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“Security interests burdening transport vehicles – The Cape Town Convention and its implementation in national law”

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1. Introductory remarks

The topic of the present national report is somewhat different than an analysis of domestic law for the purpose of a comparison with other legal systems. It concerns the (possible) impact of uniform law developed by an inter-governmental organization, the International Institute for the Unification of Private Law (UNIDROIT),¹ in the field of asset-based financing: the Cape Town Convention on International Interests on Mobile Equipment² and the Protocols thereto (relating to aircraft³, railway-rolling stock⁴ and space assets⁵).

The high practical interest of the topic cannot be underestimated, being the Convention and the Aircraft Protocol among the most successful commercial law treaties so far in terms of ratifications⁶ and volume of transactions⁷. On a more theoretical level, the Convention introduces a uniform regime in the field of secured transactions, well-known for its complexity and for the difference in the approaches developed in domestic laws.⁸ On the other hand, secured transactions have recently been the object of numerous efforts towards harmonization, globally⁹ as well as regionally¹⁰. Such efforts moved from the assumption that a wider use of cross-border asset-based financing would be beneficial but is hampered by the interplay between the conflict-of-law regime generally applicable to proprietary rights and the existing divergences in the national legal systems.

Italy has signed the Convention as well as the Aircraft and Rail Protocols, but has not (yet) ratified them.¹¹ In the case of a non-Party jurisdiction, the questionnaire prepared by the General Reporter S. Kozuka invited to compare the current domestic law with the Cape Town Convention and consider the implications of its possible future introduction in the national legal system.

¹ UNIDROIT instruments have already been the focus of an earlier session of the International Academy work, see the General Report by H. KRONKE, *Financial Leasing and its Unification by UNIDROIT, Uniform Law Review*, 2001, 23 et seq.

² Convention on International Interests in Mobile Equipment, 2001, at http://www.unidroit.org/instruments/security_interests/cape-town-convention.

³ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 2001, at http://www.unidroit.org/instruments/security_interests/aircraft-protocol.

⁴ Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, 2007, at http://www.unidroit.org/instruments/security_interests/rail-protocol.

⁵ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, 2012, at http://www.unidroit.org/instruments/security_interests/space-protocol.

⁶ Until now 60 States ratified or otherwise accessed to the Convention, while 54 States adhered to the Aircraft Protocol (which is the only one that entered into force at the time being). This is a staggering number in view of the recent adoption of the Convention and Aircraft Protocol (2001) and is steadily increasing every year. The European Union has also accessed to the Convention and the Aircraft Protocol, thus permitting ratification by Member States.

⁷ The International Registry, operated by Aviareto, a private company, by appointment and under the supervision of the International Civil Aviation Organisation (ICAO), has received more than 400,000 entries since 2006 (67,623 as the 2012 estimate). The number of entries is expected to rise considerably after the ratification by Canada and the UK.

⁸ See for all H.BEALE, M.BRIDGE, L.GULLIFER, E. LOMNICKA, *The Law of Security and Title-Based Financing*, II ed., 2012; U. DROBNIG, Ch. 43, *Security Rights in Movables*, in A.S. Hartkamp, M.W. Hesselink et al. (eds.), *Towards a European Civil Code*, 4th ed., 2010; E.-M. KIENINGER (ed.), *Security Rights in Movable Property in European Private Law*, OUP, 2009.

⁹ Apart from the Cape Town Convention developed by UNIDROIT, recent years have seen the publication in 2010 of a *Legislative Guide on Secured Transactions* by the UN Commission on International Trade Law UNCITRAL (a soft-law product with the aim of opening the way to domestic law reforms), as well as other specific instruments dealing with security rights in the capital markets (2006 *Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*; 2009 UNIDROIT (Geneva) *Convention on Substantive Rules for Intermediated Securities*). See for all R. GOODE, H. KRONKE, E. MCKENDRICK, *Transnational Commercial Law*, OUP, 2007, 433 et seq.

¹⁰ One of the most interesting achievements in this respect was the 1994 European Bank for Reconstruction and Development (EBRD) *Model Law on Secured Transactions*, aimed at facilitating the transition to capital market economies and the introduction of efficient systems of security rights over movables in Central and Eastern European countries. Other regional bodies have recently developed model laws in this field: as an example see 2002 OAS *Model Inter-American Law on Secured Transactions*. Finally, while the European Union has limited its legislative intervention to the financial markets with the *Financial Collateral Directive*, an entire book of the Draft Common Frame of Reference project was dedicated to *Proprietary security in movable assets* (Book IX, in Ch. Von BAR, E. CLIVE (Eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Vol. 6, 5389 et seq.).

¹¹ Italy is among the ten States that have adhered to the 1988 UNIDROIT *Convention on International Financial Leasing* (Ottawa Convention), which represented a – very limited – first step in the direction of cross-border recognition of leasing on equipment and as such, opened the path to the work on the future Cape Town Convention (see above, fn. 1).

Such analysis will be conducted against the backdrop of Italian general secured transactions law, the main features of which will be briefly summarized at the outset, focusing on the regime of security devices that can be effectively created over the kind of equipment asset covered by the Convention.¹² Specific key aspects of the Cape Town Convention will be then compared with Italian law. For the purposes of this report, again referring to the scope of application of the Cape Town Convention, the term “security device” will encompass a traditional security agreement (pledge or mortgage), a title reservation agreement, as well as a leasing agreement (Art. 2 (2) Conv.).

