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A Comparative Law Analysis

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Mamei mele,
cu toată dragostea

Foreword

If sanctioned by law, self-help in private and commercial laws[1] is a fast, cheap and efficient alternative for court enforcement. It is also a quintessential tool for secured transactions law as evidenced by the early generation of US and Canadian laws or the latest generation examples from the CEE region and France. Treated with indulgency by the common law systems,[2] it has been always regarded upon with suspicion and has been limited to the minimum by civilian legal systems, including France and Germany, the two jurisdictions that have served as models for many other Continental European legal systems.

First, the book argues that self-help remedies and private debt collection are not only the trait of common law jurisdictions. The book researches the history of these institutions of law and argues that remnants of private enforcement can be found in civilian systems' contract law (focusing on several well-known examples from sales and service contracts). The reason for analyzing and identifying several types of self-help in contract law[3] is twofold. On the one hand, it proves that self-help is not incompatible with or unknown to civilian systems. On the other hand, it raises the question of why in civilian systems self-help is generally available for unsecured creditors in contract law, but particularly denied to secured creditors in secured transactions, when in fact, in common law systems, the secured creditors benefit from a larger protection, deriving logically from their secured status.

Second, the book claims and exemplifies that the twenty-first century brought with it a shift towards out-of-court enforcement and debt collection also in Continental Europe as was recognized, among others, by the drafters of the European Common Frame of Reference (DCFR), who have stressed the expectation of

[1] The distinction between private and commercial laws is relevant for dualist systems, such as Germany. Romania has recently become a monist system, by implementing a new Civil Code, which in fact is a code of private law, combining civil, commercial and family laws.

[2] Goode (2014), p. 135 at 151.

[3] The best known self-help device recognized by all chosen jurisdictions is the right to withhold performance. For details, see *infra*, Chap. 3, Sect. 3.4.

creditors for speedy and efficient enforcement in Book IX devoted to secured transactions law. The book contends that implementing and recognizing self-help remedies and private enforcement benefit the economies of civil law systems, where—similarly to the U.S. or other common law countries—the economic role of both business and consumer financing has increased drastically by the twenty-first century. In order to substantiate this claim, the book comes forward with examples of known and tested self-help forms and remedies to comparatively assess the efficiency and the intensity of the concomitant risks.

Third, the book argues that—despite their usefulness—self-help and private debt collection brought to the surface significant new risks, especially for consumer-debtors. Therefore, private enforcement needs to be paralleled by introducing tailor-made consumer-debtor protection regulation. The book uses the US Fair Debt Collection Practices Act as a benchmark and compares its unique panoply of tools with the kin regulatory frameworks offered by the other jurisdictions observed to find the most efficient solutions of prevention and deterrence of abuse to which the consumer-debtors might be subjected. A matrix of *de minimis* building blocks serves as the basis for finding the most suitable consumer protection tools for each.

Last but not least, specific attention is given to factoring, which functions in many instances as a form of pseudo-private debt collection and which has been exploited to bypass sector-specific consumer protection regulations.

Reference

Goode R (1998) The codification of commercial law. Monash Univ Law Rev 14

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Abbreviations

ADR	Alternative Dispute Resolution
BFCP	Bureau for Financial Consumer Protection (the US)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
CCA	Consumer Credit Act
CSA	Credit Services Association
CSA(s)	Consumer Sales Agreement(s)
DBSG	Debt Buyers and Sellers Group
DCFR	Draft Common Frame of Reference
EAST	Electronic Archive of Secured Transactions
ECJ	Court of Justice of the European Union
FCC	French Civil Code
FDCPA	Fair Debt Collection Practices Act
FLSA	Fair Labor Standards Act
FTC	Federal Trade Commission
HPA(s)	Hire-Purchase Agreement(s)
NACP	National Authority for Consumer Protection (Romania)
OFT	Office of Fair Trading (the UK)
RDG	The Law on Provision of Non-Judicial Legal Services (Germany)
RNCC	Romanian New Civil Code
ROT	Retention of Title
RSTL	Romanian Secured Transaction Law (Title VI of Law no 99/1999)
SGA	Sale of Goods Act
STL	Secured Transaction Law
UCC	Uniform Commercial Code
UCPD	Directive 2005/29/EC on Unfair Commercial Practices
UNCITRAL	United Nations Commission on International Trade Law

