

ENFORCEMENT OF FINANCIAL OBLIGATIONS IN A CONDOMINIUM OR APARTMENT OWNERSHIP SCHEME

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INTRODUCTION

A person in whose name an apartment in a condominium or apartment ownership scheme has been registered enters into a three-fold legal relationship: he becomes the individual owner of his apartment, the co-owner of the common property of the scheme, and a member of the association of owners to whom the management and administration of the scheme is entrusted.

Harmony in an intensified community can only be achieved if the scheme is managed properly, and the common parts of the building and the common facilities are maintained adequately and regularly.¹ Consequently, each owner is obliged to share in the provision of funds for the management of the scheme and the maintenance of common parts such as the outside walls, the roof, the corridors, the structural components, recreational facilities, and the land on which

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1. See Mark F. Grant, et al., *Ocean Trail Unit Owners Ass'n, Inc. v. Mead: Democracy or Tyranny—The Supreme Court of Florida Properly Finds in Favor of Condominium Board*, 20 NOVA L. REV. 513, 515 (1995). The authors compare the condominium community with a democracy:

Ideally, the system should provide for sharing of many amenities in the form of common elements which the unit owners might not be able to afford individually in exchange for the sharing of common expenses. In reality, however, the microcosm of condominium government mirrors the operation of larger-scale democracies: there are power struggles, and the governmental representatives are challenged when they lose touch with their constituency, exceed their authority and abuse their "taxing and spending powers."

Id. at 530. In the United States and especially in Latin America, many condominium schemes are so large that they surpass many small towns both in population and land value.

the multi-unit building is erected.² These funds are budgeted for in the annual general meeting and then divided amongst the various owners according to share values or participation quotas.³ These values or quotas are usually calculated in accordance with the size of an apartment or determined by the developer at the outset.⁴ The proper maintenance, efficient management and ultimately the success of an apartment ownership scheme will depend on a steady flow of assessment funds from the unit owners to the coffers of the condominium association. Repeated failure to contribute to common expenses may hinder timely maintenance and efficient management and ultimately wreck the scheme.⁵

In some countries like South Africa, the management association's lack of funds has become part of a larger socio-economic problem. In order to bring home ownership within reach of the emerging black middle class, a high percentage of mortgage credit is supplied by financial institutions (mostly banks) in the knowledge that, quite frequently, employers automatically credit mortgage repayments to the account of the mortgage creditor. Unit owners are not made aware of their obligation to pay maintenance contributions and generally do not account for it in their financial planning. The disastrous result is that, although mortgage repayments are up to date, the arrear contributions and charges remain unpaid from the outset, and the amount of these charges increases from month to month. Consequently, management associations struggle to perform their maintenance and administration functions properly, unless the non-defaulting owners are prepared to contribute more to cover the shortfalls. This financial interdependence leads to deterioration of the building and eventually to slum conditions, and areas where financial institutions are no longer prepared to grant loans. It is, therefore, in the interest of associations, contributing apartment owners, mortgage institutions, and the community at large that bodies corporate act

2. See, e.g., Sectional Titles Act 95 of 1986 s. 32(3)(c), 37(1)(a) (BSRSA 1999) (amended 1991, 1992, 1993, 1997) (S. Afr.) [hereinafter South African Sectional Titles Act]; Ley 49/1960, de 21 de julio, sobre propiedad (B.O.E. 1960, 176) (amended 1999) (Spain) [hereinafter Spanish Law on Horizontal Property].

3. See Cornelius G. van der Merwe, *Apartment Ownership*, 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 5, §§ 339, 389, 406 (Athanasios N. Yiannopoulos, ed., 1994).

4. See *id.* § 141.

5. See *In re Body Corporate of Caroline Court 2002* (1) All SA 49 (A) at para. 7 (S. Afr.) (quoting Roger Green and Peter Feuilherade, *Lost Property*, DE REBUS, June 2001, at 18, 20).

swiftly and decisively against defaulters.⁶ Unit owners should be properly warned of the consequence of failure to make payments.⁷ If an owner does not pay in a timely manner, other action should be taken to prevent the continually accruing arrear contributions from reaching an unacceptable level.

This Article analyzes the enforcement measures or sanctions used in various common law,⁸ European,⁹ and Latin American jurisdictions¹⁰ to encourage compliance with financial obligations. All of these statutes are recent updates or replacements of older statutes.

6. See *Body Corporate of Geovy Villa v. Sheriff*, Pretoria Cent. Magistrate's Court 2003 (1) SA 69, 73-74 (TPD) (S.Afr.) ("If there are a number of defaulters, the body corporate is unable to maintain the building in a proper condition.").

7. See Michael R. Fierro, Note, *Condominium Association Remedies Against a Recalcitrant Unit Owner*, 73 ST. JOHN'S L. REV. 247, 271-72 (1999). See also Amos B. Elberg, Note, *Remedies for Common Interest Development Rule Violations*, 101 COLUM. L. REV. 1958, 1989 (2001). Elberg gives the following reasons why associations would like to enforce their rules strictly and without discretion: "desire to maintain low enforcement costs, development of a reputation for rigid enforcement, non-avoidance of scrutiny of complainant motivations, genuine belief in the efficiency of the rule, and fear of waiver." *Id.*

8. As representative of common law jurisdictions, we chose the highly developed Canadian condominium statutes of British Columbia (Strata Property Act, 1998 S.B.C., ch. 43 [hereinafter B.C. Strata Property Act]) and of Ontario (Condominium Act, 1998 S.O., ch. 19 [hereinafter Ontario Condominium Act]); the strata title statutes of Singapore (Building Maintenance and Strata Management Act 47 of 2004 [hereinafter Singapore Strata Title Act]) and South Africa (South African Sectional Titles Act, *supra* note 2); the progressive Uniform Common Interest Ownership Act [hereinafter UCIOA] (drafted in 1994 by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association on February 14, 1995, adopted by at least 7 states as of October 2005, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucioa.asp); and the new English Commonhold Act (Commonhold and Leasehold Reform Act, 2002 c. 15 (Eng.)).

9. See Law No. 65-557 of July 10, 1965, *Journal Officiel de la République Française* [J.O.], July 11, 1965, p. 5950 (amended 1966, 1974, 1977, 1979, 1985, 1986, 1992, 1994, 1995, 1996, 2000) (Fr.) [hereinafter French Law No. 65-557]; Spanish Law on Horizontal Property, *supra* note 2 (Spain).

10. See Ley de condominios, No. 104 del 25 de junio de 1958 (codified at P.R. LAWS ANN. tit. 31 §§ 1291-1294d (2005) [hereinafter Puerto Rican Condominium Law]; Ley de Propiedad en Condominio de Inmuebles para el Distrito Federal [L.P.C.I.D.F.] [Law on Condominium Real Estate-Property for the Federal District], *Diario Oficial de la Federación* [D.O.], 31 diciembre de 1998 (Mex.) [hereinafter Mexican Law on Condominiums]; Ley 675 de 2001 [Colombian Law 675 of 2001], *Diario Oficial* [D.O.], 4 de agosto de 2001 (Colom.) [hereinafter Colombian Law 675 of 2001].

I. ENFORCEMENT OF FINANCIAL OBLIGATIONS

A. General

It is generally accepted that the inability of an association to collect financial contributions from owners efficiently is the main source of financial and personal anxiety in a condominium scheme.¹¹ This function becomes more crucial in hard economic times; unfortunately, it also becomes less successful.¹² To facilitate collection, legislation and regulations contain enforcement measures to assist management associations in performing their task efficiently. The discussion of these measures will be divided into those, which can be used to force an owner with sufficient resources to pay and those, which serve to protect the association in cases where the defaulting owner does not have the necessary resources to pay his contributions.

B. Measures which May Force the Financially Sound Owner to Pay

1. *Enumeration of Measures.* Apartment ownership statutes contain several mechanisms to force the financially sound owner to pay his contributions promptly. These measures not only apply to ordinary apartment owners, but specifically target non-resident, wealthy owners who bought their apartments as investments and do not always bother to pay their monthly contributions. The primary enforcement measures are summary proceedings in court to effect swift payment of any arrears. In addition, the owner is subjected to penalties for late payment and is made liable for any interest accruing on the arrears and the cost of collecting these late payments. Further measures include denial of the right to vote at general meetings, suspension of services, shame sanctions, recourse through tenants to whom a unit is rented, and mechanisms to safeguard claims for outstanding debts on transfer of a unit.

11. James L. Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 357 (1992).

12. *Id.* Federal Rules of Civil Procedure Rule 69 provides that, unless the court directs otherwise, the process to enforce a monetary judgement shall be a writ of execution, usually by seizing and selling the property of the defaulting owner. In England, if the sums owed are under £15,000, proceedings can be initiated in the county courts. CIVIL PROCEDURE RULES practice direction 7 (Eng.).