By way of conclusion, the compatibility of the main architecture of the Cape Town Convention with principles and rules underlying current Italian general secured transactions law will be assessed.¹³

2. Brief outline of current Italian secured transactions law as applicable to the financing of mobile equipment

Generally speaking, the current Italian legal regime of secured transactions is far from being satisfactory.¹⁴

This is particularly true with respect to traditional security devices on tangible goods. Using the value of tangible goods for financing purposes is difficult for an enterprise due to the lack of efficient instruments allowing the collateralization of assets that cannot be handed over to the creditor. At the same time, this area of Italian law is confused, as a number of particularized exceptions to the principle of equal treatment of creditors¹⁵ have been introduced overtime through specific legislation without a coherent rethinking of the whole system, and to such an extent that the generality of the principle itself can be questioned.¹⁶

The 1942 *Codice civile* in principle allows only for possessory pledges where tangible assets are concerned (*pegno con spossessamento*).¹⁷ There is no general consensual non-possessory security right on specific assets held for use, or to be resold. Except for a very limited number of chattel mortgages (see below, 3), the only way to collateralize equipment which is held by the debtor would be the granting of the special “non- possessory lien” in favor of *banks* only, regulated in Art. 46 of the 1993 Banking Law (*privilegio ex Art. 46*, hereinafter “Art. 46 Bank Charge”) to secure medium- to long-term financing to enterprises.¹⁸ Art. 46 Bank Charge replaced a whole plethora of different preexisting “consensual liens” (*privilegi consensuali*), and is more accurately described as a “charge”, being the result of an agreement between the parties, connected to a loan, and needing registration to be opposable to third parties. As it will be seen in more detail below, however, the uncertainties regarding the priority against

¹² Security rights over movables and immovables were the topic of an earlier Italian national report to the International Academy: cf. M. BUSSANI, *Le présent et l'avenir des sûretés réelles*, Rapports nationaux italien/Italian National Reports, XVI International Congress of Comparative Law, Brisbane 2002, Milano, 2002, 245 et seq.

¹³ A note with respect to existing international Conventions relating to aircrafts: Italy is a party to both the 1933 *Rome Convention on the precautionary arrest of aircrafts* and the 1948 *Geneva Convention on the recognition of rights in aircrafts*. According to Arts. XXIV (1) and XXIII of the Aircraft Protocol, the Cape Town Convention prevails over both instruments (a derogation to Art. XXIV (1) would be possible by declaration of the State ratifying the Protocol, but does not appear to be advisable in the light of the limited international recognition of the Rome Convention and its obsolete regulation as regards modern developments of air services and the present needs of aircraft financing).

¹⁴ The complexity and, at the same time, insufficiency of Italian secured transactions law to meet the needs of present-day economy has been repeatedly denounced by Italian scholars, see among others (in English and French): G. TUCCI, *Towards a Transnational Commercial Law for Secured Transactions: the Preliminary Draft UNIDROIT Convention and Italian Law*, Uniform Law Review, 1999, 371 et seq.; G. FERRARINI, *Changes to personal property security law in Italy: a comparative and functional approach*, in R. Cranston (ed.), *Making Commercial Law. Essays in Honour of R.M. Goode*, 1997, 477 et seq.; M. BUSSANI, *Rapport italien*, Travaux de l'Association Henri Capitant, Vol. XLVII, 1998, 213 et seq.; A. VENEZIANO, *Italy*, in H.C. Sigman, E.-M. Kieninger, *Cross-Border Security over Tangibles*, Sellier, 2007, 159 et seq.; *Italian Report* by M. GRAZIADEI, Alb. CANDIAN, in E.-M. KIENINGER (ed.), cit. fn 8.

¹⁵ Art. 2740 (1) *Codice civile*.

¹⁶ See G. TUCCI, voce *Garanzia*, in *Digesto IV, Discipline privatistiche, sez.civ.*, VII, Torino, 1991, 579 et seq.

¹⁷ On the pledge in Italian law and its recent developments see among others E. GABRIELLI, *I diritti reali*, 5, *Il pegno*, Trattato di diritto civile diretto da R. Sacco, Torino, 2005; F. MASTROPAOLO, P. DE VECCHIS, E.M. MASTROPAOLO, in F. Mastropaolo (ed.), *I contratti di garanzia*, 1, Trattato dei contratti diretto da P. Rescigno e E. Gabrielli, Torino, 2006, 1192 et seq.; most recently F. FIORENTINI, *Il pegno*, in A. Gambaro, U. Morello, *Trattato dei diritti reali*, Vol. V, *Diritti reali di garanzia*, Milano, 2014, 1 et seq. (with a comparative introduction).

¹⁸ See among others E. GABRIELLI, *Delle garanzie rotative*, Napoli, 1998.

other security rights as well as the limited effectiveness of the enforcing procedures have rendered its use unattractive in practice.

