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Enforcement of Security Interests in Transnational Commercial Law: Current State and Future Trends

Thomas Keijser*

1. Introduction

The enforcement of security interests has been a core issue in the realm of secured transactions for as long as these have been entered into. Different choices have been made over time as to the balancing of the interests of the different actors involved in such transactions, notably the security provider and the security taker. Such balancing acts reflect attitudes with regard to issues such as the bargaining power and level of sophistication of the actors themselves, as well as the market segments and general economic climate in which they operate.

Section 2 describes a number of prototypical elements of secured transactions. These elements are used as a point of reference to subsequently compare different approaches taken in respect of enforcement in transnational legal instruments regarding intermediated securities and close-out netting, notably the UNIDROIT projects dealing with capital markets ('Section 3'); mobile equipment, such as aircraft, railway rolling stock, space assets, and mining, agricultural and construction equipment, as covered in the successful Convention on International Interests in Mobile Equipment (the 'Cape Town Convention') ('Section 4'); and non-performing loans, as set out in EU draft legislation ('Section 5'). Two topics that have an imminent impact on enforcement and that merit further attention are briefly singled out towards the end: the ongoing COVID-19 pandemic and technological developments.

* Dr Thomas Keijser is a Senior Researcher at the Business Law Institute of Radboud University in the Netherlands. The author is grateful for the inspiring exchange of views with Teresa Rodríguez de las Heras Ballell and Feben van der Linden van Sprankhuizen. The English of this contribution was checked by Patricia de Seume-Nissing.

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2. Prototypical elements of secured transactions[2]

Prototypical property law elements of secured transactions, which may of course vary from one jurisdiction to another, include formal requirements for vesting a security interest; the accessory connection between a security interest and the debt it secures; the security taker's duty to take care of encumbered assets; the borrower's (or, if the security is provided by a third party, also that party's) right to redeem an encumbered asset by paying the secured debt; and a limitation of the security taker's right to dispose of encumbered assets to cases of default. Specifically in relation to enforcement upon default, prototypical characteristics are the duty to notify the borrower and other interested parties of intended enforcement; the obligation to realise optimum value for the benefit of the borrower and other interested parties (commonly with the help of independent third parties, such as a court official, bailiff, or notary); and an obligation to pay any residual value to the borrower and/or other interested parties when the enforcement process is completed. Most of these characteristics in one way or another reflect the fiduciary relationship between the parties involved in the secured transaction.[3]

[1] For more information on these yearly gatherings, see <https://www.ipr.uni-heidelberg.de/tcl-teachers/> accessed 16 November 2020.

[2] Sections 2-5 are based on Thomas Keijser, 'Enforcement of Security Interests in Transnational Commercial Law: Balancing Tradition and Innovation', in Christoph Benicke and Stefan Huber (eds), *National, International, Transnational: Harmonischer Dreiklang im Recht: Festschrift for Herbert Kronke* (Gieseking 2020) 947.

[3] Thomas Keijser, 'Transactions in Securities', in Roy Goode, Herbert Kronke, Ewan McKendrick (eds), *Transnational Commercial Law: Texts, Cases and Materials* (2nd edn, OUP 2015) ch 15 at 15.47. This chapter contrasts prototypical property law elements of secured transactions with newer approaches in relation to intermediated securities, which are further discussed in section 3.

Similar principles regarding enforcement are reflected in the 2010 UNCITRAL Legislative Guide on Secured Transactions (the 'UNCITRAL Legislative Guide')[4] and the 2016 UNCITRAL Model Law on Secured Transactions (the 'UNCITRAL Model Law').[5] Both these instruments envisage a duty to give notice of the intent to enforce rights to a number of interested parties in an extrajudicial context that does not involve a court or other authority,[6] whereas national procedural law, including adequate notices envisaged therein, governs judicial enforcement. The purpose of realisation of maximum value is explicitly mentioned in the UNCITRAL Legislative Guide.[7] In this context, also, both the UNCITRAL Legislative Guide and the UNCITRAL Model Law distinguish between judicial and extrajudicial proceedings. In the case of judicial proceedings, external parties (the court or other authority or experts appointed by them) are likely to contribute to optimum valuation. In the case of out-of-court proceedings, the instruments do not specify comparable methods for reaching optimum value in the course of such proceedings,[8] but rather rely on a standard of good faith and commercial reasonableness, discussed in more detail below, which can only be invoked post-enforcement.[9] The obligation to pay any overvalue after enforcement is apparent from Recommendations 152-153 of the UNCITRAL Legislative Guide and Article 79 of the UNCITRAL Model Law.[10]