2. *Summary Proceedings in Court.* Most jurisdictions have to resort to ordinary court procedures to enforce the payment of contributions.¹³ Some condominium statutes, the new English Commonhold and Leasehold Reform Act and the Florida condominium statute, for example, require the directors of the association to assess the desirability of using arbitration, conciliation or mediation procedures instead of legal proceedings or to submit to non-binding arbitration before seeking court action.¹⁴

However, certain jurisdictions have introduced special summary court proceedings for the recovery of late payments. The Spanish statute introduced a summary procedure (*proceso monitorio*), which must be authorized at the general meeting. Once authorized, the debtor is notified of the amount claimed and furnished with a certificate signed by the chairman (president) and the secretary indicating the amount of the debt. Unless the defaulting owner provides a bank guarantee for this amount, the association is entitled to execute against enough of the owner's property to cover the debt.¹⁵ Under the Mexican statute, the professional manager is forced to act swiftly, as he is allowed only to initiate summary execution proceedings for late payments of up to three months, together with interest and penalties.¹⁶

The most effective summary proceedings are found in Puerto Rico and Singapore. The Puerto Rican statute allows the board of directors to sue the debtor in a special proceeding devised for the collection of small claims for arrears of up to \$5,000. The debtor must be notified of the claim for payment at least fifteen days before the filing

13. See, e.g., Commonhold Community Statement § 4.11.11(a) in the Commonhold and Leasehold Reform Act, 2002, sched. 3 (Eng.); Patrick J. Rohan & John P. Healey, *Home Owner Association Assessment Litigation in New York—An Overview*, 73 ST. JOHNS L. REV. 199, 199 (1999).

14. Commonhold and Leasehold Reform Act 2002, c. 15, §§ 35(3)(b), 37(2)(i); FLA. STAT. ANN. § 718.1255 (4) (West Supp. 1993); see also Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 STETSON L. REV. 1133, 1168 (1993), which mentions that comprehensive legislation in this area was enacted by Montgomery County, Maryland, effective January 1, 1991. This legislation requires binding mediation or a hearing before an administrative board whose decision is binding. See MONTGOMERY, MD., CODE ch. 10b (1991).

15. Spanish Law on Horizontal Property, *supra* note 2, arts. 21.1, 21.2, 21.5. For similar summary execution proceedings initiated by the professional manager of the scheme for Portugal, see Decreto-Lei no. 268/94 de 25 de Outubro, art. 6, Diário da República 1 Série A, N° 247, de 25.10.1994, 643-3; for Brazil, Lei No. 7.182, § 12.2, de 27 de março de 1984, D.O.U. de 29.03.1984 (amending Lei No. 4.591, de 16 de dezembro de 1964).

16. Mexican Law on Condominiums, *supra* note 10, art. 60.3.

of the court action.¹⁷ The Building Maintenance and Strata Management Act of Singapore authorizes the recovery of arrear contributions of up to S\$20,000 in a special small claims court.¹⁸ A contribution levied by the management corporation is deemed to be money payable under a contract for the provision of services.¹⁹ Unfortunately, the South African statute regulating small claims courts does not allow such claims, mainly because they only entertain claims between natural persons.²⁰

3. *Responsibility of Owner for Interest on Arrears and Cost of Recovery.* In order to persuade financially able owners to pay their contributions regularly, most condominium statutes (or provisions of the jurisdiction's Code of Civil Procedure) charge interest on arrear contributions (in most jurisdictions, this can be no higher than the legal interest rate²¹), penalties for being in arrears,²² and/or collection costs in recovering such contributions.²³

Under the Spanish statute, not only all reasonable legal costs, but also the cost of all attempts to collect contributions prior to a court case can be claimed upon the presentation of written proof. Court costs can also be claimed, and if the action is opposed, the general rule as to judicial costs applies, and the total cost in using legal representation can be claimed.²⁴ The Ontario statute specifically states that the management association is entitled to claim all expenses connected with the collection or attempted collection of arrears, including the costs of preparing and registering a certificate of lien (to which

17. Puerto Rican Condominium Law, *supra* note 10, art. 39 (codified at P.R. LAWS ANN. tit. 31, § 1293c) (referring to Rule 60 of the 1958 Rules of Civil Procedure, as amended).

18. Singapore Strata Title Act, *supra* note 8, § 40(8); Small Claims Tribunal Act, 308 Stat. Rep. of Singapore IX (1985) § 5(3)-(4) (1985) (Sing.) (stating that claims of up to S\$20,000 are allowed and must be brought within one year from the time the cause of action arose).

19. Singapore Strata Title Act, *supra* note 8, § 40(8).

20. See Small Claims Court Act 61 of 1984 § 7(1) (BSRSA 1999) (S. Afr.).

21. See, e.g., Ontario Condominium Act, *supra* note 8, § 85(3)(c); Puerto Rican Condominium Law, *supra* note 10, art. 39 (codified at P.R. LAWS ANN. tit. 31, § 1293c (2005)); CÓDIGO CIVIL [CÓD. CIV.] § 2686 (Arg.).

22. See, e.g., Mexican Law on Condominiums, *supra* note 10, art. 60.

23. See, e.g., Regulations in terms of Sectional Titles Act no. 95 of 1986, Annexure 8, r. 31(6), Government Notice (GN) R664 of 8 April 1988 (S. Afr.) [hereinafter South African Model Bylaws]; Spanish Law on Horizontal Property, *supra* note 2, arts. 21.3, 21.6.

24. Spanish Law on Horizontal Property, *supra* note 2, arts. 21.3, 21.6; see also French Law No. 65-557, *supra* note 9, art. 10-1.

the corporation is entitled as soon as an owner defaults).²⁵ The South African model by-laws include, under the heading “legal costs,” costs between solicitor and client, collection commission, expenses and losses incurred in the recovery of arrear levies.²⁶

In Puerto Rico, the recovery of attorney’s fees is allowed only in cases where the debtor opposes the claim without a justifiable reason.²⁷ In procedural matters, Puerto Rico has adopted the U.S. litigation pattern, which exempts the losing party from paying attorney’s fees, except in cases where the judge rules otherwise or where the law provides for a fixed amount in attorney’s fees. The Puerto Rican provision also adds that the successful party may condone the collection of sums related to costs and attorney’s fees—a rule that has always existed in civil cases.²⁸

In the United States, where attorney’s fees are notoriously high,²⁹ the Uniform Common Interest Ownership Act (UCIOA) authorizes the association to impose charges for late payment of contributions, but does not mention attorney’s fees.³⁰ This accords with the view that each party must bear its own costs, unless the parties have agreed otherwise or unless the conduct of one party in bringing or defending the action is so blatantly unmeritorious as to warrant such an award.³¹ State statutes that do allow the recovery of attorney’s fees limit these

25. Ontario Condominium Act, *supra* note 8, § 85(3)(c).

26. South African Model Bylaws, *supra* note 23. In *Barnard NO v. Regpersoon van Aminie*, the Supreme Court of Appeal confirmed the decision of the Transvaal Provincial Division in *Barnard NO v. Regpersoon van Aminie* 2000 1 SA 213 (TPD) that the owner is responsible for the legal cost of recovering arrear contributions including contributions more than two years in arrears. 2001 (3) SA 973, 982D, 985D (SCA). Brand A.J.A. argued, dogmatically correctly, that, like interest, legal costs incurred in recovering a debt cannot be separated from the debt itself but form part and parcel thereof. 2001 (3) SA 973, 981HI (SCA).

27. Puerto Rican Condominium Law, *supra* note 10, art. 42 (codified at P.R. LAWS ANN. tit. 31, § 1293f (2005)).

28. *Id.*

29. See THE BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION, REPORT OF A TASK FORCE, 1-7 (1989).

30. UCIOA § 3-102(a)(11) (1994).

31. See Fierro, *supra* note 7, at 267.

to “reasonable attorney’s fees,”³² which would not be the case when fees are out of proportion to the fine or charges claimed.³³

In practice, the threat of having to pay the fees of attorneys employed by the management association forces the defaulting owner to think twice before refusing to pay. An award of attorney’s fees is thus an effective measure to obtain compliance.³⁴

4. *Penalties for Late Payment.* In order to promote timely payment of contributions, some statutes contain stiff fines or penalties for delays in payment. Thus, the Puerto Rican statute provides that the by-laws of a scheme may charge a penalty of ten-percent interest on a contribution that is more than 15 days overdue. In addition, amounts not paid on the due date automatically generate interest at the maximum interest rate. When more than three monthly installments remain unpaid, the unpaid amount will draw an additional penalty of one percent of the total debt, to be paid monthly.³⁵

The Singaporean Act makes an owner guilty of an offence if he fails to pay any contribution or interest due within 14 days from the date of service of a written demand by the management corporation. The maximum fine is S\$10,000 plus a sum not exceeding S\$100 for every day that the sum remains unpaid.³⁶ This sanction is considered very effective, especially in the case of absentee landlords who do not bother to pay the monthly contributions. However, it has little effect in the case of indigent owners who simply do not have the money.

