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Italian secured transactions law – The need for a reform

Anna Veneziano

I. Introduction

In recent years, a significant number of national legislators in various parts of the world have undertaken wide-ranging structural reforms in the field of secured transactions. The resulting legal regimes are still quite divergent, especially when comparing European legal systems among themselves and with common law jurisdictions that followed the model of UCC Article 9, as modernised by the Canadian Personal Property Security Acts. All of them, however, shared the assumption that a reform of the outdated, often complex and incoherent pre-existing rules was necessary and would benefit the economy by facilitating access to credit.

Secured transactions have also recently been the focus of international harmonization initiatives that, whilst differing in nature (from hard law to various degrees of soft law), scope and geographical sphere of application (both global and regional), all recognise the economic relevance of implementing a sound and efficient secured transactions law in various parts of the world, particularly through the technique of the Model Law. As examples see the 2002 Organization of American States (OAS) Model Inter-American Law on Secured Transactions, as well as 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 moveables in Central and Eastern European countries. Additionally, an entire book of the Draft Common Frame of Reference for a European Private Law project (a soft law academic endeavour) was dedicated to ‘Proprietary security in movable assets’ (Book IX, in von Bar, Ch, Clive, E (eds) Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Vol. 6, (Sellier, 2009) 5389 et seq. and most recently Drobnig, U and Böger, O (eds), Proprietary security in movable assets (PEL Prop.Sec.) (Sellier, 2015).

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2 See the contributions in Part I in this volume.

3 The most successful hard law instrument being, so far, the 2001 Cape Town Convention on International Interests on Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment (adopted jointly by the Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organisation (ICAO)), with, respectively, 65 and 57 contracting States and the approval of the European Union as Regional Economic Integration Organisation, and more than 500,000 filings in the dedicated electronic international registry operated by Aviareto (a joint venture between the private company SITA SC and the Irish Government). On the Cape Town Convention see Goode, R, Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment, Official Commentary, (3rd ed., UNIDROIT, Rome, 2013). The texts of the Cape Town Convention and its Protocols are available at the UNIDROIT website (http://www.unidroit.org).


5 They range from addressing specific collateral and markets (to wit, the Cape Town Convention and its Protocols dealing with specific high value mobile equipment such as aircraft, railway rolling stock and space assets, as well as the instruments in the field of financial markets such as the 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary and the 2009 UNIDROIT (Geneva) Convention on Substantive Rules for Intermediated Securities), to encompassing general secured transactions law (as is the case for the UNIDROIT, Legislative Guide).

6 Interestingly, secured transactions have been the object of harmonisation efforts at regional level in various parts of the world,
transactions regime (and, if dealing with cross-border transactions, the need to ensure recognition and enforcement of creditor’s rights at an international level).7

In this context, the Italian legislator has been notably absent. Until recently, it has shown little interest in reconsidering what is, as will be seen in more details below, an admittedly obsolete regime, and limited itself to ad hoc interventions that did not always fulfil original expectations. Things changed at the end of 2014, when a proposal to entrust the government with the task of drafting an organic reform following a number of predetermined general directions was included in a legislative package mainly devoted to simplifying, modernising and introducing more efficiency in certain aspects of procedural and enforcement law.8 This action, undertaken directly by the Ministry of Justice, came in the wake of a wider reflection on the inefficiencies of current Italian procedural and substantive creditor protection and their detrimental effect on (foreign) investments.9 It explicitly mentioned the aim of facilitating access to credit at more favourable conditions, especially for medium-to-small enterprises. A further element considered in the proposal were the recent reforms undertaken (or at the time still pending) in other European countries, in particular France and Belgium, the secured transactions regime of which before the reform showed some similarities with Italian law.

In the present contribution, I will first give a brief overview of current Italian secured transactions law, with no pretense of completeness, but in order to underline the urgent need for a reform; secondly, I will, again briefly, discuss some of the suggestions originally contained in the legislative proposal presented in February 2014. This proposal has neither being approved at this time, nor does it seem likely that it will ever be accepted as it stands.10 Despite this, and the fact that the suggested changes were, in some respects, less incisive than they could have been, the proposal is certainly interesting from a comparative perspective and should be considered a reasonable starting point for any future endeavours towards a structural reform.

