Secured Credit in Europe

From Conflicts to Compatibility

Teemu Juutilainen

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2018

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Juutilainen, Teemu, author.

Title: Secured credit in Europe : from conflicts to compatibility / Teemu Juutilainen.

Description: Portland, Oregon : Hart Publishing, 2018. | Includes bibliographical references and index.

Identifiers: LCCN 2017048782 (print) | LCCN 2017058751 (ebook) | ISBN 9781509910083 (Epub) | ISBN 9781509910069 (hardback : alk. paper)

Subjects: LCSH: Security (Law)—Europe. | Security (Law)—European Union countries. | Debtor and creditor—European Union countries. | Conflict of laws—Security—European Union countries.

Classification: LCC KJC1088 (ebook) | LCC KJC1088 .J88 2018 (print) | DDC 346.407/4—dc23

LC record available at https://lccn.loc.gov/2017048782

ISBN: HB: 978-1-50991-006-9
ePDF: 978-1-50991-007-6
ePub: 978-1-50991-008-3

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

Introduction

I. Overview

Commercial activity largely depends on credit. However, economic actors willing to extend credit to other economic actors in need of it cannot be taken for granted. Rather, willingness presupposes a legal infrastructure that enhances the confidence of prospective creditors in the likelihood of repayment or other recovery. A major component of this legal infrastructure in different jurisdictions is a system of proprietary security rights.[1]

A proprietary (or 'real') security right is a right over an asset or aggregate of assets, and is intended to secure payment of a debt or other performance of an obligation. An asset subject to a proprietary security right is called an 'encumbered asset', while a creditor who has acquired and holds a proprietary security right is called a 'secured creditor'.[2] Accordingly, 'secured credit' means credit extended against a proprietary security right. Encumbered assets may be applied to satisfy the secured creditor's claim, often called a 'secured claim', if the debtor defaults on the obligation.[3] Henceforth, proprietary security rights are referred to as 'security rights'.

[1] For an overview of these legal infrastructures and other legal underpinnings of a market economy, see DW Arner, *Financial Stability, Economic Growth, and the Role of Law* (New York, Cambridge University Press, 2007) 91–125. See also U Drobnig, 'Secured Credit in International Insolvency Proceedings' (1998) 33 *Texas International Law Journal* 53, 54. Drobnig observes that the more a market economy advances, the more it becomes a credit economy, adding that under present conditions, credit cannot usually be granted without some sort of security. On recent empirical studies in the field, see J Armour, A Menezes, M Uttamchandani and K van Zwieten, 'How Do Creditor Rights Matter for Debt Finance? A Review of Empirical Evidence' in F Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions*, Research Handbooks in Financial Law (Cheltenham, Edward Elgar, 2015).

[2] See UNCITRAL Legislative Guide on Secured Transactions, Introduction, para 20. Especially in the context of US law, and laws influenced by it, the term 'collateral' is used for encumbered assets and the term 'security interest' for proprietary security rights.

[3] Proprietary security rights are usually provided by the debtor itself. This book is not concerned with guarantees and other personal security rights, which are the other main type of security rights. The provider of a personal security right is a third person who assumes the risk of the debtor's default and typically becomes liable to the creditor with all its assets. Personal security rights can be used as an alternative or a supplement to proprietary security rights, and they may have to serve as substitutes in legal systems that restrict the use of proprietary security rights. See U Drobnig (ed), *Personal Security*, Principles of European Law 4 (Munich, Sellier European Law Publishers, 2007) 79, 100. On the distinction between these types of security rights, see A de la Mata Muñoz, *Typical Personal Security Rights in the EU: Comparative Law and Economics in Italy, Spain and Other EU Countries in the Light of EU Law, Basel II and the Financial Crisis*, Studien zum ausländischen und internationalen Privatrecht 253 (Tübingen, Mohr Siebeck, 2010) 8–14.

This book focuses on security rights over tangible movables and receivables, with the further conditions that these rights are created by an agreement (or a unilateral disposition) between the debtor and the secured creditor, and that the secured claim is of a monetary nature. Security rights over tangible movables and receivables are suitable for examination as a single group because they tend to be used in similar economic circumstances. In particular, both types of encumbered assets play a major role in financing small and medium-sized enterprises.[4] More importantly for the present purposes, security rights over tangible movables and receivables are exposed to particular cross-border problems in trade and finance, for comparable reasons.[5]

Cross-border problems within the internal market of the EU are the point of departure for this book. The principal issues are uncertainty of enforceability and unexpected loss of security rights. These result from the combined effect of divergences between individual Member State substantive laws on secured credit on the one hand and the current condition of private international law, particularly the current conflict rules, on the other hand.[6] The main concern centres on third-party relations. Enforceability against third parties, most notably the debtor's other creditors on insolvency, is crucial to the fulfilment of the economic purposes of security rights.[7] However, as EU and Member State laws currently stand,

[4] Security rights that are created not by an agreement but directly by virtue of law often serve highly diverse purposes. Examples include the repairer's right of retention and maritime lien. See A Veneziano, 'Attachment/Creation of a Security Interest' in H Eidenmüller and E-M Kieninger (eds), *The Future of Secured Credit in Europe*, European Company and Financial Law Review, special vol 2 (Berlin, De Gruyter Recht, 2008) 128. Veneziano notes that the uniform regulation of non-consensual security rights does not seem feasible due to their diverse nature and great differences between legal systems.

[5] The cross-border aspects of security rights over immovables and investment assets have mostly become discourses of their own. On plans for a Eurohypothec over immovables, see O Stöcker, 'The Eurohypothec' in S van Erp, A Salomons and B Akkermans (eds), *The Future of European Property Law* (Munich, Sellier European Law Publishers, 2012). For an introduction to security arrangements and other transactions with respect to securities, see R Goode, H Kronke and E McKendrick (eds), *Transnational Commercial Law: Text, Cases and Materials*, 2nd edn (Oxford, Oxford University Press, 2015) 425–58. For more comprehensive treatment, see T Keijser (ed), *Transnational Securities Law* (Oxford, Oxford University Press, 2014).

[6] 'Conflict rule' is a synonym for 'choice-of-law rule'. In this book, the term 'choice-of-law system' is used for systems of conflict rules. The term 'choice of law' denotes determination of the substantive law applicable to a particular legal relation or question, by application of a conflict rule. It may also refer to the opportunity for parties to select the applicable substantive law themselves, expressly by a choice-of-law clause or tacitly. This opportunity, also known as 'party autonomy', typically exists in matters of contract law, but seldom in property law matters, such as third-party effectiveness of security rights. See generally R Westrik and J van der Weide, 'Introduction' in R Westrik and J van der Weide (eds), *Party Autonomy in International Property Law* (Munich, Sellier European Law Publishers, 2011) 1–6.

[7] See E Dirix, 'Effect of Security Rights vis-à-vis Third Persons' in U Drobnig, HJ Snijders and E-J Zippro (eds), *Divergences of Property Law: An Obstacle to the Internal Market?* (Munich, Sellier European Law Publishers, 2006) 69–70. Dirix writes: 'A security device that would not withstand the entitlement of other creditors or the administrator of an insolvency proceeding simply cannot qualify as a security right.' See also R Goode, 'The Protection of Interests in Movables in Transnational Commercial Law' (1998) 3 *Uniform Law Review* 453, 456. According to Goode, bankruptcy 'provides the acid test of the efficacy of real rights in general and security interests in particular' and protection from bankruptcy creditors is a primary concern to the holders of these rights.

enforceability against third parties usually cannot be guaranteed in cross-border contexts.

We know from various comparative studies that preconditions for and restrictions on the effectiveness of security rights against third parties vary from one jurisdiction to another. These divergences are wide, even between EU Member States.[8] Preconditions typically relate to the publicity of security arrangements and the specificity of encumbered assets. Restrictions may involve, say, cutting down the priority of secured claims in relation to other claims on the debtor's insolvency or limitations on the scope of security devices available.[9] A major cause of complications with these divergences is that the conflict rules covering third-party relations, sometimes referred to as 'proprietary' conflict rules, typically do not allow the parties to a security arrangement to know for certain beforehand which jurisdictions' preconditions they need to fulfil so as to guarantee enforceability against third parties. The general conflict rule for tangible movables, the *lex rei sitae* rule, may determine the applicable substantive law in an unpredictable manner if encumbered assets are moved from their initial location to another jurisdiction.[10] As for receivables, then, the conflict rule varies between