Contents

Chapter 1
Introduction

Access to credit, especially low cost credit, is essential to the growth of any economy, either emerging or established. Accessing credit is still of *critical* importance for consumers, small and medium-sized enterprises (SMEs) and large companies. Strongly connected to credit and collateral is the topic of enforcement, a Janus-faced problem, which deserves more attention and special treatment. On the one hand, efficient enforcement is of outmost importance to creditors, while on the other hand efficient protection against creditors' abuse is of utmost importance to consumer-debtors.[1] It is then relevant to bring forth into discussion the effectiveness of the traditional judicial methods of debt recovery as compared to alternative means, which are arguably better, cheaper and faster when considering the creditors' needs, as well as the efficiency of consumer-debtor protection mechanisms in place in the chosen jurisdictions, when considering the debtor's needs. Given the fact that the two are often intertwined, none of these aspects could and should be treated separately.

While analyzing the creditors' and debtors' needs in the context of access to credit, one can easily note that both constituencies prove equally vulnerable and have their own legitimate concerns. Lenders are more reluctant in extending credit that is considered risky, due to loss of confidence in the market and in debtors, be it businesses or consumers, but especially due to loss of confidence in the legal system, represented by courts, bailiffs and lack of (clear) substantive law.

[1] Business-debtors may also be subjected to abuse, but the magnitude of the abuse depends on the size and power of the business: the bigger the business the less likelihood for abuse. However, most of the chosen jurisdictions have decided to exclude business-debtors from the protections offered by the law and focus on consumers. It is for this reason that the book has decided to do the same. Hence, business-debtors will be addressed only where the relevant legal provisions analyzed have specifically mentioned them.

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The rapidly changing economic climate showed just how exposed they are to shifting circumstances in the debtors' economic status and pushed for increased carefulness.[2]

From the borrowers' point of view, and particularly of SMEs', affordable credit is also critical for expanding business, which means that any increase in credit's price will be reflected in the financial possibilities, economic activity and even the actual existence of SMEs. If one takes into account that SMEs constitute a considerable percentage of many emerging and developed countries' economies,[3] any negative impact on the SMEs will have a negative impact on the entire national economy.[4] In other words, as the doctrine correctly emphasized, "the critical point in lack of access to finance is that inability to borrow reduces economic growth."[5] However, in order to gain access to credit, the lenders need to be sure not only of recovery of the collateral or of the debt, but also of *fast* and *efficient* recovery, both inside and outside the courts system but still within the boundaries of the law.

In the case of SMEs, receivables financing also plays a key role, especially when capital markets are underdeveloped; banks do not grant credit due to lack of SMEs' credit history or due to lack of trust in the newcomers. Hence, *factoring* became a suitable source of financing for SMEs. One of the main advantages of factoring is that receivables owed to an SME may be sold directly to a factoring company, for a discounted price, rather than using them as collateral. If one considers the empirical data existent at the EU level, which show that on average an SME has to wait between 20 and 100 days to get their invoices paid[6] (if at all), it becomes obvious why factoring companies grew so prolific and why the debt-buying industry (sometimes doubled by the debt collection industry) is in continuous expansion. Basically, creditors are happy either to sell their debts on a discount or to farm out their collection for a success fee, thus avoiding the risk of a larger loss and of lengthy, expensive court cases, while debt buyers or debt collectors, specialized in recoveries, are not only answering to a market demand but also making huge profits from their business.

In the light of the above, supplementing or amending the current legislation with instruments that aim to modernize the procedural laws for providing faster judicial proceedings and security globally seems to be a sound solution[7] but does not solve

[2] Orkun Akseli—Vulnerability and Access to Low Cost Credit in Devenney and Kenny (2012), p. 10.

[3] According to official information at EU level, in 2013, 99 % of businesses in Europe are SMEs. See http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/index_en.htm, last visited 23.01.2015.

[4] For example, in the UK, statistics show that there are 4.7 million SMEs, with 13.5 million employees, and their contribution to the country's economy is more than half of turnover. Orkun Akseli—Vulnerability and Access to Low Cost Credit in Devenney and Kenny (2012), p. 18.

[5] Devenney and Kenny (2012), p. 11.

[6] Orkun Akseli—Vulnerability and Access to Low Cost Credit in Devenney and Kenny (2012), pp. 15–16, footnote 47.

