

12-31-2017

The Reluctance of Civil Law Systems in Adopting the UCC Article 9 “Without Breach of Peace” Standard—Evidence from National and International Legal Instruments Governing Secured Transactions

Asress Adimi Gikay

Cătălin Gabriel Stănescu

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/jcls>

 Part of the [Civil Law Commons](#)

Repository Citation

Asress Adimi Gikay and Cătălin Gabriel Stănescu, *The Reluctance of Civil Law Systems in Adopting the UCC Article 9 “Without Breach of Peace” Standard—Evidence from National and International Legal Instruments Governing Secured Transactions*, 10 J. Civ. L. Stud. (2017)
Available at: <https://digitalcommons.law.lsu.edu/jcls/vol10/iss1/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

**THE RELUCTANCE OF CIVIL LAW SYSTEMS IN ADOPT-
ING THE UCC ARTICLE 9 “WITHOUT BREACH OF
PEACE” STANDARD—EVIDENCE FROM NATIONAL AND
INTERNATIONAL LEGAL INSTRUMENTS GOVERNING SE-
CURED TRANSACTIONS**

Asress Adimi Gikay* and Cătălin Gabriel Stănescu†

I. Introduction.....	101
II. The Reception of Article 9 as Model Law in National and International Legal Instruments	104
III. Self-Help Repossession and the “Without Breach of Peace” Standard under Article 9	110
IV. Terminological Caveat.....	113
V. The Abhorrence of Self-Help Repossession in Civil Law Systems—the State of Louisiana: Where it All Started	113
VI. European Perspective: Evidence of Steps Forward	118
A. Perception and Reality.....	118
B. The United Kingdom: Is the “Breach of Peace Standard” Used to Vanquish Self-Help Repossession?	120

* Asress Adimi Gikay, LL.B. (Addis Ababa University), LL.M. (Central European University), LL.M. (International University College of Turin), S.J.D. (Central European University); currently Ph.D. researcher at the Sant’Anna School of Advanced Studies, Pisa, Italy. Email: a.gikay@sssup.it.

† Cătălin Gabriel Stănescu, LL.B. (Alexandru Ioan Cuza University); M.A. (National School of Political and Administrative Studies); LL.M., S.J.D. (Central European University); currently postdoctoral researcher at Centre for Enterprise Liability, University of Copenhagen. Email: Catalin-Gabriel.Stanescu@jur.ku.dk.

Authors contributions: Sections II., V., VII. (A), VIII. (B), VIII. (D) & VI. (C)(1) are contributed by Dr. Asress Adimi Gikay and Sections III., VI.(B), VI. (C)(2), VII. (B), VIII. (C) & VIII. (E) by Dr. Cătălin Gabriel Stănescu. The remaining sections are contributed jointly by the authors. The authors give heartfelt thanks to Prof. Tibor Tajti, Chair of the International Business Law Program, Central European University, for his support and advice in their research dedicated to secured transactions law. The article was jointly presented at the Twelfth Annual Conference organized by the Italian Society for Law and Economics in Turin, Italy in December 2016.

C. Self-Help Repossession in Civilian Jurisdictions Today	124
1. Hungary: Self-Help Repossession or Merely an Out of Court Enforcement Procedure?	126
2. Romania: A Toned-Down Type of Self-Help Repossession?	129
VII. Self-Help Repossession under International Legal Instruments	135
A. Replacing the “Breach of Peace Standard” by Contractual Clause for Sui Generis Industry: The Cape Town Convention	136
B. The Draft Common Frame of Reference	139
VIII. Judicial Repossession	141
A. Judicial Repossession in the U.S. in General	142
B. Judicial Repossession in Louisiana	144
C. United Kingdom: Return Orders, Transfer Orders, and Writs of Delivery	146
D. Hungary: Judicial Enforcement Only	149
E. Judicial Repossession in Romania	150
IX. Conclusion	152

ABSTRACT

One of the defining features of the Uniform Commercial Code Article 9 is the secured creditor’s ability to take possession of the collateral upon the debtor’s default “without breach of peace.” This standard is meant to protect the debtor from abusive secured creditors, the meaning of which has been shaped by courts on a case-by-case basis.

In reforming their secured transactions laws to enhance access to credit, continental legal systems have shown great reception to Article 9 by adopting the unitary concept and functional approach to security interests, introducing private enforcement mechanisms, including various forms of self-help repossession. However, the “without breach of peace” standard seems to be rejected by most national laws and international legal instruments acceded to by civil law countries, to accommodate the supposedly alien idea of self-help repossession with civil law tradition.

Based on comparative analysis of secured transactions laws of the US, the UK, Romania, and Hungary (representing national laws), and the Cape Town Convention on International Interests in Mobile Equipment

along with the Aircraft Protocol and the Draft Common Frame of Reference (representing international legal instruments), this article demonstrates that continental European legal systems are generally apprehensive with the “without breach of peace” standard. Thus, they are reluctant to transplant it to their legislation and try to either modify it or replace it with different legal requirements.

This article concludes that the alternatives of the “without breach of peace” standard prevailing in continental legal systems undermine the privilege of the secured creditor, pose enforcement problems (such as uncertainty of creditors’ rights and possible abuses against consumer-debtors), and restrain out-of-court enforcement.

Keywords: enforcement of security right, self-help repossession, without breach of peace, judicial repossession, UCC Article 9, Louisiana, access to credit, secured creditor, consumer-debtor, civil law

I. INTRODUCTION

Recent years have witnessed a wave of secured transactions law reforms in many countries including Central and Eastern European (CEE) countries such as Croatia,¹ Hungary,² Poland,³ and Romania.⁴ International organizations such as the European Bank for Reconstruction and Development (EBRD)⁵ and the United Nations Commission on International Trade Law (UNCITRAL) supplied

1. See Patricia Živković, *Floating Security Interest: Comparative Analysis of US, English and Croatian Approaches*, in OFFICIAL ALMANAC OF THE INTERNATIONAL CONFERENCE: THE MILESTONES OF LAW IN THE AREA OF CENTRAL EUROPE 2013 1050-1058 (Comenius Univ. 2013).

2. Hungary reformed its secured transactions law in 1996 and in 2001, and the latest comprehensive reform took place in 2013 with the enactment of the évi V. törvény a Polgári Törvénykönyvről (Hungarian Civil Code or HUCC), available at <https://perma.cc/4327-5LD4>. Book Five, Part Three, Title VII, Chapter XXI deals with secured transactions.

3. See the Polish Law on Registered Pledges and the Pledge Registry (1996), arts. 1-14, available at <https://perma.cc/P42C-27E6>.

4. See Tit. VI of Law 99/1999 on Measures for Accelerating Economic Reform published in the Official Gazette no. 236/27.05.1999, repealed and replaced by Tit. XI, C. Civ. published in the Official Gazette no. 505/15.07.2011. No English translation is available, but the Romanian text is available at <https://perma.cc/9AVS-HDFS>.

5. See John L. Simpson et al., *Model Law on Secured Transactions*, European Bank for Reconstruction & Development (2004), <https://perma.cc/JTX6-UYKP>.

countries looking to reform their secured transactions laws with model laws.⁶ The International Institute for the Unification of Private Law (UNIDROIT) administers international conventions and protocols governing secured transactions.⁷ The conventional wisdom has been that Article 9 of the Uniform Commercial Code (hereinafter Article 9),⁸ originating in a common law country with advanced economic and legal systems—the U.S.—is incompatible

6. See UNCITRAL, *UNCITRAL Legislative Guide on Secured Transactions* (New York, 2010), <https://perma.cc/8NGB-K73X>. This document contains core provisions that UNCITRAL believes any secured transactions should contain. States that opt to use the document can make use of it as it is or add to the provisions of the document. The European Bank for Reconstruction and Development also published a model law on secured transactions back in 1994. Since it was first published, the model law has been widely circulated and has served as a catalyst for defining the essential requirements of a collateral law in a modern market economy. It is not intended as detailed legislation for direct incorporation into local legal systems, but it has been widely used by the Bank and other institutions to support reform projects. For text, see Simpson et al., *supra* note 5.

7. The main UNIDROIT legal instruments governing security rights are the Convention on International Interests in Mobile Equipment (2001), commonly referred to as the “Cape Town Convention,” and its three additional protocols, i.e., the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (2001), the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (2007), the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (2012), and Protocol to the Cape Town Convention on Matters Specific to Agricultural, Construction and Mining Equipment (work in progress). For details on these legal documents, see UNIDROIT, <https://perma.cc/BC2V-EQWY> (follow “Instruments;” then follow “Security Interests”).

8. First published in 1952, the Uniform Commercial Code (UCC) is one of the longest and most detailed uniform acts and has been adopted by all 50 states in the United States in the form of statutes. Prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), the UCC in the beginning represented a recommendation of the laws that should be adopted by the states. The Permanent Editorial Board was later established to continue adapting the UCC to future changes. Although its substantive content in all states is substantially similar, some states have made structural modifications to conform to local practices. (In Louisiana, for example, the UCC is referred to as a “Louisiana Civil Code.”) UCC Article 9 was significantly revised in 2001, and these substantive revisions have been adopted in every state and govern virtually all transactions within the UCC’s scope. They have simplified the use of personal property as collateral by providing for an almost uniform set of rules nationwide. The UCC does not, however, apply to real estate transactions. For a brief summary of UCC Article 9’s creation of a personal security interest, see Philip L. Kunkel et al., *Security Interests in Personal Property*, FARM

with civil legal tradition. Recent national secured transactions law reforms defy this wisdom. Moreover, international legal instruments and model laws that represent major rapprochement of civil law and common law traditions in the field of secured transactions law have emerged.

The purpose of this article is to explain the reception of Article 9 in different civilian legal systems and the underlying reasons for that reception in legal instruments inheriting some aspects of Article 9. Most importantly, this article analyses the place of self-help repossession in the continental countries and the seemingly inevitable “without breach of peace” standard, which they replace with different legal requirements. It argues that the approach taken toward self-help repossession in European systems does not only have the effect of causing unpredictability in enforcement of security rights and of discouraging private enforcement mechanisms, but may also have adverse consequences on access to credit.

Two features make this article unique compared to any other predecessor. First, while previous works address whether self-help repossession is available under and/or compatible with civilian legal systems,⁹ this article contends that self-help repossession is already a part of many civilian legal systems. Instead, it focuses on why the “breach of peace standard,” which is an inherent part of the device under U.S. law, tends to be disregarded by continental systems. Second, in previous works, the civilian perspective on self-help repossession was based solely on the experience of the state of Louisiana while continental European jurisdictions have been widely ignored.¹⁰ However, since continental European countries have now

LEGAL SERIES—UNIVERSITY OF MINNESOTA EXTENSION (June 2015), <https://perma.cc/M5EZ-4DXZ>.

9. See, e.g., Bruce V. Schewe, *Civilian Thoughts on U.C.C. Section 9-503 Self-Help Repossession: Reasoning in a Historical Vacuum*, 42 LA. L. REV. 239 (1981).

10. *Id.*

showed what can be considered a paradigm shift in the field of secured transactions law, by reforming their laws in line with Article 9, this article analyses the topic by emphasizing recent developments and provides a broader perspective on civil law jurisdictions, supported by concrete evidence.

II. THE RECEPTION OF ARTICLE 9 AS MODEL LAW IN NATIONAL AND INTERNATIONAL LEGAL INSTRUMENTS

Secured transactions laws across the globe can be classified into two main categories: the unitary model and the non-unitary (fragmented model). The unitary model is represented by Article 9, the secured transactions laws of Australia, New Zealand, common law provinces of Canada, and the new comers Malawi,¹¹ Sierra Leone,¹² and Liberia.¹³ These countries where “all secured transactions on personal property and fixtures are brought under the same roof, if a transaction ‘in substance secures payment and performance of an obligation . . . regardless its form or who has title to the collateral,’” are referred to as the “Unitary Systems.”¹⁴ However, the unitary

11. Malawi enacted the Personal Property Security Interests Act of April 2013 and joined the unitary systems of the African front. The pdf version of the Act is available at <https://perma.cc/KLT8-Q5X6>.

12. The Act is named the “Borrowers and Lenders Act.” For information, see S.U. Thoronka, *Parliament Ratifies Borrowers, Lenders Act*, GLOBAL TIMES SIERRA LEONE, Nov. 19, 2014, <https://perma.cc/NDU4-5KFW>.

13. See Chapter 5 of the Liberian Commercial Code of 2010 (Secured Transactions Law), <https://perma.cc/D2CR-AAUT>.

14. See Tibor Tajti, *Could Continental Europe Adopt A Uniform Commercial Code Article 9-Type Secured Transactions System? The Effects of the Differing Legal Platforms*, 35 ADELAIDE L. REV. 149-50 (2014). Tajti claims that:

With the entry into force of the Australian *Personal Property Securities Act 2009* (Cth) (‘APPSA’) in 2012, the Unitary Model of secured transactions law on personal property became part of the legal system of another major economy of the world. The quintessential feature and innovation of this model is the so-called *unitary concept of security interest*, bringing all secured transactions on personal property and fixtures under the same roof if a transaction ‘in substance secures payment and performance of an obligation . . . regardless of its form or who has title to the collateral.’ Although there are meaningful differences among the jurisdictions that have taken over this model with adaptations to local conditions and expectations, the building blocks and crucial features—in particular the unitary concept of security interests—remain the same. Hence, it makes sense to refer to these jurisdictions as ‘Unitary Systems.’

model and the functional approach are not only adopted by the aforementioned common law countries, but also by civil law countries such as Hungary and Romania, or by soft laws such as the Draft Common Frame of Reference (DCFR)¹⁵ and international legal instruments such as the Cape Town Convention on International Interests in Mobile Equipment.