Italian law does recognize some title-based devices in the context of acquisition finance, in particular retention of title and financial lease. They are usually not classified as security rights but as ownership vested in the vendor/lessor. Two important consequences ensue: first of all, the requirements of effectiveness are wholly different than in the case of traditional security devices. Secondly, vendor and lessor do not have to compete with other creditors.

As far as retention of title under a sales contract is concerned, it will be seen that its statutory rules make it impractical to use on a large scale in commercial transactions.

Leasing is, on the other hand, widely used for equipment assets. The main reasons for its success, beside the fiscal ones, are the relatively rapid conclusion of the contract, the lack of formalities (as opposed to the granting of a traditional security right but also of a retention of title), the simple enforcement procedures and its high priority in insolvency, being the lessor considered as the "true owner" of the goods.

Because of the limited possibilities offered by the legal system and the burdensome rules regarding both creation and enforcement of creditor's rights, creditors that do not chose to remain unsecured (including sellers) do not usually rely on proprietary security but primarily on other devices such as personal security or bank guarantees.¹⁹

3. General secured transactions law v. specific rules applicable to transport vehicles and other mobile equipment

As already mentioned, Italian law does not contemplate a general consensual non-possessory security right or chattel mortgage.

The Maritime Code (*codice della navigazione*) and the Civil Code regulate specific chattel mortgages which are required to be filed in specialized (and separate) asset-based registries. A chattel mortgage can be created only on easily identifiable goods of relatively high unit value and for which a registry concerning title is set up: ships, aircrafts and motor-vehicles.²⁰

As far as non-registered equipment is concerned (of the kind contemplated in the Rail and the Space Assets Protocol, but also in the case of aircraft engines) the general rules apply. Thus, a security right would only be effectively created if a specific consensual lien exists or under Art. 46 Banking Law. On the other hand, financial lease would be available for all types of equipment, while a sale with retention of title could also, at least in principle, be generally used, except for those movable assets that have to be registered in a public registry.

4. Comparison with some aspects of the Cape Town Convention system

4.1. Traditional security v. title-based devices

Cape Town Convention

The Cape Town Convention provides for an "international interest" which is autonomous from any national counterpart. The term covers not only traditional (limited) rights *in rem* (an agreement granting - or transferring - a property right to secure a loan), but also acquisition finance devices based on retention of title, such as a conditional sale and a lease. The three

¹⁹ A limited protection for financiers against competing creditors when a specific economic venture of a stock company is financed is obtained by applying the provisions on "dedicated assets" (*patrimoni destinati*) introduced in the Civil code by the 2003 Company Law, in conjunction with the Insolvency Law (Art. 2447-decies *civ.cod.* and Art. 72-ter Royal Decree 16 March 1942, No. 267 (Insolvency Law) as recently amended). This device does not, however, constitute an encumbrance over the equipment itself but on the "returns" of the economic venture.

²⁰ Cf. Art. 565 *cod.nav.* (mortgage over ships); Art. 1027 *cod.nav.* (mortgage over aircrafts); r.d.l. 15.3.1927, No. 436, implemented by Law 19.2.1928, No. 510, and Art. 2810 *cod.civ.* (consensual lien (mortgage) over motor-vehicles). See LEFEBVRE D'OVIDIO, G. PESCATORE, L. TULLIO, *Manuale di diritto della navigazione*, 13th ed., 2013, 723 et seq.; A. CHIANALE, *L'ipoteca*, 2nd ed., Trattato di diritto civile diretto da R. Sacco, *I diritti reali*, vol. 6, 2010, 142, 189 et seq.

categories are subjected to the “same basic framework”²¹: in particular, the creation, registration and priorities rules apply generally. The characterization of an agreement as security, conditional sale or lease essentially only affects their enforcement. If the creditor is a chargee, it will be satisfied out of the value of the collateral up to the secured sum, with an obligation to account for the remaining proceeds, and the exercise of its remedies will be subject to notice requirements and some other restrictions depending on the contracting State’s declarations in this respect.²² The conditional seller and the lessor, being the “owners” of the equipment, are allowed to simply terminate the agreement and take possession.²³ The qualification of the agreement as a security or a title-retention device depends on the applicable domestic law. Thus, if under Italian law, as specified below, conditional sales and financial leases are not characterized as security rights, they will be treated accordingly. If, on the other hand, the applicable domestic law re-characterized such devices, the corresponding rules for security rights will come into play.²⁴

Italian law

Within the limits set forth above (paras 2 and 3), Italian law recognizes all three types of security devices covered by the Cape Town Convention. In practice, the most commonly used among them for high value equipment is finance lease (to allow both acquisition and construction of the asset).

Retention of title and finance lease are not classified as (non-possessory) security rights and are usually treated in different parts of commentaries and general treatises. A tendency seems to be developing, however, especially among comparative law scholars, to consider them alongside the more traditional devices when addressing secured financing, while by no means always implying that the same legal regime should apply.²⁵ Their functional role is therefore increasingly taken into account, though their regulation – especially as regards creation, opposability in insolvency proceedings and enforcement – has not been affected so far.