II. Brief overview of current Italian secured transactions law


8 Schema di disegno di legge di delega al governo recante disposizioni per l’efficienza del processo civile, la riduzione dell’arretrato, il riordino delle garanzie mobiliari, nonché altre disposizioni per la semplificazione e l’accelerazione del processo di esecuzione forzata (approved on 17.12.2013 and presented to the Parliament on 12.02.2014).

9 This reflection was shared by the Bank of Italy and the Italian Banking Association (ABI). See also the Document on structural reforms to facilitate economic growth released by the Council of Ministries on 8 April 2014 (Documento di Economia e Finanza 2014 - riforme strutturali per favorire la crescita).

10 The idea of a structural reorganization in this field seems to have resurfaced, rather surprisingly, within the mandate of a newly formed Commission that should study the feasibility of an organic reform of insolvency law. There is, however, no specific indication as to the direction that the Commission should follow in suggesting further action in the area of secured transactions (independently, that is, of the much needed simplification of non-consensual liens and the effects of existing security rights in insolvency proceedings). See also below, I, 2.
Italian secured transactions law is characterised by two aspects, which are, at least apparently, in contradiction. On the one hand, the legal devices at the disposal of an enterprise wishing to raise financing using the value of its assets (be they equipment, inventory or receivables) are limited and inefficient. On the other hand, the rules are complex and confused, since a number of exceptions to the equal treatment of creditors (pari passu rule) have been incrementally introduced in specialised sectors with no general rethinking of the whole system.\footnote{For a critical appraisal of current Italian secured transactions law see (in English and French): Bussani, M, Le présent et l'avenir des sûretés réelles, in Rapports nationaux italien/Italian National Reports, XVI International Congress of Comparative Law, Brisbane 2002, (Milan, Giuffrè, 2002) 245; Ferrarini, G, Changes to Personal Property Security in Italy: A Comparative and Functional Approach, in Cranston, R (ed), Making Commercial Law. Essays in Honour of RM Goode (OUP, 1997) 477; Tucci, G, Towards a Transnational Commercial Law for Secured Transactions: the Preliminary Draft UNIDROIT Convention and Italian Law, (1999) Unif L Rev, 371; Veneziano, A., Italy, in Sigman, HC and Kieninger, E-M, Cross-Border Security over Tangibles, (Sellier, 2007) 159; Italian Report , Graziadei, M and Candian, Alb, in Kieninger, E.-M. (ed.), Security Rights in Movable Property in European Private Law (fn 1).}

1. Traditional security rights over movables

The 1942 Italian Civil Code in principle only allows for possessory pledges as far as tangible assets are concerned (pegno con spossessamento).\footnote{See Art. 2740 (1) Italian Civil Code.} There is no general consensual non-possessory security right on assets either held for use or to be resold. An exception was, and still is, represented – as is the case in other civil law jurisdictions – by chattel mortgages on easily identifiable goods of relatively high unit value and for which a title registry is set up: ships, aircrafts and motor-vehicles.\footnote{See Art. 565 Italian Maritime Code (mortgage over ships); Art. 1027 Italian Maritime Code (mortgage over aircrafts); Royal Decree.15.3.1927, No. 436, implemented by Law 19.2.1928, No. 510, and Art. 2810 Italian Civil Code (consensual lien - that is, a mortgage - over motor vehicles).} Such mortgages are, however, subject to cumbersome rules as to their creation, effectiveness and enforcement that substantially deprive them of commercial attractiveness.

The ‘Italian way’ of developing new devices in order to satisfy the growing needs of modern economy was, as it has been rightly pointed out, haphazard.\footnote{Tucci, G, The Preliminary Draft Unidroit Convention and Italian Law (fn 11), 378.} As far as tangible goods are concerned, the legislator did not introduce new non-possessory pledges (with limited, more recent exceptions regarding certain specific products of the food industry).\footnote{See the statutory non-possessory pledges on PDO products kept in warehouses for long periods and subject to transformation, such as cured ham or cheese. More details in Veneziano, A., Italy (fn 11), 166.} Nor did judges (and scholars) recognise parties’ freedom in constituting new forms of security over tangibles playing on the relationship between contract and property law. Transfer of property by way of security was indeed struck down by courts as contrary to general principles, among which the well-known prohibition of pactum commissorium contained in the Civil Code.\footnote{Art. 2744 (1) Italian Civil Code.} Under the impulse of
interested economic lobbies or for reasons of national interest, a plethora of so-called “consensual liens” (privilegi consensuali) were incrementally added by special legislation, mostly dealing with enterprise crises and restructuring. Such liens markedly differed as to their scope (but were always limited to specific industry sectors), were subject to different formal and publicity requirements (invariably cumbersome) as well as to different rules on their priority vis-à-vis competing interests.