The key characteristics of the non-unitary model are the existence of numerous legal devices that in reality secure performance of obligations, but are not considered security devices, or even if they are considered security devices, different sets of rules apply to their creation, public notice (if at all required), as well as to their enforcement. The implications of this model are threefold. First, there is no single statute (or code) that provides for a comprehensive concept

The group includes, besides Australia, the United States (the birthplace of the model), the Canadian provinces and New Zealand. One should also add to this list Book IX of the sui generis soft law instrument named the 'Draft Common Frame of Reference' ('DCFR') because it represents that farthest reaching project made in the direction of the Unitary Model in Europe.

Id. (footnotes omitted) (quoting CRAIG WAPPETT, *ESSENTIAL PERSONAL PROPERTY SECURITIES IN AUSTRALIA* xxvii (2012)) (citing STUDY GROUP ON A EUROPEAN CIVIL CODE & RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP), *PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR)* (Outline ed., Christian von Bar et al. eds. 2009), available at <https://perma.cc/SAR4-NDKW> [hereinafter STUDY GROUP]).

15. The Draft Common Frame of Reference came out of a European-level project aimed at finding the common core of European private law. It is a soft law of the common principles of the laws of European countries. The outline edition of the text of the 648-page document, entitled "Principles, Definitions and Model Rules of European Private Law," referred to in a shorthand manner as the Draft Common Frame of Reference ("DCFR"). The law of security interests as enshrined in the DCFR organized security interests following the unitary system. All modern security devices that are intended to be included are contained in one document. Thus, Book IX, section 1:101 of the DCFR states that:

(1) This Book applies to the following rights in movable property based upon contracts for proprietary security: (a) security rights; and (b) ownership retained under retention of ownership devices. (2) The rules of this Book on security rights apply with appropriate adaptations to: (a) rights under a trust for security purposes; (b) security rights in movable assets created by unilateral juridical acts; and (c) security rights in movable assets implied by patrimonial law, if and in so far as this is compatible with the purpose of the law.

STUDY GROUP, *supra* note 14, at 447.

of security interests rather security devices are scattered in various statutes.¹⁶ Second, different statutes provide different sets of rules for creation, filing (if at all required), and enforcement. Lastly, certain devices are not considered security devices and thus are not covered by secured transactions law. The consequence of such a fragmented approach to security interests is a lack of consistent and uniform rules of creation, registration, and enforcement of security rights. This leads to the inefficiency of the secured transactions legal regime.

The non-unitary model has been the dominant model in continental legal systems such as France, Italy, Germany, and others that have not recently reformed their secured transactions law. The UK, although being a common-law country, also falls into this category. Nevertheless, recent reforms in Hungary and Romania led to the departure of some civilian systems from the non-unitary model, thus breaking with their former traditions and moving toward the unitary model.

Finally, in the unitary systems, despite slight variations, the fundamental building blocks and features remain close, if not the same.¹⁷ For instance, Hungarian secured transactions law, following a functional approach brings retention of title to the realm of secured transactions, but does not re-characterize financial leasing as secured transactions, dedicating separate provisions for the latter.¹⁸ Similar patterns can be noticed showing variations in the degree to which the functional approach is adopted. However, the idea that transactions that purport to secure performance of obligations should be brought under the realm of secured transactions law is

16. EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS 6 (Joseph J. Norton & Mads Andenas eds. 1998).

17. Tajti asserts that “[a]lthough there are meaningful differences among the jurisdictions that have taken over this model with adaptations to local conditions and expectations, the building blocks and crucial features—in particular the unitary concept of security interests—remain the same.” Tajti, *supra* note 14, at 150.

18. Polgári Törvénykönyv (Civil Code), Book VI, Chapter LIX, Sections 6:409 *et seq.* are dedicated to financial leasing agreements.

echoed across the jurisdictions that can be categorized under the unitary model.

With the above background on the reception of Article 9 in other jurisdictions, it ought to be inquired why Article 9 is being accepted as a model for secured transactions law. The reason is simple. Article 9 creates a very simple and efficient system. Under Article 9, the fact that the same rules of creation, perfection, and enforcement apply to all transactions purporting to secure performance of obligation comes with efficiency benefits. In other words, Article 9 is based on the idea that the cost of transaction for creation, filing, and enforcement of security interests must be low.

Due to the functional approach to security interests adopted by Article 9, the formal label of the transaction becomes irrelevant and only the economic reality behind the transaction determines whether Article 9 applies to it. This reduces the cost of transaction that would be incurred in attempting to define its precise nature or the cost incurred when an agreed upon transaction is ruled invalid based on mere formality.¹⁹ Hence, for instance, whether the transaction is labeled as “title financing” or “consignment,” the creditor is not deprived of its secured creditor status. This means that if the consignor files the transaction under Article 9, he or she is a secured creditor without regard to the fact that the transaction is not labeled as “se-

19. FORMS UNDER THE REVISED UNIFORM COMMERCIAL CODE ARTICLE 9 (2d ed., Cindy J. Chemuchin ed., ABA 2009). Chemuchin maintains that:

The form of the transaction or the label the parties put on the transaction is irrelevant for the purpose of determining whether Article 9 applies. Rather, the determination of whether Article 9 applies is based on the economic reality of the transactions. For example, transactions may be characterized as a sale or lease of goods but if in economic reality security interest is being created, Article 9 will nevertheless apply . . . it is also not required that the parties refer in their agreement to a ‘security interest’ being created under a ‘security agreement.’ Even if parties use terms such as ‘assignment,’ ‘hypothecation,’ ‘conditional sales,’ ‘trust deed,’ the like, Article 9 still applies whenever security interest in personal property is being created. Similarly, it is irrelevant for the purpose of Article 9, whether title to the collateral is in the name of the debtor or the secured party.

curity agreement.” The filing requirement that is imposed universally on the great majority of transactions ensures that third parties do not have to incur the cost of inquiring the status of the potential debtor’s property other than checking at the filing office or searching electronically where applicable. Once the third parties discover the existence of the security interest on the debtor’s asset from the relevant public record, they have to inquire about the specific details from the debtor. The secured creditor has an obligation to endorse any information provided by the debtor to ensure that the third party has accurate information.²⁰ If the debtor refuses to provide the information or the secured creditor refuses to endorse the information provided by the debtor, it is sufficient warning for the third party of the risk of dealing with the debtor.

Article 9’s filing system along with other methods of perfection tackle the ostensible ownership problem where publicly known transactions lead third parties to believe that the property is unencumbered or belongs to the debtor. Ostensible ownership is a serious problem in Germany, for instance, regarding retention of title transactions that are not subject to registration despite the rule protecting a good faith third party acquiring rights in the encumbered asset of the debtor.²¹ Hence, whether the property in the possession of the

20. U.C.C. Section 9-210(b) states the following:

Subject to subsections (c), (d), (e), and (f), a secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, shall comply with a request within 14 days after receipt: (1) in the case of a request for an accounting, by authenticating and sending to the debtor an accounting; and (2) in the case of a request regarding a list of collateral or a request regarding a statement of account, by authenticating and sending to the debtor an approval or correction.

U.C.C. § 9-210(b) (AM. LAW INST. & UNIF. LAW COMM’N 2010).

21. Jens Hausmann, *The Value of Public-Notice Filing Under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property*, 25 GA. J. INT’L & COMP. L. 427, 474 (1996). In Germany, there are limitations on the protection afforded to a good-faith third party. These limitations are that the subsequent acquirer in good faith must have been deceived by ostensible ownership, that the subsequent acquirer must have secured actual possession permanently—temporary transfer of possession does not suffice—and that the subsequent acquirer must demonstrate that his or her lack of knowledge of an existing right is not the result of his or her negligence.

debtor actually belongs to the debtor is a matter of guesswork. This entails significant transaction costs, a concern to which Article 9 inspired laws respond through a comprehensive perfection method, mainly with filing.

Lastly, the enforcement regime favors private enforcement methods through private disposition of the collateral unlike a court administered sale, the former being faster, cheaper, and commercially sensible.²² Self-help repossession, which allows the creditor to repossess the collateral without assistance of the court, subject to the “without breach of peace standard,” plays a significant role in making the enforcement of security rights quicker and cheaper, therefore more efficient.²³ Hence, without further ado, on the question why developing countries belonging to the civil law system are receptive to Article 9, one must conclude that it is because it incorporates efficiency at its heart, eases access to credit, which in its turn fosters economic development.

These are limitations to the priority right of a good-faith third party make ostensible ownership a serious problem in Germany because the subsequent third party can invoke his or her good faith only in such limited circumstances. *See id.* at 470-72.

22. Laurence M. Smith explains that “[a] secured party sale under Article 9 of the U.C.C. is a means by which a secured lender can realize on the debtor’s collateral, without the need to institute litigation or bankruptcy proceedings. It is expeditious, cost-effective and free of the adverse publicity that frequently accompanies a bankruptcy filing.” Laurence M. Smith, *Secured Party Sales Under U.C.C. Article 9: A Commonsense Solution to Maximize a Recovery*, 6 PRATT’S J. BANKR. L. 37, 42 (2010).

23. CĂTĂLIN GABRIEL STĂNESCU, *SELF-HELP, PRIVATE DEBT COLLECTION AND THE CONCOMITANT RISKS: A COMPARATIVE LAW ANALYSIS 1* (2015):

It is then relevant to bring forth into discussion the effectiveness of the traditional judicial methods of debt recovery as compared to alternative means, which are arguably better, cheaper and faster when considering the creditors’ needs, as well as the efficiency of consumer-debtor protection mechanisms in place in the chosen jurisdictions, when considering the debtor’s needs.

III. SELF-HELP REPOSSESSION AND THE “WITHOUT BREACH OF PEACE” STANDARD UNDER ARTICLE 9

The secured creditor can take possession of the collateral according to UCC Section 9-609 either judicially²⁴ or non-judicially.²⁵ When the creditor pursues non-judicial self-help repossession, it is under the duty to repossess “without breach of peace.”²⁶ The “without breach of peace” standard is undefined by Article 9 and is left to *ex post facto* determination by the courts.²⁷ The “without breach of peace” standard is intended to safeguard the debtor from abuses that can occur during self-help repossession.

Determining the existence of a breach of peace is difficult in most circumstances. This difficulty seems to be the underlining reason for which continental systems are reluctant to embrace it in their secured transactions laws. Therefore, the following brief overview of the various circumstances under which courts faced this issue serves as a stepping-stone for the rest of this article.

There are circumstances where the determination of breach of peace is easier and clear cut, such as in cases involving physical assault by the reposessor. The task becomes challenging in cases resulting in infliction of emotional distress on the debtor or when the self-help repossession took place through tactics such as the help of

24. There are primarily two channels of judicial repossession. These are an action for replevin and an action for writ of possession. Depending on the state law in question, the secured creditor has an option to resort to one of them. In either case, a state official, i.e., a sheriff or a Marshal executes the repossession on behalf of the secured creditor. *See* WILLIAM D. WARREN & STEVEN D. WALT, SECURED TRANSACTIONS IN PERSONAL PROPERTY 277 (2007).

25. U.C.C. Section 9-609(a)-(b) states the following:

(a) After default, the secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 9-610. (b) A secured party may proceed under subsection (a): (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of the peace.

U.C.C. § 9-609(a)-(b) (AM. LAW INST. & UNIF. LAW COMM'N 2010).

26. *Id.*

27. Ryan McRobert, *Defining “Breach of the Peace” in Self-Help Repossessions*, 87 WASH. L. REV. 569 (2012).

a law enforcement officer or when the repossession has emotional impact on third parties, such as children of the debtor.²⁸

In the US, court decisions have been inconsistent with regard to determining the occurrence of breach of peace across states.²⁹ The typical instance where courts agree that breach of peace occurred is the use of physical assault during the repossession.³⁰ Court decisions in borderline cases such as those involving: trespass, the mere presence of a law enforcement officer, emotional harm inflicted on third parties, and verbal objection by the debtor during the repossession have been inconsistent.³¹ The inconsistency in court decisions on breach of peace in the US leads to unpredictability for creditors involved in interstate trade.³² Thus, McRoberts argues that leaving Article 9's "without breach of peace" standard undefined defeats the very purpose of the UCC.³³

28. *Id.* at 570-71. McRobert asks several questions showing a number of scenarios in which the determination of breach of peace can be a daunting task:

For example, if a repossession agent asks the police to provide him with protection as he repossesses a vehicle, is this a breach of the peace that makes the self-help repossession unlawful? Does a breach of the peace occur when a homeowner assaults someone trespassing on his property in an effort to repossess lawn furniture? Imagine that the same homeowner does not notice his property being repossessed, but the creditor has to cut a lock and bypass a gate to repossess the property. Does this breach the peace even if there is no confrontation? What if the debtor experiences emotional distress or something happens to a neutral third party?