4.2. Effectiveness as against third parties and role of publicly accessible registries

Cape Town Convention

The Cape Town Convention provides for the setting up of an asset-based international registry, wholly electronic, for each type of collateral regulated in a Protocol, with the purpose of determining the priority of the creditor as against competing secured creditors and subsequent buyers, as well as against the debtor’s insolvency administrator. Filing in the registry is therefore not necessary to create a valid international interest *inter-partes* nor to grant the creditor the right to enforce its security upon debtor’s default. There is furthermore no need to register the agreement as such, but only a simplified document containing a limited number of required elements which will allow a subsequent interested party to search whether there are existing or prospective encumbrances on the equipment (“notice filing”)²⁶. The Convention system allows for registration of a prospective interest, i.e. an interest which is still under negotiation between the parties, as long as the collateral is identified.²⁷

As to the priority of the registered creditor, the Cape Town Convention adopts a strict first-to-file rule, with no exceptions for acquisition finance devices such as retention of title or lease, nor for subsequent buyers. This is justified both by the specialized character of the industry

²¹ See M. DESCHAMPS, *The perfection and priority rules of the Cape Town Convention and the Aircraft Protocol- A comparative law analysis*, Cape Town Convention Journal, 2013, 51, at 53, available at <http://www.ingentaconnect.com/content/hart/ctcj/2013/00002013/00000001/art00004>.

²² Arts 8 and 9 Conv.; Art. IX Aircraft Prot. See also below, para. 4.3.

²³ Art. 10 Conv. The Aircraft Protocol extends the obligation to exercise any remedy in a commercially reasonable manner to sellers and lessors. See below, para. 4.3.

²⁴ R.M. GOODE, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment*, Official Commentary, 3rd ed., Rome, 2013, 45 et seq.

²⁵ See above, fn. 14.

²⁶ The term “notice filing” as opposed to “transaction” or “transactional filing”, originally specific to the US UCC Article 9 model, is now widely used in scholarship and international instruments on secured transactions and has been even adopted by Book IX of the *Draft Common Frame of Reference*.

²⁷ R.M. GOODE, *Official Commentary*, cit. above fn. 24, 44.

sectors involved and by the nature of the collateral, that is high value equipment as opposed to inventory or receivables.²⁸

Italian law

In Italian law there is no single comprehensive filing system for security devices. Thus, a “first-to-file” rule for priority among all subsequent creditors cannot exist, not even when a filing system is in place for a specific type of device. Registration, however, has always been the traditional means to give “publicity” to charges in lieu of dispossession. There are different registries for various purposes (collateral-specific, such as the ones for aircraft and ship mortgages, or transaction-specific, such as the ones for retention of title). They differ widely as to their location, the necessary formalities for filing and the effectiveness of the filed interest vis-à-vis third parties. Some of them (such as the ones for aircrafts, ships and motor-vehicles) are not exclusively dedicated to security rights but serve as title registries as well. One common feature is that they are all “transaction filing” as opposed to “notice filing”, i.e. the operative document establishing the transaction must be presented and evaluated by the registrar. The extent of computerization of the registries is also varied, but there is, for the moment, no completely electronic registry with remote access facilities similar to the one set up for the international interest under the Cape Town Convention.

As mentioned above, the role played by the registry is diversified.

Aircraft chattel mortgage: Title and other property rights on aircrafts are filed in a national registry. Registration of an aircraft mortgage is possible only if the transaction is contained in a notarized document²⁹ and is a necessary prerequisite for their *valid creation*, and not only for priority purposes. This is, in my view, an obsolete approach to registration of security rights on movables and should not be favored.

An interesting feature to be considered is the fact that the Maritime Code introduced an exception to the rule according to which a mortgage on a future asset is validly registered only when the asset comes into existence (cf. Art. 2823 *cod.civ.*) It is possible to create a mortgage on an aircraft which is still under construction or the construction of which is planned (Art. 1028 *cod.nav.*). It must be underlined, however, that the registry for aircrafts under construction is not the same as the general one.

As to the opposability of the creditor’s rights to third parties, a registered chattel mortgage prevails over later-in-time registered rights and subsequent buyers and enjoys a high priority ranking vis-à-vis other competing interests (with the exception of a number of specific non-consensual liens, see below, para. 4.4).

Bank charge: An Art. 46 Bank Charge must be registered in order to be effective against third parties (including competing creditors) at the *Tribunale* (first or low instance court) of both the place where the grantor is located and the place where the bank has its seat (when different). Thus, registration is not a condition of the validity of the charge, though Art. 46 still requires a relatively high level of formality even as between grantor and bank.³⁰ As between Art. 46 creditors, a simple first-to-file rule would be applied. All other competing limited rights on the assets prevail over the Bank Charge if created with an “ascertained date” (*data certa*), that antedates registration of the charge. In practice, it would be difficult for a lender to determine whether a prior in time interest prevails over its security since the ascertainment of the date is not done through a public filing but through notarization or authentication by a public official, and is mainly a way to prevent fraud.³¹

Retention of title: Differently than in most other (especially European) jurisdictions, retention of title in certain items, i.e. “machinery”³² whose value exceeds what has now become a

²⁸ R.M. GOODE, *Official Commentary*, cit. above fn. 24, 67 et seq.

²⁹ Recent legislation simplified this requirement by allowing also a mere “registration” of a written document by other competent authorities, cf. Law No. 248/2006).

