

GUIDELINES ON CREDIT RISK MITIGATION

Legal Framework in Poland



*These guidelines were prepared by the Oesterreichische Nationalbank (OeNB)
in cooperation with the Financial Market Authority (FMA)*

We would like to point out that the nature of these Guidelines is intended as merely descriptive and informative. These Guidelines do not – and cannot – make any statements on the requirements imposed by supervisory authorities on credit institutions as regards their treatment of credit risk mitigating methods. Decisions by the competent authorities may diverge from the presentation given in these Guidelines. Furthermore, the editors would like to point out that these Guidelines have been drafted with consultation by Polish jurists and were translated from German into English. Despite the great care taken, the editors do not assume any warranty or liability for the contents, for the selection of the collaborators or for the translation. These Guidelines are intended to serve as an initial source of information and by no means replace a consultation with experts in Polish law. The Guidelines refer to the legal situation as at 1 April 2004.

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Preface

The spreading use of innovative financial products such as securitized assets and credit derivatives and the growing volume of investments in Central and East European countries by Austrian companies is changing the face of the Austrian banking sector.

The *Guidelines on Credit Risk Management* have been drafted to help banks accomplish the changes to their systems and processes needed for the implementation of Basel II and as a source of information on the general market conditions in Central and Eastern Europe. A number of Guidelines were published in the course of the year 2005 on the topics of securitization, rating models and validation, the credit approval process and credit risk management as well as credit risk mitigation methods.

The aim of these Guidelines is to achieve a common understanding between supervisory authorities and banks regarding the upcoming changes in the banking industry. In this context, Oesterreichische Nationalbank (OeNB) and the Financial Market Authority (FMA) view their role as that of partners for the domestic banking community.

These Guidelines entitled *Credit Risk Mitigation, Legal Framework in Central and Eastern Europe* have been drafted with the collaboration of many renowned experts from the respective countries and are designed as an introduction to security law in each country for banks operating in those countries – or planning to launch operations there – as well as for their customers. The Guidelines describe the requirements of the most frequent types of credit security and the problems that may arise in this context.

We hope that the Guidelines on Credit Risk Management will be of interest to readers and will foster a more efficient discussion of developments in the Austrian banking sector.

Vienna, September 2005



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Chapter 1: General Remarks on the Legal System in the Republic of Poland

I. Introduction

These Guidelines look at the *most important instruments used for securing credit risk* that are available under Polish law. In this Chapter there is a short description of Polish regulations, which is followed by a detailed examination of the methods available for the realization of security interest. The individual chapters will look at the specific details of the realization for each type of security.

II. Political and Legal Framework in the Republic of Poland

The Republic of Poland consists of 16 provinces (województwa, regional administrative units), which are grouped into 315 districts (powiats), 65 cities with the rights of districts and 2489 municipalities (gminas). Poland has a population of 38 million inhabitants. Its constitution was adopted on April 2, 1997.¹ In accordance with this constitution, Poland is a democratic state with a separation of powers. The legislature is formed by a two-chamber parliament. It is elected for a four-year term in general elections and comprises the *Sejm* with 460 deputies and the Senate with 100 senators. The president, who together with the government forms the executive, is also elected in general elections. The president's period of office runs for five years from the day of swearing in. The third element of the separation of powers, the judiciary, comprises independent courts and tribunals.

III. The Banking System in the Republic of Poland

The Polish banking system recognizes three types of banks: *Universal banks* (*bank komercyjny*), which have a primary role in providing a service for individual and corporate customers. In addition, there are *cooperative banks* (*bank spółdzielczy*), mainly small local banks that operate as independent units², and beside them there are *mortgage banks* (*bank hipoteczny*), which must be founded as a joint stock company.³ Their main activities include, among others, the granting of mortgage-secured loans and mortgage bond issuance.⁴

Banking supervision is the responsibility of the *Banking Supervisory Commission* (*Komisja Nadzoru Bankowego*). The decisions and duties laid down by the Bank Supervisory Commission are coordinated and carried out by the General Inspectorate of Banking Supervision (*Generalny Inspektorat Nadzoru Bankowego*), which is a separate body within the structure of the Narodowy Bank Polski (Polish National Bank).⁵

¹ Dz.U. 1997 no. 78, pos. 483.

² Sect.4, 16 of the "Act on the Functioning of Cooperative Banks, Association Procedures and the Associated Banks" (Ustawa o funkcjonowaniu banków spółdzielczych, ich zrzeszaniu się i bankach zrzeszających of December 7, 2000) (Dz.U. no.119, pos. 1252 with amendments).

³ Sect.9 Art. 1 of the "Act of August 29, 1997 on Mortgage Bonds and Mortgage Banks" (Ustawa o listach zastawnych i bankach hipotecznych, repromulgation of 2003, Dz.U. no. 99, pos.919 with amendments).

⁴ See Sect.12 of the "Act on Mortgage-backed Bonds and Mortgage Banks".

⁵ Sect.25 Art.1 of the "Act on the Polish National Bank".

Chapter 2: General Remarks on Securing Credit Risk in Polish Law

I. Introduction

Traditionally Polish law differentiates between *claims secured* by a *personal security* or by *collateral*. Sometimes an additional group of *security held in trust* is also referred to, which covers pledged property and the assignment by security. Personal security⁶ includes Civil Code regulated sureties; check and bill guarantees regulated in legislation on cheques and bills of exchange, and bank guarantees, which are regulated to a certain extent in banking legislation.⁷ Although the cumulative assumption of debt is not expressly regulated in the Civil Code, it is recognized in established case law. Claims secured by collateral include pawns, registered liens and mortgages. The Banking Act provides expressly for the assignment as collateral. Although assignment by security is not regulated by law, it is often used by banks. The retention of title is also provided for in the Civil Code.

It must be emphasized that at first glance these legal institutions appear to be very similar to the German or Austrian equivalents. On closer examination, however, significant differences become apparent, especially with regard to realization proceedings, but also due to the divergent relationships between law of obligations and property law in the respective legal systems.

II. The Significance of Academia for the Polish Legal System

These Guidelines often consider the *opinion of academia*. This is because academics play a very important role in the Polish legal system. On the one hand, legal practice is still in its infancy, which means that there is still no precedent for a large number of legal problems. With regard to the Polish banking sector it should be noted that many legal disputes do not come to court at all. This is due to the possibility of a *bank execution title* (*bankowy tytuł egzekucyjny*), provided that the contracting party has signed a written agreement to this effect and the recoverable claims form part of the bank's activities, such as for example lending, which is listed in Article 5 of the Banking Act. The submission in writing to the enforcement is rendered on standard forms. The bank execution title is an execution title, which can be issued by a bank on the basis of its banking books and other banking documents that are concerned with the performance of banking activities.⁸ If the bank obtains an certificate of enforceability from a court, it may then initiate an execution in accordance with the Code of Civil Procedure.⁹

It must also be taken into account that decisions handed down by the Supreme Court of the Republic of Poland are often subject to amendments. In particular, the direct influence of university professors on rulings and interpretations should not be underestimated. Many university professors also serve as judges and therefore issue rulings, which conform to their legal opinions but

⁶ Ustawa – kodeks cywilny of April 23, 1964 (Dz.U. no. 16, pos. 93 with amendments).

⁷ Ustawa – Prawo bankowe of August 29, 1997 (Repromulgation of 2002, Dz.U. no. 72, pos.665 with amendments).

⁸ Sect.96 Art.1 Banking Act.

⁹ F. Zoll, Verfahrensrechtliche Aspekte der dinglichen Kreditsicherheiten im polnischen Recht, in: Drobnig/Roth/Trunk (Publ.), Mobilarsicherheiten in Osteuropa, Berlin 2002, p. 125.

are not necessarily in line with prevailing opinion. This uncertainty for banks will be made clear by making references to the opinion of academia.

III. Procedures for Enforcing Claims

A. Overview

Polish law recognizes three forms of special proceedings, which aim to enforce debt collection quickly and efficiently.¹⁰ They comprise: *summons proceedings*, *summary proceedings* and *simplified proceedings*, whereby the first two can overlap with the last one in some instances. This is due to the fact that the simplified proceedings have been developed for petty disputes. Commercial proceedings must also be considered as they play a significant role for banks. Furthermore, there is a special proceeding for commercial disputes.

Above all, the proceedings are important to ensure that the claims under a loan agreement are legally enforced. The realization of collateral does not always require a complaint filed with a court, it can also be effected for example by a bank execution title.

B. Summons Proceedings

The summons proceedings (*postępowanie nakazowe*) can only be *initiated* by request of the plaintiff in the statement of claim.¹¹ The aim of the summons proceedings is to obtain a *default summons*. This will be issued if the plaintiff has a pecuniary or fungible service claim that can be substantiated by the requisite documents in accordance with Article 485 Par. 1 Code of Civil Procedure.¹² The court also issues a default summons if the debt derives from a bill of exchange, check, warrant or covenant that has been duly completed and where there is no doubt about its content or correctness. The plaintiff must submit valid documents as evidence of the claim unless the title transfer arises directly from securities.¹³ A default summons can also be decreed if the bank can assert a claim based on a statement of its bank books, if the statement of intent has been signed by authorized bank staff and is furnished with a bank seal and if there is evidence that a payment demand has been delivered to the debtor.¹⁴ *With* the issue of the *default summons*, the defendant will be requested by the court to *satisfy the entire claim* and pay the legal costs within two weeks of receiving the summons or *lodge an appeal*.¹⁵ The default summons may trigger the process of execution, which focuses on the collateral, without requiring a certificate of enforceability.¹⁶ If the defendant duly lodges an appeal, a date for a hearing will be set down.¹⁷ At the hearing a judgement will be rendered, in which the court will either uphold or set aside the default summons. In the latter case the court

¹⁰ For details see *F. Zoll*, in: *Beschleunigung des zivilgerichtlichen Verfahrens in Mittel- und Osteuropa*, Wien-Graz 2004, p. 140 ff. m.w.N.

¹¹ Sect.484¹ Art. 2 Code of Civil Procedure.

¹² This includes, e.g., an official document or a payment order accepted by the debtor which has been rejected by the bank due to a lack of cover on the account.

¹³ Sect.485 Art. 2 Code of Civil Procedure.

¹⁴ Sect.485 Art. 3 Code of Civil Procedure.

¹⁵ Sect.491 Art. 1 Code of Civil Procedure.

¹⁶ Sect. 492 Art. 1 Code of Civil Procedure.

¹⁷ Sect. 495 Art. 1 Code of Civil Procedure.

must decide on the merits of the case. The lawsuit may be dismissed for formal reasons. In this case, the proceedings are to be discontinued.¹⁸

C. Summary Proceedings

Summary proceedings (*postępowanie upominawcze*) are regulated in Articles 497¹-505 of the Code of Civil Procedure. If the conditions are met, the proceedings *will be opened ex officio*. A default summons is issued if the plaintiff wants to recover a cash claim¹⁹ and there are no *grounds for disqualification*. These would be

- The manifest *lack of merit* of the claim;
- *Doubt* about the *correctness* of the documents submitted by the plaintiff;
- *Dependence* of the satisfaction of the claim *on the provision* of a reciprocal *service*. Nonetheless, a default summons may be issued if the service has been performed by the plaintiff or the defendant is required to perform in advance.²⁰
- The abode of the defendant is unknown and/or it is impossible to process the default summons in the Republic of Poland²¹, i.e., the abode is known but it is abroad.²²

With the service of the *default summons*, the defendant will be requested to *satisfy the entire claim* and pay the legal costs within two weeks of receiving the summons or *lodge an appeal*. The lodging of an appeal results in the loss of the effectiveness of the default summons so that the subsequent proceedings deal with the claim itself only. Furthermore, the default summons in the summary proceedings differs from that in the summons proceedings in that it does *not constitute an independent title to secure the claim*.²³ If the default summons is *not effectively contested on appeal*, it has the *validity of a legal decision*.²⁴

D. The Simplified Proceedings

The legislator has regulated the simplified proceedings (*postępowanie uproszczone*) in Articles 505¹-505¹³ of the Code of Civil Procedure. As it is applied to cases where the value of the claim is low, a detailed description is therefore not necessary.²⁵

¹⁸ Sect. 496 Code of Civil Procedure.