29. *Id.* at 578-94.

30. For example, the Arkansas Supreme Court has held that violence is breach of the peace. *See Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979). Similarly, the Tennessee Court of Appeals has held that breach of the peace must involve violence. *See McCall v. Owens*, 820 S.W.2d 748, 751 (Tenn. Ct. App. 1991).

31. McRobert, *supra* note 27, at 582-91. *See Chapa v. Traciers & Assocs.*, 267 S.W.3d 386 (Tex. Ct. App. 2008). In this case, the repossession agent repossessed a vehicle without knowing that the debtor's two young children were in the back seats. The repossession agent returned the children after a while. The Texas Court of Appeals held that even though the children were diagnosed with post-traumatic stress, the repossession was not in breach of the peace irrespective of the harm to the third party. The Court disregarded what happened after repossession and focused on the nature of the repossession.

32. McRobert, *supra* note 27, at 587.

33. *Id.*:

The courts should have a legal framework that allows them to consistently apply the law. Debtors and creditors should be able to understand

However, the practical problems faced in attempting to apply the “without breach of peace” call for reform, not for abandoning the standard altogether. In response to the inconsistency of court decisions defining the breach of peace and the ensuing unpredictability, McRoberts recommends the amendment of Article 9 to include a two-stage determination of the breach of peace. In his opinion, the first stage should include a list of three *per se* violation factors while the second stage contains a set of two factors to be determined on a case by case basis,³⁴ although the feasibility of such a proposal is debatable.

A last point worth mentioning is that under Article 9, violation of the “breach of peace standard” has serious repercussions. These are criminal liability (in cases of grave breach, such as physical assault), compensatory damages, statutory and punitive damages as well as loss of the right to deficiency claim (payment).³⁵

the law surrounding breach of the peace so they are able to properly repossess property and correctly ascertain when a breach of the peace has occurred. Moreover, companies or individuals who engage in repossessions in multiple jurisdictions should not have to perform extensive legal research in order to understand the relevant standards governing their right to self-help repossession. This is completely unnecessary and contrary to the purpose of the Uniform Commercial Code.” (footnote omitted) (citing Karl N. Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROBS. 687 (1948)).

34. *Id.* at 594:

The UCC’s failure to define “breach of the peace” has produced considerable uncertainty and inconsistency in the scope of lawful self-help repossession. In order to remedy this situation, the UCC should incorporate the proposed two-part test that coherently defines “breach of the peace” in a manner that balances the interests of the debtor, creditor, and public at large. This two-part test first identifies three categories of conduct that constitute a *per se* breach of peace. A breach of the peace necessarily occurs if: (1) there is any use of law enforcement during the repossession; (2) there is any violence or threat of violence; or (3) there is any unheeded verbal request to cease the repossession. If none of the *per se* rules have been violated, then courts should proceed to the second part of the test, which requires consideration of the degree of trespass involved and any impact on third parties. This test will create greater consistency and predictability for debtors and creditors, and ensure a safer environment for the public.

We find McRobert’s entire analysis and conclusion valid.

35. See U.C.C. § 9-625 *et seq.* (AM. LAW INST. & UNIF. LAW COMM’N 2010).

IV. TERMINOLOGICAL CAVEAT

Self-help repossession is a designation used by Article 9 and secured transactions laws influenced by it. Terminological variations across jurisdictions are inevitable, given the fact that the legal systems that transplanted it did not retain all of its original features. Under the Hungarian secured transactions law and the DCFR, for instance, due to the substantial peculiarities of the private enforcement mechanism they enshrined, it is difficult to refer to “self-help repossession.” It is rather an out-of-court (non-judicial or extra-judicial) enforcement of a security right. Hence, self-help repossession, as one form of non-judicial enforcement procedure, is used strictly to mean the right of the secured creditor to take possession of the collateral without the involvement of a state agent.

There are two contexts in which the terms out-of-court, extra-judicial, or non-judicial enforcement are used interchangeably. The first is when different types of private enforcement mechanisms that do not involve state authority are being referred to. These include self-help repossession, strict foreclosure, and private sale of collateral. The second context is when the procedure being addressed does not qualify as self-help repossession in the strict sense.

V. THE ABHORRENCE OF SELF-HELP REPOSSESSION IN CIVIL LAW SYSTEMS—THE STATE OF LOUISIANA: WHERE IT ALL STARTED

The intricate relationship of civil law systems with self-help repossession begins in the U.S., in the state of Louisiana³⁶ where self-help repossession faced challenges based on two major grounds. The first challenge came from the 14th Amendment due process clause.³⁷

36. For detailed insight into Louisiana’s legal tradition, see A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENT. 1, 1 (2008), at <https://perma.cc/2UU2-JRLA>.

37. The Fourteenth Amendment’s Due Process Clause states: “nor shall any state deprive any person of life, liberty, or property, without due process of law....” U.S. CONST. amend. XIV, § 1.

While the second one stemmed from public policy based on “Louisiana’s traditional civil law hostility to self-help” that self-help repossession is considered to violate.³⁸

Even before the implementation of the UCC, it was projected that Article 9 self-help repossession might face constitutional challenges in Louisiana where self-help repossession in the creditor-debtor relationship has been regarded as incompatible with the legal system in place, on the grounds of an alleged violation of due process.³⁹ This challenge was ultimately rejected by the Supreme Court of Louisiana, which held that self-help repossession was constitutional.⁴⁰ The challenge contended that the 14th Amendment of the U.S. Constitution prohibits deprivation of property by the state without due process of law.⁴¹ The court held that because the 14th Amendment requires only state action to comply with due process

38. Paul Joseph Ory, *Nonjudicial Disposition Under Louisiana Commercial Law Chapter Nine*, 51 LA. L. REV. 1253, 1254 (1991).

39. Schewe, *supra* note 9, at 267 (footnote omitted) (quoting Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 4 (1974)):

In Louisiana, the incorporation may never occur. In the short run the utility of such an enactment is dubious since it would likely prove to be the catalyst for rounds of litigation. Assuming that the Federal Constitution is interpreted so as to uphold 9-503 and 9-504, difficulties would remain under article I, section 2 of the Louisiana Constitution. Unshackled by the state action limitation and as ‘a flexible provision which gives the courts significant leeway in developing standards of reasonableness,’ article I, section 2 may be viewed as an articulation of the civilian ideas of protection of private property. If a Louisiana creditor, acting under the authority of the U.C.C. in a manner historically associated with the government, engages in self-help, such conduct should be deemed to be violative of the tenets of civilian due process.

40. *Price v. U-Haul Co. of Louisiana*, 745 So. 2d 593 (La. 1999), available at <https://perma.cc/945S-GVY2>.

41. Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. CONST. amend. XIV, § 1 (emphasis added).

and self-help repossession was a private action, it did not violate the due process clause.⁴² The Supreme Court of Louisiana also rejected the argument that by enacting a statute allowing the exercise of deprivation of property by private entities (which amounted to a delegation of state powers and constituted a veritable privatization of enforcement), self-help repossession should also be subject to due process requirements.⁴³

Another long-standing challenge to self-help repossession, which defined self-help repossession as it appears today in Louisiana, emanated from the incompatibility of self-help repossession with the Louisianan policy of keeping public peace.⁴⁴ On multiple occasions, courts in Louisiana refused to affirm self-help repossession on the grounds that it is against public peace or order.⁴⁵

Pursuant to the above, Louisiana generally banned self-help repossession except when the debtor has abandoned the collateral, sur-

42. See *Price v. U-Haul Co. of Louisiana*, 745 So. 2d 593 (La. 1999). In the *Price* case, it is stated by way of background discussion that:

An essential requirement in any due process challenge is that the claimant must show that some property or liberty interest has been adversely affected by *state action*. *Delta Bank & Trust Co. v. Lassiter*, 383 So.2d 330 (La.1980); Lee Hargrave, *The Louisiana State Constitution: A Reference Guide* 23 (1991) (state due process guarantee protects against governmental, as opposed to private, action). Here, it is disputed plaintiff was deprived of rights that are protected by the due process guarantees of the federal and state constitutions *against state action*. The disputed issue, decisive of the constitutional challenge, is whether defendants' invoking the Act's provisions to conduct a private seizure and sale of plaintiff's property constituted state action. Defendants contend that their action involved purely private seizure and private sale of property, authorized by statute and by contract between the parties, and therefore was not state action that would implicate constitutional due process principles.

Id. at 594 (emphasis in original).

43. *Id.*

44. Ory, *supra* note 38, at 1225.

45. In *Liner v. Louisiana Land & Exploration Co.*, for instance, Justice Tate indicated that "[t]his [possessory protection in cases of eviction by force or fraud] is done in the interest of preservation of peace in society and as a deterrent against self-help." 319 So. 2d 766, 781 (La. 1975) (Tate, J., concurring in denial of rehearing). See also *Guidry v. Rubin*, 425 So. 2d 366, 371 (La. Ct. App. 1982) and *Grandeson v. International Harvester Credit Corp.*, 66 So. 2d 317 (La. 1953).

rendered it, or has given his or her consent either before or after default.⁴⁶ Hence, in Louisiana, the general rule is that the creditor has no right to repossess the collateral without court involvement.⁴⁷ As an exception, in Louisiana, self-help repossession is allowed with respect to automobiles. Under the revised Additional Defaults Remedies Act, a secured creditor can repossess a vehicle collateral (1) by sending notice to the debtor after default,⁴⁸ (2) by clearly stating in the notice that “Louisiana law permits repossession of motor vehicles upon default without further notice or judicial process,” and (3) without breaching peace.⁴⁹

Besides limiting self-help repossession to vehicle collaterals, Louisiana also took further steps. Mainly, unlike under Article 9 that leaves the determination of breach of peace to the courts in all circumstances, the revised Additional Defaults Remedies Act illustratively lists the conditions under which breach of peace occurs. Accordingly, for instance, there is breach of peace in case of unauthorized entry into the debtor’s premise (locked or unlocked) to conduct the repossession or where the repossession takes place despite the debtor’s verbal objection.⁵⁰

46. Louisiana Revised Statutes Title 10, Section 9-609(a) provides that: After default, a secured party may take possession of the collateral only: (1) after the debtor’s abandonment, or the debtor’s surrender to the secured party, of the collateral; (2) with the debtor’s consent given after or in contemplation of default; (3) pursuant to judicial process; or (4) in those cases expressly provided by law other than this Chapter.

LA. STAT. ANN. § 10:9-609(a) (2001).

47. *Id.*

48. See LA. STAT. ANN. § 6:966 (2015). Section 6:966(A)(2) states that: Prior to the use of the procedures set forth in this Chapter, a secured party shall send notice to all debtors in writing at the last known address of the debtors, of the right of the secured party to take possession of the collateral without further notice upon default as defined in R.S. 6:965(C). Such notice shall include the debtor’s name, last known address, and description of the collateral and the following in at least twelve-point type

LA. STAT. ANN. § 6:966(A)(2) (2015).

49. LA. STAT. ANN. § 6:965 (2011), available at <https://perma.cc/VU5U-7AKO>.

50. LA. STAT. ANN. § 6:966(A)(2),(B) (2015). Section 6:965(C) provides as follows:

As used in this Chapter, the following terms have the following meanings:

It should be noted that under Article 9, court decisions on whether a breach of peace occurred in cases of verbal objection by the debtor during the repossession have been inconsistent. Some courts have ruled that verbal objection does not amount to breach of peace.⁵¹ By listing the grounds for breach of peace, Louisiana has attempted to either avoid or reduce the possibility of the occurrence of breach of peace due to ambiguity of the law, in line with its high concern for maintaining public peace. While the list may prove to be a valuable aid to courts and a possible solution to the uncertainties caused by differences of interpretation, serving notice prior to the actual repossession of the collateral may undermine the very essence of the self-help remedy. These two possibilities should be considered seriously by weighing the competing interests involved: subject self-help repossession to less burdensome conditions or impose stricter rules in order to protect the prevailing public policy. Louisiana has chosen the latter path. Despite this, self-help repossession and enforcement of security rights seem to function efficiently in Louisiana.

-
- (1) "Breach of peace" shall include but not be limited to the following:
(a) Unauthorized entry by a reposessor into a closed dwelling, whether locked or unlocked.
(b) Oral protest by a debtor to the reposessor against repossession prior to the reposessor seizing control of the collateral shall constitute a breach of the peace by the reposessor.

LA. STAT. ANN. § 6:965(C) (2011).

51. *See, e.g.,* Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171, 1173–74 (Ill. Ct. App. 1996). In this case, the debtor protested to repossession by rushing out of his house in his underwear and yelled "Don't take it!" The Appellate Court of Illinois found as follows:

We note that to rule otherwise would be to invite the ridiculous situation whereby a debtor could avoid a deficiency judgment by merely stepping out of his house and yelling once at a nonresponsive reposessor. Such a narrow definition of the conduct necessary to breach the peace would, we think, render the self-help repossession statute useless. Therefore, we reject Koontz's invitation to define 'an unequivocal oral protest,' without more, as a breach of the peace.

See also Williams v. Ford Motor Credit Co., 674 F.2d 717, 720 (8th Cir. 1982).

