IS SELF-HELP REPOSSESSION POSSIBLE IN CENTRAL EUROPE?[1]

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Abstract: To create healthy and efficient market economy, a viable legal framework which protects the ownership of individuals is a requirement. A part of this legal framework is formed by a secured transactions law which in the United States represent one of the most important branches of laws which allows the creditor to take a security interest on a debtor's collateral and in case of default the creditor is entitled to take advantage of the collateral directly. Since the beginning of the 1990s in the area of Central Europe there have been several attempts to introduce new secured transactions law. This effort succeeded only partially and therefore the whole system does not work efficiently. Central and Eastern European countries suffer from devotion to "traditional legal principles" which stem up from Roman legal tradition and therefore are unable to reflect upon new market tendencies appropriately. In this article we introduce and describe the self-help repossession which represents an extrajudicial enforcement tool for secured creditors in the United States. Subsequently, we assess the self-help repossession in our legal systems, in particular Slovakia, Hungary and Romania. It will be shown that despite Supreme Court's or Constitutional Court's decisions prohibiting self-help repossession, this enforcement tool is frequently applied and exercised.

Key words: Article 9 of the UCC, CEE region, Creditor, Debtor, Secured Transaction Law, Self-help Repossession,

Introduction

The most important feature of market economy is to ensure a sufficient supply of credit. All businessmen need capital to run their corporations, so that the consumers can enjoy goods and services and afterwards pay for them and as such contribute to the economy and the economic growth. This is the reason why economists "call credit a blessing, a driving force of the economy and an engine for growth".[5] Therefore, it should be the aim of all law-makers to create a system with wide accessibility of credit at minimal costs. To create such a system where creditors are willing to provide credits for minimal costs they have to be protected by the law. The lower is the risk of non-repayment, the lower are the costs of providing a credit. Permitting creditors to secure the lending transaction reduces their risk of not being repaid by the debtors and expands the volume of available credit in the economy. Hence, it would be essential for the whole economy to favor creditors with additional rights.

It has been many times emphasized by the European Bank for Reconstruction and Development[6] or the United Nations Commission on International Trade Law[7] that secured transactions play a vital role in financing in emerging and transitional market economies, but the law-makers do not pay sufficient attention to this fact and therefore the creditors have to protect themselves on their own-by high interest rates. A legal framework for secured transaction is a key requirement in creating an investor-friendly environment. An investor who is certain that he has legally recognized rights to employ his debtor's assets in case of non-payment may assess the investment risk quite differently.[8]

To understand the features of the secured transaction law properly, we will firstly assess the Article 9 of the Uniform Commercial Code,[9] in particular the provisions and case law on self-help repossession. Article 9 of the UCC governs how security interests are created on personal property (in CEE region it constitutes "movable personal property") of the debtor, how they are perfected and what remedies are available to the secured creditor if the debtor defaults in payment or performance. The UCC grants the secured party the right to take possession of collateral on default by himself, so called self-help repossession. This extrajudicial tool accelerates the whole enforcement procedure which is generally expensive and time-consuming when it

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[1] The authors were motivated to choose this challenging topic on the basis of numerous hours devoted to the secured transactions law and the provocative questions asked by our professor Tibor Tajti, who we would like to thank for his zeal and help.

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[5] UMARJI, M.R. *The Role of Secured Transactions to Mobilize Credit and Need For Mobilizing Law*, p. 1 (Modern Law for Global Commerce, Vienna, 2007) *available at*<http://www.uncitral.org/pdf/english/congress/Umarji.pdf>/lastly visited 28th March 2011.

[6] European Bank for Reconstruction and Development [hereinafter EBRD] owned by 61 countries and two international institutions was founded in 1991 to help building market economies and democracies in 30 countries in central Europe and central Asia. EBRD provides project financing for banks, industries and businesses, both new ventures and investments in existing companies whose needs cannot by fully met by the market. *See* http://www.ebrd.com / lastly visited on 29th March 2011.

[7] The United Nations Commission in International Trade Law [hereinafter UNCITRAL] is an international body which specializes in commercial law reform worldwide for over 40 years. UNCITRAL adopted in 2007 a Legislative Guide on Secured Transactions law which aims to assist States in developing modern secured transactions law with a view to promoting the availability of secured credit. The Guide is *available at* http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf / lastly visited on 29th March 2011.

[8] Model Law on Secured Transactions, Financed by Japan-Europe Cooperation Fund and UK Know How Fund EBRD 1994, p. 4. A*vailable at* http://www.ebrd.com/downloads/research/guides/secured.pdf / lastly visited on 29th March 2011.

[9] Uniform Commercial Code [hereinafter UCC] was firstly published in 1952 and represents one of the uniform acts which has been adopted by all 50 states in the United States in form of a statute. The UCC is the longest and most elaborate of the uniform acts. It was prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). The UCC at the beginning represented a recommendation of the laws that should be adopted by the states. The permanent editorial board was as well established to continue adapting the UCC the future changes. Although the substantive content is in all states very similar, some states have made structural modification to conform to local customs (in Louisiana, the UCC is referred to as a "Louisiana Civil Code").

comes to court proceedings. We believe that in Central Europe it is essential and commercially reasonable to introduce and establish such a remedy which will secure the creditor and allow him to obtain the possession of his collateral as soon as possible. To understand all the difficulties and obstacles in the CEE region we will analyze the possibility of self-help repossession in three jurisdictions in the region, in particular Hungary, Romania and Slovakia. In all of these three jurisdictions is the self-help repossession prohibited but factually applied which leads to legal uncertainty.

1. The Role of Self-help within the Framework of Modern Secured Transactions Law in the United States

Self-help repossession forms a part or an alternative of the final stage of the security right – the enforcement. "Creditor protection through a variety of security devices, affords little actual relief if it is not complemented by sound and effective enforcement mechanism."[10] Hence, despite the fact that in the majority of cases, the security right will not reach this point, due regard has to be given to what happens on enforcement, as the entire value of the security right depends on it. Thus, one of the main issues for those States with ambition to enact advanced secured transactions regime is to decide how the enforcement stage should look like.

The US enforcement model can be used as a valuable illustration of workable solution to problems related to enforcement of secured creditor's rights in collateral (same or very similar model applies also in Canada and other common law jurisdictions). Under the US law, self-help repossession and disposition are not the only weapons the secured creditor may use. He may elect to ignore these institutes and opt for the classic suit which is secured by an efficient bailiff system and readily available preliminary measures.