32. See, e.g., Colorado Common Interest Ownership Act, COLO. REV. STAT. § 38-33.3-302(1)(k), which includes in the association’s power of recovery “reasonable attorney’s fees and other legal costs for collection of assessments and other actions to enforce the power of the association, regardless of whether or not suit was initiated . . .” (emphasis added).

33. See Bd. of Managers of 140 East 56th St. Condo. v. Hausner, 245 A.D.2d 209, 210 (N.Y. App. Div. 1996). According to Fierro, *supra* note 7, at 268-69, the answer lies somewhere between the \$9,000 in attorney’s fees awarded in *Wehunt v. Wren’s Cross of Atlanta*, 332 S.E.2d 368, 368 (Ga. Ct. App. 1985), for the collection of \$906 in common expenses and late charges, and the trial court award of \$60,000 in the foreclosure of a \$100 common assessment, which was ultimately reversed in *Ziontz v. Ocean Trail Unit Owners Assoc’n*, 663 So. 2d 1334, 1335-36 (Fla. Dist. Ct. App. 1993).

34. See Fierro, *supra* note 7, at 269 (“Practically speaking, the inclusion of a provision allowing the recovery of costs and attorney’s fees in the condominium documents is of utmost importance to augmenting its significance and its potential enforceability.”).

35. Puerto Rican Condominium Law, *supra* note 10, art. 39 (codified at P.R. LAWS ANN. tit. 31, § 1293c (2005)).

36. Singapore Strata Title Act, *supra* note 8, art 40, §10.

5. *Deprivation of Votes.* Late payment not only results in the accrual of interest or monetary penalties but can also attract non-financial sanctions, including the loss of the right to vote at general meetings and a prohibition on the use of common services or of common areas of the scheme.

The Québec Civil Code (article 1094) automatically suspends owner's voting rights if she falls three months behind in the payment of common expenses.³⁷ In other jurisdictions, the suspension kicks in after one³⁸ or two months' default and is only operative once the suspension is approved at the general meeting, and the defaulting owner is duly notified.³⁹ In South Africa, the suspension applies only in the case of ordinary owner resolutions and not for matters requiring a special or unanimous resolution. Furthermore, an owner who is in arrears may still attend and speak at general meetings, and the mortgage creditor of such owner's unit is entitled to vote as the owner's proxy.⁴⁰ According to Puerto Rican case law, the suspension of voting rights also applies to unanimous resolutions, thus depriving the defaulting owner of the capacity to veto a unanimous resolution.⁴¹ In addition, the value of the defaulting owner's vote will not be taken into account for quorum purposes. The suspension is lifted only when the whole debt is satisfied or the treasurer certifies before the meeting that the owner is keeping up with rescheduled payments approved by the board of directors.⁴²

The suspension of voting rights may be unconstitutional if not preceded by a due process hearing.⁴³ This concern is especially real when resolutions of the general meeting affect the property rights of the unit owner. Therefore, the statutes that allow the defaulting unit owner to attend and take part in the deliberations of the general meeting seem more acceptable. In addition, a suspension of voting rights might not yield the desired results. Many owners who do not

37. CIVIL CODE OF QUÉBEC [C.C.Q.] art 1094.

38. See, e.g., Spanish Law on Horizontal Property, *supra* note 2, art. 15.2.

39. See, e.g., Mexican Law on Condominiums, *supra* note 10, art. 36.

40. South African Model Bylaws, *supra* note 23, R. 64(a)-(b).

41. *Asociación de Condómines, Quadrangle Medical Centre v. Ramírez Lizardi* 2001 JTS 114.

42. Puerto Rican Condominium Law, *supra* note 10, art. 39 (codified at P.R. LAWS ANN. tit. 31, § 1293c (2005)).

43. Fierro, *supra* note 7, at 262 (supporting the argument that resolutions at a general meeting might affect the property rights of a unit owner, and that their suspension must follow the requirements of due process).

pay their contributions care little about the operation of the condominium scheme and rarely attend general meetings. In these cases suspension of voting rights has a minimal effect on encouraging compliance. On the whole, the difficulties involved in enforcing the suspension of voting rights outweigh the deterrent value of this sanction.⁴⁴

6. *Suspension of Services.* The Puerto Rican statute allows the board of directors to suspend common services such as water, electricity, gas, and telephone services when an owner defaults on his contributions for more than *two* months.⁴⁵ After the first month, the board of directors must notify the defaulting owner of its intention to suspend the services in the manner agreed upon at the general meeting or in accordance with the by-laws of the scheme. Prior to the interruption of the services, the board of directors must ensure that the suspension would not affect the health of the owners concerned. Services will only be restored once the outstanding debt has been paid in full.⁴⁶

The statute further provides that cable television, video, and other services provided by common installations may be suspended if the owner is more than *three* months in arrears with his payments.⁴⁷ Since these two articles substantially overlap, legislative amendment is necessary to reconcile the period of default required for suspension of services. The owner or occupier whose services have been suspended may not, without the authorization of the board or the manager, reconnect the services himself or with the help of a third party. If he does so or in any other way makes illegal use of common facilities of which he has been deprived, he will incur a penalty of triple the amount due, including the principal sum plus interest. This penalty is without prejudice to other applicable civil, administrative or criminal sanctions.

This sanction may be quite effective to enforce the payment of monthly contributions where the unit owner is solvent. Cutting off the water or electricity of a unit might bring a solvent owner to his

44. *Id.*

45. Puerto Rican Condominium Law, *supra* note 10, art. 38 (codified in § 1293b).

46. *Id.*

47. *Id.* art. 39 (codified in § 1293c).

senses and encourage him to pay his contributions promptly.⁴⁸ Note, however, that without authorization in a condominium statute or the bylaws, such action would constitute spoliation and the association could be ordered by the court to restore the *status quo ante*.⁴⁹ Note further that it is difficult to see how cutting off essential services would not affect the health of the defaulter. It is also questionable whether condominium associations should be given such wide powers. They are neither courts nor public service bodies and should not be encouraged to turn to such extremes. If the owner is both sensible and solvent yet refuses to pay, he may well have a valid reason. Rushed action by the association might not only lead to claims for restoration but might also ground an action for damages. If the owner is not solvent, it might cause unnecessary hardship to an owner who is already struggling to keep his unit from being sold at a forced sale.

7. *Loss of Locus Standi to Sue.* The Puerto Rican statute adds another sanction for owners with outstanding debts, applicable after only one month's default. It states that in order to challenge any resolution of the board or the general meeting (except those relating to maintenance and special contributions) in court or in any other administrative tribunal, the owner must be up to date with his payment of contributions. The court or tribunal must give both sides the opportunity to be heard and may decide in accordance with the law, equity, and good neighborliness to validate the *locus standi* of the defaulting owner.⁵⁰

8. *Shame Sanctions.* The Spanish and the Colombian statutes contain so-called "name and shame" sanctions to embarrass defaulting owners into paying outstanding debts owed to the association. The 1999 amendment to the Spanish statute requires that the notice convening a general meeting must contain a list of the names of the owners who are in arrears with the payment of their debts to the as-

48. See, e.g., *Devis v. Leafmore Forest Condominium Assoc'n of Owners*, 407 S.E.2d 76, 76-78 (Ga. Ct. App. 1991) (providing an example from the U.S. in which the court held that condominium associations could terminate water and gas, limit access to cable television service, and limit the use of a condominium unit if the owner is in arrears with paying his contributions).

49. See, e.g., *Froman v. Herbmere Timber and Hardware* 1984 (3) SA (W) at 609, 609-11 (S. Afr.). But see, e.g., *Plaatje v. Olivier* 1993 (2) SA (O) at 156, 156-60 (holding that a spoliation procedure was not necessary to compel the supply of water).

50. Puerto Rican Condominium Law, *supra* note 10, art. 42 (codified in § 1293f).

sociation. At the start of the meeting, a warning must be given to those owners with unsatisfied debts who are at risk of being deprived of their vote.⁵¹

In addition to including the names of defaulters in the minutes of the general meeting, the Colombian statute authorizes the publication of their names on a notice board in an appropriate location in the condominium complex. In order to guarantee that the notice is for the eyes of residents only, the notice may not be displayed in a place frequented by visitors to the building.⁵² While these sanctions might seem appropriate in some jurisdictions, other jurisdictions may view them as an unacceptable intrusion into the privacy of the individuals concerned.