[8] A pioneering study in this field was prepared by Ulrich Drobnig and published in 1977 as the UNCITRAL Report of the Secretary-General: study on security interests (A/CN.9/131). As for the situation in Europe, particularly illuminating have been studies where experts representing different jurisdictions discuss given factual situations on the basis of their respective legal systems. See HC Sigman and E-M Kieninger (eds), *Cross-border Security over Receivables*, GPR Praxis: Schriften zum Gemeinschaftsprivatrecht (Munich, Sellier European Law Publishers, 2009); HC Sigman and E-M Kieninger (eds), *Cross-border Security over Tangibles*, GPR Praxis: Schriften zum Gemeinschaftsprivatrecht (Munich, Sellier European Law Publishers, 2007); E-M Kieninger (ed), *Security Rights in Movable Property in European Private Law*, The Common Core of European Private Law (Cambridge, Cambridge University Press, 2004). For other relatively recent comparative reviews, see V Sagaert, 'Security Interests' in S van Erp and B Akkermans (eds), *Cases, Materials and Text on National, Supranational and International Property Law*, Ius Commune Casebooks for the Common Law of Europe (Oxford, Hart Publishing, 2012) 425–532; F Fiorentini, 'Proprietary Security Rights in the Western European Countries' in M Bussani and F Werro (eds), *European Private Law: A Handbook*, vol I (Berne, Stämpfli Publishers, 2009) 442–57; T Tajti, 'Security Rights in Central and Eastern Europe in the First Decade of the New Millennium: Where Do We Go from Here?' in M Bussani and F Werro (eds), *European Private Law: A Handbook*, vol I (Berne, Stämpfli Publishers, 2009) 489–506. Studies on cross-border aspects of secured credit have often started with a comparative part discussing the substantive law in selected jurisdictions. See, eg, B-E Reinertsen Konow, *Løsørepant over landegrenser* (Bergen, Fagbokforlaget Vigmostad & Bjørke, 2006) 45–227; B Graham-Siegenthaler, *Kreditsicherungsrechte im internationalen Rechtsverkehr: Eine rechtsvergleichende und international-privatrechtliche Untersuchung*, Berner Bankrechtliche Abhandlungen 13 (Berne, Stämpfli Verlag, 2005) 13–630; JW Rutgers, *International Reservation of Title Clauses: A Study of Dutch, French and German Private International Law in the Light of European Law* (The Hague, TMC Asser Press, 1999) 13–68.

[9] Dirix (n 7) 75–89; E-M Kieninger, 'Evaluation: A Common Core? Convergences, Subsisting Differences and Possible Ways for Harmonisation' in Kieninger (n 8) 655–57, 669–71; G McCormack, *Secured Credit under English and American Law*, Cambridge Studies in Corporate Law (Cambridge, Cambridge University Press, 2004) 32–37.

[10] C von Bar and U Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (Munich, Sellier European Law Publishers, 2004) 342, 468; E-M Kieninger, 'Introduction: Security Rights in Movable Property within the Common Market and the Approach of the Study' in Kieninger (n 8) 16–18. Even a security arrangement that is intended by the secured creditor as purely domestic may become a cross-border one if the encumbered asset is moved to another jurisdiction.

jurisdictions. As a result, the applicable substantive law may depend on the jurisdiction where the dispute is adjudicated.[11]

Even if the parties to a security arrangement could know the applicable substantive law with sufficient certainty beforehand, transaction-cost concerns remain. In particular, complying with the preconditions set by a foreign jurisdiction is likely to be costly and time-consuming. All this seems worrying from the viewpoint of the EU internal market. Indeed, many commentators perceive these problems as obstacles to its proper functioning.[12] For some, the idea of the internal market entails a need to 'level the playing field', to create equal competition conditions for enterprises from different Member States, including in terms of security rights.[13]

The foregoing merely sketches a rough overview of the problems that the European discourse on security rights addresses and attempts to solve. Proposed solutions range all the way from full substantive unification or harmonisation to abstaining from substantive efforts altogether and, instead, improving the current choice-of-law systems.[14] An intermediate solution is known as the 'European Security Right' (ESR). This would involve introducing a new supranational type of security right, not to replace but to supplement existing domestic types.[15]

[11] FJ Garcimartín Alférez, 'Assignment of Claims in the Rome I Regulation: Article 14' in F Ferrari and S Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Munich, Sellier European Law Publishers, 2009) 233–47; HC Sigman and E-M Kieninger, 'The Law of Assignment of Receivables: In Flux, Still Uncertain, Still Non-uniform' in Sigman and Kieninger (eds), *Cross-border Security over Receivables* (n 8) 46–74.

[12] See U Drobnig, HJ Snijders and E-J Zippro, 'Divergences of Property Law: An Obstacle to the Internal Market?' in Drobnig, Snijders and Zippro (n 7) 12–13. A related question is whether non-enforcement of foreign security rights may breach fundamental freedoms in the shape of free movement of goods and capital. See W-H Roth, 'Secured Credit and the Internal Market: The Fundamental Freedoms and the EU's Mandate for Legislation' in Eidenmüller and Kieninger (n 4) 37–61.

[13] See W Rank, 'Harmonisation of National Security Rights' in Drobnig, Snijders and Zippro (n 7) 206; von Bar and Drobnig (n 10) 469.

[14] eg, compare the views presented in von Bar and Drobnig (n 10) 467–69, in favour of unification or harmonisation of substantive laws, and MV Polak, 'Recognition, Enforcement and Transformation of Foreign Proprietary Rights: A Handful of Observations and Suggestions' in Drobnig, Snijders and Zippro (n 7) 127–28, in favour of unification or harmonisation of conflict rules. For overviews of the proposed solutions, see H Beale, 'The Future of Secured Credit in Europe: Concluding Remarks' in Eidenmüller and Kieninger (n 4); Drobnig, Snijders and Zippro, 'Divergences of Property Law' (n 12).

[15] K Kreuzer, 'Die Harmonisierung des Rechts der Mobiliarsicherheiten' in J Basedow, O Remien and M Wenckstern (eds), *Europäisches Kreditsicherungsrecht: Symposium im Max-Planck-Institut für ausländisches und internationales Privatrecht zu Ehren von Ulrich Drobnig am 12. Dezember 2008* (Tübingen, Mohr Siebeck, 2010) 52–69; HJ Snijders, 'Access to Civil Securities and Free Competition in the EU: A Plea for One European Security Right in Movables' in Drobnig, Snijders and Zippro (n 7) 159–64. For the original proposal, see KF Kreuzer, 'Europäisches Mobiliarsicherungsrecht oder: Von den Grenzen des Internationalen Privatrechts' in WA Stoffel and P Volken (eds), *Conflits et harmonisation: Mélanges en l'honneur d'Alfred E. von Overbeck à l'occasion de son 65ème anniversaire* (Fribourg, Editions Universitaires Fribourg Suisse, 1990) 637–40.

A majority of commentators seem to support some kind of substantive intervention by the EU. This book, in contrast, examines a broader variety of options.

In a nutshell, the aim here is to reveal the optimal way to promote compatibility between systems of security rights over tangible movables and receivables in Europe. The focus is on the EU and its Member States. Compatibility in this context is understood as the absence of cross-border problems, or at least the availability of practicable solutions to them. Importantly, compatibility is seen as a matter of degree, so that systems of security rights can be more or less compatible with each other at a given point in time. This entails that compatibility can be advanced gradually. In terms of concrete means to promote compatibility, the book analyses four main types. These can be presented as a fourfold table of two variables as follows. First, means can be introduced at the centralised level or the local level; in other words, measures can be taken by the EU or by an individual Member State. Second, means can fall under substantive approaches or conflicts approaches. A 'substantive approach' is a general term for efforts to unify or harmonise substantive law, which can be more or less comprehensive in scope, whereas a 'conflicts approach' refers to means based mainly on private international law.

In sum, the four main types of concrete means to promote compatibility are a centralised substantive approach, a centralised conflicts-approach, a local conflicts-approach and a local substantive approach. This book contributes to the European discourse on security rights by proposing the optimal division of labour between the four approaches. This proposal needs to specify the content of the approaches it encompasses; for example, within the centralised substantive approach, how comprehensively, if at all, should the EU pursue the unification or harmonisation of substantive law and by what particular instruments? As for the local conflicts-approach and the local substantive approach, Finnish law, and in some respects Nordic law more generally, serves as a case study.

Achieving optimal division of labour involves choices between the four approaches as well as within each of them, that is, finding the optimal composition of concrete means to promote compatibility. Accordingly, the core question is: how to choose? The answer this book offers is that choices should be based on a set of objectives capturing the essence of desirable development towards greater compatibility between systems of security rights, with that development being understood as a gradual process. These objectives are derived from sources as diverse as the economic functions of security rights, the conditions for legal evolution, such as adaptability to local circumstances and experimental learning, and a transnational conception of justice.

How to derive and employ the objectives is introduced in section IV. Before that, notes on how security rights are viewed and understood in this book in section II are followed by a review of the cross-border problems to which these rights are exposed in trade and finance in section III.

II. Security Rights as Relational Legal Positions

So far, we have established that this book focuses on security rights created by an agreement, that employ tangible movables or receivables as encumbered assets,[16] and that secure satisfaction of monetary claims. In most situations, these secured claims concern repayment of credit that the secured creditor makes available to the debtor. In all situations within the scope of this book, the security provider is the debtor of the secured claim, not a third person. This means that the agreement which creates the security right is between the debtor and the secured creditor. Examples of particular security devices they may have to employ to this end include pledges, fixed and floating charges, enterprise charges, retentions (or 'reservations') of title (or 'ownership'), security transfers of title (or 'ownership') and security assignments.[17]

At this point, we should note that rights created by retention of title and other so-called 'title-based' security devices are not characterised in all jurisdictions as security rights. Sometimes they are referred to as 'quasi-security rights' or 'functional equivalents of security rights', as opposed to 'genuine security rights'. However, this book rejects that distinction and treats them all as security rights. One reason is that all these rights carry out similar and in some cases identical economic functions, so the distinction would prove arbitrary or even misleading in a cross-border perspective.[18] Indeed, as the same economic function may be

[16] Questions relating to certain special types of tangible movable, eg, money, negotiable instruments and certified securities, are not discussed. The term 'receivable' is used here for personal rights to payment of a monetary sum which are not expressed as payable through a negotiable instrument. Contractual rights are the most significant group among these, but, eg, rights to non-contractual damages are also included in the definition. Then again, not all contractual rights are included. Due to the requirement of a monetary nature, eg, rights concerning services or delivery of goods are left out. *cf* Sigman and Kieninger (n 11) 3–4; A Flessner and H Verhagen, *Assignment in European Private International Law: Claims as Property and the European Commission's 'Rome I Proposal'*, GPR Praxis: Schriften zum Gemeinschaftsprivatrecht (Munich, Sellier European Law Publishers, 2006) 2.

