessary social-economic preconditions.

The said Hungarian and Romanian experiences and those of other countries of the region, however, reveal how important it would be to parallel the spreading of out-of-court enforcement with sector-specific **prudential and consumer-protection regulations**. In the aggregate and notwithstanding the Romanian backpedalling on this front, however, it would be mistaken to deny that step-by-step out-of-court enforcement is advancing, though more in reality than on law books. The members of the older generations may best testify that in the not so distant past the techniques employed by private debt collectors today were simply unheard of in the region. Besides that, one may legitimately presume that this area of secured transactions law will continue to develop yet not necessarily according to the presently formulated wishes of lawmakers. In Hungary, for example, until the next major revamping of the pertaining rules courts will be expected to give content to the novelties introduced. Though, in our ever speedier changing world it is not only secured transactions law in the context of which courts are affording increased importance, nor is this a tendency specific only to Hungary.

### 3.2. Acquisition Finance

Wise people learn from the experiences of the others, hence, it was high time to realize also in Hungary that it was not without a reason that all the countries belonging to the Unitary Group have subjected leasing<sup>85</sup> and contracts based on ROT to the secured transactions system. Seeing the related innovation of the new Hungarian Civil Code let me be immodest for a moment. Namely, trying to predict what may happen to the new Hungarian secured transactions system, I wrote in my book *Comparative Secured Transactions Law* – that has reached the market in 2002 – the following:

<sup>82</sup> See 5:132(3) § of the new PTK.

<sup>83</sup> See 5:133 § of the new PTK.

<sup>84</sup> See Ágnes Gyenis, *Vajon hová fut a kocsi? - Törvénytelen autófoglalások* (Where is the Car being Taken? – Illegal Car Repossessions), Hungarian language weekly 'HVG,' 26 March 2011 issue, at 97-98.

<sup>85</sup> Most of the Canadian provinces' Personal Property Security Acts have subjected to the Unitary Model only long term leases (lease for a term more than one year). Practicing

lawyers of the province of Ontario (70.4%), for example, responding to a questionnaire "supported the inclusion of long-term leases within the scope of the registration, priorities and conflict of laws provisions" of the new regime. See Jacob S. Ziegel, Benjamin Geva and R.C.C. Cuming, *Commercial and Consumer Transactions – Cases, Text and Materials, vol. III – Secured Transactions in Personal Property, Suretyships and Insolvency* (Emond Montgomery, Toronto, 1995), at 64.

*“The moment the ‘security idea’ had set foot in Hungary following the 1996 collateral law reform ... it could have been predicted that the failure to tackle all issues necessary for functioning of the system would lead soon to newer amendments. Yet even the 2<sup>nd</sup> act [i.e., the 2000 amendments of the Civil Code] has failed to take substantial steps on **the fate [sic] of title and receivables financing**. It can be predicted that these issues will have to be targeted by next reforms.”* [Emphasis added.]<sup>86</sup>

In other words, the issue whether title financing transactions (e.g., leasing and other contracts containing retained ownership – roughly the category of fiduciary securities known to Hungarian law) should be made part of the secured transactions system is not the issue of wishes – it is something driven by the very nature of things.

But turning back to our regional survey, it should be also visible from the above that Hungary is not the first system in the region to look upon leasing and its kin as “*deemed-security interests*.” If **predictability** is not just pivotal for law but is the synonym for **justice** in the context of commercial law, then the indeterminacy of lawmakers to add leasing and the rest of the Hungarian ‘fiduciary contracts’ to the Civil Code and make a nominate contract with clear rules out of leasing – the limbo lasting for more than a decade – is hardly justifiable.<sup>87</sup> This naturally does not mean that prudential rules added to banking laws specifically on leasing companies are not needed: prudential rules are not substitutes but rather supplements those of secured transactions laws. Roughly the same applies to the bringing of factoring under the umbrellas of the system though the reasons differ to certain extent. If doubts still exist related to these two innovations of the new Hungarian Civil Code, then one should point to Book IX of the Draft Common Frame of Reference which does the same thing when making acquisition finance transactions subject to the regime resting on equal building blocks as

the UCC Article 9 – even if openly not admitting any American influence.