Simple and prompt accessibility of fast and effective coercive enforcement methods gives creditors greater leverage in post-breach negotiations with debtors, because of what most post-breach disputes are resolved by negotiation rather than coercive enforcement. Secured creditors are able to persuade debtors to pay or hand over their property rights voluntarily because coercive execution is expensive.

1.1. Self-help Repossession in the United States – How it Works?

Movable assets and receivables[11] play a key role in secured financing for business in developed countries. The physical nature of collateralized movable assets and receivables speaks for adopting such enforcement measures which would prevent the debtor from selling, hiding or destroying the movables in his possession and thus harming the secured creditor. Creditor has to be entitled to quickly and cheaply obtain control over the collateral at the time when the continued possession of the collateral by the defaulting debtor represents a serious risk for him. The self-help repossession represents the best instrument to fulfill the given requirements.

Article 9 UCC authorizes a creditor to repossess collateral upon default either through judicial process[12] or through self-help repossession. In this article we will focus solely on the self-help repossession because we believe that in the event when the economic situation of the debtor radically decreases the prompt action becomes a necessity and in that moment, the self-help repossession represents a salvation for the secured creditor. The key provision on repossession of personal property is Section 9-609 UCC (former it was section 9-503 UCC).[13] It authorizes the secured party to take possession of the collateral or without removal, render the equipment unusable and dispose of the collateral on debtors' premises without judicial process, if he proceeds without the breach of peace. Otherwise, legal proceedings are required. Moreover, the creditor is not required to give any advance notice to the debtor.[14]

The UCC stipulates that as long as repossession of the collateral can be obtained without a breach of the peace, the secured party may proceed to seize it. Nevertheless, the question is what constitutes the "breach of peace". The drafters of the Article 9 left this for the case law to be filled. Although, the facts of cases differ from state to state, the following guidelines can be inferred from the case law:[15]

(1) Protest

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[10] Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, p. 23 (The World Bank, 2001).

[11] Receivable is an asset designation applicable to all debts, unsettled transactions or other monetary obligations owed by a debtor. (Definition given by Investopedia)

[12] When suing on the debt, secured creditor has only to prove the existence of the debt, its amount and the fact of default. The court and its officers take care of the consequent stages of the enforcement procedure. For more *see* GILMORE, p. 1211.

[13] The precise wording of the section 9-609 UCC is following: *(a) After default, a secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under section 9-610. (b) A secured party may proceed under subsection (a): (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of peace. (c) If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.*

[14] In the case of **consumer protection**, the situation differs. In general, state law provides that a creditor must give a notice by registered or certified mail to the consumer on the details of the repossession. The notice must include specific information by law. That information usually includes a statement that the consumer defaulted and the creditor intends to repossess without court proceeding, the creditor's name, address and telephone number and a description of the goods (usually a vehicle). In addition, the notice must include a statement that the consumer may assert in writing that he/she is not in default and demand the creditor to start a court proceeding. Moreover, the notice must also warn the consumer that if the consumer chooses to challenge the matter in court, he/she may be obliged to pay attorney's fees and all court costs. For more, *see* BRAUCHER, J. *Consumer Protection and the Uniform Commercial Code: The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 Wash. U. L. Q. 549 (1997).

[15] ZINNECKER, T. The Default Provisions of Revised Article 9 of the Uniform Commercial Code, *p.*36 and WHALEY, D. Secured Transactions p. 158.

The case *Morris v. First National Bank*[16] shows that repossession made over any protest by the debtor or anyone present constitutes a "breach of peace", even no violence or significant disturbance occurs. But *Williams v. Ford Motor Credit Co.* [17]unveils that property can be repossessed if the debtor is present but fails to explicitly object.

(2) Constructive Force

Weapon or any other implied threat constructs a "breach of peace". In the case *Stone Machinery Co. v. Kessler*[18] a companion of off-duty sheriff wearing his uniform is assessed as improper.

(3) Breaking and Entering

In the case that the collateral is placed in the area with restricted access and creditor uses bolt cutters to cut padlock on the chained gate, he commits a "breach of peace" (*Martin v. Dom Equip. Co.*)[19] Nevertheless, based on the contractual freedom, parties may agree upon unconditional entering on the premises and then even using a locksmith does not represent a "breach of peace" (*Global Casting Indus., Inc. v. Daley-Hodkin Corp.,*).[20]

(4) Trickery allowed

Repossessing under false pretense may seem unfair, but the courts usually held them valid (*e.g.,* creditor calls debtor to bring the car so he can fix it or check it as in *Cox. V. Galigher*).[21]

The case law indicates that the breach of the peace limitation aspires to balance the interests of creditors and debtors. Therefore, the self-help repossession under the Article 9 is "far from being totally one-sided weapon in the hands of secured parties."[22] In the case the repossessing creditor does breach the peace, the creditor first of all loses the right to repossess and second of all might be sued for conversion and the creditor may recover actual and sometimes as well punitive damages.

1.2. Constitutional Defense against Self-Help Repossession in the United States

Considering all the above mentioned facts, one has to bear in mind that self-help repossession is one of the most important rights of a secured party: the right to take possession of the collateral after default without first giving the debtor notice and an opportunity to be heard. This right of self-help repossession enables the secured party to obtain possession of the collateral quickly and inexpensively at a time when continued possession by the debtor could pose serious risks for the secured party[23]. As we already said, this right creates risks for the debtor. A mistaken or malicious secured party can seriously disrupt a debtor's business by wrongfully taking possession – a situation which could be prevented if the debtor were notified and given an opportunity to be heard prior to the repossession[24]. This led to defenses based on constitutional law: debtors across the country sought to invalidate UCC 9-503 as a deprivation of property without due process of law violating the 14th Amendment to the US Constitution[25].

The problem with these challenges was that the 14th Amendment protects only against deprivations of property by the state, which means that a private, secured creditor would therefore not seem to be covered by this prohibition. Debtors, however, tried to convince the courts that the secured creditor's remedy ought to be treated as state action. They argued both that the state was inextricably involved with self-help repossessions by statutorily authorizing them and that such repossessions represented a governmental function. These challenges were mostly unsuccessful[26].

The debtors then shifted from federal constitutional law to state constitutional law and this time they tried to challenge the self-help repossession remedy on grounds that it violates the Due Process Clause, but again the results were not what the debtors hoped for[27].

