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Personal Property Security Law: International Ambitions and Local Realities

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Personal Property Security Law: International Ambitions and Local Realities

by Giuliano G. Castellano – Andrea Tosato

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1. Introduction

Personal property security law is a key element of "access to credit" and "financial inclusion"[1]. The prevailing view is that a legal framework enabling the effective use of personal property as collateral markedly benefits both lenders and borrowers. Lenders

[1] Demirgüç-Kunt, Asli, Thorsten Beck, and Patrick Honohan, 'Finance for All? Policies and Pitfalls in Expanding Access' (World Bank, 2008); Demirgüç-Kunt, Aslı and Leora Klapper, 'Measuring Financial Inclusion: The Global Findex' (Policy Research Working Paper 6025, World Bank, 2012).

can offer financing at a lower cost thanks to reduced credit risk; borrowers can access funding by leveraging the otherwise unavailable value of the assets integral to their operations[2].

Over the past century, the priorities of personal property security law have evolved fundamentally. As small and medium-sized enterprises (SMEs) and individual entrepreneurs have become the growth engine of both developed and developing economies, legislators have grown sensitive to the financing needs of these entities. In parallel, the advent of the information society has demanded that lawmakers address squarely the rules governing the use as collateral of intangibles such as "receivables"[3], "intermediated securities"[4], "non-intermediated securities"[5], and "intellectual property rights"[6], rather than confine their gaze to tangibles such as industrial machinery, mobile equipment and inventory. Concurrently, the increasingly transnational nature of both economic development

[2] Heywood Fleisig, 'Economic Functions of Security in a Market Economy', in Joseph Norton and Mads Andenas (eds.), *Emerging Financial Markets and Secured Transactions*, (Kluwer Law International 1998) 15.

[3] Throughout this Chapter the locution "receivable" is used to refer to a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a bank account and a right to payment under a non-intermediated security.

[4] Throughout this Chapter the locutions "intermediated securities" and "indirectly held securities" are used to refer to securities (such as shares, bonds or other financial instruments or financial assets, other than cash) held in account maintained by an intermediary who in the course of their business or other regular activity maintains securities accounts for others or both for others and for their own account and is acting in that capacity (such as a stock broker or a central securities depository).

[5] Throughout this Chapter the locution "non-intermediated securities" is used to refer to securities other than securities credited to a securities account and rights in securities resulting from the credit of securities to a securities account.

[6] Throughout this Chapter the locution "intellectual property" is used to refer to copyrights, trademarks, patents, service marks, trade secrets, designs rights, and any other right considered to be intellectual property under the law of a state or an international agreement, including all types of intellectual property licenses. Specifically, on the use of intellectual property as collateral see Andrea Tosato, 'Security interests over intellectual property', (2011) 6 JIPLP 93; Andrea Tosato, 'Secured transactions and ip licenses: Comparative observations and reform Suggestions', (2018) 81 Law & Contemp Probs 154.

policies and commercial activity have engendered the need for global principles and standards for asset-based lending.

To address these novel priorities and promote a healthy and vibrant credit ecosystem, international and regional organizations have undertaken projects aimed at modernizing and harmonizing personal property security law. Over time, these efforts have yielded a panoply of legal instruments. Binding conventions have been adopted to unify the rules of discrete facets of personal property security law, while soft-law texts, such as model laws and legislative guides, have been formulated to supply comprehensive legal templates to lawmakers keen to revise their domestic legal regimes. Nevertheless, states have struggled to assimilate these international efforts into their domestic legal systems. Common law jurisdictions have been loath to abandon the familiarity and safety of the path paved by centuries of case law; in similar vein, civil law jurisdictions have resisted inducements to renovate the normative infrastructure erected by the codifications of the 19th century.[7]

This Chapter explores the tension between international ambitions and local realities, with a special focus on the issues encountered in civil law jurisdictions. To this end, the case of Italy is examined as a living experiment in comparative personal property security law. In this jurisdiction, the recent enactment of a non-possessory security device, absent a comprehensive reform of the country's civil code affords important lessons for any civil law system which might be pondering personal property security law reforms. More profoundly, it epitomizes the gap that separates the aspirations of international legal instruments from their effective implementation in domestic contexts. This analysis is divided into two parts. The first reviews international and regional legal initiatives that have shaped the personal property law landscape and then identifies a set of core tenets shared among them. In the sec-

[7] This point has been illustrated in Giuliano G Castellano, 'Reforming Non-Possessory Secured Transactions Laws: A New Strategy?' (2015) 78 The Modern Law Review 611. The study elicits the different strategies deployed by domestic policy-makers to reform secured transactions laws and indicates a new reform path to overcome the common issues affecting law reforms in common law and civil law jurisdictions alike.

ond part, attention shifts to Italy, scrutinizing both the personal property security legal edifice originally constructed in this jurisdiction and the attempts to overhaul it that have taken place over the past three decades. This is followed by a critical appraisal of the current state of the law, by reference to the aforementioned core tenets of personal property law reform.

2. International ambitions: a harmonized and modern personal property security law

Over the past four decades, international and regional legal efforts seeking to promote harmonization and modernization of personal property security law have been both numerous and diverse in nature, substance and scope. For present purposes, the following analysis segments these endeavors into two categories, discussing first initiatives that addressed this body of rules holistically, and then considering those that focused on a discrete facet.

This division neither states nor suggests that there has been a rigid separation between these two groups; the contrary is in fact true. It is a structural choice that is conducive to isolating and highlighting the objectives and policies that have emerged from these undertakings.

2.1. Initiatives addressing discrete facets of personal property security law

Ottawa Conventions: factoring and leasing as secured transactions

The first international legal initiatives that sought to modernize and harmonize discrete facets of personal property security law date back to the second half of the 1980s. In 1988, the International Institute for the Unification of Private Law (UNIDROIT) adopted the Convention on International Factoring [8] and Convention on In-

[8] *UNIDROIT Convention on International Factoring*, opened for signature 28 May 1988, entered into force 1 May 1995 (https://www.unidroit.org/instruments/factoring). See Mary Rose Alexander, 'Towards Unification and Predictability: The International

ternational Financial Leasing[9] (the Ottawa Conventions). The Ottawa Conventions centered on contractual aspects of factoring and leasing agreements; however, they also cover financing arrangements functionally equivalent to secured transactions, such as sales of receivables and leases that enable the lessor to terminate the leasing agreement[10]. Though these conventions attracted a limited number of ratifications[11], they served as a point of reference for subsequent international instruments that tackled the use of these assets as collateral[12].

UN Receivables Convention: the use of receivables as collateral

Following a decade of intense labor[13], the United Nations General Assembly adopted the United Nations Convention on the As-

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Factoring Convention Note' (1988–89) 27 Colum J Transnat'l L 353.

[9] *UNIDROIT Convention on International Financial Leasing*, opened for signature 28 May 1988, entered into force 1 May 1995 (https://www.unidroit.org/leasing-ol/leasing-english). See Ronald Cuming, 'Legal Regulation of International Financial Leasing: The 1988 Ottawa Convention' (1989–90) 7 Ariz J Int'l & Comp L 39.

[10] For an exhaustive analysis of this topic see Steven L Harris and Charles W Jr Mooney, 'When Is a Dog's Tail Not a Leg: A Property-Based Methodology for Distinguishing Sales of Receivables from Security Interests That Secure an Obligation' (2014) 82 U Cin L Rev 1029.

[11] As of November 2018, the UNIDROIT Conventions on international financial leasing has ten contracting States, while the UNIDROIT Conventions on international factoring has nine contracting States. See Michael B Carsella, 'UNCITRAL: First Step in the Globalization of Asset-Based Lending' (1998) 54 The Secured Lender; New York 108; Orkun Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments* (1 edition, Routledge 2011) 3–5.

[12] See Hannah L Buxbaum, 'Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform Worldwide' (2003) 8 Unif L Rev 321; Herbert Kronke, 'Financial Leasing and Its Unification by UNIDROIT – General Report Focus: Leasing and Its Harmonisation by UNIDROIT' (2011) 16 Unif L Rev 23, 30-34.

[13] In 1992 and 1995, two explorative studies were considered by the UNCITRAL Commission (*Possible Future Work on the Assignment of Claims*, A/CN.9/378/Add.3; *Assignment in Receivables Financing: Discussion and Preliminary Draft of Uniform Rules*, A/CN.9/412). The decision to undertake this project was adopted three years

signment of Receivables in International Trade (UN Receivables Convention) in December 2001[14]. The UN Receivables Convention aims to simplify receivables financing by removing existing legal obstacles[15]. To this end, it proffers a kernel of both substantive and choice-of-law rules for international assignments of contractual monetary claims ("receivables")[16] and the assignment of international receivables, including securitizations[17]. Though the UN Receivables Convention has not entered into force yet[18], it has decisively influenced subsequent legal texts that have dealt with the assignment of receivables, their use as collateral and the conflict-of-laws regimes applicable to these transactions[19].

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later, during the UNCITRAL Commission twenty-eighth session; see *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17*, A/50/17, paras. 374-381.

[14] The text of the UN Receivables Convention, its travaux préparatoires and the UN General Assembly Resolution 56/81 of 12 December 2001 adopting it are available at http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables.html. For a detailed analysis see Spiros V Bazinas, 'Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade UNCITRAL Draft Convention on Assignment of Receivables in International Trade' (2001) 9 Tul J Int'l & Comp L 259; Harry C Sigman and Edwin E Smith, 'Toward Facilitating Cross-Border Secured Financing and Securitization: An Analysis of the United Nations Convention on the Assignment of Receivables in International Trade' (2002) 57 The Business Lawyer 727; Woo-jung Jon, *Cross-Border Transfer and Collateralisation of Receivables: A Comparative Analysis of Multiple Legal Systems* (Bloomsbury Publishing 2018) 40–41.

[15] Preamble, UN Receivables Convention.

[16] Art 2, UN Receivables Convention.

[17] See generally Steven L Schwarcz, 'What Is Securitization: And for What Purpose' (2011–12) 85 S Cal L Rev 1283.

[18] The UN Receivables Convention requires five ratifications to enter into force. As of November 2018, it has been signed by Luxembourg (2002), Madagascar (2003) and the United States of America (2003) and acceded to by Liberia (2005). Following a favourable decision of the Senate Foreign Relations Committee, the full Senate will discuss the ratification of the UN Receivable Convention in early 2019; see *U.N. Convention on the Assignment of Receivables in International Trade, Hearing on Treaty Doc. 114-7 before S. Foreign Relations Comm.*, 115th Cong. (2018).

[19] See Carsella (n 11); Buxbaum (n 12) 321.

As UNCITRAL completed its work on the UN Receivables Convention, UNIDROIT sought to bring substantive uniformity to a different facet of personal property security law: cross-border secured transactions involving high-value mobile equipment[20]. These efforts led to the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town Convention, 2001)[21] and its protocols[22] on Matters Specific to Aircraft Equipment (Aircraft Protocol, 2001)[23], Mobile Equipment on Matters specific to Railway Rolling Stock (Rail Protocol, 2007)[24], and Mobile Equipment on Matters specific to Space Assets (Space Protocol, 2012)[25]; a fourth protocol on Matters Specific to Mining, Agricultural and Construction Equipment is being developed by UNIDROIT and is expected to be completed in 2019 (MAC Protocol)[26].

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[20] For a historical analysis see Roy M Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3rd edn, UNIDROIT 2013) 1–5, Annexes XII-XIII.

[21] UNIDROIT Convention on International Interests in Mobile Equipment (2001) (https://www.unidroit.org/instruments/security-interests/cape-town-convention). For a recent analysis see Sanam Saidova, *Security Interests under the Cape Town Convention on International Interests in Mobile Equipment* (Bloomsbury Publishing 2018).

[22] On the mechanics of the "two instrument approach" see Goode (n 20) 16–18.

[23] UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (2001). For a primer see Roy Goode, 'From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols'(2012) 17 Unif L Rev 599; Ludwig Weber and Silverio Espinola, 'The Development of a New Convention Relating to International Interests in Mobile Equipment, in Particular Aircraft Equipment: A Joint ICAO-UNIDROIT Project'(1999) 4 Unif L Rev 463.

[24] UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (2007).

[25] UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (2012).

[26] All public preparatory materials are available at https://www.unidroit.org/work-in-progress/mac-protocol. See Charles W Mooney and others, 'The Mining, Agricultural and Construction Equipment Protocol to the Cape Town Convention Project: The Current Status'(2016) 21 Unif Law Rev 332; Teresa Rodríguez de las Heras Ballell, 'Complexities Arising from the Expansion of the Cape Town Convention to Other Sectors: The MAC Protocol's Challenges and Innovative Solutions'(2018) 23 Unif Law Rev 214.

Cape Town Convention: international security interests in mobile equipment

The Cape Town Convention creates a unified framework that regulates homogenously the proprietary claims of secured creditors, conditional sellers and lessors in aircrafts, rail and space assets. This regime is built on an electronic international registry, on which proprietary right holders can register their "international interests"[27], to both give notice to third parties and establish their position on the priority ladder vis-à-vis "competing claimants".[28] The Cape Town Convention has been warmly embraced by the international community, attracting a large number of contracting states;[29] its substantive and procedural rules have become influential points of reference in international personal property security law[30].

