Secured Transactions and Financial Contracts in Hungary on the Eve of Joining the European Union*

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“...[I]n the era of globalization knowledge is the key to economic growth, and if you close your country off in any way [...] you will fall behind faster and faster.”1

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1. Introduction. – This article aims to give a survey of the central features of Hungarian secured transactions and financial contracts law existent on the eve of joining the European Union. The intention is to address – if not all, then the most important and more or less sui generis – legal formants that have and are still having impact on the development of these peculiar areas of law. Such an approach might end up on certain points in to some extent unorthodox findings, what is, however, of utmost importance, since regardless of the major steps taken in reforming this area of law, things are still far from being satisfactory in this domain in one of the leading reform oriented countries of Central and Eastern Europe (hereinafter: CEE).

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It might be worthwhile to briefly note that although undeniable differences do exist among CEE countries with respect to all the factors that play a role in any analysis on financial contracts, the number of similarities that could serve as a useful guidance in understanding the related developments of other countries of the region is not negligible. Thus, a look upon Hungarian developments could be useful also to those being interested in the status of the targeted laws in the whole region.

The roadmap for this paper is the following. After a glance on certain terminological issues, we'll proceed by describing briefly the relevant legal history and the basic features of the Hungarian legal system of importance herein. In the **third part** the focus is on the central features of the secured transactions reform acts of the 1990s. The **fourth part** endeavors to unearth those social and psychological phenomena that seem to be determinative in shaping the contours of present day application (acceptance or resistance to the inflow) of new, foreign-law-based concepts. **Finally**, the last pages will be reserved to the main conclusions reached on the basis of this analysis.

It seems to be important also to underline that the basic approach followed herein intends to be comparative. The importance of stressing this fact lies in the fact that the acceptance of the modern concepts...
often offered by comparative law – is not generally welcomed without good reason by certain segments of the academic community and practicing lawyers\textsuperscript{3} alike. Still, it is my firm belief that only a truly critical approach – even if not subscribed by many – guarantees that the depicted picture about Hungarian secured transactions law is correct.

As in case of most of the other European countries, the English language articles about Hungarian law developments – albeit one should not deny that compared with other states of similar size the number of Hungarian law related papers in English or other foreign languages shows a growing tendency and it is not negligible – is still modest and most of all the papers do not follow the pace of developments always. This means that more often than not one cannot get an updated picture without a resort to Hungarian language sources. This is true irrespective that the government, but also other players of the market\textsuperscript{4}, have subscribed to the fact that going electronic and uploading English (and other foreign language) versions of certain legal documents is of critical importance.

\textsuperscript{3} Although, the number of publications related to the Hungarian charge law reform and its consequences is not negligible, my impression is that the number of those that would approach the topic from a comparative perspective is scarce. Yet it is questionable whether questions related to a new law that is based on completely new concepts imported from foreign laws could be adequately explained remaining completely within the confines of the domestic law? Still some authors have quite conspicuously expressed their “uneasiness” with the inflow of foreign concepts. Such an ‘illustative’ title was an article by T. Anka, Halva született/Born Dead, appearing in the 2 Bulletin of Public Notaries 1998, p. 7.

\textsuperscript{4} As a matter of example here is a list of web-site addresses containing information about Hungary and/or Hungarian law. The Hungarian Constitutional Court: http://www.mkab.hu / the Hungarian Supreme Court: http://www.lb.hu / the Hungarian Ministry of Justice: http://www.im.hu / the Hungarian Ministry of Economy: http://www.gm.hu / the Hungarian National Chamber of Public Notaries: http://www.mokk.hu / the Hungarian Parliamentary Library: http://www.ogyk.hu / Hungarian governmental bonds online: http://www.akk.hu. Though, one may find articles also in English, German etc. at the http://www.mek.iif.hu.
2. Terminological considerations.

2.1. About the terminology used herein. – As the area of law of interest to us here is clearly one of those being in the center of contemporary legal developments – especially of those having the comparative or international attribute – and as such is rapidly changing, undeniably it is exposed to influences stemming from various legal systems, on certain occasions terminology could hinder communication and understanding. In order to ensure easy comprehension in this paper, therefore, a word or two devoted to these problems should be welcomed.

First of all, when used, the term ‘secured transaction’ herein would mean transactions in which certain form of collateral (in rem security) has been agreed upon by the respective parties, irrespective of the name of the underlying agreement. This would primarily mean the security devices covered by Article 9 of the Uniform Commercial Code\(^5\) (hereinafter: U.C.C.) of the United States (hereinafter: U.S.) and – where expressly indicated – transactions where real property appears in the role of collateral.

In my understanding the term ‘financial contract’ is a category having a broader connotation from ‘secured transaction’\(^6\). Yet the existence and use of this term seems to be extremely useful for a number of reasons. Pro primo, even in the U.S. practice – where according to Article 9 parties enjoy unrestricted freedom in nominating their contracts either by using the traditional terminology (e.g., pledge, conditional sale, chattel mortgage, etc.) or simply by using the name ‘security

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\(^5\) As it has become widely known even internationally by now, one of the novelties of Article 9 is the introduction of a comprehensive scheme whereby all transactions intended to create security interests in personal property and fixtures are covered. The test for determining if a transaction comes under the coverage of the Article is whether the transaction is intended to have effect as security. The unitary concept – and term – ‘security interest’ substitutes the widest variety of descriptive terms on security devices known by any contemporary legal system. See the official comment to ss. 9-101; 9-102 of the 1995 official text or ss. 9-101; 9-109 in the Revised Version of Article 9.

\(^6\) This terminus technicus is primarily used on the North American continent, though its use is spreading together with U.C.C. Article 9. One of the reasons lies with the fact that the official title of U.C.C. Article 9 itself contains this expression. Thus, the short title of Article 9 in the 1995 official version is “Secured Transactions: Sales of Accounts and Chattel Paper”. See s. 9-101 of the 1995 official version of U.C.C. Article 9.
agreement’ – secured transactions are normally located in a single document together with a loan or credit agreement. In other words, in reality often the credit contract is not a physically and/or legally separate document (or set of documents) from the security agreement. In such situations, if we would like to be precise, reference to the said document by ‘security agreement’ might be a bit misleading as containing much more than that. In German context, for example, this explanation might be even more relevant, since – if we accept retention of title (Eigentumsvorbehalt) as one of the major security devices known and utilized extensively in practice in Germany – there the retention of title security device is almost always nothing but a clause in a sale (or otherwise nominated) contract.

Secondly, if one would like to comprehend ‘secured transactions law’, one could hardly do that in isolation from the surrounding and complementary fields and categories employed by law and in practice by business. This requires transgressing the strict confines of ‘secured transactions’ and dealing, for instance, also with ‘personal securities’ – especially comparing them with secured transactions as real (in rem) or proprietary securities – or with the phenomenon of ‘securitization’. Alternatively, while it is clear that investment property (securities like stock, bond etc.) could be exploited in most systems – where they are known and used – as collateral, one would hardly get even a remotely adequate picture on their virtual role in the given system without analyzing the respective system & law on investment property, information on the functioning of the local securities market(s) and without trying to formulate an as precise as possible picture on the importance

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7 ‘Credit’ herein denotes both loan-credit and sale-credit.
9 ‘Personal securities’ mean herein security devices that confer on the creditor/beneficiary ‘only’ in personam rights, like suretyships, bank guarantees, letters of comfort, etc.
10 ‘Investment property’ as defined in s. 9-115(1)(f) of the pre-Revised Version of U.C.C. Article 9 encompasses besides securities (stocks, bonds, etc.) also security entitlements (the property interest of a person who holds a security or other financial asset through a securities intermediary) and ‘securities accounts’ (arrangement between a securities intermediary and an entitlement holder that gives rise to a security entitlement).
of the security market(s). While it may be contested, there is definitively certain interdependence between the level of development of the securities industry (non-secured transactions aspects)\textsuperscript{11} and the extent to which securities are used as collateral (security aspect)\textsuperscript{12}. This realization has dictated the inclusion of a brief survey of this segment of Hungarian law and business practices.

What's more, in more developed systems title retention contracts do not qualify at all as secured transactions and are consistently left out from the realms of secured transactions\textsuperscript{13}. Yet the two areas have such quintessential touching points that make them subject to the identical legal regime in the U.S. and the common law provinces of Canada, which are not just two leading secured transactions systems but also two economic powers from any point of view. Thus, if one would depart from the standpoint of U.C.C. Article 9, the category of secured transactions would cover all title retention-based contracts the essential feature of which the intention of the parties to provide for security.

In sum, the term 'financial contract' will in this work denote – besides secured transactions as in rem security devices – all the other imaginable transaction forms which provide for certain form of financing and credit. These might, however, include also such novel complex financing techniques as securitization\textsuperscript{14}, which is, on one hand, based

\textsuperscript{11} For example, this is to a large extent covered by U.C.C. Article 8 and other laws making U.S. 'securities law'.

\textsuperscript{12} This aspect of securities law is covered in the U.S., for instance, primarily by U.C.C. Article 9 as belonging to the body of 'secured transactions' law.

\textsuperscript{13} This is clearly the situation under German law, where retention of title – simple or extended and expanded – is a so-called kautelarische Sicherheit (contract-based-security), a category distinct from the traditional pledge. Under English law – with the notable exception of chattel mortgage – title financing contracts are not security interest-creating instruments. The prevailing view among English scholars seems to be this. For a contrary view see F. Oditah, Legal Aspects of Receivables Financing, London, 1991, p. 5. Given that 'leasing', as the ruling form of title financing contracts has not been covered by the charge law reform in the 1990s, Hungary is also a member of the group.

\textsuperscript{14} While by now a variety of securitization techniques has become known, the typical securitization transaction is essentially a complex and sophisticated financing technique made of two stages. In the first stage one or more companies transfer their rights in certain continuous receivables to a legal entity – the special purpose vehicle – which
on secured transactions law, and the presence of which in a legal system, on the other hand, is a valid proof of the existence of a relatively developed legal and economic environment.