³⁰ The charge must be create by a written document “exactly describing” (1) the collateral; (2) names of lender and debtor or third party provider of security; (3) amount of the loan and its terms; (4) sum secured.

³¹ A. VENEZIANO, *Italy*, cit. above fn. 14, 172.

³² With the exception of assets that are registered in public registries.

negligible sum is also subject to registration,³³ in the registry kept at the *Tribunale* of the place where the asset is located at the time of the stipulation. It is important to note, however, that the seller's rights are protected only as against *sub-buyers* (superseding the general *bona fide* acquisition provision in Art. 1153 *cod.civ.*), and only if the asset remains within the jurisdiction of the same *Tribunale*. In relation to competing *creditors* (in particular judgment creditors) the retention of title does not have to be filed, but has to be previously agreed upon between the parties in writing, confirmed in the sale invoices, with ascertained date prior to the date of attachment and duly registered in the buyer's accounts.³⁴

It is interesting to note that the registry for the retention of title is the same which should be used also for Art. 46 bank charges. This did not result, however, in any coordination of the priority rules, not even as between the two registrable interests, and was apparently done solely to avoid the setting up of another registry.³⁵ The question is to be considered of little practical import due to the scant attention that Art. 46 Bank Charge has received until now in financing practice.

4.3. Enforcement measures³⁶

Cape Town Convention

The default remedies under the Convention system are characterized by two essential elements. First of all, they leave wide room to parties' autonomy, and secondly, they provide for speedy enforcement measures. A set of opt-in and opt-out declarations by contracting States was a necessary complement to the conventional design in order to ensure adoption of the Convention and the Protocols. The only mandatory declaration under the Convention concerns the possibility for the creditor to exercise out of court remedies (if the leave of the court is not required in the Convention itself).

Default remedies are different depending on whether the creditor is a chargee or the holder of a retention of title. A chargee may repossess the collateral, sell it, lease it unless declared otherwise by the contracting State where the asset is located at the time of enforcement, or may collect or receive any income or profit from the operation of the asset. The debtor's agreement is needed to exercise any self-help remedy. Surplus proceeds are to be accounted for and due notice should be given to all interested persons. The chargee may also appropriate the collateral by agreement with the debtor and other interested parties or by court order if the value of the outstanding obligations is commensurate with the value of the collateral. A conditional seller or a lessor, on the other hand, may either terminate the contract or exercise possession or control, without the need for debtor's agreement and with no accounting of surplus proceeds.³⁷ All remedies (including the conditional seller's and lessor's) must be exercised in a commercially reasonable manner.³⁸

The Cape Town Convention contains a further set of rules that are crucial to an efficient enforcement system, i.e. the provisions on relief pending final determination.³⁹ Under specific objective circumstances,⁴⁰ the holder of an international interest may obtain from the competent national court speedy relief pending final determination of the creditor's claim, in

³³ Art. 1524 (2) *cod.civ.*: € 15,49 - the amount has never been adjusted to the decrease in value of the nominal sum in Italian old *lire*. Furthermore, in the case of equipment exceeding the value of € 258,23 an additional requirement of a marking – a plate containing the seller's name and its property right in the machine as well as particulars concerning the machine – is provided for by special legislation, but again only to protect the title-retaining seller from sub-buyers.

³⁴ This is the resulting regulation after the implementation of the 35/2000/EC *Late Payment Directive* (Legislative Decree No. 231/2002, Art. 11 (3)) and the decision of the European Court of Justice 26 Oct 2006, *Commission v. Italy*, C-302/05, according to which Italy did not fail to implement the Directive by providing for additional acts of the part of the seller in order for the title retention to be opposable to the buyer's creditors.

³⁵ For this comment and a review of what could be the abstractly possible solutions as to the relative priorities see A.VENEZIANO, *Italy*, cit. above, fn. 14, 173 et seq.

³⁶ Arts 8-15 Conv. And IX-XIII Aircraft Prot. On the following see R.M. GOODE, *Official Commentary*, cit. above, fn. 24, 51 et seq.

³⁷ According to the Aircraft Protocol, furthermore, all creditors may ask for deregistration of the aircraft and export or physical transfer of an aircraft object (Art. IX Aircraft Prot.).

³⁸ Provided a remedy is deemed to be exercised in a commercially reasonable manner if exercised in conformity with the provisions of the agreement, except where such provision is manifestly unreasonable (Art. IX (3) Aircraft Prot.).

³⁹ Art. 13 Conv.; Art. X Aircraft Prot.; see also Art. VIII Rail Prot.; Art. XX Space Prot.

⁴⁰ The creditor should adduce evidence of default; the debtor has to have agreed to the relief at any time: Art.13 (1) Conv.

the form of one or more of the orders listed in Article 13(1) (a) to (d)⁴¹ and as requested by the creditor.