Capitalizing on the favorable momentum generated by the Ottawa, UN Receivables and Cape Town Conventions, regional and international organizations turned their sights to the rules governing the transfer of proprietary claims in intermediated securities. At a regional level, the European Union enacted a specific set of instruments[31] which sought to reform and harmonize the substantive

[27] Art 2, Cape Town Convention.

[28] Consistently with terminology adopted by UNCITRAL, throughout this Chapter the expression "competing claimants" is used to identify a creditor of a grantor or other person with rights in an encumbered asset that may be in competition with the rights of a secured creditor in the same encumbered asset, including a transferee, lessee or licensee of the encumbered asset, and an insolvency representative.

[29] The Cape Town Convention has 79 contracting parties and the Aircraft Protocol 74. The Railway and Space protocols have not yet garnered the same level of support.

[30] See Charles W Jr Mooney, 'The Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application Essay' (2014–15) 55 Va J Int'l L 163; Mooney and others (n 26); Rodríguez de las Heras Ballell (n 26).

[31] Directive 2002/47 on financial collateral arrangements [2002] OJ L168/43, subsequently amended by Directive 2009/44 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims [2009] OJ L146/37 (Financial Collateral Directive); Council Directive (EC) 98/26 on settlement finality in payment and securities settlement systems [1998] OJ L166/45; subsequently

regime of intermediated securities transfers in the EU Single Market.[32] Notably, these laws also delve into the rules for "the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement" and "the provision of financial collateral under a financial collateral arrangement"[33]. Moreover, they introduce a conflict-of-laws approach for these transactions that is based on the "place of the relevant intermediary" (PRIMA) and selects "the place where the account is maintained" (factual PRIMA) as the determinative connecting factor[34].

Hague Securities Convention: choice-of-law for the use of securities as collateral

At international level, two conventions have been developed which focus on the international private law and substantive law regimes of intermediated securities. In 2006, the 19th Diplomatic Session of the Hague Conference on Private International Law adopted the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (the "Hague Securities Convention")[35]. It also articulates an ambitious conflict of laws system for international transfers of intermediated securities,

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amended by Directive 2009/44 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims [2009] OJ L146/37 (Finality Directive); Council Directive (EC) 2001/24 on the reorganization and winding up of credit institutions [2001] OJ L125.

[32] The literature analyzing these instruments is vast; see Louise Gullifer, 'What Should We Do about Financial Collateral?' (2012) 65 Curr Leg Probl 377; Thomas Keijser, 'Financial Collateral Arrangements in the European Union: Current State and the Way Forward' (2017) 22 Unif Law Rev 258.

[33] See Art 3, Financial Collateral Directive.

[34] Art 9, Financial Collateral Directive; Arts 8-9, Finality Directive. Maisie Ooi, *Shares and Other Securities in the Conflict of Laws* (Oxford University Press 2003) paras 12.03-12.101. For an incisive analysis of this connecting factor see Philipp Paech, 'Securities, Intermediation and the Blockchain: An Inevitable Choice between Liquidity and Legal Certainty?' (2016) 21 Unif Law Rev 612, 622–23.

[35] For a detailed commentary see Roy Goode and others, *Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary: (Hague Securities Convention)* (2nd edn, 2017).

including secured transactions[36]. In line with the stance of the EU, the Hague Securities Convention embraces the PRIMA approach, yet dictates that the law applicable to these dealings is that stipulated by account holder and intermediary for their account agreement (contractual PRIMA)[37].

Geneva Securities Convention: substantive law rules for the use of securities as collateral

The Hague Securities Convention was followed by the UNIDROIT Convention on Substantive Rules for Intermediated Securities in 2009 (the "Geneva Securities Convention")[38]. It seeks to enhance cross-border capital flows by introducing a uniform substantive framework for the holding and transferring of intermediated securities, including their use as collateral[39]. In the case of the latter, it does not address the creation of security rights in intermediated securities, exclusively touching on perfection[40], priority[41], and

[36] Art 1(1)(h), Hague Securities Convention uses the term "disposition" broadly to cover outright transfers of ownership, transfers by way of security, and any dealing for the taking of security in these assets.

[37] See Arts 2(1), 4(1), Hague Securities Convention. These provisions require that the intermediary has a qualifying establishment in the country the law of which the parties have chosen; moreover, a fallback rule is provided in art 5, Hague Securities Convention. For a comparative analysis of the Hague Securities Convention conflict-of-laws regime and that adopted by the EU in its secondary legislation see Paech (n 34) 622-23.

[38] See UNIDROIT Convention on Substantive Rules for Intermediated Securities; available at https://www.unidroit.org/instruments/capital-markets/geneva-convention. See Hideki Kanda and others, *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* (Oxford University Press 2012); Jose Angelo Estrella Faria, 'The UNIDROIT Convention on Substantive Rules Regarding Intermediated Securities: An Introduction Uniform Law Instruments'(2010) 15 Unif L Rev 196.

[39] Preamble, Geneva Securities Convention.

[40] Consistently with the terminology adopted by UNCITRAL, throughout this Chapter the term "perfection" is used to express the notion of a security interest becoming effective against third parties. See Arts 11-13, Geneva Securities Convention; see Michel Deschamps, 'The Security Interest Provisions of the UNIDROIT Convention on Intermediated Securities Focus: Secured Transactions' (2010) 15 Unif L Rev

enforcement[42]. These rules identified two methods of perfection: either taking "control"[43] of the encumbered securities or holding them in a bank account in the name of the secured creditor.[44] Priority rules attributed primacy to secured creditors in whose account the encumbered securities were held, otherwise applying a first-to-perfect approach[45]. Regarding enforcement, this convention tended to favor out-of-court and self-help, seeking to simplify and expedite the orderly liquidation of the collateral[46].

The Hague Securities Convention entered into force in 2017, whereas the Geneva Securities Convention is yet to reach the required ratifications threshold[47]. Nevertheless, the substantive and conflict of laws rules formulated by these conventions for secured transactions involving intermediated securities have become the point of reference for any legislative initiative regulating the use as collateral of these assets.

2.2. Initiatives addressing personal property security law holistically

Initial attempts to harmonize and modernize personal property security by tackling this body of rules holistically were chiefly re-

337, 338–40.

[41] Consistently with the terminology adopted by UNCITRAL, throughout this Chapter the term "priority" is used to indicate the right of a person in an encumbered asset in preference to the right of a competing claimant. Arts 19-20, Geneva Securities Convention; see ibid 340–44.

[42] Consistently with the terminology adopted by UNCITRAL, throughout this Chapter the term "enforcement" is used to refer to the realization of a security right. Arts 33-35, Geneva Securities Convention; see Kanda and others (n 38) ch V.

[43] See Deschamps (n 40) 347.

[44] Arts 11-12, Geneva Securities Convention; the methods of perfection contemplated in these provisions serve the same function as possession for the taking of security in tangible property. Art 13 expressly provides that States can establish additional methods of perfection, such as registration. See ibid 339–41.

[45] Arts 11-12, Geneva Securities Convention.

[46] Arts 32-33, Geneva Securities Convention.

[47] The Hague Securities Convention entered into force in 2017, following the ratification and accession of Switzerland (2009), Mauritius (2009) and the United States of America (2016).

gional in nature; it was not until 2016 that UNCITRAL completed a truly international inquiry into this topic. The following discourse reflects on these ventures and their relative success in order of their chronology.

2.2.1. EBRD Model Law, OHADA Uniform Act, OAS Model Law

EBRD Model Law

In 1994, the European Bank for Reconstruction and Development (EBRD)[48] adopted its Model Law on Secured Transactions (EBRD Model Law)[49]. This instrument was originally designed to equip Central and Eastern European States with a comprehensive personal property security law framework tailed for their economic, legal and social environment. The scope of the EBRD Model Law covers the taking of security in both personal and real property provided that neither party is a consumer[50]; crucially, its purview does not extend to dealings that are functionally equivalent to secured transactions, such as financial leases and assignments of receivables.

This model law advocates replacing all pre-existing security devices with a single "consensual security right" (called a "charge")[51]. Under the EBRD Model Law, a charge can encumber both tangible and intangible assets, present and future, describing

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[48] For a primer on the EBRD see Jan-Hendrik Röver, 'The EBRD's Model Law on Secured Transactions and Its Implications for an UNCITRAL Model Law on Secured Transactions'(2010) 15 Unif Law Rev 479, 485.

[49] Available at https://www.ebrd.com/news/publications/guides/model-law-on-secured-transactions.html. The EBRD Model Law was followed by ancillary projects that elaborated further its underlying principles; see the *EBRD Core Principles for a Secured Transactions Law* (1997), the *Publicity of Security Rights. Guiding Principles* (2004), the *Publicity of Security Rights. Setting Standards* (2005) and the *Mortgages in transition economies. The legal framework for mortgages and mortgage securities* (2008). All these texts are available at www.ebrd.com.

[50] Art 2, EBRD Model Law.

[51] Art 1.1, EBRD Model Law. See also the commentary to this provision. Notably, the EBRD Model Law does establish special rules for vendors'charges and enterprise charges; however, these are variations of the basic "charge" rather than autonomous and distinct security devices.

them specifically or generally; notably, a single charge can secure multiple present and future obligations[52]. For a charge to both come into existence between grantor and secured creditor and become effective *erga omnes*, parties must enter into a security agreement and then either register it in a novel electronic register created for this specific purpose (registered charge)[53] or transfer possession of the collateral to the secured creditor (possessory charge).[54] Priority between competing interests is determined by reference to the time of registration or dispossession[55]. In the event of debtor default, self-help enforcement is encouraged through out of court dispositions of the collateral[56].

OHADA Uniform Act on personal and real securities

In 1997, the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA)[57] adopted its *Acte uniforme portant organisation des sûretés*[58]; thirteen years later, OHADA reformed and expanded this legislative act into its present form (the OHADA

[52] Arts 4-8, EBRD Model Law. For more detailed analysis Jan-Hendrik Röver, *Secured Lending in Eastern Europe: Comparative Law of Secured Transactions and the EBRD Model Law* (Oxford University Press 2007) paras 7.01-7.63, 12.49-12.61.

[53] Arts 6, 8 EBRD Model Law.

[54] Arts 6.4, 10.1, the EBRD Model Law.

[55] Art 17, EBRD Model Law; cf Arts 6.7, 6.8, 17.2 EBRD Model Law, for possessory charges.

[56] Arts 22, 24, EBRD Model Law.

[57] At present OHADA has seventeen-member states: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Cote d'Ivoire, Mali, Niger, Senegal, and Togo. For a historical overview of this organization see Claire Moore Dickerson, 'Harmonizing Business Laws in Africa: OHADA Calls the Tune' (2005–06) 44 Colum J Transnat'l L 17; Peter Winship, 'Law and Development in West and Central Africa (OHADA)' (2015) No. 272 SMU Dedman School of Law Legal Studies Research Paper.

[58] *Acte uniforme adopté le 17 avril 1997 portant organisation des sûretés*; available at www.ohada.com. For a detailed analysis see Joseph Issa-Sayegh, 'Presentation Generale de L'Acte Uniforme de l'OHADA Sur Les Suretes'(2003) 8 Unif L Rev 369.

Uniform Act)[59]. The OHADA Uniform Act is directly applicable in all OHADA member states, it regulates both "personal securities"[60] and "real securities"[61], and applies to consumers and businesses alike[62]. In dealing with real securities, the scope of the OHADA Uniform Act covers all forms of security interests in personal property (*sûretés mobilières*)[63] and real property (*hypothèques*)[64]. For the taking of security in personal property, it supplies a fixed list of typified security devices, each with distinct formal and substantive rules[65]: possessory lien[66], title retention[67], transfer of ownership for security purposes[68], pledge of tangibles[69] and pledge of intangibles[70]. Transfer of possession and registration are the two

[59] *Acte uniforme adopté le 15 décembre 2010, portant organisation des sûretés.* the French official version is available at www.ohada.com; the English official translation is available at http://www.ohada.com/content/newsletters/3247/jo-ohada-se-nov2016-official-translation.pdf. For a detailed analysis see Kouakou Stéphane Bohoussou, 'Réflexion critique sur l'efficacité des sûretés réelles en droit OHADA : proposition en vue d'une reforme du droit OHADA des sûretés réelles.' (Phdthesis, Université de Bordeaux 2015); Guillaume P Blanc, 'The Granting of Security Interests over Mineral Titles in OHADA African Countries' (2015) 30 Journal of International Banking Law and Regulation 330.

[60] Arts 4, 12-49 OHADA Uniform Act.

[61] Arts 4, 50-189, OHADA Uniform Act.

[62] Art 1-4, OHADA Uniform Act.

[63] Arts 50-189, OHADA Uniform Act. The official English version of the OHADA Uniform Act uses the locution "transferable securities" to translate the French locution "*sûretés mobilières*"; as this linguistic choice might engender confusion, the locution "security in personal property" is used throughout this paragraph.