1.3. Future of Self-Help Repossession in America

Self-help repossession is not just important for the creditors, but also for the professionals and industries that actually provide the service of repossession. Repo businesses were an important industry in the US[28], but the recent report[29] of the

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[16] *Morris v. First National Bank,* 254 N.E.2d 683 (Ohio 1970).
[17] *Williams v. Ford Motor Credit Co.,* 674 F2d 717 (8th Cir. 1982).
[18] *Stone Machinery Co. v. Kessler,* 463 P.2d 651 (Washington 1970).
[19] *Martin v. Dorn Equip. Co.,* 821 P2d 1025 (Mont. 1991).
[20] *Global Casting Indus., Inc. v. Daley-Hodkin Corp.,* 432 N.Y.S.2d 453 (Supreme Court of the US 1980).
[21] *Cox v. Galigher*, 213 S.E.2d 475 (W. Va. 1975).
[22] TAJTI, T. Comparative Secured Transactions Law, p.188.
[23] Mc Laughlin & Cohen – Self Help Repossession, *N.Y.L.J.*, March 9, 1988, page 1.
[24] *Supra,* p. 2.
[25] *Fuentes v. Shavin* 407 U.S. 67 (1972).
[26] *Id.* 23, p. 2.
[27] *The law has become more hostile to efforts at self-help repossession, particularly in real property. In the landlord tenant context, both tenants and landlords have aspects of the right to exclude. The tenant has the present right to exclude third parties and limited rights to exclude the landlord. In landlord-tenant situations, the owner has delegated the right to exclude for a limited period of time to the tenant. To the rest of the world the tenant appears, like owners, to be exercising the right to exclude. The landlord has the future right to exclude third parties, and usually has limited privileges to enter for purposes of repairs and to show the premises to prospective tenants. Tenants have a wide range of use privileges protected by the right to exclude, and many of these include self-help to impede invasions. When a landlord tries to repossess, tenants can be expected to resist. Instead of delineating the boundaries of the tenant's privilege to resist, the modern trend is to force the problem into a judicial forum, where the respective rights of the parties can be determined. The deference to self-help is heavily based on exclusion, and when possession and ownership are separated, the law is less deferential to the owner's right to exclude. […]This is increasingly true in the context of real property (landlord-tenant), but courts are still somewhat deferential to self-help repossession in the case of personal *86 property. As long as the exercise of the privilege of self-help to repossess personal property does not tend to breach of the peace, the courts will generally allow it*. *See:* Henry E. Smith (2005) – Self Help and the Nature of Property, *Journal of Law, Economics & Policy*, Winter.
[28] Secured parties will often hire independent contractors to undertake repossession rather than train in house personnel. Case law generally holds secured parties liable for a breach of the peace committed by an independent contractor. Accordingly, a secured party will typically require

National Consumers Law Center (NCLC) seems to wish to put an end to it all. The report focuses on a number of abuses and incidents that happened in US and blames the industry itself. In the NCLC's opinion, *this kind of incidents could be prevented by urgently, shutting down the current system of self-help repossessions without court review or the involvement of law enforcement could help reduce the chance that automobile seizures could kill, injure or traumatize consumers, repo agents or bystanders. States that choose not to abolish self-help repossession must at least regulate a process that now stands ripe for abuses […]* that *can be removed only by restoring the responsibility and accountability of court review and law enforcement execution to the fundamentally flawed regime of self-help repossession*[30]. The NCLC proposes a number of changes to the self-help repossession process that include: federal mandates on "Right to Cure" letter, a provision to require any repossession that is opposed "in any way" by the consumer, to immediately cease, repossessions may only be allowed with a court order, a requirement that consumers authorized by the courts for repossession be notified when and where the repossession will occur, all repossessions must be conducted by law enforcement personnel.

The result of this kind of anti-repo lobby will probably cause an increase of penalties and liabilities on debt collectors of all type, which will make the collections much more difficult than they are. This will most likely have an adverse effect on recoveries, which will be reduced in number. Furthermore, this will mean on one side less satisfied creditors and on the other side less repo-businesses, as the reduced recoveries will put many collection agencies out of business. However, given the fact that we are referring to security devices, a reduced number of recoveries will affect in the end the financing industry itself and its customers. The less safe they will feel when giving money, the more expensive the loans will be. They are all linked together and an over-regulated[31] repossession process will cause only adverse effects, especially on those who are supposed to be protected by these regulations: the customers.

2. Self-help Repossession in Slovakia & Theoretical Approach towards the Self-help Repossession in CEE Region

Enforcement in Slovakia, as well as in most of the Central European countries, is strictly connected to courts and bailiffs, which is time consuming and costly. In addition, preliminary measures do not function as quick as they should. It has to be mentioned that there are certain remedies which aim to speed up the enforcement techniques.[32] Following the strong civil law tradition, Slovakia restricts the use of self-help as a means of interfering in another person's rights to circumstances of real necessity. Only a person whose rights are immediately threatened may obviate the threat in an appropriate manner. Otherwise, such conduct would be considered as an unlawful interference with another person's right. The restriction on self-help is expressed in §6 of Slovakian Civil Code, which reads:

"If a person is imminently threatened with an unjustifiable interference with his right, the person so threatened may himself avert such violation in an appropriate manner."[33]

To understand the current approach to self-help, it is necessary to assess the historical evolvement of this institute and associated legal thinking in CEE region. This concept originally evolved as a special entitlement towards the protection of one own ownership through the self-enforcement of his/her rights. Firstly, as *Otakar Sommer* correctly pointed out the basic defect in the application of the self-enforcement is not the fact that the stronger wins, which not necessarily is the one on whose side the law is, but the fact that the law is not discovered, nor established.[34] Secondly, in civil law jurisdictions, the theory of division of power is strictly applied and the essence is the separation of private and public power which stands on the following principles: 1. Who believes that his/her rights are curtailed is not entitled to decide on this issue by him/her but, 2. must turn to court or other competent authority to decide whether this right belongs to him/her and 3. if the decision is not performed voluntarily, only the appointed executive body is entitled to enforce this right.[35] Hence, the self-help is approached in very critical way and is assessed as an exception than the rule. Nevertheless, the reality is different.

As it is stated above, Slovakian Civil Code stems from the general principle that the self-help is allowed only in those situations, where it is impossible to effectively invoke the help of the public authority. However, such interpretation would be too broad and one could conclude that in the event of long-standing unlawful matter where no public authority proceeds or it takes too much time and therefore has an irreversible legal or economic effect on one's rights, he/she can take the law - enforcement

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that the independent contractor insure against claims of breach of the peace. *See*: J. Braucher (1997) *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 Wash. U.L.Q. 549, 560-66 (Spring).

[29] The Report is entitled: REPO MADNESS, How automobile repossession endangers owners, agents and the public, March 2010. *Available at:* http://toddmurraylaw.com/wp-content/uploads/2010/04/2010_03-Repossession-Report.pdf/ lastly visited on 6th April 2011.