Assignment of debt, to which the prohibition of pactum commissorium was not deemed to apply, received a less restrictive treatment. The traditional assignment rules in the Civil Code were however – and still are – incompatible with modern receivable financing techniques, given that formal notice to the account debtor (or the acceptance of the latter in a document containing a certified date) is a strict requirement for effectiveness towards competing third parties and in insolvency.\(^\text{17}\) Nor was the problem solved by the legislative introduction of simpler rules applicable to commercial receivables, that were in practice only applied to factoring contracts.\(^\text{18}\)

2. Recent developments and their limitations

More recently, the need to adapt the obsolete Italian legal framework to the growing needs of economic operators, and financial institutions especially, have led to some interesting developments. I will focus here on two of them: the introduction of a special “Bank Charge” on enterprise assets, and the recognition of revolving pledges and transfer of property (also) by way of security for financial collateral. They certainly represent important steps towards a modernisation of a clearly outdated regime. They are, however, confined to specialised and restricted sectors; the first of them, moreover, failed to achieve its practical purpose.

A reform of the Banking Law in 1993 introduced a special ‘non-possessory lien’ in favor of banks only, regulated in its Art. 46 (privilegio ex Art. 46, hereinafter ‘Art. 46 Bank Charge’) to secure medium- to long-term financing to enterprises. Art. 46 Bank Charge replaced a veritable maze of different pre-existing consensual liens and is indeed more accurately described as a ‘charge’, being the result of an agreement between the parties, connected to a loan, and requiring publicity (though registration) in order to be opposable to third parties. Whilst, in theory, Art. 46 could have been the basis for the creation of a veritable enterprise floating

\(^\text{17}\) Art. 1265 Italian Civil Code.
security, the uncertainties regarding the revolving effect as pertains to future inventory,\(^1^9\) its priority against other security rights,\(^2^0\) as well as the limited effectiveness of its enforcing procedures\(^2^1\) have rendered its use unattractive in practice.

A second important step forward was the judicial and scholarly recognition (at least to some extent and with some interpretative uncertainties) of the revolving pledge on intangibles (in particular, financial collateral). This development was subsequently backed by the legislator and finally sanctioned by the implementation of the EU Directive on Financial Collateral Arrangements ('Collateral Directive').\(^2^2\)

In the context of this contribution regarding general secured transaction laws, two elements relating to the specialised field of financial collateral are particularly worth mentioning.

The first one is that the implementation of the Collateral Directive introduced a number of relevant derogations from the general rules applicable to secured transactions in Italy. Among others, it sanctioned the admissibility and enforceability of both pledges and transfers of title or assignments of debt, also by way of security; it dramatically reduced the formalities for constituting and enforcing the security; it confirmed the right to use the encumbered financial collateral without requiring further action to ensure the validity or effectiveness of the pledge; it dramatically reinforced creditor’s rights in insolvency; finally, it allowed self-help enforcement provisions, including appropriation if parties so agree and provided an objective evaluation mechanism. This in turn forced the legislator to formally repeal the traditional prohibition of \textit{pactum commissorium} as regards financial collateral. It is especially the latter aspect concerning enforcement measures that, in my opinion, may be of particular interest in the perspective of an organic reform of secured transactions law, as will be seen below.

\(^1^9\) A literal reading of the legislative provision, backed by the Bank of Italy, denies the revolving character of the security as to inventory, see critically Tucci, G, \textit{The Preliminary Draft UNIDROIT Convention and Italian Law} (fn 11).

\(^2^0\) 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’ (\textit{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. In insolvency, moreover, the creditor is postponed to a number of preferred claims that enjoy higher priority. For more details see Veneziano, A, \textit{Italy} (fn 11).

