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A Secured Transactions' Regime for Europe: Treatment of Acquisition Finance Devices and Creditor's Enforcement Rights

1. The scope of a secured transactions regime: Introduction

In the preceding contribution, by Hugh Beale, the issue of what kinds of devices should be covered by the rules on secured transactions was intentionally left open. It will be addressed here, together with the suggested treatment of another area that is key for the creation of an effective secured transactions regime — the creditor's enforcement rights outside insolvency. It must be noted at the outset that both of these topics are still under discussion in the working group on security in movable property led by Ulrich Drobnig within the Study Group on a European Civil Code. The considerations here expressed are not intended to reflect a common position reached within said group. Furthermore, they relate mainly to commercial security, leaving aside issues of consumer protection, unless specifically stated otherwise.*¹

The scope of the scheme is arguably one of the most debatable questions as regards a possible future European regime for secured transactions. We can try to put the problem in the simplest way possible: should it matter whether the transaction formally creates a limited real right in favour of the creditor or whether one party retains 'title' to the collateral but does so to secure a monetary claim toward the other party (i.e., retention of title in a sales contract, financial lease)?

This is often referred to in the context of a contrast between a 'functional' and a 'formal' approach to personal property security devices. I wish to argue that the mentioned contrast of approaches is less radical than one might think at first and that at least some 'formalistic' legal systems in this respect have shown a tendency to apply a functional reasoning. This having been said, it is still quite a difficult area to tackle at a European level, and the possible solutions, as we will see, may largely depend on how we shape the secured transactions regime as regards other key issues, such as publicity, priorities, and enforcement rights.

Before entry into discussion of the subject matter at hand, a word should be spent on the *acquis communautaire* in the area of retention of title devices. As is well known, there is very little of this, and what there is proves not particularly helpful. I am referring to article 4 of the Directive on Late Payments in Commercial Transac-

¹ The rules drafted by the Working Group, being meant to be part of the Academic Common Frame of Reference, do purport to cover consumer contracts as well and will probably contain specific rules on consumer protection issues.

tions², which contains a short and quite obscure rule on simple clauses on retention of title in sales contracts (that is, when the seller retains title only to the sold goods until full payment of their price). Apart from the obscurity of the text, a recent decision of the European Court of Justice stated that the formal requirements set forth in this directive apply only to the *inter partes* effects of the retention of title clause. non-performance of an obligation gives the injured party reasonable reason to believe that the party cannot rely on the other party's future performance³. The conclusion is that the directive is of little relevance as far as we are concerned.

2. The case for a functional approach to retention of title devices

The question I would like to address is how a future European secured transactions law should treat retention of title devices.

One possible approach is, of course, to exempt them altogether from a general secured transactions regime, in view of their different formal structure. Both seller and lessor are 'true owners' of the assets and deserve to be considered as such. The opposite solution may appear to be excessively influenced by the modern secured transactions regimes modelled on article 9 of the Uniform Commercial Code, that is the Personal Property Security Acts of the various Canadian provinces and the more recent New Zealand legislation, and not tailored to the basic characteristics of most European property law systems.

I would like to argue against the formalistic approach. It is true that most European legal systems still accord importance to whether one party is formally vested with 'title' — i.e., 'ownership' — of the goods. Thus, in retention of title devices the creditor is considered the 'owner' of the assets and may act as such and not just as if entitled to a limited right. Retention of title devices are usually governed by general and specific contract law and are not subject to special publicity requirements.⁴ Furthermore, they are mostly dealt with, from a systematic point of view, in quite different parts of the relevant legislation (be it the relevant civil code or *ad hoc* statutes). When we look at the individual legal systems, however, these statements are qualified by a number of exceptions. Moreover, the rules are not always the same for the different types of retention of title devices — sale with reservation of ownership and financial lease.