[30] National Consumer Law Center (2010) *REPO MADNESS, How automobile repossession endangers owners, agents and the public*, p 16-17. On line source: http://toddmurraylaw.com/wp-content/uploads/2010/04/2010_03-Repossession-Report.pdf/ lastly visited on 6th April 2011.

[31] The conclusion is valid only for self-help repossession, as other debt collection means and agencies managed to flourish in the US despite the implementation of the Fair Debt Collection Practices Act which was meant to be an answer to unfair or abusive debt collection practices. What needs to be underlined here is that in Continental Europe there is no such Act. But an analysis of the causes or consequences of such legislative gap in this respect would exceed the purpose of the present paper.

[32] In 2008 The Act No. 99/1963 Coll. the Civil Procedure Code in Slovakia has undergone a several important novelties and amended among others the payment order (sec. 172). Based on the sections 172 to 174 the creditor is entitled to request a payment order within 10 days after the court fees were paid, which would impose the duty to pay on the debtor within the 15 days or the obligation to appeal. In the case the debtor did not appeal, after the 15 days period creditor may seek the services of the bailiff. Nevertheless, this remedy may be applied only in the case of specific financial amount. If the creditor has to estimate the price of his collateral, the whole civil suit is inevitable. Moreover, the Civil Procedure Code lays down specific requirements which have to be met to be able to obtain an effective payment order (e.g. the seat of the debtor has to be known, the payment order has to be delivered directly into debtor's hands.

[33] The text in Slovakian of §6 of the Civil Code reads: "Ak hrozí neoprávnený zásah do práva bezprostredne, môže ten, kto je takto ohrozený, primeraným spôsobom zásah sám odvrátiť." Same or very similar provision can be found in Hungarian as well as Romanian civil code.

[34] SOMMER, O. Textbook of the Private Roman Law, p. 34.

[35] ŠVESTKA, J. Občanský Zákoník, p. 99.

in his/her own hands. This interpretation would be incorrect and such actions should be held illegal. The §6 of the Slovakian Civil Code has to be read in connection with the other surrounding provisions which would led to following interpretation[36] of the possible application of self-help:

a) Ineligible interference in one's rights;
b) Imminence of such interference which takes form of a real and imminent danger or which already occurred and lasts as incomplete;
c) Self-help must be carried out appropriately in connection to intensity, danger and form of the interference;
d) The only entitled person is the one endangered (or his/her legal representative or agent).

The given legal interpretation of the applicability of the self-help is recognized also in Hungary and Romania. This base for legal reasoning is correct however it does bring some other relevant questions towards a discussion because in every-day-life, the self-help repossession in Slovakia is performed, mainly by leasing companies, banks and other companies which specialize in the field of private enforcement. Nevertheless, until now no one has questioned these practices. We should ask why it is so. Whether it is due to legal illiteracy or the reasoning of the leasing and other companies is respectable. First of all, they do incorporate a specific provision which entitles them in the event of default to seize the collateral and in some cases even to come into your house.[37] The reasoning is simple, the creditor retains the title of the collateral therefore he is still the owner and following the contractual freedom if so agreed, creditor may take what is his. Moreover, they inform and provide the debtor with the terms and conditions in advance, so the debtor could not object. In other situations than leasing, e.g. in the case of credit when the ownership remains with the debtor and creditor creates a lien, following the rules of Slovakian Civil Code, the creditor is not entitled in the event of default to seize and repossess the collateral.[38]

Despite of these rationales, are the creditors entitled to proceed in such a way when the Slovakian Civil Code expressly prohibits to take the right/the enforcement in one own hands? If someone still hesitates, what is the meaning and the application of the self-help within the §6 of the Slovakian Civil Code, the Supreme Court of Slovakia rendered a decision connected directly to this issue, where it was clearly stated that **no** so called "possessory self-help" is allowed:[39]

> *"A form of protection of the subjective right alongside the judicial protection thereof may be, in extraordinary circumstances, the self-help, meaning a possibility of the endangered to prevent by own force the immediate unlawful interference of a third person with his right under the conditions set forth by the law. Nevertheless,* ***our law under no circumstances allows the aggressive, so called possessory self-help which purports to take the right from a third person to whom this right does not belong****."*

It is without any doubt, that such self-help repossession creates an unlawful interference into the one's rights and into a peaceful state as well. Such interference, based on the Civil Code and the Supreme Court decision, is prohibited. One cannot decide upon his own rights by himself and even in the case of default, the creditor has to approach the court. No contractual provision can refrain from this general principle.

In conclusion, our legal doctrine requires state and only state to provide legal protection of rights of individuals including the legal entities. It is not only a duty of the state towards individuals, but also an exclusive right of the state. The cases which will be described in the following parts present in Hungary and Romania do take place as well in Slovakia, but until now no one has questioned them.

3. Self-help Repossession in Hungary

An article was published in the weekly HVG with the title of "[w]here does the car go?"[40] It draws the attention of recently reported car self-help repossession practices in Hungary. According to it, a shocked Budapest resident reported her car was stolen from a public parking lot. The police officer informed the owner, they had been contacted previously via phone that the bailiff is about to carrying out an enforcement order. However, the debtor was neither duly notified, nor a report[41] was filed

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[36] ŠVESTKA, J. Občanský Zákoník, p. 100.

[37] Only a very small number of leasing companies provide directly the leasing contracts on their web pages. Generally, future clients may only register and fulfill the request for a leasing but cannot download the leasing contract. The provision on the possible future self-help repossession is drafted as: *"The Lessee is obliged to provide the lessor access to the leased object. Lessee agrees upon the entry of the Lessor's agent on the premises of the Lessee where the leased object is situated for the purpose of control, documentation, evaluation, sale or removal in the case of early termination of the lease contract according to the Terms and Condition of the contract."* Based on this provision, the Lessor – Creditor is entitled to seize and repossess the collateral in the case of early termination (withdrawal or termination of contract by one of the parties, delay in payment/s which forms a default, etc.).

[38] Slovakian Civil Code regulates creation of lien in the third part (§151s-151v). Under the section 151s the creditor is entitled to seize the movable property of the debtor, but not arbitrarily or deceitfully. Only in the event of debtor's bankruptcy, the creditor is entitled seize the movable property of the debtor to ensure the due debt.

[39] Rozsudok Najvyššieho súdu Slovenskej Republiky, sp. zn. 2 Obo 33/2000 [The Supreme Court of the Slovak Republic decision No. 2 Obo 33/2000].