Again, contracting States may modify the conventional regime by opting out of Art. 13, in whole or in part (a choice that was not, however, favored by contracting States) and/or by opting in the Protocols provisions on interim relief (which allow States to determine the number of days within which a remedy under Article 13 will be granted and parties to exclude the court's power to impose protecting terms in favor of the interested persons' for the contingency that the creditor breaches its obligations or fails to eventually establish its claim).⁴²

Italian law

One important obstacle to a more widespread use of non-possessory security rights in Italian law is represented by the cumbersome enforcement procedures. Possessory pledgees enjoy speedier remedies upon debtor's default and may choose between the normal execution rules of the Procedural Code and the self-help provisions contained in the Civil Code (the latter allowing the creditor to ask a court for appropriation of the collateral after appraisal of its value and with an accounting to the debtor of any excess, or to seize the asset and have them sold by an official agent – at auction or market price - or, if previously agreed upon with the debtor, to use a different method of sale). No such direct remedy is available to the creditor in the case of a non-possessory security right: the ordinary rules of the Procedural Code must be followed (Art. 502 *c.p.c.* et seq.), which require a judicial decision and formal (and lengthy) enforcement proceedings, aiming at liquidation. This is especially true for consensual liens and the Art. 46 Bank Charge.

Chattel mortgages on aircrafts are governed by specific enforcement rules that are no less cumbersome than the ordinary ones.⁴³ An interesting aspect, however, is the fact that the competent court may permit the continuing use of the equipment if adequate insurance is provided. The proceeds of such activity may be sufficient to cover the mortgagee's outstanding credit thereby avoiding the enforced sale and its inefficiencies.⁴⁴

Italian procedural law allows for interim relief remedies under Arts. 669 *bis* et seq. of the *Procedural Code* (and in particular Arts. 700 et seq. for urgent measures – left to the court's discretion – if the creditor demonstrates a well-founded risk of imminent and irreparable prejudice). Such rules do not admit derogations by party autonomy (differently from what is provided in the Aircraft Protocol) nor do they set a mandatory time-limit for the giving of relief.⁴⁵

Conditional sellers and lessors are, in contrast, considered to be the "owners" of the asset and, as such, can exercise all actions available to the holder of title. The title-retaining seller may terminate the contract and recover the asset. Special provisions protect the defaulting buyer from abuse in the case of an installment sale.⁴⁶ The financial lessor's rights upon default depend on the contract; the lessor is usually granted automatic termination and may repossess the asset, while the protective measures applicable for installment sales do not apply.

4.4. Effectiveness in insolvency proceedings

Cape Town Convention

The provisions on the effectiveness of creditor's rights in debtor's insolvency are at the core of the Cape Town Convention system. A prior-in-time registered creditor enjoys a very strong

⁴¹Art. 13 lists the following orders: (a) preservation of the object and its value; possession, control or custody of the object; (c) immobilisation of the object; (d) lease or, except when covered by (a) to (c), management of the object and the income therefrom. The Aircraft Protocol adds the possibility of asking the court to sell the collateral and apply its proceeds to the creditor's satisfaction.

⁴² Art. X (2) and (5) Aircraft Prot.

⁴³ See Art. 1055 et seq. *cod.nav.*; E. RIGHETTI, *Ipoteca navale ed aeronautica*, in *Digesto comm*, Vol. VII, 1992, 535, at 557 et seq.

⁴⁴ Art. 1063 *cod.nav.*; LEFEBVRE D'OVIDIO, G. PESCATORE, L. TULLIO, *Manuale*, cit. above, fn. 20, 764.

⁴⁵ See G. TUCCI, *The preliminary draft UNIDROIT Convention*, cit. above, fn. 14, at 390.

⁴⁶ Arts 1525 and 1526 *cod.civ.*

position and may exercise all its default remedies as against the insolvency administrator of the debtor.

There are some provisions in the Convention that operate as a balance and take into account the possible existence of other interests that a State may wish to protect. Thus, the Convention does not affect the domestic law rules on avoidance of a transaction as a preference or a transfer in fraud of creditors (Art. 30(3) Conv.). Moreover, States are permitted to declare in advance which (already existing) domestic non-consensual rights will preempt the creditor's interest (Art. 39 Conv.), and which domestic preferential claims can be filed in the international registry to obtain priority over later-in-time international interests (Art. 40 Conv.). In the absence of such declarations, all national rights or liens will be preempted by the international interest.

The Convention contains a further exception for rescue or similar proceedings, where the administrator has the power to limit or delay the enforcement rights of secured creditors.⁴⁷ The rationale of such an exception is not to interfere with the policies pursued by national legislators in this field. The Protocols, however, deviate from the Convention on this point, introducing a set of alternative provisions left to the choice of the contracting State of the primary insolvency jurisdiction. The first option⁴⁸ gives the creditor the greatest protection, drastically reducing any powers of an insolvency administrator to stay or limit creditor's rights of enforcement on the collateral, be it during liquidation, rescue proceedings or even prior to insolvency, during a fixed period of time indicated in a State's declaration. The second option⁴⁹ substantially leaves it to courts to decide what is appropriate in each circumstance, unless the debtor gives notice that it will either cure all defaults or give the creditor the opportunity to take possession of the equipment in accordance with the applicable law. If no choice is made, the domestic insolvency law will apply.

It is important to note, from an economic perspective, that the aviation industry expressed a strong preference for Alternative A, and included it in the list of so-called "Qualified Declarations" under the *OECD Aircraft Sector Understanding on Export Credits for Civil Aircraft* (1 September 2011). According to this agreement, States that comply with the required declarations will be eligible for officially supported export credits for the sale or lease of aircraft and related materials at a discount rate.

