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Preliminary feasibility study on possible additional work on the development of Principles of Transnational Civil Procedure relating to effective enforcement

(prepared by Prof. Rolf Stürner)

Summary	*Advantages of filling in the gaps of the ALI/ UNIDROIT Principles of Transnational Civil Procedure with general principles on enforcement mechanisms*
Action to be taken	*To take note of the preliminary study in view of a possible insertion of the subject in the Work Programme 2017-2019*
Related document	*UNIDROIT 2016 –C.D (95) 13 rev., paras 74-79*

1. As indicated in document C.D. (95) 13 rev. (paras. 74 to 79), the Secretariat believes there is a case for considering additional work on the development of Principles of Transnational Civil Procedure relating to enforcement mechanisms as the current Principles only minimally address issues of enforcement. In particular, Principle 29 emphasises the need for speedy and effective enforcement, but the comment makes it clear that the topic as such was beyond the scope of the 2004 ALI- UNIDROIT Principles of Transnational Civil Procedure.

2. The proposal by the Secretariat is supported by a preliminary feasibility study conducted by Rolf Stürner, Emeritus Professor at the University of Freiburg (Germany) and former co-reporter of the ALI/UNIDROIT Principles of Transnational Civil Procedure. The Study (see ANNEX to the document) provides a more detailed analysis of the legal obstacles created by the lack of general principles on enforcement mechanisms in transnational civil procedure and of the advantages of filling in the gaps of the ALI/ UNIDROIT Principles of Transnational Civil Procedure in this regard.

3. The Governing Council is invited to take note of the preliminary feasibility study received by the Secretariat.

ANNEX

Principles of Effective Enforcement

Feasibility Study

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Table of Contents

A. The Proposal of a New Project and its Grounds

I. Principles of Transnational Civil Procedure and the Law of Enforcement

In 2004, the American Law Institute (ALI) and UNIDROIT adopted the Principles of Transnational Civil Procedure, which were the successful result of the first joint project of the ALI and UNIDROIT. In 2014, the European Law Institute (ELI) and UNIDROIT initiated a new joint project on "European Rules of Civil Procedure", which is designed to implement these Principles and to develop European Civil Procedure Model Rules on the basis of the Principles. Principle 26 of the ALI-UNIDROIT Principles already contains some guidelines on the immediate enforceability of judgements, while the details for implementing such a general provision and the enforceability of other kinds of titles as well as their embedding in civil proceedings are taken into consideration within the current project on European Rules of Civil Procedure. Principle 29, in its turn, emphasizes the need for speedy and effective enforcement, but the comment makes it clear that the topic of enforcement is beyond the scope of the Principles.

II. Why Principles of Civil Enforcement?

1. The Present State

Whereas UNIDROIT, UNCITRAL, the United Nations, and the Hague Conference have developed model laws or sets of principles for the worldwide harmonization of civil procedure, arbitration and insolvency procedures, and conventions on the recognition of judgments and arbitral awards, these institutions for worldwide harmonization of law have not initiated any corresponding activities for the harmonization of the law of enforcement. It is only more recently that the European Union took some first steps towards harmonization of the law of enforcement, preferring a "step-by-step approach" for harmonization by European legislation. In the United States and the European Union the law of enforcement lies, in principle, in the competence of the individual states, and until now neither a set of principles nor a restatement of this field of law have been drafted as a basis for harmonization.

2. The Need for Principles of Civil Enforcement

The reason for the lack of uniform instruments in this field is not the fact that there may be no need for principles and harmonizing guidelines. The right to effective enforcement of judgements and arbitral awards is an integral part of the worldwide accepted fundamental right to a fair and effective procedure. This right embraces fair decision-making *and* execution. Effective enforcement mechanisms are of high economic significance and, consequently, they are considered an important criterion for a national economy's standard and its evaluation for credit rating purposes as, for example, practised in the Doing Business Reports of the World Bank.

During the last decades, many states have reformed their enforcement law, e.g. in Europe France, Spain, England (still in process), in part Germany and other Member States of the EU, in East Asia especially Japan, and other large and important countries like China or Brazil, improve their law of enforcement through step-by-step reforms. The EU has enacted a regulation establishing a European account preservation order to facilitate cross border debt recovery and has initiated reports on the present status of the enforcement laws of the Member States of the European Union. All these activities document an increasing concern on the inefficient enforcement of decisions or other executable titles at a national and supranational level.