### 3.3. Floating Securities

The domestication of the floating – or property encumbering – security interest, the local equivalent of the English floating charge or the US floating lien, remains a challenge in all the reform countries. This may be concluded even though very few publications are devoted to them and thus it is very hard to draw firm conclusions apart from that fact that problems and dilemmas abound. One may, for example, legitimately speculate whether the dilemmas on the exact priority point of the local floating securities have been fully resolved – for what Hungary needed a number of years and a high court decision.<sup>88</sup> Likewise, it is still not clear who enforces floating securities; whether appropriate substitutes exist in the focused upon countries for the common law receivers – professionals with more than a century history? Croatian’s struggle, for example, with the reconciliation of the civilian property law principles and the new common-law originated device – what legitimates presuming that similar problems exist elsewhere in this niche of Europe as well.<sup>89</sup>

### 3.4. On the Need to Synchronize Secured Transactions and Bankruptcy Laws

The unusual closeness of secured transactions and bankruptcy law, two sides of the same coin, has not been tackled above because the complexity of this issue would require writing of a book; let alone the lack of quality empirical evidences and scholarly analyses from the region. Yet it could be firmly claimed that due to system (dogmatic) thinking strongly engraved in civil lawyers it has still not been fully realized how important is to ensure synchronization of the two. Though, as the doyen of German commercial law, Ulrich Drobnig put it “[*t*he acid test of security is, of course, its status and effectiveness in the event of the debtor’s insolvency.”<sup>90</sup> This is in particular a problem because the tests designed

<sup>86</sup> See Tibor Tajti, *Comparative Secured Transactions Law* (Akadémiai k., Budapest, 2002), at 370.

<sup>87</sup> See, e.g., Norbert Hete, *Leasing in Hungary – A Burgeoning Business amidst of a Non-Regulated Legal Environment*, in: Stefan Messmann & Tibor Tajti (eds.), *the Case Law of Central and Eastern Europe – Leasing [...]* 228 (Eur. Univ. Press, Bochum-Germany, 2007). See in particular the elaboration on the Supreme Court decision No. EBH 2000.274 the holding of which stated that “[...] in the course of qualification of mixed contracts (such as, for example, leasing agreements) the relevant rules of that [nominated] contract prevail which – by taking into account the subject-matter of the agreement in its entirety – is considered to have the most in common with the characteristics of the underlying legal relationship.” Quoted *Id.* at 236.

<sup>88</sup> For an overview of this development see István Mándoki, *A vagyont terhelő zálogjog ranghelye*, *Közjegyzők közlönye*, Nos. 7-8 (July-August 2006), at 14-17.

<sup>89</sup> Croatian courts have faced the conflict of the floating charge with the specification requirement of civil law. See Edita Čulinović-Herz, *Zalaganje Pokretnih Stvari Određenih po Rodu Prema Zakonu o Upisniku Sudskih i Javnobilježničkih Osiguranja Tražbina Vjerovnika na Pokretnim Stvarima i Pravima*, *Zbornik Pravnog fakulteta Sveuč. Rijeka* (1991) v. 27, br. 2, 655-689 (2006).

<sup>90</sup> Quoted from Ulrich Drobnig, *Basic Issues of European Rules on Security in Movable*, in: John de Lacy (ed.), *Personal Property Security Law – Comparative Perspectives* 444-456 (Routledge, 2010), at 449.

for evaluation of the overall success of the secured transactions reforms in the region tend to take into account only the non-bankruptcy context. Further, it is a common denominator of the region that the bankruptcy laws of the region suffer from many common maladies making the realization of security interests problematic. Needless to say, this is to a great extent attributable to the fact that the bankruptcy laws of the region are also the products of the post-1990 transitory period only; thus, they are also still immature. At the same time, it would be high time to realize as well that insolvency has by now become a grave socio-economic problem of systemic dimensions in this niche of Europe.

### 3.5. Operation of the Registries

The above synopsis has revealed also that – with the exception of Slovenia – in all the other discussed post-socialist countries the reform entailed erection of new registries for registration of the newcomer security interests. Unfortunately, it is also conspicuous that the opted for solutions vary a lot, among others, concerning who was entrusted with the operation of the system, whether the entries were paralleled with authentication or were closer to the mere notice-filing system of UCC Article 9? As far as the new Hungarian Civil Code is concerned, a look at the few related paragraphs<sup>91</sup> would easily reveal that Hungary is amidst of transition to the latter one and that the said paragraphs denote a major advancement in that direction. Needless to say, what fees should be payable for entries and for other services of the new registries has remained a hot issue. The data reveal that the solutions and the prices of entries and searches differ radically. Noticeable novelty is that as per the new PTK search of the register is free of charge.<sup>92</sup> If the idea of the DCFR on the erection of a common European registry for encumbrances on movables and rights is to materialize, the adaptation of the existent diverse national systems would amount to a real obstacle and would generate meaningful unnecessary costs and expenditures.