Italian law

The rules on the effectiveness of financier's rights in insolvency proceedings vary, in Italian law, according to whether the financier is a chattel mortgagee, a chargee with a non-possessory security over the equipment (in particular, an Art. 46 chargee), a seller under a retention agreement or a lessee under a financial lease.

A chattel aircraft mortgagee is satisfied with priority on the proceeds from the sale of the collateral, but is preempted by a (limited) number of specific non-consensual liens pertaining to the aircraft and its operation (such as the ones in favor of the costs of the execution proceedings, unpaid taxes and duties, employees' wages and social security payments, salvage costs, etc.).⁵⁰

The Art. 46 Bank Charge is expressly given the rank of a lien under Art. 2777 of the Civil Code. This means that the bank will be satisfied on the proceeds of the sale of the collateral but will be postponed to a number of preferred claims that enjoy a special priority. Moreover, a recent Insolvency Law reform added another category of super-priority that takes precedence even over the afore-mentioned preferred claims, including, among other, costs relating to the

⁴⁷ The Convention does not expressly refer to rescue or similar procedures, which are not autonomously defined in the Convention, but mentions "rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator". The *Official Commentary*, however, refers to an automatic stay on the enforcement of proprietary rights after commencement and illustrates it with a case concerning reorganization. See R.M. GOODE, *Official Commentary*, cit. above, fn. 24, ...

⁴⁸ Alternative A, see Art. XI Air Prot.; Art. IX Rail Prot.; Art. XXI Space Prot.

⁴⁹ Alternative B.

⁵⁰ Art. 1023 *cod.nav.*

insolvency administration when provisional operation is authorized within a liquidation procedure and claims deriving from post-commencement financing.⁵¹

The above-mentioned regime is modified when an alternative procedure to the traditional liquidation is opened (such as in the case of the extraordinary receivership arrangement which can be used by large firms)⁵² or when other “rescue” procedures are initiated (voluntary arrangements entered into before or during insolvency).⁵³ A recent reform of the latter procedures (that seem to be the object of continuous adjustments by the legislator), reinforced the insolvency administrator’s powers towards creditors secured by a lien, a mortgage or a pledge in the interest of reaching a viable rescue plan.⁵⁴

In the case of buyer’s insolvency, a seller with retention of title prevails if the conditions for opposability to conflicting creditors are satisfied (see above, para. 4.2). According to Art. 73 (1) Insolvency Law, the insolvency administrator has the option of either keeping the contract (in which event the seller has the right to ask for the setting aside of a sum for future payment of the price unless the sum is immediately liquidated) or terminating it (in which event the seller may repossess the asset with no obligation to account for any excess of value).

The position of the lessor in the lessee’s insolvency is now expressly regulated in Art. 72-*quater* of the Insolvency Law. The insolvency administrator may decide whether to continue the contract or terminate it. In the event of termination the lessor has the right to retake the asset and must pay over to the insolvency administrator any monies exceeding the unpaid rent that derive from the sale or other use of the asset.

5. Implementation of the Cape Town Convention in the Italian legal system: a first assessment in the light of the general principles underlying Italian secured transactions law

First of all, the potential economic significance of the Cape Town Convention for Italy should be addressed. As regards the aircraft industry, and similarly to what happened in other jurisdiction, present-day air transport regulations in Italy opened the market to competition and forced participants to operate on an entrepreneurial basis. The need to make recourse to private financing has considerably grown, also in view of the restrictions to State aids provided by the European legislation. Competition of services has, moreover, extended to foreign companies and in particular European ones. The Protocol would facilitate the obtaining of financing at lower rates and strengthen the competitiveness of Italian actors in the market. Similar consideration may apply in regard to the Rail Protocol, though it is difficult at present to gauge their potential extent. The private market is still much more limited, the role of institutions is prevailing and the financing of construction and operation of rail rolling stock equipment follows alternative routes. In order to provide economic benefits the Rail Protocol should be implemented on a wider European scale. Finally, concerning the Space Protocol, facilitation of the influx of private capitals in this rapidly growing sector would certainly be of great benefit to the Italian industry, that is currently one of the major actors in Europe in this area.

In assessing the compatibility of the Cape Town Convention system with Italian law two relevant points should be highlighted from the start.

Firstly, Italian law is clearly obsolete in many respects, especially in the case of security devices on tangible goods. Internationally accepted provisions that deviate from current domestic regulation may well turn out to be a welcome innovation and even an interesting model for a future – much desirable – reform of Italian general secured transactions law. This especially for those areas where no fundamental incompatibility is to be seen, or where recent developments have already paved the way to a more modern approach. I am referring, in

⁵¹ Art. 111 (1) 1) and 111-*bis* Insolvency Law.

⁵² Legislative Decree No. 270/1999 (*Amministrazione straordinaria delle grandi imprese in crisi*).

⁵³ *Concordato fallimentare* (Art. 124 et seq. Royal Decree No. 267/1942 on insolvency law); *concordato preventivo* (Art. 160 et seq. ins.law).