2.2. **Terminological problems corollary to the inflow of new legal concepts.**

Before embarking on questions *in merito*, a couple of thoughts needs to be aired on certain terminological problems that inevitably follow the receipt of foreign legal concepts, so typical exactly to the secured transactions law reform efforts of the 1990s in Hungary. Often, however, these problems reveal certain in-depth conceptual misunderstandings.

The first type of problem is the clash between those opposing the domestication of foreign language-based terms promoting rather their substitution with [more] traditional terms\(^{15}\), and those – primarily businesspeople – who do not really see a problem with a closer reliance on the source language. Another type of recurring problem relates to difficulties related to finding of proper counterpart legal notions and terms.

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\(^{15}\) Thus, some banks were criticized for using the domesticated version of ‘securitization’ – i.e., *szekuritizáció* – in their Hungarian language documents. While occasionally more or less successful alternatives were offered, the use of ‘mirror-image-translation’ terms - as often expressing much more unequivocally the intended meaning - has remained part of business practices.
Occasionally this has led to some confusion. A notable example is the central secured transactions term *security interest*, the meaning of which seems to be obscure even among those proficient in English language\(^{16}\). Now, if one would add to this the fundamentally different meaning attributed to the term *charge* – equally important and often utilized\(^{17}\) – in various common law jurisdictions, spiced with the “umbrella function” played by the term *lien*, one could easily understand that in such a novel area of law as the one with which we are dealing with herein, one has to set out by fixing the terminology necessary for unhindered communication. At least, this is the experience from Central Europe\(^{18}\).

3. The Hungarian legal environment.

3.1. The evolution of Hungarian secured transactions law\(^{19}\). – From a purely legal point of view the following points seem to be determinative in the long process of the development of Hungarian secured transactions law: (1) the mixed, Franco-Latin and Germanic, legal heritage shaping the fundamentals of the legal system\(^{20}\); (2) the very progressive and receptive reform efforts of the first decades of the 20th century\(^{21}\); (3) the impacts and remnants stemming from the period of the reign of

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\(^{16}\) As a consequence, for example, the English language translations of the Hungarian secured transactions reform acts have appeared in versions, one having ‘charge’, another having ‘lien’ as the term denoting the central category of these acts. Curiously, the use of the term ‘security interest’ is still rare.

\(^{17}\) It has to be underlined that the EBRD Secured Transactions Model Law also utilizes this term. Given that the Hungarian reform acts were drafted influenced by the EBRD Model Law, ‘charge’ is more often applied than ‘security interest’.

\(^{18}\) Reference to the Hungarian secured transactions acts herein will take the form of either ‘secured transactions act/law’ or ‘charge act/law’, both covering the very same documents. Still, my impression is that the use of the term ‘charge’ is more widespread than a reference to these documents by ‘secured transactions’ or ‘security interest laws’. Similarly, ‘charge’ or ‘lien’ is much more known than ‘security interest’.

\(^{19}\) For a more detailed account on the evolution of Hungarian secured transactions law see T. Tajti, *Comparative Secured Transactions Law*, Budapest, 2002, p. 293 – 316.


\(^{21}\) The best illustration of the achievements of this productive era is the draft (it has eventually not been enacted) statute No. 1185 on Chattel Mortgages from 1926, which
socialist law; and (4) the reform efforts of the 1990s (stretching over to the new millennium) aiming towards free market – and credit – economy influenced by western and international developments. A brief description of these elements would provide the necessary explanation for most of the characteristics of the legal ambient existent in year 2003, on the eve of joining the European Union.

We do not need to dwell much on the first of the points raised since it is a common feature of all CEE legal systems that they have evolved under the substantial influence of one or both of these legal families over the course of the 19th and 20th centuries. Admittedly the influences stemming from German and Austrian law seem to be of greater importance in case of Hungary, yet certain aspects of secured transactions law show closer resemblance with the Franco-Latin legal family. Notably, if one departs from the basic features on assignment and receivables financing (including use of receivables as collateral), indeed, the system seems to be closer to the traditionally restrictive French law solutions. Nonetheless, it would be clearly erroneous to contend that Hungarian secured transactions law is essentially equal with, either

has tried to domesticate the chattel mortgage already in those times. Eventually chattel mortgage has been introduced as a security device to be used solely by agricultural enterprises with the 35th Act of year 1927. Given that agricultural has always played a central role in Hungarian economy, especially in the pre World War II period, this seems to be understandable.

22 The degradation of the role property - and as a corollary - credit and security was a central feature of all socialist laws as incompatible with the basic tenets of socialist ideology. Consequently, the progressive achievements from the previous periods were not followed. Formally, however, the system got reduced to the dualism of real property mortgages and possessory pledges of movables. Still, it must be added that there were crucial differences among various socialist laws as far as credits and securities are concerned: as right after the former Yugoslavia Hungary was the most reform oriented socialist country in the region. Thus, by the 1980s credit as an important cogwheel of economy has regained an important position in the society. This was definitively not the situation in socialist countries outside Central Europe.

23 This statement needs a qualification given that even French law has taken steps to make the assignment-related rules less onerous by the introduction of the so-called Daily assignment in 1981 not requiring notification of obligor. This possibility is exclusivity provided only for banks from the European Union.
German or any other law’s solutions, in particular not after the common law influences in the 1990s. Hence, it is fair to claim that Hungarian secured transactions law has become unique from many point of view. Thus, while retention of title clauses – as important form of kautelarische Sicherheiten – are almost an unavoidable corollary of international business transactions conducted by German businessmen, this security device is still not very much utilized in Hungary.

Secondly, it cannot be left out of sight that the importance and relationship of credits, secured transactions and other financial contracts has not been truly recognized, neither by lawyers (legal scholars and practicing lawyers alike), nor by businesspeople, until the 1990s. While one of the central figures of Hungarian history, count István Szécsényi, has already in the first half of the 19th century promoted views stressing what economic power lies in credits, a more widespread acceptance of credit and credit-related ideas has occurred only somewhere around the end of the 19th century and the beginning of the 20th century. Otherwise, exactly this period is deemed to be the peak period of Hungarian capitalistic development characterized by significant eco-

24 Albeit, if one would look upon title financing in isolation, or more precisely, on the ambient within which ‘leasing’ contracts exist nowadays in Hungary, then the basic features of the two systems would show quite a big resemblance in this respect.
25 This is the reason why some authors claim that “[…] the countries of Central and Eastern Europe may well, in the not so distant future, have secured transactions laws that are simpler, more flexible and better adapted to their economic needs than those of the European Union countries.” Quoted from F. Dahan, Secured Transactions Law in Western Advanced Economies: Exposing Myths, in Law in Transition, EBRD, Autumn 2000, p. 43.
26 Kautelarische Sicherheiten are security devices of customary law, first conceived and applied by businessmen, then recognized by courts, as the means whereby the numerus clausus of proprietary rights of the German Civil Code (Bürgerliches Gesetzbuch; hereinafter: BGB) could be circumvented for the sake of business interests. The most well known forms are the simple and extended & expanded form of ‘security transfer’ (Sicherungsübereignung) and retention of title (Eigentumsvorbehalt) and the security assignment/transfer (Sicherungsabtretung).
27 István Szécsényi (1791 – 1861), Hitel/Credit, published in 1830 underlined the importance of credit and the impact the lack of credit economy has on Hungarian economy.
nomic achievements. Unfortunately, the World War I and the ensuing dismemberment of Hungary, and later on the socialist era, have in essence halted and in many respects reversed such trend of progressive development. Moreover, exactly the financial contracts law is that branch of law on which this outcome has been very conspicuously reflected.

Interestingly, while no Hungarian Civil Code has been enacted until 1959, more – in those times quite forward looking – acts have been drafted regulating certain aspects of secured transactions law and credits. In my view, this was the first time when some common law solutions have been made use of, at least, as far as financial contracts are concerned. For instance, this is the time when the floating charge-idea had set foot on Hungarian soil. What’s more, a number of important capital scholarly works have been publicized, indeed, in those times. These books – having the size and features of American treatises – have become again very topical and very valuable with the advent of the transitory period during the 1990s. This fact is of importance not just for historical reasons but because these works – together with the texts of the acts and bills from the beginning of the 20th century – have been heavily and directly relied on in drafting the secured transactions reform laws of the 1990s.

The central feature of the socialist period of relevance here was the attempt to break with the previous – capitalist – law to the extent possible. Thus, the Civil Code (1959) has degraded the importance of credits and security interests by dislocating them from the chapter on property and transforming them to just another form of accessory obligations. This was paralleled by the failure to implement the progressive secured transactions law developments of the earlier times. This was

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28 This seems to be a common characteristic of CEE countries (especially Central European countries); until the late 19th century and first years of the 20th century the region has lagged behind Western Europe economically for centuries. The growth was stopped – basically with the World War I. the difference in economic development has then just widened during the socialist period.


30 I.e., acts that were eventually not enacted.
mainly due to the fact that – as in all socialist countries of those times – the concepts of property, credit and consequently also security have been intentionally weakened as the main pillars of the capitalist system. At the same time, however, the German-law-based-categorization remained intact and the basic criterion for the classification of security interests depended on the physical characters of the collateral. At the end of the day, the system got reduced to possessory pledge on movables and to mortgage of immovables.

3.2. The present time. – The transitory process towards free market economy starting in 1990s has relatively early promoted the urgent reform of the credit system and secured transactions law to central aims\textsuperscript{31}. Understandably, the Civil Code has not been – and of course, could have not been – changed overnight to entertain the needs of the desired credit economy. As a consequence, the legislative approach chosen was the amendment of the security interests related chapter of the Code by a separate statute in 1996\textsuperscript{32}, which was drafted under a strong influence of the European Bank for Reconstruction and Development’s (hereinafter: EBRD) Secured Transactions Model Law. Since this Model Law itself had been created with having U.C.C. Article 9 and certain solutions from English law on mind, the 1\textsuperscript{st} Reform Act has also embraced certain common law concepts in more or less modified form. Notably, the creation of a centralized registry of charges on movables\textsuperscript{33}, the reappearance of chattel mortgage and the introduction of the local counterpart of the English floating charge (or the U.S. floating lien concept).