III. The Purpose and Function of Principles of Civil Enforcement

Principles of enforcement law could be helpful guidelines for legislatures, which want to improve their enforcement law, and at the same time they could be a first step towards harmonization of the various systems of enforcement law. Common minimum standards for national procedures are the necessary basis for the improvement of international cooperation in enforcement procedures. Cooperation seems desirable and helpful especially in cases in which national enforcement upon acknowledgement of foreign judgements does not really suffice. The proposed Principles could cover both minimum standards for the enforcement procedures as such and minimum standards for transnational cooperation. In a second future step, the development of a Convention on Judicial Assistance in Civil Enforcement Procedures may be envisaged. UNIDROIT was and is still the promoter of the Cape Town Convention on International Interests in Mobile Equipment and its Protocols; the Hague Conference developed the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, and both instruments greatly contribute to establishing rules for international finance, which permit the enforcement of creditor's rights both within and outside of insolvency. The efficiency of these conventions and similar international efforts towards harmonization of the law of security interests, such as the UNCITRAL Legislative Guide on Secured Transactions, would improve remarkably if they were embedded in a step-by-step harmonized insolvency *and* enforcement law. The new project, therefore, intends to complement preceding endeavours of UNIDROIT and other international organizations to make the worldwide exchange of goods and its financing easier and safer.

IV. Prospects for Success of Principles of Effective Civil Enforcement

An important argument against a project to develop Principles of Effective Civil Enforcement may focus on the obstacles to the harmonization of this field of law, which, with good reason, may have discouraged international organizations to make first attempts towards harmonization. A broad common consent on a need for better harmonization does not mean that the stock of common features and legal traditions could really form a reliable and sufficient basis for success. The following considerations analyse and document common ground and differences, to conclude that common principles outweigh differences, and that attempts towards approximation and harmonization of national laws of enforcement may lead to convincing results. The analysis goes from the specific to the general because it would be a serious mistake to formulate general principles too quickly, which do not meet the reality of the various modes of enforcement.

B. Common and Divergent Features of National Laws of Enforcement and the Development of common Principles

I. Modes of Enforcement and their Specific Principles – A Surprising Harmony

All legal cultures have developed nearly the same forms and kinds of enforcement measures, though there are differences regarding details. The reason for this conformity, at least partially, lies in the common history of the enforcement systems of the continental "Learned Procedure" and the English Common Law and Chancery procedures during the time of the "Ancien Régime" (15th to the 18th century). However, to a higher degree, the conformity may result from the fact that the conceivable contents of obligations and, consequently, the contents of executable titles, are determined by the factual realities of daily life and its economic or technical conditions and that, all over the world, sanctions for noncompliance are based on physical power over persons and things, leave only a relatively small leeway for reasonable variance. Common types of enforcement measures are enforcement on goods with orders for sale, third party debt orders or garnishee proceedings, charging orders on land and orders for sale or receivership, delivery of goods or

recovery of land, fines and similar punitive payments or even imprisonment for noncompliance with prohibitive or mandatory injunctions. All developed legal systems protect from fraudulent conveyance by the debtor according to the common tradition of the Roman *actio Pauliana*.

1. Enforcement on Movable Goods (Tangible Personal Property)

In all legal cultures today enforcement on personal property is, in principle, done by seizure, which creates a form of an execution lien empowering to public sale, mostly after appraisal of the goods as a safeguard against inadequate price. The proceeds of sale, after deductions for fees and costs and payments to creditors with priority, are paid to the levying creditor, and any excess goes to the debtor. Many variations exist in detail: the scope of admissibility of various kinds of private sales and of direct transfer of property to the creditor; rights of redemption; protection of the purchaser (full protection in case of public sale, acting in good faith as a precondition, strict or modified caveat emptor rule); priority rules regarding their validity in principle (first come first served, pro rata distribution among all unsecured creditors, mixed systems) or the decisive time (perfection of an execution lien or judgement liens upon rendition or registration of judgements). Some of these variations are to be discussed below on a broader basis, such as the admissibility of private agreements, the debtor's protection from unfair enforcement and the protection by exempting property, as well as the choice between the principle of priority and that of equality of creditors, or the combination of both principles. The relation between consensual liens and execution liens should reflect the rules of the substantive law of the individual states and should not be a part of the project, or only to a very limited extent.

Receivership and administration or sequestration of movable goods may happen in all systems in connection with provisional measures or in some systems as a consequence of special security rights. These measures will be discussed below.

2. Third Party Debt Orders or Garnishment Proceedings

In most legal cultures today, garnishment is the preferred kind of monetary enforcement (seizure of earnings and bank accounts). The basic structure of garnishment proceedings is more or less the same all over the world. The creditor has to apply for issuance of a garnishment order, and the garnishee, the execution debtor's debtor, has to be informed about the attachment through formalized service of the order. The garnishee is no longer permitted to satisfy the execution debtor, who upon service of the order is prohibited to take satisfaction. The attachment invests the creditor with a right to demand fulfilment of the garnishee's obligation towards the execution debtor. Some differences between the various national systems are the same as already discussed for enforcement on goods (problems of priority, debtor's protection). Other differences in detail mirror specific problems of the third party constellation of this kind of enforcement: requirements of the degree of specification of the attached claims; scope of attachment, especially in cases of attachment of earnings or bank accounts (future claims, future balances of accounts, common order for all accounts of the debtor); function of a third party declaration (acknowledgement or evidentiary significance only, actionable obligation or not etc.); mechanisms for the judgment debtor's protection (automatic or upon demand only); admissibility of substituted service on the garnishee; collection and enforcement of the attached claim by the creditor (court proceedings between creditor and garnishee in disputed cases) or by enforcement organs (opposition of the garnishee in disputed cases). In most cases of such differences, modern tendencies towards an international preference are developing or thoughtful compromises seem to be possible.