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[4] UNCITRAL Legislative Guide on Secured Transactions (2010) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/09-82670_ebook-guide_09-04-10english.pdf> accessed 16 November 2020, especially chapter VIII ('Enforcement of a security right').

[5] UNCITRAL Model Law on Secured Transactions (2016), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf> accessed 16 November 2020, especially chapter VII ('Enforcement of a security right'). The UNCITRAL Model Law was supplemented by a Guide to Enactment in 2017, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlst_guide_to_enactment_e.pdf> accessed 16 November 2020; see especially chapter VII ('Enforcement of a security right').

[6] Recommendations 147(b) and 149-151 of the UNCITRAL Legislative Guide (n 4) and Articles 77(2)-(3) and 78(4)-(8) of the UNCITRAL Model Law (n 5).

[7] UNCITRAL Legislative Guide (n 4) Recommendations 131-177, Purpose (b), 310.

[8] Recommendation 148 of the UNCITRAL Legislative Guide (n 4) and Article 78(3) of the UNCITRAL Model Law (n 5) establish that the secured creditor may determine the 'method, manner, time, place and other aspects' of extrajudicial enforcement, but are silent on methods of optimum valuation. Only in the case of appropriation is the value of the encumbered assets mentioned explicitly; see Recommendation 157(b) of the UNCITRAL Legislative Guide and Article 80(3)(a) of the UNCITRAL Model Law.

[9] Recommendation 131 of the UNCITRAL Legislative Guide (n 4) and Article 4 of the UNCITRAL Model Law (n 5).

[10] A note on terminology: the primary actors in the UNCITRAL Legislative Guide (n 4) and the UNCITRAL Model Law (n 5) are the debtor, the grantor and the secured party; the collateral provider

3. The UNIDROIT capital markets projects

The final decades of the last century represented a period of profound change for financial markets. One important feature of that change was a shift within the securities markets from direct contact between investors and issuers (on the basis of paper certificates/entries in the issuer's register) to a world in which, notably for reasons of efficiency and speed, intermediation by one or more tiers of financial institutions became the norm. Intermediation meant that investors and issuers were no longer perforce directly connected, and that investors' holdings were no longer represented by paper certificates and/or entries in the issuer's register (certificates now often being immobilised or even dematerialised at central securities depositories) but rather by electronic entries on accounts with intermediaries.

This change of paradigm also required a new approach from a legal point of view, both in relation to conflict-of-laws and substantive law issues. This initially resulted in the 2002 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (the 'Hague Securities Convention'),[11] elaborated under the auspices of the Hague Conference for Private International Law and focusing on the international private law aspects of intermediated securities.[12] Immediately after that, in 2002, UNIDROIT followed suit with a complementary project to develop substantive rules for this new type of asset, which resulted in the 2009 UNIDROIT Convention on Substantive Rules for Intermediated Securities (the 'Geneva Securities Convention').[13]

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and the collateral taker feature in the context of financial collateral; the Cape Town Convention mentions the chargor and the chargee; whereas the proposed EU instrument relating to non-performing loans identifies the business borrower and the creditor. This contribution generally follows the terminology used in each instrument.

[11] The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (2002) <https://assets.hcch.net/docs/3afb8418-7eb7-4a0c-af85-c4f35995bb8a.pdf> accessed 16 November 2020; the Hague Securities onvention was 'adopted' (at a diplomatic Conference) in 2002 and 'concluded' (following the first signature) in 2006. On this old practice of distinguishing between adoption and conclusion, see Herbert Kronke, 'Brüsseler Springprozession: Die Harmonisierung des Rechts zentralverwahrter Finanzinstrumente als Lehrstück über Privatautonomie, Regulierung, Lobbyismus und Verwaltung' in Cordula Stumpf, Friedemann Kainer and Christian Baldus (eds), *Privatrecht, Wirtschaftsrecht, Verfassungsrecht: Privatinitiative und Gemeinwohlhorizonte in der europäischen Integration* (Nomos 2015) 759, 762.