[7] Kieninger (2004), pp. 7–8.

the problem of actual recovery. It is obviously beneficial for a creditor to obtain judgment against a defaulting debtor in 3 months instead of 3 years, but there is no guarantee that such judgment will be actually enforced. Therefore, private enforcement alternatives such as self-help, which have a long established tradition in the US and the UK, may prove to be a valuable source of inspiration for European developing countries,[8] such as Romania, and also for those with developed economies such as Germany and France.

It is generally accepted that secured lending reduces the risk of nonpayment and lowers the cost of access to credit.[9] But even so, a system that is entirely based on judicial enforcement will have serious efficiency issues. There are two possible justifications for excluding the state's involvement. One has to do with the state's incapacity to deal with all the issues that might arise from a business relationship. The second, which derived from the first, is that due to the risky and expensive nature of judicial proceedings,[10] a market for debt collection services has emerged and developed, and there are now many professional debt collection businesses available. One of the book's main claims is that the future of debt collection is shifting towards private enforcement;[11] hence, there is a need to address the concomitant risks deriving from it.

The most important element, which is common to all private collection practices, is the exclusion of the state's involvement. The collection is done by the creditor himself or through specialized private agents, without intervention from authorities: neither courts nor state bodies. Evidently, exclusion of *ex ante* judicial control and apparent lack of due process raises the issue of balancing between the interests of creditors and debtors and finding appropriate means to ensure enough protection against abuse from both sides while not affecting the efficiency of the debt collection itself.

At this point, the US model becomes relevant again since in the US resort to private debt collection is the usual practice,[12] notwithstanding whether the debt is secured or not. Obviously, in case of secured claims, a fast repossession of the

[8] One should also mention here the UNCITRAL Convention on the Assignment of Receivables, whose purpose was to establish a model for the modernization of domestic assignment law and as a first substantive step towards the overall harmonization of the law of assignment of receivables in international trade; the UNCITRAL Guide or the EBRD Model Law on Secured Transactions, which target the modernization of emerging markets' secured transactions regimes in which inefficient rules often prevent facilitation of secured credit; and last but not least, the UNIDROIT Convention on International Factoring, whose declared scope, although similar, is narrower than the one of UNCITRAL Convention on the Assignment of Receivables.

[9] Kieninger (2004), p. 7.

[10] Taylor (1998), pp. 847–850. Also King and Cook (1996), p. 7.

[11] The book's standing is not unique. Recently, the Draft Common Frame of Reference, representing the combined work of more than 250 European scholars and their current views, has emphasized the need to shift towards and encourage private enforcement. See von Bar and Clive (2010), p. 5614. For a similar view concerning the inevitability of channeling enforcement towards the out-of-court venue, see Tajti (2013), p. 13.

[12] Taylor (1998), p. 841; Gilmore (1999), p. 1212.

collateral enhances the position of the creditor and exerts additional pressure on the debtor to pay the debt. Moreover, in case of an unsuccessful private debt collection attempt, creditors enjoy the option to turn to formal court proceedings.[13] Parties can resort to state bodies at any time, which means that they are not deprived of their access to court and due process. This gives them a wider strategic advantage. One might argue that this right to choose the best avenue deemed appropriate is one of the reasons why the U.S. system proves to be so efficient.

1.1 Justification of Dealing with Private Enforcement

The need for simplicity, speed and the issue of costs borne by creditors has become a concern for states as well. At the European level, for example, this need led to the adoption of a European order for payment procedure and measures to simplify and speed up small claims litigation. The stated purpose was to make it easier to obtain, recognize and enforce court decisions throughout the Member States of the European Union.[14] However, these procedures remain judicial by nature and do not solve the issue of enforcement: creditors still need to resort to courts and go through the entire judicial process, pay judicial fees (even if they were reduced to a minimum), pay attorneys' fees, suffer the risk of losing the trial, while the debtor still has time to sell or hide the collateral and other assets.

The same need is the reason why this work is dedicated exclusively to nonjudicial enforcement and covers both theoretical and practical aspects of debt recovery. The topic is important since private enforcement is becoming a part of our day-to-day lives. The mere recognition of this fact should convince both practitioners and academics to dedicate more time to its research and understanding. At the same time, its study should enable practitioners to make correct use of it for the benefit of their clients.