2.1. European national laws

In considering the legislation of individual countries, first of all one should note that some European jurisdictions do require certain formalities and even registration in the case of sale with retention of title, though it must be admitted that the manner and the effects of such formalities vary considerably and are not always crystal clear.⁵ Registration is also exceptionally required for leases, in order to render the lessor's right opposable to third parties'.⁶

More importantly, the nature of the retention of title where security is concerned is given practical recognition in many legal systems. Even putting aside the example of Germany (where retention of title clauses extended to future receivables deriving from the resale of the original assets and to future products manufactured with the original assets are treated as security rights in the buyer's insolvency)⁷, several countries have taken the

² Directive 2000/35. — OJ L 200, 8.08.2000, pp. 35–38.

³ ECJ case C-302/05, *Commission v. Italy*, 26 October 2006. — OJ C 326, 30.12.2006, pp. 16–17. The same interpretation was put forward in legal scholarship, see in particular E.-M. Kieninger, *Der Eigentumsvorbehalt in der Verzugsrichtlinie – Chronik einer verpassten Chance.* — J. Basedow et al. (eds.), *Aufbruch nach Europa*. Tübingen: Mohr Siebeck 2001, p. 160 ff.

⁴ See for all the general report by E.-M. Kieninger. — E.-M. Kieninger (ed.), *Security Rights in Movable Property in European Private Law*. Cambridge Univ. Press 2004, p. 54 ff. For the treatment of retention of title in Eastern Europe see J.-H. Röver, *Secured Lending in Eastern Europe*. Oxford University Press 2007, esp. p. 172 ff.

⁵ Italian law, for instance, requires a written document with prior ascertained date proving the title retention clause in order for it to be opposable to other competing creditors and in the debtor's insolvency, while registration is an added requirement as against subsequent purchasers for retention of title clauses on certain items. For details see A. Veneziano, *Italy.* — H. C. Sigman, E.-M. Kieninger (eds.), *Cross-Border Insolvency over Tangibles*. Sellier 2007, p. 167 ff. Another interesting example is Spanish law, where the effects of the law No. 28/1998 on the registration of retention of title clauses are still debated: for a thorough discussion with references to case law see A. Carrasco, *Los derechos de garantía en la Ley Concursal*. Madrid: Aranzadi 2004, p. 160.

⁶ For instance, the *crédit-bail* is subject to filing in a specialised register in France: Décr. 4 juillet 1972, article 8. A registered *crédit-bail* is opposable to third parties. The lessor may nevertheless prove its title as against other creditors by other means, though actual knowledge of each individual creditor in insolvency should be established. L. Aynés, P. Crocq, *Les sûretés. La publicité foncière*. II ed. Paris 2006, p. 347.

⁷ *Absonderungsrecht* under § 52 InsO. The simple retention of title, on the other hand, still enjoys a full *Aussonderungsrecht*: § 47 InsO. See for all K. Reinicke, D. Tiedtke, *Kreditsicherung*. V ed. 2006, p. 289 ff.

security function of such devices into account. The recent French reform of secured transactions law, for instance, has integrated the *clause de réserve de la propriété*, thereby openly recognising its character as a security. This characterisation entails, among other things, the debtor's right to receive any difference between the value of the assets and the outstanding debt: 2371 (3) c.c.*⁸

2.2. Recent international instruments

When we turn to international instruments dealing with secured transactions, we find that two important texts have appeared in recent years: the 2001 Cape Town Convention on International Interests in Mobile Equipment and its protocols (the 2001 Aircraft Protocol and 2007 Railway-Rolling-Stock Protocol)⁹ and the draft UNCITRAL Legislative Guide on Secured Transactions.¹⁰ They both choose a 'functional' approach and, in particular, include retention of title devices in the general regulatory framework for secured transactions.