3. Charging Orders on Land and Orders for Sale or Orders for Receivership

There are three kinds of monetary enforcement on real property by judgement creditors: charging order against the judgement debtor's land, creating an execution lien and finally resulting in an order for sale; receivership designed to administer the fruits of the land; and judicial mortgage. Enforcement proceedings upon charging order have many issues of comparative concern in common with the already described enforcement in movables, such as rights of redemption with varying requirements or different conceptions of the scope of the caveat emptor rule regarding the position of the execution purchaser. However, the different legal systems have generated differing fine structures of enforcement due to the economic significance of real property and its specific legal form as developed by the individual national laws: in most countries, requirements for registration with the land register, or in some cases with commercial registers, extended formalization of the public sale and its preconditions, consequences of the public sale for mortgages or other interests in land with priority (extinction upon monetary compensation out of the sale's proceeds, continuance, or extinction with a right of the entitled third party to opt for continuance as a more and more attractive compromise), procedural position of holders of subordinated rights or interests, etc. A remarkable part of these issues of comparative concern can be resolved only upon knowledge of the different conceptions of substantive real property law and the varying functions and kinds of land registers. However, this does not mean that careful drafting of compatible principles of the procedure of enforcement as such is not feasible and could not create step-by-step helpful harmonizing effects if the drafters were sensitive of the common structures and connected problems of substantive law and enforcement law. This is especially true in case of enforcement by creditors who hold a security interest in land where combined provisions of procedural and substantive law govern the execution procedure (e.g. judicial foreclosure or deficiency judgment in case of enforcement of mortgages etc.).

At first glance, remarkable differences between legal cultures may exist in the field of enforcement by means of receivership or judicial mortgages. But this is correct for post- judgment enforcement at a terminological level only, not at all for prejudgement remedies and their enforcement. In the interest of future execution of final court decisions, all well developed legal systems provide for provisional measures, which in appropriate cases could result in an order for receivership or administration of land, or kinds of preliminary attachment of land. In countries where judicial mortgages are not used as a means of post judgement enforcement, their priority securing function is mostly replaced by charging orders of long duration. While, in many countries, receivership of land is a form of post-judgment execution besides public sale upon charging order according to the creditor's free choice, some jurisdictions, especially in common law, permit receivership only if public sale does not provide adequate satisfaction.

4. Delivery of Goods or Recovery of Land and Transfer of Property

In a first group of legal systems, sales agreements or similar transactions with an obligation to vest the other party with property and possession need both conveyance for the transfer of ownership and delivery of possession for their complete execution. In a second group of legal systems, transfer of ownership happens without any kind of separate conveyance already with the conclusion of the agreement. In a third group of legal systems, transfer of ownership is completed with the performance of an additional act like registration, delivery of possession and the like. In many systems different rules of substantive law apply for different items to be transferred (personal property, land, claims etc.).This is the reason why different kinds of enforcement measures are needed according to the requirements of national substantive law, especially those relating to delivery of possession of goods, land, documents, to a declaration of intent to conclude a transaction, or to the performance of any other act.

In nearly all legal cultures, delivery of possession is or can be enforced with the assistance of a court officer or another execution authority, which can directly force the entry upon land and the delivery of movables. In case of recovery of land the execution authority may use physical force to move the debtor, his family and other people without an independent own right to stay, and all items of these persons out of buildings and land. In all these cases of direct enforcement the question arises whether a special court order will be necessary to protect fundamental rights of the debtor and third persons who are affected by special enforcement measures. The formulation of principles may be a good chance to establish some common standards as required by the rule of law and world wide accepted constitutional guarantees.

Globally, there are three different ways to enforce declarations owed by the debtor: a court decision having the effect of a declaration made by the debtor in due form of law; appointment of a person who acts at the costs of the non-complying party with the same effect as done by that party; holding the debtor in contempt to compel obedience (attachment or sequestration of property, fines, imprisonment). Most jurisdictions choose one of these measures, some common law jurisdictions contemplate all sanctions leaving the individual choice to the courts according to the nature of the case.