[40] Based on Agnes Gyenis article in the weekly HVG, 26 March 2011 issue, at 97-98.

[41] Under Section 35 of the Act LIII of 1994 on Judicial Enforcement.

(1) The bailiff shall file a report regarding on-site procedures and other enforcement actions prescribed by legal regulation. Reports regarding on-site procedures shall be drafted at the venue where conducted. The report may be completed elsewhere if the bailiff is obstructed; in this case the report shall contain the venue where drafted and the reason for the bailiff's inability to complete it at the original location.

(2) The report shall contain:

a) the name and address of the parties and other persons of interest attending (representatives of parties, curator ad litem, official receiver, witnesses, family members of legal age living in the judgment debtor's household, etc.) and the name and office address of the bailiff and the legal representative;

b) the place and date of the procedure;

regarding the procedures and enforcement actions. It is clear from the article the debtor has not performed its obligation to pay. We do not have any information regarding the reason for failure. By the beginning of 2011 she has not paid for 4 months. Consequently, the bank terminated their agreement. The creditor involved one of its agents into the proceeding in order to collect either the money or the car itself. The agent and the debtor entered into an oral agreement that the balance would be paid. Though, the car was taken two days prior the agreed deadline. The debtor asked for an explanation, but the creditor was unwilling to provide any information, referring to bank secrecy. It only referred their general practice in similar cases, when the agent may repossess the car in case of 'the possibilities to enter into a mutual agreement during the negotiations are exhausted'. Furthermore, the bank said its primary interest is to maintain the contractual relationship. It added, repossessing the car is the final device. After termination of the contract the debtor shall be obliged to deliver the car to the creditor. In case of not doing so, the creditor retains the right to repossess the car unilaterally.[42] Additionally, also the expenses of such repossession are imposed on the debtor. The debtor shall be notified regarding the mode, place and time in advance. Therefore, the debtor can collect its personal items from the car. According the bank's standard policy conditions,[43] if the debtor is not present the bank undertakes responsible custody and shall provide for the safekeeping of the things belonging to the debtor.

In Hungary[44] 'self-help repossession' devices based on the principle of freedom of contract do exist. However, we would like to clear that in Hungary we do not have legal instrument under the terminology of 'self-help repossession'. The practice that can be named as self-help repossession under Hungarian law is present in the form of waiving the right of the protection of possession. For instance, under the provisions of standard policy conditions of a credit contract, when the debtor is unwilling or unable to perform its contractual obligation to pay, the creditor is entitled to exercise its right of purchase (option). The debtor's ownership ceases to exist at the same time. Unless otherwise agreed by the parties, the creditor gets ownership and the car is to be considered as delivered. The parties' agreement contains security provisions; more precisely the debtor is required to hand over the car with all documents to the creditor or its duly authorized agent at an agreed place and time. In case of not doing so the debtor is obliged to tolerate that the creditor takes possession of the car used as security according to the terms of the agreement. Furthermore, the debtor gives its consent and does not consider this behavior as a trespass to chattel, since the debtor waives its right to protection of possession. Under the Hungarian law the above mentioned practice in case of default is legal, because there is no statutory provision stating that waiving the right to protection of possession is impossible, and such contracts shall be considered as null or void. Therefore, the parties can enter into mutual agreement containing such security devices. Indeed, the parties tend to enter into such contract when it becomes impossible for the debtor to perform and they intend to avoid a long and expensive judicial process. However, in the above-mentioned article the circumstances are different. The debtor acknowledged its debt, the parties agreed in time extension and the deadline when the debtor was supposed to perform its balance. Contrary to this agreement, the agent went earlier and took possession without any prior notice. Given the fact that the agent did not act in accordance with their agreement, this step was illegal and also it is against good faith principle. Taking into account that there is no information about the exact details of the contract either between the agent and the creditor, or between the debtor and the creditor, I am only in the position to provide information about the possibilities for similar cases within the legal terms and statutory provisions[45]. Furthermore, the nature of the contract itself bears relevance as well. First, the article mentions that the debtor was financing the car from a loan of 6 million HUF and she still owed more than 5 million HUF. Later the article refers to the parties' agreement as a bank credit contract. All in all, the nature of the contract between the parties is not identified clearly. Moreover, in case of cars also a common type of agreement between the parties is the leasing. In case of leasing, there is no transfer of ownership; therefore there is no granted right of purchase (option). While in case of credit and loan agreements, the debtor has the ownership but the right of purchase is granted.

In general the security holder is entitled to seek satisfaction from the collateral in case of default. If we speak specifically about lien, the right to take possession without judicial proceedings in the form of self-help repossession is illegal. Under the main provisions of the Hungarian Civil Code, the only possibility for the creditor is through judicial enforcement proceedings.[46] The same provision is supported[47] by banning the parties to conclude a contract before the claim is due, accordingly the non-performance of the obligor results in that the legal title of the pledged property goes to the lien holder. However, this provision only governs cases before the claim is due. Consequently, after the claim is due, the parties are entitled to conclude contract containing such provisions. Nonetheless, these provisions only apply to lien. In case of bank credit and loan agreements the security device is the car. Contrary to the fact that the nature of the car in such agreements may be considered as collateral,

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c) the legal title and amount (subject matter) of the claim to be enforced;
d) the name of the court (authority) ordering the enforcement, as well as the name and file number of the enforcement order;
e) description of the act of enforcement;
f) petitions and remarks of the parties and other persons of interest;
g) other data and circumstances prescribed by law.
(3) The report shall be signed by the bailiff, the parties and other persons of interest attending the act of enforcement. Any refusal to sign the report and the reasons therefor shall be indicated in the report.

[42] The creditor may also prevent or restrict the debtor from using it, and entitled to withdrew it from circulation.

[43] A number of standard policy conditions of other banks contain similar provisions.

[44] We have to clarify we are providing background for cases involving only movable personal property, such as cars. We do not refer to mortgage or intangible property.

[45] Also in Hungary there are self-help provisions under the Section 190 (1) and (2) of the Civil Code. *"A possessor shall be entitled to use his own might and power to avert an attack directed against his possession to the extent necessary for protection of the possession. A person shall be allowed to act on his own might and power in the interest of reacquiring a lost possession only if the time lost through the use of other means of protection would frustrate protection of the possession."* This provision has been interpreted in the second part of our article.