\textsuperscript{31} The importance of secured transactions law has become topical quite early, though initially the mainstream reformers tended to look only upon German and French law as possible sources for the reform. See, e.g., A. Harmathy, \textit{A hitelbiztosítékok jogának változásáról/On the Change of the Secured Transactions Law}, in Kemenes Emlékkönyv, p. 139 (published by József Attila University, Szeged, Hungary).


\textsuperscript{33} The registry system emerged partly influenced by the \textit{Feasibility Study for a Computerized Registration System for Charge in Hungary} (EBRD, July 1996) prepared by John L. Simpson, Jan-Hendrik M. Rover & Jonathan Bates. The act officially introducing the new system was the Governmental Decree No. 7/1997 (of January 22) on the Registry of Chattel Mortgages and Property Encumbering Charges.
Naturally, it may be disputed what features should be enumerated as central when talking about the reform acts. For the purposes of this paper, besides the above mentioned features, it is inevitable to add the following: (1) the rules on possessorry pledge have in essence remained untackled; (2) the use of claims and rights as collateral requires notification; (3) title retention (in essence in practice restricted to retention of title as a contractual clause and to ‘leasing’ contracts) is not covered by the new regime and thus dilemmas surrounding, for example, the purchase money problem have not been tackled; (4) the so called ‘independent charge’ (essentially the local counterpart of the German land charge (Grundschaft) device) has become part of the system.

While the system has been successfully launched and certain encouraging statistical data was in 1998\textsuperscript{34} available, it turned out subsequently that certain essential questions have not been properly formulated and in general there was a need for a more detailed regulation given the truly innovative nature of the whole undertaking. The Second Reform Act of year 2000\textsuperscript{35}, has, however, in my mind, only filled the gaps and clarified certain dubiosities in the text rather than revolutionizing the field as proclaimed. This act has effectuated also the necessary corollary changes in the Bankruptcy Act enacted in 1991\textsuperscript{36} and in the relevant provisions of the Company Law Act from 1997\textsuperscript{37}. Some technical problems have also emerged related to the operation of the

\textsuperscript{34} Data for year 1997 shows the following. The number of all kinds of secured transactions related communication with the registry offices (i.e., initial entries, modifications, searches, etc.) was 25,417 on national level. As far as the structure of entries is concerned, the biggest number of registered security devices were chattel mortgages. Interestingly, yet understandably, the number of property encumbering charges (floating charge) was quite low. Furthermore, firms prime in utilizing the new system and almost as a rule collateral is normally encumbered solely with one charge/security interest. The most typical assets used as collateral include wide panoply of assets from motor vehicles, stock-in-trade through equipment of restaurants. See Közjegyzők közlönye/Public Notaries Newsletter, No. 4, 1998, p. 11-13.


\textsuperscript{36} A csödelftárasról, felszámolási eljárásról és végelszámolásról szóló 1991. évi IL. törvény [4\textsuperscript{th} Act of Year 1991 on Bankruptcy, Liquidation and Final Accounts].

\textsuperscript{37} Az 1997. évi CXLV. Cégtörvény [Act No. 145 of Year 1997 on Companies].
registry system. Hence, even if one would depart solely from a purely formal point of view, the best way to describe the present situation is stagnation. If this is combined with pertaining economic figures and relevant business practices, one could safely conclude that it would be exaggerating to claim that the new system has truly boosted the credit industry\textsuperscript{38}.

Yet compared with other Central European states – more precisely, Eastern European and former Soviet Union Republics – the Hungarian achievements are undoubtedly significant and prime in the region. It has to be borne on mind also that secured transactions is just one type of financial contracts and – nevertheless how important – it is not the sole factor influencing the economy. With these caveats on mind, the reform efforts’ results seem more encouraging.

3.3. European Union law-compatible Civil Code on its way. – The latest development of central relevance was the launching of a project aiming at preparing the new Civil Code in 1999\textsuperscript{39}. One of the basic policy aims is to draft a Code that would be based on the society-model embraced by the European Union, which is described as ‘social-market economy’. This central aim is one of those that have had an impact on all major aspects of the work, though, international achievements were also given proper attention. Concretely, the Vienna Convention on International Sales of Goods (hereinafter: CISG), the UNIDROIT Principles of International Commercial Contracts (1994) and the Principles of Euro-

\textsuperscript{38} See also, I. Gárdos, Az Ingó Jelzálogjog és a Vagyont Terhelő Zálogjog a Ptk.-Módosítás Után/Chattel Mortgage and the Floating Charge after the Amendment of the Civil Code, in the periodical Gazdaság és Jog, No. 10, October 2001, p. 13, according to whom it was of central importance that the 2\textsuperscript{nd} Reform Act has not paid due attention to the particularities of chattel mortgage and floating charge versus classical security interests. The author has also proposed that the registration of security interests on motor vehicles should be registered on the certificates of title. The same author has in another issue of the same periodical (No. 12 of December 2000) subscribed for a system in which separate regulatory regime would apply to movables and immovables.

\textsuperscript{39} Contact: Az Igazságügyi Minisztérium Polgári Jogi Kodifikációs Titkársága, 1055 Budapest, Kossuth tér 4, email: ptk@im.hu [The Civil Code Codification Secretary of the Ministry of Justice]. The material containing the proposals of the working group has appeared in the Hungarian Official Gazette No. 2002/15/II as ‘The Concept of the New Civil Code’.
pean Contract Law (1997), which serve as direct sources of law. True, formal considerations were also determinative since the Code had been amended more than fifty times during the 1990s, what has reduced substantially comprehensibility and easy application.

Apart from the above sources, it has been likewise the aim of the drafters to harmonize the Code with the *acquis communautaire* right from the beginning. This fact had direct implications on a number of issues covered by the Code. Among these the consumer protection directives\textsuperscript{40}, the directives on electronic signatures\textsuperscript{41} and electronic commerce\textsuperscript{136} prime, because these had entered into the draft-text in – with the European Union legislation – harmonized form.

On the front of secured transactions and financial contracts a number of fundamentally important changes have been proposed and have been open to public debate. These are the proof that the reform process has not fully halted and that some parts of the academic- and the business society feel that certain important open questions loom large. The contention on the stagnation of the reform is, nonetheless, meritorious because eventually apart from the work on the new Code, nothing meaningful seems to have been occurring related to this particular field of law recently.

Since the debate is ongoing and therefore one should be careful in deducing thoroughgoing qualifications, in my opinion, the final solutions on the following issues seem to be of direct interest to us. Let us

\textsuperscript{40} More precisely, the following directives: 85/577/EEC on the protection of consumers in respect of contracts negotiated away from business premises; 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (amended by Directive 90/88/EEC); 90/314/EEC on package travel, package holidays and package tours; 93/13/EEC on unfair terms in consumer contracts; 94/47/EEC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; 97/7/EC on the protection of consumers in respect of distance contracts; and 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees. It must be noted, however, that these acts have already become part of the Hungarian legal system through the enactment of a number of respective governmental decrees. For a list see the pertaining comment in Book Fourth on Obligations in *The Concept of the New Civil Code*.

\textsuperscript{41} 1999/93/EK. This directive has been already implemented by a separate Act No. 35 of Year 2001 into Hungarian Law.

\textsuperscript{42} 2000/31/EK.
begin with a comment on systematization: the proposal is to move the rules on security interests/charges from the book on contracts back into the book on property ("dologi jogi könyvébe")\textsuperscript{43}. While it has been underlined that such an alteration will not have practical effects in reality it has been added that this would..."bring the proprietary character of security interests into the forefront since the basic feature of security interests is not that it serves as a security for a contractual obligation but that it serves to the secured creditor – up to a fixed value – as an exclusive right to get satisfaction from the owner of the collateral"\textsuperscript{44}. This is nothing but the 'rehabilitation' of credits, together with secured transactions and the expression of the realization how important role is played by these legal categories in modern, European market economies.

Perhaps the most interesting point, however, relates to the position of retention of title. At the moment the Civil Code's provisions in force regulate this issue amidst of provisions on sales contracts\textsuperscript{45}, thereby extending to this security device a quite restricted role\textsuperscript{46}. The proposal aims to fundamentally change this position by extending the effects of retention of title\textsuperscript{47}. Furthermore, there is a suggestion to recognize the vertical and horizontal extension of retention of title similarly, for example, to the German extended and expanded retention of title clauses\textsuperscript{48}. If this argumentation will be accepted, the pertaining rules would be moved into the book on proprietary rights.

Another milestone – if embraced – is represented by the new rules on assignment according to which these should be modified to more readily entertain the requirements imposed by modern receivables financing (in particular factoring)\textsuperscript{49}. Namely, existing court decisions look upon factoring as being nothing more than mere assignment, although

\textsuperscript{43} The 'degradation' of credits and secured transactions in the line with socialist values took the shape of - among others - their removal from property law chapter. See, supra section 3.1.

\textsuperscript{44} See the comment on security interests in 'The Concept of the New Civil Code'.

\textsuperscript{45} § 368.

\textsuperscript{46} This being so especially since – as it stands – the owner’s position is protected only until the ownership has been validly acquired by a good faith third person.

\textsuperscript{47} See the section on retention of title in 'The Concept of the New Civil Code'.

\textsuperscript{48} On these themes see e.g., P. Bülow, Recht der Kreditsicherheiten, cit.; R. Serick, Securities in Movables in German Law: An Outline, cit.

\textsuperscript{49} See the section on assignment in 'The Concept of the New Civil Code'.

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in reality factoring contracts normally contain also certain other additional elements and obligations (e.g., accounting, collection authorization, etc.). Therefore, additional rules are needed for these contracts with respect to such additional obligations. What’s more, it must be explicitly stated in the new Code that no notification of the obligor is required in case of assignment, as this is now not unequivocal under the relevant provision of the Code. A further related task is to clarify whether it is possible to assign future claims, and if yes, under what circumstances.

It is also a very sensible proposal to include into the Code certain relatively novel – yet nominated – contracts, which have in the second part of the 20th century become relatively widely used in the country; in particular franchise, leasing and factoring. While ‘franchise’ is deemed to be inherently so complex that its inclusion is not foreseen, factoring and leasing are two financial contracts that will most probably be awarded a separate place in the future Code. As foreseen, factoring would be located amidst the provisions on assignment. In case of leasing, installment sales would be the recipient ‘mother-contract’. The installment sales rules would be then supplemented by rules on credits (financial leasing) and rent/lease (operational leasing).