9. *Recourse through the Tenant.* Several statutes allow some kind of recourse for unpaid contributions through the tenant if the unit of the defaulting owner is leased. Such recourse either takes the form of a security right in respect of the outstanding rent, or a direct action by the association against the tenant for rent owed on the apartment in satisfaction of the debt or part thereof. The French statute grants the association certain rights over the rent owed to the defaulting owner in the case of a lease of a furnished apartment.⁵³ By contrast, the Ontario Condominium statute provides that, on default, the corporation may, by written notice, require the lessee to pay the lesser amount of the default and the amount due under the lease.⁵⁴ The Puerto Rican statute is even more direct. It provides that if the unit is let, the association can request a court order compelling the tenant to pay all rent due directly to the management council of the scheme for the benefit of the association until the whole debt is extinguished.⁵⁵ The Colombian statute employs a third mechanism. It provides that the owner and the person occupying the unit, by whatever title, are jointly and severally liable to the association for any

51. Spanish Law on Horizontal Property, *supra* note 2, art. 16.

52. Colombian Law 675 of 2001, *supra* note 10, art. 30.

53. French Law No. 65-557, *supra* note 9, art. 19 (granting the association special rights to the furniture in the apartment in the case of the lease of a furnished apartment).

54. Ontario Condominium Act, *supra* note 8, art. 87, paras. 1-2 (providing that the notice may be by personal service or by sending it by prepaid mail addressed to the lessee at the address of the unit).

55. Puerto Rican Condominium Law, *supra* note 10, art. 39 (codified in § 1293c).

contributions due.⁵⁶ This means that a tenant or other occupier can be sued directly, whether or not the owner defaults on his or her payments. Note that the occupier would only be liable for claims that arise after the commencement of his occupation and would have recourse against the owner for payments made to the association.⁵⁷

In practice, the agents collecting the rent on behalf of the owner usually deduct their commission and monthly contributions from the rent they collect before passing on what is left to the owner-landlord. This practice should be embodied in legislation, which automatically diverts the required portion of the rent to the association. The Colombian approach of holding occupiers liable even if they do not necessarily pay rent (a student living in the apartment of his father, for example) is also sound. Since the occupier enjoys the use of the common property and the facilities and services of the scheme, it is only just that he may be called upon to pay for contributions that the owner cannot pay. In fairness, such liability should be limited to six months arrears, which would leave time for the association to resolve the situation.

10. *Mechanisms Designed to Safeguard the Claims for Outstanding Debts on Transfer of the Unit.* The statutes employ various mechanisms to ensure that the body corporate does not suffer financially when the seller of an apartment has not cleared all his assessment debts at the time of transfer. In jurisdictions that require notarial documentation for transfers, special provisions are added to procure the help of notaries in the collection process or in notifying the purchaser of outstanding contributions. Purchasers may obviously obtain such information from the condominium association itself, but in obliging the notary to notify the purchaser, future conflict is avoided with regard to collection or the purchaser's awareness of the outstanding debt that might encumber the apartment. Notaries who ignore their legal obligations in this regard may be subject to disciplinary measures and civil sanctions.⁵⁸ Some statutes go further still, placing an embargo on transfer unless all the contributions due have

56. Colombian Law 675 of 2001, *supra* note 10, art. 29 (“[E]xistirá solidaridad en su pago entre el propietario y el tenedor a cualquier título de bienes de dominio privado . . .”).

57. *Id.*

58. See Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945, 966-67 (1998) (stating that notaries in jurisdictions outside the United States are generally subject to civil and criminal liability in the practice of their profession).

been paid or acceptable security has been offered for payment. Finally, some statutes impose liability for payment on the incoming purchaser, while most of these statutes combine this with joint and several liability (*in solidum*) on the part of the seller and the purchaser for outstanding contributions.

The Argentine Civil Code contains the general provision that debts owed by the transferor pass to his universal and particular successors. Particular successors, however, are liable only for amounts up to the value of the unit transferred to them.⁵⁹ The Commonhold Community Statement (model bylaws) of the new English Commonhold statute contains a similar provision. It requires that, on transfer, the new unit holder, following a notice procedure, must pay any outstanding commonhold contributions and reserve fund payments and any interest that has accrued on the default of his predecessor.⁶⁰ This could create reluctance on the part of purchasers to purchase any unit burdened with any significant assessment liability and could even lead to the discharge of arrears by the selling unit holder to facilitate the sale.⁶¹ But a former unit holder has no liability under the Act for unpaid contributions passed to the purchaser.⁶² The furthest the English rule goes is to deem the right of the association to enforce payment of assessment arrears to be assigned to the new unit holder, if he promptly clears the arrears.⁶³

The Spanish statute imposes liability on the transferee⁶⁴ of a unit for contributions that remained unpaid for the current and the previous year.⁶⁵ It even goes so far as to create a legal hypothec on the unit sold as security for the unpaid contributions.⁶⁶ In order to relieve the burden upon incoming owners, the Spanish statute requires that the

59. Cód. Civ. art. 3266 (Arg.).

60. Commonhold Community Statement, art. 4, paras. 4.7.3, 4.7.5. See also Commonhold and Leasehold Reform Act, 2002, c. 15, § 16 (Eng.) (specifying the effect of the Commonhold Community Statement on the transfer of units).

61. Commonhold Community Statement, art. 4, paras. 4.7.1, 4.7.2, 4.7.4 (stating that a unit holder can require the association, within 14 days of the notice, to certify sums claimed as owed prior to transferring the unit and that sum is the maximum the new owner must pay).

62. Commonhold and Leasehold Reform Act, 2002, c. 15, §16, para. 2 (Eng.).

63. Commonhold Community Statement, art. 4, para. 4.7.7 (Eng.); Commonhold and Leasehold Reform Act, 2002, c. 15, § 16 (Eng.) (specifying the effect of the Commonhold Community Statement on the transfer of units).

64. The cause of the transfer, whether it be a sale, exchange, donation, inheritance, etc., is of no importance.

65. Spanish Law on Horizontal Property, *supra* note 2, art. 9.

66. "El piso o local estará legalmente afecto al cumplimiento de esta obligación." *Id.*

public deed transferring the unit (usually a deed of sale) must contain a certificate signed by the secretary and countersigned by the president, which either states that all sums due have been paid or mention the amount still due. No transfer is possible without such certificate unless the transferee (purchaser) expressly exempts the notary from including the certificate in the deed of transfer.⁶⁷ The above provision constitutes an effective embargo against transfer of a unit unless contributions still owed by the transferor (seller) have been fully paid. If the purchaser has exempted the notary from including the certificate in the notarized deed of transfer, the purchaser would incur liability for all the debts still owed by the transferor (seller) in respect of the unit. He would, however, incur such liability with full knowledge of the consequences of granting the above-mentioned exemption.

A final provision requires the seller to notify the secretary of the association of the change in ownership of the unit. Without such notification, the transferor would still be liable *in solidum* (jointly and severally) with the transferee for outstanding contributions in respect of the unit. In this situation, the former owner would be left with a right of recourse against the new owner if the association succeeded in a claim against him.⁶⁸ This is standard in cases of joint and several liability, and the converse should also apply. Nothing prevents the management association from instituting a claim jointly and severally against both the former and the present owner.⁶⁹ This provision is not applicable where any management body had express or implied knowledge of the change of ownership.⁷⁰

The Mexican statute also requires that a certificate stating that there is no outstanding debt in respect of the unit be issued to the purchaser as part of the preparation of a deed of sale. If no such certificate is issued in respect of the unit, the transferor and transferee will remain liable *in solidum* (jointly and severally) for the debt still owed.⁷¹

The Colombian statute starts with a general statement that the transferor (seller) and the transferee (purchaser) are liable *in solidum* for any outstanding debts of the transferor.⁷² In order to safeguard

67. *Id.*

68. *Id.*

69. *Id.* art. 21.

70. *Id.* art. 9.