This task is challenging since the topic does not fit easily within the canons of any area of private law. As the book will show, it touches upon commercial,

[13] "The US enforcement system is successful because it provides the secured party with an *option* entitling him to choose the best way of enforcing his security rights depending on the circumstances of each individual case. Thus, if for any reason self-help is not an acceptable alternative, the secured party may immediately turn to courts to protect his rights" Tajti (2002), p. 182. Also: Kieninger (2004), p. 60. This choice was maintained by the Revision of the UCC, and it is currently contained in Section 9-601(a)(1). In this regard: McCahey (2001), pp. 7–8.

[14] Recitals 3, 6, 7 and 8 of Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, available online at http://eur-lex.europa.eu/legal-content/EN/ALL/;jsessionid=bDWtTW1LJ5yqYRGMSlvxpNPgp794JdJ2m51yFGsJ6xYgF5l4KKcx!847294412?uri=CELEX:32007R0861. Also Recitals 5, 6 and 9 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, available on line at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006R1896, both last visited 22.01.2015.

contract and consumer protection laws. However, the topic's usefulness is beyond doubt if one considers the reform of secured transaction law based on the American model, which relies heavily on self-help devices and also due to the wide spread of private enforcement in continental jurisdictions.[15]

With respect to the author's domestic jurisdiction, Romania has adopted legislation that revolutionized (at least on paper) its secured transactions regime, however, without paralleling the spread of out-of-court enforcement with a requirement for licensing of private enforcers, sector-specific prudential and consumer protection regulations.[16] Although this aspect does not necessarily cause a backlash in resorting to private enforcement, it leaves most of it at (and outside) the boundaries of the law, which results in consumer-debtors being vulnerable to creditors' or third party collectors' abuse.[17]

In this regard, a comparative approach between the American benchmark and its chosen European counterparts proves useful in guiding legislators in finding the answers. The same comparison is also useful for practitioners who may easily learn and employ the experience of other legal systems in understanding and interpreting their own national legislation in the field.

Last, but not least, the book comes to fill in a literature gap. Although in the US one can find a large number of cases, articles and studies on the matter of self-help, to the extent of the author's research, at the time of writing the book there is no integrated work dedicated specifically to the issue of private enforcement. This situation is more visible in the chosen European jurisdictions where both literature and court cases are extremely scarce. No comparative work of this scale and depth has been identified either.

1.2 The Choice of US Law as Benchmark and the Choice of Jurisdictions

The book uses the private enforcement framework in the US as a benchmark for the analysis of the selected European jurisdictions: its justification, history, development, current status and future perspectives. Then it analyzes private collection in selected EU jurisdictions (UK, Germany and France) in the same way as it did with the US, where data and similar legislation are available. The UK is considered as a

[15] See *supra* footnote 8.

[16] "Prudential regulation [. . .], on the one hand, and market regulation and consumer protection regulation, on the other, serve different, if related, purposes. Prudential regulation is concerned with institutional and systemic stability. It has a particular focus on the management and regulation of risk and on the safety and soundness of institutions and the financial system. Consumer protection and market regulation are largely concerned with the conduct of market actors, whether retail, professional, or market infrastructures, and the protection of market confidence through the support of market efficiency, transparency and integrity." Ferran et al. (2012), p. 119.

[17] Tajti (2013), p. 13.

common law jurisdiction whose legislation is more intertwined with civil law systems due to its EU member status. Germany and France are the two jurisdictions that traditionally influenced greatly the Romanian legislation, until the reforms undertaken by the latter in late 1990s. Given the fact that France has also undertaken from 2006 on a multistep reform of secured transactions law, a look into it provides the necessary information on the new civil law trend in this area, despite that the reform has maintained the ban on self-help repossession, while Germany still retains an unreformed system. Finally, it includes a comparative analysis of the same practices in CEE—concentrating on the case of Romania, the author's home jurisdiction.

Romania is also an interesting and somehow peculiar case, since it introduced a secured transactions law in 1999, based on Article 9 of the UCC, and, on paper, it enjoyed one of the most modern secured transactions law in the EU. The draft proposal mentioned expressly the US as the source of inspiration for the Romanian law, and although Romania has just amended its Civil Code (Law no 71/2011 for the application of the New Civil Code repealed Title VI of Law 99/1999, by Art. 230, letter u)) based on the Quebec Civil Code,[18] a comparison with the US system and practice is still beneficial. The amendment maintained the US law as a model, but also provided for a more extensive judicial control, in order to bring the legal provisions in line with the decision of the Constitutional Court.[19]

However, Romania has failed to introduce a Fair Debt Collection Act,[20] and it is suffering right now from a legal void with respect to abuses to which debtors can be subjected. Once again, in this respect, the American and English experiences can both be beneficial. The third reason is the literature void. The issue of self-help practices and of repossession is almost completely ignored by Romanian authors. The book fills in this enormous gap and provides Romanian practitioners with an effective theoretical and practical apparatus in this area.