[12] On the need for such a convention, see Herbert Kronke, 'Capital Markets and Conflict of Laws' (2000) 286 Collected Courses of the Hague Academy of International Law 245.

[13] The UNIDROIT Convention on Substantive Rules for Intermediated Securities (2009) <https://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf> accessed 16 November 2020; adopted at a diplomatic Conference in Geneva in 2009. In order to prevent overlap, the UNCITRAL Legislative Guide (n 4) (Recommendation 4(c)) and the UNCITRAL Model Law (n 5) (Article 1(3)(c)) do not relate to (intermediated) securities.

Chapter V of the Geneva Securities Convention addresses financial collateral arrangements, such as securities lending and repurchase agreements. This chapter mirrors the 2002 EU Financial Collateral Directive.[14] Content-wise, these instruments represent a fairly radical break with the prototypical features of security interests outlined in the previous section. For the sake of market liquidity, formal requirements for vesting a security interest are relinquished and the collateral taker may be given the right to dispose of encumbered assets as if it were their owner (hence, also in the absence of default). Such a disposal in the ordinary course of business implies that the accessory connection between a security interest and the debt it secures is loosened, that the collateral taker can no longer fulfil its duty to take care of encumbered assets, and that the collateral provider can no longer redeem the assets.

Specifically in relation to enforcement, whether by way of sale, appropriation or close-out netting, Chapter V of the Geneva Securities Convention and the Financial Collateral Directive envisage that no prior notification of the intention to enforce is required, that the terms of enforcement (including valuation) do not need to be approved by a court, public officer or another independent third party, and that enforcement need not be conducted by public auction or in any other prescribed manner. Only the obligation to pay any surplus value to the collateral provider (or other interested entities) is thus left intact. In this way, enforcement has become a tool tailored to the needs of collateral takers. Its fiduciary features have been hollowed out.[15] This may not matter all that much in the case of highly liquid securities for which prices are readily available on a single market, but disapplying safeguards concerning valuation/pricing may well be an issue in the case of less liquid securities, in highspeed or volatile markets, or in the context of co-existing market platforms with different prices.[16]

The only relief given to collateral providers is a non-mandatory option to challenge the outcome of enforcement proceedings in court (including the crucial

[14] Directive 2002/47/EC on financial collateral arrangements (as amended). On this directive, see Matthias Haentjens (ed), *Financial Collateral: Law and Practice* (OUP 2020, forthcoming); Thomas Keijser, *Financial Collateral Arrangements: The European Collateral Directive Considered from a Property and Insolvency Law Perspective* (Kluwer Legal Publishers 2006).
[15] Goode, Kronke and McKendrick (n 3) 15.48-56.
[16] On the problem of fragmented pricing on multiple platforms, see David Donald and Mahdi Miraz, 'Multilateral Transparency for Security Markets Through DLT' (2019/2020) 25(1) Fordham Journal of Corporate & Financial Law 97, <https://ir.lawnet.fordham.edu/jcfl/vol25/iss1/2/> accessed 16 November 2020.

matter of valuation of the assets involved) based on a standard of commercial reasonableness. A pig in a poke, some might argue, since (i) the standard is non-mandatory and States may decide not to implement it (although general principles of law may in that case apply), (ii) safeguards in the form of a check by external parties during enforcement are replaced by a standard that should be observed by the collateral taker and that can only be invoked by the collateral provider post-enforcement, and (iii) the collateral provider may in effect face the burden of detecting and proving any misconduct by the collateral taker and of shouldering the related costs, which is likely to be particularly onerous for smaller, non-specialised entities, not to mention ordinary consumers.[17]

In light of the above, several authors have argued that the approach taken in the Financial Collateral Directive and in Chapter V of the Geneva Securities Convention may be appropriate for transactions between professional, wholesale market participants, but not in other contexts, particularly where the parties involved do not enjoy equal bargaining positions.[18]