In sum, the new Civil Code is directly and indirectly influenced by European – and international – developments and is the concrete example of the positive influences coming from the west in the last decades or so. Irrespective that it is yet to be seen what the final outcome will be, there is an uncontested consensus that the applicable European Union law must be implemented. Yet this seems to be the less

50 § 328 (3).
51 According to the Hungarian Supreme Court – implementing a rather restrictive policy in this respect – nonexistent or yet-to-arise claims cannot be assigned legally (Gf. I 32 365/1994; BH 1996/379; Fpkr. VI. 32 798/1994/BH 1996/380). Interestingly enough, commentators of the pertaining provisions of the Code are not that strict and claim that this is possible. See the pertaining comment of ‘The Concept of the New Civil Code’.
53 See the section dealing with the allocation and regulation of nominated contracts in ‘The Concept of the Civil Code’.
important benefit of approximation, as much bigger economic potential lies behind embracing of western business practices, especially as far as financial contracts are concerned. As hinted at earlier, these transgress the confines of secured transactions law strictly speaking and many are hidden exactly in the dilemmas raised by the drafters and highlighted above. The important point is that the ideas expressed in the yet-to-be-Code show that something is happening on the plane of financial contracts and that the joining of the European Union will – hopefully – further boost this trend.

4. The social ambient.

4.1. The Hungarian banking sector. – In analyses on the banking sector it has become traditional to make a division to ‘financial market-based systems’ and ‘banks-based systems’, the U.S. representing the former and Germany the latter. All the other developed legal and economic systems are somewhere in-between. Hungary, as one might presuppose, is by all means closer to the German system, though there is certain level of general awareness that economic needs require looking further than the Continent in order to find new patterns that could be adapted to local needs and that would drive development. Consequently, certain Hungarian peculiar solutions are existent, which are going to be discussed below in a nutshell.

Thus, in Hungary savings and bank deposits are still the primary methods of investment. The citizenry and entrepreneurs find the stock exchange and other novel methods of investment too risky, although reports on the daily trading on the Budapest Stock Exchange (reopened in the beginning of 1990s) are now a routine business of all major TV and radio news. What’s more, private pension founds – as important investors – have also become part of Hungarians’ lives and newspapers are full with advertisements on various investment opportunities (Hungarian treasury bonds fared quite well last years, for example). In other words, irrespective of the abundance of investment opportunities offered, ‘free-riding’ is not a typical pattern of behavior in Hungary as of

yet and it is fair to presume that in the near future it is not realistic to expect a sudden growth of interest in non-banks-based investments.

It is also of importance that, at this point in time, we may safely claim that the banking sector has consolidated and the transition, at least, in this particular economic sector is essentially over\textsuperscript{55}. The price of this outcome was a couple of bank-bankruptcies in mid-1990s and problems with some government-close financial institutions, some of which have still not been adequately resolved. Foreign banks are present on the market for many years now and with the exception of a few, most of them proved to be successful. Banks the had left Hungary – as it might be concluded on the basis of the publicly available data – were those the management of which was essentially either unwilling or not capable of dealing with the specifics of the Hungarian market (which are normal corollary of each and every system even in developed western economies) and not because of a non-adequate legal and business environment.

The characterization of Hungary as a ‘banks-based system’ has important repercussions with respect to financial contracts. This means not just that typically firms are closely attached to a single chosen ‘house bank’ on a long term basis and that this bank might – especially in case of larger firms – have a closer say in the management of such client, but also that the credit industry – including the conditions of extending credits and most importantly, taking of securities – is to a great extent shaped by banks and they are the primary source of relevant information. Furthermore, normally banks tend to be supportive of established businesses together with tailored financing and they normally demand collateral (often pledging the shares of the client) or some other security device.\textsuperscript{56}

\textsuperscript{55} An EBRD survey from July and August 1998 – seen with the eyes of lawyers and other specialists being active in CEE, including the Common wealth of Independent States – on the legal and regulatory framework governing banking and capital markets in these countries has ranked Hungary among the systems having ‘strongly conforming’ banking and capital markets laws. See, A. Ramasastry and S. Slavova, Market Perceptions of Financial Law in the Region – EBRD Survey Results published in EBRD’s quarterly Law in Transition, Spring 1999, p. 24, 26.

\textsuperscript{56} For a list of security devices typically asked in case of leasing contracts see section 4.4.
Nonetheless, the role banks and other financial organizations played in the preparation of the secured transactions reform laws was – if compared – far below the truly active role American financial organization had played in shaping the contours of U.C.C. Article 9 in mid-20th century. In Hungary, it seems, public notaries have had a bigger say in this process than banks themselves, what could be attributed to the fact that lobbying is a relatively new thing here and the reform acts have imposed the tasks of registration on public notaries (who were, therefore, directly affected by the system).

4.2. The Budapest Stock Exchange (BPSE). – It is of importance to cast a few words on this issue because this information could further illuminate the social environment from which certain further conclusions might be drawn with respect to financial contracts.

First, as hinted at above, the citizenry is still “conservative” in the sense that the overwhelming part of wealth is still kept in cash or in bank-savings deposits. The attitude of domestic businessmen is not much different. Consequently, irrespective that the BPSE is open to

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57 Still, it would be misleading to tell that banks were totally passive in the secured transactions reform process. In 1992 the ‘Commercial Bank’ has, for example, founded the ‘Land Credit Commercial Bank’ exactly with the purpose to prepare the principles of modern mortgage law. Banks main concerns were about enforcement of security interests and the solutions of bankruptcy law. Though, the deletion of the sui generis ‘bank credit’ – which was the creature of socialist times and which has dominated the credit market until the stepping into force of the 1st Reform Act – has also caused a rupture in bank business as the new security devices could not replace it immediately. See, K. Auer, A Hitelezők (Hitelintézetek) Védelmét Célzó Módosítások az Új Zálogjogi Szabályozásban/Amendments Aimed at Protecting Creditors/Credit Institutions in the New Charge Law, in the periodical Gazdaság és jog, No. 6, June 2001, p. 11 - 14.

58 According to the Hungarian National Bank’s on various forms in which money was kept or invested in Hungary in year 2002 the following data is available: 62,64% was kept in cash or on bank deposits; 15,69% was invested in pension and life-insurance funds and only 13,21 % was invested in bonds and stocks (the remaining 8,46% is investment in other types of securities).

59 For example, bonds/debentures issued by corporate entities are basically still unknown. See, e.g., interview with Mr. Ádám Farkas, the general manager of CIB Bank (responsible for the business policy of the bank), in the daily Népszabadság, November 4th, 2002 issue at p. 15.
foreigners and according to certain data the BPSE was in year 2002 one of the most successful exchanges in the world\textsuperscript{60}, the trading volume figures are much less impressive.

Secondly, there is an awareness of the fact that the Hungarian financial market – with the BPSE at forefront – is not developing as it could\textsuperscript{61}. For example, led by the Ministry of Finance and some other participants of the financial market, a separate committee is trying to conceive measures that would boost the financial market, among others by proposing that the rules of the game of stock exchanges should be included into the curriculum of schools. More importantly, as of January 1\textsuperscript{st}, 2003, investors will be entitled to certain newly introduced dividend-tax benefits\textsuperscript{62}. Yet, it is not easy to set the ball rolling, since even the private pension funds, offering various investment portfolios, tend to follow a conservative path not willing to invest in newly offered and thus deemed-to-be-more-risky securities. Consequently, corroborated by the available data, these funds prefer treasury securities\textsuperscript{63}.

The latest information according to which the BPSE is looking for a ‘conservative partner’ in West Europe\textsuperscript{64} should be likewise of relevance to our deliberations. The related negotiations with a number of stock exchanges are aimed at a partnership that would enable the BPSE to get connected to the chosen one’s computerized-electronic system to provi-

\textsuperscript{60} According to the latest data the year 2002 brought 34\% income in U.S. dollars or 10\% income expressed in Hungarian Forints, which makes – on the basis of these data – the BPSE one of the best 5 stock exchanges of the world in year 2002. See, the interview with Mr. Zsolt Horváth, the general manager of the BPSE, in daily \textit{Budapesti Nap}, January 4\textsuperscript{th}, 2003 issue at p. 8.

\textsuperscript{61} The BPSE was liquidated in 1948. Securities have reappeared only somewhere in 1983; however, the BPSE was reopened only in 1990. Thus, to the overwhelming part of citizenry and business community securities and stock exchanges were something completely new, what is definitively one of the reasons for the modest interest for BPSE irrespective that 12 years had past in the meantime.


\textsuperscript{63} See, \textit{Kockázatthatnak a pénztárgyak/Fund Members May Choose to Risk}, in daily \textit{Világgazdaság}, December 30\textsuperscript{th}, 2002, p. 10.

\textsuperscript{64} See., e.g., \textit{Konzervatív partnert keres a BÉT/The BPSE is Looking for a Conservative Partner} in the daily \textit{Magyar Hirlap}, January 20\textsuperscript{th}, 2003. The ‘conservative’ attribute denotes that BPSE is looking for a partner having a stricter disclosure system.
de domestic investors easier access to foreign financial markets thereby enlarging investment opportunities. Namely, due to the shrinking of the Hungarian market investors were forced to find partners abroad by themselves in the near past. From our point of view this development is of relevance because by all means it represents another form of rapprochement, or another step towards European markets and eventually through that towards a more harmonized law; nevertheless whether existent or yet-to-be enacted.

Admittedly, the relevance of these points might be a little bit far from secured transactions, yet they are useful tools to show the overall “spirit” of the Hungarian financial market. Furthermore, the above data might tell us also that the use of various types of investment property for securing credits is definitively not widespread in Hungary, not just because of the lack of tradition of doing that but simply because the shares of the overwhelming part of Hungarian businesses is not traded publicly and the majority of Hungarian firms are small, middle-size and closely held business organizations. This in conjunction with the above described general reluctance to invest outside banks and the fledgling secured transactions system could lead to nowhere else but to the conclusion that there is an awfully big room for the exploitation of investment property for security purposes. In the absence of empirical data even these, by empirical data not fully supported, insights might tell a lot.

