

Secured Transactions Law Reform in Europe

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I. Secured transactions reform in European Union law

1. EU competence for secured transactions reform:

- Art. 114 Lisbon Treaty: Adoption of measures necessary for the establishment and functioning of the European internal market
- ECJ: No general power to regulate the internal market. Mere differences between national laws as such do no justify the harmonisation of law
- Art. 352 Lisbon Treaty allows other measures by unanimous action by the Council

EU instruments on the harmonization of secured transactions law must be suitable for common law and civil law jurisdictions

2. Late Payments Directive (2000/2011) and the Insolvency Regulation (2000/2015):

Recognition of the retention of ownership

- Retention of ownership recognized as such,
- but requirements for validity to be determined under applicable national law

3. Financial Collateral Directive (2002):

Flexibility and lack of formal requirements for security over financial assets

- functional approach: no distinction between title transfer security and security rights
- security over financial assets to be perfected by control
- secured creditor may dispose over financial collateral before default
- appropriation as method of enforcement of financial collateral

I. Secured transactions reform in European Union law (contd.)

4. Book IX on Proprietary Security in Movables of the 2008 European Draft Common Frame of Reference (DCFR)

- about the DCFR:

- DCFR: format of a codification, covering most areas of a Civil Code
- Book IX: regime for proprietary security in movable assets
- originally an academic project, later mandated by the EU Commission

- Secured Transactions Regime under Book IX of the DCFR:

- covering intangibles and tangible movable property
- general system of publicity by registration (notice filing)
- promoting self-help and out-of-court remedies in enforcement, incl. appropriation
- non-unitary approach towards retention of ownership (seller under conditional sale/lessor remains owner)

- current status:

- DCFR incl. Book IX not likely to be adopted as EU Regulation or Directive in the near future
- Possible use as toolbox for European legislator
- Soft law status as pan-European academic text
- common point of reference/inspiration for autonomous law reform on national level

II. Secured transactions reform in Europe on national level: Belgium and Germany as examples

1. Belgium: Secured transactions law reform inspired, amongst others, by DCFR Book IX:

- pre-reform: Napoleonic tradition
- 2013 reform:
 - introduction of a general system of publicity by registration
 - traditional distinction between pledge/lien and retention of ownership maintained

2. Germany: Flexible legal system in unreformed stage – reluctance towards clear codification of priority rules and publicity requirements

- some characteristics of present German secured transactions law:
 - no general requirement of publicity (especially for security transfer of ownership)
 - secured creditor may use and dispose over collateral (irregular pledge)
 - retention of ownership clauses can be extended to proceeds/products or other claims
- attitude towards secured transactions law reform in Germany:
 - Lack of support for general requirement of publicity (efficiency concerns)
 - Reluctance towards codification of judge-made law concerning priority of retention of ownership
 - Supportive towards Cape Town Convention system