Certainly, they do so in somewhat different ways. The UNCITRAL Legislative Guide shows a marked preference for what it calls a 'unitary approach' to acquisition financing devices (defined so as to encompass both traditional security devices enabling a person to acquire assets and title retention arrangements with the same purpose). The unitary approach means that acquisition finance devices — in particular, title retention devices — are included within the general definition of security rights.¹¹ The lively debate on this issue during the preparatory work, however, has prompted the elaboration of an alternative text, applying a so-called non-uniform approach to acquisition finance devices. In practice, one of the versions of the latter option — called alternative A — enables countries to pursue the aim of functional equivalence by retaining their own settled terminology and legal concepts relating to retention of title agreements.¹² A further option, alternative B, taking stock of the opposition from the representatives of some European countries, treats assets under acquisition security devices as third-party-owned.¹³

Irrespective of the model followed by each state, however, the most important message of the draft UNCITRAL Legislative Guide on this point is that states should not simply rely on traditional classifications. They should clearly spell out the policy decisions underlying their choices and the economic results of these decisions. Moreover, all devices pursuing the same function of enabling acquisition of assets on credit by the debtor should be treated alike, whatever their structure or form.

The Cape Town Convention provides a list of interests in mobile goods to which it applies, separately mentioning security rights, the rights of the seller under a title retention clause, and rights of a lessor under a finance lease agreement. The English-language version of the title itself, moreover, does not even contain the term 'security' (while the French does refer to *garanties* — though not to *sûretés*). When we look at the applicable provisions, however, it is easy to discern that there is much less difference than one might imagine among the rules applicable to the three interests mentioned above (mostly pertaining to enforcement procedures). In practice, the Cape Town Convention and the arguably more convincing option in the UNCITRAL Legislative Guide are similar, in the sense that countries could express the functional equivalence by applying their own terminology and in a manner consistent with their own legal concepts.

Earlier still, the EBRD Model Law on Secured Transactions had tried to find a distinctly European approach to this subject matter, to be used as a model in Central and Eastern European legal systems. It too, however, included retention of title within the scheme, transforming it into an unpaid vendor's charge.¹⁴

I would like to point out that it is reasonable to look at those international instruments when drafting a new European regime. We need rules that are adapted to the specifications of the European financing market but are at the same time competitive in the wider context of international trade.

⁸ Ordonnance 23 mars 2006, article 2367 *ff.* c.c. See L. Aynés, P. Crocq (Note 6), p. 344 *ff.*

⁹ The text of the Convention and of the Aircraft Equipment (the only Protocol entered into force at the present date) are reproduced in R. Goode, Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment. Official Commentary — Commentaire Officiel. — Uniform Law Review/Revue de droit uniforme 2002, p. 353 *ff.* The finalised text of the Railway Rolling Stock Protocol, approved 23 February 2007, is available at www.unidroit.org/english/conventions/mobile-equipment/railprotocol.pdf (15.09.2008).

¹⁰ The latest text at my disposal is: Security Interests. Recommendations of the UNCITRAL Draft Legislative Guide on Secured Transactions, Note by the Secretariat, A/CN.9/631 16 March 2007 (courtesy of Prof. Harry Sigman, whom I thank).

¹¹ A/CN.9/631 (Note 10), paragraph 184.

¹² A/CN.9/631 (Note 10), Alternative A paragraph 174: "The insolvency law should provide that, in the case of insolvency proceedings with respect to the debtor, assets subject to an acquisition financing right are treated in the same way as assets subject to security rights generally".

¹³ A/CN.9/631 (Note 10), Alternative B paragraph 174.

¹⁴ Article 9 EBRD Model Law (London: EBRD 1994): the unpaid vendor's charge does not require registration in order to be opposable to third parties (thus, also other secured creditors) if it secures the payment of the price for the original goods and is not stipulated for a period longer than six months. Available at <http://www.ebrd.com/pubs/legal/secured.htm> (15.09.2008).

3. Functional approach and special treatment of acquisition finance devices

The main question, in my opinion, lies not so much in how broadly a security interest is defined but in how all functionally equivalent devices are subsequently treated as concerns publicity, priority, and enforcement.