This train of thought suggests that the direct and indirect holding system saga of U.C.C. Article 9 with all its corollary paraphernalia and the creation of a legal environment that would boost the use of investment property for security purposes - and thus would further enhance credit economy - is a problem for some future time. At any event, attempts of UNIDROIT and some other international organizations\(^\text{65}\) planning to deal exactly with this aspect of commercial law should be most welcomed in Hungary.

4.3. On the receptiveness of Hungarians. – A survey of collateral law reforms in CEE compiled by the European Bank for Reconstruction and Development in 2000 has ranked Hungary among the top ‘advanced reform’ countries of the region, noting, however, that there are a number of problems that needs to be addressed in the future\(^\text{66}\). Apart from this finding and as hinted at above, the main problem seems to be the stagnation of the reform process: the two reform acts, the installed registration system and eight years were not enough to truly boost the secured transactions system. The reason for hesitation to exploit the new system is not attributable solely to “uncertainties relating to the substantive law”\(^\text{67}\), as claimed by the EBRD people. More indicators lead to the conclusion that certain segments of the legal community and occasionally the society on the whole are not really receptive to ideas coming from outside the country\(^\text{68}\). Fortunately, the overall situation is by all means far from being hopeless – the wide support of the EU accession is a good indicator of that – yet it would be clearly erroneous to overlook this factor. The EU accession will help Hungary, indeed, to come out from this stale-mate position and encroach on a path of a more efficient development of all legal forms and touched upon herein.

Part of the story – to a significant extent valid in Hungary – is the well-known and often reiterated truth that lawyers tend to be quite conservative, this term here implying non-receptiveness. While in Hungary this claim has been always only partially valid, certain resistance and hostility towards the imported concepts and practices is clearly present.

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\(^{67}\) See, ibid., p. 32.

\(^{68}\) As Prof. Attila Harmathy (now a judge of the Hungarian Constitutional Court) has vividly described: “Similarity of the rules of the Civil Code with those of market economy countries is, however, not sufficient in itself. The ideology and practice of the 40 years between 1940 and 1988 have had an effect on mentality and on certain rules and institutions which influence the effective enforcement of agreements and so the functioning of secured transactions as well.” See, A. Harmathy, The EBRD Model Law and the Hungarian Law, in Norton & Andenas, Emerging Financial Markets and Secured Transactions, London, 1998, p. 197, 205.
Occasionally, this attitude takes the form and intensity that transgresses the boundaries of tolerable⁶⁹.

For example, it struck the eye of those who have tried to follow the developments of the secured transactions law reform that a number of public notaries have eloquently spoken against the intrusion of common law concepts and have in essence doomed the whole project to failure. The problem was not in the fact that the project’s solutions were exposed to criticism – as after all good faith criticism should be welcomed in cases like this – but that the critics have quite harshly done that without really proposing a better alternative that could boost the credit system but the rules enshrined into the Civil Code, the solutions which reflect the circumstances of mid-20th century socialism⁷⁰. It was both strange and problematic that the fiercest criticism stemmed from quite well known public notaries⁷¹, upon whom the successf

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⁶⁹ Rodolfo Sacco’s findings seem to speak about Hungarian realities when claiming that “[s]cholars and teachers perpetuate [...] false differences [among various laws] and proclaim the discord. The comparativist is absent; he does not exist.” See, R. Sacco, One Hundred Years of Comparative Law, in 75 Tul. L. Rev., March 2001, p. 1159, 1163. Still, in case of Hungary it seems that on various occasions the incompatibility of solutions offered by comparative law with ‘the spirit of domestic law’ are promulgated not just by scholars.

⁷⁰ On this point see T. Tajti, Viehweg’s Topics, Article 9 UCC, the “Kautelarische Sicherheiten” and the Hungarian Secured Transactions Law Reform, in The Vindobona Journal of International Commercial Law and Arbitration, vol. 6, issue 1, 2002, p. 93 – 132 (published by the Moot Alumni Association, Vienna, Austria; http://www.vindobonajournal.com). The article is available also electronically at http://www.SSRN.com lega scholarship. In this article I have tried to show through highlighting certain important features of U.C.C. Article 9, the German customary law-based securities and the Hungarian secured transactions reform that no credit economy could arise on the basis of ‘traditional rules’ enshrined into the Hungarian Civil Code a half-a-century ago. Instead of trying to find the legal paraphernalia that would boost credits and market economy in Hungary in the outdated Civil Code or in certain ‘traditional rules’ hovering somewhere in the air, the aim to be achieved should have priority and the law should yield to the ideal of credit economy (and not vice versa). In other words, the Hungarian reform experience is a good example of the clash of ‘problem-oriented’ and ‘system-oriented’ attitudes in law.

whole reform depended due to the fact that they were entrusted with the maintenance of the registry system.

On the other hand, banks and other financial institutions have quietly embraced and adapted a number of innovative business techniques to Hungarian circumstances with more or less successfulness. Among these it is securitization that primes. Truthfully, this technique is far from being utilized at the level known in the United States; nonetheless successful securitization ventures are already part of Hungarian reality. Although, they are primarily of the ‘mortgage-backed-type’ transactions, the first ‘asset-backed’ securitization transactions have also appeared.72

4.4. ‘Leasing’ and ‘title retention arrangements in Hungary. – Opposed to securitization – which is still a category truly novel to the legal community – the basic contours of such advanced contract types of ‘leasing’, ‘franchise’ or ‘factoring’ are widely known. From among these, however, we would deal in some detail only with title financing devices since they play an important role in Hungarian economy and also because they are inherently very close to secured transactions.

The position of ‘leasing’ de lege ferenda is discussed above amidst of the elaboration on the new Civil Code. The inclusion of ‘leasing’ as an important item on the agenda in shaping the new Civil Code is also the expression of the fact that the position of ‘leasing’ is not satisfactorily determined in the law in force today. The good in the bad is that is has been recognized that something has to be done in this respect. However, it is questionable whether all the factors playing a role in ‘leasing’ context have been taken account of and especially whether all the possible solutions offered by comparative law have been given adequate attention. Clearly, the confines of the paper would not be sufficient to give a full account of this problem, therefore, just a few relative dilemmas are going to be raised, believing that this would provide further useful insights into the complexities of financial contracts law in Hungary. (Here the use of ‘financial contract law’ is intentional because ‘leasing’ and other title retention devices – with the exception of chattel mortgage – are not covered by the new Hungarian secured transactions law regime).

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72 See, e.g., at http://www.pbleasing.hu where car-leasing-based-receivables have been securitized.
First of all, the English-origin term 'leasing' has not been translated and nobody is seeking for a genuine Hungarian-language counterpart, because 'lizing' has become domesticated. Furthermore, it is more or less clear that there is a need for the imported term because 'lizing' stands for a transaction, which is considerably more complex than the category of the traditional rent or lease (bérlet) contracts otherwise known for centuries in Hungary, too.

Although, a number of leasing related cases have reached the Hungarian Supreme Court, which obiter provide for a definition of the contract as if everything would be completely clear; a comparative lawyer should not be satisfied with such a position. Since so far no statutory definition of leasing exists, the Supreme Court's views seem to be the only solid pillars in any related discussion. The pertaining literature is also quite confused. As a consequence of these the rights of parties to leasing contracts are often unclear. Interestingly, just like in the 19th century U.S. – at the time conditional sale and leasing contracts had set out to help shrewd businessmen to circumvent fraudulently the onerous chattel mortgage legislation's formal requirements – it is not unheard of that a 'leasing' contract gets prequalified by a Hungarian court as a sham transaction. These are the clear indicia that the primary problem is finding of the proper definition of this sui generis finan-

73 In decision No. BH 1991/357 the court said: "The leasing is an atypical contract, the content of which is rent - and in the present case also installment sale - that produces a continuous legal relationship because of what conceptually no statute of limitation can be applied and therefore run out with respect to individual installments."
In decision No. BH 1994/97 the position taken is somewhat different: "The leasing contract is in effect a mixture of sales and rent contracts, on the basis of which the lessor allows the use of [certain] capital equipment by the lessee for a fee. It is the feature of the contract that upon the expiration of the contact the ownership on the object of the lease will be either transferred onto the lessee or the lessee will get a right of option to buy the asset according to s. 375 of the Civil Code." [The court qualified the leasing contract in this case also as a sham transaction.]

74 See, e.g., case No. BH 1997.85. In this case, the Supreme Court has held that the contract concluded between the parties - and nominated as 'leasing' contract - was neither a financial lease nor an operating lease (leasing contracts that had become known in business life) and that the parties have misused the 'leasing' form to evade certain tax burdens.
cial contract. More precisely, defining the proper meaning of all transactions or devices that are close to leasing.

In addition, 'conditional sale' and 'hire-purchase', as separate nominated contracts in common laws, are essentially unknown categories in Hungary. Moreover, use of title retention clauses by inclusion into sales or other contracts is only now becoming more and more accepted as the cheapest security available. If one would analyze the texts of leasing contracts utilized in the transitory period, it would very soon become clear that these transactions could qualify, for example, under English law as 'hire-purchase' in some instances, in others as 'conditional sale' and in certain instances they would amount to nothing else but simple 'lease' contracts.