5. Enforcement of Mandatory or Prohibitive Injunctions

In countries of Germanic legal tradition, a debtor's disobedience to a mandatory or prohibitive injunction has been and still is punished by contempt, fine or imprisonment. In countries of the Romance legal family, non-fulfilment of an obligation something to do or not to do was originally only sanctioned by awarding damages. In cases where the due act can be performed not only by the debtor but also by third persons, the court can order the act to be executed by another person at the cost of the non-complying party. During the last century, most jurisdictions of the Romance legal tradition have moved towards the model found in the Germanic legal tradition (fine, imprisonment) or followed the special development in French law, which created the "astreinte", a periodic penalty payment to the creditor according to the period of non-compliance as determined by the court. However, there are still jurisdictions without special sanctions for non-compliance provided by enforcement law, besides the obligation to pay damages according to provisions of substantive law or besides sanctions of criminal law (alternatively or cumulatively applied).

Harmonization of this field of the law of enforcement should put emphasis on the following topics: the importance of a special sanction in enforcement law for non-compliance in every legal culture, according to the worldwide modern development towards an increase of injunctions in the interest of effective and timely protection of rights, especially in the field of intellectual and industrial property rights and competition law; the efficiency of this sanction regarding the amount of fines and the threat of personal imprisonment in serious cases; the significance of proportionality in choosing the debtor's sanction (e.g. mandatory sequence between fine and imprisonment in the sense of a strict "*gradus executionis*" or individual judicial discretion according to the nature and gravity of the debtor's breach); sanctioning of the debtor's preceding breach only for enforcement purposes or also as a prevention of future breaches by other debtors; applicability of the "*nulla poena sine culpa*"- principle.

6. Complex Enforcement Cases, Enforcement on Special Assets and Receivership

There are cases where the regular modes of enforcement are inadequate or unavailable. The question of the availability of a regular mode of enforcement, e.g., may arise in cases of enforcement on securities. According to the prevailing opinion, the enforcement measure depends on the nature of the security as determined by substantive law. In principle, negotiable instruments can be levied upon by taking possession following the rules of enforcement on

movable goods. A combination of rules for enforcement on goods and for garnishment procedures may however apply if the securities are in the hands of third persons such as trustees or intermediaries, or in the case of order instruments; whereas garnishment may be sufficient for purely "virtual" securities held on custody accounts. It is the internationally accepted tendency that enforcement measures should mirror all acts necessary for the creation of consensual security interests, and, consequently, complex rules of substantive law result in complex enforcement measures, which combine various modes of enforcement. The "mirror principle" may also apply in case of enforcement on various forms of shares, copyrights, intellectual and industrial property rights, software or domains in the Internet etc. The degree of a right's transferability determines whether execution measures need the debtor's consent or not.

Though combined enforcement measures and the mirror principle are helpful instruments to manage problems of complexity, there remain cases where the combination of various kinds of enforcement measures results in much too complicated structures or do not really suffice for an efficient protection of the creditor's interests. Some legal systems, especially of the common law legal family, but to a limited degree also of the civil law legal family, have therefore developed kinds of post-judgement receivership of assets subject to enforcement. Post-judgement receivership is practiced especially in cases of enforcement on future advance (income derived from a trust fund; future proceeds from a sale of land, enforcement on a debtor's usufruct or a debtor's claim for transfer of land; receivership of land charged with a mortgage upon default of the secured claim's debtor; receiver for collection of assets located or arising in foreign countries and for transfer, etc.). It should be noted, however, that receivership is more the exception than the rule and a matter of last resort in most jurisdictions.

7. Interim conclusions

An analysis of the various modes of enforcement comes to the conclusion that there are many varieties in detail, but that, nevertheless, common conceptions of enforcement measures prevail. It is, consequently, feasible and helpful to draft common principles, which should govern the individual measures of enforcement and give some guidance to national legislatures wishing to introduce reforms and improvements against the background of international experiences.

II. Overarching Principles of Civil Enforcement

The surprising harmony that has already been reached at the level of concrete enforcement modes and instruments encourages an attempt to develop overarching principles of an overall system of well-functioning civil enforcement. Sometimes comparative contributions discuss principles like efficiency or proportionality, which are very general and govern each field of good law as cornerstones of justice. The following considerations intend to put principles of civil enforcement in much more concrete form, and they take into account the importance of general principles of good law in so far as it is necessary and appropriate against the background of the specific conflicts and problems of enforcement.

1. Organizational and Procedural Principles

a) Full and Complete Disclosure of the Debtor's Assets?

Complete and full knowledge of the debtor's assets facilitates the choice of the most efficient and at the same time proportionate and appropriate enforcement measure, and it permits a coordination of several parallel measures. However, full disclosure is a serious intrusion on the debtor's private or business sphere. Each legal system has to balance the creditors' right to an