[46] Article 255 (1) of Civil Code: "*Unless otherwise provided by law, satisfaction from the pledged property shall take place on the basis of court order by a writ of execution."*

[47] Section 255 (2) of Civil Code: *"Agreements that are concluded before the claim is due and grant the lien holder the right to acquire ownership of the pledged property in the event of the failure to fulfill the obligation shall be null and void."*

these agreements are not lien contracts. Under the Civil Code,[48] *"liens are created under contract or pursuant to legal regulations…"* and also stipulates the *"lien contracts shall be concluded in writing"*. The credit and loan contracts are not necessarily lien contracts. If it were a lien contract, there should be a separate, written lien agreement between the parties.

As a result of the introduction of the two amendments of the Civil Code,[49] affected by the UCC Article 9 as well, some new institutions were introduced, including floating lien and lien on things, but these amendments do not contain provisions regarding self-help repossession. In Hungary, officially the creditors have two available options to enforce their rights and get satisfaction from the pledged property. One is a judicial; the other one is a non-judicial civil procedure. The second one is the effort of the last decades' legislators creating more and more exceptions.[50] The increasing debt among population and the standard of living dictates that the state should undertake certain role to provide and guarantee a fair, due proceeding for the parties. However, we should bear in mind that in order to maintain competition in business life there should be provided a cheaper and more flexible way of satisfaction from creditors, even if they are not literally non-judicial proceedings. Under the provisions of the Enforcement Act in Hungary, upon the deadline for performance is over, by issuing enforcement order the court, as well as the notary public binds the debtor to pay to the creditor.[51] In the enforcement stage court, police and bailiff got formal role. The creditor itself is not entitled to act.

As an alternative provided in the non-judicial form, since June 1, 2010 there is a new and quite efficient way for the companies and private parties to enforce their demands.[52] Issuing order for payment falls under the competence of public notary. Electronic claims may be uploaded and submitted directly to the Hungarian Association of Notaries Public. The public notary issues the order for payment within three days of receipt rendering to pay the debtor. Given the reason it is fast, it is worth also to file these payments of orders for smaller amount of debts. These orders are issued and posted centrally by the system of the National Chamber of Notaries. Within 15 days defendants may raise objections. In case of objection the whole process turns into a court proceeding. The public notary sends the documents to the court electronically. In case no objections are raised, the order is enforceable and it has the same effect as the final court verdict.[53] This is the closest way in Hungary to non-judicial but formal and legal enforcement proceedings. On the other hand, it is still not self-help repossession.

In conclusion, what we have learnt from the HVG case there is a sort of self-help repossession in case of bank credit and loan contracts. The car constitutes a security device, which protects the creditor. If banks did not hold the right to take possession it would mean that many debtors would use the cars without paying for it, and the parties would have to face with a long and expensive process of judicial enforcement. On the other hand, the credit and loan agreements refer to the car as a 'device' (*eszköz*), or 'security device' (*biztosíték*). These contracts do not use the word 'lien' at all. If it were a lien, there would be a separate agreement between the parties. Though, the exact steps of the repossession are defined and based on the parties' agreement. Therefore, in our opinion, in the HVG case, repossession prior the agreed deadline without notifying the debtor about the time, place and manner constitutes as a breach of contract. The agent did not act in accordance with their contractual terms. Also the authorized court should, in accordance with the relevant regulations and laws, have judicial supervisory competence to examine the general terms and conditions of the credit institutions. But the court provides decisions within the terms of existing statutory provisions and contractual terms. The disputes have to be decided on a case-by-case basis, but ignorance of the law or not knowing the law is no excuse. In our view, the main problem arises from the financial culture and payment morale, and while it is true the bank defines the terms of the contracts unilaterally, the debtor is the person who signs it without reading it [carefully]. The debtors usually see only the amount of installments and the date when they get the car, but they do not pay attention to the other sections of the contract. People undertake more than they can afford and forget the Hungarian phrase 'you reach out until your blanket lasts'.

4. Self-help Repossession in Romania

4.1. Implementation of Self-Help Repossession in Romania

It might come as a surprise for those unfamiliar with the Romanian legislation, but according to a Report of EBRD[54], *Romania has established one of the most advanced regimes for secured transactions in the EBRD region*[55]. On the 27th of May 1999, the Law titled "Legal Treatment of Security Interests in Personal Property" (Title VI of Law No. 99/1999, hereafter "Law on Security Interests") was published in the *Official Gazette* implementing the taking security on movable assets.

The 5th Chapter of Title VI of Law No 99/1999, "Enforcement of Security Interests provides for self-help repossession. Articles 62 and 63 explicitly state that: *Upon default of the secured obligation, the secured party may choose to initiate judicial proceedings in accordance with the provisions of the Code of Civil Procedure, or to enforce the security interest in accordance with the provisions of this chapter* and that *In the event that the debtor defaults on the secured obligation, the secured party has the right to satisfy the secured obligation from the collateral.* ***To achieve this end, the secured party has the right to take***

[48] Section 254 (1) and (2) of Civil Code

[49] Act XXVI of 1996 on the Amendment of Certain Provisions of the Hungarian Republic's Civil Code in 1996 and Act CXXXVII of 2000 on the Amendment of the Law Regulating Charges.

[50] Section 257 and 258 of Civil Code the parties can agree in writing to sell the property jointly by establishing the lowest price or in a simplified procedure. See further provisions in Act CXII of 1996 on Credit Institutions and Financial Enterprises (contains provision for consumer protection as well) and No. 12/2003 (I. 30.) regulation of the Hungarian Government about non-judicial sale of collaterals.

[51] Section 10 of the Act LIII of 1994 on Judicial Enforcement.

[52] Act L of 2009 on Regulation of Electronic Payment Procedures.

[53] Available at: http://www.coe.int/t/dghl/standardsetting/minjust/mju30/Hungary_ejustice.pdf/lastly visited on 6th April 2011.

[54] Commercial Laws of Romania, *An Assessment by the EBRD*, July 2008, *Available at:* http://www.ebrd.com/downloads/sector/legal/romania.pdf / lastly visited on 6th April 2011.

[55] Commercial Laws of Romania, *An Assessment by the EBRD*, July 2008, *Available at:* http://www.ebrd.com/downloads/sector/legal/romania.pdf/ lastly visited on 6th April 2011, p.19.

possession of the collateral or its proceeds by peaceful means without the need for judicial summons, judicial assistance, or the need to pay a fee, tariff, or any tax. *No notice must be given to the debtor before taking possession. When exercising this right to repossess, the secured party shall not breach the peace, use physical force or intimidation, or resort to any other method designed to coerce the debtor at the time the secured party takes possession. When repossessing the collateral, no public official or police officer may be present at any time unless a judicial order authorizes such a presence. In order for the creditor to make use of the rights set out in this Article, the security agreement must include the following sentence in upper case of not less than size 12 point: "IN CASE OF DEFAULT, THE CREDITOR MAY USE SELF-HELP IN TAKING POSSESSION OF THE COLLATERAL"*. According to the drafters, the Source of these articles was the famous UCC Art 9 – 503. What is surprising is this case is how the legislators decided to transplant a legal provision, belonging to the common-law jurisdiction, in a country belonging to a civil law system, without transplanting also the enforcing means and the anti-abusive measures. One explanation might be that in order to ease access to credit, the legislators tried to create a pro-creditor system. Whether such system would stand in courts is another discussion.