Given that the new Civil Code Concept foresees as one of the alternatives the transformation of retention of title into a security interest – which, in the lack of indication of the source of the idea, could not be interpreted otherwise than the acceptance of the solution of U.C.C. Article 9 – the unanswered dilemma then is what should be the destiny of 'leasing' contracts? In other words, the issue is whether 'retention of title arrangements' are distinct from 'leasing and its relative contracts'? And, therefore, should they be made subject to a separate regulatory framework or not? Without entering into further detail on this topic, one thing should be uncontested: 'leasing' is surrounded with serious

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75 The meaning of the mentioned contracts might be substantially different even in common law systems. Thus, it is of utmost importance to pick a legal system, find all the interconnected legal categories and then to analyze things from the chosen system's point of view. Jumping from one jurisdiction to another without first fixing a point would lead to confusion. This seems to be the situation in Hungary on 'leasing' and 'retention of title' issues. English law offers the following categories and definitions of relevance, as advanced by Roy Goode in his Commercial Law, 2nd ed., 1995, p. 776, 763, 767-768. In particular, "in the eyes of English law a lease of goods is a hire contract, by whatever name is called. Its essential characteristic is that goods are bailed by one party, A, to another party, B, for B's use or enjoyment in exchange for payment of rent. It is distinguished from hire-purchase and conditional sale in that B has neither the option nor the obligation to purchase the goods but is required to return them to A, or deal with them as A direct, when the bailment comes to an end." Conditional sale, on the other hand, is different from hire-purchase in that "the buyer is contractually committed to buying while the hirer has merely an option, but no obligation, to buy".
fundamental conceptual dilemmas. If these will not be adequately solved, that would give a serious blow not just to the successfulness of the future Civil Code, but would also undermine the heretofore results of the secured transactions law reform. The right solution is nevertheless not that far away.

The main problem seems to be that the right connection among the above mentioned legal categories has not been found, nor has been clearly decided which model offered by comparative law is going to be promoted as the central one on this particular question.

A very important factor in deciding which way to go is the fact that ‘leasing’ is deemed to be a risky business in Hungary, just like all over CEE. This qualification should be given due consideration irrespective that, for example, the role leasing plays in the economy of the Czech Republic is considerably bigger than in Hungary76, or for that matter that Romania has already enacted a separate statute devoted exactly to the leasing phenomenon77. Of course, this does not mean that nobody makes use of this scheme in Hungary. On the contrary, the leasing market growth data show a constant increase in the last few years78. Put

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76 It must be noted, however, that the relevant data might not be always accurate and it is always questionable what criteria and definitions were applied in making the comparison. Suffice to underline the fact that – given that in Hungary there is no generally accepted definition of leasing – there are inevitably serious problems because it is not clear which transactions have been taken into account and were deemed to be ‘leasing’ transactions. One thing is, however, quite clear, in Hungary leasing has been primarily employed in marketing cars and other motor vehicles. Moreover, often some ‘leasing scheme’ is the preferable one over outright crediting. The major car producers had formed their own financing banks or leasing companies long ago, which have founded subsidiaries in Hungary after entering the market (e.g., Opel). Others have relied on local financing companies. (E.g., Fiat is in connection with ‘Euroleasing’, Peugeot with ‘Budapest Autófinaszirozási Rt.’).


78 If one departs from the net value of the leased objects compared with the value of all investments, then the data are quite impressive: from 4,5% in year 1994 the proportion of leasing has increased to more than 18% in year 2001. (Data of the Hungarian National Bank. See, Megpezsdíílt a Lízingpiac/Boosting of the Leasing Market, in Magyar Nemzet, December 5th, 2002, p. 16. With such a level of leasing-based-investment Hungary has reached the average level of the European Union, though there is a significant difference in the structure and lease of electronic equipment or machines is much smaller.
simply, ‘leasing’ – with all the surrounding open questions – is very much part of Hungarian economy and certain quintessential related queries are undeniably present irrespective that there are scholars who think that the existing legal framework is more or less satisfactory. While ‘leasing’ as such is a recurring theme – primarily in business journals and less in legal periodicals – published in Hungary, a truly in-depth comparative analysis, which would relate leasing to the secured transactions reform, is still missing. Truthfully, I have raised certain doubts about the correctness of the sharp division of ‘leasing’ and secured transactions law reform, however, amidst of a more general discussion on the Hungarian secured transactions theme.\(^7^9\)

Yet the most detailed treatise available on Hungarian leasing law\(^8^0\) confirms my above findings and underlines (1) that insurance companies tend to look upon the leasing-business as very risky and are therefore willing to insure in this area only under rather strict and burdensome conditions. Furthermore, (2) securing of the lessors’ rights by tested in rem or in personam security devices is crucial. However, it is indicative that – albeit the authors have provided a detailed list of first, second and third category security devices\(^8^1\) traditionally used to secure lessors’ rights in 1990s – the ‘object of leasing’ itself has not been used as collateral. In other words, in essence the object of leasing should not be used as collateral as of yet in Hungary. This seems to be, hence, the

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\(^8^0\) A. Csíby, G. Kiss, Z. Sárhegyi, and A. Tuller, *Lízing*, 2nd ed., Budapest, 1995. Note that the text reflects the conditions existing in Hungary prior to the enactment of the 1996 1st Reform Act. Yet as the Reform Act does not extend to ‘leasing’ transactions one may comfortably claim that the problems inherent to ‘leasing’ have not been adequately solved by the reform. Otherwise, the fact that the Concept of the New Civil Code has raised a number of issues related exactly to this area of law, is a good proof of the expressed standpoint herein.

\(^8^1\) For example, a first class security device would be (1) a governmental guarantee (joint or several liability); (2) Bank guarantee; (3) Deposit, if the object of deposit is readily marketable (high liquidity), like cash, governmental bonds, blocking of bank accounts, negotiable instruments issued by banks or other financial institutions; (4) joint and several liability of a debtor with first class credit history; (5) pledge of stock or inventory, etc. See, id., at p. 90 – 92.
crucial difference between U.S. and Hungarian law. Presumably this
state of affairs could not be attributed solely to the framework of U.C.C.
Article 9 – the bankruptcy, the enforcement regime and the high level
of the rule of law play definitively crucial role also – but it is important
to underline that in U.S. objects of leasing tend to be sufficient by them-
selves to serve as collateral.

Consequently, the costs accompanying leasing ventures in Hungary
– and in other CEE countries – are considerably higher because of the
need to provide additional security. Some responsibility lies naturally
also with the ineffective Hungarian enforcement system, which has
remained quite robust irrespective of certain improvements in the 1990s
and the inclusion of some self-help concepts – with the notable exception of *self-help repossession*\(^\text{82}\) – into the secured transactions reform acts.
It is also a matter of fact that extra-court repossession of cars from
defaulting lessees is not something unusual, just as the existence of pro-
fessional enforcement agencies often dealing on the verges of legality in
the lack of adequate regulatory background. This ostrich-behavior-like-
regulatory policy not taking account of realities is just another reason
why the ‘leasing theme’ should be from every point of view very
important.

The leasing question is one of good examples of the fact that an ade-
quate legal regime could have directly visible economic effects: the de-
tected legislative inertia together with a non-functional approach to law
jointly has created non-negligible burdens to business. The extent of this
burden will be, however, palpable once such a regulatory framework
and enforcement system will be at place, which would make possible
most leasing businesses taking the leased object as collateral. The de-
crease of costs because of the more efficient – thus, considerably less costly –
enforcement of lessors’ (and lessees’) rights and the need to provide and
bear the costs of additional security (but the object of lease itself) will as
foreseeable truly revolutionize and boost the leasing industry.

\(^\text{82}\) Hungarian – officially not necessarily recognized – empirical evidence corrobo-
rates the finding that “[…] in an unreliable enforcement regime, transactions tend to
become intermediated through institutions or concentrated among agents bound by
some form of private enforcementl.” See, F. Modigliani and E. Perotti, *Security Versus
Bank Finance: the Importance of a Proper Enforcement of Legal Rules* (February 2, 2000)
No adequate solutions could be, however, found without approaching the problem functionally\textsuperscript{83}, or at least, giving priority to functional considerations over systematic ones. At any event, a closer look should be cast on the pertaining solutions of U.C.C. – primarily – Article 9\textsuperscript{84}. Though, some Canadian and French solutions could be very valuable in shaping the future Civil Code on this point. At the end of the day, however, the raised dilemmas appropriately demonstrate that secured transactions and ‘leasing’ law cannot be tackled in isolation from one another.

This fact has not been, in my opinion, given sufficient attention in international harmonization efforts either. The EBRD Secured Transactions Model Law\textsuperscript{85}, for example, provides for a \textit{sui generis} solution – the unpaid vendor’s charge\textsuperscript{86} – which neither has been widely embraced (presumably because it’s too “artificial”, i.e., not tested truly anywhere in practice and being incompatible with known conditions) nor seems to tackle adequately the problem. Obviously, in states in transition and where the ‘embeddedness and social significance of the law’ is of lesser degree than in developed western states, an Article 9-like, registration based system, would be a better solution and the token of a much speedier economic development. These claims apply to a great extent also to all the other CEE, though there is a significant difference among these states as far as the state of the rule of law is concerned.

\textsuperscript{83} For a functional analysis of the EBRD Secured Transactions Model Law, including the criticism of the ‘unpaid vendor’s charge’ concept, see J.A. Spanogle, \textit{A Functional Analysis of the EBRD Model Law on Secured Transactions} 3-SPG NAFTA: L. & Bus. Rev. Am. 82 (Spring, 1997).

\textsuperscript{84} The ‘primarily’ is added to stress that in U.C.C. ‘leases’ are regulated at two places: ‘true leases’ in Article 2A and ‘security leases’ in Article 9. The main disadvantage of this system is that often it is not easy to differentiate between these two forms of leases. The abundant case law deals exactly with this question.

\textsuperscript{85} The Model Law is available electronically at http://www.ebrd.com. The Model Law was prepared by John L. Simpson and Jan-Hendrik M. Röver with assistance from the member of EBRD’s Office of the General Counsel.

\textsuperscript{86} The ‘unpaid vendor’s charge’ is regulated in Article 9 of the EBRD Model Law on Secured Transactions. “The unpaid vendor’s charge replaces reservation of title by a charge in favor of the unpaid vendor – title passes to the purchaser and simultaneously a charge is given back automatically in favor of the vendor.” See, official comment to article 9.1. of the EBRD Model Law.
Perhaps a separate project that would deal with the harmonization of the ‘leasing’ or title financing contracts area initiated from within the European Union - that would try to make the system compatible with secured transactions laws (which have become the centerpiece of most international bodies dealing with rapprochement of commercial laws) - would be beneficial for all those already being inside the Union and those aspiring for membership. As things look nowadays, the separate treatment of title financing contracts from secured transactions and the variety of secured transactions models offered internationally\textsuperscript{87} to transitory countries, definitively is not leading towards a desired - and viable - harmonization of this important segment of law and economic life. It seems that this should be one of the central tasks awaiting the prospective European Civil Code.