efficient enforcement with the debtors' right to adequate data protection. A very common means of disclosure is the debtor's declaration, and only very few legal systems do not provide for this instrument of disclosure. Nevertheless, there are many variations in detail: duty to declare at the very commencement of enforcement proceedings or after an unsuccessful seizure attempt or already in cases where the probability of success is low; full disclosure or identification of assets sufficient for the creditor's enforcement of his claim only; disclosure once and for all or piecemeal disclosure according to the status of success of the enforcement; written declaration under affidavit only or oral examination and cross examination in a court hearing in appropriate cases; registration of refusal to declare in a public register or in a register with limited access only; forced appearance in court for declaration and imprisonment as sanction of last resort or lack of sanctions working *in personam*. Some jurisdictions empower execution authorities to ask for assistance of public authorities or private agencies holding records containing information on the debtor's assets (requests for information from social security records or fiscal records; information about the debtor's employment from social insurance records, etc.). In most jurisdictions enforcement authorities are empowered to request disclosure of data from public registers with full or limited access (land registers, motor vehicles registers, commercial registers, population registers, etc.). The development of common principles for asset declarations faces the challenge of reaching a satisfying balanced approach taking into consideration the diverging interests of creditors and debtors. The present development in many legal systems moves towards an increase in disclosure of information, whereas the protection of the debtor's data decreases.

b) Centralization or Decentralization of Responsibilities?

There are states with a single powerful enforcement authority, which has a more or less embracing competence of all enforcement measures (separate execution court or the deciding court functioning as execution court, administrative authorities, enforcement agents, etc.). Most states confer the responsibility for different enforcement measures and procedures on different specialized enforcement authorities (magistrates of execution courts, bailiffs, private agents, notaries) according to the nature of the enforcement measure (enforcement on goods by bailiffs or private agents, garnishment and contempt sanctions by courts, enforcement on land by courts or notaries, etc.). Centralization and decentralization also describe organizational models, ranging from one central local competence of enforcement authorities, e.g. at the debtor's domicile or place of business, to several differing local competences of enforcement authorities of the same type, especially according to the location of the individual asset subject to enforcement. From this perspective, most legal systems realize decentralized models. Regional traditions and the general regional administrative organization, as well as the size of the state and the number of its inhabitants, may interfere in determining the organisational structure, and it may be in part very difficult to analyse common trends, which could serve as a worldwide guideline. Nevertheless, flexible or alternative principles could be developed. In modern times, mandatory electronic registration of the individual enforcement measures may contribute to helpful coordination, even in legal systems with decentralized responsibilities.

c) Private or Public Organization of Enforcement Organs?

While it is not seriously disputed that state courts, and not arbitral tribunals, should decide on conflicts between creditor, debtor and enforcement authorities, the concepts of the organization of enforcement authorities differ remarkably. Some states mainly prefer private agencies, which have the status of a liberal profession or of a limited liability company, or the like, and these private agencies are invested with forms of public power bestowed by legislative regulation. They live on fees paid in advance by the creditor or at the end by the debtor depending on the circumstances of the case. The profit orientation of this organization of private agencies is designed to stimulate a quick and efficient taking and carrying out of enforcement procedures, whereas a disadvantage of

the pressure of success may be the danger of an excessively rigid enforcement. The majority of states maintain the traditional public organization of enforcement authorities, which are court officers or court magistrates paid like civil servants and without financial incentives to do more than necessary. Some countries have developed mixed structures, where creditors can make their choice between co-existing publicly and privately organized enforcement authorities. There are also some systems with enforcement authorities which are on the one hand civil servants with a basic income paid by the state, and on the other hand entrepreneurs with an additional income from a part of the fees and with their own staff and facilities, a solution which intends to combine the advantages of public and private organization and at the same time to avoid the disadvantages of both forms of organization. The present wave of deregulation in many fields of public service in the Western world seems to be in part weaker compared to the stronger trend which characterised the last decades, but mixed structures may have their advantages not only as a simple form of compromise but also as a well-balanced form of organization of an important and sensitive part of the administration of justice.

d) Party Driven or Ex Officio Procedure

In the majority of all systems of enforcement it is, in principle, up to the creditor to initiate enforcement procedures and to determine the steps to be taken by enforcement authorities. In such systems the creditor may, again in principle and within the limits of legal regulation, use any available method of enforcement, and use more than one method of enforcement, either at the same time or one after another. In other systems, which seem to be the minority, upon initiation by the creditor, the enforcement authority controls and determines the whole enforcement process with considerable discretionary powers regarding the steps to be taken and their sequence. There are, as always, also systems with mixed structures, where the creditor may apply to the enforcement authority for execution measures of his choice and the authority has to decide upon due consideration. The same procedural questions arise when provisions for the debtor's protection may apply. Most jurisdictions differentiate in such cases between minimum standards of protection, which should be taken into account ex officio, and other protective instruments depending on the special circumstances of the case, which need the debtor's motion for their realization. Harmonizing principles may be pragmatic and choose balanced solutions, which avoid extreme positions.