71. Mexican Law on Condominiums, *supra* note 10, art. 61.

72. Colombian Law 675 of 2001, *supra* note 10, art. 29.

the interests of the transferee, it then requires the notary who prepares the transfer documents to obtain a certificate from the legal representative of the condominium association stating the amount of debt still owed in respect to the unit.⁷³ If no such statement is obtained, this fact as well as the liability *in solidum* of the transferor and transferee must be communicated to the manager of the condominium.⁷⁴

The Puerto Rican statute proceeds from the premise that the claim for common expenses constitutes a burden on the unit if registered in the land register. It then draws a distinction between voluntary and involuntary transfers of the unit. Voluntary transfer of the unit includes all transfers to outsiders at any price, including transfer to a mortgage creditor who purchases the unit for a sum exceeding the outstanding debt. Involuntary transfer of the unit is limited to a transfer to the mortgage creditor in a judicial auction where no outsiders offered to purchase it for a price that equals or exceeds the outstanding debt plus interest. In the case of a voluntary transfer, the transferor and transferee are liable *in solidum* for the outstanding debts of the transferor. This includes a right of recourse for the purchaser against the former owner.⁷⁵ In the case of an involuntary transfer, the mortgage creditor, to whom the property is transferred, is only liable for those unit debts that were incurred in the six months before the acquisition of the unit.⁷⁶ The statute also extends this obligation to financial institutions that had provided credit to purchasers who bought units in a scheme on the basis of building plans before the condominium building was completed.⁷⁷

In terms of the Québec Civil Code, the purchaser of a unit may request a statement from the association (*syndicat*) detailing the common expenses due with respect to the unit, adjusted to the last annual budget. If the statement is not provided within fifteen days,

73. *Id.*; see also *id.* art. 51 (requiring the administrator to issue a certificate indicating the outstanding debt in respect of the unit in every case of a change of ownership of a unit).

74. *Id.* art. 29.

75. Puerto Rican Condominium Law, *supra* note 10, art. 41 (codified in P.R. LAWS ANN. tit. 31, § 1293e (2005)).

76. *Id.* arts. 39, 41 (codified in §§ 1293c, e).

77. *Id.* art. 41 (codified in § 1293e). Financial institutions that take over units in building projects in a mortgage foreclosure are not equated to developers and are thus exempted from paying debts owed in excess of six months, provided that they do not take charge of the completion of the project. *Id.*

he will be under no obligation to pay the expenses.⁷⁸ This fits in well with the notion of estoppel: the impression created by the silence of the association is that there are no outstanding claims against the previous owner.⁷⁹ Having received the statement, the prospective purchaser can presumably negotiate for a lower price. The loss suffered on account of non-delivery of the statement must presumably be born by the association or recovered from the official responsible for issuing such a statement. The Québec Civil Code does not impose liability *in solidum* on the purchaser of a unit and does not distinguish between voluntary and involuntary transfers of a unit. For example, the Québec court has ruled that a mortgage creditor who takes over the unit in a mortgage foreclosure is only liable for expenses arising subsequent to his acquisition of the property by court order.⁸⁰

The French statute imposes a specific obligation on notaries in an effort to eliminate outstanding debts in respect of the unit at the moment of transfer. It obliges the seller, on transfer of a unit, to furnish the notary with a certificate from the manager of the building. The certificate must specify that all debts have been paid, and it must have been prepared within the last month. If this is impossible, the notary must notify the manager of the building (*syndic*) by recorded delivery within 15 days of the transfer of the unit that all debts have not been paid. The *syndic* can then by notice oppose any transfer of funds until assessment arrears have been paid off out of the proceeds. The notice must indicate the cause and the amount of the debt and must be served at a domicile within the jurisdiction of a court of first instance. The embargo on disbursement to the seller is limited to the amount mentioned in the notice. Any voluntary or judicial payments made in contravention of the foregoing do not have any legal validity against the *syndic*. An action by the *syndic* gives rise to a security right in terms of article 19-1 in favor of the association (*syndicat*).⁸¹

The Unit Ownership Act of Montana contains another example of joint and several liability of the seller and purchaser of a unit.⁸² This statute provides that the “consensual grantee” of a unit is liable *in solidum* for the unpaid debts of the consensual grantor up to the

78. C.C.Q. art. 1069.

79. C.C.Q. art. 1062 annot. 1062/7 (citing Syndicat de la copropriété Le Château Bellevue c. Paradis-Coté, C.Q. St.-François, no. 450-32-004157-988, le 19 février 1999).

80. *Bank Royale du Canada c. Syndicat Port Royal* [1998] R.D.I. 705 (C.Q.).

81. French Law No. 65-557, *supra* note 9, art. 20.

82. MONT. CODE ANN. § 70-23-611 (1995).

time of the grant or conveyance.⁸³ This is without prejudice to the grantee's right to recover from the grantor the amount paid by the grantee.⁸⁴ In the case of an involuntary transferee (for example, when the unit is taken over by a mortgagee at a foreclosure sale), the debt of the former transferor is divided proportionally amongst all the unit owners, including the purchaser.⁸⁵

A variant on the foregoing appears in the South African Sectional Titles Act.⁸⁶ This Act provides that the land registrar is not entitled to register a transfer of a unit in the land register unless furnished with a conveyancer's certificate. This certificate must confirm that, as of the date of registration, the body corporate (management association) has certified that all moneys due to it have been paid or that satisfactory provision has been made for the payment thereof.⁸⁷ This provision places a restriction on the transfer of a unit until arrear levies have been paid.⁸⁸ In the South African courts, a dispute has raged for some time over whether this embargo can be construed as a tacit lien in favor of the association ranking above a previously registered mortgage. The Supreme Court of Appeal decided that this restriction could be significant in the case of the transfer from an insolvent estate.⁸⁹ In such a case, the embargo can be accommodated as part of the "cost of realization" within the scheme provided for by the South African Insolvency Act.⁹⁰ Consequently, the debt must be paid before the applicable conveyancer's certificate will be issued,⁹¹ which would then lead to the registration of the transfer of the unit. Only then would the mortgagee be able to exercise his security right to be satisfied out of the proceeds of the sale. However, in cases where the transfer was not from an insolvent estate, the Supreme Court of Ap-

83. *Id.*

84. *Id.*

85. *Id.* § 70-23-610. The cost of foreclosure is borne by all the unit owners as well as the purchaser and not by the purchaser alone. *Id.*

86. South African Sectional Titles Act, *supra* note 2.

87. *Id.* § 15B(3)(a)(i)(aa).

88. *See id.*

89. *See, e.g.,* First Rand Bank Ltd. v. Body Corporate of Geovy Villa 2004 (3) SA 362 (SCA) at para. 27 (S. Afr.).

90. Insolvency Act 24 of 1936 § 89(1) (BSRSA 2000) (S.Afr.); *see also* Nel NO v. Body Corporate of the Seaways Building 1995 (1) SA 130 (C) at 136E-F (S. Afr.) *aff'd*, Nel NO v. Body Corporate of the Seaways Building 1996 (1) SA 131 (SCA) (S.Afr.).

91. Nel NO v. Body Corporate of the Seaways Building 1995 (1) SA 130 (C) at 139F (S. Afr.).

peal has refused to recognize that the embargo could be construed as a security right, which affords the association a preferential right with respect to outstanding debts pertaining to the unit.⁹² Ultimately, the provision is only effective in the case of insolvency of the transferor by virtue of the peculiar provisions of the South African Insolvency Act. In all other situations, this measure is effective only where the unit owner has sufficient funds to satisfy his outstanding debts so that the unit can be transferred.

In our opinion, an embargo on transfer or disbursement of the proceeds of the sale to the seller-transferor, is, in principle, the most efficient way of ensuring that the association is reimbursed for assessment arrears. Since the transferor is ultimately responsible for paying the assessment debt up until transfer, it seems only fair that the purchaser-transferee should have a right of recourse against the seller-transferor if he is forced to pay the outstanding debts of the former. If this right of recourse proves fruitless, the loss should still fall on the purchaser who, by virtue of most statutes in most jurisdictions, has the right to obtain a certificate from the association indicating the extent, if any, to which contributions remain unpaid.⁹³

C. Measures to Protect the Financial Position of the Management Association where the Financial Position of the Unit Owner Is not Sound

1. *Introduction.* In order to protect management associations from financially weak owners, several statutes grant the management association some kind of automatic security right over the most valuable assets of such defaulting owners, namely their movable or immovable property (the apartment). These assets are encumbered automatically. Although most statutes require that the security right be registered, the right is created without the necessity of a court order. The most important question to be considered below is whether and to what extent the association's security right for unpaid contributions has priority over previously registered mortgages that already burden the apartment.