The main justification for giving green light to self-help repossession was that personal property usually depreciates faster than real property. Consequently, accepting personal property as collateral requires minimizing the time required for recovery. The people interviewed for the background study for this law indicated that repossessing and selling collateral – movables and intangible property – takes two to four years and it consumes a lot of resources. Such costs in time and money eliminate as potential collateral much personal property whose economic value might, with lower costs, be used to secure loans. Permitting the secured party to take possession and sell the collateral permits substantial reduction in the time needed to repossess. In permitting private enforcement, the law explicitly prohibits the use of force by the private party. Should the private party need to use force, then the private party must go to a court to obtain an order for police assistance. The private party may not, according to the legal text, under any circumstances, directly use the police for assistance in enforcement. These provisions aim at preserving a clear distinction between the peaceful means agreed to between creditor and debtor and the use of force requiring the intervention of the state to ensure the lawful application of force[56]. The American experience seemed to have reached Romania who was now to become a Paradise for creditors, banks, other financiers as well as trade creditors[57]. The question is: is this kind of procedure really implementable in Romania?

The answer to this question is rather negative than affirmative. Enforceability has always been a problem in civil Law systems[58] because all executions are to be based on a so-called 'executive title', the content of which, in Romania's case, are defined by the Code of Civil Procedure Code. The essence is that execution can only take place after court's approval[59] and through the bailiff's action. The bailiff can also ask the help of the police in order to complete de execution, as execution is considered to be action of the state. This clear difference between the personal action of the creditor and the state action performed by the bailiff makes us wonder how effective really is self-repossession in Romania and by what means are the debtor's rights protected.

4.2. Constitutional Defense against Self-Help Repossession in Romania: A Different Outcome?

In 2006, the Romanian Parliament modified the Civil Procedure Code, by introducing art 373¹ which removed the requirement that the enforceable title should be reviewed by a court of execution[60]. This would have meant that an enforceable title was out of court's reach, leaving total freedom to creditors and bailiffs.

We need to bear in mind that according to the modified Civil Procedure Code, the enforceable title was to be submitted to the bailiff for execution, what would have, however, still qualify as state action on the basis of the Code of Civil Procedure.

In 2009 the Constitutional Court of Romania was requested to verify the constitutionality of the modified Art 373.¹ The gist of the claim was that although foreclosure is a civil trial phase, by removing the intervention of the court in reviewing **the legality of the procedure** at the beginning of execution, it was given an administrative character, what violates the constitutional principle of separation of powers. In Decision no. 458/2009 The Constitutional Court of Romania found the provisions of art. 373¹ to be unconstitutional for violation of the principle of separation of power and for violation of the right to a fair trial which was guaranteed by both the Romanian Constitution and the European Convention of Human Rights (which has priority over the Constitution). The Court reasoned that art 373¹ basically transforms the foreclosure procedure (a state action under the supervision of the courts) into an administrative (personal) procedure, performed by private individuals, which offers no guarantees to those subjected to it. It then stated that:

> *[T]he foreclosure should not be viewed unilaterally, only from the perspective of the creditor and its rights, but also from the perspective of the debtor, who must be secured and have those guarantees that characterize the right to a fair trial, by removing any possibilities of abuse and possible abusing approaches. Giving access to court - by ensuring the possibility of challenging the acts of an execution which was contrary to law - is not always a sufficient remedy provided to the person against whom the execution procedure was started in an unlawful manner. It is necessary to have a procedural guarantee for the debtor to prevent any abuse from the creditor and*

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[56] Nuria de la Pena, Heywood W Flisig (coord) (1998): Romania, *Draft on Security Interests in Personal Property and Commentary*, Center for Economic Analysis and Law, March, page 37. *Available at:* www.ceal.org/pubs/RomlawEngV77,final,transmittoIBRD&Errata.rtf/ lastly visited on 6th April 2011.

[57] Trade creditors are those creditors – i.e. suppliers or consignors – who retain title in the goods.

[58] "Enforcement was always a problem and always will be a problem in civil law regimes. There could be no self-help repossession provision; because it would violate their norms of citizen action" *See:* John A. Spagnole (2009) Secured Transaction Law in Eastern Europe: The Polish Experience as an Example, p. 1.

[59] Art 374¹ of the Romanian Civil Procedure Code provides that those deeds that are acknowledged by the law to have the value of a title will not necessitate enforcement from the court, but they will still require the involvement of the bailiff.

[60] For a detailed description of the bailiff system and enforcement procedure in Romania, see Stefan Messmann & Tibor Tajti (eds), *The Case Law of Central and Eastern Europe. Enforcement of Contracts*, p. 692-725.

the judicial control of the commencement of enforcement proceedings also constituted an adequate and effective guarantee of the right to a fair trial for all parties involved in this procedure[61].

To summarize, the Constitutional Court decided that discarding of courts' approval in execution procedure is in fact a violation of due process, exactly the opposite of what their colleagues from the US said. Although this Decision does not refer directly to the issue of self-help, seeing the reasoning of the Constitutional Court, we have grounds to believe that in case of a constitutional action against art 63 of Law no 99/1999, the outcome would be the same, as the personal action leaves room arbitrariness and abuses.

4.3. Future of Self-Help Repossession in Romania

We were unable to find any Supreme Court case with respect to self-help repossession. This may mean only two things: either the value of the goods was not that big to reach to the Supreme Court, or the debtors have not resisted creditors' requests. But from our experience this remedy works only for those who are not smart enough or rich enough to put up a fight against the creditors and their collection agents[62]. One of the authors of this article was personally involved in a case where a leasing company sent its agents to repossess two leased cars. On his advice the debtor refused to "peacefully" surrender the cars, stating that the cars are used in his line of work and that would affect his activity. He also stated that he does not recognize the existence of debt. Because the agent was clearly not aware of the law which says that in case of objections you cannot proceed any further with the repossession the Police was called to remove him from the premises. In the end the agent had to come back with the bailiff and the enforced title in order to recollect the cars. In order to underline even more the importance of this remedy we will share that by the time he came back, the cars were no longer in the debtor's possession. **The fact that the creditor needed the court's approval and the intervention of the bailiff not only deprived him of his money but also of his own goods, which is exactly what self-help repossession remedy was trying to prevent**.