e) Party Autonomy and Agreed Enforcement Proceedings

In more or less all developed legal systems, most provisions governing enforcement procedures are considered to be, in principle, mandatory law, which cannot be replaced ex ante by binding agreement of the parties, though parties may abstain from full use of their procedural rights even when entitled to them. Details of the significance of this form of party autonomy in enforcement proceedings are somewhat unclear in most legal systems. The role of party autonomy is actually significant especially in connection with two stages of enforcement proceedings. Firstly, in many countries enforcement authorities practise forms of mediation between creditor and debtor in cases where the debtor is only able to pay instalments of the due amount or to pay a reduced sum or where the debtor offers a form of satisfaction, which differs from the contents of the title to be executed. Many countries have changed their law, providing room to the advantage of such activities on the part of enforcement authorities, always subject to the condition of the creditor's consent and the debtor's convincing intention to do his best to satisfy the creditor. It may be recommendable to encourage the enactment of provisions for the expansion of this form of agreed enforcement. Secondly, in the field of consensual security interests, many legal systems permit *ex ante* enforcement agreements, mostly in the interest of the creditor, with the intent to facilitate and simplify the procedure and to exclude courts and enforcement authorities from any involvement, especially in foreclosure and public sale procedures. In some legal systems, courts

have set limits for the waiver of provisions designed to protect the debtor from forms of sale without any control by courts or enforcement authorities. However, a creditor's right to conclude an agreement whereby the return of the title deed of the charged land is deemed to be full satisfaction of the secured debt (deed in lieu of foreclosure clause) *ex ante* is a result of party autonomy, and could only be regulated or restricted by banking law, in the interest of well working capital and land markets.

2. Principles Balancing Creditor's and Debtor's Substantive Rights

a) Party Autonomy and Proportionality

In some legal systems, creditors are free to choose among all methods of enforcement, which are all available without any restrictions. There is no hierarchy of the available modes of enforcement according to the degree of their intrusion in the debtor's rights and sphere. These legal systems confide in the debtors' ability and freedom to independently choose the most proportionate mode towards creditor's satisfaction, if this method really exists. The underlying theory is the conviction that the well administered autonomy and freedom of both parties excludes any disproportionate intrusion on the debtor's sphere. If, for instance, the creditor charges valuable land for the enforcement of a title over a relatively small sum, the debtor voluntarily may pay this amount from her or his existing account or per cash to avoid the more bothersome enforcement method of charging and selling valuable land. If a less intrusive form of satisfaction does not really exist, enforcement by charging land is not considered disproportionate because, in this individual case, it is the only efficient method of successful enforcement. The majority of jurisdictions maintain the traditional theory of a *gradus executionis* between modes of execution according to the degree of their intrusive effects in more or less modified forms. The sequence in Roman-Canonical tradition was *mobilia, immobilia, res incorporales* (movables, land, receivables), and today the sequence of most jurisdictions honoring this tradition is seizure of goods or garnishment, followed by enforcement in land or interests in land. It should be noted that this is true for several civil law countries and several jurisdictions of common law, too. Differentiations in detail concern the degree of discretionary power of courts and enforcement authorities. Legislatures of some jurisdictions established a very strict legal order, while most jurisdictions invest courts and enforcement organs with discretionary power to decide according to the circumstances of each individual case. Most jurisdictions do not permit attempts at enforcement if they cause only costs to be later reimbursed by the debtor without any reasonable chance to satisfy at least part of the creditor's claim. However, in most jurisdictions, enforcement measures should not be considered disproportionate if the costs of enforcement are higher or even much higher than the value of the executed claim or if the execution of titles with very small sums demands the liquidation of high value assets because a more proportionate alternative is lacking. The argument is the need of enforceability even of small amounts, whereas the opposite stance in some jurisdictions focuses on the abuse of process (*summum ius summa iniuria*). The international discussion on this issue is not always entirely lucid and principles could offer helpful guidelines.

b) Priority or Equality?

Most states distribute the proceeds of enforcement measures among competing creditors according to the priority principle ("first come, first served" or "first in time, first in right"). It has already been mentioned that the exact determination of the decisive time differs remarkably (perfection of an execution lien, application for enforcement, judgment liens upon rendition or registration of judgments or court orders, etc.) and that the same legal system may have different times for different assets on which enforcement is levied (e.g. land and personal property). The advantages of this priority principle are the stimulation of party activity and the practical effect of the first creditor's safe position. The creditor is no longer forced to observe and calculate later seizures of