Several years after the adoption of the Geneva Securities Convention, subsequent capital markets instruments were adopted in the shape of the 2013 UNIDROIT Principles on the Operation of Close-Out Netting Provisions[19] and the 2017 UNIDROIT Legislative Guide on Intermediated Securities.[20] In the wake of the global financial crisis of 2007 and onwards, both instruments, to some extent, reflect an extensive debate on the micro- and macro-economic pros and cons of enhancing liquidity in the securities markets, facilitating enforcement, and the creation of insolvency 'safe harbours' with a view to protecting the takers of financial collateral, specifically.[21]

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[17] See Laura Franciosi, 'Commercial Reasonableness in Financial Collateral Contracts: A Comparative Overview' (2012) 17(3) Uniform Law Review 483; Michele Graziadei, 'Financial Collateral Arrangements: Directive 2002/47/EC and the Many Faces of Reasonableness' (2012) 17(3) Uniform Law Review 497; Goode, Kronke and McKendrick (n 3) 15.54-55; Keijser (n 14) ch V.2, especially 287.

[18] Eg Louise Gullifer, 'What Should We Do About Financial Collateral?' (2012) 65 Current Legal Problems 377; Keijser (n 14).

[19] <https://www.unidroit.org/english/principles/netting/netting-principles2013-e.pdf> accessed 16 November 2020.

[20] <https://www.unidroit.org/instruments/capital-markets/legislative-guide> accessed 16 November 2020.

[21] See Rizwaan Mokal, 'Liquidity, Systemic Risk, and the Bankruptcy Treatment of Financial Contracts' (2015) 10(1-2) Brooklyn Journal of Corporate, Financial & Commercial Law 15, <https://brooklynworks.brooklaw.edu/bjcfcl/vol10/iss1/2> accessed 16 November 2020; Marcel

4. The Cape Town Convention

The Convention on International Interests in Mobile Equipment (the 'Cape Town Convention')[22] with its separate Protocols for aircraft equipment,[23] railway rolling stock,[24] space assets,[25] and, most recently, for mining, agricultural and construction (MAC) equipment is one of UNIDROIT's flagship projects.[26] Chapter III (Articles 8-15) of this Convention relates to default remedies. These enforcement provisions are modified on some points in the Protocols relevant to specific industry settings.

Chapter III of the Cape Town Convention contains several provisions that echo the prototypical features of enforcement outlined in section 2. Article 8(4), for example, requires prior notice of intended enforcement by way of a sale or granting a lease, Article 9(4) relates to the possibility of redemption, and Article 8(6) addresses the distribution of any surplus value upon enforcement. The Cape Town Convention, however, also contains provisions that focus on party autonomy rather than on pre-established enforcement rules involving a court or other independent third parties. This becomes evident in the context of remedies upon default, as well as in that of 'speedy relief' measures.

Articles 8(1) and 9(1) of the Cape Town Convention allow the secured party to exercise remedies in accordance with an agreement which the parties may have

Peeters, 'On Close-Out Netting' in Thomas Keijser (ed), *Transnational Securities Law* (OUP 2014) ch 3 (as updated in the online Oxford Legal Research Library). Both contributions contain a host of references to further literature.

[22] The Convention on International Interests in Mobile Equipment (2001) <https://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf> accessed 16 November 2020; signed at Cape Town on 16 November 2001.

[23] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (2001) <https://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf> accessed 16 November 2020; signed at Cape Town on 16 November 2001.

[24] Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (2007) <https://www.unidroit.org/english/conventions/mobile-equipment/railprotocol.pdf> accessed 16 November 2020; signed in Luxembourg on 23 February 2007.

[25] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (2012) <https://www.unidroit.org/english/conventions/mobile-equipment/spaceassets-protocol-e.pdf> accessed 16 November 2020; signed in Berlin on 9 March 2012.