In other words, the choice of a functional approach does not necessarily mean that **all aspects** of the regulation concerning security rights should be automatically applicable, without further thought, to all devices aimed at securing a creditor by granting satisfaction concerning the value of certain assets of the debtor with priority against competing third parties.

There is a middle way between completely excluding retention of title devices from the general regime for secured transactions and including them without taking their nature into account.

First of all, if a general requirement of registration for all secured transactions is envisaged, one may think of special treatment of simple retention of title clauses in sales contracts (for instance, a total exemption from registration up to a certain amount of time, as suggested for the unpaid vendor's charge in the above-mentioned EBRD model law). More convincingly, a shorter, commercially reasonable 'grace period' for the registration of retention of title may be envisaged. If the buyer's obligation is fulfilled within that time, no need for registration arises. Should what is agreed upon exceed the grace period, the seller must register in order to ensure its priority.

At the same time, one may work on the priority rules. The practical result of applying a formal approach to retention of title is precisely that the seller prevails over a temporally prior perfected floating lien on present and future debtor's assets, by virtue of its being a true 'owner' of the assets. The policy of granting preference to acquisition finance devices, however, may be pursued even if registration is required for both traditional security rights and retention of title, justifying it via efficiency arguments and not on account of the formal structure of the security device. The financier who enables the debtor to acquire assets is granted a super-priority, meaning that it prevails even as against a non-acquisition security right registered earlier.

The most interesting feature of the latter model is that the 'purchase money security interest priority' is extended to **all** devices serving the same acquisition function, whatever their form. Thus, it would apply to a seller with retention of title, to a finance lessor, to a lender whose loan is extended for the specific purpose of acquisition of certain assets, and to other lenders potentially using other formal devices to obtain the same result. The reason is not the structure of the transaction but its economic purpose. Certainly, other issues have to be considered, such as how to determine the relationship between the loan and the purpose of acquisition of an asset, whether special transparency rules are required (specifically concerning notice to prior-in-time lenders), and whether proceeds of the original collateral should enjoy the same priority — or not — as against a prior floating lienor.

Finally, one may envisage a different treatment as regards enforcement measures (as discussed below, in Section 5).

4. Other issues of scope: Sale of receivables, true consignment, and 'true lease'

Finally, a few words must be devoted to other issues of scope. Some transactions may be included in the general scheme as regards specific rules (such as the rules on creation or the publicity and priority requirements), though they do not necessarily serve a security function. One of the reasons to do so may be to foster simplicity and certainty of the legal regime envisaged. In the case of outright sales of receivables, for instance, as opposed to assignment by way of security, there may be difficulties in distinguishing the precise function of the parties' agreement in practice. Taking the economic importance of receivable financing in commercial transactions into account, common rules on creation and publicity may aid in reducing unnecessary litigation related to the characterisation of the parties' agreement. Even stronger is the need for common rules in the case of consignment contracts. Canadian jurisdictions, finally, have extended registration and priority rules to so-called 'true leases' as opposed to leases by way of security, in view of the practical difficulties of establishing the real intent of the parties under the Uniform Commercial Code article 9 model.

Less convincing, to my mind, is the need to protect third parties from the debtor's 'apparent wealth'. This would entail publicity of all transactions separating 'ownership' from 'possession' and also of non-consensual liens limiting the availability of the debtor's assets to creditors. Some jurisdictions have gone in this direction, but it seems to me that the best approach is a practical one. Where difficulties in discerning the purpose of transactions are present, a common publicity regime is useful. A good example is offered by the US practice of optional filing for consignment contracts that do not serve a security function. Most creditors file because they want to achieve greater certainty.