1.3 Central Category: Private Enforcement

As already mentioned, the goal of this work is to deliver a more practical than theoretical perspective. Where necessary, theory was employed to explain the practical implications and to justify the book's conclusions.

The principal reason for which creditors request access to private enforcement is to minimize the risk of nonrecovery with its accessory effects. There are multiple

[18] Iolanda Boti, *Influenta Codului Civil din Quebec asupra Noului Cod Civil din Romania* www.juridice.ro *at* http://www.juridice.ro/152502/influenta-codului-civil-din-quebec-asupra-noului-cod-civil-din-romania.html, p. 1.

[19] *Infra* Chap. 4, Sect. 4.1.3.3.

[20] An attempt to introduce such an act was rejected by the Romanian Parliament in 2012. See *infra* Chap. 6, Sect. 6.1.7.

explanations for this requirement, but beyond any discussion related to the economics and importance of credit, private enforcement proves to be of practical necessity. It is why even civilian jurisdictions, generally against any form of private justice, outside the judicial system imposed by the state, should recognize as such the covert self-help devices existent in their contract laws[21] and thus change their perception regarding self-help repossession and private enforcement altogether.

Of practical necessity is the matter of private enforcement to debtors as well as, and especially, to consumer-debtors. They need not only to be protected from abusive collection practices but also to be provided with adequate responses and incentives to determine them to act and defend themselves against abuse. At federal level,[22] the US has had a very effective tool in place—The Fair Debt Collection Practices Act—for the past 40 years, although this piece of legislation is in stringent need of update since it lags behind technological advancement. On the other hand, the UK and its 2014 Consumer Credit sourcebook cover for all modern abusive devices but lack the efficiency of their American counterpart due to the fact that their subjects can only resort to administrative enforcement. Both of them require similar attention and study since they prove to be valuable examples for those jurisdictions seeking a balance between creditor and debtor rights.

1.4 Limits of the Book

The topic is treated neither exhaustively nor in extensive detail, due to the inherent limitations of a monograph. The main concern was to identify, if possible, the idiosyncratic traits of private enforcement in the chosen jurisdictions and emphasize their practical aspects. This work is not a treatise of private enforcement, but it strives to become the starting point in this growing domain.

Usually in the area of secured transactions, the main focus is to ensure the creditor obtains recovery of his claim. However, in the narrower field of private enforcement, without minimizing the need to protect creditor's interests, the focus was on balancing these interests with the interests of the debtor. The special position held by the creditor when it comes to secured transactions must not become an excuse to allow him to resort to abuse in his relationship with the debtor. The book strives to make this position clear.

[21] Self-Help and Contract Law.

[22] The FDCPA has been used as a *de minimis* standard of protection against abusive debt collection practices, and the book refers mostly to this act. However, there is also FDCPA type of laws at state level in the US, most of them offering a higher degree of protection than the federal act. For details, see *infra* Chap. 6, Sect. 6.1.3.

1.5 Terminology: The Meaning of "Self-Help"

A terminology *caveat* is necessary at this point since, especially for those coming from a civil law jurisdiction, the term "self-help" might be puzzling or misleading. Not only that the term *per se* is obscured, but more importantly many from civilian systems might even confuse "self-help" with "self-defense."[23] Such confusion would somehow be justified by the common origin of self-help and self-defense, but the two are not the same. As it was rightfully pointed out, "the privilege of self-defense is perhaps the most notable form of self-help in criminal law. The privilege allows persons to use reasonable force against an aggressor to protect themselves against tortious or criminal attacks."[24]

However, these types of self-help, which are also recognized by civilian jurisdictions, are but a limited version and understanding of self-help. And they are not what this book is talking about. **For the purposes of this work, self-help must be understood as that "permissible conduct which individuals undertake, absent any legal obligation to do so, and without any assistance of a state official (the police, the bailiffs or the judiciary) in efforts to prevent or remedy a legal wrong."**[25] Self-help is therefore **a legally recognized extrajudicial alternative to traditional judicial remedies**.