[26] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment <https://www.unidroit.org/english/conventions/mobile-equipment/mac-protocol-e.pdf> accessed 16 November 2020; signed in Pretoria on 22 November 2019.

concluded.[27] Such remedies include taking possession and control of charged objects, selling of or granting a lease concerning such objects, collecting or receiving income or profits in relation to such objects, or appropriation ('vesting of the object in the chargee in or towards satisfaction', in Convention-speech). The courts only become involved in the enforcement process where a State has made the declaration contemplated under Article 54(2) of the Convention, specifying that any default remedy may only be exercised with leave of a court; by choice of the chargee under Article 8(2) (who may, however, also opt to enforce its rights itself in accordance with the agreement between the parties); and, in the context of the enforcement mechanism of appropriation under Article 9(2)-(3), as an alternative to an agreement between the parties.

To 'compensate' for the quasi-absence of an independent third party such as a court during enforcement, Article 8(3) of the Cape Town Convention provides for a standard of commercial reasonableness, which also applies in the context of interim relief proceedings (Article 13(4)). Contrary to the standard in the Financial Collateral Directive and the Geneva Securities Convention, the standard in the Cape Town Convention is both mandatory and stricter. Article 8(3) of the Convention states: 'A remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.' This means that the parties may determine what is commercially reasonable and that only 'manifest unreasonableness' can prevail over their agreement.[28]

Similarly, party autonomy may prevail over the role of a court in determining how interested persons should be protected in the context of speedy relief proceedings. The respective Protocols envisage the possibility of excluding the application of Article 13(2) of the Cape Town Convention (and thus the role of the courts in this context) by way of a written agreement.[29]

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[27] Article 11(1) of the Convention reinforces the prevalence of party autonomy by allowing the parties to agree which events constitute a default or otherwise give rise to certain default-related rights and remedies.

[28] See also Aircraft Protocol (n 23) Article IX(3); Railway Protocol (n 24) Article VII(3); Space Protocol (n 25) Article XVII(1); MAC Protocol (n 26) Article VIII(3). The standard is discussed in Anna Veneziano, 'The Contours of "Commercial Reasonableness" under the Cape Town Convention' (2018) 7 Cape Town Convention Journal 83.

[29] See Aircraft Protocol (n 23) Article X(5); Railway Protocol (n 24) Article VIII(5); Space Protocol (n 25) Article XX(5); MAC Protocol (n 26) Article IX(5). Roy Goode, *Official Commentary on the*

This focus on party autonomy (implying a diminished role for independent third parties) was originally developed for highly sophisticated actors in the aircraft, rail and space sectors and may indeed have benefits in economic sectors involving parties with equal bargaining power. Credit may become cheaper. However, favouring certain classes of creditors has an impact on other creditors. Moreover, in situations where there is a disparity between the negotiating parties, such an approach may yield undesirable results. A case in point might be the MAC sector, which is much less homogeneous than the aircraft, rail and space sectors, and which would appear to have a far greater range of market participants in terms of size and level of sophistication. How does the power balance play out where a small farm-holding (in a developing country) transacts with a major manufacturer/supplier of agricultural equipment (from a developed country)? As in the case of financial collateral, such a scenario may lead to (un)'reasonable' standards being forced upon weaker parties pre-default, while the weaker party may—absent an independent third party such as a court during enforcement—face the burden (and related costs) of detecting and proving 'manifest unreasonableness' post-default.

Moreover, one may wonder whether it is desirable to envisage the possibility of all too expeditious, practically irreversible enforcement measures in the MAC context. For example, Article VIII(1) and (7) of the MAC Protocol, in addition to the remedies set out in the Convention itself, envisages the remedy of 'export and physical transfer of equipment from the territory in which it is situated' upon giving 'reasonable prior notice'.[30] Another example is the sale of the charged assets as an additional speedy relief measure.[31] Such irreversible, 'speedy' actions may be devastating to the business and/or livelihood of the chargor, in particular where the court is prevented from imposing terms to protect interested parties.[32] This may be especially aggravating in the context of debtors in developing countries. Specifically

Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment (4th edn, UNIDROIT 2019) 5.59, cites 'transaction costs' as a justification for this approach. Cf Article 15 of the Convention itself, which prohibits such contractual arrangements.

[30] MAC Protocol (n 26) Article VIII(4) specifies a minimum period of fourteen days for a notice of a proposed sale or lease to be deemed reasonable. Whether this number of days also applies in the context of export and physical transfer is not entirely clear and may be clarified in the forthcoming Official Commentary on the MAC Protocol.