VI. EUROPEAN PERSPECTIVE: EVIDENCE OF STEPS FORWARD

In civilian legal systems, outside of the US, the perception of self-help repossession has been negative. Regarding this, Warren and Walt wrote “the Europeans tend to see it as another example of American Barbarism: ‘You mean that the creditor can just go out and steal the property back?’”⁵² The criminalization of self-help repossession in Germany reflects this perception,⁵³ and so does the failure to regulate it in other civil law countries. One possible reason self-help repossession has been unknown in the civilian systems is that the efficiency of judicial enforcement or the availability of an alternative judicial remedy, i.e., judicial repossession renders self-help repossession unnecessary. However, as shown later, evidence does not support this argument. Similarly to the civil law state of Louisiana, another reason advanced for rejecting self-help repossession is its incompatibility with due process of law and public peace and order. Even so, the judicial confirmation of self-help repossession as well as the existence of other covert self-help remedies in civilian law⁵⁴ refute the argument of incompatibility of self-help repossession and civilian systems.⁵⁵

A. Perception and Reality

Despite the longstanding perception that self-help repossession is incompatible with civil law tradition, there are also counter-examples manifesting that developing civil law countries, either knowingly or unknowingly, have embodied a type of self-help repossession.

52. WARREN & WALT, *supra* note 24, at 269.

53. TIBOR TAJTI, SYSTEMIC AND TOPICAL MAPPING OF THE RELATIONSHIP OF THE DRAFT COMMON FRAME OF REFERENCE AND ARBITRATION 134 (2013).

54. For details on covert self-help remedies still present in civil law countries, see STĂNESCU, *supra* note 23, at 51-95.

55. For details on constitutional challenges to self-help repossession in Central and Eastern Europe, see Alexandra Horváthová et al., *Is Self-Help Repossession Possible in Central Europe? The Case of Hungary, Romania and Slovakia*, 4 J. EURASIAN L. 83 (2011).

sion into their legal systems. For instance, in some civil law countries, the lessor can take possession of the leased good by giving notice to the lessee upon the lessee's default. No additional safeguard is in place to protect the interests of the lessee who might have paid a significant amount of the value of the property.⁵⁶

Compared to self-help repossession under Article 9 (subject to *ex post facto* judicial control), the form of self-help repossession, hardly noticed in the civil law countries, can have far-reaching consequences on the debtor. One must then reach the conclusion that there is a discrepancy between the perception and the reality of self-help repossession in civil law countries. The permissibility of self-help repossession in financial leasing is not paid attention to merely due to the dogmatic thinking and approach in civil law countries that financial leasing is not a secured transaction.⁵⁷ However, under certain conditions, financial leasing for all purposes create a security

56. For instance, Ethiopia's (civil law country) Capital Goods Leasing Business Proclamation states the following:

1) Where the lessee defaults in the payment of the rent, or commits another fault which may breach the agreement, the lessor shall grant him a period of 30 days for remedying the default so far as the default may be remedied.

2) Where the lessee does not remedy the default within the period specified in sub-Article

(1) of this Article, the lessor may rescind the agreement, repossess the leased capital goods and claim related damages.

Capital Goods Leasing Business Proclamation No. 103/1998, Part Two, Article (6), *Negarit Gazeta* 710. Hence, the lessor has a statutory right to repossess the collateral if thirty days' notice was served upon the debtor. The possibility that the debtor might have paid ninety percent of the value of the leased good is irrelevant. This makes the device harsh for debtors under the financial leasing law. The International Institute for the Unification of Private Law (UNIDROIT) also administers an international financial leasing law that allows the lessor to take possession of the collateral up on the lessee's default. See UNIDROIT Convention on International Financial Leasing art. 13, *opened for signature* May 28, 1988, 2321 U.N.T.S. 41556. This convention is effective in civil law countries such as Hungary, Italy, and France. For the status of the convention, see *Status—UNIDROIT Convention on International Financial Leasing* (Ottawa, 1988), <https://perma.cc/2DK2-BZQE> (last updated June 28, 2017).

57. Under the U.C.C., a leasing is a secured transaction if it meets the following noncumulative criteria:

(a) it is not subject to termination by the lessee and (b) at least one of four listed situations is present. These are (i) that the original term of the lease equals or exceeds the remaining economic life of the asset, (ii) that

right in favor of the lessor on the lease, as a result of which it is re-characterized as secured transactions in countries that adopted the functional approach to security interest.⁵⁸ Consequently, the permissibility of self-help repossession in financial leasing implies that self-help repossession has been part of civil law tradition in a field, which is essentially similar to secured transactions.

B. The United Kingdom: Is the “Breach of Peace Standard” Used to Vanquish Self-Help Repossession?

The presence of the United Kingdom⁵⁹ in an analysis dedicated to the “without breach of peace” standard in continental systems might be surprising and somehow unfit, given the fact that all of the countries in this analysis belong to the civil law tradition. However, although England and Wales are obviously common-law jurisdictions, they have been in constant contact with civilian systems due to the United Kingdom’s EU membership and adherence to the *acquis communautaire*. Since it is also the only European jurisdiction (besides Romania), where the “without breach of peace standard” is

the lessee is bound to renew for the remaining economic life or to become the owner of the asset, (iii) that the lessee may renew for the remaining economic life for no or nominal additional payment, and (iv) that the lessee may become the owner at the end of the lease term for no or nominal additional payment.

Herbert Kronke, *Financial Leasing, and its Unification by UNIDROIT – General Report*, 16 UNIF. L. REV. 23, 29 (2011) (citing U.C.C. § 1-203(b) (AM. LAW INST. & UNIF. LAW COMM’N 2010)).

At the same time, in a recent case in Romania involving a five-year-long financial leasing contract, the court of first instance of Bucharest’s First District held that the provisions of Law 99/1999 governing Romanian secured transactions, are inapplicable with respect to leasing. The ruling is in complete contradiction to the provisions of Article 2 of the Law, which clearly state that financial leasing contracts concluded for a period longer than a year are governed by Law 99/1999. Moreover, despite obvious errors made by the court of first instance in the understanding and interpretation of the law, the Bucharest Tribunal dismissed the appeal and upheld the decision. See Decisions no. 24877/17.12.2015 and 4064/22.11.2016 rendered in case no. 66094/299/2014, unpublished, at <https://perma.cc/PQA6-GFPV> and <https://perma.cc/E58K-PUYW>.

58. See Kronke, *supra* note 57, at 29.

59. Although we refer to the United Kingdom as one jurisdiction, the ensuing analysis focuses mostly on the law of England and Wales.

(still) upheld, the authors deemed the inclusion of English law to be beneficial for the purposes of this article.

It must be stated at the outset that the position of British commentators, such as Roy Goode, does not differ much from that of their U.S. peers, even though the UK does not have a secured transaction law that resembles the unitary model advocated by Article 9. However, Goode underlines that a creditor who exercises his or her right to repossession “must take the greatest care not to commit any of the numerous offences that lie in store for him,” and “where the exercise to self-help involves the use of violence against the person or property of another, it ceases to operate.”⁶⁰

This is pretty much where the certainty regarding self-help repossession and the “without breach of peace” standard ends. Bridge states that “the law has been somewhat equivocal about whether individuals may exercise self-help as a remedy instead of pursuing their grievances in court,” especially with respect to personal property where “the law on self-help falls significantly short of standards of clarity and consistency.”⁶¹ Like all other jurisdictions, Britain also lacks a definition of the standard, which leaves the task to the courts that will decide on a case-by-case basis. The explanation for this trait of common law systems might reside in their court system. Unlike civil law courts, which are bound to interpret and apply the existing law, common law courts are also creators of law. Thus, common law courts enjoy more freedom and flexibility in applying the rules on a case-by-case basis, while their civilian counterparts require clear(er) guidelines.

60. ROY GOODE ET AL., *GOODE: CONSUMER CREDIT LAW AND PRACTICE* (1st ed. 1999 & Supp. 26, 2008, Roy Goode ed.).

61. MICHAEL BRIDGE, *PERSONAL PROPERTY LAW* 121 (4th ed., Paul Craig ed., Oxford U. Press 2015).

Self-help repossession is known in the UK under the term “re-capture,”⁶² a right which is “constrained by the limitation that reasonable means be employed.”⁶³ In Michael Bridge’s reading, these reasonable means require the creditor to serve a notice to the wrongful possessor of the collateral of his or her intention to recover it.

Additional attention should be given to the notice requirement in the UK, for its presence here might be surprising. In the UK, the Consumer Credit Act (CCA) 1974 introduced a series of rules designed to protect consumers who became indebted under regulated agreements, but since most of them proved inefficient, the CCA 2006 had to come up with extra provisions designed to make sure that all consumers in arrears receive default notices, in order to understand their position.⁶⁴ In 2014, as the Financial Conduct Authority (FCA) took over consumer credit regulation, the CCA was doubled by secondary legislation, the Consumer Credit Sourcebook (CONC), meant to strengthen the protection of consumer debtors from unfair debt collection practices.⁶⁵

These provisions served to delay the creditor from enforcing his or her rights until certain formalities are complied with.⁶⁶ Creditors must provide debtors with notices before they can terminate an agreement, recover possession of any good, or enforce any security.⁶⁷ In those cases where there has been a breach of contract by the debtor, under the 2006 amendments, it must be provided with 14

62. J.K. MACLEOD, *CONSUMER SALES LAW* 759 (2d ed., Routledge-Cavendish 2007).

63. BRIDGE, *supra* note 61, at 121.

64. MACLEOD, *supra* note 62, at 813. *See also* COMMERCIAL AND CONSUMER LAW 527 (Michael Furmston & Jason Chuah eds. 2010) and HUGH BEALE ET AL., *THE LAW OF SECURITY AND TITLE-BASED FINANCING* 918 (2d ed. 2012).

65. *See* FINANCIAL CONDUCT AUTHORITY, *CONSUMER CREDIT SOURCEBOOK*, ch. 7 (2017).

66. GEOFF HARDING, *CONSUMER CREDIT AND CONSUMER HIRE LAW: A PRACTICAL GUIDE* 111 (1995). *See also* COMMERCIAL AND CONSUMER LAW, *supra* note 64, at 527.

67. HARDING, *supra* note 66, at 112. *See also* FINANCIAL CONDUCT AUTHORITY, *supra* note 65, at arts 7.17 *et seq.*

days (under CCA 1974, there were only 7) to cure the breach.⁶⁸ Three extra arrears notices are provided for the benefit of debtors who have made at least two installment payments,⁶⁹ to be served at the expense of the creditor. Default notices are not required when the creditor is simply looking for recovery of arrears of instalments, but only when it claims damages for breach, enforcement of the agreement or repossession.⁷⁰ Similarly, no notice is required in the case of non-commercial, unsecured agreements.⁷¹

The purpose of the default notices is to assist the debtor in resolving his or her difficulties. In the case of supply of goods, a default notice also *suspends* the right of the creditor to immediately take possession of the goods.⁷² In other words, the possession of the debtor over the collateral is still legitimate since the right of the creditor to repossess is on hold. Obviously, these notices established by the CCA 2006 may have the perverse effect of prolonging non-payment, but failure to provide them in the prescribed form deprives the creditor of his or her right to enforce and ask for interest on the amounts due or the default sum.⁷³ Although the consequences seem harsh, they are a reaction to the failure of the CCA 1974 to provide efficient redress to aggrieved debtors for not receiving notice, thus forcing them to seek action in common law for conversion or wrongful taking of possession.⁷⁴

68. IAIN RAMSAY, *CONSUMER LAW AND POLICY: TEXT AND MATERIALS ON REGULATING CONSUMER MARKETS* 474 (3d ed., Hart Publ'g 2012). The fourteen-day term is maintained by the Consumer Credit sourcebook. See FINANCIAL CONDUCT AUTHORITY, *supra* note 65, at art. 7.17.4.

69. The protection afforded to debtors who have made payments is similar in purpose to the sixty-percent rule available under the U.C.C. Given that United Kingdom consumers must prove payment of only two installments, however, the protection available to them is much broader than that available to United States consumers.

70. A.G. GUEST ET AL., *ENCYCLOPEDIA OF CONSUMER CREDIT LAW* 2086 § 1 (Thomson Reuters 2009).

71. *Id.* See, e.g., Consumer Credit Act 1974, c. 39, §§ 86C(7), 86E(8) (UK).

72. MACLEOD, *supra* note 62, at 815.

73. *Id.* at 814. COMMERCIAL AND CONSUMER LAW, *supra* note 64, at 527.

74. RAMSAY, *supra* note 68, at 474.

Upon receiving the notice, the debtor has two options, to either comply or not. If he or she complies *in full*⁷⁵ before the established date for that purpose, then the breach is cured and treated as if it never occurred. In the case that the debtor does not comply within the given term, the suspension of the creditor's rights ends and he or she may now resort to the termination of the agreement, repossession of the goods, and levy of a default charge. In fact, although being a common-law jurisdiction (generally favorable to self-help remedies), the UK has the most detailed regulation of default notices compared to the rest of the jurisdictions analyzed. Therefore, the CCA appears as a very paternalistic and over-protective regime for consumer debtors in the after default and pre-repossession period.