It should be emphasized that this remedy created an entire industry around it. This also aids economy as it creates workplaces, incomes and it contributes in form of taxes, three essentials that every emerging economy should be interested in.[63]

Does self-help repossession have a future in Romania?[64] Not really. Not right now. Not under these circumstances. Not when the provisions of Law no 99/1999, art 63 are in fact irreconcilable with the pertaining provisions of the Code of Civil Procedure. A powerful and enforceable self – help remedy would necessitate a substantial change not only in the field of law but also in the way a civil law system and society thinks. Given the fact that Romanians regained their civil freedoms only recently, it is hard to believe that they would give them up for the sake of creditors.

Conclusion

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[61] Decision no 458/2009 of the Constitutional Court of Romania, published in the Official Gazette no 256/17.04.2009. The cited text reads in Romanian as follows: [..] *executarea silită nu trebuie privită unilateral, numai din perspectiva creditorului şi a drepturilor acestuia, ci şi din perspectiva debitorului, căruia deopotrivă trebuie să-i fie asigurate garanţiile ce caracterizează dreptul la un proces echitabil, prin înlăturarea oricăror posibilităţi de abuz şi a eventualelor demersuri şicanatorii. Accesul la o instanţă de judecată, prin posibilitatea contestării actelor de executare făcute cu încălcarea legii, nu constituie întotdeauna un remediu suficient oferit persoanei împotriva căreia s-a procedat în mod nelegal la începerea executării silite. Este necesară o garanţie procesuală a debitorului pentru prevenirea oricărui abuz în exercitarea dreptului de către creditorul urmăritor, iar controlul judecătoresc al începerii executării silite constituia o asemenea garanţie, adecvată şi eficientă, a dreptului la un proces echitabil al tuturor părţilor implicate în această procedură.*

[62] On the same issue, see Messmann & Tajti (eds), p. 727: *"[…] Serious problems have arisen in cases of enforcement by bailiffs, and thus, it is almost certain that creditors accompanied by any public authority should not expect a different treatment.*"

[63] We are referring here only to the repo-industry. With respect to debt collecting industry itself one should note that Romania is one the markets with the highest potential, which was exploited in the last years both by banks and other collection agencies. For example, factoring companies have constantly increased their profits. If in 2001 the volume of factoring operations raised up to 105 million Euros which represented a 175% raise compared to year 2000 and a 552 % raise compared to year 1996 (http://factoring.3x.ro/tendinte.php/ lastly visited on 6th April 2011). The figures presented above are very small compared to other former communist countries. For example, in 2001, when in Romania the factoring operations reached for the first time 100 million Euros, in Poland the factoring operations reached 3 000 million Euros. The Hungarian and Czech market were also superior (http://www.sfin.ro/articol_4943/factoring__alternativa_la_metodele_clasice_de_finantare.html/ lastly visited on 6th April 2011).). In a relatively recent article published by a Romanian newspaper – Gandul – it was stated that even now the Romanian factoring market is "400 times smaller than in EU", according to the Factoring Division of BRD Groupe Societe Generale. Basically only "a few hundred small and middle enterprises are using factoring as a financing instrument". Even so, "the Romanian factoring market reached 1 billion Euros" (All three quotes from http://www.gandul.info/financiar/factoring-ul-romania-400-ori-mic-ue-271668) in 2006 and its peak of 1, 8 billion Euros in 2008 (http://www.ghiseulbancar.ro/articole/5/8332/tot_articolul_Piata_de_factoring_din_Romania_.htm). In 2009 the market suffered a 27, 8% drop (to 1,3 billion Euros) but it was expected to recover 10-15% in 2010 (http://www.doingbusiness.ro/ro/stiri-afaceri/16140/piata-romaneasca-de-factoring-ar-putea-avansa-cu-10-15-in-2010-dupa-ce-a-cazut-cu-28-anul-trecut).The recent development is due to the fact that more and more banks are offering factoring services. It was introduced in the 90's by BRD (which has now more than 15 years of experience) and in 2006 "owned" 42% of the entire Romanian factoring market http://www.hotnews.ro/stiri-arhiva-1152169-brd-detine-42-din-piata-factoring-din-romania.htm being its uncontested leader. Other important players are Compania de Factoring IFN (a division belonging to Banca Transilvania) which is considered to be the first factoring company in Romania (2006), BCR (Banca Comerciala Romana, which used to be the market leader in 2003), ABN-AMRO, Banca IFIS (which is actually a factoring company using the name "bank" to attract clients), ING. Pireus Bank tried also to come with a factoring product called "Cash Flow Factoring", addressed strictly to those companies doing business with the state, the public authorities or subordinated companies of public authorities[f]. There are also players, not belonging to banks, but specialized in finance services: Fortis Commercial Finance, Next Capital (http://www.nextcapital.ro/cine-suntem), Decameron (http://www.decameron-wap.com), Direct Factor, belonging to a Hungarian leader, Verestoy Attila and to a former Romanian Finance Minister, Daniel Daianu (www.directfactor.ro) and EOS KSI Romania SRL (http://www.eos-ksi.ro).

[64] For a similar opinion, *see id. 62: "Despite being introduced in the Romanian law almost a decade ago, self-help as a legal tool for speedy recovery remains more of a theoretical option."*

We believe that this topic, however often neglected, needs to be brought to the attention of legal scholars. Civil law systems lack efficient and fast means of enforcement. Central and Eastern Europe countries being so-called “emerging economies” suffer from this fact. Emerging economies need money to finance projects, day-to-day business and new investments. But investors and financing companies will either not come or will give credit with high interest rates in order to secure their business. The less safe the creditors feel when providing credits, the more expensive they will be .As we mentioned before, a secured creditor who can rely also on extrajudicial, personal, fast and cheap enforcement methods, has more incentives to give credit with lower interest rates than an unsecured one. They are all linked together and an over-regulated repossession process causes only adverse effects, especially on those who are supposed to be protected by these regulations: the customers. As it was shown, the self-help repossession is also applied and performed in CEE region but is not regulated. Everything is in the contract and generally debtors are not protected and in the case the creditor would unjustifiably seize their property or the leased car, their only possibility would be to go to court and sue. In addition, the burden of proof would lie on the shoulders of debtor, not the creditor. Now the question arises, isn’t the US system safer and more predictable than ours? Does it not provide better protection for the debtor? We leave the answers for you.

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