5. Creditor's enforcement rights: How to reconcile the diverging interests

The importance of sound rules on enforcement after default is often underestimated in the case of movable collateral.^{*15} On the contrary, there are many elements present that suggest that a future European secured transactions regime should include a well-developed separate part on enforcement, following the example of recent international instruments such as the Cape Town Convention^{*16} and the draft UNCITRAL Legislative Guide.^{*17}

First of all, some movable goods have a high unit value, and, for these, enforcement proceedings on the part of a creditor may lead to full or at least not negligible satisfaction of that creditor's claims. Secondly, separate enforcement may be exceptionally granted during insolvency proceedings, thereby shielding the creditor from the effects of insolvency. Furthermore, it is important for creditors wishing to extend financing in a particular state to know that there is an efficient system that will treat them fairly when enforcing their rights. This will ensure predictability of results and thus may enhance the availability of cross-border financing. Last but not least, as is well known, extra-judicial means to avoid formal insolvency proceedings through co-operation between (at least some) creditors and the debtor are advantageous, especially in cross-border transactions. The availability of an efficient, speedy, and cost-effective system of recovery will undoubtedly influence the outcome of any 'composition' or 'work-out' agreement after default.

The main obstacle in this area is the close relationship with the efficiency of general procedural law. Even the best enforcement rules can be of no avail if their practical operation is completely left to non-uniform procedural rules. On the other hand, procedural rules are usually linked to public policy concerns, and therefore it is hard to agree on common ground.

Notwithstanding the above-mentioned difficulties, a key principle remains that should be taken into account in determining how to deal with enforcement. Most of all, rules should be clear and simple, in order to ensure predictability of results by the parties.^{*18}

A further point is the need to strike a reasonable balance between ease and speediness of enforcement measures, on one hand, and protection of both the debtor and third parties. It must be stressed that, though the two goals may seem contradictory and tailored to protecting the diverging interests of the parties involved, simple and quick procedures are to the advantage of all participants and not just of the secured creditor.

This is where the question arises of how to bridge the gap between more supple and more restrictive approaches to enforcement in European law.

Traditionally, a contrast is drawn between non-formalistic or less formalistic European legal systems (such as those of England and Germany) and more restrictive legal systems deriving from the French model.^{*19}

The difficulties in reaching a common perspective are shown by the Cape Town Convention, which strongly enhances parties' autonomy but leaves states free to opt out of the general scheme by insisting on the need for court intervention or by limiting or excluding the use of interim measures or of non-traditional specific remedies such as lease of the collateral.^{*20}

¹⁵ For the need of a careful consideration of enforcement measures see U. Drobnig. Die Verwertung von Mobiliarsicherheiten in einigen Ländern der Europäischen Union. – *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht (RabelsZ)* 1996 (60), p. 40 ff., at 41. An example of legislative inattention to this focal issue is represented by the Italian legislation on the Enterprise Non-possessory Charge in the reformed Banking Law (*privilegio mobiliare ex Art. 46 legge bancaria*). The Banking Law attempted to introduce a modern non-possessory security granted by enterprises in favour of banks, but did not change the cumbersome enforcement proceedings of the Civil Code regarding non-possessory liens, which remain applicable to the new security. See G. Tucci. Towards a Transnational Commercial Law for Secured Transactions: the Preliminary Draft UNIDROIT Convention and Italian Law. – *Uniform Law Review/Revue de droit uniforme* 1999, p. 371 ff.; A. Veneziano (Note 5), p. 159 ff.

¹⁶ Cape Town Conv. (Note 9), Chapter III, articles 8–15.

¹⁷ Draft UNCITRAL Legislative Guide on Secured Transactions, Recommendations, A/CN.9/631 (Note 10) paragraphs 128–172 (Post-default rules).

¹⁸ This is underlined by the Draft UNCITRAL Legislative Guide, see A/CN.9/WG.VI/WP.27/Add.2, 27 April 2006, Default and Enforcement, paragraph 3.