When analyzing the requirement of prior notice, Michael Bridge concludes that in the absence of clear statutory standards and given the uncertainty of the repossession's aftermath, "the continuing obscurity of the right may therefore be seen as providing evidence of a desire not to encourage reception,"⁷⁶ while the requirement of prior notice renders quick and effective recovery of collateral almost impossible. Thus, the UK seems to have picked the worst of both worlds, for it overemphasizes the importance of prior-notice, which characterizes civilian jurisdictions, and suffers from the lack of clear standards, giving rise to the same criticism heard in the U.S. The UK is now part of the trend where instead of adding clarity to the standard, to ease the use of self-help remedies, the legislators take the view that it is easier to render it unusable.

C. Self-Help Repossession in Civilian Jurisdictions Today

Recent development in secured transactions law reform shows further steps in civil law countries where self-help repossession started being introduced. However, the "without breach of peace standard," which is the center of this article, is either removed or

75. Partial compliance is insufficient. *See Price v. Romilly* [1960] 1 WLR 1360 (QB) (Eng.).

76. BRIDGE, *supra* note 61, at 122.

modified. The question that follows is whether the fact that self-help repossession, as designed under Article 9, is stripped of its major features when incorporated into a civil law system turned it into a different legal device.

The question is worth addressing before moving into the analysis of the two selected civilian jurisdictions. Self-help repossession as a non-judicial enforcement mechanism developed in United States case law and was statutorily recognized under UCC Article 9. Its essential components under Article 9 are: (a) default, (b) taking of the property by the secured creditor without the assistance of a state official and without notice to the debtor and (c) observance of the “without breach of peace standard.”

The authors argue that in general, the defining element of self-help repossession is the absence of a state official in the enforcement (police, bailiff of the judiciary) and the secured creditor’s right to take possession of the collateral.⁷⁷ Therefore, the fact that in Romania, the secured creditor serves notice to the debtor before repossession as opposed to the approach in the US, does not mean that the device is less of a self-help mechanism. Rather, the notice requirement entails a consequence on the efficiency of the device. Hungary presents a unique experience as discussed later where not only should the creditor provide notice, but also must request the debtor to release possession of the collateral. The creditor must quit the procedure if the debtor refuses to surrender the collateral voluntarily. With this background, the coming sections analyze in detail how self-help repossession is enshrined in the laws of Hungary and Romania.

77. See Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 850 (1984). See also STĂNESCU, *supra* note 23, at 8. “Self-help is therefore a legally recognized extrajudicial alternative to traditional judicial remedies.” (emphasis in original) *Id.*

1. Hungary: Self-Help Repossession or Merely an Out of Court Enforcement Procedure?

The Hungarian Civil Code of 2013 (HUCC) generally bans self-help remedies though allowing exceptions which must be expressly provided for by law: “Unless otherwise provided for by law, the rights afforded in this Act may be enforced by way of judicial process.”⁷⁸ The prohibition of private justice in Hungary is affirmed by the criminal code, which criminalizes, among others, the use of force to enforce lawful or allegedly lawful pecuniary demands, except when the use or threat of use of force constitutes an authorized means of enforcement of claim.⁷⁹ It is within this context that whether self-help repossession is permitted under Hungarian law and under what conditions should be examined.

In Hungary, self-help repossession occurred in practice sometime before the enactment of the HUCC⁸⁰ despite the absence of regulation.⁸¹ The HUCC, which represents a major step forward in the evolution of the Hungarian secured transactions law, introduced an out-of-court enforcement procedure. Whether the new out-of-court procedure amounts to self-help repossession and whether it is as efficient are debatable issues.

78. See PTK., bk. I, § 1:6.

79. 2012. évi C. törvény a Büntető Törvénykönyvről (Act C of 2012 on the Criminal Code). Section 368 of the Hungarian Criminal Code, which is captioned “Private Justice,” provides as follows:

(1) A person who, by force or by threat of force, with the purpose of enforcing his lawful or allegedly lawful pecuniary demand, compels another person to do, not to do, or to endure something, is guilty of a felony punishable by imprisonment between one to five years. (2) The penalty shall be imprisonment between two to eight years if private justice is committed: *a*) by displaying a deadly weapon; *b*) by carrying a deadly weapon; *c*) in a gang; *d*) against a person incapable of self-defense. (3) Where the use of force or threat of force constitutes an authorized means of enforcement of a claim, it shall not be construed as private justice.

BTK., ch. XXXV, § 368.

80. Horváthová et al., *supra* note 55, at 3.

81. *Id.* at 3.

The relevant Hungarian version of out-of-court enforcement of security right has four essential defining features. These are: (a) default of the debtor (b) the creditor's right to request release of possession of the collateral for the purpose of disposition (c) notice (ten days for movable collateral and twenty days for immovable collateral) and (d) the debtor's duty to surrender the collateral and refrain from conduct that prevents the secured creditor from selling the collateral.⁸² These four essential features of the HUCC private enforcement of security interest raise several concerns regarding the possibility to conduct private enforcement successfully.

First, the procedure does not seem to be self-help repossession at all because it does not entitle the secured creditor to take possession of the collateral. It merely entitles the secured creditor to request the release of the possession of the collateral by the debtor, which was possible even in the absence of a specific provision to that effect. One may wonder what happens if the debtor refuses to comply with the request. Since Hungarian law prohibits the use of force or the threat to use force in view of enforcement, it seems reasonable to conclude that if the debtor refuses to surrender the collateral, the creditor has no other option than judicial enforcement. This

82. PTK., bk. V, ch. XXVII, § 5:132(1)-(3):

[Right of possession of the pledged property]

(1) Following the effective date of the right to satisfaction, the lien holder shall have the right to take possession of the pledged property for the purpose of sale, and, to this end, to call the lienor to release the pledged property into his possession by the time limit specified.

(2) For compliance with the request of possession a time limit justified by the circumstances shall be given, of at least ten days in the case of movable properties and at least twenty days for real estate properties. A residential property shall be surrendered fully vacated within a time limit of at least three months.

(3) Following the effective date of the right to satisfaction, upon the lien holder's request the lienor shall release the pledged property in his possession to the lien holder within the prescribed time limit for the purpose of sale, to permit the lien holder to take possession of the pledged property, and shall refrain from any conduct aimed at preventing the lien holder from carrying out the sale.

does not fit the definition of self-help repossession where the creditor is at least allowed to take the collateral without the consent of the debtor as long as it is done in a peaceful manner.

The second point is that the secured creditor has the right to request the release of the collateral *for disposition*. Considering that the enforcement right presupposes disposition, the fact that the relevant HUCC provision explicitly refers to “disposition” as the reason for which the creditor can request the release of the collateral implies that if the creditor is not able to dispose of the collateral immediately, there is no right to take the possession of the collateral.⁸³ The problem with this approach is that it is practically infeasible to make the request for taking the possession of the collateral conditional to the immediate sale of the collateral. The practical inconvenience of this provision stems from the fact that the market demand for the collateral might not be readily available and the creditor may not be certain as to whether he or she can dispose of the collateral.⁸⁴ Hence, either the creditor has to market the collateral while it is in the debtor’s possession and request the release of possession after locating a buyer or not exercise his or her right at all.

The third and overarching point regarding the HUCC private enforcement provision is whether the provision can be used to carry out extra-judicial enforcement and whether it is efficient. The HUCC imposes the duty on the creditor, to serve notice to the debtor before the repossession takes place. The notice is supposed to inform the debtor of the potential enforcement through repossession and give the debtor the chance to rectify the default, an approach similar to UK law. If the debtor does not rectify the default under the HUCC, the creditor can request the surrender of possession, which the debtor can either reject or comply with. Hence, whether the extra-judicial repossession is possible depends on the voluntary

83. See Tibor Tajti (Thaythy), *Security Rights & European Insolvency Regulation, Report for Central and Eastern Europe: Focus on Hungary, Lithuania and Poland* 48 (2016), <https://perma.cc/P2ZT-S7FH>.

84. *Id.*

surrender by the debtor of the collateral. Nevertheless, the assumption that a defaulting debtor would voluntarily surrender the collateral seems naïve. Even if the debtor is willing to do so, the creditor can repossess the collateral only if he or she is in the position, thus putting another hurdle on the possibility of repossessing the collateral.

Based on the preceding analysis it can be concluded that the HUCC extra-judicial enforcement is not self-help repossession. It is rather an out-of-court enforcement process that gives the creditor and the debtor the chance to avoid court proceedings, but denies the creditor any chance of conducting non-consensual repossession. Therefore, the “without breach of peace standard” that is supposed to tackle abusive practices is irrelevant to the HUCC provision governing out-of-court enforcement due to the way the procedure is defined. The authors argue that the HUCC makes self-help device impotent and compels the secured creditor to resort to judicial enforcement. Consequently, it is legitimate to conclude that the provision governing private enforcement of security interests in Hungary does not serve its intended purpose.

2. Romania: A Toned-Down Type of Self-Help Repossession?

When Romania decided to reform its secured transaction law in 1999, the proposed text was almost an identical translation of UCC Article 9.⁸⁵ Upon the debtor’s default, the secured party was entitled to “take possession of the collateral or its proceeds by peaceful means,” with “no notice . . . to the debtor before taking possession.”⁸⁶ However, the secured creditor had an obligation “not [to] breach the peace, use physical force or intimidation, or resort to any

85. The proposed law expressly mentioned U.C.C. section 9-503 (currently section 9-609) as a source of inspiration for article 36. *See* Tit. VI, ch. 3, art. 36 of Law 99/1999 on Measures for Accelerating Economic Reform published in the Official Gazette no. 236/27.05.1999, *repealed and replaced by* Tit. XI, C. Civ. published in the Official Gazette no. 505/15.07.2011, *available at* <https://perma.cc/3Y9U-DN6V>.

86. *Id.* at art. 36, para. 1.

other method designed to coerce the debtor at the time the secured party takes possession.”⁸⁷ Thus, one could notice several limits imposed on the creditor: a) limits related to public order, b) limits related to violence (whether physical or verbal), c) limits related to intimidation, and d) limits related to any other means of coercion. Together combined they represented a big difference from the American model, where the sole limit imposed by the law is the “without breach of peace.” It is inferred that by doing so, the Romanian legislator attempted “to classify, even if not clarify,”⁸⁸ the experience of the vast US case law, although, in the authors’ opinion, this contention has little support.

Following the approach of Article 9, the proposed law did not define “breach of peace,” although one may argue that the insertion of limits, like in Louisiana, had the purpose to ease somehow the task of practitioners. The drafters’ commentary, although emphasizing the importance of repossession in reducing time and costs of defaulted credit recovery, also left untackled the issue of “breach of peace.” It merely mentions that the legal provisions “aim at preserving a clear distinction between the peaceful means agreed to between creditor and debtor and the use of force requiring intervention of the state to ensure lawful application of force,”⁸⁹ an explanation hardly sufficient to clarify the practical issues posed by the novel remedy of self-help repossession in a civilian country. Moreover, if in the US, the lack of definition may be substituted by the ability of American courts to create law, whereas Romanian courts can only interpret it.⁹⁰

87. *Id.* at art. 36, paras. 1-2.

88. RADU RIZOIU, GARANȚILE REALE MOBILIARE: O ABORDARE FUNCȚIONALĂ—ANALIZA ECONOMICĂ A DREPTULUI GARANȚIILOR REALE—INTRODUCERE ÎN REGIMUL JURIDIC AL IPOTECILOR MOBILIARE 597 (2011).

89. For commentary on art. 36 of the proposed law, see Nuria de la Peña & Heywood Fleisig, *Romania: Draft Law on Security Interests in Personal Property and Commentaries* (Ctr. for the Economic Analysis of Law, 1999), <https://perma.cc/NH2C-NFHB>.

90. STĂNESCU, *supra* note 23, at 114 nn. 79-80.

Additional problems stemmed out of the translation of the proposed law. The legislators translated “breach of peace” as “*tulburarea ordinii publice*” which means “disturbance of public order.”⁹¹ As the literature emphasized:

[T]he peaceful character of repossession is closely related to non-disturbance of public order. In other words, the right of the creditor to repossess the collateral is strongly bound by the right of each citizen to live in a climate of social peace. The public interest prevails over the private one, for Romanian law protects mere possession, even in the absence of a title. Thus, the maintenance of the *status quo* regarding possession was more important when it came to preserving the public order.⁹²

The conclusion is that in Romania, the analysis of repossession cases was not to be regarded as “a conflict between two private interests (the creditor’s v. the debtor’s) but between a private interest versus a public one which means that the law was not defending a debtor’s right, but only social peace.”⁹³

However, leaving the concept of “breach of peace” undefined by the legislator was not the only problem. The peculiar translation adopted by the Romanian law also posed a great deal of practical issues since aiding standards or directions existed not as much in its civil law, but in its criminal law.⁹⁴ One thing is certain, due to the translation and the division of limits adopted by Law 99/1999, when Romanians and Americans discuss “breach of peace” they do not mean the same thing.⁹⁵

91. For the implementation of the proposed article 36, *see* art. 63(2) of Law 99/1999.

92. RIZOIU, *supra* note 88, at 593.

93. *Id.*

94. “*Tulburarea linistii publice apare intotdeauna atunci când sunt inculcate norme imperative din dreptul penal sau cel contravențional.*” (“Disturbance of public order appears always when mandatory rules of criminal or misdemeanors law are breached.”) Radu Rizoiu, *Garantie reala mobiliara. Executare prin mijloace pașnice. Intelesul noțiunii “in mod pașnic,”* 2 REVISTA ROMÂNĂ DE DREPT PRIVAT 6-8 (2008).