¹⁹ Sect. 498 Art. 1 Code of Civil Procedure.

²⁰ *Manowska*, *Postępowanie nakazowe i upominawcze* (Enforcement and Summary Procedures), Warszawa 2001, p. 130; *F. Zoll*, in: *Beschleunigung...*, p. 148.

²¹ Sect. 499 Code of Civil Procedure.

²² *F. Zoll*, in: *Beschleunigung...*, p. 149. See Supreme Court decision of November 13, 1970, (II CZ 193/70, OSP 7-8/1971, pos. 144).

²³ *F. Zoll*, in: *Beschleunigung...*, p. 150.

²⁴ Sect. 504 Art. 2 Code of Civil Procedure.

²⁵ This type of procedure is applied, among other things, when a contractual claim is being demanded and the amount disputed does not exceed PLN 5,000 as well as in warranty and guarantee disputes in which the value of the object of the performance does not exceed the amount named above. The amendment of the Code of Civil Procedure includes a new maximum amount, namely, PLN10,000. Within the scope of the simplified proceedings complaints, objections, etc. are submitted by using special forms. Only one claim can be the object of a complaint, and it is not permitted to change a complaint. For more details see *F. Zoll*, in: *Beschleunigung* p. 150.

E. Commercial Legal Proceedings

Commercial legal proceedings²⁶ (*postępowanie w sprawach gospodarczych*) are applicable to civil law *disputes between companies* engaged in economic activity.²⁷ In this context banks are regarded as companies.²⁸ Petty corporate disputes are not included within the scope of the regulation.²⁹ Due to the parties' expert knowledge, many regulations protecting plaintiff parties are waived. There are special rules on the serving of notices, provisions on mandatory attempts to reach an out-of-court settlement before initiating proceedings, adjudicative procedural options without holding oral proceedings etc.

IV. Realization of Security

If the debtor does not attend to his or her obligation to pay, the creditor can gain satisfaction by realizing the collateral used to secure the claim. Polish law recognizes various options to realize security. The realization method availed of by the creditor is always dependent on the specific type of security. In the case of a *pawn* for example only judicial realization by *execution* is possible. For the *financial lien*, in contrast, there are several *out-of-court realization options*, such as for example the sale of the collateral security or its appropriation. As there are numerous out-of-court realization methods, they are described in the sections on the relevant types of security; the following section looks in general at the judicial realization of security.

A. Realization of the Security by Execution

The basis for the execution is a writ of execution with clause of enforceability.³⁰ The clause of enforceability is issued by the competent court.³¹

1. Priority Classes

In Polish law the principle of *pro rata satisfaction of claims* in the creditor classes applies in the execution. Claims that have been secured by a specific collateral security will be satisfied in these classes in accordance with their respective ranking. The existence of a group of preferential claims as against secured claims must always be taken into account. Article 1025 par. 1 of the Code of Civil Procedure contains the fundamental ranking in which claims in execution proceedings are satisfied. The *ranking of the classes* is as follows:

1. Legal costs;
2. Alimony claims;
3. Wage claims for three months up to the amount of the minimum wage³² and social insurance claims for illness, work incapacity, disability or death as well as the cost of a decent funeral;

²⁶ Regulated in Sect. 479¹ Code of Civil Procedure.

²⁷ Sect. 479¹ Code of Civil Procedure.

²⁸ Sect. 479² Art. 1 Code of Civil Procedure.

²⁹ Sect. 479² Art. 2 Code of Civil Procedure.

³⁰ Sect. 776 Code of Civil Procedure (Ustawa – Kodeks postępowania cywilnego of October 17, 1964, Dz.U. no. 43, pos. 296 with amendments).

³¹ Sect. 781 Code of Civil Procedure.

³² The minimum wage is PLN 824.00, Rozporządzenie Rady Ministrów w sprawie wysokości minimalnego wynagrodzenia za pracę w 2004 r. (Decree of the Council of Ministers of September 9, 2003 on the amount of minimum wages in the year 2004, Dz.U. no. 167 pos. 1623).

4. Claims resulting from loans secured by a mortgage;
5. Claims secured by a mortgage or a registered lien or by liens recorded in another relevant register;
6. Wage claims that are not satisfied in the third class;
7. Claims applicable in accordance with the provisions in Part III of the Fiscal Code³³ in as far as they were not satisfied in the fifth class;
8. Claims secured by lien or such that do not have priority in the previous classes mentioned (pawns);
9. Claims of those creditors that have initiated the execution;
10. Other claims.

These classes form, as already mentioned, the normal ranking for the satisfaction of claims. Interest and proceedings costs are satisfied in the same class as the claim. However, only interest for the two years before the conferral of ownership and proceedings costs enjoy the same treatment as the claims in classes 4, 5 and 8 (lien) of up to a maximum of 10% of the capital (claim). The other interest and costs are satisfied in the tenth class.³⁴ If the amount for the full satisfaction of all claims and rights of one class is insufficient, the claims in classes 4, 5 and 8 in their relevant priority according to ranking are satisfied, whereas other claims are satisfied in relation to their respective size.³⁵

2. Execution Title

The Polish Code of Civil Procedure includes a list of permissible *execution titles*. Execution can only be carried out if the title contains a certificate of enforceability.³⁶ Execution titles can be the following:

- A legally enforceable *judgment* or an immediately *enforceable judgment* or a *settlement* agreed-on in court;
- A *judgment* rendered by an *arbitration tribunal* or a *settlement* agreed before such court;
- Other judgments, settlements and legal instruments that can be legally enforced;
- A *notarial instrument*, in which the debtor has submitted to the execution and which contains an obligation to pay a cash sum or provide other fungibles – under the prerequisite that the quantity is determined in the notarial instrument, or an obligation to surrender a specific property listed in the notarial instrument; however, the term of payment, the term of service or the surrender, respectively, must be set out in the notarial instrument;
- A notarial instrument, in which the debtor has submitted to the execution and which stipulates the obligation to pay a cash sum directly set down in the notarial instrument or a sum determined with the help of a stable value clause as long as the notarial instrument has set down the conditions that entitle the creditor on the basis the certificate to execute the enforcement of the entire claim or part of the claim; furthermore, the notarial instru-

³³ Ustawa – ordynacja podatkowa of July 29, 1997 (Dz.U. no. 137, pos. 926 with amendments).

³⁴ Sect. 1025 Art. 3 Code of Civil Procedure.

³⁵ Sect. 1026 Art. 1 Code of Civil Procedure.

³⁶ Sect. 776 Code of Civil Procedure.

ment must set down the period within which the creditor may apply for an application of a certificate of enforceability.³⁷

A special execution title, the bank execution title (*bankowy tytuł egzekucyjny*), is regulated in the Banking Act.³⁸

B. Realization of Collateral in the Event of Bankruptcy

1. General Remarks on Bankruptcy Proceedings

The realization of collateral in bankruptcy proceedings has several special features. The Bankruptcy and Composition Act³⁹ differentiates between *declarations of bankruptcy with the possibility of composition* and declarations that *end in liquidation*. Bankruptcy proceedings with the possibility of composition are undertaken if a credible case can be made that the creditor will receive a better settlement using this alternative than if bankruptcy proceedings ending in liquidation are initiated.⁴⁰ If this is not the case, then bankruptcy with liquidation is declared.⁴¹ The court may amend its decision to conduct liquidation proceedings and initiate bankruptcy proceedings with the possibility of composition instead and vice versa,⁴² if the basis for such bankruptcy proceedings become clear no earlier than during the course of the proceedings.⁴³

Bankruptcy proceedings are *opened upon application*. Both the debtor and his or her creditors are entitled to submit an application.⁴⁴ Prerequisite is the insolvency of the debtor.⁴⁵ The court must *dismiss* a bankruptcy application (mandatory) if the assets of the debtor are insufficient to cover the costs of the proceedings (*insufficiency of assets*). In addition, the court can dismiss the application (optional) if it establishes that the debtor's property has been used as collateral to such an extent that the remaining assets of the debtor are insufficient to cover the costs of the proceedings. If the collateral proves to be invalid, the bankruptcy proceedings are not dismissed.⁴⁶

2. Order of Creditor Satisfaction

The Bankruptcy and Composition Act regulates the satisfaction of creditors according to class. The classes are as follows:

1. *Costs of the bankruptcy proceedings*, employee social security tax, wage claims, claims for the past two years of farmers on contracts to deliver products from their own farm, alimony claims, pensions, claims arising from *legal transactions* undertaken by the *administrator*⁴⁷ of the *bankrupt's estate*

³⁷ Sect. 777 Art. 1 Code of Civil Procedure.

³⁸ Sect. 96-98 Banking Act.

³⁹ Ustawa – Prawo upadłościowe i naprawcze of February 28, 2003 (Dz.U. no. 60, pos. 535 with amendments).

⁴⁰ Sect. 14 Art. 1 Bankruptcy and Composition Act.

⁴¹ Sect. 15 Bankruptcy and Composition Act.

⁴² Sect. 17 Art. 1 Bankruptcy and Composition Act.

⁴³ Sect. 16 Bankruptcy and Composition Act.

⁴⁴ Sect. 20 Art. 1 Bankruptcy and Composition Act.

⁴⁵ Sect. 10 Bankruptcy and Composition Act.

⁴⁶ Sect.13 Bankruptcy and Composition Act.

⁴⁷ In the event of a declaration of bankruptcy, an administrator of the bankrupt's estate is appointed at the time of liquidation. An administrator in composition by contrast is appointed when the undischarged bankrupt is banned from administering the estate or when the undischarged bankrupt is charged with the administration of only part of the assets. Sect.156 par.1, 3 Bankruptcy and Composition Act.

- or *the administrator in composition*, claims from the mutual contracts that were agreed before bankruptcy was filed by the undischarged bankrupt and which the assets' administrator or liquidator have deemed must be fulfilled, *claims* attributable to the *unjustified enrichment* of the *bankrupt's estate* as well as claims arising from legal transactions that the undischarged bankrupt in agreement with the judicial supervisor has undertaken;⁴⁸
2. *Taxes*, other *fiscal charges* as well as social security contributions for the year prior to the declaration of bankruptcy that do not fall into the first class including interest and execution charges;
 3. *Other claims*, which *do not fall into the fourth class*, including interest for the year prior to the declaration of bankruptcy, contractual claims for damages, proceedings and execution costs;
 4. *Interest*, which *does not fall into the higher classes*, in order of satisfaction of the capital, as well as the court and legal fines, and claims from gifts and legacies.⁴⁹

This is the basic order of satisfaction. There are exceptions, which will be examined in conjunction with the relevant types of security.