4.5. The rule of law. - It might be a little bit unorthodox to include a few sections about the rule of law into a paper dealing with commercial law, as often this theme deems to be the exclusivity of constitutional lawyers. Such a standpoint presupposes that the rule of law is a constant variable for the analysis of which one is - a kind of - automatically instructed to consult other sources\textsuperscript{88}. Yet, to tell the least, it is hard to

\textsuperscript{87} See, for example, the Report of Working Group VI (Security Interests) on the work of its first session (New York, 20-24 May 2002) (Document No. A/CN.9/512) which under point F. 34 states: “It was […] suggested that the draft Guide [on secured transactions] could make a significant contribution to practice by recommending that retention of title should be treated as a security right. However, the Working Group made no decision as to whether retention-of-title arrangements should be regarded as conditional sales or secured transactions.”

\textsuperscript{88} The rule of law is present “…when the law in general does not take you by surprise or keep you guessing, when it is accessible to you as is the thought that you might use it, when legal institutions are relatively independent of other significant social actors but not of legal doctrine, and when the powerful forces in society, including the government, are required to act, and come in significant measure to think, within the law; when the limits of what we imagine, our options to be, are set in significant part by the law and where these limits are widely taken seriously – when the law has integrity and it matters what the law allows and what it forbid.” See, M. Krygier, Transitional Questions about the Rule of Law: Why, What, and How? in East Central Europe, special issue: Ius and Lex in East Central Europe: Socio-Legal Conditions of the Rule of Law Amid Post-communist Transformation, vol. 28, part 1, 2001, p. 13.
understand or to conceive adequate solutions to existing problems without having the level of development of the rule of law in any one given system on mind.

It is also part of the truth that constitutional lawyers themselves tend to disagree on the meaning of this fundamental principle, what, however, should not prevent us to jot down a few important thoughts on the connection of the rule of law and financial contracts. In the domain of direct interest here solely that aspect of the rule of law matters which indicates to what extent does the law count or is embedded in the society.\textsuperscript{89}

Namely, the models followed in reforming the financial contracts field and the solutions - as adapted to local conditions - directly depend on the extent to which the law is 'embedded' and respected by all segments in the society. A number of fundamental questions depend primarily exactly on this and on the extent to which reality and projections on the state of rule of law are overlapping. Thus, taking just the example of the Hungarian 'leasing', the question whether 'retention of title' clauses if included into contracts are going to become powerful security devices depends primarily on the extent to which law - in this case contractual promises - are respected in the society. Or, in other words, to what extent are contracts self-executory and in what percentage of cases are promises kept without any intervention from the side of courts or other governmental bodies. The differences in the 'embeddedness' of the law and contractual promises seems to be the primary reason why has the retention of title become a truly powerful security device in Germany and significantly less powerful in Hungary.

On the terrain of enforcement a number of problems does not seem to subside. Thus, enforcement of real estate mortgages tends to be quite problematic, especially in non-business cases; though some municipal courts have never had even the opportunity to deal with this issue.\textsuperscript{90}

\textsuperscript{89} Krygier has identified four elements of the rule of law: (1) there should be no privileged groups or institutions exempt from the scope of the law (scope); (2) the law should be such that people will be able to be guided by it (character of law); (3) the law must be treated as authoritative (authoritativeness) and (4) the law must be widely accepted, it must matter/count both by those who exercise it and by those on whom it is exercised. See, Id., p. 10 - 13.

\textsuperscript{90} See, e.g., S. Timár [the president of the Town Court of Rackeve], Enforcement of Immovables Full with Question Marks, in Magyar Jog, No. 6, 1999, p. 344.
Clearly, dislodgement is likewise a true battle in developed credit economies, but that does not make the whole – or a substantial part of – collateral and enforcement system ineffective. One of the reasons lies with the inherited anomalies of the real property registry system itself in Hungary, which requires more often than not a relatively long periods of time for the effectuation of entries and which unfortunately provides a room for forging registry certificates and consequently recurring fraudulent activities.  

Furthermore, practices and attitudes stemming from the previous regime are also to be attributed part of the responsibility for the present state of affairs. Eviction as such – although foreseen by the law – was in essence incompatible with socialism, because of what the number of registered evictions or enforcements of mortgages was minimal in that period of time. It seems that not much has changed in the transitory period in that respect; though enforcement of mortgages in the business arena seems to much less problematic.

Nonetheless, one would be blind not to see that important developments surface. Some of these unequivocally show that ever newer segments of the society feel that the law should be respected to the extent possible since this is the token of prosperity and of a brighter future. One of the latest such development is the decision reached in a case initiated by a handicapped individual suing one of Budapest coffee houses for not being wheelchair accessible. This is the first suit of this kind in recent history of Hungary, which will hopefully fundamentally change the attitude not just of the public but also of courts. Although beginning from 1998 law there is an explicit mandate of the law according to which all newly built public buildings must be made wheelchair accessible, in the overwhelming part of cases the law has not been adhered

\[91\] The anomalies identified by Harmathy in 1994 have not been satisfactorily resolved by now, though certain improvements have been effectuated during the 1990s and the problem of ‘apartment-mafia’ is constantly in the spotlight of political developments. This includes occasionally also cases of criminal prosecution of real property registry officials. In Harmathy’s view two main problems loomed large in 1994: (1) the lack of real estate markets in certain parts of the country, and (2) various deficiencies in the maintenance of the registry system. See, interview with Prof. A. Harmathy given to the Hungarian business journal Kereskedelmi és Jogi Értesítő, May 1994, p. 5.
to, neither by the owners of already standing buildings (they need to make the premises wheelchair accessible by 2005) or by developers of new sites. What’s more, the competent authorities did not really care about the disregard of the act. Yet nothing has occurred until January 16th, 2003, when the mentioned court decision has been reached.

The peculiarity of the case is also that the claimant was directly supported by the non-governmental sector and – besides the obligation to effectuate the necessary construction works to make the place wheelchair accessible within 120 days – the claimant was awarded also a monetary sum for the non-material harm suffered on the account of the infringement of his human dignity\(^\text{92}\). While it’s still questionable what is going to be the aftermath of this – strictly speaking non-authoritative – precedent, decisions like that might strengthen the respect towards courts and the law as such in the society. If things will develop in this positive direction, that will indirectly influence also all the other areas of law, especially the ones that are contract-based. Consequently, the sophisticated subject matter of the rule of law, nevertheless how abstract and not easily perceptible, should because of these reasons be an important corollary of discussions on the reform of any field of commercial or private law.

5. Conclusions.

5.1. Combination of top-to-bottom and bottom-up changes. – On the basis of the above brief elaboration a number of conclusions follow. First of all the heretofore achievements – which on certain points prime in the CEE region – were the product of various legal formants\(^\text{93}\). On the basis

\(^{92}\) Nagy Benedicûz v. Centrál Kávéház Kft. (decision as of January 16\(^{\text{th}}\), 2003). Given that the decision was reached by a lower court this is the only available data on the case as lower level court cases are not reported anywhere. What may be known on the basis of such information (i.e., public media) is the following: (1) the claimant’s (Mr. Nagy) human dignity was infringed because the coffee house did not provide him the possibility to enter the building with a wheelchair, thereby depriving him the unhindered use of the coffee house’s services; because of what (2) the coffee house is obliged to make its building and premises wheelchair accessible within 120 days; (3) the claimant was awarded 120,000. – Hungarian Forints on the account of non-material damages.

\(^{93}\) The Hungarian developments clearly support Bussani according to whom “... the contrast between top down and bottom up legal change is a false opposition. All
of this fact it is fair to presume that future development will likewise not depend on any one isolated segment of the society. Thus, if the adoption of the secured transactions reform acts was the product of a top-to-bottom approach, then the gradual enrichment of Hungarian banking and business practices with novel financing techniques seems to be the result of a primarily reverse process. It is also characteristic that this development, reaching its peak with the passing of the 1st Reform Act in 1996 and the introduction of the charge registry system in 1997, is in essence in stagnation today. It is fair to claim that irrespective of the enactment of the extended and with – in the meantime – emerged problems consolidated 2nd Reform Act, the act has unfortunately not caused much upheaval in business circles. Or, at least, it has not boosted the credit market as it was expected.

True, the step-by-step introduction of various governmental programs aiming at bolstering house-building together with the emergence of a modern ‘mortgage industry’ has become an irreversible process by now. This seems to be the most important factor that has made subsequently the use of ever newer financing techniques – like securitization – possible. Still it looks as if these pathbreaking phenomena have to a large extent bypassed the legal community, which seems to be – with notable exceptions – satisfied with the existent legal framework irrespective of the problems with the real property registry – and occasionally with the newly created registry of charges on movables – system, dilemmas about enforcement of security interests and rights based on other financial contracts (leasing) or dilemmas surrounding the compatibility of the bankruptcy system with the new secured transactions laws; to name a few. It seems as if lawyers had become passive observers in a process in which they should be somewhere up front. Passivity or occasionally resistance – not to changes – but rather to the inflow of foreign law and practices is often the characteristic of legal scholars, and to a lesser extent, practicing lawyers. While courses directly related to European Union Law have become part of regular curricula of law schools and other educational institutions, many „unorthodox” topics – like the new secured transactions system (espe-

cially from a comparative perspective) – some of which would be covered by the future European Civil Code and which have so far mainly remained outside of EU regulation, are only rarely covered adequately.

5.2. Stalled reform? – As follows from the above, I would subscribe to the opinion – stated somewhere in 1998 – that the whole transitory process has stalled. Similarly, the failure of credit industry – implying the modest success of the secured transactions legal reform venture – was undeniably one of the key reasons behind such result. If we add that the first years of the new millenium have been characterized by focusing on the accession to the European Union and leaving aside most of things directly not being a prerequisite to accession – notably, secured transactions and many other private law topics – one may have a pretty clear picture on the present state of affairs.