95. “[N]u putem sa confundam breach of peace cu încălcarea linistii publice.” RIZOIU, *supra* note 88, at 597.

Because criminal law deals with mandatory rules of behavior, any crime or misdemeanor occurring during self-help repossession would remove its peaceful character. In Romanian criminal law, the “disturbance of public order” has a double meaning: either producing a public scandal, or damaging moral standards. As a rule, public scandal means a serious breach of public peace. In the area of self-help repossession this would imply: a public scandal caused by the repossession of the collateral despite protests of third parties (such as neighbors or relatives of the debtors, or simply members of the community), acts which could not be circumscribed to violence or intimidation against the debtor himself, and which would never be sanctioned under the American definition of breach of peace. However, this result will affect the peaceful character of repossession only at the time of repossession and not afterwards. Thus, for example, in the case where the creditor peacefully repossessed a collateral consisting of a vehicle and afterwards, while driving the vehicle, committed a misdemeanor related to driving on public roads, the respective misdemeanor will not affect the peaceful character of the repossession.⁹⁶

Unfortunately, not even by referring to criminal law standards does the issue of defining “disturbance of public order” become easier. RizoIU showed that the concept differs from one normative act to the other⁹⁷ and generally has a very wide coverage. Thus, he attempted to adapt these concepts to the needs of secured transactions law, by stating that “disturbance of public order” is nothing more than an intentional tortious act and that any act that causes a disturbance of the public order must have a close tie to the collateral.⁹⁸ Either way, the tortious act must be sanctioned not only by compensating the loss of the debtor, but also by sanctioning the creditor in order to deter similar acts from being committed in the future or by

96. RizoIU, *supra* note 94, at 8.

97. For a thorough analysis of the concept throughout Romanian law, see RIZOIU, *supra* note 88, at 597-601.

98. *Id.* at 602-04.

other persons. This would explain the choice of the Romanian legislator to include, for the first time in history, severe civil penalties payable to the debtor.⁹⁹

A question which could be raised is the one concerning *abuse of rights*. Although the law gave the right to the secured party (and its agents) to take possession of the collateral upon the debtor's default, it is obvious that the said right may not be exercised outside its boundaries. The legal interdiction to "disturb the public order" was to set precisely the internal boundaries for self-help repossession. Thus, a secured creditor who resorts to self-help repossession must take all necessary precautions to avoid the "disturbance of public order."¹⁰⁰ According to the Romanian criminal law definition, the "disturbance of public order" is different from the "without breach of peace standard" as defined by American courts. Therefore, the Romanian court's task of finding a balance between the right of the secured creditor to take back the collateral (as fast and as cheap as possible), the rights of the society to public order, and the rights of non-parties to the security agreements to not be affected by any repossession attempts is seriously impaired.

By referring to "disturbance of public order" as a criminal law concept, it appears that under Romanian law the rights of the secured creditor stretched only until they conflicted with rights of third parties. This is a very different result than the approach of the U.S. courts where it was held in numerous cases that only directly affecting the debtor may be considered in order to impair self-help repossession.¹⁰¹ In the absence of relevant Romanian court cases, it is difficult to say whether the aforementioned theoretical conclusion is confirmed by practice, however, such absence cannot constitute proof to the contrary either.

99. Arts. 87-88 of Law 99/1999.

100. RIZOIU, *supra* note 88, at 594.

101. See STĂNESCU, *supra* note 23, at 122-23, especially the cases in nn. 123-24.

In 2011, Romania changed its Civil Code and, together with it, its secured transactions law. Law 99/1999 was repealed and most of its provisions were included in the New Civil Code (NCC). The provisions of articles 2429 to 2441 of NCC now govern self-help repossession. Concerning breach of peace, the NCC specifically mentions that the creditor is banned from disturbing public order and peace, and from resorting to any direct or indirect means of coercion, even if his or her acts would not qualify as criminal offenses.¹⁰² It was inferred that despite changes in the wording, the effects of the new law are entirely similar to the previous one.¹⁰³

However, a major change did occur. Unlike the Law 99/1999, the NCC imposed a requirement for the creditor to serve a prior notice, through a bailiff, of his or her intention to repossess to the debtor.¹⁰⁴ Although being in trend with most of the European reformed systems¹⁰⁵ or the suggestions of the DCFR,¹⁰⁶ the notice requirement undermines one of the main advantages of self-help repossession by removing the element of surprise.

Thus, Romanian law moved away from American law, which does not require any notice to the debtor regarding self-help repossession¹⁰⁷ and took a serious step back towards the over-protectionism of the debtor witnessed in the UK. According to American literature, the debtor was not to be informed of the creditor's actions and intentions regarding the collateral, after the debtor's default. The simple logic behind it was to enable the creditor to repossess the collateral fast and with avoidance of any physical deterioration or loss of market value. At the same time, the debtor was precluded from hiding or displacing the collateral, once informed of the upcoming repossession.

102. Art. 2440 (2), C. Civ.

103. RIZOIU, *supra* note 88, at 623.

104. Art. 2440 (1), C. Civ.

105. Tibor Tajti, *Post-1990 Secured Transaction Law Reforms in Central and Eastern Europe*, II SZEGEDI KÖZJEGYZŐI KÖZLÖNY 1, 8 (2013).

106. *See infra* section VIII. B.

107. GRANT GILMORE, 2 SECURITY INTERESTS IN PERSONAL PROPERTY 1213 (photo. reprt. 1999) (1965).

By introducing the requirement of prior notice, the Romanian legislator now gives the debtor the upper hand, for he or she is empowered to paralyze any repossession attempts through private means. In other words, it appears that the Romanian legislator did its best to limit to a maximum extent (even if not by specifically saying so) the usage of a self-help remedy. Given the code's silence with respect to the nature and content of the notice, the creditor may be able to serve it on the very same day of the repossession,¹⁰⁸ but it is undeniable that a resort to self-help repossession is currently seriously impaired in Romania. Despite this, Romania remains one of the few civilian systems that introduced and maintained the requirement of "without breach of peace" standard in relation to self-help repossession.

VII. SELF-HELP REPOSSESSION UNDER INTERNATIONAL LEGAL INSTRUMENTS

International legal instruments governing secured financing represent the attempt to accommodate common law and civil law traditions for the sake of promoting efficiency, predictability, and security in cross-border transactions, leading to the convergence of the two legal traditions. The negotiation of an international legal instrument governing cross-border commerce typically leads to an acceptable compromise between both legal traditions. The Cape Town Convention (CTC) and the Draft Common Frame of Reference (DCFR) will be reviewed in this section. While the CTC is an international worldwide legal instrument, the DCFR is a European one, intended to pave the way to a European Civil Code.

108. STĂNESCU, *supra* note 23, at 127.

A. Replacing the “Breach of Peace Standard” by Contractual Clause for Sui Generis Industry: The Cape Town Convention

The central objective of the CTC is to facilitate financing of high value mobile equipment by providing the legal framework for creation, registration, and enforcement of international interests recognized by signatory parties.¹⁰⁹ As of 2017, the CTC has 73 contracting parties from both civil law and common law countries.¹¹⁰ In the light of the multi-jurisdictional legal and political efforts put into designing the convention,¹¹¹ and the diversity of the membership to the convention, it is fair to say that it represents a major rapprochement of the civil and common law legal traditions.

The enforcement regime of the CTC is characterized by wide room for party autonomy.¹¹² Unless the member state in question has opted out, the secured creditor (chargee) can take possession of

109. See Convention on International Interests in Mobile Equipment, *opened for signature* Nov. 16, 2001, 2307 U.N.T.S. 285. The recitals state:

THE STATES PARTIES TO THIS CONVENTION, Aware of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner, Recognising the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them, Mindful of the need to ensure that interests in such equipment are recognised and protected universally, Desiring to provide broad and mutual economic benefits for all interested parties, Believing that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions, Conscious of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection, Taking into consideration the objectives and principles enunciated in existing Conventions relating to such equipment, Have agreed upon the following provisions

110. *Id.*, *Chart of signatures, ratifications and accessions*, UNIDROIT, available at <https://perma.cc/DRY3-4ZT4>.

111. Legal Advisory Panel to the Aviation Working Group, *Self-Instructional Materials: For Use by the Cape Town Convention Academic Project* (2014), <https://perma.cc/XF4C-GMQE>. In particular, see Introduction.

112. Anna Veneziano, *Security Interests Burdening Transport Vehicles – The Cape Town Convention and Its Implementation in National Law*, in Italian National Reports, International Congress of Comparative Law, Vienna 7 (2014), <https://perma.cc/ES2N-MMXE>.

the collateral upon the debtor's default.¹¹³ The remedy for the seller with retention of title or the lessor is slightly different unless those are recharacterized as security interests in the relevant domestic secured transactions law.¹¹⁴ As this article does not dwell upon the analysis of the slight differences in the remedies available to the chargee, and conditional seller (or lessor), it focuses solely on the self-help remedy, where it is available, and the conditions under which it is exercised.

Self-help repossession is possible under the convention and the Aircraft Protocol subject to the consent of the debtor.¹¹⁵ No specific formality is required to secure the consent of the debtor.¹¹⁶ The debtor's consent can be secured before or after default.¹¹⁷ However, the "without breach of peace" standard has not been imported by the CTC regime. Neither does it subject self-help repossession to prior notice. This is rather a unique approach to self-help repossession compared to Article 9 or the approach prevailing in civil law countries. It is different from Article 9 due to the lack of "without breach of peace" standard. It is different from the typical civil law approach, for instance, Louisiana and Romania because it does not require notice to be served to the debtor. The requirement of consent of the

113. *Id.* at 7. Article 8(1)(a) of the Cape Town Convention states the following:

(1) In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies: (a) take possession or control of any object charged to it

Convention on International Interests in Mobile Equipment, art. 8(1)(a), *opened for signature* Nov. 16, 2001, 2307 U.N.T.S. 285.

114. Article 10 deals with remedies available to conditional sellers and lessors. For further discussion, *see* ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT: OFFICIAL COMMENTARY 58-59 (3d ed., Int'l Inst. for the Unification of Private Law (UNIDROIT) 2013).

115. Art. 8(1) and the Aircraft Protocol Article XI (2) Alternative A Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, art. XI(2), Alternative A, *opened for signature* Nov. 16, 2001, 2367 U.N.T.S. 517.

116. GOODE, *supra* note 114, at 59.

117. *Id.*

debtor potentially undermines the efficiency, especially when the consent has not been secured before default.

Given that the convention along with the protocols target an industry of professionals with comparable bargaining position (e.g., airlines companies), the CTC's version of self-help repossession is easy to apply and probably sound from a policy perspective. While promoting its foundational policy (i.e., efficient enforcement of security rights), it also strikes the balance between the rights of the creditor, on the one hand, and the debtor's, on other hand, by subjecting repossession to prior consent of the debtor. The midway solution between Article 9 and the civil law approach adopted by the CTC and its protocol appears to be reasonable in its own context. To a large extent, this convention governs *sui generis* industries such as airlines and big technology companies. In these fields, it can safely be assumed that the parties have comparable bargaining powers and the likelihood of imposition of a standard contract clause subjecting one party to an abusive term is low. Hence, once the parties have agreed to self-help repossession in the security agreement or subsequently, the convention assumes that *ex post facto* judicial control is not necessary.

This solution is not fit for domestic secured transactions law because the dynamics involved are different. Domestic secured transactions law must address the risk of potential abuse on consumer-debtors. This is not to suggest that a business to business relationship is immune from the risk of abuse, but the concern is higher in business to consumer transactions. Moreover, in the industries targeted by the convention, for instance airlines, one can reasonably expect the parties to deal with enforcement issues in light of protecting their reputation. Hence, the possibility of self-help repossession to occur in practice is likely to be low. Domestic secured transactions enforcement, comparatively speaking, presumes frequent repossession in situations where, due to the diversity of the creditors and the debtors, an aggressive enforcement mechanism is inevitable, and the concomitant risks are higher. But the convention is another good

example of the reluctance in adopting the “breach of peace standard.”

The authors are aware that with the coming into force of the protocol governing security interests in high value agricultural, mining, and construction equipment, the same policy is likely to be maintained. With respect to smallholder agricultural financing, it is possible to make the argument that the farmers deserve better protection in cases of enforcement. Either way, the UNIDROIT self-help repossession mechanisms appear to be reasonable in its limited context.

B. The Draft Common Frame of Reference

Drafted and prepared by the elite of the European legal scholars and professionals, the DCFR was meant to be a model for a future European Civil Code, a project no longer on the political agenda. However, the importance and the magnitude of this document should not be underrated, for it provides a glimpse into the possible future of self-help repossession in Europe. The issue of default and enforcement of secured transactions in movable assets is addressed in Chapter 7 of Book IX, where the drafters stated from the outset that “in many European countries there is an increasing movement seeking an alternative to traditional methods of enforcing security rights because of its delays, costs and often disappointing results,”¹¹⁸ a statement which remained bold and revolutionary, but may not be supported by the legal provisions that followed.¹¹⁹

The DCFR places the entire burden on the creditor, overlooking not only his or her secured status, but also the fact that once default

118. STUDY GROUP ON A EUROPEAN CIVIL CODE & RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP), PRINCIPLES, DEFINITION AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) 5614 (Christian von Bar & Eric Clive eds, Oxford Univ. Press 2010) [hereinafter STUDY GROUP 2010].