The legislation stipulates that the claims of one class will only be satisfied after the complete settlement of the claims of the preceding classes. If there are insufficient assets for the full satisfaction of one class then the claims in this class will be satisfied pro rata.⁵⁰

3. Netting

Netting is not a form of realization in the sense of realization of collateral. However, as there are special netting features in Polish law, in particular, with regard to bankruptcy proceedings, the following will review them in brief.

a. Netting According to the Civil Code

In principle, netting is possible if two persons have a relationship in which they are both creditor and debtor at the same time and the object of the claim is either cash or just goods of equal quality specified according to its species. In addition, the claims must be due and enforceable in court or before a state body. On that conditions the one claim compensates the other up to the amount of the lower of the two.⁵¹ The claim is netted in so far as one party issues a referring statement towards the other party. The legal effect of this statement is backdated to the time when the netting first became possible.⁵²

It should be noted that not every claim can be netted. *Excluded* from this option are:

- Non-attachable claims;
- Alimony claims;
- Claims pertaining to illegal acts;

⁴⁸ The judicial supervisor is appointed when bankruptcy with the possibility of composition is declared, Sect.156 Art.2 Bankruptcy and Composition Act.

⁴⁹ Sect.342 par. 1 Bankruptcy and Composition Act.

⁵⁰ Sect.344 Bankruptcy and Composition Act.

⁵¹ Sect. 498 Civil Code.

⁵² Sect. 499 Civil Code.

- Claims that the provisions specifically exclude from the netting option.⁵³ These provisions include for example Article 89 of the Bankruptcy and Composition Act.

b. Netting in the Case of Bankruptcy

There are special netting features in bankruptcy proceedings. When *bankruptcy proceedings with the possibility of composition* are initiated, the netting of mutual claims of the creditor and the bankrupt is *basically permissible*.⁵⁴ If the creditor wishes to make use of his or her netting rights in bankruptcy proceedings with the possibility of composition, the creditor must declare this intention by the latest when filing the claim.⁵⁵

If *proceedings to liquidate the bankrupt's assets are opened*, then the netting of a claim of the bankrupt with that of a claim of the creditor is permissible *if both claims existed on the day that bankruptcy was declared*, even if one of the two claims was not yet due. The total sum of the claim of the undischarged bankrupt is used for the netting, i.e., the principal claim as well as the interest due⁵⁶ on the netting day; while the amount of the creditor's claim comprises the principal claim including the interest calculated up to the day bankruptcy was declared only. If the undischarged bankrupt has a non-interest bearing loan that is not yet due on that day, the netting is based on the principal amount less the statutory interest, but not more than 6%, which accrues for the period from the day bankruptcy is declared to the day of maturity (that is the day on which the claim must be settled as per the contract), but with the restriction of not more than two years of accumulation.⁵⁷ In cases where *claims arise after the declaration of bankruptcy*, the Supreme Court states that the admissibility of netting is evaluated in accordance with general netting provisions of the Civil Code⁵⁸ but not in accordance with the provisions in the Bankruptcy and Composition Act.⁵⁹ This means that netting is permitted without any further restrictions.⁶⁰ The judgment gained wide approval in legal academic circles.⁶¹

Netting is *not permissible* if the debtor of the undischarged bankrupt acquired the claim via an assignment or endorsement after the declaration of bankruptcy or if the claim was acquired within the last year before the day bankruptcy was declared and the debtor had knowledge of the declaration of bankruptcy. Netting is, however, *possible* if the acquirer becomes a debtor vis-à-vis the bankrupt due to the redemption of a debt of the undischarged bankrupt for which he or she was liable personally or with specified assets, and the acquirer did not have any knowledge of the reasons for the declaration of bankruptcy at that time.⁶² In this context, we are looking at the repayment of a debt, e.g., by the guarantor or by a debtor being liable in rem, such as

⁵³ Sect. 505 Civil Code.

⁵⁴ Zedler, in: Jakubecki/Zedler, Prawo..., Sect.89 note 1.

⁵⁵ Sect.89 Bankruptcy and Composition Act.

⁵⁶ Jakubecki, in: Jakubecki/Zedler, Prawo..., Sect.93 note 5.

⁵⁷ Sect.93 Bankruptcy and Composition Act.

⁵⁸ Sect.498-505 Civil Code.

⁵⁹ Supreme Court decision of February 20, 1997 (I CKN 3/97, OSN 8/1997, pos. 109).

⁶⁰ Jakubecki, in: Jakubecki/Zedler, Prawo..., Sect.93 note 8.

⁶¹ See e.g. Torbus, in: Przegląd Sądowy 3/1998, p. 90; Wąsowicz, in: Państwo i Prawo 3/1998, p.109.

⁶² Sect.94 Art.1, 2 p. 1 Bankruptcy and Composition Act.

for example the mortgage debtor.⁶³ If a third party has entered into the rights of the satisfied creditor up to a year before the declaration of bankruptcy, the acquirer of the satisfied claim can always net said claim with that of the undischarged bankrupt.⁶⁴ Netting is not permissible if the creditor became the debtor of the undischarged bankrupt after the day bankruptcy was declared.⁶⁵

If a creditor wishes to make use of the right to net claims in liquidation proceedings, said creditor must declare this intention *by the latest when filing the claim*.⁶⁶

4. Ineffectiveness of Legal Transactions in Bankruptcy Proceedings

a. Ineffectiveness According to Sect. 127 ff Bankruptcy and Composition Act

Section 127 ff of the Bankruptcy and Composition Act regulates which legal transactions concluded by a debtor shall not be effective with respect to the bankruptcy estate. The Bankruptcy and Composition Act considers the following *legal transactions to be ineffective*:

- *Legal transactions* that were undertaken by the undischarged bankrupt one year before filing the bankruptcy petition and which had the purpose of a disposition of his or her estate on the condition that the *legal transaction* was free-of-charge or if it involved charges and the volume of the *obligation* to be performed by the undischarged bankrupt was *grossly disproportionate* either to the *service rendered in return* for the undischarged bankrupt or for a third party. This holds true for court settlements, acceptance of lawsuits and the waiver of claims as well;⁶⁷
- Furnishing security and *payment of a debt that is not yet due* if this occurs in the two months before the bankruptcy petition is filed. However, the person that received the payment or security can request that this legal transaction be seen as valid in the case of a lawsuit or an objection if said person had no knowledge of the grounds for the declaration of bankruptcy.⁶⁸
- *Legal transactions against payment*, which have been concluded with *close relatives*⁶⁹ within six months of filing the bankruptcy petition. This is also true if the undischarged bankrupt is a company or a legal entity and a legal transaction has been executed with its *stockholders, representatives* or their *spouses* or if the legal transaction has been concluded with an *associated companies*, its stockholders, representatives or their spouses.⁷⁰

⁶³ *Jakubecki*, in: *Jakubecki/Zedler, Prawo...*, Sect.94 note 4.

⁶⁴ Sect.94 par.2 p. 2 Bankruptcy and Composition Act.

⁶⁵ Sect.95 Bankruptcy and Composition Act.

⁶⁶ Sect.96 Bankruptcy and Composition Act.

⁶⁷ Sect.127 par.1, 2 Bankruptcy and Composition Act.

⁶⁸ Sect.127 par. 3 Bankruptcy and Composition Act.

⁶⁹ The law expressly specifies the respective persons – e.g. spouses.

⁷⁰ Sect.128 Bankruptcy and Composition Act.

There are also legal transactions that do not become ineffective by operation of law, but can be declared as such *upon request of a bankruptcy judge (sędziakomisarz)*⁷¹ by the issuance of a *ruling*. This delegated authority is accorded in Article 129 ff of the Bankruptcy and Composition Act.⁷²

b. Ineffectiveness According to the Civil Code

The Bankruptcy and Composition Act refers to the Civil Code⁷³ for the authority to rescind legal transactions, but only if no regulation can be found in the Bankruptcy and Composition Act (principle of subsidiarity).

Article 527-534 of the Civil Code makes a reference to contestable transactions under *actio pauliana*. Accordingly, if a *debtor's legal transaction*, which *disadvantages the creditors*, gives a third party pecuniary benefit, every creditor may demand that the legal transaction be made *invalid in respect to him or her* (relative invalidity) if the debtor acted in the *knowledge of the disadvantage to the creditors* and the *third party* could have gained *knowledge* thereof by exercising due diligence. A *legal transaction* is to the disadvantage of a creditor if its execution caused the debtor to become *insolvent* or aggravated this *insolvency*. If, as a result of the legal transaction mentioned, a person, which has a *close relationship* with the debtor or an entrepreneur with whom the debtor maintains a stable business relationship, has gained pecuniary benefit, then it is assumed that this person or legal entity has acted in bad faith.⁷⁴ The relationship is deemed as close if it can be assumed that the third party has information about the financial situation of the debtor.⁷⁵ This is true, in particular, for fiancées and companions in life.⁷⁶ However, close relatives are not automatically subsumable under this legal provision.⁷⁷ If the third party gained pecuniary benefit from the legal transaction free-of-charge, the creditor may request an annulment without the third party having acted in bad faith.⁷⁸ If the debtor was insolvent at the time of making a gift or became insolvent as a result, it may be assumed that the debtor acted consciously to the detriment of the creditor.⁷⁹ A decision

⁷¹ After the declaration of bankruptcy, the bankruptcy judge conducts the bankruptcy proceedings with the exception of activities that fall into the jurisdiction of the bankruptcy court, Sect.151 Bankruptcy and Composition Act.

⁷² This refers to the amount of the wages of employees who work in the administration of the company or of persons who supply services related to the administration of the company. A gross discrepancy to the usual wages for this type of activity must be given. The same applies to severance charges granted to such persons on the termination of the employment contract (Sect.129 par.1, 3 Bankruptcy and Composition Act). Furthermore, this refers to collateral encumbered by liens on the assets of the undischarged bankrupt, if said bankrupt was not the personal debtor and the establishment of the lien took place within one year prior to the filing for bankruptcy and the undischarged bankrupt did not receive any consideration or a relatively small one. Regardless of the amount of the consideration, the bankruptcy judge declares the security given as invalid if these debts are secured by close relatives, partners, representatives or their spouses (Sect.128 Bankruptcy and Composition Act and Sect.130 par.1-3 Bankruptcy and Composition Act).

⁷³ Sect.131 Bankruptcy and Composition Act.

⁷⁴ Sect.527 Civil Code.

⁷⁵ Supreme Court decision of April 10, 1964 (III CR 39/64, OSN 5/1965 pos. 75).

⁷⁶ Supreme Court decision of May 11, 1951 (C. 213/46, Państwo i Prawo 9-10/1964, p. 176).

⁷⁷ *Jakubecki*, in: *Jakubecki/Zedler, Prawo upadłościowe i naprawcze (Bankruptcy and Composition Act)*, Sect.131 note 4.

⁷⁸ Sect.528 Civil Code.

⁷⁹ Sect.529 Civil Code.

on the relative ineffectiveness shall be reached by a court in legal proceedings against the third party.⁸⁰

It should be noted that the above mentioned *actio pauliana* is enforceable not only within the framework of the bankruptcy proceedings, but is also generally valid.