\(^2^1\) The Banking Law did not in fact modify the ordinary rules of enforcement (Art. 502 et seq. Civil Procedural Code), which require a judicial decision and formal (and lengthy) enforcement proceedings, aiming at liquidation. On enforcement see in particular Tucci, G, \textit{The Preliminary Draft UNIDROIT Convention and Italian Law} (fn 11), 378.

The second element concerns the scope of application of the Collateral Directive. Originally, the Directive only applied to financial collateral defined as ‘financial instruments’ and ‘cash’, where at least one of the parties was a public authority, central bank or a financial institution (and the secured party had possession or ‘control’ over the collateral). In 2009, the European legislator amended the Directive, inter alia expanding the notion of financial collateral to encompass not only financial instruments and cash but also ‘credit claims’, i.e. loans granted by banks to firms. In relation to this latter type of financial collateral, however, not all the provisions of the Directive apply: this is notably the case for right of use of financial collateral under security financial collateral arrangements. In addition, Member States were given the option to introduce further exceptions to the general regime and to continue requiring formal acts for the effectiveness of collateral arrangements concerning credit claims in relation to (the debtor and) third parties. It is worth noting that the Italian legislator took advantage of the latter option and retained the publicity requirements of the Civil Code on third party enforceability of assignments of credit claims. I believe that this choice, whilst effectively retaining an antiquated rule regarding enforceability of assignments of debts against third parties, may be seen, in perspective, as a blessing in disguise. It would enable a future legislator undertaking an organic reform to consider in that wider context which publicity and priority rules may be more suitable for general secured transactions law as opposed to a specialised sector such as that of financial markets.

3. Asset-based acquisition finance devices

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. Thus, the requirements for admissibility and effectiveness are completely different from those applicable to traditional security devices.

24 According to Art 2(1)(o) of the Directive, ‘credit claims’ are ‘pecuniary claims arising out of an agreement whereby a credit institution, as defined in Art 4(1) of Banking Consolidation Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions [2006] OJ L 177, including the institutions listed in Art 2 of that Directive, grants credit in the form of a loan’.
25 Art. 5 of the Directive.
26 See the new para in art 3 of Legislative Decree 21.05.2004, No. 170, introduced by Legislative Decree 24.03.2011, according to which enforceability as against third parties for collateral arrangements on credit claims is still subject to the publicity requirements of the Italian Civil Code (notification to or acceptance by the account debtor).
The 1942 Italian Civil Code, adopting a rather modern approach for the time, already provided specific rules on installment sales and the effects of retention of title clauses in a sales contract.\textsuperscript{28} As opposed to in most other (especially European) jurisdictions, retention of title in certain items, i.e. ‘machinery’\textsuperscript{29} whose value exceeds what has now become a negligible sum\textsuperscript{30} is also subject to registration, in the registry kept at the Tribunale (first instance court) 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 Civil Code), only in relation to the specific asset that was sold, and only if that asset remains within the jurisdiction of the same Tribunale.\textsuperscript{31} In relation to competing creditors (in particular execution or judgment creditors) and also as against an insolvency administrator, the retention of title does not have to be filed, though it must be previously agreed upon in writing between the parties, confirmed in the sale invoices, with ascertained date prior to the date of attachment and duly registered in the buyer’s accounts.\textsuperscript{32} Moreover, only simple retention of titles not extending to proceeds or products of the original assets are allowed.

It is interesting to note that the registry for the retention of title is the same one that should be used also for an Art. 46 Bank Charge. 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.\textsuperscript{33} The question is to be considered of little practical importance due to the scant attention that Art. 46 Bank Charge has received until now in financing practice.

In sum, as far as retention of title under a sales contract is concerned, 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, besides the fiscal ones, are the relatively rapid conclusion of the contract, the lack of formalities (as opposed to the

\textsuperscript{28}Arts 1523-1526 Civil Code.

\textsuperscript{29}With the exception of assets that are registered in public registries.

\textsuperscript{30}Art. 1524 (2) Civil Code: € 15,49 - the amount has never been adjusted to the decrease in value of the nominal sum in Italian old lire.

\textsuperscript{31}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.

\textsuperscript{32}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 26.10.2006, 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.

\textsuperscript{33}For this comment and a review of what could be the abstractly possible solutions as to the relative priorities see Veneziano, A, \textit{Italy}, (fn 11), 173.
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 deemed the ‘true owner’ of the goods.