[17] For an overview of these security devices and their uses, see U Drobnig, 'Security Rights in Movables' in AS Hartkamp et al (eds), *Towards a European Civil Code*, 4th revised edn (Alphen aan den Rijn, Kluwer Law International, 2011). On variation in terminology, see E-M Kieninger and GL Gretton, 'Glossary' in Kieninger (n 8). *cf* Rank (n 13) 203. Rank uses the term 'proprietary security right' for 'security rights under which title to the collateral is vested in the collateral taker'. What he means by the distinction between proprietary and non-proprietary security rights is more commonly expressed as the distinction between title-based and other security devices. In this book, and in accordance with established usage, the location of title is irrelevant as to whether a security right is deemed proprietary. The term 'proprietary security right' is used at the beginning of the book to mark the distinction from personal security rights, which fall outside the scope of the book. See n 3.

[18] See RD Vriesendorp, 'The Effect of Security Rights Inter Partes: Some Observations from a Netherlands Law Perspective' in Drobnig, Snijders and Zippro (n 7) 64. Vriesendorp notes the arbitrariness of the distinction. For an alternative account, see L Gullifer, 'Quasi-security Interests: Functionalism and the Incidents of Security' in I Davies (ed), *Issues in International Commercial Law* (Aldershot, Ashgate, 2005). Gullifer weighs advantages and drawbacks of the distinction, mainly from the viewpoint of English and Welsh law. See also PR Wood, *Comparative Law of Security Interests and Title Finance*, Law and Practice of International Finance 2, 2nd edn (London, Sweet & Maxwell, 2007) 27–30.

achievable through a title-based security device in one jurisdiction and through a non-title-based security device in another, both kinds of security device must be included for a whole picture of security arrangements used in practice. Another reason is that the book seeks transnational solutions to the cross-border problems addressed, so that it cannot be premised on jurisdiction-specific taxonomies of rights.

In contrast, an important distinction in this book consists in that between possessory and non-possessory security rights (and security devices). In the case of a possessory security right, such as a traditional right of pledge, the encumbered asset may be held by the secured creditor (pledgee) or a third person, while the security-provider debtor (pledgor) must be dispossessed of the asset (for third-party effectiveness, if not for the existence of the right). The commercial significance of non-possessory security rights is far greater because they typically allow the debtor to continue using, refining and even disposing of the assets by sale or otherwise.[19]

Regardless of the above distinctions, a security right is best understood as a creditor's legal position, consisting of different entitlements and protections in relation to different persons. The following account is a comparative generalisation rather than a description of any particular legal system.

Certainly the most fundamental relation, and the first in time, is that between the creditor and the security-provider debtor. By virtue of their security agreement, the creditor becomes a secured creditor, and the creditor's claim a secured claim; in other words, a security right is created.[20] The security agreement can be a separate contract, or a clause or a set of clauses in a contract on, say, credit or credit sales.[21] As for substance, the security agreement designates as encumbered a tangible movable, a receivable, or some amount or aggregate of those assets. These encumbered assets may be applied to satisfy the secured claim if the debtor defaults on the obligation, that is, fails to pay the debt as agreed. Depending on the security device used, this may involve realising encumbered assets and recovering the debt out of the realisation proceeds, or repossessing assets that the debtor has been supplied with. The former is typically the case for pledges and charges, and the latter for retentions of title and the like.

The above entitlements concern the secured creditor's relation to the debtor. However, in view of the economic purposes of security rights, these entitlements

[19] Drobnig (n 17) 1026–38. This distinction applies to security rights over tangible movables. All security rights over receivables are inherently non-possessory due to the non-physical nature of encumbered assets. On the diminishing role of possession in doctrines on security rights, see Kieninger (n 9) 652–54.

[20] UNCITRAL Legislative Guide on Secured Transactions, ch II, para 1. According to the terminology of the Legislative Guide, a security right is deemed to be created when it has become effective against the grantor, ie, the security provider. As to the Legislative Guide's recommendations on creation of security rights, see Veneziano (n 4).

[21] On security agreements generally and with comparative observations, see AJM Steven, 'The Effect of Security Rights Inter Partes' in Drobnig, Snijders and Zippro (n 7).

as such are not enough. Indeed, entitlements also need to be protected against third parties, meaning persons who are outsiders to the security agreement and who may threaten the secured creditor's position based on that agreement. This kind of threat is present if third parties compete for the same assets that the security agreement between the secured creditor and the debtor designates as encumbered assets. For if a third party or some collective of third parties prevails, the security right proves ineffective and unenforceable against that third party or collective. As a consequence, the secured creditor will be treated as an ordinary, unsecured creditor with regard to the encumbered assets. This can be illustrated by an example from the context of liquidation-type collective insolvency proceedings.

In the example, the relevant third parties are the debtor's other creditors, represented by the insolvency administrator. Let us first assume that the secured creditor's security right is unenforceable against the other creditors and, additionally, that no creditor is entitled to any kind of preferential treatment. In that case, distribution of the debtor's assets follows the so-called *pari passu* principle. This means distributing the assets among the creditors in proportion to the amounts of their outstanding claims. In other words, it pursues pro rata equality based on the creditors' pre-insolvency entitlements. Typically, the total amount of the creditors' claims exceeds the amount of the debtor's assets, so that no creditor can be paid in full. In contrast, let us now assume that the secured creditor's security right is enforceable against the debtor's other, unsecured creditors. Through recourse to the encumbered assets, the secured creditor receives proportionally more than the unsecured creditors and may even be paid in full. This of course diminishes the assets that can be distributed among the unsecured creditors.[22] As can be expected, the opportunity to evade the 'equality of misery' of *pari passu* distribution is generally considered as the main reason why creditors demand security rights.[23]

[22] Contrary to the terminology adopted here, the term '*pari passu* principle' is sometimes used for the equal treatment of creditors in a similar priority position or belonging to the same creditor class, eg, the rateable abatement of the claims of those creditors. See RJ Mokal, 'Priority as Pathology: The *Pari Passu* Myth' (2001) 60 *CLJ* 581, 583–84. Mokal points out the unsoundness of this use as follows. The use disconnects the determination of equality from pre-insolvency law. In addition, the use reduces the principle to triviality in that the principle then only describes what insolvency law actually does and fits with any priority scheme. As a result, the principle says nothing about why insolvency law treats certain creditors as equals. However, here Mokal refers to 'equality', within quotation marks, since in his view the principle in any case reflects mere formal as opposed to true equality.

[23] McCormack (n 9) 5. The microeconomic purpose of security rights discussed so far can be called the risk-reduction function. A second, closely related function is prevention of risk-shifting. This means that without a security right, the debtor could increase the creditor's risk in several ways, eg, by issuing more debt to other creditors, giving away its assets or developing a riskier investment strategy. A third function may be to inform the creditor about the debtor's willingness to eventually repay the credit. See J-H Röver, *Secured Lending in Eastern Europe: Comparative Law of Secured Transactions and the EBRD Model Law* (Oxford, Oxford University Press, 2007) 11–15. For a critique of some aspects of this third function, the 'signalling' theory, see J Armour, 'The Law and Economics Debate about Secured Lending: Lessons for European Lawmaking?' in Eidenmüller and Kieninger (n 4) 6–7. To be sure, the microeconomic purposes of security rights can be explained in various ways. See, eg, HW Fleisig, 'Economic Functions of Security in a Market Economy' in JJ Norton and M Andenas (eds),

But why, though, does the law allow deviation from *pari passu* distribution with security rights?[24] For surely the pro rata equality that this principle represents is an intuitively appealing starting point for distribution of an insolvent debtor's assets. Accordingly, Lynn M LoPucki hits the mark with his often-cited view on the nature of security rights: 'Security is an agreement between A and B that C take nothing.'[25] Following that idea, this book has to consider why and to what extent prospective secured creditor A and debtor B are allowed to dispose of the insolvency value of B's assets to the benefit of A in a way that binds unsecured creditor C. Interestingly, different legal systems give somewhat different answers to this.

The main justification seems to be the same everywhere. It is based on the assumption that insolvency-proof security rights increase the availability of credit and lower its cost, notably the interest rate. Creditors are assumed to extend more and cheaper credit in exchange for their reduced credit risk. Moreover, the assumption is that the ensuing increase in lending and borrowing stimulates economic activity and growth. In this way, credit is supposed to act as 'the oil of an economy'.[26] Nevertheless, the actual implications of these assumptions vary between legal systems. This variation warrants calling some jurisdictions liberal and others strict or even illiberal in their attitude towards secured credit.[27] This finds its most concrete expression in the preconditions for and restrictions on the effectiveness of security rights against third parties that jurisdictions have introduced, especially against the debtor's other creditors in collective insolvency proceedings.[28]

The preconditions often concern publicity. Most legal systems require security arrangements to be made public. However, the security devices subject to

Emerging Financial Markets and Secured Transactions, International Economic Development Law 6 (London, Kluwer Law International, 1998) 16–21. Fleisig starts by defining asymmetric information, moral hazard and adverse selection as underlying characteristics of a credit market, or indeed any market that involves promises over time, and then goes on to explain how security rights help to deal with these characteristics. In addition to these purposes, security rights often entail other practical advantages. eg, they may enable the creditor to sell off or to take possession of the encumbered assets without judicial or other official intervention. See McCormack (n 9) 7–11.