[64] Arts 190-223, OHADA Uniform Act. The official English version of the OHADA Uniform Act uses the locution "mortgages" to translate the French locution "*hypothèques*"; as this linguistic choice might engender confusion, the locution "security in real property" is used throughout this paragraph.

[65] Art 50, OHADA Uniform Act.

[66] Arts 67-70, OHADA Uniform Act.

[67] Arts 72-78, OHADA Uniform Act. See Zakari Njutapvoui, 'Le Droit de Rétention Dans Le Nouvel Acte Uniforme Portant Organisation Des Sûretés: Sûreté Active Ou Passive?' (2016) 3 Journal of Comparative Law in Africa 112.

[68] Arts 79-91, OHADA Uniform Act.

[69] Arts 92-124, OHADA Uniform Act.

[70] Arts 125-161, OHADA Uniform Act.

primary methods for perfection[71]. In the latter instance, the OHADA Uniform Act relies on the general Register of Commerce and Securities (*Le Registre du Commerce et du Crédit Mobilier*) (RCS), established by the OHADA Uniform Act Relating to General Commercial Law (*Acte uniforme portant sur le droit commercial general*)[72]; critically, initial filings[73], amendments[74] and cancellations[75] of security interests in the RCS are subject to strict formalities and require extensive and precise disclosures detailing all aspects of the transactions in question. The OHADA Uniform Act articulates priority rules for the resolution of conflicts among competing security devices of the same type, generally embracing a first-in-time rule[76]; by contrast, this instrument offers little normative guidance for the regulation of priority conflicts that arise between different types of security devices.

OAS Model Law

The most recent regional initiative to modernize and harmonize personal property security law has been stewarded by the Organization of American States (OAS). In 2002, the OAS adopted its Model Inter-American Law on Secured Transactions (OAS Model Law)[77], followed by the Model Registry Regulations under the

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[71] All pledges, title retention, and security transfer of ownership may be perfected either through transfer of possession or registration; by contrast, the fiduciary transfer of funds and pledges of financial instruments and intellectual property rights can only be perfected by registration.

[72] See Arts 34-100, *Acte uniforme OHADA du 15 décembre 2010 portant sur le droit commercial general*, available at www.ohada.com; OHADA unofficial English translation available at http://www.ohada.org/attachments/article/482/AUDCG_EN_Reviewed_Unofficial_Translation.pdf. The RCS serves as a general business register for legal and natural persons carrying out trading activities; notably, it is also designed to record finance leases contracts entered into by these persons.

[73] Art 53, OHADA Uniform Act.

[74] Art 60-61, OHADA Uniform Act.

[75] Art 64, OHADA Uniform Act.

[76] For the priority rules of pledges see Art 107, OHADA Uniform Act.

[77] The Model Inter-American Law on Secured Transactions was adopted during

Model Inter-American Law on Secured Transactions (OAS Model Registry Regulations) in 2009[78].

The OAS Model Law espouses a functional and unitary approach; it formulates a single, unitary regime to regulate all transactions that award a proprietary "interest"[79] in personal property[80] for the purpose of securing an obligation[81]. Under this model law, a security right is created between a "secured debtor" and "secured creditor" by way of contract[82]. Parties can agree that this can interest attaches to any present or future form of personal property, determined or determinable, including a pool of assets, such as all present and future assets of the grantor[83]. Coextensively, the se-

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the Sixth Inter-American Specialized Conference on Private International Law (CIDIP VI); it is available at (http://www.oas.org/DIL/CIDIPVI_home.htm). On the history of this legal instrument see Boris Kozolchyk and John M Wilson, 'The Organization of American States: The New Model Inter-American Law on Secured Transactions' (2002) 7 Unif L Rev 69, 87–88.

[78] The Model Registry Regulations under the Model Inter-American Law on Secured Transactions (Model Regulations) were adopted during the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) on October 9, 2009. See John M Wilson, 'Model Registry Regulations under the Model Inter-American Law on Secured Transactions Focus: Secured Transactions' (2010) 15 Unif L Rev 515; Marek Dubovec, 'UCC Article 9 Registration System for Latin America' (2011) 28 Ariz J Int'l & Comp L 117.

[79] The OAS Model Law use the term "security interest" mirroring the terminology the American Uniform Commercial Code Article 9.

[80] Arts 1, 3, 5, OAS Model Law. Notably, the OAS Model provides that implementing states can establish a different secured transactions regime for idiosyncratic asset classes such as intermediated, de-materialized securities.

[81] The OAS Model law does not require an implementing state to abolish existing security devices, but rather to subject them to its rules. Notably, no distinction is drawn between business and consumer transactions. See Kozolchyk and Wilson (n 77) 90-94.

[82] Art 5, OAS Model Law. The terms "secured debtor" and "secured creditor" are used here consistently with the OAS Terminology.

[83] Art 2, OAS Model Law. Art 3(VI) provides that parties can agree for a security right to cover both an asset and its "attributable property" defined as "the movable property that can be identified as derived from the originally encumbered property, such as fruits, or property resulting from its sale, substitution or transformation". On this linguistic choice and the legal category which it identifies see Kozolchyk and Wilson (n 77) 94–95.

cured obligation can be of any nature, present or future, determined or determinable[84].

Under the OAS Model law, a validly created security interest must be "publicized"[85] to become effective against third parties; this can be achieved either by delivery of possession[86] or by filing a notice in a novel register created for this specific purpose[87]; this document must identify the debtor and secured creditor and describe both the encumbered collateral and the maximum amount of the security[88]. Priority among competing claims to an encumbered asset is based on the chronological order in which they were publicized[89], subject to limited exceptions[90]; in particular, special rules govern the priority of "acquisition security interests"[91] and "buyers

[84] Art 1, OAS Model Law. This is a consequence of the OAS Model Law conceiving security interests as not accessory to the obligation that they secure; see Boris Kozolchyk and Dale Beck Furnish, 'The OAS Model Law on Secured Transactions: A Comparative Analysis Symposium: CAFTA and Commercial Law Reform in the Americas'(2005-06) 12 Sw J L & Trade Am 235, 250; Kozolchyk and Wilson (n 77) 96–97.

[85] See Title III, OAS Model Law. In line with the civil law tradition, the OAS model does not use the term "perfection", opting instead for "publicity" to express the concept of a security interest becoming effective against third parties; for an historical analysis see Castellano, 'Reforming Non-Possessory Secured Transactions Laws: A New Strategy?'(n 7), 622–31.

[86] See Arts 8, 10, 27, 22, 26, 29. Cfr art 30, OAS Model law.

[87] Arts 10, 12, 14, 31, 35-46 OAS Model Law. Art 10(2) OAS Model Law specifies that "a security interest may be publicized by delivery of possession or control only if the nature of the collateral so permits", limiting this method of perfection to security interests in those tangible goods that can be reduced into possession.

[88] Art 35-46, OAS Model Law; see Kozolchyk and Furnish (n 84) 106-13. On the security register itself see OAS Model Registry Regulations; Kozolchyk and Wilson (n 77) 523–26.

[89] Arts 47-48, OAS Model Law.

[90] Art 52(I)-(III), 53, OAS Model Law. For an exhaustive analysis see Kozolchyk and Furnish (n 84) 121–23.

[91] Arts 12, 40 OAS Model Law. Art 3, OAS Model Law defines an "acquisition security interest" as "a security interest granted in favor of a creditor – including a supplier – who finances the acquisition by the debtor of the moveable corporeal property over which the security interest is granted. Such security interest may secure the acquisition of present or subsequently acquired movable property so financed".

in the ordinary course of business"[92]. In respect of enforcement, this legal instrument offers limited out-of-court options to secured creditors, requiring that public officials are closely involved in the realization of the collateral[93].

In contrast to the EBRD Model Law and the OHADA Uniform Act, the OAS Model Law also includes a minimalistic conflict-of-laws ruleset[94]. It establishes that the law applicable to the proprietary aspects of a security right is either the law of the State where the collateral is situated or the law of the State where the grantor is located, depending on the type of encumbered property[95].

2.2.2. UNCITRAL Model Law on Secured Transactions

Historical background

In 2001, the UNCITRAL Commission mandated Working Group VI (Security Interests) to commence work in the area of personal property security law[96]. This was a productive manoeuvre that led to a suite of legal texts that have made a decisive contribution to the harmonization and modernization of this area of commercial law internationally. In 2007, the UNCITRAL Commission adopted the UNCITRAL Guide on Secured Transactions Law (the UNCITRAL Guide)[97], which was followed by the UNCITRAL

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[92] Art 3, OAS Model Law defines a "buyer in the ordinary course of business" as "a third party who, with or without knowledge of the fact that the transaction covers collateral subject to a security interest, gives value to acquire such collateral from a person who deals in property of that nature".

[93] Arts 54-56, 58-67, OAS Model Law.

[94] Art 69-71, OAS Model Law.

[95] Arts 69-70, 72, OAS Model Law. Notably, Art 71, OAS Model Law establishes a special asset rule for non-possessory security interests in negotiable incorporeal property.

[96] See UNICTRAL Report on the work of its thirty-fourth session (2001) A/56/17 paras 351-358; UNCITRAL Security Interests – Current activities and possible future work (2000) A/CN.9/475 and UNCITRAL Security interests (2001) A/CN.9/496.

[97] See UNICTRAL Report on the work of its fortieth session (2007) A/62/17 (Part 1) para 154, (Part II) para 99-100. The draft guide was in UNCITRAL documents A/CN.9/631 and Add. 1-11, and A/CN.9/637 and Add.1-8; the UNCITRAL Guide is

Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property in 2010 (the UNCITRAL IP Supplement)[98], and the UNCITRAL Guide on the Implementation of a Security Rights Registry in 2013 (the UNCITRAL Registry Guide)[99].

Emboldened by these successes, the UNCITRAL Commission instructed Working Group VI to draft a self-contained, coherent body of model rules based on the substance of the instruments it had previously developed. This mandate[100] came to bear in 2016 with the birth of the UNCITRAL Model Law on Secured Transactions (the UNCITRAL Model Law)[101], followed by the UNCITRAL Guide to Enactment of the UNCITRAL Model Law on Secured Transactions (the UNCITRAL Guide to Enactment), in 2017[102].

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available at https://uncitral.un.org/en/texts/securityinterests/legislativeguides/secured_transactions.

[98] See Report of UNCITRAL on the work of its forty-third session (2010) A/65/17, para. 227; the UNCITRAL IP Supplement is available at https://uncitral.un.org/en/texts/securityinterests/legislativeguides/secured_transactions/supplement; see Andrea Tosato, 'The UNCITRAL Annex on Security Rights in IP: A Work in Progress'(2009) 4 Journal of Intellectual Property Law & Practice 743; Spyridon V Bazinas, 'UNCITRAL's Contribution to Intellectual Property Financing Law' in Toshiyuki Kono (ed), *Security Interests in Intellectual Property* (Springer 2017).

[99] See UNICTRAL Report on the work of its forty-sixth session (2013) A/68/17, para 191; the UNCITRAL Registry Guide is available at https://uncitral.un.org/en/texts/securityinterests/legislativeguides/security_rights_registry.

[100] For an insightful reflection on the challenges of this opus see Neil B Cohen, 'Should UNICITRAL Prepare a Model Law on Secured Transactions Focus: Secured Transactions'(2010) 15 Unif L Rev 325.

[101] See Report of UNCITRAL on the work of its forty-ninth session (2016), A/71/17, para. 119; the UNCITRAL Model Law is available at https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions.

[102] See Report of UNCITRAL on the work of its fiftieth session (2017), A/72/17, para. 216; the UNICTRAL Guide to Enactment is available at https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions/guide_to_enactment. This text complements the UNCITRAL Model Law. It aims to provide operative guidance to legislators who might be considering adopting the UNCITRAL Model law in their domestic legal order. In July 2019, UNCITRAL is expected to adopt a Practice Guide to support the Model Law.

Functional and unitary approach

The scope of the UNCITRAL Model Law covers the taking of security in all types of "movable assets", subject to limited exceptions[103]. It takes a unitary and functional approach to personal property security law; it characterizes all agreements[104] that create an absolute "right"[105] in personal property for the purpose of securing performance of an obligation as secured transactions and subjects them to a homogenous body of rules[106]. This regime is also extended to all transfers of receivables, both outright and for security purposes, consistently with the underlying normative policy choices of the UN Receivables convention[107].

Creation: the security agreement

The UNCITRAL Model Law states that "grantor" and "secured creditor" can create a mutually binding security right by way of agreement[108]; to be enforceable, such a contract must include the identity of the parties, and a description of both the encumbered asset and the secured obligation[109]. There are no limits on the type

[103] Art 1(1), UNCITRAL Model Law. The UNCITRAL Model law uses the term "movable assets" as a residual category that includes all assets that are neither land nor fixtures.

[104] The UNCITRAL Model Law does not cover statutory security devices and preferential claims.

[105] The UNCITRAL Model Law adopts the term "security right" throughout. See pars 22-23, UNCITRAL Guide to Enactment.

[106] Arts 1(1), 2(kk), UNCITRAL Model Law; Rec 8, UNCITRAL Guide.