III. Some thoughts on recent plans for a legislative reform

As already noted, the legislative proposal presented in February 2014 had the - limited - purpose of empowering the Government to embark on an organic reform of secured transactions law, following a number of fundamental principles and directions on which any subsequent legislative act should have been based. It represented, therefore, a “kick-off” of sorts for further governmental action. Though the proposal as such did not pass, it is my belief that the vast majority of goals it wished to achieve are still worth considering within the framework of the wider comparative reflection provided in this book and, despite some shortcomings and limitations, should at least provide a useful starting point for any future reform project in Italy.

1. The reform strategy: generalisation of a non-possessory security right, publicity, flexibility and easier enforcement

The explanatory report to the February 2014 legislative proposal highlighted the reasons for a reform in the area of security rights over movables referring both to the fragmentary nature of current law and to its inability to meet the needs of modern economy. The overall goals of the reform endeavour should therefore be a simplification and rationalisation of the applicable rules, to enhance their predictability and accessibility, as well as the introduction of a regime that would be more flexible and efficient, thereby aligning Italian law with the most recent developments at European and international level.

In order to reach these goals, Article 4 of the proposal listed several criteria that would serve as a general guidance for future governmental legislative activity.

First and foremost, it envisaged a generalisation of a non-possessory security right on movables\(^{34}\), which is currently only admissible on specific collateral (and with different rules depending on the collateral). Thus, from being considered an exception to the general rule that the debtor should be dispossessed, the non-possessory pledge would become the norm, independently of the type of asset on which it were created.

More precisely, the opposability of the security right against third parties would not depend on dispossession anymore, but the latter would be replaced by a new publicity mechanism based on a unified, debtor-based, publicly accessible and entirely electronic registry, devoted only to security rights over movables and enabling

\(^{34}\) Interestingly, the proposal does not use the expression *pegno non possessorio* (non-possessory pledge) but the more neutral term *garanzia mobiliare* (security right over movables). See also below, para. 2.
electronic consultation and filing (including modifications, renewals and termination). Such a registry would determine the opposability and priority rank of the security right vis-à-vis third parties.

Furthermore, it would be possible to constitute a valid and enforceable security not only on precisely identified assets, but also on collateral determined by reference to a general category or type (such as stock, inventory etc.) and to an overall value, provided that mechanisms for the subsequent identification of future assets were included.

Unless otherwise agreed by the parties, the security provider would have the right to use the collateral (in keeping with its intended use) as well as to dispose of the collateral. Disposition would however only be admissible in the case the debtor were an enterprise; the creditor’s priority would be transferred on to the proceeds or products. The same kind of flexibility would be admitted in relation to the secured credit or credits (be they present or future and even resulting from a not yet existing relationship), provided that a maximum amount of indebtedness were established.

A further point connected to the flexibility of the secured credit regarded the introduction of a so-called “rechargeable hypothec on movables”, a special type of security based on the example of the French reform of 2006\(^3\) (but recently repealed by the French legislator\(^4\)) that would extend to different or additional credits with no need to determine them in advance.

As regards enforcement of the security right, the proposal abolished the prohibition of the pactum commissorium contained in the Italian Civil Code and advocated that the efficiency of enforcement measures be strengthened, with due consideration for the protection of the debtor’s interests. More generally, a substantial part of the February 2014 proposal was devoted to the simplification and acceleration of credit enforcement procedures (regardless of the existence of a proprietary security right). In particular, Article 5 repealed the cumbersome procedure of the forced auction sale regulated in the Civil Procedural Code, whilst Article 6 introduced a monitoring system of the enforcement process by electronic means.

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35 The French hypothèque rechargeable was introduced by the Ordonnance 23.6.2006 No. 346, portant réforme des sûretés (Art 2422 Code civil and Arts. L313-14, L313-14-1, L313-14-2 Code de la consommation). Its aim was to allow that a plurality of credits be secured by a single deed, with the possibility to add new credits or substitute old ones at any time of the duration of the security. It could be created both on immovables and on (consumer) goods. See Aynès, L and Crocq, P, Les suretés – La publicité foncière, Malaurie-Aynès (eds), Droit civil (4th ed., Paris, Défrois, 2009), 303.