[24] McCormack (n 9) 11–38. For an overview of various theoretical explanations for these deviations, see M Brinkmann, 'The Position of Secured Creditors in Insolvency' in Eidenmüller and Kieninger (n 4) 251–60.

[25] LM LoPucki, 'The Unsecured Creditor's Bargain' (1994) 80 *Virginia Law Review* 1887, 1899.

[26] Drobnig (n 1) 54. See McCormack (n 9) 15–22.

[27] See U Drobnig, 'Recognition and Adaptation of Foreign Security Rights' in Drobnig, Snijders and Zippro (n 7) 114; Kieninger (n 10) 18.

[28] Kieninger (n 9) 655. Kieninger's analysis suggests that in Europe, liberal jurisdictions include Germany, Greece, England and Ireland, whereas Austria, France, Belgium, Portugal, Italy, Spain, the Netherlands, Scotland, Denmark, Sweden and Finland are stricter. The strictness of the latter group is due to their 'comparatively hostile attitude towards non-possessory security rights', which stems from their close adherence to principles such as publicity, specificity and the mandatory character of property law rules, and from the prohibition of the *pactum commissorium*. For a global perspective and different assessment criteria, see Wood (n 18) 16–24. For updates on selected jurisdictions, see L Gullifer and O Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Oxford, Hart Publishing, 2016).

publicity requirements, and the means of fulfilling those requirements, vary between jurisdictions. The usual means are dispossessing the security-provider debtor of the encumbered assets,[29] notifying a certain person of the security arrangement, and registration. The significance of creditor possession is generally decreasing due to the growing prevalence of non-possessory security rights, which allow the debtor to use encumbered assets productively.[30] Notification requirements mainly concern security rights over receivables. Where applicable, notice is to be given to the debtor of the encumbered receivable. However, the trend seems to be towards abolishing notification requirements.[31] Registration systems come with different characteristics. Some registers are indexed by assets, others by persons. Accordingly, a register can be searchable either by individualised encumbered asset or by name or other identifier of a security-provider debtor. The data subject to registration and the documentation needed for registration also vary between registration systems.[32]

Another group of typical preconditions concerns the specificity of encumbered assets. Specificity requirements determine whether and to what extent constantly changing asset-entities, such as stock-in-trade or an enterprise's assets as a whole, or future assets are eligible as encumbered assets. Yet, the potential ineligibility of future assets (or 'after-acquired assets') may also result from publicity requirements that cannot be fulfilled beforehand.[33] Further, specificity requirements determine whether and in what way generic assets have to be individualised in order to be fit for security purposes.

[29] If the security-provider debtor is dispossessed of the encumbered assets, the security right is a possessory security right. In other words, the distinction between possessory and non-possessory security rights is made from the secured creditor's point of view.

[30] Drobnig (n 1) 55. According to Drobnig, the most important development with respect to security rights in the twentieth century was the discovery of ways to effectively use non-possessory security rights. See E-M Kieninger, 'Securities in Movable Property within the Common Market' (1996) 4 *European Review of Private Law* 41, 43–47. Kieninger outlines the directions this development has taken in different European jurisdictions. Several jurisdictions have introduced special types of non-possessory security rights which are made public by registration, whereas some others, particularly Germany, allow extensive use of title-based security devices such as retention of title and security transfer of title, thus in effect abandoning the publicity principle. See also Kieninger (n 9) 652–56. There, Kieninger notes the connection between the decreasing significance of possession and the gradual disappearance of the doctrine of ostensible or apparent ownership, according to which third parties can rely on the fact of possession when evaluating their prospective business partner's creditworthiness. On earlier developments in these matters, see WJ Zwalve, 'A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods' in Kieninger (n 8).

[31] Kieninger (n 9) 649–50, 657; Flessner and Verhagen (n 16) 6. See generally AF Salomons, 'Deformalisation of Assignment Law and the Position of the Debtor in European Property Law' (2007) 15 *European Review of Private Law* 639.

[32] HC Sigman, 'Perfection and Priority of Security Rights' in Eidenmüller and Kieninger (n 4) 156–59; Kieninger (n 9) 670–71. See S van Erp, 'The Cape Town Convention: A Model for a European System of Security Interests Registration?' (2004) 12 *European Review of Private Law* 91, 96–97, 103–08.

[33] Kieninger (n 9) 669–70. Kieninger approvingly recognises the tendency in most jurisdictions of the EU to widen the range of assets eligible as encumbered assets.

Prime examples of restrictions are so-called 'carve-out' provisions. These set aside part of the proceeds from the realisation of encumbered assets, with a view to leaving more to be distributed among unsecured creditors.[34] In addition, jurisdictions have traditionally introduced various statutory privileges that rank ahead of secured claims on insolvency. Perhaps the most typical are those granted to the employees of an insolvent company or to tax authorities.[35] True, statutory privileges are themselves deviations from *pari passu* distribution, but since they militate against the priority of secured over unsecured claims, they can be classified here as restrictions.

These preconditions and restrictions combine differently in terms of particular types of security rights and security devices that different jurisdictions make available for use. Although the above discussion of preconditions and restrictions focuses on the effectiveness of security rights against the debtor's unsecured creditors in collective insolvency proceedings, these creditors are not the only relevant group of third parties. Others include the debtor's creditors in debt recovery proceedings (individual enforcement) and persons claiming to have subsequently acquired ownership or a limited proprietary right in encumbered assets, insofar as that acquisition of right is somehow incompatible with the prior security right. An instance of a limited proprietary right is a subsequent security right over an asset already encumbered by a prior security right. The effectiveness preconditions against these third parties may be, but do not necessarily have to be, the same as against the debtor's unsecured creditors in collective insolvency proceedings. Each legal system has its way of ranking competing rights and of resolving priority conflicts.[36]

As will by now have become clear, the understanding of security rights here is based on a distinction between their effectiveness against a security-provider debtor and against third parties.[37] In theory, this distinction can always be drawn. In practice, though, effectiveness against a security-provider debtor and effectiveness against third parties, as well as the respective preconditions for effectiveness, coincide at times. This may occur in two ways. First, registration is sometimes a precondition for effectiveness not only against third parties but also against the

[34] See G McCormack, 'The CFR and Credit Securities: A Suitable Case for Treatment?' in A Vaquer (ed), *European Private Law beyond the Common Frame of Reference: Essays in Honour of Reinhard Zimmermann* (Groningen, Europa Law Publishing, 2008) 114–16; McCormack (n 9) 32–37.

[35] Dirix (n 7) 75–77. Often the purposes of statutory privileges can be fulfilled by alternative means, such as mandatory insurance schemes in the case of wage security for employees.

[36] See generally Dirix (n 7) 75–89.

[37] This corresponds to the distinction in the UNCITRAL Legislative Guide on Secured Transactions between the creation of a security right (effectiveness as between the parties), as in ch II, and the effectiveness of a security right against third parties, as in ch III. The same is reproduced in the UNCITRAL Model Law on Secured Transactions, cc II and III. A similar distinction is adopted in the Draft Common Frame of Reference, Book IX Proprietary security in movable assets, cc 2 and 3. See C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, full edn, vol 6 (Oxford, Oxford University Press, 2010) 5408–547.

security-provider debtor. Examples of this so-called 'constitutive' effect of registration can be found in special legislation on ships and aircraft. Second, effectiveness against third parties sometimes results immediately from effectiveness against a security-provider debtor, which may be achieved by mere agreement. Examples of such situations often concern title-based security devices, especially retention of title.[38]

III. Incompatibility: Cross-border Problems in Trade and Finance

The problems that this book seeks to solve, or at least alleviate, arise in connection with situations that can be termed 'cross-border third-party conflicts'. These situations are third-party conflicts in that a secured claim, or its preferential treatment on insolvency, is challenged by a third party or a collective of third parties, most typically the security-provider debtor's other creditors in insolvency proceedings. Third parties compete for the same assets that the security agreement designates as encumbered assets. National laws on secured credit are typically well equipped to solve third-party conflicts.[39] Thus, insofar as national law and purely domestic cases are concerned, solutions are often easily available. Importantly, parties to security arrangements generally know beforehand what they are required to do in order to achieve and retain effectiveness against third parties.

However, the same cannot be said of third-party conflicts that involve cross-border aspects, that is, cross-border third-party conflicts. As a rule, jurisdictions are much less prepared to deal with them.

Of course, some cross-border aspects are more significant than others. Within the scope of this book, some of the most prominent situations are those where the 'parties' to a third-party conflict, the secured creditor and, say, the other creditors of the security-provider debtor, have different expectations about the substantive law governing the conflict. When the case is being adjudicated, they may disagree as to whether or not the law of the forum, the *lex fori*, should govern the dispute, or whether or not that law is to be applied similarly as in a purely domestic case. These kinds of cross-border third-party conflicts give rise to the main issues addressed in this book, namely uncertainty of enforceability and unexpected loss of security rights.