1.6 Methodology

A practical approach to the topic may reflect and reveal different aspects than a purely theoretical one. The reasons lie not only in the different methodologies employed but also in the different interest and focus of a practitioner in comparison to those of an academic. However, there is a great deal of technicalities, which were employed for identifying issues and similarities between legal regimes, but always in the quest for a practical solution.

Speaking of methodology, the book analyzes and compares the chosen jurisdictions before reaching conclusions with respect to the future of self-help and private debt-collecting practices in the chosen European jurisdictions, by resorting to all three dimensions[26] of comparative law: empirical, analytical and normative.

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[23] For example in BGB, Section 229, self-help is defined as an exception from the interdiction to exercise one's rights if they cause damage to the person or the things of another, and in Section 859 it is used to describe the right of a possessor to use force when defending himself against unlawful interference.

[24] Brandon et al. (1984), p. 878. On the delineation between self-help and self-defense in criminal law, see also Smith (2005), pp. 80–82.

[25] Brandon et al. (1984), p. 850.

[26] Rover (2007), p. 30.

The ***empirical*** dimension consists of a description of the different legal frameworks concerning private debt collection within the chosen jurisdictions, departing from the assumption that there are functionally equivalent institutions[27] in these different laws that can be compared with one another. The ***analytical*** dimension consists in providing the reader with an understanding of the notions and systems of the laws in force. Therefore, efforts have been made to provide the reader with a unified, adequate and (possible) neutral terminology as well as to identify and present only a set of relevant legal issues. Lastly, the ***normative*** dimension consists of a critical assessment of the different jurisdictions chosen, with a focus on domestic law. Therefore, where possible and needed, this work provides the reader with an answer to the question "which legal model solves the legal issues with which the book is concerned in the most appropriate way," together with a rational explanation for the chosen answer. The criteria employed were based on the solutions' practicality, economic rationale and risk-reducing function. In other words, the book tries to show which system answers best the challenges raised by self-help and private debt collection in the twenty-first century, which one places the smallest burden on the consumer and which one has the most deterrent effect on wrongdoers.

To comply with the abovementioned criteria and dimensions, several methods were combined and used together. Therefore, the method of ***legal families*** was employed in the comparison between the US and the UK, on the one side, and France, Germany and Romania, on the other side. The focus was on particular issues as they appear in all jurisdictions, with **the US** used **as a basis for comparison**: the first part of the book is dedicated to the definition and history of self-help, general self-help devices in contract law (broader approach) and especially self-help repossession (narrower approach); the second part deals with the specific issue of pseudo-debt collection, namely factoring and receivables financing, while the third part is dedicated to risk handling and consumer protection against unfair debt collection practices.

Where fitting and possible, the ***functional*** approach was used to evaluate the compared legal provisions (for example, in order to determine whether self-help repossession is justifiable or compatible and should or could be implemented as such by the civil law jurisdictions). ***Critical comparative law*** method was likewise

[27] Here the book considers one of the elements of the functional method as identified by Ralf Michaels, namely that "function itself serves as *tertium comparationis*. Institutions, both legal and non-legal, even doctrinally different ones, are comparable if functionally equivalent, if they fulfil similar functions in different legal systems." However, this work considers also the fourth element mentioned by Ralf Michaels, according to which functionality serves as a criteria for evaluation. "Functionalist comparative law [then] becomes a 'better-law comparison' – the better of several laws is that which fulfils its function better than the others." Michaels (2006), p. 342 (details at pp. 367–369). As with respect to concepts of functionality, the book combines classical functionalism with instrumentalism, focusing on the idea that "if law fulfills functions and meets societal needs, then the lawyer's job is to develop laws that perform these tasks [. . .], and comparative law can help compare the ability of different solutions to solve similar problems, and spur similar degrees of progress." Michaels (2006), p. 351.

employed in order to assess certain desired results of the comparison (such as the need for adopting and implementing a proper Fair Debt Collection Practices like act in Romania).