## 4. Conclusions

### 4.1. What is Common in the Region?

On the basis of the above elaboration a few conclusions virtually lend to be formulated starting with the fact that the overwhelming number of post-socialist countries in the region have **embarked on the reform** of secured transactions law inspired, directly or indirectly, by the common law-inspired Unitary Model. It remains to be seen whether the refusal by Slovenia to follow the suit was the right choice, though the chances are meagre that the secured transactions law reform would be perceived as one sort of panacea for the still unfolding sovereign debt financing crisis of Slovenia.

It is also characteristic of these countries that the reform continues and normally **more waves of major changes** could be differentiated – as illustrated, for example, by the new Hungarian Civil Code representing the third wave of major changes. One may even detect some tendencies like the spreading of the realization that leasing and other acquisition finance transactions or factoring contracts ought to be subsumed under the secured transactions system or else the new charge (primarily chattel mortgage) – as a costly functional substitute of leasing – would never become a widely resorted to device. It would be mistaken not to see the virtually unstoppable advancement of out-of-court enforcement as well. Even though recoiling or backpedalling is not unheard of (e.g., Lithuania and Romania), more and more jurisdictions are forced, even if only grudgingly, to open wider the doors. This is superbly illustrated now by the new Hungarian Civil Code, which has now introduced a milder form of self-help repossession; that form of self-help which is most capable of endangering social peace. Remains to be seen how will the already very much present international and local private debt collectors exploit the novelties and whether similar sequences of events awaits the rest of the region.

Even though almost two decades have passed with experimentations, the number of secured transactions-related **publications on and from the region is still very modest**. Additionally not infrequently they are also uncritical and tainted with bias – what includes also the EBRD and other international organizations especially when they are casting a vote on the results of their own work. The picture that is canvassed about the reforms cannot be but incomplete and somewhat distorted as a result. Further aggravating factor is that the local industries, albeit in the possession of valuable empirical evidences, are reluctant to reveal and critically assess the achievements or the problems because of their (real or alleged) conflicting business or professional interests.

**Reform fatigue**, a non-negligible degree of **anti-Americanism** or **“anti-Westernism”** as well as simple **incomprehension** are further obstacles because they make invoking the experiences of the model jurisdictions undesirable. The mentioned heightened attention devoted to out-of-court enforcement of security interests by the new Hungarian Civil Code and the failure to take a closer look at the rich experiences of common laws with self-help is, however, not the only such example. Let us point briefly to one specific American security device, the so-called *field warehousing*, which has during the first decade of the 21<sup>st</sup> century turned into a booming industry

<sup>91</sup> New Hungarian Civil Code 5:112§ to 5:117§.

<sup>92</sup> New Hungarian Civil Code 5:112(2) §.

in Hungary (“*művi raktározás*”). This device is nothing else but a form of constructive pledge and yet it has so far never been even linked to the secured transactions reforms in Hungary even though both the supporters and opponents of the reforms were keen to find some formula for the evaluation of the reforms’ successfulness. Non-negligible benefits could have stemmed from taking a look at the related American experiences also because of the more than century long history of field warehousing to find answers for the childhood problems surrounding this device in Hungary.

Last but not least, it ought to be added as well that the region’s countries are also featured by their failure to learn from the experiences of the others; not necessarily only because of language barriers or historic animosities. The price paid is, at least, repetition of mistakes made by others.

#### **4.2. What Future awaits the Secured Transactions Laws of the Region?**

As far as the ultimate question of **what future awaits secured transactions law in the region** the following need to be said. Clearly a lot depends on the stance of the EU itself and of the EU’s economically and politically strongest countries. This in particular includes Germany the leading scholars of which, however, have already

expressed their affirmative vote as materialized in Book IX of the DCFR – a programmatic piece of soft law that recommends for Europe a unitary system resting on building blocks equal to that of UCC Article 9. Belgium, for example, exactly inspired by the DCFR is in the process of introducing such a system.<sup>93</sup> Yet one should not expect too much from the DCFR because it reflects only the stance of the world of academia rather than that of the industries or other political forces.

In the lack of such a pan-European *volte face*, the reform process will undoubtedly continue in the region, sometimes by backpedalling but gradually, step-by-step moving closer to the Unitary Model. Should that be the case, the unanswered dilemmas will be clarified in an organic process. No matter, however, which of these avenues will eventually prevail, it seems hardly plausible that the process of secured transactions reforms has reached its ending in Hungary with the passage of the new PTK.

**Prof. Dr. Tajti Tibor**

Professor of the Central European University  
Department of Law

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<sup>93</sup> See the draft law of 23 May 2013 amending the respective provisions of the Civil Code available in Dutch and French

at <<http://www.lachambre.be/FLWB/PDF/53/2463/53K2463012.pdf>>.