¹⁹ See U. Drobnig (Note 15), p. 40 ff.; a recent, up-to-date overview is provided by E. Dirix. Remedies of Secured Creditors Outside Insolvency. – H. Eidenmüller – E.-M. Kieninger (eds.). *The Future of Secured Credit in Europe*. – *European Company and Financial Law Review*, Special Volume 2, 2008, p. 223 ff.

²⁰ If the contract so provides, the chargee may take possession or control of any collateral, sell it or grant a lease on it, collect or receive any income or profits arising from the management or use of the collateral (article 8), be vested with the property of the collateral (article 9) and exercise interim speedy relief pending final determination (article 13) without the need of any prior court's authorisation. Member States, however, are entitled to opt out and impose leave of court for any of the preceding remedies (article 54 (2)) as well as forbid lease of the collateral in its territory while the charged object is situated within, or controlled from its territory (article 54 (1)) and modify, limit or exclude altogether interim relief measures (article 55): R. Goode (Note 9), p. 454 ff.

On the other hand, in the specialised area of financial instruments, the Financial Collateral Directive^{*21} introduced non-formalistic enforcement measures, which had to be accepted even by stricter legal systems.^{*22} In some cases, the obligation to transpose the European rules tailored to the needs of the financial markets triggered consequences in the area of general secured transactions law.^{*23}

These developments have prompted authoritative scholarship in traditionally formalistic legal systems to detect a tendency in the direction of some convergence, which was unthinkable even in the recent past.^{*24} It goes without saying that if future common rules on enforcement are presented in the form of a suggestion to the national legislators, each of the latter may decide when and how to implement the advised changes. However, even if the European legislator decides to act on the suggestions, the time might be ripe to find reasonable rules commensurate with the needs of the European market and with the multitude of European jurisdictions.

5.1. Ease and speediness of measures

There is much to be said in favour of common enforcement rules based on the principles of simplicity and speedy conclusion. A first step in this direction is to enhance the role of parties' autonomy in the proceedings. The parties should be free to define by agreement the concept of 'default' that leads to enforcement (this may be achieved by applying the general rules on the content of parties' obligations) and in principle be able to determine the consequences of default.

Furthermore, it is true that many legal systems still impose — at least in some cases and especially where non-possessory security is concerned — realisation of the value of the collateral through public officials. It leaps to the eye, however, that such a method is extremely cumbersome and not well suited to cross-border enforcement. It will often mean depreciation of the assets to be sold. Moreover, it may lead to factual discrimination due to the different length and efficiency standard of proceedings in the various European countries. Particularly important, therefore, would be to allow non-judicial sale exercised in an expedited way and directly by the secured creditor, or by the debtor itself if applicable, as well as other means of using the value of the collateral (i.e., lease), if commercially reasonable. Interim remedies, certainly under the debtor's and other parties' right to oppose, could also prove to be of great importance. These rules should be presented as the default ones, though, of course, parties may agree on the need to go to court and take up formal proceedings if they wish to do so.

The point that is bound to raise more concerns is the right of the secured creditor to repossess the collateral after default without asking for judicial authorisation, when the collateral is in the possession of the debtor (in commercial cases, this usually means the debtor's business premises). English law generally allows self-help remedies such as the one mentioned, within the limits of not 'breaching the peace', while other European jurisdictions do not encourage 'private' actions of this kind and instead require judicial authorisation and/or intervention of a public official.^{*25} The latter approach would certainly be more protective of the debtor's rights but may unduly burden the creditor if the proceedings to obtain judicial authorisation or intervention are lengthy and costly. Common European rules should either require (or suggest) the introduction of expedited proceedings or allow for some form of self-help with all necessary safeguards for the debtor.

5.2. Protection of the debtor and of third parties

Traditionally, the protection of the debtor and third parties is left not only to formal judicial proceedings and lengthy public sales of collateral but also to certain 'validity' requirements such as the prohibition *a priori* of agreements allowing the creditor to appropriate the collateral upon default (that is, prohibition of *pactum commissorium*).

²¹ Directive 2002/47. – OJ L 168, 27.06.2002, pp. 43–50.