[38] Veneziano (n 4) 119–21. See Kreuzer, 'Die Harmonisierung' (n 15) 58. Kreuzer refers to the German 'all or nothing' solution, which does not separate creation inter partes and third-party effects.

[39] The relevant legal norms are usually classified as property law or (substantive) insolvency law. They include preconditions for and restrictions on the effectiveness of security rights against third parties.

In short, these issues are brought about by the combined effect of substantive divergences between jurisdictions and the current conflict rules of private international law. As noted in section II above, preconditions for and restrictions on the effectiveness of security rights against third parties vary between EU Member States. Since enforceability against third parties is crucial to the fulfilment of the economic purposes of security rights, (prospective) secured creditors need to know which substantive law will govern potential third-party conflicts and thus which jurisdiction's preconditions for third-party effectiveness their security arrangement should fulfil. The current conflict rules often prove unhelpful in this respect.[40]

Conflict rules covering third-party relations are asset type-specific.[41] The general conflict rule for tangible movables (and immovables), used in Europe and widely elsewhere 'by tradition and often unwritten', is the *lex rei sitae* rule.[42] According to this rule, the applicable law is that of the jurisdiction where the asset in question is physically located. In terms of security rights, the rule refers to the location of an encumbered asset. Despite its clear-cut appearance, the rule is to be blamed for uncertainty of enforceability and unexpected loss of security rights. This is due to its connecting factor, location of the asset, which proves unstable in situations where the encumbered asset is moved from its initial location to another jurisdiction. These situations are often referred to as *Statutenwechsel* or *conflit mobile*.[43] The latter term is used henceforth.

Indeed, the applicable law may change every time the asset is moved across a border. If the encumbered asset is moved after the creation of a security right but before a third-party conflict emerges, such a conflict will raise the question as to

[40] In this book, the terms 'effectiveness' and 'enforceability' against third parties are not used interchangeably. Effectiveness means fulfilment of the preconditions for protection against (the relevant type of) third parties under the substantive law of a particular jurisdiction. Enforceability additionally takes into account any hurdles to such protection related to private international law. If a security right is enforceable against third parties, the judiciary of the relevant jurisdiction actually protects the secured creditor's entitlements against third parties. In a purely domestic case, effectiveness and enforceability coincide. In a cross-border case, though, a security right may meet the criteria for effectiveness under the substantive law of one jurisdiction, but still be unenforceable since the relevant conflict rule points to the substantive law of another jurisdiction whose effectiveness criteria this right fails to meet. Unenforceability may also result from failure to find a domestic equivalent to a foreign security right which a jurisdiction would otherwise be willing to protect. This is the case if protection in that jurisdiction necessarily requires the transposition of the foreign right into the domestic system of security rights. On the doctrine of transposition, see Kieninger (n 10) 17–18. See also B Akkermans and E Ramaekers, '*Lex Rei Sitae* in Perspective: National Developments of a Common Rule?' in B Akkermans and E Ramaekers (eds), *Property Law Perspectives*, Ius Commune Europaeum 106 (Cambridge, Intersentia, 2012) 129–30, 143–44.

[41] The scope of these 'proprietary' conflict rules, meaning conflict rules for property law matters, varies between jurisdictions. Nevertheless, they invariably cover third-party relations.

[42] Von Bar and Drobnig (n 10) 342, 468. Similarly, see K Kreuzer, 'Conflict-of-Laws Rules for Security Rights in Tangible Assets in the European Union' in Eidenmüller and Kieninger (n 4) 298–99.

[43] See J Kropholler, *Internationales Privatrecht einschließlich der Grundbegriffe des Internationalen Zivilverfahrensrechts*, 6th revised edn (Tübingen, Mohr Siebeck, 2006) 188, 559–64; Rutgers (n 8) 165, 210.

which of the successive locations is decisive, or whether both should play a role. Although different jurisdictions and commentators approach this problem of successive locations somewhat differently, third-party conflicts are usually governed by the law of the jurisdiction where the asset is located at the time when the conflict emerges, for example, when insolvency proceedings against the security-provider debtor commence (giving rise to a conflict between the secured creditor and the debtor's other creditors). As a result, a secured creditor may be startled to discover that the encumbered asset has been moved to another jurisdiction and that the security right has proved unenforceable against third parties because the preconditions for third-party effectiveness set by that jurisdiction are not fulfilled.[44] For the secured creditor, this means loss of the security right.

These situations are bound to occur frequently because commercially, as noted in section II, the more significant types of security rights are non-possessory. Since the encumbered asset remains in the possession of the security-provider debtor, the secured creditor typically lacks effective means to ensure that the asset stays in the initial location or in some other jurisdiction whose preconditions for third-party effectiveness the security arrangement fulfils. While the parties to the security agreement can stipulate a particular location, the secured creditor cannot know for sure that the security-provider debtor will act accordingly. It is important to note that this risk concerns not only security arrangements that from the outset are planned to cross borders, but also those meant by the secured creditor to be purely domestic. An initially domestic security arrangement may give rise to a cross-border third-party conflict if the security-provider debtor in possession of the encumbered asset moves the asset across the border.[45]

Because the *lex rei sitae* rule is known to function particularly arbitrarily with assets that by their nature often cross borders, some Member States have introduced special conflict rules for those assets. These rules typically concern major means of transport, such as aircraft and ships, and make use of the relevant registry (or otherwise defined state of origin) as the connecting factor.[46] However, this *lex registrationis* solution is problematic insofar as it is not adopted throughout the EU and the scope of the special conflict rules varies between Member States. Where conflict rules diverge between jurisdictions, the law applicable to a third-party conflict may vary depending on the jurisdiction where the dispute

[44] Drobnig (n 27) 114; von Bar and Drobnig (n 10) 342; Kieninger (n 10) 17–18. Of course, it is also possible that the secured creditor moves the encumbered asset and, being ignorant of the relevant conflict rule and the effectiveness preconditions set by the jurisdiction of the new location, causes the unenforceability. However, this book is more concerned about situations where even informed secured creditors acting prudently are at risk.

[45] E-M Kieninger, 'European Regulation of Security Rights' in Drobnig, Snijders and Zippro (n 7) 167. According to Kieninger, goods that are not originally intended to cross borders and cases where the secured creditor never thought that the security right might have to be enforced in another Member State are the 'most prominent problem'.

[46] Kreuzer (n 42) 298–99. See Polak (n 14) 126–27.

concerning that conflict is adjudicated. This may also enable and even encourage forum shopping.[47]

In the case of third-party relations with respect to receivables, no single general conflict rule exists in Europe. True, Article 14 of the Rome I Regulation,[48] which deals with the assignment of claims, explicitly states that its concept of assignment also covers security rights over claims.[49] Yet the Article is silent as to which law governs third-party relations, such as conflicts between an assignee and the assignor's creditors or between two assignees in the case of a double assignment of the same claim. The conflict rule for third-party relations was omitted from the Article because the Member States failed to reach a consensus on the most suitable connecting factor.[50] Article 27(2) of the Regulation contains a review clause according to which the issue is to be considered further.[51]

At present, different Member States use different conflict rules. Worse, some Member States have not even decided which conflict rule to use. As may be expected, scholarly opinion is divided over the most suitable connecting factor. The competing connecting factors and the general options for a common European conflict rule are the law governing the contract of assignment, the law of the assignor's habitual residence and the law governing the assigned claim.[52] It is unlikely that a single perfect solution exists for all cases and circumstances,

[47] On conflict rules and forum shopping, see generally AS Bell, *Forum Shopping and Venue in Transnational Litigation*, Oxford Private International Law Series (Oxford, Oxford University Press, 2003) 15, 38–47.

[48] Parliament and Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

[49] Art 14(3): 'The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.' While this book focuses on security arrangements with respect to receivables, it should be kept in mind that the same conflict rules and similar cross-border problems concern the outright transfers of receivables.

[50] PMM van der Grinten, 'Article 14 Rome I: A Political Perspective' in Westrik and Van der Weide (eds) (n 6) 154–61; Garcimartín Alférez (n 11) 218, 233–47; Sigman and Kieninger (n 11) 50–59. *cf* A Flessner, 'Between Articles 14 and 27 of Rome I: How to Interpret a European Regulation on Conflict of Laws?' in Westrik and Van der Weide (eds) (n 6). The notion of a 'third party', as used here, does not include the assigned debtor, ie, the debtor of the assigned claim. See Art 14(2) of the Rome I Regulation.

[51] According to Art 27(2), the Commission should have submitted a report on the issue to the European Parliament, the Council and the European Economic and Social Committee by 17 June 2010. The Commission fulfilled this obligation as late as 29 September 2016 with 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person' COM(2016) 626 final. The Commission states that the search for a common European conflict rule continues in the context of the Capital Markets Union programme and presents three 'possible approaches'. The report is based on the 'Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person', prepared for the Commission by the British Institute of International and Comparative Law (BIICL) and published on the Commission website: ec.europa.eu/justice/civil/document/index_en.htm (Reports & Studies 2012).

[52] Garcimartín Alférez (n 11) 233–49. See TC Hartley, 'Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation' (2011) 60 *ICLQ* 29, 51–56.

so the technique of a main rule and exceptions may be needed. At any rate, the need for a common European conflict rule is well established.[53] The current situation is unsatisfactory, similarly to the non-uniform *lex registrationis* solution, in that the law applicable to a third-party conflict often varies depending on the jurisdiction where the dispute concerning it is adjudicated.