[107] Art 1(2), UNCITRAL Model Law; cfr. art 1(1), UNCITRAL Receivables Convention. Para 22, UNCITRAL Guide to Enactment explains the reasons for policy choices mentioning that "(a) financing against receivables is often done using an outright transfer of the receivables rather than by the creation of a security right in the receivables; and (b) it is sometimes difficult to determine at the outset of a transaction whether it will be characterized as an outright transfer of, or the creation of a security right in, the receivables".

[108] These terms are defined in Art 2(o), (ff), UNCITRAL Model Law.

[109] Art 6, UNCITRAL Model Law. In addition, States may choose to also require that the parties specify the maximum amount for which the security right can be en-

of obligation that can be secured, including future, conditional or fluctuating[110]. Coextensively, a grantor can encumber a present or future asset, one of its parts, or an undivided share, as well as entire classes of goods, including all the present and future assets of a person.[111] Unless otherwise agreed, a security right in an asset extends to all its "identifiable proceeds"[112][113].

Perfection: registration and possession

The UNCITRAL Model Law contemplates two methods of perfection: either by filing a notice in a novel register created for this specific purpose (the Registry) or by transferring "possession" of the encumbered asset to either the secured creditor or a custodian[114]. Notably, this model law offers an exhaustive set of rules for both operational and substantive aspects of the Registry[115]. For the initial registration, it provides that a single notice can perfect multiple security rights[116], and that it can be filed prior to the security agreement being concluded between the parties[117]. To be valid, a notice must have been authorized by the grantor[118], contain the name and address of the parties, and a description of the collateral

forced.

[110] Art 7, UNCITRAL Model Law.

[111] Art 8, UNCITRAL Model Law.

[112] Art 10, UNCITRAL Model Law.

[113] Art 2(bb), UNCITRAL Model Law provides a broad definition of proceeds.

[114] Art 18(2), UNCITRAL Model Law. Art 2(z), UNCITRAL Model Law defines "possession" in somewhat circular manner as "the actual possession of a tangible asset by a person or its representative, or by an independent person that acknowledges holding it for that person".

[115] For a comparative overview of the OAS and UNCITRAL registration systems see Spyridon V Bazinas, 'The OAS and the UNCITRAL Model Laws on Secured Transactions Compared' (2017) 22 Unif L Rev 914.

[116] Art 3 Registry Provision, UNCITRAL Model Law.

[117] Art 4 Registry Provision, UNCITRAL Model Law.

[118] Art 2 Registry Provision, UNCITRAL Model Law; crucially the authorization can occur before or after the filing and a written security agreement is deemed prima facie authorization by the grantor.

that reasonably allows its identification[119]. The registration of an initial notice is effective when the information therein becomes accessible to searchers of the Registry record[120].

Priority: prior in tempore potior in iure principle

The priority regime of the UNCITRAL Model Law is built upon the *prior in tempore potior in iure* tenet: priority is awarded to the secured creditor first to register or otherwise perfect[121]. This general rule is complemented by exceptions for "acquisition security rights"[122], buyers, lessees and licensees "in the ordinary course of … business"[123], and asset-specific priority rules for negotiable instruments, rights to payment of funds credited to a bank account, money, negotiable documents and tangible assets covered by negotiable documents, and non-intermediated securities[124].

Enforcement: judicial and self-help remedies

The UNCITRAL Model Law contains innovative provisions regarding the enforcement regime for security interests upon "default"[125] of the grantor. As an alternative to ordinary judicial en-

[119] Arts 8-11 Registry Provision, UNCITRAL Model Law. Depending on the choices of the enacting State regarding the requirements of the security agreement, the maximum amount secured by a security interest might also need to be included in an initial notice. In addition, the period of effectiveness of the registration might also need to be stated, pursuant to Art 14 Registry Provision, UNCITRAL Model Law.

[120] Art 13 Registry Provision, UNCITRAL Model Law.

[121] Art 29, UNCITRAL Model Law.

[122] Art 2(b), UNCITRAL Model Law defines an "acquisition security interest" as "a security right in a tangible asset, or in intellectual property or the rights of a licensee under a license of intellectual property, which secures an obligation to pay any unpaid portion of the purchase price of an asset, or other credit extended to enable the grantor to acquire rights in the asset to the extent that the credit is used for that purpose".

[123] Interestingly, the notion of an ordinary course of business transaction in not defined in the UNCITRAL Model Law.

[124] Arts 46-51, UNCITRAL Model Law.

[125] Art 2(j), UNCITRAL Model Law, define "default" as "the failure of a debtor to pay or otherwise perform a secured obligation and any other event that constitutes de-

forcement proceedings, secured creditors are offered self-help and extra-judicial tools to realize their security right[126]. Interestingly, the highest ranking secured creditor is afforded the power to take over the enforcement process and repossess the encumbered asset[127], or "dispose"[128] of it; this is subject to an obligation to distribute the resulting liquidity in accordance with the priority ladder[129], or submit a proposal to acquire the encumbered asset in total or partial satisfaction of the secured obligation[130]. These enforcement regimes aim to find equilibrium between the conflicting interests of secured creditors, grantors and unsecured creditors, while concurrently ensuring a flexible, expeditious and efficient realization of the security[131].

Conflict-of-law rules for international secured transactions

Lastly, the UNCITRAL Model Law includes an exhaustive conflict-of-laws framework for security interests that are connected to multiple jurisdictions[132]. These provisions adopt the *dépeçage* legal technique, partitioning secured transactions into discrete functional segments and establishing different applicable law rules for each one pursuant to distinct connecting factors[133]. Accordingly, the

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fault under the terms of an agreement between the grantor and the secured creditor".

[126] Notably, Chapter VI does not apply to contractual, outright transfers of receivables, save for art 83, UNCITRAL Model Law that is specifically devoted to these transactions.

[127] Art 77, UNCITRAL Model Law.

[128] Art 78, UNCITRAL Model Law, contemplates the possibility of a sale, lease or license, depending on what is the most economically reasonable outcome.

[129] Art 79, UNCITRAL Model Law.

[130] Art 80, UNCITRAL Model Law.

[131] Arts 77-80, UNCITRAL Model Law, describe in detail the rights of the grantor and other competing claimants, including the possibility to oppose the extra-judicial actions under way in favor of court proceedings.

[132] See Neil B Cohen, 'The Private International Law of Secured Transactions: Rules in Search of Harmonization Secured Transactions Law in the Twenty-First Century' (2018) 81 Law & Contemp Probs 203.

[133] This normative technique is often called *dépeçage*: for a detailed explanation

UNCITRAL Model Law articulates two general conflict of law regimes for tangible[134] and intangible[135] assets that distinguish between creation, perfection, priority and enforcement. In addition, it also sets out asset-specific conflict of laws rules for security rights in receivables relating to immovable property, rights to payment of funds credited to a bank account, intellectual property, and non-intermediated securities[136].

2.3. Core tenets for a modern personal property security law

Core Tenets to facilitate access to credit and enhance financial inclusion

The preceding discussion has reviewed the international legal initiatives that have sought to promote the modernization and harmonization of personal property law across jurisdictions over the past four decades. Even at a cursory glance, it is readily apparent that these sources each propose a disparate set of substantive rules to regulate secured transactions. Nevertheless, a principled analysis reveals that there are common objectives and policies shared by these legal texts. All these endeavors expressly or implicitly recognize that personal property security law should aim to facilitate access to credit and enhance financial inclusion. Though there is not complete uniformity, the following core tenets emerge consistently as the cardinal elements required to achieve these objectives.

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see Symeon C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press 2014) 221.

[134] Arts 85, UNCITRAL Model Law. Notably, this provision articulates slightly different conflict of laws rules for the creation and perfection of security interests in tangible assets "of a type ordinarily used in more than one State" (grantor's law) and tangible assets "in transit at the time of its putative creation or intended to be relocated to a State other than the State in which it is located at that time" (State of the asset's ultimate destination); this provision also establishes a special conflict of laws rule for the perfection of a security interest in "a tangible asset covered by a negotiable document made effective against third parties by possession of the document as against the right of a competing claimant" (law of the States where the document is located).

[135] Art 86, UNCITRAL Model Law.

[136] Arts 87, 97, 99-100, UNCITRAL Model Law.

First, persons should be able to encumber all forms of personal property (both present and future) to secure any type of obligation (monetary and non-monetary, present and future), subject to limited exceptions based on public policy grounds.

Second, transactions that have the purpose of securing an obligation should be governed by a homogenous regime that includes special rules catering to the idiosyncratic features of certain forms of property and financing arrangements.

Third, persons should be granted ample freedom of contract in structuring their security agreements, only limited by narrow mandatory rules based on public policy; crucially, the path to encumbering fluctuating classes of personal property and all present and future assets should be cleared of obstacles.

Fourth, streamlined methods for the perfection of security interests should be made available, including a general security rights register that serves as a reliable and exhaustive source of information documenting the existence of security rights.

Fifth, priority among competing claimants should be determined pursuant to a first-in-time rule, based on the moment when notice of the proprietary interests in question was given to the general public; only limited exceptions should be contemplated, such as those necessary to safeguard ordinary course of business transferees and acquisition financiers. The resulting priority ladder should be readily ascertainable and free from any circularity.

Sixth, enforcement of security rights should be possible both through out-of-court and judicial mechanisms that are rapid and inexpensive, yet also balance the conflicting interests of the debtor in default, secured creditors and unsecured creditors.

3. Local realities: the tale of a civil law jurisdiction

Over the past four decades, numerous states in Central America, South America, Africa, Eastern Europe, Western Europe, the Middle East, Asia and Oceania have overhauled their personal property security law frameworks[137]. These efforts have borne diverse fruit.

[137] A comprehensive overview is provided by the Secured Transactions Law Re-

They differ markedly in scope, form and substance; moreover, the extent to which they reflect the influence of the international initiatives considered above varies wildly.

Such dissimilarities both in outcomes and reform approaches can neither be explained nor understood on the basis of a facile division between common and civil law traditions. In fact, some common law jurisdictions, such as Australia and Malawi, have comprehensively overhauled their personal property security law frameworks, by enacting legislation that reflects the aforementioned core tenets of a modern secured transactions law, albeit not identically[138]. Conversely, other common law jurisdictions, such as England, Hong Kong, and Singapore, have retained almost unaltered a legal apparatus for taking security in personal property that dates back to the 19th century[139]. Coextensively, similar levels of heterogeneity are found among civil law jurisdictions. For example, in France, the civil and commercial codes have been amended, transforming profoundly security devices that stemmed from the Napoleonic Code Civil and had roots in Roman law[140]. In similar

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form Project at https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/.

[138] For an in-depth analysis of the secured transactions law reform in Malawi and the influence of the UNCITRAL Legislative Guide in this process, see Marek Dubovec and Cyprian Kambili, 'Using the UNCITRAL Legislative Guide as a Tool for a Secured Transactions Reform in Sub-Saharan Africa: The Case of Malawi' (2013–14) 30 Ariz J Int'l & Comp L 163. For an exegesis of the Australian Personal Property Security Act 2009 that emphasises the influence of the UNCITRAL Guide see Anthony J Duggan and David Brown, *Australian Personal Property Securities Law* (2nd edn, LexisNexis Butterworths 2015); Anthony Duggan, 'The Trials and Tribulations of Personal Property Security Law Reform in Australia' (2015) 78 Sask L Rev 257.

[139] For an analysis of personal property security in England see Louise Gullifer, *Goode on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell 2018). In Hong Kong, see generally Mark Williams and others, *Secured Finance Law in China and Hong Kong* (Cambridge University Press 2010). For a comparative assessment of personal property security law and creditor rights in Asia see Qiao Liu, Paul Lejot, and Douglas W Arner, *Finance in Asia: Institutions, Regulation and Policy* (Routledge, 2013) 201-203. For a critical analysis of the reform debate in Singapore, see Gerard McCormack, 'Reforming the Law of Security Interests: National and International Perspectives'(2003) Sing J Legal Stud 1.

[140] For an exhaustive and cogent analysis of the French personal property security

vein, Bulgaria, Hungary, Lithuania, Poland, Romania, Slovakia, Slovenia, and Ukraine have enacted personal property security laws that depart from their private law traditions, looking instead to the works of the EBRD and other international sources[141]. By contrast, in Austria, Germany, Spain, Argentina and Japan, efforts aimed at rejuvenating personal property security law have gained little traction[142].

It is submitted that to understand and appraise the reform attempts of any jurisdiction, one must consider its original personal property security law framework, the legislative interventions amending it, and their confluence. The core tenets identified in the previous section afford a penetrating and objective benchmark for this assessment. Through this prism the following discourse examines how Italy, an archetypal civil law jurisdiction, has striven to modernize its secured transactions law regime.

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law see Riffard, Jean-Francois, 'The Still Uncompleted Evolution of the French Law on Secured Transactions towards Modernity' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Bloomsbury Publishing 2016).