[31] MAC Protocol (n 26) Article IX(3). The concept of 'speedy' should be defined in a declaration by a Contracting State (see MAC Protocol Article IX(2)), but it should presumably be less than fourteen days to qualify as such–cf (n 30).

[32] MAC Protocol (n 26) Article IX(5); cf (n 29).

in the context of agriculture, concerns as to food security also come to mind: without equipment it may be impossible for farmers to take necessary steps in the production cycle—such as sowing, sprinkling, harvesting, or milking[33]—in a timely manner.[34]

A 'one size fits all' approach may thus well lead to undesirable consequences. Different, complementary ways forward are available. One pathway is to reflect on an effective interpretation of 'party autonomy'. Where such autonomy is 'real' or 'absolute', it could guide enforcement. However, where it is diminished, distorted, or absent, it may well lead to situations that are unfair and/or unreasonable, and enforcement is in that case best organised in line with different principles. Another avenue is consideration, on the basis of proper data, of the modalities of the rights that creditors allegedly need to provide financing. In such an analysis, the interests of debtors and sector-specific circumstances should also be taken into account. It may not be necessary to give creditors virtually all rights and debtors none—there is likely some middle ground. Depending on the context at hand, one could discuss the involvement of independent third parties in the enforcement process, the length of enforcement procedure, the (ir)reversibility of measures, and/or the application of rules regarding standard terms, unfair conditions, or other protections of weaker parties in business transactions. Specifically in relation to the strict standard of manifest unreasonableness envisaged in the Cape Town Convention, situations may be determined where it is softened, combined with other measures, and/or where the burden of proof is reversed.

5. The debate on non-performing loans in Europe

Another secured transaction instrument put forward in Europe in the wake of the global financial crisis of 2007 and onwards is the so-called 'Accelerated Extrajudicial Collateral Enforcement' mechanism, set out in Title V of the proposed

[33] MAC Protocol (n 26) Annexes 1-3 list the mining, agricultural and construction equipment to which the Convention applies.

[34] For inspiration regarding national law enforcement caveats in the context of agriculture, see UNIDROIT 2016 – Study 72K – CGE1 – Doc. 4, Appendix V ('Research on special insolvency regimes affecting farmers and agricultural enterprises'). See also Thomas Keijser, 'Overestimating Party Autonomy? The Enforcement of Security Interests under the Draft MAC Protocol to the Cape Town Convention' (*Oxford Business Law Blog*, 7 October 2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/10/overestimating-party-autonomy-enforcement-security-interests-under> accessed 16 November 2020.

Directive on credit servers, credit purchasers and the recovery of collateral (the 'proposed Directive').[35] This enforcement mechanism is part of a range of other measures envisaged to combat the unsustainable levels of non-performing loans ('NPLs') that appeared on the balance sheets of financial institutions in Europe in the wake of the global financial crisis.[36] Such other measures include rules on putting aside sufficient resources for NPLs in a financial institution's portfolio and developing secondary markets for NPLs, as well as a blueprint for setting up and operating national asset management companies in compliance with current State aid and bank resolution rules. As to the proposed extrajudicial enforcement mechanism, it should be noted that this is not limited to NPLs held by financial institutions, but is much wider in scope and covers credit agreements secured by movable and/or immovable assets between creditors and business borrowers generally.[37]

The prototypical elements of enforcement, which were discussed earlier, are relatively easy to spot in the proposed mechanism. The requirement of prior notification is set out in Articles 23(1)(c), 25(1)(c) and 26(1)(b) of the proposed Directive, while the provisions on the realisation of optimum value feature in Articles 24-26. The overall picture is that the extrajudicial regime in the proposed Directive appears more appreciative of the interests of both borrower and secured creditor than are the creditor-oriented regimes for financial collateral and of the Cape Town Convention, yet a bias in favour of secured creditors is apparent. Although Article 24(2) envisages the possibility of a role for independent parties such as a notary, bailiff or other public official in the enforcement process, that role is not mandatory; the creditor organises the valuation, without having to involve the borrower (Article

[35] Brussels, 14 March 2018, COM(2018) 135 final; this is the text referred to below. The proposed Directive was split into two directives and in November 2019 the Council was awaiting the views of the European Parliament regarding the proposed Directive on the Accelerated Extrajudicial Collateral Enforcement Mechanism; see Council of the European Union, Note from the Presidency to the Permanent Representatives Committee/Council (Brussels, 28 November 2019; 14354/1/19 REV1), section IV.