In the event of the ineffectiveness of a legal transaction of a debtor (includes all of the above mentioned instances) everything, which due to this legal transaction reduces the assets of the bankrupt debtor, must be *surrendered to the bankruptcy estate*, and if this is not possible, the equivalent must be contributed in cash.⁸¹

5. Excursus: Legislation on Substitute Share Capital

According to Article 14 par. 3 of the Polish Commercial Companies Code⁸² a claim by a shareholder of a corporation (joint stock company and private limited company) to which such shareholder has extended a loan will be regarded as capital invested by the shareholder should the company declare bankruptcy. But this is only the case if bankruptcy is declared within two years from the day the loan contract was concluded.⁸³ This means that the lending shareholder cannot be satisfied without infringing upon the rights of the creditors of the company. The lender is thus only able to satisfy his or her claim pertaining to the loan contract after the third party has been satisfied.⁸⁴

It is not clear whether “credits” are also subsumed under “loans”. Academics seem to lean towards a narrower interpretation.⁸⁵ Despite this, there is also the view that credit should be covered by this regulation,⁸⁶ as the ratio legis of the discussed provision is the protection of the creditors of a company, which justifies the exception to the rule.

6. Discharge of Residual Debt

If the undischarged bankrupt is a natural person, a ruling on the termination of liquidation proceedings may on the *application of the undischarged bankrupt*, declare a discharge of residual debt. By this one understands the settlement of the entire or part of the unsatisfied obligations of the undischarged bankrupt in the bankruptcy proceedings. A discharge from the remaining debt may be granted when:

⁸⁰ Sect.531 Art. 1 Civil Code.

⁸¹ Sect.134 par.1 Bankruptcy and Composition Act.

⁸² Ustawa – Kodeks spółek handlowych of September 15, 2000 (Dz.U. no. 94, pos. 1037 with amendments).

⁸³ Sect.14 Art. 3 Polish Commercial Companies Code.

⁸⁴ *Szumański*, in: Sołtysiński/Szajkowski/Szumański/Szwaja, Kodeks spółek handlowych. Tom I. Komentarz do artykułów 1-150 (Polish Commercial Companies Code. Volume I. Comments on Sections 1-150), Warszawa 2001, Sect.14 Rn. 30.

⁸⁵ Cf. *Szumański*, in: Sołtysiński/Szajkowski/Szumański/Szwaja..., Sect.14 Rn. 29; *Kidyba*, Kodeks spółek handlowych. Tom I. Komentarz do art. 1-300 k.s.h. (Polish Commercial Companies Code. Volume I. Comments on Sect.1-300), Kraków 2002, Sect.14 note 7. These authors make a reference to Sect.720-724 Civil Code, i.e., to the rules for loans.

⁸⁶ Cf. also *Kwaśnicki*, Pożyczki udzielane spółce kapitałowej przez wspólnika lub akcjonariusza (Loans granted to a stock company by a partner or a shareholder), in: Monitor Prawniczy 23/2001, p. 1169. Cf. also *Oplustil*, Pożyczki wspólników udzielane spółkom kapitałowym. Analiza regulacji art. 14 § 3 i art. 189 § 2 k.s.h. (Loans granted by partners to a stock corporation. An analysis of the rules in Sect.14 Art. 3 and Sect.189 Art. 2 Polish Commercial Companies Code), Kraków 2001, p. 70-72.

- The insolvency resulted from extraordinary circumstances, which were not the fault of the undischarged bankrupt;
- There are no circumstances that give reason to suspend the right to undertake economic activity on one's own account or the right to represent a trading corporation, a company, a cooperative, a foundation or an association; and
- The undischarged bankrupt met his or her obligations in the bankruptcy proceedings honestly.⁸⁷

Included in the discharge of residual debt are claims on the claims list as well as claims that can be registered if their existence is established in the documents of the undischarged bankrupt.⁸⁸ The court must take into account the earnings potential of the undischarged bankrupt, the size of the unsatisfied claims and the probability of their future satisfaction in its deliberations when reaching to a decision.⁸⁹

⁸⁷ Sect.369 par.1 Bankruptcy and Composition Act.

⁸⁸ Sect.369 par.2 Bankruptcy and Composition Act.

⁸⁹ Sect.370 par.1 Bankruptcy and Composition Act.

Chapter 3: Liens on Movable Property

I. Introduction

This Chapter looks at liens on movable property and claims. First, the so-called simple lien will be examined. The special features of the pledged object will be taken into account (property, rights, securities). Then follows an examination of the registered lien, before going into the special features of the pledging of stock and financial liens.

II. General Remarks on Liens

Polish legislation recognizes two types of liens: the lien of the Civil Code⁹⁰ (the simple lien, *zastaw*) and the registered lien (*zastaw rejestrowy*). There is a fundamental difference between the two types that will be explained in this Chapter.

The term simple lien is understood as meaning a mortgage on moveable property whereby creditors have the right to satisfaction of their claims from the property without regard to who the owner of the property is and with priority over the personal creditors of the owner of the property except in cases in which applicable legislation accords them special priority. This encumbrance is used to secure a specific, future or contingent claim.⁹¹

III. Simple lien

A. Origins

The creation of a simple lien requires a *contract* that has been agreed on by all the parties concerned: i.e., the owner of the property to be encumbered and the creditor as well as the *transfer* of the property to the creditor or a third party (bailee).⁹²

B. Object of the Lien

1. Simple lien on Property

The simple lien on property (*zastaw na rzeczach*) is in contrast to the registered lien *seldom used in practice*, as from the creditor's point of view it has many disadvantages. The mortgaged property must be surrendered to the creditor or a third party⁹³ – a constructive bailment⁹⁴ is insufficient – and an out-of-court settlement is categorically ruled out and the secured claim falls into a low satisfaction class, namely the eighth.⁹⁵

⁹⁰ Sect.306 ff. Civil Code.

⁹¹ Sect.306 Civil Code.

⁹² Sect.307 Art. 1 Civil Code.

⁹³ Sect.307 Art. 1 Civil Code.

⁹⁴ The constructive bailment means that the lien debtor (owner) has possession of the asset for the creditor.

⁹⁵ Sect.1025 Art. 1 fig. 8 Code of Civil Procedure.

2. Simple lien on Rights

The simple lien on rights (*zastaw na prawach*) plays a greater role than that on property. It primarily plays a role as *provisional collateral before the recording of the registered lien* in the lien register.

The simple lien can be created for *transferable rights*.⁹⁶ Regulations concerning the transfer of these rights are applicable upon the creation of a simple lien on rights (see Chapter 5). However, the contract about creating a simple lien must always be agreed *in writing* and be furnished with a certified date (*data pewna*)⁹⁷, even if the contract on the transfer of rights does not require this. If the creation of a lien does not result in either the *transfer* of documentation or an *endorsement*, then *written notification* to the *third-party debtor* by the lienee is required.⁹⁸

3. Simple lien on Securities

If a lien on securities held on the account of the lienee is created in accordance with Article 78 of the “Decree of the Council of Ministers of September 3, 2002 on Determining the Type and Mode of Procedure of Brokerage Houses and of Banks Engaging in Brokerage Activities as well as of Banks that Manage Securities Accounts”⁹⁹ (Brokerage Activities Decree), the brokerage house¹⁰⁰, after receiving the lien agreement and on the written request of the client, must impose a blocking notice on the account. In accordance with Article 80 par. 1 of the Brokerage Activities Decree, the brokerage house transfers the *proceeds* of these securities, and in particular the interest and dividends, to the lienor, unless it has been agreed otherwise.

4. Simple lien on Participation Certificates

Despite their illiquidity, participation certificates may be the object of a lien.¹⁰¹ The creation of a lien on participation certificates is effective when it is recorded in the Register of Participation Certificate Holders (*uczestnik funduszu*);¹⁰² this

⁹⁶ Sect.327 Civil Code.

⁹⁷ The legal definition of the certified date is contained in Section 81 Art. 1 Civil Code. An officially certified date is required. According to Sect.96 fig 3 of the Act on Notary of Feb 14, 1991 (Prawo o notariacie, Dz.U. No. 22, Pos. 91) this is a date certified by a notary public. Furthermore, a legal transaction also has a certified date when the intent is documented by some type of official document – as of the date of said document or when the document containing the legal transaction has an annotation by an official body, a body of a territorial autonomous government unit or of a notary public – as of the day of the annotation, Sect 81 Art. 2 Civil Code.

⁹⁸ Sect.329 Civil Code.

⁹⁹ Rozporządzenie Rady Ministrów w sprawie trybu i warunków postępowania domów maklerskich i banków prowadzących działalność maklerską oraz banków prowadzących rachunki papierów wartościowych (Dz.U. no. 165, pos. 1354).

¹⁰⁰ Brokerage houses are stock corporations seated in the territory of the Republic of Poland that carry on the business of brokerage, Sect.29 of the “Act of Aug. 21, 1997 on the Public Trading of Securities” (Prawo o publicznym obrocie papierami wartościowymi, Dz.U. no. 118, pos. 754). Brokerage activities comprise all business that involves trading in securities admitted to public trading. These include, e.g. securities trading advice, acquisition and management of securities owned by third-parties, etc. See Sect.30 ff. of the Act mentioned.

¹⁰¹ Sect.61 par. 4 p. 1 Investment Fund Act of August 28, 1997 (Ustawa o funduszach inwestycyjnych, repromulgation of 2002, Dz.U. no. 49, pos. 448).

¹⁰² This register is kept by the investment fund (Sect.65 par1 of the Investment Fund Act). It contains, among other things, the following information: data on the beneficiaries of participation certificates, number of participation certificates, information on possible powers of attorney conferred or withdrawn by the beneficiaries, notes on the establishment of a lien on the participation certificates (Sect.65 par.2 Investment Fund Act).

takes place at the request of the lienee, after the investment company has been presented with the contract pertaining to the creation of the lien.¹⁰³

C. Realization of the Lien

1. Realization by Execution

The satisfaction of a claim from pledged property is attained through legal proceedings (*execution*).¹⁰⁴ The distribution of proceeds takes place in the *eighth settlement class*¹⁰⁵ (see Chapter 2). With regard to a lien on a receivable, the lienor has the right to demand the assignment of the seized receivable, when the secured receivable falls due. The maximum amount is defined by the secured claim.¹⁰⁶

The lienor may gain satisfaction from holding participation certificates serving as pledged property only by selling these certificates to the investment fund. The sale takes place at the request of the lienor during the execution proceedings.¹⁰⁷ An out-of-court settlement is not permissible.

2. Realization in the Bankruptcy Proceedings of the Lienee

When *bankruptcy proceedings to liquidate* the lienee's assets are opened, the lienor is vested with preferential right to separate satisfaction from the bankrupt's estate. The lienee's claim will be satisfied from the proceeds of the sale of the mortgaged property after deducting the costs associated with the selling of the asset.¹⁰⁸

When *bankruptcy proceedings with the possibility of composition* are opened, the secured claim is excluded from the proceedings unless the secured creditor had unconditionally and irrevocably agreed to include the claim before the ballot on the composition was opened.¹⁰⁹ A creditor whose claim is secured by a pledge is entitled to register said claim. Should the creditor fail to do so, the claim will be included in the list *ex officio*.¹¹⁰

IV. The Registered Lien

A. General

The registered lien (*zastaw rejestrowy*) plays an *important role* in practice and is very often used as a means of security. It is regulated by the "Act of December 12, 1996, on Registered Liens and the Lien Register" (Registered Lien Act).¹¹¹ The lien register is maintained in electronic form,¹¹² which enables

¹⁰³ Sect.61 par. 5 Investment Fund Act.

¹⁰⁴ Sect.328 in conjunction with 312 Civil Code.

¹⁰⁵ Sect.1025 Art. 1 fig. 8 Code of Civil Procedure.

¹⁰⁶ Sect.335 Civil Code.

¹⁰⁷ Sect.61 par. 4 p. 2 Investment Fund Act.