The analysis of the benchmark jurisdiction was done following a ***sequence of topics***. However, within the chapters, each topic was analyzed going ***country by country***. Attention is also given to unorthodox sources of law as newspaper articles, magazines, blogs and websites. This is needed because, in the absence of scholar studies, one has to look for information in the nonlegal area. However, this information was not used without a critical filter. Only those sources that could be corroborated with other sources and easily verified have been used for the purposes of this work. Hence, the reason for this type of comparison lied with the fact that unlike the American literature, the European one is rather scarce on the matter. Also, given the fact that in many European jurisdictions some nonjudicial practices (such as self-help repossession) are strictly forbidden by law (although they occur in practice), there were not any similar legal provisions to compare.

1.7 The Structure of the Book

The book is structured in three main parts. Each part deals with one specific facet of private enforcement, and together they strive to offer the reader a holistic and integrated picture of the topic, together with a multitude of practical implications. The normative proposals argue for a change in approach and perspective that would lead to the proper integration of private enforcement in the chosen jurisdictions and to solving the numerous existing legal issues.

The first part deals with the definition of self-help and its applications in the context of private and commercial law only. The *second chapter* offers the history and the legal background of private enforcement in the five jurisdictions chosen, while also analyzing the provisions of the DCFR, perceived as a glimpse into the future of the topic in Europe. The *third chapter* is dedicated to the analysis of three of the most employed self-help devices in sales law, which are common to all jurisdictions, in order to emphasize not only the existence of self-help devices across legal families but also their compatibility with both common law and civil law systems: the right to withhold performance, liquidated damages or penalty clauses and extrajudicial termination. However, as it is shown, in civilian systems these devices, which the book considers to be types of "passive self-help," are covert forms of self-help, widely used but not recognized as such. The *fourth chapter* deals solely with secured transactions law, namely self-help repossession and private administrative receivership, which the book considers as "active self-help."

The second part is dedicated to the special case of pseudo-debt collection under the coverage of factoring and receivables financing. Despite that factoring was used mostly in business relationships, nowadays it covers also business-to-consumer transactions; hence, this work could not have omitted it from its analysis.

The reasons are twofold: on the one hand, the US law, which is used as benchmark, established for factoring (i.e., sale of receivables) the same legal regime as for using receivables "only" as collateral. Therefore, since factoring in the US is covered by UCC Article 9 the distinction between business relationships and business–consumer relationships is not relevant for their legal regime. On the other hand, factoring has been employed in the European countries to cover for debt collection services, which led the book to the usage of the term "pseudo-factoring" or "pseudo-debt collection." A monograph dedicated to private enforcement would not be complete without the analysis of such quasi-debt collection practices, which is why the *fifth chapter* addresses them in detail.

The third part is dedicated to abusive debt collection practices and consumer-debtor protection. The *sixth* and *seventh chapters* cover the US federal FDCPA and its US state law counterparts as well as its kin legislation from the other chosen jurisdictions, where the case. They also propose a matrix of analysis of any antiabusive debt collection legislation, which should enable any interested party to assess the efficiency of such legislation.

References

Brandon DI, Cooper ML, Greshin JH, Harris AL, Head JM Jr, Jacques KR, Wiggins L (1984) SPECIAL PROJECT. Self-help: extrajudicial rights, privileges and remedies in contemporary American society. Vanderbilt Law Rev 37:845

Devenney J, Kenny M (2012) Consumer credit, debt and investment in Europe. Cambridge University Press, Cambridge

Ferran E, Moloney N, Hill J, Coffee JC Jr (2012) The regulatory aftermath of the global financial crisis. Cambridge University Press, Cambridge

Gilmore G (1999) Security interests in personal property. The Lawbook Exchange, LTD, Union, New Jersey

Kieninger E-M (2004) Security rights in movable property in European private law. Cambridge University Press, Cambridge

King LP, Cook ML (1996) Creditors' rights, debtors' protection, and bankruptcy. Mathew Bender, New York

McCahey JP (2001) Commentary on the enforcement of security interests under UCC Revised Article 9. Hahn & Hessen LLP, New York

Michaels R (2006) The functional method of comparative law. In: Reimann M, Zimmermann R (eds) The Oxford handbook of comparative law. Oxford University Press, Oxford

Rover J-H (2007) Secured lending in Eastern Europe. Comparative law of secured transactions and the EBRD Model Law. Oxford University Press, New York

Smith HE (2005) Self-help and the nature of property. J Law Econ Policy 1:69

Tajti T (2002) Comparative secured transactions law. Akadémiai Kiadó, Budapest

Tajti T (2013) Post-1990 secured transaction law reforms in central and eastern Europe. Szegedi Közjegyzői Közlöny II:1