To sum up, the main cross-border problems in trade and finance, including situations that are initially domestic but later on acquire cross-border aspects, are basically similar with respect to security rights over tangible movables and those over receivables.[54] A central concern is that the parties to a security agreement, especially the secured creditor, cannot know for certain beforehand which law will govern potential third-party conflicts. This law may eventually be different from the law that the secured creditor initially had in mind. As a consequence, a security right may turn out to be wholly or partially unenforceable against third parties. In other words, the secured creditor is at risk of unexpectedly losing this right or some of the entitlements it is supposed to entail.[55] Comparative surveys have shown differences in the willingness of different jurisdictions to recognise and enforce foreign security rights. Generally, these differences reflect the liberality or the strictness of a jurisdiction's domestic system of security rights, that is, its internal substantive laws regarding these rights.[56]

Relations between the parties to a security agreement seldom give rise to such issues. These relations are often understood as contractual,[57] and the Rome I Regulation provides conflict rules for contractual relations. Importantly, Article 3 allows the parties to select the applicable substantive law by themselves (party autonomy).[58] Problems are unlikely to arise even if some aspects of these relations, inter partes, are understood as proprietary.[59] One exception may be certain situations where effectiveness against a security provider coincides with effectiveness against third parties.[60] Even so, it is generally hard to find reasons not to recognise and enforce a security right validly created in another jurisdiction if no

[53] See Garcimartín Alférez (n 11) 246–49.

[54] Further, cross-border problems may be similar irrespective of whether the security right in question secures sale credit or loan credit. On these two main types of credit, see Röver (n 23) 7–10.

[55] See Wood (n 18) 143. Wood calls these situations an 'international legal ambush where expectations in one jurisdiction are surprised by the rules of another'.

[56] Drobnig (n 27) 113–14.

[57] For a comparative review of law on these relations, see Steven (n 21).

[58] On the law applicable in the absence of party choice, see Art 4. As for assignments of claims, see Art 14(1), which provides for 'between assignor and assignee' use of the same conflict rules that cover contracts in general. Traditionally the idea of party autonomy has been rejected in property law, at least where third-party effects are concerned. See Westrik and Van der Weide, 'Introduction' (n 6) 1–6; Kieninger (n 10) 16–17.

[59] See Recital 38 of the Rome I Regulation, which clarifies that Art 14(1) 'also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations'.

[60] Discussed in section II above. See also C Forsyth, 'Certainty versus Uniformity: *Renvoi* in the Context of Movable Property' (2010) 6 *Journal of Private International Law* 637, 637–38.

third-party interests are at stake. Therefore, this book is mainly concerned with third-party relations and cross-border problems in that respect.[61]

Even if the law governing potential third-party conflicts was always sufficiently clear to the parties to a security agreement, another reason for dissatisfaction with the current state of the laws in Europe consists of increased transaction costs in cross-border contexts. Finding out and fulfilling the preconditions for third-party effectiveness of security rights set by a foreign jurisdiction is likely to be cumbersome and costly compared to a domestic setting.[62] Foreign legal services may have to be purchased to arrange that reliably. The loss of time and money is even greater if several potentially applicable substantive laws have to be taken into account.

To see the whole picture of cross-border problems sketched out above, one has to consider their consequences for individual market actors and whole markets. These microeconomic and macroeconomic viewpoints are interconnected, and findings are similar with respect to both of them: fulfilment of the economic purposes of security rights is seriously impaired in cross-border contexts as compared to domestic ones.

By bargaining on a security right, a prospective secured creditor wishes to increase the likelihood of recovering the credit it is about to make available, that is, to reduce its credit risk. Because payment difficulties and insolvency often attract third parties interested in the debtor's assets, reduction of credit risk requires that a security right is effective and enforceable against third parties, especially against the debtor's other creditors.[63] However, as explained above, uncertainty of enforceability is rather the normal state of affairs in cross-border environments, bringing with it loss of security rights, often unexpectedly. The kind of certainty that the prospective secured creditor seeks may not be achievable where cross-border third-party conflicts may arise. Of course, the more probable these conflicts are, the less certain the secured creditor's position is.

This is not a problem only for secured creditors; security-provider debtors are also harmed by it. If prospective secured creditors have to fear that security rights may prove unenforceable against third parties, they have little or no incentive to offer prospective debtors more favourable credit terms in exchange for security rights, because these rights do not significantly reduce their credit risk. As a result, prospective debtors may lose the benefit of, say, a lowered interest rate, an increased amount of credit or a prolonged credit period. Indeed, credit may not

[61] Nevertheless, divergences as to rules on enforcement of security rights as such may cause problems in practice, irrespective of whether third parties are involved. See, eg, H-J Lwowski, 'Ökonomische und rechtliche Anforderungen an ein optimal funktionierendes Mobiliarkreditsicherungsrecht aus der Sicht der Praxis' in Basedow, Remien and Wenckstern (n 15) 179. These rules concern a secured creditor's remedies upon default, including the realisation of encumbered assets. Since these matters are clearly different from the more substantive questions of effectiveness and enforceability against third parties dealt with in this book, they would require a study of their own.

[62] Rank (n 13) 206.

[63] See Röver (n 23) 11–14; McCormack (n 9) 4–11.

be offered at all in the first place.[64] In sum, uncertainty as to the enforceability of security rights against third parties frustrates the microeconomic purposes of these rights.[65]

The viewpoints of individual market actors can be broadened to cover whole markets. This is so because the advantages that prospective secured creditors offer to prospective debtors in exchange for security rights are thought to matter for the entire economy. In particular, security rights are assumed to increase the availability of credit and lower its cost in general. These effects, then, are assumed to increase total investment and production in the economy concerned. In this way, security rights are expected to promote economic activity and growth.[66]

This ultimate macroeconomic purpose of security rights cannot be achieved without an appropriate legal framework.[67] Any defects in a legal framework that impede the microeconomic purposes of security rights may be expected to cause suboptimal macroeconomic performance. To be sure, the uncertain enforceability of security rights must be seen as a major defect in this respect. Even if a jurisdiction has an appropriate domestic system of security rights and other parts of a legal framework to support it,[68] the probability of cross-border third-party conflicts may cause such uncertainty. As emphasised above, even security arrangements that are intended as purely domestic may give rise to these conflicts, so that the combined effect of conflict rules and substantive divergences may result in security rights becoming unenforceable. This suggests that the lack of compatibility between EU Member State systems of security rights may even impede the internal functioning of those systems individually.

The above problems show further dimensions when studied in the light of EU internal market law. The concept of the internal market embraces the idea of trade and finance freely flowing across jurisdictional boundaries.[69] However, when security rights are deployed in the internal market, in cross-border trade and finance, the probability of cross-border third-party conflicts becomes remarkably higher than in the case of security arrangements intended as domestic. Consequently, the risk of unenforceability becomes more constant. This is likely to constrain the fulfilment of the microeconomic and macroeconomic purposes of

[64] Röver (n 23) 12. See McCormack (n 9) 15–16.

[65] For a practitioner's account confirming and illustrating these observations, see LJ Town, 'A Banker's Perspective' in M Bridge and R Stevens (eds), *Cross-border Security and Insolvency* (Oxford, Oxford University Press, 2004).

[66] Röver (n 23) 15–16; McCormack (n 9) 15–22.

[67] See Fleisig (n 23) 24–35. Fleisig ends his essay, a comparison between the US and certain South American jurisdictions, in an attempt to quantify the losses caused by defective systems of security rights. In his analysis, reform in this area could raise Argentine gross domestic product by between six and eight per cent, and Bolivian by between three and nine per cent.

[68] This is not the case in all European jurisdictions. See L Gullifer, 'Conclusions and Recommendations' in Gullifer and Akseli (n 28) 506–08; Tajti (n 8) 489–503.

[69] See Art 26(2) of the Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

security rights within the internal market as a whole. In addition, transaction costs increase for having to comply with requirements of foreign systems of security rights, particularly preconditions for third-party effectiveness.[70]

Several commentators have advanced these and related arguments to demonstrate that the current situation obstructs the functioning of the internal market.[71] It has even been suggested that the situation is a case for negative integration. According to this view, it may be illegal for Member States not to recognise and enforce foreign security rights. The usual argument to this effect is that a refusal to recognise and enforce may qualify as a measure having an effect equivalent to a quantitative restriction on imports, as prohibited by Article 34 of the Treaty on the Functioning of the European Union (TFEU).[72]

Still, the main focus of the European discourse on security rights remains the need for positive integration and the means for achieving it. A broad range of options for solutions have been put forward. Many commentators propose substantive unification or harmonisation, often more or less along the lines of Article 9 of the US Uniform Commercial Code (UCC). Others would rely on gentler means, such as the unification and improvement of conflict rules.[73] This book aspires to inform future choices between the various options.

IV. The Quest for Compatibility

The overarching issue in this book is one of systems compatibility: how optimally to promote compatibility between systems of security rights over tangible movables and receivables in Europe? This general issue unfolds into more specific sub-questions concerning, first, the available concrete means of promoting compatibility and, second, the choices between them. Answers are sought with a hypothesis on the methodological potential of objective-based assessment, as explained below.