the same asset by competing creditors and to attach additional assets to compensate the decrease of the value of the first pledge because of a distribution of proceeds among all seizing creditors on the basis of equality. The priority principle follows the same order among consensual security interests as determined by rules of substantive law, though in some jurisdictions priority rights of substantive law may exist and should be taken into account. Nevertheless, many countries, especially of the Romance legal family, prefer the principle of equal distribution among all seizing creditors insofar as priority rights ("privileges") of substantive law do not apply. Equal satisfaction of all creditors is the leading and fundamental principle of insolvency procedures in cases where the debtor's assets do not suffice to satisfy all creditors correctly. There are legal systems, which provide for insolvency procedures only if the debtor is a merchant, a legal entity or the like. In case of insolvency of private individuals, enforcement procedures, which permit equal satisfaction of creditors, partially replace insolvency procedures and, consequently, a change of such legal systems from the principle of equality to the priority principle is not without problems if special consumer insolvency procedures are not enacted together with this change. In modern times, some countries have abandoned enforcement procedures on the basis of equal satisfaction, in full or partial favour of the priority principle. Some legal systems seek to strike a compromise and follow the "group principle", according to which the priority order is valid between groups of creditors only formed by creditors who perfected their liens during the same period of time (e.g. ten days, etc.). Attempts towards harmonization on a simple basis may not be really helpful. Nevertheless, modern development prefers the priority principle together with the introduction of consumer insolvency, with exceptions in special cases or with application of a very moderate group principle (e.g. one day), which avoids or at least dampens the reckless race of unsecured creditors for the best time and place for enforcement.

c) Enforcement Measures Operating in Rem or in Personam?

In former times, many legal cultures made much more use of enforcement measures operating *in personam* (fine, imprisonment) than today. Enforcement measures operating *in rem* are considered more proportionate and appropriate than measures operating *in personam*, which are a very hard and serious intrusion on private life and may harmonize with the modern understanding of human rights solely under very special circumstances as a measure of last resort. Most countries provide for enforcement measures operating *in personam* only in cases where modes of enforcement operating *in rem* are not available, especially when court orders to do or not to do something are enforced. Even in these cases, the clear majority of all legal systems consider imprisonment a much more intrusive measure than punishment by fines and permit imprisonment solely if punishment by fines does not suffice to break the debtor's resistance. Some countries provide for measures operating *in personam* together with measures operating *in rem* at least in theory, but this technique to strengthen the pressure on the debtor seems to be used very rarely. A special case of a measure operating in *personam* is the English freezing order. It stops debtor's future transactions on assets, holding in contempt disobedient debtors as well as third parties who intentionally cooperate with the non-compliant debtor. This order replaces the function of attachments operating *in rem* and may efficiently embrace even debtor's transactions in foreign jurisdictions without any need for the aid of foreign state authorities as long as the debtor or third persons under the threat of contempt stay permanently or momentary within English territory, though in case of this form of enforcement questions of infringement of foreign sovereignty may arise. The development of Principles on Civil Enforcement could contribute to a clarification of the manifold problems, which are connected with an extended use of enforcement measures operating *in personam*.

d) Exemptions and Limits to Enforcement

The idea of exempt property is common to all legal systems, and it is much older than the modern movement towards "constitutionalization" of enforcement law, according to which the protection of human rights covers exemptions from enforcement to a certain degree. The purposes of exemption are the protection of the debtor and the debtor's family, and the protection of society by granting the debtor an opportunity for self-support so that the debtor does not become a burden upon the public and its social security system. Exempt property may be identified by type, value or by type *and* value. Common reasons for exemptions are religious consideration, maintenance of self-support regarding the daily life or the continuance of a debtor's business, support of disabled people etc. Most states provide specific exemptions of wages, social insurance, life insurance or claims for support against family members or the public social security. Only a portion of regular income, however, is exempt from attachment, and it is mostly adapted according to amounts paid by social security, to the level of national minimum wage or the like. While many states continue to protect regular income after transfer to a bank account, in other states regular income of the debtor is no longer protected after deposit into a bank account. Most jurisdictions reduce the scope of protection in favour of privileged creditors (e.g. creditors of claims for support), though the privileges of some groups of creditors are seriously disputed (e.g. privileges for tax creditors or secured creditors financing the purchase of the attached property). In some jurisdictions homestead exemptions protect debtors from loss of real property and its possession under special conditions (use as a family residence, present possessory interest, formal homestead declaration, value type exemption etc.), but mostly this exemption does not apply in case of the enforcement of a mortgage held by the financing creditor. Another issue is the protection of a tenant or possessor of a house or apartment from a sudden loss upon the successful exercise of an action of eviction by the owner or landlord. Most countries provide for protective court orders, which may grant adequate delay depending on the circumstances of the individual case. Special legislative measures may be necessary in times of a financial crisis causing masses of legal disputes which cannot be determined adequately and in due time by courts. In nearly all jurisdictions, courts are invested with the general power to stop enforcement measures in exceptional cases and to grant a moratorium if this is considered clearly necessary in the interest of justice. In the field of exemptions, there is a lot of common ground, which would permit a speedy development of principles, but as always there are also very special peculiarities, which require careful consideration and the application of a flexible approach.