While to Hungarian lawyers functional way of looking upon law and understanding of the social role of law through an economic perspective might be novel – leading to or expressing the conservativeness and inertia of a large part of the legal community – law and those directly responsible for shaping and implementing it are also significantly responsible for the stagnation of the transitory process. The today undeniable fact that Hungary – the truly successful forerunner in the transitory race, roughly, in the first half of the 1990s – is not the top country of the CEE region according to some sources, could be ascribed to a great extent exactly to the problems highlighted herein.

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94 Prof. A. Harmathy, a leading figure of the secured transactions reform process has vividly described this: “In the field of the economy the crucial role of the market is well understood and that of the financial market is admitted as well. Capital markets emerged only after the political changes, and it takes time until their role will be strong enough for the development of the economy. Alternative sources of financing have been missing. Banks have been undercapitalized and have misallocated savings. The failure of credit markets has been stated to be the primary reason for the stalled transition.” See, A. Harmathy, The EBRD Model Law and the Hungarian Law, in Norton & Andenas, Emerging Financial Markets and Secured Transactions, London, 1998, p. 201.

95 According to the latest ranking list of the Davos (Switzerland) World Economy Forum (January 2003) Hungary has lost its leading position in the CEE region. Slovenia has, for example, better macro and micro economic results than Hungary; Estonia primes only according to the macro economic data. See, e.g., Romló magyar versenyké-
5.3. Accession: the missing impetus. – The accession to the European Union might be exactly because of the stagnation important: ‘the new rules of the game’ might set the ball rolling again in the transitory process and would hopefully bolster the efforts of reformers. Judges will be forced to face the challenge and necessity of applying EU law and law schools will have to take a more open approach, to name a few foreseeable developments. These jointly will have direct and indirect impacts also on secured transactions and other financial contract laws, especially if Union-level harmonization efforts would ensue in the near future.

At any event, secured transactions and financial contracts are those areas of law the harmonization of which is not just possible but also desirable. The inclusion of these items into the agenda of ever more organizations dealing with certain form of harmonization of laws corroborates this claim. However, the offering of substantially divergent models to transitory countries might be disadvantageous. Indeed, as the available data shows, the CEE countries tend to reform their laws not following one model. Moreover, normally they do not tackle all types of financial contracts at the same time. The fate of the Hungarian title retention devices is one of the notable examples.

This, in other words, means that some kind of guidance from within the EU should be beneficial to all interested. Even though it is a positive development that most of the CEE countries have already set out to create an appropriate legal environment for credit economy, yet a too divergent legal ambient might cause problems in drafting the European Code in the future. Secured transactions and financial contract law seem to be of particular importance for a number of reasons, beginning from the fact that its reform requires – where registration of security interests has been embraced as the central policy aim – substantial investments (more than just passing of a law amending the existing rules) through the direct effects these branches of law have on economy.

96 If my understanding is correct this facet of secured transactions law has been underlined also by M. Bussani, L'Intégration Juridique et le Droit des Suretes Réelles, in Vers L'harmonisation en Europe du Droit de L'insolvabilité et des Garanties, published by the Law School of the Université Libre de Bruxelles, in Brussels, volume 24/2001, p. 111.
To conclude with, the future European Civil Code and the efforts leading to it could serve as a panacea to the existing piecemeal harmonization approach that had arisen more or less spontaneously due to the overlapping harmonization aims of various international organizations.\textsuperscript{97} It is high time to realize that financial contract law is made of segments, which are equally important from an economical point of view and which are subject to a substantially distinct set of rules in various developed laws (that may serve as models), however, it is questionable whether they should be reformed separately from one another\textsuperscript{98}. More concretely, it is questionable whether secured transactions law (true \textit{in rem} rights), title retention-based contracts (e.g., leasing) and investment property related contracts together with their use for security purposes, could be reformed in isolation from one another. Hungarian experience – concretely the need to tackle also retention of title and the need to find its proper relationship with secured transactions (char-

\textsuperscript{97} Albeit the following characterizations might be disputed, they might serve the purpose of showing that CEE countries have followed – on many points significantly – different models. Thus, the EBRD Secured Transactions Model law \textit{per se} is a mixture of U.C.C. Article 9 – English law – and some \textit{sui generis} solutions (e.g., unpaid vendor’s charge). It has served as a model in more CEE states, though subject to certain modifications. Some other CEE states have shaped their respective laws with the help of the American Institute IRIS (Institutional Reform and the Informal Sector) relying directly on U.C.C. Article 9 (e.g., Albania). The German Organization for Technical Cooperation (\textit{Deutsche Gesellschaft für Technische Zusammenarbeit}) has also assisted to CEE states, in particular to Central Asian and Caucasian states. (Since I’m not familiar with the secured transactions model they tried to promote, I do not want to make unfounded statements, yet it is fair to presume that within this project the German model has been primarily made use of, which is a ‘registration-hostile’ system as far as personal property is concerned and is as such on more fundamental points directly opposite to U.C.C. Article 9). The UNCITRAL secured transactions project has tried to learn on the experience of others, but it is still yet-to-be-seen what the final contours of the project will be and with what will be added to the EBRD secured transactions project. UNIDROIT is also interested in security interests, though, its related projects are restricted to specific types of collateral (internationally mobile goods and ‘space equipment’) because of what inherent problems in the form of overlap or diverging findings/guidelines are minimized.

\textsuperscript{98} As indicated above, in case of Hungary while the secured transactions system (charge law) has been made subject to reforms, leasing and other retention of title contracts have so far remained intact.
ge) law only a few years after the enactment of the first secured trans-
tions reform act – is a proof of the point that it is not possible and this issue
will have to be dealt with sooner or later. If the finding of the proper mean-
ing of the (according to me) newly-emerged term ‘financial contract’ pre-
supposes a more unified approach to harmonization of this sensitive field
of law, ‘financial contracts’ should be given uncontested priority and
heightened attention on the way towards the future European Civil Code.
The Hungarian developments corroborate this finding.

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SINTESI

LE GARANZIE DEL CREDITO
E I CONTRATTI DI FINANZIAMENTO IN UNGHERIA
ALLA VIGILIA DELL’ADESIONE ALL’UNIONE EUROPEA

Il saggio indaga il diritto ungherese delle garanzie del credito e dei
contratti di finanziamento avendo riguardo all’ambiente sociale ed eco-
nomico esistente in questo Paese nell’età dell’adesione all’Unione Euro-
pea. La maggior parte di ciò che scopriamo con riguardo all’Ungheria,
tuttavia, vale egualmente per altri sistemi in transizione, specialmente
per quelli appartenenti alle regioni dell’Europa Centro-Orientale, acco-
munati dall’aver vissuto una storia socialista comune e dall’essersi poi
aperti agli impulsi provenienti dall’Occidente. Se il diritto delle garan-
zie del credito e dei contratti di finanziamento fosse stato oggetto di
regolamentazione diretta a livello europeo, l’Ungheria avrebbe armo-
nizzato il suo diritto interno in questo settore secondo i principii comu-
nitarii, così come ha fatto con tutte quelle materie che sono oggetto del-
l’aquis communautaire. Dato che quel settore del diritto è rimasto al di
fuori dalla disciplina comunitaria, l’Ungheria ha riformato quest’area
prendendo spunto da modelli occidentali che sono stati adattati grazie
ai risultati di vasta portata delle elaborazioni che i giuristi ungheresi
hanno affinato a partire dai primi decenni del XX secolo. Ciò ha deter-
minato, tra l’altro, l’importazione di quelli istituti – particolarmente
favorevoli allo sviluppo del credito – come il ‘chattel mortgage’ ed il
‘floating charge’, provenienti dagli ambienti di common law, o come la
Grundsahl tedesca.
Più in generale, occorre qui ricordare in primo luogo come la riforma ungherese del diritto delle garanzie del credito ha seguito le vie dischiusa dalla ‘legge modello’ della Banca Europea per la Ricostruzione e lo Sviluppo (EBRD) – adottando così un registro computerizzato per le garanzie mobiliari. A prescindere dal graduale aumento del numero di coloro che ricorrono a questo sistema, il desiderato incremento dell’attività creditizia (che faceva affidamento, tra l’altro, sul nuovo sistema di garanzie) non si è tuttavia ancora verificato. Questo è il motivo per cui si registra un certo livello di stagnazione nello sviluppo dell’industria dei finanziamenti. L’adesione all’Unione Europea molto probabilmente darà lo slancio necessario per una ripresa di questo sviluppo.

In secondo luogo, occorre considerare che è stata avviata la redazione di un nuovo Codice Civile, direttamente basato sugli sviluppi europei moderni. Il nuovo Codice, oltre a ricomprendere tutte le acquisizioni rilevanti a livello dell’Unione Europea, cerca di fornire soluzioni idonee a promuovere la causa dell’economia creditizia, ad esempio disciplinando per la prima volta figure giuridiche di enorme rilievo per la prassi, come il leasing, il factoring o la riserva di proprietà.

È evidente che, a prescindere dal momento di arresto di cui s’è detto, il circuito commerciale, ed in particolare l’attività bancaria e creditizia, hanno continuato a svilupparsi più o meno indipendentemente da altri segmenti della società. Non potrebbe aversi miglior testimonianza di ciò dal fatto che oggi l’utilizzazione di tecniche di finanziamento tanto nuove e complesse come la securitization è ormai una consolidata realtà. Non c’è bisogno di rimarcare che proprio tali sviluppi sono la miglior prova del fatto che l’economia ungherese è pronta ad aderire all’Unione Europea. I nuovi istituti di libero mercato, insieme ai programmi di governo miranti al supporto dell’attività di credito fondiario, provano anche che il processo di riforma è irreversibile. Di conseguenza, l’occasionale ostilità che è dato registrare fra taluni esponenti del mondo accademico, o professionale, nei confronti dell’importazione di modelli giuridici stranieri non è espressione di un più profondo malessere dell’economia e della società, ma rappresenta piuttosto uno degli inevitabili corollari del lungo processo di transizione verso un’economia di libero mercato, processo che inevitabilmente troverà proprio nell’adesione all’Unione Europea l’auspicata accelerazione.