[141] On the influence of the EBRD in the region see Frederique Dahan, 'Law Reform in Central and Eastern Europe: The Transplantation of Secured Transactions Laws'(2000) 2 Eur JL Reform 369; Tibor Tajti, 'Security Rights and Insolvency Law in the Central and Eastern European Systems' in McCormack, Gerard and Bork, Reinhard (eds), *Security Rights and the European Insolvency Regulation* (Intersentia 2017).

[142] For a primer on personal property security law in Austria see Tajti (n 141). For an incisive analysis of German law see Moritz Brinkmann, 'The Peculiar Approach of German Law in the Field of Secured Transactions and Why It Has Worked (So Far)' in Louise Gullifer and Orkun Akseli (eds), *Secured transactions law reform: principles, policies and practice* (Hart Publishing 2016). For an overview of personal property law framework in Spain see Teresa Rodríguez de las Heras Ballell and Jorge Feliu Rey, 'Modernisation of the Law of Secured Transactions in Spain' in Louise Gullifer and Orkun Akseli (eds), *Secured transactions law reform: principles, policies and practice* (Hart Publishing 2016). For a primer on the law in Argentina and Japan see respectively Fernando D Hernandez, 'Secured Credits in Insolvency Proceedings in Argentina' (2015) 9 Insolvency & Restructuring Int'l 21; Souichirou Kozuka, 'The Economic Implications of Uniformity in Law' (2007) 12 Unif L Rev 683; Kumiko Koens and Charles W Jr Mooney, 'Security Interests in Book-Entry Securities in Japan: Should Japanese Law Embrace Perfection by Control Agreement and Security Interests in Securities Accounts'(2016–17) 38 U Pa J Int'l L 761.

3.1. Origins and developments of a civil law archetype: the Italian case

Italian personal property security law has its roots in the civil and commercial codes enacted shortly after the foundation of Italy as an independent State in 1861. This body of rules manifestly displayed its Roman law lineage, yet also bore Napoleonic *Code Civil* and Austrian *Allgemeines bürgerliches Gesetzbuch* veining[143]. The Italian Civil Code of 1942 (hereinafter "CC")[144] substantially restructured this legal edifice yet retained its pillars unaltered[145]. For the purpose of the present inquiry, five fundamental features deserve special attention.

Pledge, Hypothec and Privilege in Italy: numerus clausus

[143] For one of the few accounts of these codifications in English see Icilio Vanni, 'Italian Civil Code of 1868' in Various Authors (ed), *Progress of Continental Law in the Nineteenth Century*, vol 1918 (Little Brown & Co 1918); Alfredo Rocco, 'The Commercial Codes'in Various Authors (ed), *Progress of Continental Law in the Nineteenth Century*, vol 1918 (Little Brown & Co 1918).

[144] For an English translation of the CC see Mario Beltramo and others (eds), *The Italian Civil Code and Complementary Legislation* (2nd edn, Oceana Publications 1990). For a holistic analysis of the CC in English see Pietro Rescigno, 'Fifty Years of the Italian Civil Code.' in Alfredo Mordechai Rabello (ed), *European Legal Traditions and Israel: Essays on Legal History, Civil Law and Codification, European Law, Israeli Law* (1994).

[145] For an analysis of the Italian personal property security law framework in English see Guido Ferrarini, 'Changes to Personal Property Security Law in Italy: A Comparative and Functional Approach' in Ross Cranston (ed), *Making commercial law Essays in honour of Roy Goode* (Clarendon Press 1997); Giuseppe Tucci, 'Towards a Transnational Commercial Law for Secured Transactions: The Preliminary Draft UNIDROIT Convention and Italian Law' (1999) 4 Unif L Rev 371; A Veneziano, 'Italian Secured Transactions Law – The Need for Reform' in Louise Gullifer and Orkun Akseli (eds), *Secured transactions law reform: principles, policies and practice* (Hart Publishing 2016); Giuliano G Castellano, 'Reverse Engineering the Law: Reforming Secured Transactions Law in Italy' in Orkun Akseli and Spiros V Bazinas (eds), *International and Comparative Secured Transactions Law: Essays in honour of Roderick A Macdonald* (Bloomsbury Publishing 2017); Andrea Tosato, 'Security Interests over Intellectual Property Rights in Italy: Critical Analysis and Reform Proposals' in Orkun Akseli and Spiros V Bazinas (eds), *International and Comparative Secured Transactions Law: Essays in honour of Roderick A Macdonald* (Bloomsbury Publishing 2017).

First, the CC provides three security devices that serve as exceptions capable of circumventing the *pari passu* principle[146] otherwise regulating the claims of creditors upon default of their common debtor: *pegno* (hereinafter "Pledge"), *ipoteca* (hereinafter "Hypothec") and *privilegio* (hereinafter "Privilege")[147]. Pledge, Hypothec and Privilege are proprietary rights *in rem* that are effective *erga omnes* and bestow a right of suit upon their holders, subject to limited exceptions[148]. They are typified and a *numerus clausus*. This is to say that the CC does not admit ulterior security devices and limits stringently the parties' contractual freedom to veer away from the specific statutory regime that it articulates for these devices[149]. In addition, though the CC does not forbid sales with reservation of title, it expressly voids any arrangement that transfers the ownership of an encumbered asset to the secured creditor in the event of the grantor's default[150]; notably, courts have construed this provision strictly striking down any dealing that functionally transferred ownership of an asset for security purposes[151].

Accessory to obligations

[146] Art 2740.1 CC; in Italian legal scholarship this principle is conventionally referred to as *par condicio creditorum*. In France, this principle is contained in the Civil Code, Art 2093 and it is referred to as *égalité des créanciers*.

[147] Art 2741.2, CC. The terms Pledge, Hypothec and Privilege are used here for linguistic convenience; neither parallels nor inferences should be drawn with security devices bearing similar names in other jurisdictions.

[148] Art 2808 CC; for an exhaustive analysis see Anna Veneziano, 'Italy' in Harry C Sigman and Eva-Maria Kieninger (eds), *Cross-Border Security over Tangibles* (Sellier 2007) 162.

[149] Art 2741.1, CC.

[150] Art 2744, CC.

[151] The origin of this rule can be traced back to 326 AD when the Roman Emperor Constantine enacted a law prohibiting any such arrangements (*lex commissoria*); see Constantine Code 8.34.3. For a historical analysis see William M Jr McGovern, 'Forfeiture, Inequality of Bargaining Power, and the Availability of Credit: An Historical Perspective' (1979) 74 Nw U L Rev 141, 145–51.

Second, though governed by separate regimes, Pledge, Hypothec and Privilege share two traits that profoundly affect the shape of the entire personal property security apparatus under consideration. They are accessory to an obligation[152]. As such these security devices cannot come into existence until the obligation which they secure has emerged and automatically cease to exist if this obligation is extinguished. Moreover, Pledge, Hypothec and Privilege can only attach to specifically-identified assets[153]. These devices cannot be used to encumber an indeterminate array of goods (e.g. "the grantor's equipment"), a whole property class (e.g. "all intangibles owned by the grantor"), a fraction of an undivided asset, or the entirety of the assets held by the grantor[154].

Creation and Perfection as a unitary notion

Third, the CC does not treat the creation and perfection of a security right as distinct phases, but rather collapses them into a unitary notion[155]. The implication of this normative choice is that a security right does not arise until parties have both stipulated a security agreement that satisfies all relevant requisites and complied with the publicity regime applicable to their chosen security device[156]. In practice, this process typically involves both formalities and either a transfer of possession or the filing of multiple documents in apposite registers. Operations of such cumbersome nature have arresting commercial repercussions which become especially acute when future[157] assets are used as collateral[158]. Notably, once

[152] This principle is inferred from Arts. 2808, 2843, 2852 CC.

[153] This principle is inferred from Art 2809 CC.

[154] Notably, statutory privileges can attach to the all the assets of the grantor; see art 2746, CC.

[155] For a primer on the conceptual distinction between creation and perfection see Gullifer (n 139) paras 2–02.

[156] On the requirements of the security agreement and publicity regime of a Pledge, Hypothec and Privilege see 3.1.1., 3.1.2., 3.1.3. respectively.

[157] Throughout this Chapter, when the adjective "future" is used to describe property it is intended to indicate both property not yet in existence and property not yet owned by the grantor.

a security right does come into existence, it is simultaneously effective between grantor and secured creditor, and against third parties. However, if the parties enter into a security agreement yet fail to satisfy all the aforementioned requirements, their contract only engenders rights *in personam*.

Possession as the primary publicity method

Fourth, the CC furnishes distinct publicity and priority regimes for each security device. Looking at this body of rules holistically, possession emerges as the primary publicity method, as the law deems this state of fact to be an external manifestation of ownership on which third parties in good faith are entitled to rely. Registration of a security interest is a publicity method available only for assets that are subject to title registers; notable examples are cars, ships, airplanes and tractors, but also patents, design rights and registered trademarks.

Enforcement through judicial proceedings

Fifth, CC and the Italian Civil Procedure Code (hereinafter CPC) lay out the regime pursuant to which both secured and unsecured creditors can enforce their unsatisfied claims in the event of a debtor's default[159]. A detailed analysis of the relevant provisions is beyond the scope of the present enquiry; for present purposes it is sufficient to emphasize that these rules subject the realization of security rights to lengthy, adversarial judicial proceedings and that grantor and secured creditor cannot contractually agree to out of court, self-help enforcement measures.

Mindful of these features of the original Italian personal property security law framework, attention can turn to a comprehensive analysis of the Pledge, Hypothec and Privilege.

3.1.1. Pegno – Pledge

[158] See *infra* 3.1.1-3.i)

[159] Arts 2910-2933 CC and Arts 474-632 CPC.

The Pledge is a possessory security device.[160] It is pervasively infused with the legal heritage of the Roman Law *pignus* and the *gage* of Napoleonic *Code Civil*.

Possessory security device: tangible moveable goods

Art 2784 CC establishes that a Pledge can be granted both by the person who owes the obligation to be secured or by a third party willing to offer their own assets as security. This provision specifies the types of assets that can be the object of this security device: tangible moveable goods, receivables and rights other than receivables, provided that they relate to tangible moveable goods[161]. Both present and future property can be pledged.

Constitutive requirements

The constitutive requirements for a Pledge to be created and perfected vary depending on the type of property involved in the secured transaction at hand.

If the collateral is a tangible moveable asset, grantor and secured creditor must first enter into a security agreement that precisely identifies the secured obligation and the encumbered asset[162]; thereafter, the grantor must surrender possession of the collateral either to the secured creditor or to a third-party custodian[163]. By contrast, if the object of a Pledge is a receivable, parties must enter into a written security agreement that precisely indicates the value of the secured obligation and the collateral, and subsequently

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[160] The Pledge is a purely consensual security device.

[161] Art 2784 CC.

[162] The CC does not impose any requirement of form *per se*; however, art 2787.3 CC provides that the security agreement must be dated and in writing when the value of the secured obligation exceeds €2.52, effectively imposing these formalities for all Pledges of tangible moveable assets. Moreover, by way of exception, an instrument unilaterally issued by the grantor can be a valid source of a Pledge, provided that it satisfies all substantive and formal requisites regarding the identification of the secured obligation and the collateral.

[163] Art 2786 CC.

formally notify the debtor of the receivable of their transaction[164]; crucially, this regime and its associate formality are inconsistent with the UN Receivables convention[165].

Still differently, if a Pledge is taken in a right other than a receivable, the CC requires that the creation and perfection of this security right must conform to the same substantive and formal requirements that govern the assignment of the [right][asset] in question[166]. However, art 2806.2 CC further holds that Pledge of rights other than receivables are subject to any asset-specific rules applicable to the encumbered collateral; interestingly, the *travaux preparatoires* of the CC state that this provision was included ostensibly to defer to statutes such as those regulating IPRs[167]. Notably, when receivables and rights other than receivables are pledged, there is a publicity deficit, as third parties have no readily available avenue through which they can discover the existence of these security rights.

Multiple pledges in the same asset: first-in-time rule

The CC allows for multiple pledges over the same asset and prescribes that priority must be determined pursuant to a first-in-time rule. Critically, as a corollary of the possessory nature of this security instrument, when a tangible asset has been pledged, ulterior security rights can only arise with the consent of the first secured creditor. For any subsequent Pledge over the same tangible asset to be created and perfected, the first secured creditor must agree to hold possession both on their own behalf and on behalf of the subsequent secured creditor(s). Conversely, when receivables or rights other than receivables are used as collateral, multiple Pledges can be granted in the same asset without the consent of the first secured creditor[168]. In the event of multiple pledges over the

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[164] Art 2800, CC.

[165] See *supra* 2.1.

[166] Art 2806.1, CC.

[167] See Tosato, 'Security Interests over Intellectual Property Rights in Italy: Critical Analysis and Reform Proposals' (n 145).

[168] Ibid.

same asset, priority among secured creditors will be assessed pursuant to the first-in-time rule[169].A Pledge holder in possession of the collateral cannot use it or dispose of it, unless otherwise agreed with the grantor[170]. Nevertheless, under art 2791 CC, such a secured creditor is presumptively entitled to appropriate proceeds stemming from the encumbered asset yet must treat them as contributions towards repayment of the secured obligation. Crucially, the notion of proceeds in this provision is limited to natural fruits and does not include revenues flowing from dealings in the encumbered asset such as licenses and leases.[171] In addition, a Pledge holder has access to two sets of judicial actions to protect the collateral from external interferences: those available to lawful possessors of a tangible asset and those available to the grantor as owner of the encumbered asset[172].