[36] On the situation in Europe just prior to the outbreak of the COVID-19 pandemic, see Corrado Macchiarelli, Renato Giacon, Andromachi Georgosouli and Mara Monti, 'Why Non-performing Loans are Still Putting the European Banking Union at Risk' (*LSE Europe Blog*, 27 March 2019) <https://blogs.lse.ac.uk/europpblog/2019/03/27/why-non-performing-loans-are-still-putting-the-european-banking-union-at-risk/> accessed 16 November 2020.

[37] See Articles 1(c) and 2(2) and (5) of the proposed Directive. Statements such as that indicating that the proposed Directive should not 'replace existing national enforcement measures' (recital (40)) and does not concern borrower rights (Explanatory Memorandum, p 7) are rather nonsensical, since a new enforcement regime that is applied in practice (because it is attractive to and thus negotiated by credit providers) in effect replaces other national regimes and affects borrower rights.

24(4)); it is unclear whether the independent valuer, which in itself is a concept in line with the fiduciary relationship between the parties, may be appointed only by means of a post-enforcement agreement or also by a pre-enforcement arrangement (Article 24(4)(a)-(b));[38] a standard of 'fair and realistic' (but not maximum) valuation, akin to that of 'commercial reasonableness', appears in Article 24(4)(c); the safeguards concerning valuation in Article 24(4) apply to an extrajudicial public or private sale (Article 24(2)) but not to appropriation (Article 24(3)); and finally, the valuation may be contested in court (Articles 24(4)(e) and 28), but may imply hurdles in the path of the borrower comparable to those discussed above (burden of proof, cost). The 'prototypical' obligation to pay any residual value is set out in Articles 24(3) and 29 of the proposed Directive. These provisions envisage the payment of surplus value to the business borrower, and as such fail to consider the interests of other involved parties, such as other secured creditors.[39]

6. Outlook: the COVID-19 pandemic and technology

The discussion on non-performing loans should, of course, be reconsidered in the light of the ongoing COVID-19 pandemic, which is likely to result in a steep rise of NPLs. Such a development may require a new set of measures to tackle NPLs, including a fresh look at the best way to enforce security interests in this context. Another example of an economic sector that is in unprecedentedly severe weather due to the pandemic is the aviation industry.[40] The new dynamic in the relationship between airlines and their financiers, also in the context of a variety of ongoing restructuring and insolvency proceedings, raises the question of how the creditor-focused approach of the Cape Town Convention operates in such an emergency.

[38] If the appointment could be concluded pre-enforcement, the collateral taker could use negotiating leverage and the valuer would in that case not be truly independent. Cf. Recommendation 133 of the UNCITRAL Legislative Guide (n 4) and Article 72(3) of the UNCITRAL Model Law (n 5) that prohibit relinquishing borrower rights pre-enforcement.

[39] For more information, see eg Ben Schuijling, Vincent van Hoof and Tom Hutten, 'Non-performing Loans and the Harmonisation of Extrajudicial Collateral Enforcement across Europe' (2019) 28(3) International Insolvency Review 340; Kyriaki Marina Platsa, *Legal Aspects of the Enforcement of Non-Performing Loans in Europe* (2019 Thesis International Hellenic University), <https://repository.ihu.edu.gr/xmlui/handle/11544/29356> accessed 16 November 2020.

[40] The International Air Transport Association (IATA) estimates that airline revenues will be down at least 50% in 2020 (USD 419 billion compared to USD 838 billion in 2019). See IATA Press Release 82 (13 October 2020) <https://www.iata.org/en/pressroom/pr/2020-10-13-02/> accessed 16 November 2020.