This quest for compatibility relies on certain conventional assumptions as to the role of secured credit. It generally subscribes to the dual conviction that a system of security rights forms part of the necessary legal infrastructure of a market economy,[74] and that secured credit is a 'general social and economic good'.[75]

[70] Roth (n 12) 38–40; Rank (n 13) 204–06. See also von Bar and Drobnig (n 10) 347–49.

[71] Drobnig, Snijders and Zippro (n 12) 12.

[72] Cited in n 69. See Roth (n 12) 40–61. On the law governing free movement, with observations on security rights, see S Weatherill, 'Diversity between National Laws in the Internal Market' in Drobnig, Snijders and Zippro (n 7) 131–36.

[73] Beale (n 14) 377–81; Drobnig, Snijders and Zippro (n 12) 12–13.

[74] See Arner (n 1) 107–09.

[75] See McCormack (n 9) 18–22. McCormack discusses various indications of a growing international consensus on this.

Accordingly, the quest also considers cross-border problems and their consequences described in section III above to be socially wasteful. All in all, this book does not question the need for greater compatibility between systems of security rights. Generally speaking, it would be difficult to find justifications not to facilitate secured credit in cross-border contexts, seeing how forcefully the same institution is being facilitated in national settings. Indeed, secured credit hardly turns less legitimate when it transcends jurisdictional boundaries. Since the need for compatibility can be treated as given, the book directly focuses on the available concrete means of promoting it.

However, a note of caution is in order here. The belief that secured credit is a societally beneficial institution does not necessarily imply that the use of security rights should be unrestricted or that claims secured by those rights should enjoy absolute priority over other claims in the debtor's insolvency proceedings and in other third-party conflicts.[76] Certain limitations on the preferential treatment of secured creditors on insolvency are unlikely to render security rights impractical.[77] What is more, recurrent controversies over justification for the priority of secured over unsecured claims, debated in terms of distributional fairness and economic efficiency, demonstrate that systems of security rights involve difficult value and policy choices.[78] Differing understandings as to justification for priority may actually explain some divergences between these systems.[79]

In this book, compatibility between systems of security rights is defined as the absence of cross-border problems, particularly those discussed in section III, or the availability of workable solutions to them. Compatibility is of course a matter of degree at any given moment, as it exists more or less, while the adoption of a particular means may increase compatibility to a greater or lesser extent. As a technique of presentation, and with a view to structuring the discussion, the concrete means through which compatibility can be promoted are sorted into four main

[76] *cf* F Dahan and J Simpson, 'The European Bank for Reconstruction and Development's Secured Transactions Project: A Model Law and Ten Core Principles for a Modern Secured Transactions Law in Countries of Central and Eastern Europe (and Elsewhere!)' in Kieninger (n 8) 101–04. Dahan and Simpson refer to the ten core principles for a modern secured transactions law, prepared by the European Bank for Reconstruction and Development (EBRD). See especially principles 5 and 7.

[77] Röver (n 23) 17–18. Röver writes: 'It is, however, one thing to reject the idea of taking away preferred satisfaction of the secured creditor and quite another to claim that preferred satisfaction must be unfettered.' According to him, the costs of the insolvency procedure and claims by the insolvent company's employees 'typically and justly' rank above secured claims. Further situations that may call for limitations to preferential treatment of secured creditors, he notes, are those where the security right has been received in a 'doubtful way', such as shortly before insolvency proceedings were opened or without providing real value in exchange, and those where the insolvent company is to be kept as a going concern by way of restructuring or by selling it in its entirety.

[78] On these debates in the US and England, see McCormack (n 9) 22–37.

[79] T Juutilainen, 'Security Rights and the Lack of a Priority Debate: How to Proceed with Choice of Law and Harmonization?' in T Wilhelmsson, E Paunio and A Pohjolainen (eds), *Private Law and the Many Cultures of Europe*, Private Law in European Context Series 10 (Alphen aan den Rijn, Kluwer Law International, 2007) 348–54.

types, called 'approaches': (1) a centralised substantive approach; (2) a centralised conflicts-approach; (3) a local conflicts-approach; and (4) a local substantive approach.[80]

The centralised approaches (1 and 2) consist of measures taken by the EU, and the local approaches (3 and 4) consist of measures taken by an individual Member State. The substantive approaches (1 and 4) include all kinds of efforts to unify or harmonise substantive law, while the conflicts approaches (2 and 3) are mainly based on private international law, notably conflict rules making up choice-of-law systems. In other words, means within the substantive approaches typically solve cross-border problems by eliminating divergences between Member State substantive laws, whereas means within the conflicts approaches facilitate coping with those divergences.

These four approaches give an idea of what the multi-level structure of European private law is about in this particular area of law. Considering the various legislatures and courts, including in connection with negative integration and competences as to private law,[81] a picture emerges where 'the powers and also, to some degree, the resources for political action, are located at various and relatively autonomous levels dispersed throughout the Union'.[82] Nevertheless, this picture is somewhat simpler than those concerning certain other parts, let alone the entirety, of European private law.[83] Two factors contribute to its relative simplicity. First, promoting compatibility between systems of security rights requires binding legislation or case law, particularly to address the treatment of these rights in insolvency-related and other third-party conflicts. Therefore, at the end of the day, only 'hard law' will do.[84] Second, the kind of law required may be issued only by the EU, a state or a jurisdiction within a state. Even so, the contents of the concrete means considered, and perhaps eventually adopted, may be influenced by other actors as well.[85]

[80] This division bears some resemblance to Kreuzer's classification of the instruments of 'spatial coordination law' (*räumliches Koordinationsrecht*). See Kreuzer, 'Europäisches Mobiliarsicherungsrecht' (n 15) 613–14.

[81] See generally J Stuyck, 'The European Court of Justice as a Motor of Private Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge, Cambridge University Press, 2010) 102–05; S Weatherill, 'Competence and European Private Law' in Twigg-Flesner (above in this note); Weatherill (n 72).

[82] C Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline' (2004) 14 *Duke Journal of Comparative & International Law* 149, 190. The quotation is from Joerges' account of the European polity as a multi-level system of governance *sui generis*.

[83] See generally F Cafaggi and H Muir-Watt, 'Introduction' in F Cafaggi and H Muir-Watt (eds), *Making European Private Law: Governance Design* (Cheltenham, Edward Elgar, 2008).

[84] This is not to downplay the potential role of, say, model laws and legislative guides as intermediate steps.

[85] Suffice it to recall the United Nations Commission on International Trade Law (UNCITRAL) and the EBRD and other organisations that have advised Central and Eastern European jurisdictions in law reforms during the transition from a planned to a market economy. See generally TC Halliday, 'International Organizations as Global Lawmakers: Seven Shifts in Practice for Secured Transactions Law and Beyond' in NO Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis*

The choice as to whether or not to adopt a particular concrete means should be made on the basis of its advantages and drawbacks. This is the point where the above overarching question gives way to more specific sub-questions. It is naturally possible that means belonging to different approaches are used simultaneously. In some cases, though, using a certain means may pre-empt the means of all or some other approaches. For example, assuming the competence required, comprehensive unification of substantive law by the EU (1) could make the conflicts approaches (2 and 3) altogether futile and spontaneous harmonisation by an individual Member State (4) impossible or illegal.[86] Likewise, full unification of conflict rules by the EU (2) could prevent Member State efforts to improve choice of law (3).

These trade-offs suggest that the optimal composition of concrete means to promote compatibility between systems of security rights amounts to the optimal division of labour between the four approaches. Ergo, determining the optimal division of labour should indicate the optimal way to promote compatibility.

This book proceeds on the hypothesis that the optimal division of labour can be determined by way of objective-based assessment. This in turn requires developing a set of objectives to function as criteria for evaluating the four approaches and the advantages and drawbacks of different concrete means within those approaches and then comparing them with each other. Importantly, these objectives should capture the essence of desirable development towards greater compatibility between systems of security rights, a process expected to progress gradually. To that end, the objectives should at least attend to the following general requirements. First, they should set and adhere to long-term goals for development. These should include facilitating the fulfilment of the economic purposes of security rights in cross-border contexts. Second, they should recognise and deal with the fact that decisions on the features of systems of security rights often have to be made with imperfect information. This particularly holds true for controversial policy choices, such as questions of priority and publicity.[87]

(Cambridge, Cambridge University Press, 2013); T Meyer, 'Social Market Economy Values in Legal Reform Projects in South East Europe (SEE)' in C Jessel-Holst, R Kulms and A Trunk (eds), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?* Materialien zum ausländischen und internationalen Privatrecht 50 (Tübingen, Mohr Siebeck, 2010). On the role of the EBRD, see F Dahan, 'The EBRD's Experience in Secured Transactions Reform: How Can Outsiders Help?' in Gullifer and Akseli (n 28).

[86] The term 'spontaneous harmonisation' is used here for situations where individual jurisdictions align their laws, out of their own initiative, with the laws of other jurisdictions. For a different definition, see MBM Loos, 'The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization: On the Disturbance and Reconstruction of the Coherence of National Contract Law and Consumer Law under the Influence of European Law' (2007) 15 *European Review of Private Law* 515, 523–24.

[87] See, eg, Kieninger (n 10) 8–9. According to Kieninger, 'it should not be overlooked that there exists also a substantial amount of literature which questions the assumption that security rights are economically beneficial' and 'awareness of the detrimental effects which secured transactions might

Third, they should encourage the use of shorter-term remedies to cure issues, notably injustices, caused by remaining incompatibility at different stages of development.