3. Creditor's and Debtor's Remedies

In all developed jurisdictions, creditors and debtors can apply to a court, mostly to the court with special local and subject matter jurisdiction for enforcement proceedings, if enforcement authorities do not comply carefully with all legal provisions governing their enforcement activities. In countries with administrative enforcement authorities affected parties may be required to apply to such authority as a precondition to exercise further judicial actions. However, the scope of the special jurisdiction of execution courts differs in detail from state to state. In some jurisdictions, the execution court has full competence to determine all disputes arising from enforcement procedures including questions of substantive law with respect to substantive rights of the debtor and third parties. In these jurisdictions, execution courts decide disputes on the post-judgement continuance of the debtor's obligation, disputes between creditor and third party debtor in garnishment procedures, and disputes on a third party's property or other substantive rights as a ground for opposition against enforcement measures, sometimes, in modern systems, upon rendition of interim orders becoming final only after a period of time for opposition or after settlement of disputes. In other jurisdictions disputes on substantive rights are not within the competence of the execution court, it is the competence of courts of general jurisdiction to decide this kind of cases. There are, of course, also systems with mixed structures. Full jurisdiction of execution courts has

the advantage of clarity and simplicity, but the disadvantage of affecting or even weakening the third party's or the debtor's procedural position. Shared competence of execution courts and courts of general jurisdiction may create complicated structures and many procedural issues. A set of common Principles on Civil Enforcement may attempt to provide some guidelines for clear and well operating structures.

4. Interim conclusions

It may be more difficult to draft convincing general and overarching principles of civil enforcement than specific principles of individual modes of enforcement. Nevertheless, the analysis once again demonstrates a lot of common ground in the conceptions of civil enforcement as a whole. Where in some cases contradicting approaches become apparent, mixed structures or alternative principles could be recommendable, as well as a clear choice of the evidently better-outweighed and better functioning conception depending on the circumstances of the conflict to be resolved and the nature of the questions in dispute.

C. Principles of Cross Border Enforcement - Territoriality and Cooperation

Territoriality of the exercise of state power is a fundamental principle of international law and the cornerstone of mutual respect of state sovereignty. This principle makes direct cross border enforcement without interstate cooperation more or less impossible because enforcement needs the exercise of physical power over things and persons. Normally, the creditor must apply for recognition and enforcement of a judgment or another execution title in a state where the debtor is domiciled or where the debtor has property, and then, upon a judgment or order of enforceability, the creditor must try to enforce the executable title under the law of this state. Consequently, enforcement of a state's execution title in foreign countries may occur at the same time in different countries under different laws, and in many cases does not require any cooperation between the states involved. There are, however, exceptions, where cross border enforcement could be facilitated by mutual assistance or tolerance. Some examples may illustrate this concern. Firstly, enforcement measures may create forms of indirect exercise of state power on foreign territory and cause conflicts where the question of infringement of foreign sovereignty is still in dispute. Prominent cases are contempt sanctions against debtors or third persons who are permanent or momentary residents, regarding their activities in foreign states (e.g. freezing orders with respect to accounts or assets in foreign states). Similarly, "notice" to third persons domiciled in foreign states to do or not to do something in order to avoid other disadvantages (e.g. notice to the garnishee not to pay in order to avoid double payment etc.), or receivership for the collection of a debtor's assets in foreign countries, are other instances to consider. Future Principles on Civil Enforcement could try to formulate guidelines for fields of enforcement where the limits of sovereignty are still questionable, though decisions of highest courts have contributed to some clarification. Secondly, forms of mutual information between enforcement authorities of different states may avoid cost intensive but not successful or double and parallel enforcement measures and further coordinated enforcement. This exchange of information may include results of the debtor's or garnishee's declaration as well as other information collected by enforcement authorities. Thirdly, under certain conditions, garnishment orders issued in other states could be acknowledged, and their prompt service on third debtors in foreign countries facilitated by use of the available mechanisms of the Hague Service Convention, and priority rules could apply among liens based on garnishment procedures in different countries.

As already mentioned, in the long term such guidelines may prepare steps towards a convention on cooperation in cross border enforcement.

D. Final Conclusions

This study comes to the clear result that the development of Transnational Principles of Effective Civil Enforcement is just as feasible as it is recommendable. Transnational Principles will set common minimum standards of enforcement, they will motivate legislatures to evaluate and improve the quality of their laws and thereby strengthen the efficiency of enforcement in foreign countries. Common minimum standards will be a source of increasing harmonization of enforcement laws, as well as predictability of the results of enforcement measures in foreign countries and facilitation of enforcement in cross border cases. A certain degree of harmonization is a necessary precondition of international cooperation in the field of cross border enforcement, which is designed to avoid conflicts of sovereignty and conflicting or superfluous parallel and cost intensive enforcement measures. Worldwide, there is sufficient common ground for specific principles of individual modes of enforcement and for overarching general principles of an overall system of efficient civil enforcement. The variety of organizational structures should not be considered a decisive obstacle to harmonizing principles. It will be possible to develop principles, which define managerial standards to be met by the enforcement mechanisms and the individual enforcement authorities and which at the same time leave necessary leeway for successful regional traditions and local needs. Co-operation with other organizations dealing with the harmonization of law could result in a helpful increase of human and financial resources. The experience of the first joint project with the American Law Institute was very encouraging.

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