92. First Rand Bank Ltd v. Body Corporate of Geovy Villa 2004 (3) SA 362 (SCA) at paras. 30-31 (S.Afr.).

93. See, e.g., Commonhold Community Statement, art. 4, para. 4.7.4; MONT. CODE ANN. § 70-23-611 (1995).

2. *Automatic Lien over Movable Property.* France is the only one of the statutes analyzed here in which a lien over the movable property of the unit owner is used as a security mechanism. In other countries, in order for movable property to attach, it must be seized in an embargo procedure. The French statute extends the application of the special privilege (lien) created in article 2102, par. 1, of the French Civil Code to the condominium association (*syndicat*).⁹⁴ This privilege (lien) gives the association a preferential claim to the furniture in the unit when the unit has been rented out as a furnished apartment. Further, this privilege secures all claims that are due or will become due to the association. If the furniture is removed, the association can retain its security by demanding restoration within 15 days.⁹⁵

3. *Automatic Liens over the Apartment of the Defaulting Owner.* Since the apartment is usually the most valuable asset of a defaulting owner, several statutes grant the management association an automatic lien against the unit and its appurtenant share in the common property. In Ontario, this security right is linked to the unpaid amount, interest thereon, and all costs and expenses incurred in the collection or attempted collection of the debt.⁹⁶ This lien expires three months after the default occurred, unless the corporation registers a lien over the unit, having notified the owner ten days in advance. Once registered, the lien may be enforced in the same way as a mortgage.⁹⁷ Also in Ontario, on prior notification, the lien has priority over existing registered and unregistered encumbrances.⁹⁸ However, this priority does not extend to certain claims by the Crown and municipal claims for taxes, charges, rates or assessments.⁹⁹

Under the British Columbia Strata Property Act, the management corporation is also empowered to register a lien against an owner's strata unit (lot) for non-payment of strata fees or a special levy if the owner has not responded to a two weeks' notice for payment and has been warned that a lien would be registered in case of

94. French Law No. 65-557, *supra* note 9, art. 19.

95. C. CIV. art. 2102 (Fr.).

96. Ontario Condominium Act, *supra* note 8, § 85(1).

97. *Id.* §§ 85(2)-(6).

98. *Id.* §§ 86(1), (3), (5).

99. *Id.*

non-payment.¹⁰⁰ On registration, the lien ranks before every other lien or registered charge, except for certain charges in favor of the Crown,¹⁰¹ and entitles the management corporation to apply to the Supreme Court for an order for a forced sale of the unit (lot).¹⁰² Such an order must provide that if the debt is not paid within the time period required by the order, the strata corporation may sell the strata lot at a price and on terms to be approved by the court.¹⁰³ Reasonable legal costs, land title and court registry fees, and other reasonable disbursements in connection with the registration or enforcement of a lien may also be added to the amount due.¹⁰⁴

The Singaporean Act creates a similar statutory charge if a contribution remains unpaid for a period of 30 days after a written demand for payment has been served and the charge has been registered.¹⁰⁵ If a prior mortgage or charge creditor sells the lot in exercise of a power of sale, the Act expressly provides that the registered charge of the management corporation shall not be defeated by the exercise of such power of sale.¹⁰⁶ Following the procedure and precautions set out in the Act, the management corporation may finally sell the unit affected if the levies remain unpaid.¹⁰⁷ If the lot is burdened with a prior mortgage, the management corporation would, in practice and in view of its priority in such a case, try to save the cost of litigation and wait for the mortgage creditor to exercise its power of sale.

Under the Spanish statute, claims of the management association for the present and previous year take precedence over registered mortgages and claims provisionally registered in the land register as a result of attachments, seizures or execution of a judgment by order of the court. However, they rank lower than tax claims, certain insur-

100. B.C. Strata Property Act, *supra* note 8, §§ 112, 116(1), 116(2). Section 116(1) notes that a lien can also be registered if the money is owed as reimbursement of the cost of work undertaken by the corporation and the strata lot's share of the judgement debt against the strata corporation.

101. *Id.* §§ 116(4)-(5). The lien further does not enjoy priority to the extent that the corporation's lien is for a share of a judgment against the strata corporation.

102. *Id.* § 117.

103. *Id.*

104. *Id.* § 118.

105. Singapore Strata Title Act, *supra* note 8, § 43(1).

106. *Id.* § 43(2)(b).

107. *Id.* § 43.

ance claims, and certain other security rights over the unit.¹⁰⁸ In France, the administrator (*syndic*) may register a *hypothec* over the unit for contributions due over the last five years.¹⁰⁹ No registration or supplementary registration can be requested for a debt due that is over five years old.¹¹⁰

The Puerto Rican statute grants the management association a lien over a defaulting owner's unit for outstanding maintenance and other contributions ranking above all other claims, subject to a few exceptions. The exceptions are as follows: state and municipal claims for property taxes for the current year and the five years prior; claims for outstanding insurance premiums in respect of the unit and the building for the last two years; and, most importantly, registered mortgages.¹¹¹ If the debt is claimed in court, the association can request that a restriction be placed on the unit preventing it from being encumbered any further. Once the embargo is decreed, it is the responsibility of the board of directors to file a certified copy of the embargo with the public land registry to be noted in the appropriate files.¹¹²

In summary, the security right over the unit of an apartment owner for unpaid contributions sometimes arises automatically, but it must ultimately be registered to obtain validity. The secured claim in terms of the security right varies from two to five years. In some cases, the security right is granted priority over existing mortgages, while in other cases it is not. In what follows, we shall scrutinize the United States practice and, in particular, the super lien granted by the UCIOA in order to find the ideal solution.

4. *U.S. Practice.* In the United States, many state statutes and condominium declarations provide for liens against units to secure payment of contributions from the unit owner.¹¹³ However, despite common law authority to the contrary, many statutes or condominium declarations have typically ranked these assessment liens lower

108. Spanish Law on Horizontal Property, *supra* note 2, art. 9; CÓD. CIV. art. 1923 (Spain).

109. French Law No. 65-557, *supra* note 9, arts. 19, 19-1.

110. *Id.*

111. Puerto Rican Condominium Law, *supra* note 10, art. 40 (codified at P.R. LAWS ANN. tit. 31, § 1293d (2005)).

112. *Id.* art. 39 (codified in § 1293c).

113. See Winokur, *supra* note 11, at 357.

than mortgages recorded at an earlier date.¹¹⁴ This placed associations in an unenviable position, since foreclosure sales rarely produce proceeds sufficient to satisfy the unpaid contributions secured by the association's lien. In a weak market where the proceeds of the sale of the unit do not even cover the outstanding debt of the first mortgage, the association's lien would be worthless.¹¹⁵

It is generally accepted that the needs of mortgage lenders who play a crucial role in the development of condominiums must be addressed. However, it must be pointed out that the financial strength of an association has a strong effect on the value of the apartments in which both lenders and residents have invested. Difficulties experienced in the collection of contributions affect the lender itself, since not only the value of the unit concerned but also the values of other units in the condominium which he holds as security would decrease. As a result of the economic interdependence of unit owners, the uncollectible shares of defaulting unit owners are passed on to their paying neighbors. These increased contributions put greater pressure on conforming owners to also default or sell their units at lower prices in order to avoid unexpected assessment costs.

Furthermore, financially weak associations that find it hard to justify the cost involved in pursuing the collection of unpaid contributions set contributions at an artificially low level by cutting back on maintenance and management.¹¹⁶ This strategy not only overburdens upstanding owners but also hastens the decline of common facilities and the need for major replacement of condominium assets. These conditions are greatly exacerbated in hard economic times. Foreclosures and abandonment of units severely deplete the assessment base and property values within these condominiums. As the assessment base dries up, associations will be left with the choice of either heavily burdening the decreasing number of remaining solvent residents with increased contributions or deferring necessary maintenance operations. This, in turn, will spark even higher levies as deferred maintenance takes its toll. These problems will become more acute in the future as condominium buildings become older.¹¹⁷ The provision for

114. *Id.* at 357-58.

115. *Id.* at 358-59.

116. *Id.* at 359-60.

117. *Id.* This problem is especially acute in South Africa where more than half of the condominium stock consists of old rental buildings that have been converted to condominiums. See

reserve funds in most statutes does not solve the problem of rising recurring costs.

In non-condominium foreclosures, the lender will typically try to protect his security by payment of property taxes, premiums on casualty insurance, and physical maintenance of the house. The lender should also realize that he is protecting his own interest by shouldering some of the responsibility for the payment of outstanding contributions in condominium foreclosure scenarios. Furthermore, the lender is able to protect himself against losses by a proper investigation of the borrower's credit, by varying the size of the loan relative to the value of the property, by requiring escrow funds to cover priority claims, or by obtaining mortgage insurance. Being the unit owner's involuntary creditor, none of these safeguards are open to the condominium association.¹¹⁸

5. *The Superlien of the Uniform Common Interest Ownership Act (UCIOA)*. To strike an equitable balance between the need to collect unpaid levies swiftly and the necessity to retain the continued investment of lenders in condominiums, the UCIOA offers an ingenious compromise: it grants the condominium association a super priority lien over previously registered (first) mortgages for unpaid contributions for up to six months before the foreclosure action.¹¹⁹ Computation of the amount of the lien is based on a periodically adopted budget.¹²⁰ In reality, a lien with a split priority is created. This perpetually renewable lien comes into existence once the assessment or fine becomes due. As soon as a unit owner defaults on his payments, it is transformed into a lien with super priority.¹²¹ Any excess of the total assessment defaults and fines or costs over the six month ceiling remains a lien on the property. The portion of the association lien securing this excess will be junior to the first mortgage

1 CORNELIUS VAN DER MERWE & D.W. BUTLER, SECTIONAL TITLES, SHARE BLOCKS AND TIME-SHARING 7-14 n.63 (1999).

118. See Winokur, *supra* note 11, at 360-61.

119. UCIOA §§ 3-116(a), (b), (d), (h). See Winokur, *supra* note 11, at 366-68 on the question of whether a non-judicial foreclosure also qualifies as an "action."