119. On the failure of the DCFR to change the general European approach to self-help remedies, *see* STĂNESCU, *supra* note 23, at 42-47.

has occurred, he or she is also strategically the weaker party in relation to a defaulting debtor. First, the DCFR requires the creditor to serve a minimum 10 days prior notice to consumers whenever it intends to repossess the collateral,¹²⁰ which basically strips repossession of both the element of surprise and the leverage factor, since the debtor is granted enough time to preclude the creditor from reaching the collateral. Interestingly, the commentary addresses the issue of debtor's remedies against secured creditors who fail to send notice, but does not consider any remedy for the secured creditor who, because of proper notice, finds him or herself in the position of not being able to recover the collateral. The DCFR obviously fails to provide a balance between the interest of the creditors' expectation of fast and cheap recovery and those of the debtors' expectation for adequate consumer protection against abuse, a balance which lies at the core of UCC Article 9 when it comes to self-help repossession.

In fact, the DCFR bans self-help repossession in its entirety even though it does not state it openly.¹²¹ This unfortunate result is indirectly achieved by the provision which requires the secured creditor to obtain the consent of the debtor, *at the time* of repossession. Failure to obtain such a voluntary relinquishment of the collateral forces the secured creditor to stop any attempts and switch to the judicial remedies available. Thus, as if the notification requirement was not enough, under the provisions of the DCFR, the creditor does not benefit from the possibility given to U.S. creditors to avoid the lack

120. STUDY GROUP 2010, *supra* note 118, at 4701, bk. IX, ch. 7, § 1, art. IX.-7:107 ("Enforcement notice to consumer").

121. The commentary to article IX.-7:201 states as follows:

The dilemma for the secured creditor arises if, as happens frequently, the security provider who is in possession of the encumbered assets and who may need them urgently for the continuation of its production or sales or other commercial activity, refuses or attempts to delay the transfer of possession. This Article is designed to solve this dilemma. *Without saying so expressly, self-help by the secured creditor is clearly excluded* (emphasis added).

STUDY GROUP 2010, *supra* note 118, at 4707, bk. IX, ch. 7, § 2, subsec. 1, art. IX.-7:201 ("Creditor's right to possession of corporeal asset") cmt. C.

of debtor's consent by repossessing the collateral from public places or by avoiding the debtor's presence. In other words, if the debtor does not expressly consent to repossession, the creditor must always resort to judicial enforcement. This is an obvious contradiction of the aforementioned premise according to which, the DCFR recognized the need to provide secured creditors with speedy and efficient private enforcement alternatives.

The DCFR does not mention anywhere the requirement that the secured creditor must act in full compliance with the "without breaching the peace standard." However, a comment mentions the fact that "the rules of the Article¹²² proceed on the basis that the secured creditor may proceed against the holder of the encumbered assets only in a peaceful way. Therefore, the latter's present or a past consent is necessary."¹²³ The drafters understanding that repossession by peaceful means equals consent is extremely limitative, especially by comparison with the U.S. model, or even Romanian law, whose approach to what breach of peace means is broader than the one in the U.S. Like in the case of the UK or Hungary, the only answer to the DCFR's position was the desire of the drafters to limit to the largest extent possible the usage of self-help repossession and force the creditor to shift immediately to courts, where all enforcement procedures could be supervised by the judge.

VIII. JUDICIAL REPOSSESSION

The central idea behind addressing judicial repossession here is to determine whether there are efficient alternatives to self-help repossession to justify its mutations in the continental systems. Therefore, the following subsections investigate whether it is possible to judicially repossess the collateral in a swift and less costly manner and if so, what are the implications on the way self-help repossession is regulated?

122. STUDY GROUP 2010, *supra* note 118, at 4706, art. IX.-7:201.

123. *Id.* at 5632.

A. Judicial Repossession in the U.S. in General

In the U.S., when the secured party cannot, or does not, want to pursue self-help repossession, as an alternative, he or she can resort to repossession by judicial action.¹²⁴ Generally, Article 9 gives the secured creditor the right to take possession immediately upon default. Since the law protects the secured status of the creditor, he or she is entitled to take possession of the collateral without involvement of state or court agents, provided there is no breach of peace. This would generally save the secured creditor time, effort, and money. However, when the debtor resists self-help repossession or when the creditor does not want to pursue it,¹²⁵ the latter must resort to judicial measures and obtain a court order for the possession. The sheriff then enforces the order. Most states authorize the sheriff to use force to take possession,¹²⁶ a right the secured creditor making use of his or her self-help remedy does not have. The most common way of obtaining an order is by filing an action for replevin.¹²⁷

The mechanism might be familiar to civilian systems as well. The secured creditor files a civil action against the debtor and, immediately upon filing, he or she then moves for an order granting immediate temporary possession pending the outcome of the case. Typically, this does not take more than 10 to 20 days. In some U.S. states, the procedure is *ex parte* which means the debtor may not even be informed and the case is solved in a matter of hours.¹²⁸ In

124. JAMES J. WHITE & ROBERT S. SUMMERS, PRINCIPLES OF SECURED TRANSACTIONS 221 (2007).

125. The creditor might be reluctant in resorting to self-help repossession and may thereby wish to avoid the risks of being held liable for potential violations of the “without breach of peace” standard.

126. LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 42 (7th ed. 2012).

127. “By far the most common users of replevin today are secured creditors entitled to possession of collateral pursuant to UCC Section 9-609.” *Id.* at 41.

128. See *Del’s Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 603 F. Supp. 1071 (W.D. Wis. 1985), in which the secured creditor successfully filed an action for replevin without notice to the debtor and obtained a writ of replevin on the same day. Later that day, the secured creditor presented the writ to the debtor and demanded possession of the collateral under threat that it would return with the sheriff for enforcement. The debtor complied and surrendered possession of the

order to obtain the writ of replevin, all the creditor needs to establish at the hearing is the likeliness that the action will prevail on the merits.¹²⁹ Usually, the writ is conditioned by the posting of a bond in order to protect the debtor in case the creditor's case will be rejected. In theory, the debtor can regain possession of the collateral by posting a similar bond in favor of the creditor, but where the default is due to the debtor's inability to pay the likeliness that the debtor will be able to post such bond is low.

The distinguishing feature of this procedure is its swiftness. Once the writ is issued and the collateral is in the creditor's possession, the debtor has no reason to defend the action of replevin and judgment is entered by default.¹³⁰ As a result, a secured creditor obtains possession of collateral (provided it is a tangible good) through judicial procedure within two or three weeks, after which the creditor can foreclose the collateral by selling it in a commercially reasonable manner as per Article 9. What follows is that over-careful secured creditors can choose to resort directly to judicial repossession, for the procedure is not much lengthier than the self-help remedy and, provided the debtor's default is real, it poses fewer risks.¹³¹ It might explain, for instance, why self-help repossession maintains a limited attraction in Louisiana (being mostly used for repossession of vehicles): judicial repossessions are just as fast.

The main difference between judicial repossession and self-help repossession is the involvement of the judiciary, i.e., the court and

collateral. The federal case brought by the debtor alleging violation of the constitutional right to due process was dismissed. Nevertheless, states where no notice is required are the exception, not the rule, which means that generally the procedure will not be as fast as the one described here.

129. LOPUCKI & WARREN, *supra* note 126, at 41.

130. *Id.*

131. Courts generally hold that the duty to refrain from breach of the peace during repossession is nondelegable, which means that secured creditors who resort to professional repossessors cannot escape liability in case the latter engage in abusive practices. In other words, secured creditors cannot insulate themselves from the consequences of unlawful repossession by simply externalizing the service to a third party. *Id.* at 43.

the sheriff, which makes the procedure relatively longer and, potentially, more expensive. Judicial repossession is safer for the creditor because he or she avoids the likelihood of being sanctioned for violating the “without breach of peace” standard. Nonetheless, compared to ordinary judicial enforcement procedure, judicial repossession is cheaper and quicker and hence more efficient. Therefore, it is an attractive remedy for the secured creditor.

B. Judicial Repossession in Louisiana

In Louisiana, the secured creditor can judicially repossess the collateral. In other states in the U.S., judicial repossession is exercised mostly through an action for replevin. In Louisiana, it is exercised through executory process under the Code of Civil Procedure: “Executory process begins with the filing of a special kind of lawsuit where there is no citation and no service of process on the debtor.”¹³² Similarly to replevin, after the hearing of petition for executory process, the court can order the seizure and sale by the sheriff of the collateral.¹³³

Executory process is faster compared to the ordinary process because under the former, the collateral after being repossessed by the sheriff can be sold without judicial appraisal provided that waiver of judicial appraisal has been agreed upon in the security agreement¹³⁴

132. Michael H. Rubin & Jamie D. Seymour, *Deficiency Judgements: A Louisiana Overview*, 69 LA. L. REV. 783, 794 (2009). Article 2631 of the Louisiana Code of Civil Procedure states that executory proceedings are “those which are used to affect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law.” LA. CODE CIV. PROC. ANN. art. 2631.

133. Article 2638 of the Louisiana Code of Civil Procedure provides that “[i]f the plaintiff is entitled thereto, the court shall order the issuance of a writ of seizure and sale commanding the sheriff to seize and sell the property affected by the mortgage or privilege, as prayed for and according to law.” LA. CODE CIV. PROC. ANN. art. 2638.

134. Article 2723 of the Louisiana Code of Civil Procedure states that: Prior to the sale, the property seized must be appraised in accordance with law, unless appraisal has been waived in the act evidencing the mortgage, the security agreement, or the document creating the privilege and plaintiff has prayed that the property be sold without appraisal, and

and the secured creditor loses its right to deficiency judgement.¹³⁵ In order to prove his or her right to the executory process, the creditor must submit the petition along with statutorily required documents, including, an authentic evidence of the security agreement,¹³⁶ and a judgement confession.¹³⁷ Because the virtue of executory process lies in the fact that it is fast and less expensive, the Civil Procedure Code of Louisiana gives the debtor limited defenses,¹³⁸ giving the secured creditor the benefit of enforcing its claim without delay, “[t]hree days, exclusive of holidays, after having served the notice of seizure, the sheriff may proceed to have the property appraised and advertisements of the sale published.”¹³⁹

The current form of enforcement of security rights in Louisiana is the result of deliberate and cautious process of weighing various

the order directing the issuance of the writ of seizure and sale has directed that the property be sold as prayed for. There is no requirement that seized property subject to a security interest under Chapter 9 of the Louisiana Commercial Laws (R.S. 10:9–101, et seq.), be appraised prior to the judicial sale thereof.

LA. CODE CIV. PROC. ANN. art. 2723.

135. Rubin & Seymour, *supra* note 132, at 796-97.

136. See LA. CODE CIV. PROC. ANN. art. 2635(A), which states the following:

In order for a plaintiff to prove his right to use executory process to enforce the mortgage, security agreement, or privilege, it is necessary only for the plaintiff to submit with his petition authentic evidence of: (1) The note, bond, or other instrument evidencing the obligation secured by the mortgage, security agreement, or privilege. (2) The authentic act of mortgage or privilege on immovable property importing a confession of judgment. (3) The act of mortgage or privilege on movable property importing a confession of judgment whether by authentic act or by private signature duly acknowledged.

137. John Pierre & M.R. Franks, *The Consequence of Default to the Debtor Under Part 5, Chapter 9 of the Louisiana Commercial Laws: A Primer on Debtor's Rights*, 18 S.U. L. REV. 21 (1991). See also LA. CODE CIV. PROC. ANN. art. 2632: “An act evidencing a mortgage or privilege imports a confession of judgment when the obligor therein acknowledges the obligation secured thereby, whether then existing or to arise thereafter, and confesses judgment thereon if the obligation is not paid at maturity.”

138. Louisiana Code of Civil Procedure article 2642 limits the defenses available to the debtor to (1) an injunction against the seizure and sale and (2) a suspensive appeal of the order of seizure and sale. LA. CODE CIV. PROC. ANN. art. 2642. Louisiana Code of Civil Procedure article 2751 further limits the grounds for granting an injunction to claims that (1) the debt is extinguished, (2) the debt is unenforceable, or (3) the incorrect procedure was followed. LA. CODE CIV. PROC. ANN. art. 2751.

139. George C. Herget, Comment, *Execution Sales*, 21 LA. L. REV. 235 (1960).

interests. To ensure efficient enforcement of security rights and despite the availability of judicial repossession under the executory process, Louisiana permitted self-help repossession while delimiting its contours substantially to accommodate it within its civil law tradition. Furthermore, despite the narrow scope of self-help repossession, Louisiana still subjects self-help repossession to the “breach of peace standard” partially defined by statute and subject to further *ex post facto* judicial control. This shows that self-help repossession and judicial repossession cannot replace one another, but rather complement each other. The presence of efficient judicial repossession cannot imply that the regulation of self-help repossession should be disregarded or that some of its essential elements should be taken lightly.