²² For reference to critical appraisals see E. Dirix (Note 19), p. 224.

²³ See French law, where through the mentioned general reform of secured transactions' law (Ord. 23 March 2006), article 2078 c.c. was substituted by article 2348 c.c., according to which the parties to a pledge or a *nantissement* may agree at any time (thus even before default) that the creditor acquires ownership of the asset upon default of the debtor. The law imposes an evaluation by an expert of the value of the assets at the time of the transfer to the creditor, except for financial assets within a regulated market. The debtor is entitled to the difference between the value of the assets and the amount of the secured debt. See L. Aynés, P. Crocq (Note 6), pp. 222–223.

²⁴ See E. Dirix (Note 19), p. 228 *ff.*, who drives specific attention to the law of mortgages on **immovable** property as well as the law of charges on movable collateral; G. Tucci (Note 15) with particular regard to Italian law.

²⁵ On the common law model (with some differences among jurisdictions) see H. Beale, M. Bridge, L. Gullifer, E. Lomnicka. *The Law of Personal Property Security*. Oxford University Press 2007; see also U. Drobniig. *Vergleichender Generalbericht*. – K. F. Kreuzer (ed.). *Mobilarsicherheiten. Vielfalt oder Einheit?* Baden-Baden: Nomos Verlag 1996, p. 25 *ff.*

The tendency in commercial transactions is to abandon such validity requirements (which are more and more restricted and challenged even in traditional legal systems)^{*26} and to concentrate attention on the control of proper enforcement proceedings. In particular, invalidity is substituted for by the use of evaluation criteria in order to achieve a fair realisation value, by applying standards such as 'good faith' or 'commercial reasonableness' to the creditor's conduct.^{*27} Parties should not be able to contract out of such standards. Waiver of other obligations, on the other hand, should be possible by agreement but only after default.^{*28}

Another mechanism of protection of the debtor and third parties is to avoid any enrichment of the creditor (i.e., if there happen to be any surplus from the sale or alternative use of the value of the collateral, it should return to the debtor). While this principle is well established in the area of traditional security rights such as non-possessory pledges, more resistance is encountered in the case of retention of title devices — in particular, sale with retention of ownership and financial lease. The argument is made that the seller or lessor is the 'real owner' of the assets and thus should be able to exercise full right of ownership.^{*29} Though not referring to the notion of title, also the Cape Town Convention provides that the conditional seller or the lessor may terminate the agreement and take possession or control of the assets without accounting for any surplus.^{*30}

Prohibition of undue enrichment, however, may be important also in the case of retention of title devices — all the more so if a 'floating' retention of title continuing on proceeds is allowed.

Finally, transparency rules may be useful, an example being a duty of the secured creditor to give notice to the debtor and/or other interested parties (i.e., other secured creditors) prior to any extra-judicial disposition of the encumbered assets. On the other hand, the cost-effectiveness of such a requirement depends on the degree of the formalities that are imposed (written form, minimum content of notice, etc.) and it may turn out to be less efficient in the case of other interested third parties than where the debtor is concerned.^{*31}

²⁶ See E. Dirix (Note 19).

²⁷ See Draft UNCITRAL Legislative Guide on Secured Transactions, Recommendations (Note 10), paragraph 128. The Cape Town Convention expressly states that "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" (Cape Town Conv., article 8 (3)).

²⁸ Draft UNCITRAL Legislative Guide on Secured Transactions, Default and Enforcement (Note 18), paragraphs 10–11.

²⁹ But see the recent different approach taken by French law, article 2371 (3) c.c. (Note 8).

³⁰ Cape Town Conv. (Note 9), article 10. Contracting States may impose a leave of court for the exercise of termination and repossession under article 54 (2).

³¹ On the desirability of a prior notice see Draft UNCITRAL Legislative Guide on Secured Transactions, Default and Enforcement (Note 18), paragraph 16.