⁵⁴ Cf. L. GUGLIELMUCCI, *Diritto fallimentare*, 5th ed., Torino, 2012, 272 et seq.; 321 et seq.

particular, to the introduction of a publicity system through registration to solve priority issues and of speedier and more efficient enforcement proceedings.

Other aspects of the uniform provisions, such as the impact on insolvency law or the treatment of acquisition finance devices, deserve a more careful consideration, in view of the potentially disruptive effect vis-à-vis policy choices made by the national legislator. In this respect, however, it is important to consider the scope of application of the Cape Town Convention. The Cape Town “international interest” does not purport to displace already existing domestic devices, but only to introduce an autonomous instrument, limited to enumerated high value, uniquely identifiable collateral, that would be effective against third parties and in insolvency wherever the equipment be at the time of enforcement (within the territorial scope of application of the Convention). Thus, the central aim of the uniform regime is to solve cross-border issues that are currently not addressed, for a specific kind of mobile equipment. This element should be taken into account when analyzing the acceptability of deviations from current domestic law provisions.

Turning to the specific issues just mentioned, the introduction of a system of publicity through a public registry is perfectly compatible with Italian law. It is indeed a time-honored solution to the problem of admitting non-possessory security rights, and not only for uniquely identifiable, high value mobile collateral such as aircrafts or ships, for which a title registry exists. Consensual “liens” or charges provided by special legislation were and are characterized by registration, and even sales with retention of title are supposed to be registered (though only for the purpose of superseding the good-faith acquisition rule). The main difference with the Cape Town Convention lies in two interconnected features: the choice of a “notice-filing” approach, and the exclusive purpose of the registry (i.e. solving the priority conflicts between the holder of an international interest and other creditors with proprietary rights on the same asset, subsequent buyers and the debtor’s insolvency administrator). Both features, coupled with the development of a sophisticated software for electronic filing, provide a more efficient solution to priority issues than the current haphazard and diversified systems.

Finally, the Cape Town Convention opted for asset-based registries (different for each type of collateral). This choice is justified by the nature of the collateral and the high specialization of the financing and industry sectors involved (particularly so for aircrafts and satellites).

Another key set of provisions of the Cape Town Convention is devoted to enforcement remedies upon the debtor’s default. It is a sensitive area in respect to many domestic laws,⁵⁵ as demonstrated by the fact that the uniform regime allows derogation through a variety of opt-out and opt-in State declarations. Party autonomy certainly plays a much more important role in the Cape Town system than in Italian law. On the other hand, two critical points should be highlighted. Enforcement proceedings for chargees are excessively cumbersome in Italy when the supplier provisions of the possessory pledge are not applicable, so that the current discipline cannot be easily defended and a reform would be welcome, independently of the conventional rules. Furthermore, recent developments in other commercial sectors, such as financial markets, have already challenged the traditional limitations affecting the validity of the collateral agreement and/or the formalities of the enforcement mechanisms. In particular, the implementation of the *EU Financial Collateral Directive* has forced Italian courts and scholars to cope with the new concept of “reasonability” in enforcement as a substitute for the above-mentioned limitations.⁵⁶

The insolvency provisions of the Cape Town Convention deserve careful consideration. Enforceability against the debtor’s insolvency administrator is an essential element in an efficient secured transactions regime. Under the Protocols, however, and differently from the Convention, the holder of an international interest may prevail over the administrator not only in liquidation, but also in reorganization or “rescue” proceedings, if “Alternative A” is chosen by the contracting State. Furthermore, national consensual and non-consensual liens would be

⁵⁵ G. TUCCI, *The preliminary draft convention*, cit., fn. 14, 392: “The remedies provisions (...) and the realisation of the international interest via the procedural law of each State is naturally the part of the future Convention which could potentially create the most significant problems in so far as they will need to be applied in conjunction with the domestic law rules of each State”.

⁵⁶ See in particular F. MURINO, *L'autotutela nell'escussione della garanzia finanziaria pignoratizia*, Milano, 2010, 83 et seq.

postponed to the duly registered international interest, except when a State declared their status as preferred priorities under Art. 39 Conv. or when they were registered at an earlier time under Art. 40 Conv. This solution appears to be justified in a restricted and highly specialized economic sector such as the one where the Aircraft or the Space Protocol are applicable. For the Aircraft Protocol, there is the additional incentive of the compliance with the "Qualifying Declarations" of the *OECD Aircraft Sector Understanding* (see above, para. 4.4). It must be said, however, that it would be more difficult to accept such an unfettered creditor's right as a model on a wider scale.

Finally, treatment of financial leases under the Cape Town Convention should be briefly addressed. It is true that financial leases are not classified as security devices nor subject to any kind of publicity under current Italian law. The filing procedure under Cape Town, however, is simple and relatively inexpensive, so that it does not appear to constitute an excessive burden, especially when compared to the benefits of a full cross-border recognition of the lessee's rights. Furthermore, as seen above (para. 4.1) the Convention simply extends to title reservation devices the basic regime applicable to traditional security rights, with some exceptions. In particular, financial leases (and sales with retention of title) are subject to different rules of enforcement. The resulting regime for lessors is perfectly compatible with Italian law.