36 Art. 46 of the Law 17.3.2014 (JO 18 mars 2014), loi relative la consommation. The statute had ex nunc effect starting 1.7.2014. The Parliament decided to repeal it essentially because it was feared that it would easily lead to an over-indebtedness of the consumer (see the Report to the Parliament, Rapp AN n°1156 of 13.6.2013, available at ‘http://www.assemblee-nationale.fr/14/rapports/r1156.asp’. In practice, however, this device was rarely used.
In conclusion, Article 4 strongly enhanced party autonomy. As a balance, it introduced both a publicity system that would guarantee transparency and predictability, and rules protecting the debtor’s interest, by limiting the extent of its liabilities and both debtor and third parties by monitoring creditor’s actions in enforcement proceedings. A final point in Article 4, moreover, entrusted the government with the general task of including further limitations of parties’ autonomy in consumer credit contracts.

2. An appraisal of the reform strategy: a step in the right direction with some caveats

Before considering the merits – and shortcomings – of the February 2014 proposal, one ought to note once again that it did not contain a fully-fledged statutory reform, but delegated the power to draft a legislative decree following specified policy goals to the Government. Should such a guidance ever be implemented, it would be necessary to address a relevant number of additional issues, some of them requiring further policy decisions that were not directly envisaged. Thus, whilst many of the criteria that were listed may represent desirable outcomes, their general nature makes it difficult to understand how exactly they would be translated into a detailed legislative action.

Having said this, an appraisal on whether the proposal was a step in the right direction is certainly possible. To this end, I will focus on two points in particular that I see as veritable cornerstones for any future reform: the setting up of a public electronic registry on the one hand, and the enhancement of parties’ autonomy in the enforcement of the security right on the other. I will also, however, attend to what were, in my opinion, the most relevant drawbacks of the proposal, namely the failure to address the issue of the opposability of creditor’s rights in insolvency proceedings (including any conflicts with non-consensual liens), and the failure to clearly define what was meant by “security right” and to expressly adopt a “functional” approach as regards the scope of the intended reform. It should be underlined that such limitations were by no means unintentional: in particular, the proposal was purposely silent on insolvency law, since additional legislative changes had just been introduced and a wider organic reform in this field was in the pipeline.

The proposal, as was seen above, expressly directed the Government to tie the third party effects of a security right with a public registration system and to set up a dedicated registry for this purpose. Public registration of a security right is indeed a time-honored solution to the problem of admitting non-possessory security rights in Italian law, 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 differences with the more modern approach envisaged in the reform proposal lie in several interconnected factors: the introduction of a unified registry for the general non-possessory security right, which would displace the fragmented and inefficient current regimes; the development of a sophisticated software for electronic filing, which would provide a more efficient and cost-effective solution; the exclusive purpose of the registry (i.e. solving the priority conflicts between the secured creditor and third parties, and not addressing other aspects such as the validity of the security right as such or title issues); and finally, the acceptance of a clear-cut first-to-file priority rule.

Admittedly, a number of key aspects of the future publicity regime were not clarified. In particular, whilst the proposal admitted the creation of a floating lien on inventory (and probably also book debts), there was no mention of whether the priority rules should be differentiated according to whether the third parties were creditors with security rights on the same asset, lien or judgement creditors, or subsequent buyers in the ordinary course of business. Moreover, a correct functioning of the priority rules as envisaged would, in my view, require the adoption of a “notice-filing” in lieu of the more traditional “transactional filing” approach, but nothing was specified on this point either. All these aspects should be kept in mind when proceeding with an organic reform.

Furthermore, the accompanying explanatory report to the proposal aptly envisaged that the registry fee be diversified depending on the operation (a lower fee would be levied for mere consultation) but should not be in any case excessive. This is again an element that should be considered in future legislation.

Overall, however, the new publicity system would be perfectly compatible with existing Italian law and would provide a more efficient solution to priority issues than the current haphazard and diversified regimes.