Is this procedure utilized in continental jurisdictions? If so, does that have an implication on the way self-help repossession is regulated? While the presence of an efficient judicial enforcement procedure, alternative to self-help repossession, can make the latter less indispensable, it is not clear to what extent it affects the conditions under which self-help repossession can be exercised.

C. United Kingdom: Return Orders, Transfer Orders, and Writs of Delivery

Generally in English law, in case of default, the secured creditor is entitled to seizure of collateral by resorting to self-help remedies (recaption).¹⁴⁰ Self-help remedies are favored, where available, for they are fast, they avoid legal costs, and can bypass procedural and substantive law obstacles to a judicial remedy. Matters are somewhat complicated in English law due to the distinction between legal and equitable security interests. Yet once the right to take possession due to the debtor’s default was expressly reserved in the security

140. ROY GOODE, *GOODE ON COMMERCIAL LAW* 121 (5th ed., Ewan McKendrick ed. 2016).

instrument, it can be exercised regardless of the nature of the security interest.¹⁴¹ A secured creditor can seize goods without an order of the court, provided there is no breach of peace and there are no statutory restrictions.¹⁴² For instance, there can be no repossession of a good covered by a regulated agreement within the CCA meaning, without a fourteen-day notice to the debtor,¹⁴³ and court orders are required in case the creditor must enter the premises of a debtor to repossess goods from the consumer-debtor.¹⁴⁴

Judicial repossession can occur by order of the court, either directly for possession or for the appointment of a receiver, who will have the power to take possession. Furthermore, the CCA provides that, in an action brought by the creditor to recover possession of goods to which the agreement relates, the court may either make an order (a return order) for the return to the creditor of goods to which the agreement relates, or make an order (a transfer order) for the transfer to the debtor of the creditor's title to certain goods to which the agreement relates (the transferred goods), and return to the creditor of the remained of the goods (a return order).¹⁴⁵

Return or transfer orders have limited power, for they do not allow recovery agents to enter the premises of the debtor to recover possession of collateral, and do not entitle the holder to seek the assistance of police officers in the process. This is problematic because the law states that if the debtor fails to comply with the return or transfer order, the goods to which the order relates but were not returned, the creditor must submit another application to the court. As a result of this subsequent judicial action, the court may revoke the part of the order that referred to the non-returned goods and order

141. *Id.* at 707-08.

142. BEALE ET AL., *supra* note 64, at 623.

143. Consumer Credit Act 1974, c. 39, § 88 (UK), available at <https://perma.cc/4VE6-HWJ5>.

144. JUDITH TILLSON, CONSUMER AND COMMERCIAL LAW 196 (2011). See also Consumer Credit Act 1974, c. 39, §§ 90, 92 (UK), available at <https://perma.cc/UJU8-96H5> and <https://perma.cc/9LX6-HT8Y>, respectively.

145. Consumer Credit Act 1974, c. 39, § 133(1)(b) (UK), available at <https://perma.cc/M9TL-UPNZ>.

the debtor to pay the creditor the unpaid portion of so much of the total price as is referable to those goods.¹⁴⁶

The possible effect is staggering, for the (quasi-)secured creditor faces the risk to return to the initial situation, where the default of the debtor deprived him of both the payments and the collateral. This possibility undermines the very idea of secured status. Later on, the CCA states that refusal to deliver the goods at the request of the creditor may be deemed to be adverse to the creditor and entitles the secured creditor to bring a claim for damages in conversion. However, this does not solve the main issue of non-payment, delays, or even impossibility to recover the collateral, for it does not empower the creditor or his/her agents to enter the premises of the debtor to take possession.¹⁴⁷

Hence, when the goods whereabouts are known and the debtor did not comply with the return order, the creditor is entitled to apply for a writ of delivery. The procedure requires the creditor to pay an additional fee, but once obtained, the writ of delivery allows the creditor's agent to access (on sight of goods) any lock-up, land, or garage (provided it is not attached to a dwelling house) and may use reasonable force in order to seize the goods.¹⁴⁸ At the same time, a writ of delivery also entitles the holder to ask for the assistance of police officers in the process. They will ensure there is no breach of the peace whilst the goods are recovered. The writ takes about 10 days to obtain and is valid for a year after, which emphasizes the risk that within the 10 days period the debtor can move the goods to another location and hinder repossession efforts.¹⁴⁹

Unlike the U.S. where judicial repossession is almost as fast as the self-help remedy, in the UK, judicial action poses an entire series

146. *Id.* at § 133(7).

147. On the issue of delays and hardships faced by creditors as well as on the alternatives available to them, see *Insights: Return of Goods Orders - Understanding Your Enforcement Options*, OPTIMA LEGAL, June 2015, <https://perma.cc/VZQ8-979V> (last visited June 16, 2017).

148. *Id.*

149. *Id.*

of risks to the secured creditor, requires significant amount of time, additional costs and does not appear to be a viable alternative to self-help remedies (where they exist).

D. Hungary: Judicial Enforcement Only

In Hungary, the secured creditor has the option to enforce its security right through judicial or non-judicial means.¹⁵⁰ However, the HUCC does not contain any special rules regarding judicial repossession. Judicial enforcement in general is governed by various statutes the most important ones being the Civil Procedure Code¹⁵¹ and the Act LIII 1994 (Judicial Enforcement Act).¹⁵² The closer examination of the application of judicial enforcement rules in Hungary does not suggest that secured creditors have efficient enforcement mechanism alternatives to self-help repossession that can render the latter inessential. When non-judicial enforcement under the HUCC fails, the secured creditor switches to ordinary judicial enforcement process, which is lengthy and costly.¹⁵³

According to a report prepared by a practitioner in the year 2017, judicial enforcement of a security right takes between several months to a year from petitioning for trial to final distribution of proceeds of sale depending on the complexity of the case and various defenses pleaded by the debtor.¹⁵⁴ In a nutshell, in Hungary,

150. Section 5:126(3) of the Hungarian Civil Code of 2013 states that “The lien holder shall have the option to exercise his right to satisfaction either by way of judicial enforcement or by means other than by judicial enforcement.” PTK., bk. V, tit. VII, ch. XXVII, § 5:126(3).

151. 1952. évi III. törvény a Polgári perrendtartásról (Act III of 1952 on the Code of Civil Procedure).

152. 1994. évi LIII. törvény a bírósági végrehajtásról (Act LIII of 1994 on Judicial Enforcement).

153. See EULER HERMES, *Collection Profile: Hungary 5* (2016), available at <https://perma.cc/Z53N-RP6T>. This report states:

Commencing ordinary legal action in Hungary is not advisable and amicable settlement opportunities should always be considered as a major alternative to court proceedings. Indeed, the Hungarian judiciary system is overall excessively formal and costly, whilst the courts have difficulties coping with the caseload because they are often ill-equipped and there is a lack of trained staff.

154. *Id.*

there is no judicial repossession procedure comparable to replevin or executory process. Consequently, secured creditors in Hungary do not reap the privilege offered by security interest, i.e., cheaper and speedier enforcement of their claim against the collateral. Due to the vigorous conditions under which private enforcement must be exercised that effectively forces the secured creditor to resort to ordinary judicial process, the advantageous position of the secured creditor is undermined by the system, which potentially leads to an increase in the cost of credit.

E. Judicial Repossession in Romania

The Romanian secured transactions law also establishes the right of the creditor to take possession of collateral by private means or with the aid of a bailiff.¹⁵⁵ Like the U.S. creditor, the Romanian one enjoys the right to choose any of the options and he or she is not obliged to resort to self-help before employing judicial repossession.¹⁵⁶ The judicial repossession is simple, for there is no court involvement. In fact, the secured creditor can address the bailiff directly. The only requirement is to attach to the enforcement request a copy of the security agreement, a description of the collateral, and where the case may be, a certified copy of the filing with the electronic archive. At the request of the bailiff,¹⁵⁷ police officers must provide assistance in recovery of the collateral.¹⁵⁸ Within 48 hours of the creditor's request, the bailiff must go to the location of the collateral,¹⁵⁹ take possession, and hand it over immediately to the

155. Art. 2439, C. Civ.

156. Art. 181 of Law 71/2011 for the Implementation of Law 287/2009 regarding the Civil Code.

157. Article 649 of the New Code for Civil Procedure ("NCCP") details the concrete ways in which agents of public force assist in prompt and effective enforcement.

158. Art. 2442(2)-(3), C. Civ.

159. This article presumes that the location of the collateral is known to the enforcement officer, for the obligation to identify it is his or hers and not the creditor's. In cases where the location is not yet known, the 48-hour term is calculated from the moment when the enforcement officer has knowledge of the collateral's location.

creditor. An enforcement minute must be drawn up immediately in two original copies, one for the bailiff's file and one to be communicated to the debtor.¹⁶⁰ All expenses generated by the repossession effort, as well as transportation, deposit risks, and costs are advanced by the creditor.¹⁶¹ In cases where the use of force is required for taking possession of the collateral, the bailiff is obliged to return on the same day with police officers in order to perform the repossession.¹⁶² No court order or any other administrative act is required thereof.¹⁶³ However, like self-help repossession, judicial repossession may trigger the liability of the secured creditor in case of a breach of provisions concerning repossession.¹⁶⁴

The aforementioned provisions seem to indicate that the bailiff is not entitled to resort to the use of public force immediately, but must try first to obtain possession peacefully and without police assistance. Only where the use of force is necessary, he or she is required to return during the same day with police officers to take possession of collateral. Based on the above, it is safe to conclude that like in the U.S., judicial repossession constitutes a viable alternative to self-help repossession, although we lack hard evidence to substantiate this theoretical assessment. On paper, it is a fast, *ex parte* procedure, which does not require any court involvement. The only potential issues are the expenses which must be advanced by the creditor and the lack of knowledge concerning the collateral's location, which may result in prolongation of the procedure. Finally, whereas U.S. creditors who wish to avoid any potential liability arising from the repossession choose judicial repossession, in Romania,

160. Communication is done in accordance to the provisions of the NCCP. See COLECTIV, NOUL COD CIVIL. COMENTARIIL, DOCTRINĂ ȘI JURISPRUDENȚĂ § 3, 855 (2012).

161. The creditor will recover the expenses generated by judicial repossession from the debtor by using the general provisions of the NCCP.

162. According to article 2474 of the NCC, failure to return on the same day may result in liability for the secured creditor for any damages caused. See COLECTIV, *supra* note 160, at 856.

163. Art. 2443, C. Civ.

164. Arts. 2474, C. Civ. *et seq.*

creditors who resort to judicial repossession do not insulate the secured creditor from the dire consequences of wrongful repossession.

IX. CONCLUSION

This article shows that self-help repossession in civilian systems is tainted by internal self-contradictions, with serious implications on the success of out-of-court enforcement of security rights. This has negative consequences on the possibility of an aggrieved secured creditor to benefit from a swift and least costly recovery of his or her claim, thus affecting the very rationale behind security interests and secured transactions law reform.

One of the essential elements of self-help repossession under Article 9 is the “breach of peace standard,” which is intended to protect debtors from abuses that can occur during self-help repossession. Despite its utility, the standard is difficult to determine in many circumstances, which appears to be the reason continental countries are reluctant to embrace it in their secured transactions laws. Instead of improving the standard, national laws, including in the UK, and international instruments are prone to amend the self-help remedy, by creating their own “mutated” forms, or remove it altogether.

This article argues that serving prior notice contradicts the very essence of self-help repossession, thus putting the entire out-of-court enforcement system under a question mark. Removing or impeding out-of-court enforcement by curtailing its features that are distinctively necessary for efficient and speedy recovery of the secured creditor’s claims increases the cost of enforcement, which ultimately increases the cost of credit and undermines the underlying reasons of secured transactions law reforms.

Implementing self-help repossession requires weighing various competing interests. The guiding principles in this regard should be striking the balance between efficient enforcement of security rights and protecting vulnerable debtors from concomitant risks. Article 9 offers efficient enforcement of security rights both through its self-

help repossession provision and judicial repossession that is exercised under common law. Louisiana accepted Article 9 with substantial modifications because it had a swift and efficient judicial repossession in place. Romania carved self-help repossession probably because it implemented an effective judicial repossession as well, while the UK and Hungary desperately need a self-help device because their judicial enforcement procedures are long, complex, and costly.

The authors contend that those legal systems that took the initiative to implement a secured transactions regime based on Article 9 should maintain out-of-court enforcement, in general, and self-help repossession, in particular, but also parallel them with tailor-made protective measures for debtors against any sort of abuse that may be inflicted upon consumer-debtors. Thus, instead of fearing the unknown—the “without breach of peace” standard—these states should learn from the experience of the U.S. and reform the standard to increase its practicability and predictability as well as provide the courts with clear standards of assessment.

While the anxiety in bringing the relatively new concept of self-help repossession is understandable, it is not reasonable to implement a legal institution that wishes to introduce the benefits of an efficient enforcement system, which at the same time negates its purpose by placing unnecessary conditions on its practical implementation. We argue that the Hungarian secured transactions law represents a good example of a legal regime that fails to address the dilemma, while the experience of Romania shows a cautious approach to balancing various interests.