¹⁰⁸ Sect.345 par.1 Bankruptcy and Composition Act.

¹⁰⁹ Sect. 273 Art. 2 Bankruptcy and Composition Act.

¹¹⁰ Sect. 236 par.2 Bankruptcy and Composition Act.

¹¹¹ Ustawa o zastawie rejestrowym i rejestrze zastawów (Dz.U. no. 149, pos. 703 with amendments).

¹¹² Art. 2 par1 of "Decree of the Minister of Justice of 15 October 1997 on the Exact Organization and the Type and Procedure for the Keeping of the Lien Register" (Rozporządzenie Ministra Sprawiedliwości w sprawie szczegółowej organizacji i sposobu prowadzenia rejestru zastawów, Dz.U. no. 134, pos. 892).

searches according to various criteria (e.g. people, real estate). A separate lien register exists for liens of the tax authorities.¹¹³

B. Creation of a Registered Lien

1. The Status of Lienor

Registered liens cannot be created to secure the claims of any indeterminate creditor. Article 1 par 1 of the Registered Lien Act provides for a *closed group* of possible lienors. Included are both domestic and foreign banks. Registered liens may also be used to secure the claims of holders of borrower's notes and other debt instruments, which are issued in accordance with legislation valid in OECD countries.

2. Form

To ensure that a contract regarding the creation of a registered lien is not *null and void* it must be concluded in *writing* and must as a minimum include the following *information*:

- The date of the conclusion of the contract;
- The surnames and first names (designation), the place of residence (domicile) and the addresses of the lienor, lienee and the debtor;
- The object of the registered lien, as well as
- The designation of the amount and legal relationships of the claim secured by a registered lien as well as the maximum amount of a future or contingent claim to be secured, if the amount was not established at the time the registered lien contract was concluded.¹¹⁴

The creation of the registered lien requires that it *be recorded in the lien register*. The lienor or lienee must submit an application to record the lien within one month of the date the contract was concluded. After expiration of this period, the application will be dismissed.¹¹⁵ The application must be filed using an official form.¹¹⁶ The specimens for these forms are laid down in the "Decree of the Justice Minister on the Determination of Specimen Forms" of October 15, 1997¹¹⁷. The submission of the application is subject to a fee.¹¹⁸

3. Object of the Lien

All *movable property and transferable property rights* can be the object of a registered lien. The only exception is liens on seagoing vessels that are recorded in the maritime register.¹¹⁹ In particular, a registered lien can be created on the following objects:

¹¹³ Sect.42 Art. 1 Fiscal Code.

¹¹⁴ Sect.3 par.1, 2 Registered Lien Act.

¹¹⁵ Sect.3 par. 3 Registered Lien Act.

¹¹⁶ Sect.39 par.2 Registered Lien Act.

¹¹⁷ Rozporządzenie Ministra Sprawiedliwości w sprawie określenia wzorów urzędowych formularzy (Dz.U. no. 155, pos. 1018).

¹¹⁸ Art. 45¹ Art. 1 of the "Decree of the Minister of Justice of 17 Dec. 1996 on the Determination of the Amount of the Fees in Civil Law Cases" (Rozporządzenie Ministra Sprawiedliwości w sprawie określenia wysokości wpisów w sprawach cywilnych (Dz.U. no. 154, pos. 753 with amendments)). The fee is PLN 200.00. The fee for the deletion is PLN 50.00, Art. 45¹ par 3 of the Decree.

¹¹⁹ Sect.7 par.1 Registered Lien Act.

- Specific property,
- Unascertained goods,
- The entirety of property or rights that form an economic unit, including varying stock,
- Claims,
- Incorporeal rights,
- Securities rights.¹²⁰

A registered lien can also be created on property or rights that the lienee will acquire in the future. In such a case, the registered lien is effective from the time the lienee acquires the property or rights.¹²¹

The encumbrance on a property by a registered lien remains effective regardless of any changes that might arise in the conversion of the property into a new article. If the property has been combined or blended together with other movable property so that the restoration to its previous state is impossible or would entail excessive expenditure or costs, then the registered lien would cover the entirety of the combined or blended property respectively.¹²² The registered lien lapses when the mortgaged property becomes a constituent part of real estate holdings.¹²³ In such case, the lienor acquires the right to create a mortgage on the real estate up to the amount of the value of the named asset.¹²⁴

As regards registered liens on *securities* held on a lienee's securities account, we refer to the explanations on simple lien.¹²⁵ The blocking notice is only then to be recorded when a duplicate transcript of the lien register that furnishes proof of registration is provided to the brokerage house.¹²⁶

The provisions of the Registered Lien Act are not applicable to goods that are warehoused in accordance with the Warehouse Act¹²⁷ and for which a warehouse certificate has been issued.¹²⁸

C. Advantages over Simple liens

An advantage of this type of security compared to the simple lien is that the pledged asset does *not have to be transferred* to the lienor.¹²⁹ Furthermore, the secured claim is satisfied in a *higher class*, i.e., in the fifth class (as opposed to the eighth) during liquidation proceedings.¹³⁰ The parties may agree on an *out-of-court settlement*, such as for example realization through the *transfer* of *ownership* of the object of the registered lien¹³¹ or through the *sale* of the object in a public auction by the bailiff or a notary¹³² or the satisfaction from the rev-

¹²⁰ Sect.7 par.2 Registered Lien Act.

¹²¹ Sect.7 par. 3 Registered Lien Act.

¹²² Sect.8 par.1 Registered Lien Act.

¹²³ A constituent part of an asset is everything that cannot be separated from it without damaging or materially changing the entirety of the asset or the object to be separated, Sect.47 Art. 2 Civil Code.

¹²⁴ Sect.9 par.1, 2 Registered Lien Act.

¹²⁵ See Chapter 3 II B 3.

¹²⁶ Art. 78 par.2 Regulation of September 3, 2002.

¹²⁷ "Act on Warehouses and the Amendment to the Civil Code, the Code of Civil Procedure and other Laws" Ustawa o domach składowych oraz o zmianie Kodeksu cywilnego, Kodeksu postępowania cywilnego i innych ustaw of Oct. 16, 2000 (Dz.U. no. 114, pos. 1191).

¹²⁸ Sect.30 par.2 Warehouse Act.

¹²⁹ Sect.2 par.1, 2 Registered Lien Act.

¹³⁰ Sect.1025 Art. 1 fig. 5 Code of Civil Procedure.

¹³¹ Sect.22 par.1 Registered Lien Act.

¹³² Sect.24 Registered Lien Act.

enues of the company of which the object of the registered lien is part.¹³³ In such case the company may, at the request of the lienor, be leased so that the credit can be satisfied from the rent.¹³⁴

D. Restrictions on Disposal

The Registered Lien Act¹³⁵ grants the possibility to rule out *contractually* the transfer the pledged property rights to a third party up until the registered lien is extinguished, which also applies to parties not involved in the legal transaction. This differs to both Article 57 par 1 of the Civil Code, which prohibits provisions to prevent the sale, and Article 311 of the Civil Code that, with regard to a simple lien, goes as far as declaring that a commitment not to sell a mortgaged item as being against the law. Article 14 par. 2 of the Registered Lien Act provides for the protection of the good faith of the acquirer, who at the time of the conclusion of the contract did not know about the prohibition or would not have been able to find out even when exercising due diligence. However, if the *asset* is sold *contrary* to the *prohibition*, the secured claim falls due for repayment with *immediate effect*.¹³⁶

E. Principle of Good Faith

The purchase of mortgaged property covered by a registered lien results in the *annulment of the lien* if the purchaser had no knowledge of the existence of the lien at the time of the transfer of the property or was unable to gain knowledge of the lien even after having observed due diligence.¹³⁷ No-one can claim *ignorance of the facts if the asset is recorded in the register*, except in cases in which this could not be discovered even in the exercise of due diligence.¹³⁸ This means that a purchaser wishing to rely on good faith protection must prove that he or she has *checked the register*. The obligation to examine the register before the purchase of the asset does not¹³⁹ arise if the purchaser has acquired property charged with a registered lien if the property has been sold within the scope of the usual economic activity of the lienee.. In this case, the purchaser acquires the property free of liens unless the purchaser has acted with the intent of disadvantaging the lienor.

The acquisition in good faith of a registered lien from an *unauthorized person* is also protected by Article 2 par. 3 of the Registered Lien Act.¹⁴⁰ If a lien was created and recorded in the lien register and the lienor was in good faith, then this means that the lien was acquired in good faith. If the property has been lost, the lien will become effective only three years after the time the property was lost.

¹³³ Sect.27 par.1 Registered Lien Act.

¹³⁴ Sect.27 par. 2 Registered Lien Act.

¹³⁵ Sect.14 par.1 Registered Lien Act.

¹³⁶ Sect.14 par. 3 Registered Lien Act.

¹³⁷ Sect.13 fig. 1 Registered Lien Act.

¹³⁸ Sect.38 par.1 Registered Lien Act.

¹³⁹ Sect.13 fig. 2 Registered Lien Act.

¹⁴⁰ In conjunction with Sect.169 Civil Code.

F. Conflict with Other Rights in Property

Rights in rem, which are *created later on*, cannot be exercised to the detriment of an already *existing* registered lien.¹⁴¹ If there are several registered liens on a mortgaged asset, priority is assigned according to the date of the *application* to register the lien in the lien register.¹⁴² The judgment regarding the competing rights of registered liens created on an asset is based not only on the provisions of the Registered Lien Act, but also on Article 1025 par. 1 of the Code of Civil Procedure. The classes one to four cited therein guarantee the preferential right to satisfaction for the rights named therein (see Chapter 2).¹⁴³

Conflicts with tax liens are regulated in Article 20 par. 2 of the Registered Lien Act. Accordingly, the statutory lien that the tax authorities are entitled to resulting from tax liabilities as well as the priority ranking cannot be exercised with regard to the asset charged with a registered lien, unless the statutory lien had been recorded in the relevant register before the registered lien was created.¹⁴⁴

The relationship of a *registered lien on a warehouse* with variable stock to a *registered lien created later on an individual item that belongs to the warehouse* poses a special problem. Which lien has priority to be satisfied in this case is uncertain due to the lack of relevant precedents.

G. Realization of the Registered Lien

1. Out-of-court Realization

a. General

As already mentioned above (see Chapter 2), it is possible to contractually agree an out-of-court realization when creating a registered lien. For this agreement to become effective with regard to third parties, the *realization agreement* must be *recorded in the lien register*.¹⁴⁵

b. Satisfaction through the Appropriation of the Pledged Object

A lien agreement can provide for the satisfaction of the lienor through the assignment of ownership of the asset charged with a registered lien. This agreement may be accorded if:

- The registered lien is created on *securities* admitted to public trading and the securities commission has approved the assignment of ownership and defined the conditions,
- The asset charged with a registered lien falls into a category of goods that forms part of *normal trade*, or
- The assets charged with a registered lien are *property, claims* and rights, whose *value has been precisely defined in the lien agreement*.¹⁴⁶

¹⁴¹ Sect.15 Registered Lien Act.

¹⁴² Sect.16 Registered Lien Act.

¹⁴³ See Chapter 2 IV A 1.

¹⁴⁴ To create the lien of the tax authorities, it is required to enter it into the lien register of the tax authorities, Sect.42 Art. 1 Fiscal Code.

¹⁴⁵ *Leśniak*, Umowa zastawnicza zastawu rejestrowego (Pfandvertrag beim Registerpfandrecht), in: Prawo Spółek 9/2001, p. 40.