Three objectives can be identified, each of which matches one of the above requirements: foreseeability, which supports the 'universal' economic functions of security rights; responsiveness, which safeguards 'evolutionary prerequisites' of the law, including adaptability to local circumstances and experimental learning;[88] and the division of unforeseeability costs, which implements a transnational conception of justice. Identification raises epistemic questions—in particular, whether we know, or whether we can be convinced, that these objectives, rather than others, should guide development towards greater compatibility between systems of security rights. A strong theoretical case can be made because the three objectives are already visible in the European discourse on security rights, even though their roles and interrelations have not so far been examined in depth. Additionally, the objectives must be tried out in practice, so as to ascertain their capability to guide choices between concrete means of promoting compatibility.

In this way, testing the objectives in theory and practice also tests the hypothesis on the methodological potential of objective-based assessment. The agenda as a whole may best be described as a combination of research *de lege ferenda* and normative regulatory theory,[89] applied in the multi-level structure of European private law. While this book is not a comparative study in the standard meaning of systematic comparison between a number of legal systems, it nevertheless builds on various such studies. Comparative observations and analysis are essential in recognising cross-border problems and as a reservoir of ideas in the search for solutions to them.[90] In assessing concrete means of promoting compatibility between systems of security rights, the legal positivist constraints of different legal orders have to be taken into account. This in turn involves the viewpoint of

arguably have on unsecured creditors is helpful for understanding the restrictions that presently exist in Member States' laws'. She thus concludes: 'For any future European legislation, it will no doubt be essential to get a clear picture of the economic advantages and possible disadvantages of any suggested regime of security rights.' However, a clear picture may be hard to get because commentators disagree on central points. At the same time, cross-border problems make the current situation untenable.

[88] This book is not concerned with the potential of biological evolutionary theory in legal scholarship. For such an approach, see JM Smits, 'How to Predict the Differences in Uniformity between Different Areas of a Future European Private Law? An Evolutionary Approach' in A Marciano and J-M Josselin (eds), *The Economics of Harmonizing European Law*, New Horizons in Law and Economics (Cheltenham, Edward Elgar, 2002).

[89] On difficulties in clearly distinguishing between 'legal' and 'regulatory' scholarship, see J Black, 'Law and Regulation: The Case of Finance' in C Parker, C Scott, N Lacey and J Braithwaite (eds), *Regulating Law* (Oxford, Oxford University Press, 2004) 33–40.

[90] This can be called 'applied' comparative law. See E Örücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Leiden, Martinus Nijhoff Publishers, 2004) 16.

doctrinal study of law, or 'legal dogmatics'. In particular, this concerns determining the limits of the 'legally possible', whether the means are part of centralised or local approaches.[91] As for the centralised approaches, with the EU as the relevant actor, competences must be scrutinised. As for the local approaches, with individual Member States as the relevant actors, constraints result from EU and domestic law alike. Further, if the coherence of law is to be preserved,[92] the means to be adopted generally cannot depart too much from courses of action typical of the legal order in question.

This book is limited to European jurisdictions and mainly focuses on the EU and its Member States. Such a limitation can be criticised on the basis that cross-border third-party conflicts may also have connections to non-European jurisdictions and that efforts to create transnational commercial law should be global rather than regional.[93] Still, the limitation adopted is justifiable, above all in that the EU and its Member States are in a relatively good position to succeed in achieving compatibility between systems of security rights.[94] This is due to the EU legislature on the one hand and the relative legal cultural proximity of the Member States on the other. Nevertheless, the limitation must not lead to overlooking feasible initiatives at the global level.[95] The focus on EU Member States notwithstanding, the local approaches are also open to non-Member States, including any future ex-Member States.[96]

[91] Doctrinal study of law may sometimes be able to extend these limits. See T Wilhelmsson, *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law*, Law and Philosophy Library 16 (Dordrecht, Kluwer Academic Publishers, 1992) 46–48. Wilhelmsson emphasises the role of new future-oriented general principles constructed by scholars.

[92] See U Liukkunen, 'Collision between the Economic and the Social: What Has Private International Law Got to Do with It?' in P Letto-Vanamo and J Smits (eds), *Coherence and Fragmentation in European Private Law* (Munich, Sellier European Law Publishers, 2012) 134. Liukkunen writes: 'A legal system is considered coherent if its components fit together.' According to her, coherence 'should be regarded as a fundamental value in every legal system', yet it 'does not commit us to an unrealistic ideal of a tensionless legal order'. See also K Tuori, *Ratio and Voluntas: The Tension between Reason and Will in Law*, Applied Legal Philosophy (Farnham, Ashgate, 2011) 153, 164–65. Tuori connects the importance of coherence to formal justice in legal decision-making, ie, to treating like cases alike and unlike cases unalike, and thus safeguarding legal certainty and predictability. To this end, legal norms applied in individual cases have to manifest more extensive legal principles that form a coherent whole.

[93] See, eg, Kreuzer (n 42) 308. Calling for worldwide solutions where possible, Kreuzer argues that 'regional, especially European solutions should be the exception, and should only be adopted if there are compelling objectives under European law such as the creation of a single European judicial area'. In his view, especially the coordination of private international law 'should not be restricted to one region, eg Europe'. On global (and some regional) developments, see generally NO Akseli, *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments*, Routledge Research in Finance and Banking Law (Abingdon, Routledge, 2011) 7–17.

[94] *cf* RH Stevens, 'Choosing the Right Approach for European Law Making' in Eidenmüller and Kieninger (n 4) 96–101.

[95] eg, the UNCITRAL Legislative Guide on Secured Transactions is an essential source for this book, and the (UNIDROIT) Convention on International Interests in Mobile Equipment, signed at Cape Town on 16 November 2001, is discussed in connection with the relevant approaches.

[96] On 29 March 2017, the UK notified its intention to withdraw from the EU in accordance with Art 50 of the Treaty on European Union (Consolidated Version [2016] OJ C202/13).

The agenda of this book is implemented in three stages in chapters one to three. Chapter one situates the agenda in the ongoing European discourse on security rights, which seeks solutions to practical cross-border problems outlined in section III above. Virtually all commentators consider that some measures should be taken to remedy the current situation, but the debate on the appropriate measures is far from a consensus. The four main types of means to promote compatibility between systems of security rights—the four approaches—provide a structured way to explore the main dividing lines of the discourse. It is proposed that the dynamic of the discourse is best presented as a dialectic between those who argue for the centralised substantive approach, in a more or less comprehensive variant, and those who see better solutions among the three 'gentler approaches'.

Chapter one ends in the preliminary conclusion that the optimal way towards greater compatibility between systems of security rights is likely to be a combination of means belonging to several of the four approaches. This combination is termed an 'integrated approach'. The argument for an integrated approach comes in two versions. According to the weaker and more conventional version, such an approach is necessary due to circumstances in the short and medium term. Even if full substantive unification or harmonisation by the EU was regarded as the best solution, achieving it would take time. Therefore, other approaches would be needed in complementary roles for the meantime. According to the stronger and more controversial version, an integrated approach may be desirable even as a long-term solution. This is so because different approaches entail different virtues, so that focusing on only one of these approaches would lead to losing the virtues of other approaches. Some of the virtues, so this version of the argument goes, may be too valuable to lose. Optimally, an integrated approach combines the advantages and avoids the drawbacks of all four approaches.

While chapter one demonstrates the prima facie feasibility of an integrated approach, its actual feasibility can be confirmed, and its content determined, only by way of a detailed division of labour between the four approaches. This requires choices between the concrete means within each of the four approaches. To guide these choices, chapter two lays out the set of objectives introduced above. Developing this set requires not only clarifying the content and importance of the three objectives but also defining their relations, each to the other, and reconciling them with one another where needed. In sum, chapter two paves the way for an objective-based integrated approach.

Chapter three, making up the practical part of the agenda, first applies the set of objectives to centralised approaches, that is, EU measures. The centralised substantive approach is studied first, followed by the centralised conflicts-approach. The different concrete means belonging to these approaches are assessed on the basis of the extent to which they advance or impede achieving the objectives developed in chapter two. Next, a similar exercise is carried out with respect to local approaches. The local conflicts-approach is followed by the local substantive approach. Finnish law serves as a case study, but some of the argumentation,

especially in terms of the local conflicts-approach, applies to Nordic law more generally. Likewise, argumentation in the other Nordic jurisdictions is often useful in the context of Finnish law.[97]

Provided that the premises are correct, the results of chapter three should express the optimal composition of concrete means to promote compatibility between systems of security rights over tangible movables and receivables in Europe. Thus, the outcome should be the optimal way to promote compatibility between these systems.

[97] On legal cultural proximity between the Nordic jurisdictions, see generally J Husa, K Nuotio and H Pihlajamäki (eds), *Nordic Law: Between Tradition and Dynamism*, Ius Commune Europaeum 66 (Antwerp, Intersentia, 2007). On its role in legal scholarship, see Wilhelmsson (n 91) 16–20. Wilhelmsson notes that the Nordic legal community in private law makes the exchange of dogmatic ideas between legal scholarship of the different countries a natural occurrence. Especially concerning property law, *cf* J Sandstedt, *Sakrätten, Norden och europeiseringen: Nordisk funktionalism möter kontinental substantialism* (Stockholm, Jure Förlag, 2013) 181–82.