Some of the Convention's remedies, such as repossession and redeployment of assets, may be of little interest in a context where airplanes are grounded. Aid packages provided by governments (and thus ultimately taxpayers) have come to play a crucial role, hence these now also have a stake in optimum solutions. In addition, in the wake of the pandemic, at least 30-40 States have reportedly changed their laws on asset-based financing, in respect of issues such as the exercise of remedies, barriers to initiating proceedings (such as moratoria and suspension of proceedings), and caps and limitations on the amount of damages.[41] Moreover, practical impediments to the enforcement of security interests, such as pandemic-related difficulties in accessing the courts in a timely fashion, should be taken into account. Such issues raise the question of under what circumstances States may be considered to be in breach of their obligations under the Cape Town Convention. In any case, the examples of non-performing loans and the aviation industry show that the impact of the COVID-19 pandemic should be further examined, with a view to reaching optimum outcomes of enforcement proceedings in the light of new economic realities.

Another issue that deserves further attention is the impact of technology on enforcement. Technological developments in the form of automation, smart contracts, self-executing codes, computerised databases, artificial intelligence, distributed ledger technology and the like may impact the way in which enforcement takes place.[42] An example is the possible reliance on databases and artificial intelligence in determining the value of encumbered assets. Such a computerised process could change the role of independent third parties in the valuation process, or even replace them. Technological input could also shape the content of relatively open standards such as 'commercial reasonableness'.

It is important to monitor in which ways technology enables more effective enforcement and how any changes affect the balance of the interests of current and new actors involved.[43]

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[41] Presentation by Jeffrey Wool and Jasmine Jin at the 9th Cape Town Convention Academic Conference (Rome, 10-11 September 2020).

[42] On the imminent impact of technological developments on the financial industry, see a series of papers published by the International Swaps and Derivatives Association (ISDA) at <https://www.isda.org/2019/10/16/isda-smart-contracts/> accessed 16 November 2020.

[43] For further discussion of this topic, see Teresa Rodríguez de las Heras Ballell, 'Digital Technology-based Solutions for Enhanced Effectiveness of Secured Transactions Law: The Road to Perfection?' (2018) 81(1) Law and Contemporary Problems 21,

7. Concluding remarks

The enforcement of security interests is an area that has always reflected a variety of paradigms. Some stress the importance of party autonomy and the advantages of making it easier to obtain credit and may therefore be inclined to enhance the position of the secured party. Others focus on the fiduciary relationship between borrower, grantor and security taker, and stress the importance of protecting weaker market participants against more powerful credit providers, and so primarily advocate a fair balance between the parties. Such views have crystalised in legal frameworks for different market segments, each with their own focus. The primacy of party autonomy is probably reflected most markedly in the context of financial collateral and close-out netting. A comparable, albeit somewhat more moderate, approach may be detected in the context of the Cape Town Convention and its current protocols. Transactions that involve only a relatively small group of major players are typical of these contexts, but to extend such a 'liberal' regime to situations involving less powerful entities would appear unwise. An approach in which the interests of the parties are more balanced is reflected in 'prototypical' secured transactions and (with some exceptions) in the proposed regime for non-performing loans in Europe. Moreover, in the wake of the COVID-19 pandemic, governments have come to provide financial assistance to important segments of the economy, and their role deserves to be taken into account. Much, therefore, depends not only on favoured paradigms, but also on the type of market that is the focus of regulation, as well as general economic developments. What is 'effective' in certain contexts and for certain actors may have dire consequences if applied in other settings.[44]

<https://scholarship.law.duke.edu/lcp/vol81/iss1/2/> accessed 16 November 2020; Thomas Keijser, 'The Potential Impact of Technology on the Enforcement of Security Interests', in Corjo Jansen, Ben Schuijling and Irene Aronstein (eds), *Onderneming en Digitalisering* (Deventer: Wolters Kluwer 2019; Serie Onderneming en Recht 116) 189, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3671040> accessed 16 November 2020.

[44] In September 2020, the UNIDROIT Governing Council authorised the establishment of a Working Group to develop draft 'Best Practices for Effective Enforcement' (Study LXXVI B). See <https://www.unidroit.org/work-in-progress/best-practice-effective-enforcement> accessed 16 November 2020.