¹⁴⁶ Sect.22 par.1 Registered Lien Act.

Article 23 paragraph 1, 2 of the Registered Lien Act regulates the determination of the value of pledged assets in cases in which a claim is satisfied through the transfer of ownership. If the mortgaged assets are *securities* admitted to public trading, the value is based on the closing price on the day ownership is transferred. If the securities are not quoted on the day they are transferred, their value is determined by the price on the last day these securities were quoted. If the lien agreement provides for the satisfaction of the lienor through the transfer of ownership of goods that form part of normal *trade*, the value is fixed on the basis of the average price on the day of the purchase. If the value of assets charged with a registered lien is to be fixed in the lien agreement, the question of scope of discretion arises for fixing the value of the asset. Should the value determined deviate significantly from the market value of the pledged asset, it is assumed that there has been a transaction *contra bonos mores* as understood in Article 58 Par. 2 of the Civil Code, which in accordance with par. 3 of this provision usually results in the partial annulment of the contract and entailing the *annulment of the clause* on an *out-of-court settlement*.

A claim secured by a registered lien is subject to satisfaction up to the value of the pledged asset. If this value exceeds the amount of the secured claim, the lienor is obliged to repay the excess within 14 days of the acquisition date.¹⁴⁷

Immediately before the transfer of ownership of a registered lien asset, the lienor must inform the *lienee in writing* of the *planned acquisition*. The lienee has the right within seven days of notification to furnish the security or file a complaint to establish that the claim does not exist or is wholly or partially not due for repayment.¹⁴⁸

c. Satisfaction through the Sale of the Pledged Object

A contract of registered lien can theoretically also provide for the satisfaction of the lienor through the sale of the assigned asset through a *public auction* by a bailiff or a notary.¹⁴⁹ The details of this auction are regulated in a decree handed down by the Justice Minister. Up to 2004, the *decree* has *not* been *enacted*, even though the law was passed in 1996. In practice, therefore, the *notaries and bailiffs refuse* to execute such sales.

d. Satisfaction from the Revenues of a Company with a Part that is the Object of the Registered Lien

In the lien agreement, the parties can agree that a claim may be *satisfied* from the *revenues* of the *company*, a constituent part of which is the object of the registered lien. This company may also be taken into judicially enforced receivership; the official receiver must be named in the lien agreement. If the lien agreement provides for it, such company can, at the request of the lienor, be leased so that the credit can be satisfied from the rent.¹⁵⁰ This *form of liquidation* is *not applied* in practice, perhaps in part due to the unclear formulation of Article 27 of the Registered Lien Act.

¹⁴⁷ Sect.23 par. 3 Registered Lien Act.

¹⁴⁸ Sect.25 par.1, 2 Registered Lien Act.

¹⁴⁹ Sect.24 par.1 Registered Lien Act.

¹⁵⁰ Sect.27 Registered Lien Act.

2. Conflicts in the Realization of the Lien

As an asset can be encumbered with several registered liens, the problem of a conflict between the *various forms of realization* arises. As the latter two forms of realization do not play a role in practice, the conflict is limited to judicial realization and the agreed transfer of ownership as well as to a conflict between the agreed transfer of ownership to the benefit of several lienors.

In particular, a conflict may arise when a second-ranking registered lien with an agreed assumption clause on the mortgaged claim falls due earlier than a first higher-ranking registered lien, which is subject to judicial realization. The same problem arises, when, in both cases, appropriation was agreed on and the second-ranking lien secures an earlier maturing credit. There are *two possible solutions* neither of which, however, have yet been decided on in court. On the one hand, it could be decided not to annul the first-ranking lien with appropriation and render the second-ranking lienor liable to the first-ranking lienor with regard to the asset. On the other hand, it could be argued that in the case of such conflict, the lien must be realized by a court in accordance with Article 21 of the Registered Lien Act which is a general rule. The legal situation is unclear at present as to what ruling a court called upon would reach to solve this problem.

3. Third-party Appeal against the Pledge in Execution

In accordance with the most recent jurisdiction, when the secured property is distrained upon, the entitled party may file a third-party appeal against the levy of execution.¹⁵¹ This decision does not find support among the legal academia.¹⁵²

4. Realization in the Bankruptcy Proceedings of the Lienee

The creditor secured by a registered lien has the right to file for satisfaction of said claim. If the creditor does not do this, the claim will be included in the list *ex officio*.¹⁵³

If *proceedings to liquidate* the lienee's assets are opened, the bank is vested with a right to separate satisfaction from the bankrupt's estate.¹⁵⁴ If, however, the bank is entitled to satisfy its claim on the pledged property through appropriation, it can still exercise this right after the bankruptcy proceedings have been opened.¹⁵⁵ Should the asset be held by the administrator of a bankrupt's estate and the lienor be entitled to appropriation, the bankruptcy judge shall set a deadline for the exercise of this right that may not be less than one month. After the unsuccessful expiration of this deadline, the asset will be disposed of in accordance with the provisions of the Bankruptcy and Composition Act.¹⁵⁶ If the asset is held by the administrator of the bankrupt's estate and sale of the asset through a public tender is agreed, the administrator will sell the asset in accordance with the provisions in the Bankruptcy and Composition Act.¹⁵⁷

¹⁵¹ Supreme Court decision of November 19, 2001 (V CKN 616/00, OSN 7-8/2002, pos. 105).

¹⁵² *Lis/Strzeszyński*, in: *Monitor Prawniczy* 18/2002, p. 859 ff; *Marciniak*, in: *OSP* 4/2003, pos. 51.

¹⁵³ Sect.236 par.2 Bankruptcy and Composition Act.

¹⁵⁴ Sect.345 par.1 Bankruptcy and Composition Act.

¹⁵⁵ Sect.327 par.1 Bankruptcy and Composition Act.

¹⁵⁶ Sect.328 par.1 Bankruptcy and Composition Act.

¹⁵⁷ Sect.328 par.2 Bankruptcy and Composition Act.

If *bankruptcy proceedings with the possibility of composition* are opened, the secured claim is generally to be excluded from the composition. However, there is an exception if the secured creditor has declared agreement to its inclusion unconditionally and irrevocably before the ballot on the composition.¹⁵⁸

V. Liens on a Warehouse (Warrants)

A. General

In accordance with the Warehouse Act, a debt may be secured by a warrant. A warrant is a *separable part of a warehouse certificate*. To execute the lien, the warrant must be *separately endorsed and surrendered*.¹⁵⁹ The endorsement is subject to the provisions of the Act on Bills of Exchange.¹⁶⁰ Warehouse stored goods on which a warehouse certificate has been issued are *not subject to execution* (and also, therefore, do not fall within the province of the *bankrupt's estate*).¹⁶¹ The owner of the goods is obliged to present a warrant for payment to the domicile bank¹⁶² on the date of maturity. In the case of a payment default, a *protest may be drawn up* subject to the sanction of the loss of the right to put forth a claim under the right of recourse. Provisions in the Act on Bills of Exchange regulate issues concerning the presentation of a warrant for payment as well as the drawing up of protests on the grounds of nonpayment. The protest may be replaced by a certified, dated certificate from the domicile bank on the non-payment.¹⁶³

B. Realization

1. Out-of-court Realization

The Warehouse Act provides for an *out-of-court settlement* for liens on warehouses. A warrant holder can, even if he or she has not drawn up a protest, write to the warehouse and demand the *sale* of the asset with a lien on it.¹⁶⁴ The sale should take place within the shortest possible time, but not earlier than three days from the statement of the demand. This is necessary to ensure that the right of recourse is not lost. The warrant holder loses the right of recourse, if he or she does not make a demand to sell within a month of lodging the protest. The planned sale *must be published* in the court and business bulletin¹⁶⁵ as well as in a publication that usually covers the activities of the warehouse. The sale will be handled by a bailiff, notary, attorney at law or legal

¹⁵⁸ Sect.273 par.2 Bankruptcy and Composition Act.

¹⁵⁹ Sect.30 par.1 Warehouse Act. See also *Halgas*, Warrant (zastawniczy dowód składowy) – zagadnienia wybrane (Lagerschein (Pfandrechtlicher Lagerbeweis) – Ausgewählte Fragen), in: *Transformacje Prawa Prywatnego* 4/2003, p. 45.

¹⁶⁰ Ustawa – Prawo wekslowe of April 28, 1936 (Dz.U. no. 37, pos. 282).

¹⁶¹ Sect.63 fig. 1 Bankruptcy and Composition Act. Sect.31 Art.1 Warehouse Act.

¹⁶² A domicile bank is defined in Sect.2 fig 9 of the Warehouse Act as a bank named in a warehouse receipt as responsible for receiving delivery, keeping and payout of quotas that belong to the owner of the warehouse receipt or parts thereof.

¹⁶³ Sect.37 Warehouse Act.

¹⁶⁴ Sect.38 Warehouse Act.

¹⁶⁵ Monitor Sądowy i Gospodarczy.

counsel¹⁶⁶ that has been mandated by the warehouse to conduct the *public auction*.¹⁶⁷ The Warehouse Act provides for a ranking in the satisfaction of claims, which the warehouse must adhere to. Thus, claims on the proceeds obtained must be *satisfied in the following order*:

- Sale costs;
- Unpaid public charges, which are linked to the asset;
- Claims of the warehouse that are secured by statutory lien and named in the warehouse certificate. Claims, which originate after the issue of the warehouse certificate, are only to be satisfied insofar as they are payable on warehousing during the period of time named in the warehouse certificate. If the warehousing period is not named in the warehouse certificate, only those claims will be satisfied in this class that have not been stored for more than one year after the issue of warehouse certificate;
- Claims of the warrant holder including all accessory claims.

If the claim is *not yet due* at the time of its payment by the warrant holder, then a discount is to be deducted, which will be calculated in accordance with Narodowy Bank Polski's valid rediscount rate for Poland's domestic bills.¹⁶⁸

2. Consequences of the Sale of an Object by the Warehouse

Ownership of the property is *transferred unencumbered* to the purchaser, if this property is sold for the purpose of satisfying the warrant holder. The law goes so far that a violation of the sales regulations in Articles 38-41 of the Warehouse Act will not prevent the unencumbered acquisition of this property. In this case, the warehouse is obliged to pay compensation to the person who suffered damages by the breach.¹⁶⁹

3. Realization in the Event of Bankruptcy

As already mentioned above, property stored in the warehouse, for which a warehouse receipt has been issued, is not subject to judicial enforcement and is thus not included in the debtor's assets.¹⁷⁰ Therefore, the satisfaction of the warrant holder is not adversely affected by the initiation of *liquidation proceedings*. In the event *bankruptcy proceedings with the possibility of composition*, Article 273 par. 2 of the Bankruptcy and Composition Act is applicable whereby lien-secured claims are excluded from the composition unless the creditor has explicitly agreed to this.

¹⁶⁶ Legal consultants are similar to lawyers. Apart from the restrictions in Family Law and in Criminal Law, they are basically equal in standing to lawyers.

¹⁶⁷ Sect.40 par.1, 2 Warehouse Act.

¹⁶⁸ Sect.41 Warehouse Act.

¹⁶⁹ Sect.42 Warehouse Act.

¹⁷⁰ See Chapter 2.