Under art 2743 CC, if the collateral deteriorates, even in fortuitous circumstances, to the point of becoming inadequate to secure the obligation in question, the Pledge holder can demand that the grantor replace it with alternative adequate assets; failure to comply with this request entitles the secured creditor to demand immediate discharge of the secured obligation. By way of reinforcement, art 2795 CC states that if the collateral loses market value, both the Pledge holder and the grantor may ask judicial authorisation for the asset to be sold on the open market; this provision also entitles the grantor to seek judicial authorisation to sell the collateral at any time if an especially favourable offer is received[173].

Special enforcement tools

The Pledge benefits from special enforcement tools additional to those available under the proceedings regulated by the CC and CPC. In the event of a grantor's default, the CC provides that a

[169] Ibid.

[170] Art 2792, CC.

[171] See Veneziano, 'Italian secured transactions law – The need for reform' (n 145).

[172] Art 2789, CC.

[173] Art 2795 CC.

holder of this security right can either privately sell the encumbered asset in the open market or formally ask the judicial authority to take ownership of the collateral[174]; if the value of the appropriated collateral or the proceeds of its sale exceed that of the secured obligation, the grantor is entitled to receive either the outstanding proceeds or a compensatory payment. To exercise these self-help, out-of-court enforcement rights, the Pledge holder must serve a written notice to the grantor who has five days to object.

3.1.2. Ipoteca – Hypothec

Non-possessory security device: immovables goods

Hypothec is a non-possessory security device[175]. Similarly to the Pledge, the influences of both Roman law and the Napoleonic *Code Civil* loom large over this security device. In Roman law, *hypotheca* – from Greek (*ὑποθήκη*) – was the term that came to be used to identify the *pignus conventum* (or *conentum*); this was a security device that enabled a debtor to grant a security interest in both real and personal property by virtue of an agreement with the secured creditor (*pactum conventum*), without having to deliver possession of the collateral (*traditio*) as required for the *pignus datum*[176]. It the late middle ages, European jurists predominantly adopted the view that dispossession was a fundamental requisite for the taking of security in personal property and gradually recharacterized *hypotheca* into a security device confined to assets that were incapable of dispossession[177]. This transformation was

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[174] Arts 2797-2798 CC.

[175] In contrast to the Pledge, a Hypothec can be consensual, judicial or statutory in nature.

[176] Some commentators have suggested that a constructive delivery (*constitum possessorium*) might have been originally necessary for a valid *hypotheca*; nevertheless, if such a requisite originally existed, it no longer recognized in the late empire and the Justinian codifications; see William W Buckland, *A Text-Book of Roman Law: From Augustus to Justinian* (Cambridge University Press 1921) 471–80.

[177] See Willem J Zwalve, 'A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods'in Eva-Maria Kieninger (ed), *Security Rights in Movable Property in European Private Law* (Cambridge University Press 2004) 39–

concluded by the drafters of the Napoleonic *Code Civil* who structured the hypothèque confined to the taking of security in real property[178].

Constitutive requirements

In light of this legal history, it is unsurprising that the incidence of the Hypothec in the realm of personal property is relatively limited, as art 2810 CC dictates that only the following types of assets can be the object of a Hypothec: immovables, rights over immovables, Italian treasuries, cars, aircrafts and ships, both present and future[179]. Notably all these asset classes are subject to a title registry system. A Hypothec neither extends to the proceeds of the collateral nor does it entitle the secured creditor to appropriate them[180].

A Hypothec can be granted both by the person who owes the obligation to be secured or by a third party willing to offer their own assets as security[181]. Its creation and perfection are subject to two requirements. First, grantor and secured creditor must enter into an agreement[182] which details the value of the secured obligation and the encumbered assets[183]; this contract must be in writing, signed and authenticated by a notary[184]. Secondly, the secured creditor must file the following documents in the relevant title register for the asset in question: the original or an authenticated copy of the security agreement, accompanied by a notice detailing, *inter*

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[178] Ibid.

[179] For a list of all the relevant special laws governing Hypothecs in cars, aircrafts and ships see Ferrarini (n 145) 483–85.

[180] Art 2811, CC.

[181] Art 2808, CC.

[182] By way of exception, art 2821 CC establishes that an instrument unilaterally issued by the grantor can be a valid source of a Hypothec, provided that it satisfies all substantive and formal requisites regarding the identification of the secured obligation and the collateral.

[183] Arts 2826, 2838, CC.

[184] Art 2835, CC.

alia, the identity of the parties, a precise description of the collateral, and the value of the secured obligation[185]. This filing is effective for twenty years but can be renewed by the secured creditor for a further two decades at any time[186].

Multiple hypothec in the same asset: chronological order of filing

More than one Hypothec can be granted over the same asset. Priority among secured creditors and other competing claimants is based on the chronological order of their respective filings[187]. If the secured obligation is assigned or otherwise transferred by the original secured creditor, the Hypothec securing that obligation follows suit, in a manner consistent with the accessory nature of security rights under the CC[188]. In line with the general Hypothec publicity regime, all such transfers are ineffective against third parties until they are registered[189].

Hypothec holders are entitled to seek judicial relief if the grantor or another person is responsible for conduct that diminishes the value of the encumbered asset[190]. Moreover, they can demand that the collateral be replaced if it deteriorates, even in fortuitous circumstances, to the point of becoming inadequate to cover the secured obligation. If the grantor fails to comply with this request, the Hypothec holder can call for immediate discharge of the secured obligation[191].

In the event of a grantor's default, the holder of a Hypothec must rely on the judicial proceedings generally applicable to all unsatisfied creditors. Though special laws facilitate the expeditious realization of this security device when cars, aircrafts and ships, are

[185] Arts 2838-2839, CC.

[186] Arts 2847, CC, 2851.

[187] Art 2852, CC.

[188] See 3.A.

[189] Art 2843, CC.

[190] Art 2813, CC.

[191] Art 2743, CC.

used as collateral, the applicable regime is neither as effective nor as flexible as that enshrined in the CC for the Pledge.

3.1.3. Privilegi – Privileges

Statutory preferential claims

The CC originally structured Privileges as statutory preferential claims, mirroring the provisions of the Napoleonic *Code Civil*[192]. It established that determinate contractual and non-contractual obligations were automatically secured by a Privilege that awarded such creditors (*rectius* obligees) a security right in specific assets of their debtors (*rectius* obligors). Each one of these Privileges had its individual roots either in the nature of the obligation in question or the identity of the creditor.

The CC stated in no uncertain terms that Privileges were statutory rights: persons could not autonomously create these security rights by way of agreement in connection to an obligation of their choosing. Nevertheless, Art 2745.2 CC expressly provided that, exceptionally, the law could identify peculiar obligations in respect of which a Privilege might arise if creditor and debtor agreed as much, and possibly subject to precise publicity requirements.

Italian lawmakers took advantage of the opening offered by Art 2745.2 CC beyond all reasonable expectations. During the second half of the 20th century, they enacted a staggering array of legislative acts that introduced multifarious Privileges, many of which were consensual and subject to non-possessory publicity regimes[193]. The ostensible aim of this manoeuvre was to facilitate asset-based loans extended by regulated credit institutions to enterprises operating in strategic industrial sectors. Regrettably, legislators paid heed neither to the reciprocal interactions of these Privileges nor to their impact on the Pledge and the Hypothec; this

[192] Art 2745, CC. For a comparative analysis of security devices of this nature across European jurisdictions, see Ulrich Drobnig, 'Mobiliarsicherheiten Im Internationalen Wirtschaftsverkehr' (1974) 38 RabelsZ 468.

[193] See Tosato, 'Security Interests over Intellectual Property Rights in Italy: Critical Analysis and Reform Proposals' (n 145).

cavalier approach was especially apparent regarding priority conflicts between these devices[194].

3.2. Legislative reforms

As the 20th century drew to a close, a broad constituency comprising financiers, enterprises, legal practitioners and academics grew increasingly vociferous in its criticism of the personal property security law framework enshrined in the CC.

The prevailing view was that this body of rules did not cater adequately to the needs of market participants; above all, there was dissatisfaction with the absence of flexible, non-possessory security devices for the taking of security in tangible and intangible assets. The Pledge, Hypothec and consensual Privileges did not afford flexible and efficient solutions. Historically hesitant to alter the CC radically, Italian lawmakers responded to these demands by enacting special legislation, with the intention of addressing the shortcomings of the extant personal property security law framework.

3.2.1. Privilegio Speciale – Bank Charge

In 1994, Italian lawmakers enacted the D.lgs 1 September 1993, n. 385 "Testo unico delle leggi in materia bancaria e creditizia" (hereinafter "TUB")[195]. This law aimed to restructure the extant banking law framework fundamentally; among the multifold novelties introduced by this law, Art 46 TUB replaced all pre-existing consensual Privileges that secured medium- and long-term loans to enterprises with a *privilegio speciale* (hereinafter Bank Charge)[196].

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[194] See Ferrarini (n 145); Tosato, 'Security Interests over Intellectual Property Rights in Italy: Critical Analysis and Reform Proposals' (n 145).

[195] This law consolidated pre-existing Italian banking legislation and meaningfully reformed the extant legal framework; it was subsequently subject to minor amendments by the Decreto Legge del 23 dicembre 2013, n. 145. For a systemic overview see Domenico Siclari (ed), *Italian Banking and Financial Law* (Palgrave McMillan 2015).

[196] See Ferrarini (n 145) 486–88; Veneziano, 'Italian secured transactions law – The need for reform' (n 145); Vania Petrella and others, 'Italy's New Rules to Foster Access to Medium/Long-Term Financing' (2014) 131 Banking LJ 436. The expression

The scope of Bank Charges is relatively narrow yet economically significant[197].

Scope restrictions on Bank Charges

Only "enterprises" registered on the Italian Enterprises Register[198] have access to this security device, and the assets that they can use as collateral must be used in the course of their business activity[199]; however, forms of personal property subject to a specialized registration system (such as aircraft, ships, cars and registered intellectual property rights[200]) cannot be encumbered with a Bank Charge[201].

A further scope restriction of this device is that it can only be granted to secure monetary obligations that have a duration exceeding eighteen months and are owed to a regulated credit institution[202].

Separation of creation and perfection

"Bank Charge" is used here to emphasize that this security device can only be used to secure a loan issued by a regulated credit institution.

[197] Art 46.1 TUB.

[198] In Italian law, the notion of "enterprise" is inferred inductively from that of "entrepreneur" defined in Art 2082 CC. The Italian Enterprises Register is a public register the function of which is to publicize information regarding enterprises. It was originally conceived by the drafters of the CC, yet was only realized by Law 29 29 December 1993, n. 580 and become operative after the Presidential Decree n. 581 of 1995.

[199] Under Art 46.1, TUB the following asset classes are listed as examples: (a) existing or future plants or equipment, licenses, capital goods or any asset that is instrumental to the business; (b) raw materials, incomplete products, finished products, stock, crops, fruit, livestock and merchandise; (c) any asset acquired with the loan secured by the Bank Charge; (d) receivables, including future receivables, deriving from the sale of goods referred to in the preceding categories.

[200] On the fraught relationship between the Bank Charge and intellectual property rights see Tosato, 'Security Interests over Intellectual Property Rights in Italy: Critical Analysis and Reform Proposals' (n 145); Tosato, 'Secured transactions and ip licenses: Comparative observations and reform Suggestions' (n 6).

[201] Art 46.1, TUB.

[202] Art 46.1-2 TUB.

In a conceptual departure from the CC, the TUB separates the creation and perfection of a Bank Charge into two legally distinct moments. This security device is created and binding between the parties when they enter into a written and signed security agreement that details the identity of the grantor and secured creditor, the terms of the secured loan, the value of the security interest, and the encumbered collateral[203].

Art 46.2 TUB expressly states that both present and future assets can be the object of this security device yet emphasizes that they need to be described precisely in the security agreement. Notably, both commentators and courts are divided on whether this device can encumber indeterminate and fluctuating classes of property and asset pools, including the whole inventory of a business[204].

Perfection of Bank Charges

Perfection of a Bank Charge requires that a certified, notarized copy of the security agreement is filed in a special registry that is held in each First Instance Court throughout Italy[205]; this registration must be effectuated in the geographically competent register for both the grantor and the secured creditor[206].

Priority of Bank Charges

The time of registration serves as the priority point to resolve conflicts between Bank Charges and competing secured creditors[207] and subsequent transferees[208]. However, this general rule is

[203] Art 46.2 TUB.

[204] For a description of the diverging scholarly views on this matter, see Veneziano, 'Italian secured transactions law – The need for reform' (n 145) fn 19; and Castellano, 'Reverse Engineering the Law: Reforming Secured Transactions Law in Italy' (n 145) 314-315.

[205] Art 46.3 TUB. The competent registers are those identified in Art 1524 CC.