Taylor CR (1998) Self-help in contract law: an exploration and proposal. Wake Forest Law Rev 33:839

von Bar C, Clive E (2010) Principles, definition and model rules of European private law. Draft Common Frame of Reference (DCFR). Oxford University Press, Oxford

Chapter 2
General Background and History of Self-Help and Private Enforcement

Self-help and debt collection are traced back to the beginning of trade in the history of mankind. Despite that self-help and debt collection receive more attention today, it would be a mistake to think they are new phenomena. In reality, they have been with us since the moment we started doing business—although in primitive form[1]—and they will continue to be with us in the future. Throughout our existence as a species, we have created methods to recover debts, both by private and public means, according to the conditions at hand.

As the book is dedicated to self-help, self-help repossession and other methods of private enforcement, it will not touch upon public means of collection. This should not be construed in the sense that they did not or do not exist. They most certainly do. As it will be shown, at various historic times, public means of enforcement have been the only ones permitted, while other times they coexisted with private means. Some might be surprised to learn, for example, how well developed and sophisticated private enforcement was before the fall of the Western Roman Empire. Some will be surprised to see how it reemerged after the Middle Ages when the local lords enjoyed absolute legal power.

What is certain is that self-help repossession and private debt collection methods are rampant in practice today in most legal systems, although not necessarily recognized by positive law. The lack of recognition raises concomitant risks, for any self-help method has a potential for abuse and only by acknowledging the problem can one find a solution. Therefore, a brief incursion within the history of self-help and private debt collection helps in understanding their development, functions and the rationale. This chapter also provides several theoretical explanations of the differences between the legal systems compared.

[1] Black and Baumgartner (1987), p. 33. "Historically, for instance, the degree of self-help has been highest in primitive societies, in bands and tribes, and has declined progressively with social evolution and the growth of law."

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2.1 Why Should One Resort to Self-Help

One question to be answered before going into the history and analysis of private enforcement is "why does society or the commercial world need or resort to self-help?" Why do we not simply trust the power of the court systems and resort to the public means of enforcement,[2] given the level of advancement and sophistication of our legal systems?

In order to answer this question, one should consider what an action in court means and what kinds of problems it poses. In other words, the *first* issue is that the aggrieved party might not even know that there is a possibility to have his or her dispute settled by a court.[3] The *second* is represented by the language and procedural formalities in which the majority of people are not well versed in.[4] *Third*, depending on the jurisdiction or the state or national rule of procedure, prior communication and settlement attempts might be required before allowing a claim to be filed with the court. Such attempts must be documented; they are time consuming and might even involve expenses, all these factors having a deterring effect towards the party seeking reparation.[5] This is why many jurisdictions have tried to implement clearer provisions to ease the burden on certain categories of plaintiffs, such as consumers.[6] *Fourth*, the average duration of a court action is in itself discouraging since most European procedures take between 6 and 12 months to get a decision from the first instance court, the term being two or three times longer in case of an appeal or recourse filed against the previous judgments.[7] The *last* problems with public enforcement are represented by the risk of losing the trial and the expenses generated by the entire procedure.[8]

Costs of proceedings associated with the risk of losing might be the most important burden that the parties have to face when considering court action. They may include travel (and accommodation) expenses, judicial fees (required to start the procedure), attorney fees (for advice and representation), expenses generated by discovery (fees paid to experts, expenses of witnesses heard, administrative fees for obtaining official information from public authorities or copies from archives, etc.). Additionally, it should be kept in mind that all these expenses have to be paid when they occur and, despite the fact that generally the losing party will cover the winning party's expenses at the end of the trial (from the chosen

[2] Kronman (1985), pp. 24–25. The author emphasizes that although the existence of the state and its enforcement machinery would make reliance on self-help mechanisms unnecessary, in reality this is not the case, the reason being uncertainty of both parties: "The legal right to enforce a promise can reduce but never eliminate insecurity [. . .]."

[3] Brownsword et al. (2011), p. 491.

[4] Brownsword et al. (2011), pp. 492–493.

[5] Brownsword et al. (2011), p. 493.

[6] Brownsword et al. (2011), p. 494.

[7] Brownsword et al. (2011), pp. 494–495.

[8] Taylor (1998), p. 847.