VI. Financial Liens

A. General

The legislator has translated *EU Directive 2002/47/EC*¹⁷¹ into Polish law in the form of the Financial Collateral Act.¹⁷² This law creates the concept of financial lien (*zastaw finansowy*) that may be considered a subcategory of simple lien in accordance with the Civil Code. The *object* of a financial lien may be *cash* – something that is not possible with other types of liens – as well as *financial instruments*.¹⁷³ The group of possible *contracting parties* is laid down in Section 2 of the Act.¹⁷⁴

B. Cash as the Object of a Pledge

As already mentioned, apart from financial instruments, cash may also be used as collateral. It is defined as cash on account as well as “*claims*”¹⁷⁵ on the payment of cash.¹⁷⁶ Up until now, the direct creation of a lien on cash was not permitted due to the necessity of complying with the principle of *clarity and definiteness*. It appears at least questionable whether said law has established such a category of liens.

C. Creation of a financial lien

The Financial Collateral Act regulates contracts on the creation of financial collateral in general. In this contract, the *financial claims to be secured and the form of collateral must be named*, especially with regard to the creation of liens on rights to cash or financial instruments (financial liens).¹⁷⁷ An original feature regarding the creation of said collateral is that – contrary to Article 329 par. 2 of the Civil Code¹⁷⁸ – *neither a fixed date nor a contract with a notarized signature* is required. The creation of the collateral will be recorded on the account holding the cash, which is the object of the collateral.

Collateral created on financial instruments will be *recorded* on the custody account, the securities account or in any other securities register that is maintained by the subject in question.¹⁷⁹ Article 7 par. 2 of the law does not stipulate whether the recording of the lien should be of a constitutive nature for the creation of the lien.

¹⁷¹ The “Act of 2 Apr. 2004 on Certain Financial Collateral“, *Ustawa o niektórych zabezpieczeniach finansowych* (Dz.U. no. 91, pos. 871).

¹⁷² Directive of the European Parliament and of the Council on Financial Collateral Arrangements of June 6, 2002 (Abl. L 168 of June 27, 2002, p. 43).

¹⁷³ Financial instruments according to Sect.3 fig. 2 of the Securities Act in the meaning of law on the public trading of securities, bank securities in the meaning of the Banking Act, shares in companies as well as participation certificates (*jednostki uczestnictwa w funduszach inwestycyjnych*) in investment funds.

¹⁷⁴ Par. 1 of the Section limits the subjects that may become contractual partners on the one side. The subjects listed correspond to those mentioned in Sect.1 of the Directive 2002/47/EC. There are no restrictions as regards the subject that is on the other side of the contract. However, the provisions of the law do not apply to contracts to which even one party is a natural person.

¹⁷⁵ Here, the Directive 2002/47/EC speaks of receivables which in Polish corresponds to “*wierzytelność*“. But Polish law uses the term “*roszczenie*“ which means claim.

¹⁷⁶ Sect.3 fig. 1 Financial Collateral Act.

¹⁷⁷ Sect.5 par.1 Financial Collateral Act.

¹⁷⁸ The contract on the establishment of simple lien must always be done in writing and must have a certified date even if the contract on the assignment of rights is not required to have this form.

¹⁷⁹ Sect.7 Financial Collateral Act.

D. Realization

1. The Out-of-Court Realization

The bank can satisfy its claim through the *sale* of the secured object. The law also stipulates settlement by “*netting or setting off*” of the value of the collateral against the secured claim. An *appropriation of the secured asset* to satisfy the claim may then follow, if a provision to this effect has been included in the contract to create the collateral.¹⁸⁰ The “*netting or setting off*” is, if agreed, applicable to cash collateral.¹⁸¹ If settlement through appropriation has been agreed and is applicable to a lien on securities admitted to public trading on a regulated market, the value of these securities is determined based on the closing price. If the security is not quoted on the day of appropriation, its value is fixed according to the price at the close of the last trading day.¹⁸² There is no provision that translates Article 4 par. 2 lit. b) of the EU Directive 2002/47 EC according to which appropriation is only possible if the collateral agreement allows for the valuation of the financial instrument.

A special realization right is granted for a lien on participation certificates (*jednostki uczestnictwa funduszu inwestycyjnego*).¹⁸³ Article 10 par. 3 of the Financial Collateral Act stipulates that the liquidation is carried out in accordance with the provisions of the Investment Fund Act. In accordance with Article 61 par. 4 of this law, a lienor may be satisfied exclusively through the sale of the participation certificates to the investment fund if requested to do so within the scope of execution proceedings. An out-of-court settlement is not possible.

2. Financial Collateral in Bankruptcy

The Financial Collateral Act has amended several of the provisions in the Bankruptcy and Composition Act. Basically, however, the financial lien shares the *same fate as the simple lien* in bankruptcy proceedings.

Article 77 par. 1 of the Bankruptcy and Composition Act says that a bankrupt’s legal transactions regarding those assets, which form part of the estate of the bankrupt and over which he or she has lost the right of administration, are null and void. The Financial Collateral Act includes one exceptional regulation, whereby the rule does not apply if the contract matures or the creation of the financial lien occurs on the day bankruptcy is declared and the collateral creditor can prove that he or she did not know of the initiation of the bankruptcy proceedings and nor would have been able to discover this even in exercise of due diligence.¹⁸⁴

The amended provisions do not cover the realization of pledged assets. There is no explicit stipulation in the Financial Collateral Act that is commensurate with the regulation on the realization of a registered lien.¹⁸⁵ According to the wording of the Bankruptcy and Composition Act, the object of the regis-

¹⁸⁰ Sect.10 par.1 Financial Collateral Act.

¹⁸¹ In the Financial Collateral Act the term compensation (*kompensata*) is understood to mean the possibility of offsetting even before the two claims fall due. This option depends on the agreement of a compensation clause.

¹⁸² Sect.11 par.1 Financial Collateral Act.

¹⁸³ Participation certificates represent the asset rights of the holders of shares of an open investment fund, Sect.5 par2, 61 par1 Investment Fund Act.

¹⁸⁴ Sect.17 fig. 1 Financial Collateral Act (new Sect.77 par. 4 Bankruptcy and Composition Act).

¹⁸⁵ Sect.327 Bankruptcy and Composition Act.

tered lien should, as with all other assets of the bankrupt's estate, be liquidated by the administrator, and the proceeds less the sale and collection charges should be transferred to the lienor. There is, however, no regulation that allows for the appropriation of the pledged asset or for the sale out of the bankruptcy proceedings of the financial lien. There is legal uncertainty with regard to the analogous application of the provisions on registered liens of the Bankruptcy and Composition Act to financial collateral.

E. Financial Collateral in International Private Law

The Financial Collateral Act includes a conflict-of-laws rule to regulate international cases. The law governs the contract on the creation of collateral on dematerialized securities, on the rights arising from this collateral, the priority of the rights, as well as the satisfaction of claims from such collateral that is subject solely to the law of the state in which the custody account, the securities account or any other securities register containing the record of the pledge is maintained. This law also governs the acquisition in good faith of dematerialized securities.¹⁸⁶

VII. Blocking Securities on a Securities Account

A. General

Polish law recognizes the securing method of blocking securities held on a securities account (*blokada autonomiczna*).

As long as the securities are blocked, the institution¹⁸⁷ that manages the securities account is not authorized to carry out orders from its customer (i.e. the debtor) with regard to

- the lifting of the block;
- the selling of the blocked securities; or
- the transfer of these securities to another securities account. The transfer may be performed if the contract to establish the block provides for this and the block remains intact.

Transactions other than those named above can only be performed within the framework of said contract.¹⁸⁸

The blocking applies to a *specified number of securities* and is connected to the conferral of the *power of attorney* in favor of the beneficiary of the blocking.¹⁸⁹ This person may, as a result of the power of attorney, instruct the institution that manages the account to sell the securities covered by the block and to use the proceeds to settle his or her claim. However, this can only be done from the day that the claim falls due for repayment on. The power of attorney is irrevocable and is not annulled by the death of the grantor of the power of attorney. However, the *irrevocability* must be expressly reserved in the power of attorney.¹⁹⁰

¹⁸⁶ Sect.13 Financial Collateral Act.

¹⁸⁷ This refers to a brokerage house or in the case of a bank, a separated organizational unit that carries on the business of brokerage (Sect70 Art. 1 Decree on Brokerages).

¹⁸⁸ Sect. 74 Brokerage Activities Decree.

¹⁸⁹ Sect. 72 Brokerage Activities Decree.

¹⁹⁰ *Włodarska, Charakter...*

It should be noted that the block can only serve to secure an already *existing and still valid claim resulting from a defined legal relationship*.¹⁹¹

If the contract establishing the block does not make any other provision, the institution managing the account transfers the proceeds of the securities, in particular, interest, dividends and other cash benefits that the debtor of the security furnishes to the customer of the institution to said customer.¹⁹²

B. Unlimited and Irrevocable Block

As in the Decree on Brokerage Activities, there are two types of securities block: the *unlimited* and the *irrevocable*. The first is set up until the revocation or fulfillment of the secured obligation, while the second is lifted on the day after the expiration of the agreed contractual period of the block.¹⁹³

C. Establishing the Block

The prerequisites for the establishment of the block are an agreed *contract* between the holder of the securities account and the creditor as well as a written or electronically sent *declaration* by the holder about the establishment of the block.¹⁹⁴ The law stipulates that the contract must be agreed in *writing*, as the institution managing the securities account can only impose a blocking notice “after receiving the contract”.

D. Realization

On the day the blocked, secured claim matures or on the next possible day, the institution will sell the blocked securities at the request of the authorized creditor and transfer the proceeds to the creditor, but only to the amount that is required to satisfy the creditor’s claim. The period in which the creditor can lodge the demand will be set down in the contract. After this period has expired, the institution can no longer comply with the request.¹⁹⁵ We would like to point out again the explanations on the Financial Collateral Act.

E. Blocking in International Private Law

Please refer to the explanations on financial collateral for questions regarding International Private Law.

¹⁹¹ Sect. 68 par.1 fig. 1 Brokerage Activities Decree.

¹⁹² Sect. 75 Brokerage Activities Decree.

¹⁹³ Sect. 76 par.1 Brokerage Activities Decree.

¹⁹⁴ Sect. 72 Brokerage Activities Decree.

¹⁹⁵ Sect. 77 Brokerage Activities Decree.

Chapter 4: Mortgages

I. General

It is possible to *create a lien* on real estate assets to secure a specific claim, which enables the creditor to satisfy the claim from the *property* regardless of who owns it and with preference over the personal creditors of the owner of the real estate (mortgage, *hipoteka*).¹⁹⁶ There are many exceptions to this general definition of a mortgage, both with regard to the secured claim as well as with regard to the pledged asset. A mortgage can also cover *future claims* that may arise out of a defined legal relationship, as well as claims for which the amount has yet to be defined. A *maximum amount mortgage* is applicable in these cases (*hipoteka kaucyjna*).¹⁹⁷ A mortgage that secures a fixed existing claim is called a *regular mortgage (hipoteka zwykła)*. Apart from the real estate, a mortgage can be created on a share of a co-owner.¹⁹⁸ The object of a mortgage can also be perpetual usufructuary rights.¹⁹⁹ In such case, it comprises both the buildings, and the furniture and fixtures, which are located on the real estate covered by the perpetual usufructuary rights and owned by the beneficiary of the usufructuary rights. Furthermore, a mortgage may cover cooperative rights approximating to ownership on premises, rights to a cooperative single-family housing²⁰⁰ as well as mortgage secured claims.²⁰¹

A mortgage is accessory, i.e., the content and the existence of the mortgage is dependent on the content and fate of the secured claim.²⁰² The accessory nature of the mortgage is eased in the case of maximum amount mortgages.²⁰³

Satisfaction from the object of the mortgage can be achieved by *judicial enforcement* or by a *state enforcement authority*.²⁰⁴ If settlement is effected by judicial enforcement, the mortgage lender will be satisfied in the fifth class.²⁰⁵

¹⁹⁶ Sect.65 par.1 “Act of 6 July 1982 on Land Register and Mortgages” (Ustawa o księgach wieczystych i hipotece, repromulgation of 2001, Dz.U. no. 124, pos.1361).