120. UCIOA §§ 3-116 (h), 3-103(c) (1994). See also Winokur, *supra* note 11, at 369, opining that the UCIOA budget procedure strikes a good balance between insisting on methodical financial planning by associations and allowing association boards space to govern without severe interruption by unrepresentative, disgruntled owners.

121. UCIOA § 3-116(b)(ii) (1994). For the position of condominium associations existing before the introduction of the super lien, see Winokur, *supra* note 11, at 369-74.

on the unit, but senior to other mortgages and encumbrances not recorded before the declaration. Thus, although the association's lien is a single lien, it is split into two liens holding varying priority.¹²² The mortgage foreclosure can thus extinguish whatever portion of this lien is not prioritized as it would any junior lien.¹²³ Subject to any contrary language in the declaration, the UCIOA's assessment lien covers regular monthly dues, as well as fees, charges, fines and interest.¹²⁴ The lien and its statutory priority may not be waived.¹²⁵

To benefit from this mechanism, the association must record a verified claim for unpaid contributions, which describes the amount due, the name of the owner, and the common elements of the scheme. There is no need to record the lien, since recording of the declaration on establishment of the scheme is considered notice of any future claim of the association and perfection of the lien.¹²⁶ A lender or prospective lender is not kept ignorant of the outstanding amount. The former may at any time ascertain this amount by requesting that the unit owner obtain from the association a recordable statement indicating the precise amount of any arrears.¹²⁷ If the unit owner fails to pay, the association can collect the assessment by taking advantage of

122. Winokur, *supra* note 11, at 366 (showing that such a split priority is also encountered in a construction loan lien securing future optional advances held partially senior and partially junior to an intervening materialman's lien, based on advances made before a materialman's lien attached). See *id.* at 374-75 for the ranking of mechanics' liens vis-à-vis the super lien.

123. Winokur, *supra* note 11, at 363 (discussing the possible advantages of installment assessment obligations and providing a reference to WASH. REV. CODE § 123.1 64.34.364(1) (1990) as an illustration).

124. UCIOA § 3-116(a) (1994). Some states expressly add attorney's fees. See, e.g., COLO. REV. STAT. § 38-33.3-316(1) (1991) (Supp. 1991); CONN. GEN. STAT. § 47-258(1991). See Karen Ellert Peña, *Reining in Property Owners' Associations' Power: Texas's Need for a Comprehensive Plan*, 33 ST. MARY'S L.J. 323, 350 (2002), for a discussion of § 207.125(j) of the proposed Texas Planned Community Act, which prohibits the association from foreclosing a lien for an assessment consisting solely of fines or attorney's fees associated with fines.

125. UCIOA § 1-104 (1994). See generally Winokur, *supra* note 11, at 363-67.

126. UCIOA § 3-116(d) (1994). See generally Winokur, *supra* note 11, at 385-87.

127. See Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495, 541-43 (1997). See also Winokur, *supra* note 11, at 387-89, which states that instead of having assessment delinquencies recorded, the UCIOA § 3-116(h) allows a unit owner to request a recordable assessment status certificate from the association indicating the unpaid contributions charged against the owner. This certificate, which must be delivered within ten business days, is binding on the association, the board and all the unit owners. The certificate statement can be placed on public record and presented to other interested parties, such as a mortgagee or potential buyer. In practice, buyers, lenders and title insurers regularly insist on such an "estoppel statement" as proof that assessment delinquency does not encumber the unit. *Id.*

the local jurisdiction's expedited foreclosure or holdover-tenant procedures.¹²⁸ Alternatively the association may simply wait and use the lien to prevent the sale of the unit until the lien is paid off. If a unit owner resists, or brings an action to challenge the imposition of fees or the lien, or contests foreclosure and loses, the association is entitled to attorney's fees.¹²⁹

An association lien may be foreclosed in a similar manner to a mortgage on real estate or by power of sale if the declaration allows for such an option.¹³⁰ The association would join the holders of any mortgage, deeds of trust or other interests junior to the super lien as necessary parties to a judicial foreclosure, or formally notify these parties of the sale in non-judicial foreclosure.¹³¹ Holders of junior interests would have the right to receive any excess of the foreclosure sale price over the amount of the super lien in the order of their priorities.¹³² The association's lien on an outstanding amount exceeding six months from the date of action would be among those junior interests.¹³³

If the first mortgagee institutes foreclosure proceedings on any ground,¹³⁴ the mortgage and its foreclosure would be subject to an existing super lien.¹³⁵ As a senior interest, the association's super lien could probably not be forced into the mortgage foreclosure, but if the association participates, payment of the super lien will be necessary to clear title for resale or for presentation of mortgage insurance.¹³⁶

In the past, lenders tended to delay foreclosure on their mortgages for extended periods until they had worked out some disposition for the property.¹³⁷ This delay threatened many condominium associations in economically depressed markets when a single lender held defaulted mortgages on a substantial number of units with either

128. UCIOA § 3-116(j) (1994).

129. UCIOA § 3-116(g) (1994). *See also* Elberg, *supra* note 7, at 1974-75.

130. UCIOA § 3-116(j) (1994). *See* Winokur, *supra* note 11, at 376-77 (discussing the position with regard to foreclosure by power of sale).

131. *See* Winokur, *supra* note 11, at 377.

132. *Id.*

133. *Id.*

134. This could be on mortgage payment default or in terms of a provision in the mortgage deed allowing the mortgagee to initiate action on assessment default by the mortgagor-unit owner.

135. *See* Winokur, *supra* note 11, at 371-74.

136. *See* Winokur, *supra* note 11, at 377-78.

137. *Id.* at 379.

insolvent or abandoning owners.¹³⁸ But now lenders are threatened with substantial procedural delays if the association forecloses on its super lien.¹³⁹ In order to retain control over foreclosure, the lender may agree to pay delinquent contributions to the association. This was the response envisaged by the drafters of the UCIOA.¹⁴⁰

Such payment might also seem attractive when assessment default is not accompanied by default in the mortgage payments, especially since most mortgage agreements allow a borrower's delinquent contributions to be added to the secured debt. Moreover, payment is frequently realized by discounting the value of the unit by an amount equal to the six months' levies and adjusting the size of the loan accordingly. While still subject to the super lien being triggered on future defaults,¹⁴¹ with any luck those defaults will not immediately prompt an association foreclosure. While the economy is strong, the lender (mortgage creditor) can frequently encourage the unit owner to cure his default and avoid future defaults even if this means providing the unit owner with some cash by raising the amount of the loan. When the economy is weak, the lender would probably elect to refrain from paying contributions, obtain title to the unit in foreclosure, and either sell or rent the unit for income to pay contributions.¹⁴² In the final analysis, the association has an interest in facilitating the foreclosure: foreclosure results in a new owner for the unit, most likely the initial lender, who will pay contributions regularly in the future. If the lender holds multiple properties in a condominium scheme, the resulting assessment income can be substantial.¹⁴³

A compelling case can be made for granting the assessment lien a limited priority over first mortgages.¹⁴⁴ The money obtained from unit owners is used to maintain the common property and to encourage efficient management and thus to protect the first mortgagee's (lender's) security by maintaining or increasing the market value of

138. *Id.*

139. *Id.*

140. UCIOA § 3-116 (1994).

141. Payment by the lender does not necessarily trigger an equitable redemption of the super lien due to the latter's renewable character. See Winokur, *supra* note 11, at 380-84.

142. See *id.* at 385.

143. See *id.* at 377-79.

144. See generally Natelson, *supra* note 127, at 543; Winokur, *supra* note 11, at 357; Fierro, *supra* note 7, at 265-66.

his security.¹⁴⁵ Since the lender expects to spend money in other foreclosure settings to protect his security, he should not balk at the idea of a super priority of six months' contributions that ranks above his mortgage for money expended on the mortgaged property. Without such priority, the costs of maintaining the building are diverted unfairly to the other unit owners who are ultimately liable for any shortfall. Furthermore, mortgage foreclosures on units leave the association with little remaining equity in the defaulter from which to collect arrears; the other owners are not obliged and are often unwilling to stand in for the shortfall whenever there is one. Over time, this lack of money would ruin the reputation of the building and in turn the security of other lenders.