[206] Art 46.3 TUB.

[207] Both Bank Charges, and between Bank Charge and other security interests.

[208] Art 46.4-5, TUB.

subject to two exceptions that bear systemic consequences of import. First, Art 46.4 TUB provides that Bank Charges are always subordinate to certain statutory preferential claims, including those held by unpaid employees, self-employed contractors and agents[209]. Secondly, Art 46.5 TUB establishes that lawful transferees take free from any pre-existing registered Bank Charge if they acquire possession of the collateral for value and in good faith[210]; in such a case, the security right of the defeated Bank Charge holder shifts to the proceeds of the transaction that resulted in the possession of the collateral being transferred[211]. The prevailing view among commentators is that the Art 46.5 TUB exception also extends to Pledge holders; accordingly, in a priority conflict between a Bank Charge and a subsequent Pledge, the latter prevails as long as possession of the collateral has been obtained for value and in good faith[212]. Nevertheless, commentators have suggested that a filing in the Bank Charge registry should be construed as constructive notice of the existence of the related security right and thus rule out the possibility of any subsequent transfer of possession of the encumbered asset in good faith[213].

Lack of special enforcement tools

In contrast to the Pledge, the Bank Charge does not benefit from any bespoke instrument that allows for self-help, out of court enforcement in the event of the grantor's default. As a result, the realization of the encumbered assets is typically a burdensome and lengthy venture, as holders of this security device are confined to the general proceedings governed by CC and CPC and must advance their claim via the applicable judicial path.

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[209] The list of these preferential claims is contained in Art 2777 CC.

[210] Art 46.5, TUB, this is an application of the general principle *possession vaut titre* enshrined in Art 1153 CC.

[211] Art 46.5, TUB.

[212] See Lucio Ghia, Carlo Piccinini, Fausto Severini, *Gli organi del fallimento e la liquidazione dell'attivo* (UTET 2010) 284.

[213] For an exhaustive analysis see Castellano, 'Reverse Engineering the Law: Reforming Secured Transactions Law in Italy' (n 145) 314-316.

Art 46 TUB has been in force for over two decades yet has failed to produce the positive outcomes auspicated by its drafters; the initial enthusiasm that had accompanied it has progressively faded into disappointment. First, this legislative reform has had a mixed impact on Italian personal property security law. As drafters of this law elected merely to introduce a novel security device, all pre-existing shortcomings and flaws of this body of rules survived unaltered. Moreover, this legislative intervention both increased and decreased the degree of complexity of the entire system. On one hand, it simplified the extant framework by consolidating a large number of pre-existing consensual privileges; on the other, it injected additional complication by introducing a new security device the scope of which largely overlaps that of the Pledge.

Secondly, the Bank Charge has not been embraced warmly by its intended audience and is seldom used in credit markets.[214] The policy choice to limit the asset classes that it can encumber and the obligations that it can secure have been called into question; equally, the decision not to offer self-help, out of court enforcement mechanisms specific for this security device has been received unfavourably by prospective lenders. Above all, profound dissatisfaction has been directed at the cloud of legal uncertainty hovering over this security device. The lack of clarity regarding whether the Bank Charge can be used to encumber fluctuating classes of property has stifled any attempt to pursue financing arrangements secured by inventory and other fluctuating asset pools. Commentators and stakeholders have voiced even greater frustration towards the lack of coordination between the priority regime articulated in Art 46 TUB and that mandated by the CC for other security devices, remarking that conflicts between Bank Charges and subsequent Pledges remain shrouded in uncertainty[215].

3.2.2. Pegno Mobiliare Non Possessorio – Non-Possessory Pledge

[214] See Veneziano, 'Italian secured transactions law – The need for reform' (n 145) who discusses available empirical data.

[215] See Castellano, 'Reverse Engineering the Law: Reforming Secured Transactions Law in Italy' (n 145); Tosato, 'Security Interests over Intellectual Property Rights in Italy: Critical Analysis and Reform Proposals' (n 145).

*[mn]A special form of Pledge[#mn]*Italian lawmakers first amended the original normative framework of the Pledge by enacting special laws for the use as collateral of certified hams[216], and subsequently for aged cheeses[217]. Albeit not perfectly identical, these laws shared the same reform approach and legislative technique: they contained few key provisions and referred to the general regime of the Pledge for all outstanding matters not expressly addressed. Their effect was to engineer a modified form of the Pledge limited to these two asset classes that differed in one cardinal aspect from the original: secured creditors were not required to take and retain possession of the collateral to bring into existence and maintain their security right. Instead, these special Pledges were created and perfected by filing a notice in a special registry and engraving a seal on each encumbered ham or cheese wheel[218]. The crucial benefit of these novel security devices was that grantors retained possession of the collateral, and thus could continue carrying out the essential work needed to improve their food products and advance their ageing process. This non-possessory dynamic also allowed grantors to borrow preemptively against the value of the fully finished and aged product[219].

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[216] See Law 24 July 1985 n. 401. The scope of this law was narrow as it only covered hams protected by the Italian geographical indication "*denominazione di origine controllata e garantita*" (DOCG); though the DOCG was subsequently replaced by the European Union quality schemes, the personal property security law in question was unaffected (for a commentary on EU quality schemes with special focus on traditional specialities guaranteed see Andrea Tosato, 'The Protection of Traditional Foods in the EU: Traditional Specialities Guaranteed'(2013) 19 European Law Journal 545).

[217] Article 7 of the Law 27 March 2001 n.122. Analogously to the legislation governing the use as collateral of hams, only cheeses falling with the Italian DOCG schemes were originally covered by this special personal property security law.

[218] The legal consequences if only one of the two requirements (registration or sealing) is met are nonetheless unclear.

[219] The production of *parmigiano reggiano* cheese relies on loans that are up to 80% of the value of the finished and fully aged product and that its overall market value exceeds 2 billion Euros; see Castellano, 'Reverse Engineering the Law: Reforming Secured Transactions Law in Italy' (n 145); N Trichakis, G Tsoukalas, E Moloney, 'Credem: Banking on Cheese' (March 2015) *Harvard Business School Case*, 615.

Additional amendments to the Pledge regime for financial collateral

Italian lawmakers further amended the Pledge regime to implement EU rules harmonizing secured transactions involving "financial collateral" in 2004 and 2011.[220] These legislative acts expressly recognized that Pledges could be taken over indeterminate and revolving pools of financial collateral; moreover, they ushered in a marked simplification of the formalities required for the creation and perfection of these security rights, as well as a loosening of the strictures limiting the use and disposition of encumbered assets. Coextensively, in the event of the grantor's default, these rules opened up access to self-help enforcement arrangements, including ownership transfers of encumbered financial collateral to the secured creditor.

The Banks Decree

In May 2016[221], the Italian Government enacted a legislative decree that introduced urgent[222] measures to stabilize the Italian banking sector[223]; shortly thereafter, the Italian Parliament converted this decree into law (Banks Decree)[224]. The primary objectives

[220] See *supra* 2.1. The relevant Italian laws are Legislative Decree 21.05.2004, No 170 and Legislative Decree 24.03.2011, No 48.

[221] In 2014, draft legislation was prepared aimed at entrusting the government with the task of developing a comprehensive legislative reform of the entire personal property security law framework pursuant to predetermined tenets. Regrettably, this initiative did not come to fruition and only partly flowed into the subsequent reform endeavours.

[222] This decree was drafted and enacted by the Government under the urgency procedure for delegated legislative acts articulated by Art 77, Italian Constitution.

[223] D.l. n 59 3rd May 2016.

[224] D.l. n 59 3rd May 2016; pursuant to the relevant legislative procedure, the Italian Parliament converted this decree into Law 30 June 2016 n 119/2016 (GU n 153, 2 July 2016). Though not reshaping the substance of the law, the Italian Parliament introduced key amendments to the text of the original decree when converting it into a law. These changes will be evidenced where useful to the purposes of the present inquiry. For a comprehensive analysis of this law in English see Giuliano G Castellano,

of the Banks Decree were to expedite the enforcement of contractual monetary claims held by banks, alleviate the impact of non-performing loans on regulated financial institutions, and strengthen recourse mechanisms available to investors and deposit holders in the event of bank failures[225]. Crucially, the Banks Decree also sought to facilitate access to credit for entrepreneurs; to this end, it introduced a new security device: the *pegno mobiliare non possessorio* (hereinafter "Non-Possessory Pledge"). The report of the Italian Government accompanying the Banks Decree expressly stated that the Non-Possessory Pledge was intended to facilitate the taking of security in personal property. Drafters also remarked that this new security device had been inspired by international principles and UNCITRAL texts, as well as recent legislative reforms enacted in other civil law jurisdictions[226].

Non-Possessory Pledge: scope of application

Only enterprises registered on the Italian Enterprises Register[227] can grant a Non-Possessory Pledge[228]. This security device can be used to secure obligations both present and future, either determinate or determinable, as long as they stem from the entrepreneurial activity of the grantor[229]. This device is compatible with all types of movable goods both tangible and intangible, as long as they are used in the ambit of the business activity of the grantor. However, the Banks Decree places assets that are subject to a registration system outside the reach of Non-Possessory Pledges; accordingly, registered intellectual property rights, cars, ships, aircrafts and cer-

'The New Italian Law for Non-Possessory Pledges: A Critical Assessment' (2016) 31 BJIB & FL 542.

[225] Non-possessory Pledge Law 2016 Art 1.

[226] See Relazione: Fascicolo Iter DDL S. 2362DDL S. 2362 (Senato della Repubblica, 19 March 2018) (hereinafter 'Report to the Senate'); available at http://www.senato.it/leg/17/BGT/Schede/FascicoloSchedeDDL/ebook/46821.pdf accessed June 2019.

[227] See *supra* note 198.

[228] Art 1.1, Bank Decree.

[229] Art 1.1, Bank Decree.

tain types of mobile equipment are not viable collateral with this security device.

Non-Possessory Pledge: separation of creation and perfection

In like manner to Art 46 TUB and diverging from the CC blueprint, the Banks Decree separates the creation and perfection of a Non-Possessory Pledge into two legally distinct moments[230]. A Non-Possessory Pledge is created when secured creditor and grantor enter into a written agreement that identifies the parties, the collateral and the maximum value of the security[231]. Notably, in a marked departure from the framework of the CC, the Banks Decree expressly states that parties can use this novel security device to encumber present and future assets, both determined or determinable, including entire classes of goods[232].

The combined outcome of these rules is that entrepreneurs can rely on the Non-Possessory Pledge to secure all or part of their present and future obligations, by encumbering any fluctuating asset pool of their choosing, including their inventory and all their present and future personal property. Furthermore, echoing the Banks Charge and the special Pledge on certified hams and cheeses, the Banks Decree provides that grantors can use and even dispose of their encumbered assets in the context of their business activity; in such cases, unless otherwise agreed, the security interest held by the Non-Possessory Pledge holder shifts either to the proceeds ob-

[230] Art 1.3, 1.4 Banks Decree. In the original text of the Bank Decree, creation and perfection were not separated. A Non-Possessory Pledge was both created between the parties and effective against third parties upon satisfaction of two requirements: first, secured creditor and grantor had to enter into a security agreement and, second, a notice had to be filed in the designated electronic register. The policy choice to separate creation and perfection was implemented by Parliament at a later stage, yet the amendments introduced to this effect give rise to ambiguities owing to their fraught phraseology; see Castellano, 'The New Italian Law for Non-Possessory Pledges: A Critical Assessment' (n 224) 543-544.

[231] Art 1.3, Banks Decree.

[232] Art 1.1, 1.2, Banks Decree.

tained by the grantor or to the product resulting from the use of the collateral[233].

A Non-possessory Pledge is perfected upon filing a notice in a new electronic registry system operated by the Italian Tax and Revenue Agency[234]; this document must identify the parties and adequately describe both the collateral and the secured obligation[235]. The Banks Decree does not detail the regime governing the operation of this new registry nor the rules governing searches, amendments and cancellations, but rather entrusts these essential elements of the Non-Possessory Pledge regime to future ministerial regulations[236].

Priority among Non-Possessory Pledges: first-to-file rule

The Banks Decree establishes that priority among Non-Possessory Pledges is determined pursuant to a first-to-file rule[237]. Casting aside the tenets of the CC, the time of filing of a Non-Possessory Pledge that covers future assets serves as the priority point, rather than the time at which the collateral is acquired by the grantor. By way of exception, the Banks Decree provides that a Non-Possessory Pledge which secures a purchase money obligation and takes security in the financed asset, has priority over any pre-existing Non-Possessory Pledge that extends to after acquired property[238].

Expedite realization of Non-Possessory Pledges

[233] Art 1.2, Banks Decree.

[234] Art 1.3, 1.4 Banks Decree.

[235] Art 1.3, 1.6 Banks Decree.

[236] Art. 1.6 Banks Decree.

[237] Art. 1.4 Banks Decree.

[238] Art. 1.4 Banks Decree. This provision extends this priority rule also to retention of title sellers and Pledge holders; This normative stance is somewhat surprising, as a Non-Possessory Pledge covering after-acquired property cannot attach to an asset obtained by the grantor under a retention of title sale. Similarly, the notion of a purchase money financier taking a possessory pledge in the financed asset appears unlikely.