Turning to the issue of enforcement of secured creditor’s rights upon debtor’s default, the need to improve and modernise Italian law in this area is undeniable. The current regime is excessively cumbersome when the suppler provisions of the possessory pledge are not applicable, and relies on outdated techniques to protect the debtor and third parties, to wit, imposing formal judicial proceedings and public enforcement measures as well as sanctioning the invalidity of certain parties’ agreements. The clear statement in the proposal that the general prohibition of pactum commissorium should be abandoned is to be welcomed, also in light of the fact that even the
most traditionally oriented national laws in this respect show a clear tendency to move away from a strict interpretation of the requirement, not only in very specialized areas, such as financial collateral, but in general.37

The proposal is admittedly rather vague on the issue of how to achieve more simplicity and efficiency in enforcement and on what would be the “specific measures” to protect the debtor (and, I would add, third parties), though it does emphasise the need to introduce stricter limitations on party autonomy when the debtor is a consumer. I would submit that using ex-post evaluation of the exercise of enforcement rights through the application of a standard of “commercial reasonableness” in business-to-business transactions would be perfectly acceptable in Italian law.

As already mentioned, there is one aspect of secured transactions law on which the proposal was silent, i.e. the opposability of the security right in insolvency proceedings. It almost goes without saying that any structural reform in this area should expressly determine the extent to which a security right survives insolvency and address the interaction with insolvency legislation. Furthermore, additional thought should be given to reorganising the current opaque and extremely complex regime of non-consensual liens, especially in insolvency. The recent creation of an ad hoc Commission that should study the feasibility of an organic reform of insolvency law including a possible simplification of the rules applying to non-consensual liens is a welcome step in this direction. It would be important that this work be properly coordinated with any substantive law reform efforts in this area.

Finally, a word about the definition of what is meant by “security right over movables” and the scope of application of the proposed reform. Article 4 purposely avoided the use of a technical terminology to refer to the type of agreement that should be covered by the new regime. It did not use any of the traditional terms (pegno (“pledge”), ipoteca mobiliare (hypothecc over movables), privilegio consensuale (consensual lien) but preferred to adopt the more neutral expression garanzia mobiliare (security right over movables), an innovation as far as the Italian legislative and judicial language is concerned. Effectively, any issue regarding a more precise definition of the scope was shifted to the future drafters.

In principle, this left the opportunity of embracing (or at least discussing the feasibility of) a more functional approach to secured transactions open. Retention of title devices, especially in sales contracts, leaps to mind in

37 See for example Art. 2348 of the French code civil, as modified by the 2006 French secured transactions law reform, that considers such agreements valid.
this connection. On the one hand, existing international instruments have clearly opted for an inclusive approach concerning retention of title devices. On the other hand, this issue in relation to national law is far from uncontroversial, especially as regards European jurisdictions, and it represents a difficult point on which one should tread carefully. In any case, however, it is my firm belief that a legislator considering an organic reform of secured transactions should - at the very least - openly acknowledge that there are other contractual devices that, in practice, despite a different formal allocation of title on the assets as between the two parties, fulfil the function of securing a creditor’s claim with an in rem right that is opposable to third parties. There may be good reasons to treat retention of title differently than more traditional security rights, and indeed uniform law instruments in this field have all recognised some degree of flexibility in this respect. Such a choice, however, should be embraced in a transparent way, taking into account the economic purpose of the device rather than, exclusively, its formal legal structure. The seller’s claims should be openly weighed against the interests of other competitors over the value of the assets, and, possibly, all devices fulfilling an analogous economic purpose should be subject to the same treatment, at least regarding priority rules, again notwithstanding their formal legal structure.

IV. Concluding remarks

In this contribution, the need for an organic reform of Italian secured transactions law was highlighted and the key points of a recent attempt to put this subject on the legislative agenda were critically discussed. Notwithstanding the limitations that were flagged in the preceding paragraphs, I believe that the general criteria contained in the February 2014 legislative proposal are still of value and could indeed be seen as a sound basis on which to build a more comprehensive reform that will hopefully follow in the near future.

38 See the Cape Town Convention on International Interests in Mobile Equipment (above, fn 2) covering not only traditional (limited) rights in rem (an agreement granting - or transferring - a property right to secure a loan), but also finance devices based on retention of title, such as a conditional sale and a lease (Art. 2(2) Conv.). Likewise the UNCITRAL Legislative Guide on Secured Transactions (above, fn 3) shows a marked preference for including retention of title devices in the overall secured transactions regime (see in particular paras 101-112 and Recommendation 8). A similar approach is followed by regional instruments. Particularly interesting, in this respect, is Book IX of the Draft Common Frame of Reference (above fn 5), that covers both contractual ‘security rights’ and ‘ownership retained under retention of ownership devices’: DCFR, Art IX 101.