Again, where the association provides additional services in the form of the provision of roads and garbage collection, such services could be drastically impeded with a negative effect on the security of lenders. In this context, the association's lien is comparable to a local authority's charge on property for payment for services rendered. Furthermore, lenders are in a much better position to protect themselves against default than the association. In principle, associations are not allowed to restrict entry into a condominium scheme, whereas lenders can choose the persons they want to do business with. In addition, lenders can obtain mortgage insurance and insist on escrow arrangements (money paid into a trust account), as they already do for taxes and insurance.¹⁴⁶ The idea behind limiting the super priority to six months of periodic contributions levied pursuant to a budget is to encourage associations to enforce the lien diligently and to take care by budgeting meticulously. Since lenders are almost invariably sufficiently sophisticated to have notice of the recorded condominium declarations and can obtain a certificate indicating the outstanding charges against a unit, they can devise an action plan to safeguard their security.¹⁴⁷

In the United States fears have been expressed that the super priority of the association would impair the sale of mortgages on the

145. According to most condominium statutes, a unit consists of a particular apartment plus an undivided share in the common elements. See, e.g., South African Sectional Titles Act, *supra* note 2, § 1; MONT. CODE ANN. § 70-23-401 to 403 (1995).

146. Natelson, *supra* note 127, at 543.

147. The practice of furnishing such an "estoppel" certificate is well established. See, e.g., Uniform Ownership Act, MONT. CODE ANN. § 70-23-611 (1995).

secondary market.¹⁴⁸ This in turn would dry up mortgage funds to prospective unit owners and interfere with the sale of condominiums.¹⁴⁹ However, the most important lending institutions¹⁵⁰ expressly contemplate acquisition of mortgages subject to the super lien.¹⁵¹ Furthermore, attorneys in states that have adopted the super lien insist that there is no evidence that its existence impairs sales of mortgages on the secondary market or indeed the sale of condominiums in general.¹⁵² It has also been suggested that the loss of priority would force lenders to demand that each purchaser of a unit escrow six months of contributions to stave off the risk of having to pay for defaulted contributions.¹⁵³ Since developers may not be shown any preference in the allocation of assessment liability, the substantial burden placed on them during the early life of a condominium would substantially increase the development cost of condominiums, which would be passed on to purchasers. However, the expectation that escrows would be required was one of the reasons behind the UCIOA's provision limiting the super lien to six months' arrears.¹⁵⁴ While experience with the super lien suggests that lenders do not ordinarily impose escrow conditions on unit purchasers,¹⁵⁵ the imposition of escrow conditions should be recognized as a legitimate cost generated by the maintenance of the building and other services and facilities in which unit owners share. Furthermore, the requirement for escrow funds ultimately protects the interests of the non-defaulting owners whose own contributions might otherwise increase substantially upon the default of other owners.¹⁵⁶

The UCIOA's super lien should be seen as a genuine attempt to protect the financial vitality of condominium associations, which are

148. Mortgage creditors sell their negotiable mortgage bonds in the secondary mortgage market to investors who normally require these bonds to be insured with priority claims on the property offered as security. See Winokur, *supra* note 11, at 390-91.

149. For unwarranted fears expressed by title insurers see Winokur, *supra* note 11, at 392-93.

150. Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mae).

151. See Winokur, *supra* note 11, at 390 & n.157.

152. See *id.* at 390-91 & n. 158.

153. See *id.* at 391.

154. UCIOA, § 3-116, comment 1, 7 (1994); 7 U.L.A. at 529 (1982); Robert A. Wittie, *Origins of the Community Association's Special Lien Priority for Unpaid Assessments under the Uniform Acts*, 1 MULTIPLE OWNERSHIP ACTS SYMPOSIUM 171, 173 (1991).

155. See Winokur, *supra* note 11, at 392 & n.162.

156. See *id.* at 391-92.

now performing many functions traditionally carried out by local authorities in the United States, such as garbage collection and maintenance of streets and parks. Problems with the collection of contributions would jeopardize important community services and would place the burden of maintaining the common elements disproportionately on the shoulders of the members who make timely payments. The super lien would substantially improve the financial strength of associations, address lender concerns by limiting the super lien to six months' arrear contributions and shield unit purchasers from additional payments. Furthermore, lenders have a variety of other means of protecting themselves. Some added risk does not seem unduly burdensome in exchange for assuring maintenance of common property and protecting the value of their collateral. A fair balance is thus struck between the interests most closely involved. Again, this lien can make sometimes enfeebled associations more aggressive vis-à-vis other foreclosure claimants and "leaner" by compelling them to streamline association budgeting, increase responsiveness to inquiries and document their affairs more thoroughly.¹⁵⁷

CONCLUSION

It is clear that condominium associations must be given teeth to enforce the payment of contributions. A quick solution is needed in order to place associations in a position where they can manage the scheme effectively and not procrastinate on maintenance and repairs. What is needed is a swift, inexpensive procedure to allow the association to gather funds in a short time. For this purpose, associations in many countries have to fall back on ordinary recovery of debt procedures, while some jurisdictions provide for a swifter summary procedure in their condominium statutes.

The best solution is offered by the Singaporean statute, which allows condominium associations to institute their claims for arrear contributions in small claims courts. These courts, as elsewhere, are

157. See *id.* at 294-95; *id.* at 395 (summarizing the technical problems impeding the functioning of the super lien provisions of the UCIOA); Ronald B. Cox, *Case Law Development: Commercial Law: II. Purchase Money Mortgage Held Superior to Liens for Past Due Assessments*, 47 S.C.L. REV. 26, 30-31 (1995); Peña, *supra* note 124, at 350, 363-64 (arguing for better protection of the owner at a foreclosure sale and for more compassionate means of enforcing an owner's assessment debt). See also Natelson, *supra* note 127, at 546-47 (criticizing provisions that allow the association to collect rent from the unit owner after default until eviction).

renowned for their swift and inexpensive operation.¹⁵⁸ As in the case of ordinary debtors, defaulters on contributions should be obliged to pay interest on late payments as well as the cost of collection, including reasonable attorney's fees. Deprivation of the vote of defaulting owners would have little deterrent value. However, if compatible with the social *mores* of a country and the owner's human rights,¹⁵⁹ the imposition of fines, the cutting off of services and use of facilities, and the "name and shame" measures discussed above might well make a solvent owner think twice before he falls into arrears with his payments.

However, the crucial question is how the condominium statutes should deal with the unit owner who has financial difficulties in keeping up with his payment of contributions. Most statutes allow for the attachment of the movable (personal) property of the defaulter and ultimately for foreclosure on the unit itself. Alternative dispute resolution procedures might be helpful to bring the defaulter, the association and lenders (mortgage creditors) together in an effort to re-schedule the mortgage debt and/or work out ways in which the contribution debt can be satisfied.¹⁶⁰ The debtor may, for instance, be able to refinance his unit with his original mortgage creditor and use the additional amount to pay his arrear contributions.¹⁶¹

But ultimately a quick measure is needed to replace the defaulter with a solvent new owner who can honor his contribution payment obligations to the association. In this regard, the super lien proposed by the UCIOA seems to offer an ideal solution. The compromise reached for the division of the proceeds of the foreclosure sale seems fair and financially sound. The priority claim for six months arrears

158. See also Hadley Batchelder, *Mandatory ADR in Common Interest Developments: Oxymoronic or just Moronic*, 23 T. JEFFERSON L. REV. 227, 240 (2001).

159. Article 8 of the European Convention of Human Rights identifies respect for private life and the home as an important human right, which can only be infringed if such an infringement is proportionate to the offense. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, *opened for signature* November 4, 1950, 213 U.N.T.S. 222. In principle, a condominium association as a non-public, non-governmental body would generally be in a very weak position to justify infringing human rights on the European stage.

160. A struggling artist can, for instance, be employed to complete artwork authorized by the general meeting in the common areas. Depending on their individual skills, other unit owners can be required to provide a specific service relating to cleaning, maintenance or security in order to "work off" their arrears. For criticism of using ADR processes to recover arrear contributions, see Batchelder, *supra* note 158, at 236-40.

161. This is normally an option for retired unit owners who have good credit ratings but have developed cash flow problems as a result of small pensions.

should encourage the management association to act swiftly to get the condominium scheme back on track by providing for a solvent new owner prepared to regularly pay his or her contributions to common expenses.