Regarding enforcement, the Bank Decree introduces a special regime to expedite the realization of Non-Possessory Pledges which departs from that of the CC. If a grantor defaults, the secured creditor can sell the collateral or take payment of the encumbered receivable[239]; alternatively, the secured creditor can take ownership of the collateral,[240] lease it or otherwise dispose of it, as long as such alternatives have been concurred in the security agreement.[241] Crucially, Non-Possessory Pledge holders can undertake these enforcement avenues without judicial intervention, yet must communicate their intentions to the grantor who can object[242] through urgent court proceedings[243]. Moreover, the Banks Decree allows the grantor to seek compensatory damages if the secured creditor fails to comply with all requirements for enforcement[244]. In the event of the grantor becoming insolvent, a Non-Possessory Pledge is treated identically to a CC Pledge[245].

It should be noted that, at the time of writing (June 2019), the ministerial regulations required for the establishment and functioning of the registry system of the Non-Possessory Pledge have not been enacted. Consequently, this security device continues to be inoperative and its impact on Italian personal property security law cannot be appraised fully. Nevertheless, it is possible to advance observations based on its substantive features.

The drafters' attempt to create a flexible, non-possessory security device which relies on an electronic registry system for its publicity is a commendable step towards the core tenets that have been recognized as integral to a modern personal property security law. However, the following normative choices give reason for concern.

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[239] Art. 1.7(a)-(b), 1.7-*ter*, 1.7-*quater*, Banks Decree.

[240] Art. 1.7(c), Banks Decree. Notably, the secured creditor will have to reimburse the grantor if the value of the appropriated collateral exceeds that of the secured obligation; the Banks Decree is enabling the parties to agree a *pactum marcianum*.

[241] Art. 1.7(c)-(d), Banks Decree.

[242] Art 1.7-*bis*, Banks Decree.

[243] Art. 1.7(a)-(d), Banks Decree.

[244] Art. 1.9, Banks Decree.

[245] Art. 1.10, Banks Decree.

Non-Possessory Pledge: problematic normative choices

First, the Banks Decree mandates that all components of the Non-Possessory Pledge that are not expressly regulated therein are subject the general rules of the Pledge. This precept is perplexing and likely to give rise to interpretative challenges, as all the provisions of the latter are based on the axiom that the secured creditor has possession and control of the collateral. Commentators have gone as far as stating that applying the rules of a possessory security device to one that is designed to be non-possessory is a legal oxymoron.

Secondly, the scope limitations on the types of assets that can be used as collateral significantly undermine the breadth and elasticity of the Non-Possessory Pledge. For example, if a lender sought to take security in all present and future assets of a business using this device, they could not encumber any of its registered patents and trademarks.

Thirdly, the drafters' decision to create a new electronic registry system for the Non-Possessory Pledge that exists in parallel to all the others already in operation and without any information sharing mechanism is problematic. It engenders coordination difficulties and increases transaction costs for market participants by requiring them to search multiple sources of information. Notably, entrusting the operation of this registry to the Italian Tax and Revenue Agency is a peculiar experiment that is unprecedented in any other jurisdiction. It calls into question whether the legislative intention is to use registration and search fees as a source of revenue, eschewing the recommendations of the UNCITRAL Guide[246]. Poignantly, it raises doubts as to whether business might perceive the involvement of the tax authorities as a new form of fiscal levy on credit or a monitoring channel over their business activity.

Fourthly, the Banks Decree articulates a lacunose and shortsighted priority regime that lacks systematic coordination with ex-

[246] See UNCITRAL Guide, para 37, Recommendation 54(i); UNCITRAL Registry Guide, para 274. These texts suggest that registration and search fees should not exceed what is necessary to recover the costs of constituting and operating the general security registry, in order to maintain the lowest possible transaction costs.

isting security devices. This law contains no express indication to resolve conflicts between a Non-Possessory Pledge holder and other competing claimants, including holders of either subsequent or antecedent Pledges and Bank Charges, as well as transferees and lessees who take possession in good faith. Still further, the Banks Decree's residual reliance on the regime of the Pledge is entirely ineffectual, as the applicable rules in the CC do not contemplate the priority conflicts under consideration. In this legislative vacuum, there is complete uncertainty as to whether a holder of a Non-Possessory Pledge should be treated analogously to a holder of a Pledge who has acquired possession of the collateral in good faith; equally shrouded in uncertainty is whether a Bank Charge has priority over a subsequent Non-Possessory Pledge.

3.3. Italian reforms vis-à-vis international ambitions

Italian laws deviate from international core tenets

Italian legislators have often paid lip service to international legal initiatives and foreign reform projects when introducing measures aimed at improving personal property security law. Emblematically, the government report accompanying the Banks Decree[247] described the legislative act in question as consistent with the legal texts adopted by UNCITRAL[248], and aligned with the norms enacted in other civil law jurisdictions, such as France and Quebec[249].

However, these parallels are unsubstantiated. With Sisyphean predictability, the Banks Decree merely spawned another variant of the Pledge, which fails to amend existing personal property security law rules, just as all other legislative interventions preceding it. By contrast, the UNCITRAL Guide, Model Law and Guide to Enactment unequivocally recommend comprehensive reform of domestic secured transactions regimes.

[247] See Report to the Senate (n 227) 5.

[248] Ibid.

[249] See Report to the Senate (n 227) 6.

The Banks Decree is also at odds with the approaches followed in both France[250] and Quebec[251], where legislators revised personal property security law by systematically redrafting the relevant segments of their respective civil and commercial codes. For example, in France,[252] the long-standing archetypal possessory security device (*gage*) was recast from a *contrat réel* to a *contrat solennel*[253]; accordingly, its creation was subjected to a written agreement[254], while perfection was tied to either dispossession of the collateral or, alternatively, registration of a notice in a new register.

More broadly, the preceding analysis has shown that the Italian personal property security law framework continues to deviate fundamentally from the international core tenets outlined above. Though recent interventions have made it possible to encumber all forms of personal property for the purpose of securing any type of

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[250] See Riffard (n 140).

[251] See Ronald A. Macdonald and Jean François Ménard 'Credo, credere, credidi, creditum: Essai de phénoménologie des sûretés réelles', in Sylvio Normand (Ed.), *Mélanges offerts au Professeur François Frenette* (Presses de l'Université Laval, 2006), 309 –360.

[252] See *Ordonnance n° 2006-346 du 23 mars 2006 relative aux sûretés*. This law added Articles 2333–2350 to the French Civil Code; it also added Articles L527-1 to L527-11 to the French Commercial Code (Code de commerce). On the law governing security interests in France, see generally Jean-Francois Riffard, *Droit des Sûretés* (Paris: Lexifac, 2012). A detailed empirical study on the French reform cogently showed that this new regime benefited small and financially constrained business, particularly those based outside large cities, reducing inequalities in credit access; see Kevin Aretz, Murillo Campello, Maria-Teresa Marchica, 'Access to Collateral and the Democratization of Credit: France's Reform of the Napoleonic Code' (forthcoming), Journal of Finance.

[253] A *contrat réel* requires a physical interaction with the asset in question to create a right *in rem*, whereas a *contrat solennel* requires the fulfilment of specific formalities to create a right *in rem*; see Renaudin, Muriel, 'The Modernisation of French Secured Credit Law: Law as a Competitive Tool in Global Markets'(2013) 24 International Company and Commercial Law Review 385.

[254] Recently, the French *Cour de cassation* has stipulated that a written agreement is not necessary for a *gage commercial* as registration suffices to satisfy the formalities demanded by the law; see Cour de cassation, Arrêt n° 209 du 17 février 2015 (13-27.080). For a detailed analysis of this decision and, more broadly, on the role of publicity rules to facilitate access to credit *see* Castellano, 'Reforming Non-Possessory Secured Transactions Laws' (n 7) 623–26.

obligation (conforming to the first tenet), grantors and secured creditors are confronted by a plethora of security devices governed by substantively disparate rules (diverging from the second tenet).

It should be emphasized that, albeit to a varying degree, all available security devices compress the parties' freedom of contract in structuring their security agreements; market participants are prevented from encumbering a fluctuating pool of assets due to either express normative exclusions or legal ambiguities (diverging from the third tenet). Paradoxically, far from streamlining perfection rules, the legislative acts of the past three decades have muddled them, introducing overlapping and uncoordinated security rights registers that impose sundry filing requirements (diverging from the fourth tenet). Furthermore, these enactments have made it difficult to ascertain priority among competing claimants, owing to their failure to address exhaustively conflicts between different security devices (diverging from the fifth tenet).

Concurrently, the general regime for the enforcement of security rights in the event of a grantor's default has stagnated. On this front, however, the novelties introduced by the Banks Decree for the enforcement of Non-Possessory Pledges give reason to hope for wider adoption self-help, out-of-court options in future (diverging from the sixth tenet).

It is submitted that the reform strategy implemented by lawmakers is the primary cause of the current unsatisfactory state of Italian personal property security law[255]. For the past thirty years, wielders of legislative power have insisted on enacting a sequence of incremental normative amendments that either created new variants of existing security devices or engendered entirely new ones. Examined individually, these amendments superficially appeared to bear positive novelties capable of improving the legal ecosystem for grantors and secured creditors. Nevertheless, when analyzed in the context of the entire Italian personal property security law

[255] The lack of a comprehensive general regime for security interests over movables has been often remarked in the last decades by Italian scholars; in English see Ferrarini, 'Changes to Personal Property Security Law in Italy: A Comparative and Functional Approach', in R Cranston (ed) *Making Commercial Law: Essays in Honour of Roy M. Goode* (Oxford University Press 1997) at 477; Veneziano, 'Italy' (n 148) 159.

framework, it became apparent that these interventions were piecemeal and severely lacking in systemic coherency. In a fulgid example of path dependency, each new legislative act has added an ulterior normative layer, sowing ambiguity and legal uncertainty ever deeper and increasing both the cost and complexity of any subsequent enactment.

It is perhaps unsurprising that Italy's "Getting Credit" score in the Doing Business Report issued yearly by the World Bank has steadily deteriorated for the past decade[256]. Notably, in the most recent edition of this report, the Italian personal property security law framework was awarded a mark of 2 out of 12, confirming a historical downtrend with no point of inflection in sight[257]. The accuracy and significance of any synthetic benchmark must always be parsed with a healthy dose of constructive scepticism. Nevertheless, this World Bank index should not be dismissed lightly, as it signals that international observers and credit market participants consider the Italian credit ecosystem inhospitable both on an absolute and comparative basis.

4. Conclusion

Over the past 40 years, personal property security law has become an important piece in the rich mosaic of access to credit and financial inclusion. Concurrently, socio-economic changes such as

[256] The Getting Credit score is one of the metrics on the basis of which the World Bank measure the business ecosystem across 186 countries in its Doing Business Report. In the past decade, Italy's Getting Credit ranking has dropped from 84 (Doing Business 2009) to 112 (Doing Business 2019); see World Bank & International Financial Corporation, *Doing Business 2009*, Washington (2009) and World Bank Group, *Doing Business Report 2019 – Training for Reform (Italy)*, Washington (2018). The International Monetary Fund has expressed similar views to those of the World Bank in its most recent reports; see for example International Monetary Fund (IMF), 'Italy – Selected Issues' (July, 2015) IMF Country Report No. 15/167, 67.

[257] The "Getting Credit" score is based on two distinct factors: "strength of legal rights" and "depth of credit information"; the former assesses the reliability and efficiency of a country's personal property security law. Notably, in 2013, Italy was attributed 3 points out of 10; see World Bank & International Financial Corporation, *Doing Business 2009*, Washington (2013) 172.

the prevalence of SMEs, the advent of the information society and globalization, have recast the priorities of this body of rules. In response to these structural shifts, international and regional organizations have undertaken to promote the harmonization and modernization of personal property security law. These endeavors have gained limited traction at local level.

This Chapter has sought to explore the tensions that exist between these lofty international ambitions and domestic realities. It began by surveying the most significant texts that emerged from these international initiatives. It then proceeded to show that, despite some substantive dissimilarities, these instruments share a set of core tenets that constitute the fundamental building blocks for an effective regime for the taking of security in personal property.

Through this prism it examined Italy's struggle to overhaul its secured transactions law regime. It illustrated that, despite best intentions and repeated attempts, this jurisdiction has largely failed to align its rules to the aforementioned international tenets; efforts to address these deficiencies have merely increased the complexity of the extant system. At present, the Italian personal property security law framework features multiple, overlapping consensual security devices. Their perfection regimes are discordant and fettered by the co-existence of distinct and uncoordinated registry systems. Above all, there is no coherent priority regime to resolve conflicts among competing claimants.

The main submission of this Chapter was that Italy's current predicament is attributable to the fact that its legislative reforms have been piecemeal and myopic, ultimately increasing complexity and uncertainty. Resolving these issues and achieving the lofty ambitions envisioned by international and regional organizations will require a contextual and holistic approach that takes as its foundations the core tenets identified in the preceding discourse.