¹⁹⁷ Sect.102 Act on Land Register and Mortgages. Details on the maximum amount mortgage III G.

¹⁹⁸ Sect.65 par.2 Act on Land Register and Mortgages.

¹⁹⁹ Usufruct rights may be established on real property owned by the state within the administrative territorial borders of cities and such pieces of real property outside of these borders that form part of the spatial development plan of a city and are part of the realization of the economic functions of a city; as well as on pieces of real property forming part of territorial self-administrated units and its constituent parts and all those properties belonging to the state specified in special laws on units of territorial self-administration or their constituent parts in favor of natural and legal persons, Sect.232 Civil Code. The content of eternal usufruct rights is governed by Sect.233 Civil Code which states that the party enjoying usufruct may use and exercise the right on the piece of real property excluding all other persons within the limits defined by the law and the limits of communal life as well as within the borders defined in the contract on the establishment of eternal usufruct.

²⁰⁰ The Act on Land Register and Mortgages differentiates between ownership-like cooperative rights to dwellings, cooperative rights to usable space and rights to cooperative single-family homes. However, the difference between the two first categories in the new “Act on Residential Building Cooperatives” (Ustawa o spółdzielniach mieszkaniowych of Dec. 15, 2000, repromulgated in 2003, Dz.U. 119, pos. 1116) has been discarded. These are joined to form premises. The third category no longer exists according to the new law, which means that a mortgage can no longer be created on it. Any mortgages established previously remain valid.

²⁰¹ Sect.65 par. 3, 4 Act on Land Register and Mortgages.

²⁰² *Rudnicki*, Ustawa o księgach wieczystych i hipotece. Przepisy o postępowaniu w sprawach wieczystoksięgowych. Komentarz (Act on Land Register and Mortgages. Rules of Procedure in Land Register Matters. Commentary), Warsaw 2004, Sect.65 note 1.

²⁰³ Cf. Chapter III G 2.

²⁰⁴ Sect.75 Act on Land Register and Mortgages. See “Act on Administrative Enforcement Procedures” (Ustawa o postępowaniu egzekucyjnym w administracji of June 17, 1966, (Repromulgated in 2002, Dz.U. no. 110, pos. 968 with amendments).

²⁰⁵ Sect.1025 Art. 1 fig. 5 Code of Civil Procedure.

II. Types of Mortgage

The *creation* is structured differently, according to whether it is a contract, statutory or judgment lien. *Statutory mortgages*, i.e., mortgages that are established by operation of law, regardless of registration in the land register, play an almost negligible role today.²⁰⁶

A *judgment lien* can be created at the request of a creditor, whose claim is established by an execution title. On the grounds of this title, the creditor can acquire a mortgage on all of the debtor's real estate.²⁰⁷ Tax mortgages are also execution liens.²⁰⁸ An execution lien is only valid when it is registered in the land register.²⁰⁹

Contract mortgages are also only valid after they have been registered in the land register. They can be created not just on one real estate asset but also on several real estate assets (*contract collective mortgage*).²¹⁰ A (regular) collective mortgage is also applicable if real estate covered by a mortgage is split up. In such case, the mortgage covers all the real estate involved in the division.²¹¹

In accordance with the "Act on Mortgage-backed Bonds and Mortgage Banks" a *mortgage bank* (*bank hipoteczny*) can, among other things, grant mortgage-secured loans and acquire loans from other banks that are secured by a mortgage taken out by the borrower. This activity forms the basis for the issue of mortgage bonds.²¹² Claims of the mortgage bank, which must be recorded in the mortgage bond register²¹³, can only be secured by a mortgage that is registered as ranking first in the land register.²¹⁴

III. Contract Mortgages

A. Creation

1. Form

a. Regular Procedure

When creating a mortgage, the general regulation of Article 245 Par. 1 of the Civil Code is applicable to the establishment of a *restricted right in property*. In accordance with this provision, regulations pertaining to the transfer of ownership are applicable to the creation of a restricted right in property. It is, however, permissible to agree a *time limit* or *conditions*. The form of a *notarial instrument* is only *required* for the declaration of the owner who grants the right.²¹⁵ A declaration of intent by the creditor may also be implicit. For a mort-

²⁰⁶ The only still existing case of a statutory mortgage results from Sect.1037 Art. 3 Code of Civil Procedure according to which such a mortgage secures the claim of a creditor toward the acquirer of a piece of real estate within the course of execution proceedings.

²⁰⁷ Sect.109 par.1 Act on Land Register and Mortgages.

²⁰⁸ Sect.34 Art. 1 Fiscal Code.

²⁰⁹ Sect.67 par.1 Act on Land Register and Mortgages.

²¹⁰ Sect.76 par. 3 Act on Land Register and Mortgages.

²¹¹ Sect.76 par.1 Act on Land Register and Mortgages.

²¹² Sect.12 fig. 1, 3, 4 "Act on Mortgage-backed Bonds and Mortgage Banks".

²¹³ The mortgage-backed bonds register is kept by the mortgage bank. It contains claims of the bank and the rights and means that form the basis for the issuance of mortgage-backed bonds. The entries are done in the full amount of the loans extended. (See Sect.24 "Act on Mortgage-backed Bonds and Mortgage Banks").

²¹⁴ Sect.20 par.1 "Act on Mortgage-backed Bonds and Mortgage Banks".

²¹⁵ Sect.245 Art. 2 Civil Code.

gage to be created it must be *registered in the land register*.²¹⁶ This entry establishes the creation of the mortgage even if it is not yet legally valid.²¹⁷ If there is a *change in ownership* between the completion of the mortgage contract and its entry in the land register, the mortgage cannot be registered in the land register without the purchaser's agreement.²¹⁸

b. The Provisions of the Banking Act (Sect.95 par3f)

An exception to the principle of the formality of a notarial instrument described above is stipulated in Article 95 paragraphs 3, 4 of the Banking Act. To secure a loan granted to a borrower by a bank by means of a mortgage it suffices for the owner of the real estate or the person having ownership-like rights to the real estate in a cooperative to submit his or her *declaration* to the bank, with the declaration having to be submitted *in writing* as otherwise it would be null and void. The bank account documents and statements, which relate to the receipt of the declarations on property rights and obligations that are signed by authorized bank staff and affixed with a bank seal, are used as the basis for registering the mortgage in the land register.

2. Creation of a Mortgage by Spouses

If the mortgaged object forms part of a *married couple's assets*, the agreement of the mortgage debtor's spouse is required for the valid creation of the mortgage.²¹⁹ The agreement must take the form of a notarial instrument. According to the planned amendment of the Family Act, the form of a notarial instrument will no longer be required.²²⁰

3. Acquisition in Good Faith

If the substantive legal position regarding a plot of land differs from the formal records, the position in the land register is key for deciding in favor of the person who, based on a legal transaction against payment, acquired in good faith the ownership or other rights in property to real estate (*guarantee of the full faith and credit of the land register, rękojmia wiary publicznej ksiąg wieczystych*).²²¹ This provision is also applicable to the creation of a mortgage by a reputed owner registered in the land register, as it does not qualify a contract to create a mortgage as either against payment or as free-of-charge. Thus, the mortgage lender is protected in his or her good faith and trust in the correctness of the land register and acquires the mortgage even if the owner registered in the land register was simply the reputed owner.

A person acts in bad faith if he or she knows that the land register is incorrect or could easily have recognized this.²²² The guarantee of the full faith and credit of the land register is also valid if the mortgaged object belongs to *marital property assets* and the required agreement of the spouse is lacking. As regards *banks*,

²¹⁶ Sect.67 par.1 Act on Land Register and Mortgages.

²¹⁷ Rudnicki, Note on Supreme Court decision of March 9, 1995 (III CZP 149/94, Monitor Prawniczy 11/1995, p. 336 f.), in: Przegląd Sądowy, 10/1995, p. 101 ff.

²¹⁸ Supreme Court decision of June 28, 1995 (II CRN 61/95, OSN 11/1995, pos. 166).

²¹⁹ Sect.36 Art. 2, 37 Family Act.

²²⁰ Draft bill of April 23, 2003.

²²¹ Sect.5 Act on Land Register and Mortgages.

²²² Sect.6 par.2 Act on Land Register and Mortgages.

the Supreme Court has handed down a decision stating that the bank as a purchaser of the mortgage has acted in bad faith if it has relied on the declaration of the creator of the mortgage that he or she is the sole owner of the mortgaged property even though it would have been easy to establish that the real estate actually belonged to marital property assets by conducting a due diligence.²²³

B. Scope of the Security

A mortgage can only secure a *cash loan* and can only be expressed in terms of a specified amount of money. If the loan, in accordance with the law, is expressed in a foreign currency, the mortgage must also be expressed in this currency.²²⁴ The mortgage also secures the *interest not statute barred* and the *awarded proceedings costs* within the limits laid down in the special regulations. Thus, in a *judicial enforcement* the interest and proceedings costs will be settled together with the *principal loan* in the *fifth class*,²²⁵ the interest, however, only for the two years prior to acknowledgement of ownership (*przysądzenie własności*) and for the proceedings costs not more than 1/10 of the principal. The remaining interest and costs will be satisfied in the tenth class.²²⁶

If the proceeds thereof are distributed within the framework of enforcement *under administrative law*²²⁷ the principal is settled in the third class, while the interest is satisfied in the sixth class.²²⁸ In practice this means that the mortgage-secured interest does not have priority in administrative enforcement proceedings. The sole advantage is that the mortgage creditor can collect interest independent of the ownership of the relevant real estate.

It is unclear to what extent the interest must be satisfied in *bankruptcy proceedings*. In accordance with Article 345 par. 3 of the Bankruptcy and Composition Act, the secured interest together with the principal will be satisfied as will proceedings costs up to a maximum of 1/10 of the capital. This provision does not say, however, to what extent the interest is covered by the mortgage. Opinion in academic circles²²⁹ states that based on the right to the separated assets of a bankrupt's estate, only the outstanding interest for the *two years* prior to the acquired ownership within the framework of the bankruptcy proceedings is meant.²³⁰ The remaining interest is settled in the fourth class, in accordance with the general regulations of the Bankruptcy and Composition Act.²³¹ The wording of the law is also unclear about whether the *interest on the capital* and the *interest on arrears*²³² are secured by the

²²³ Supreme Court decision of May 5, 1993 (III CZP 52/93, OSN 12/1993, pos. 218) with a partly critical note *Szpunars*, OSP 12/1994, pos. 238.

²²⁴ Sect.68 Act on Land Register and Mortgages.

²²⁵ Sect.1025 Art. 1 fig. 5 Code of Civil Procedure.

²²⁶ Sect.1025 Art. 3 Code of Civil Procedure.

²²⁷ If, for example, a tax authority levies execution.

²²⁸ Sect.115 Art. 1 fig. 3, 6 Act on Execution under Administrative Law.

²²⁹ *Jakubecki*, in: *Jakubecki/Zedler, Prawo...*, Sect.345 note 5.

²³⁰ Sect.1025 Art. 3 Code of Civil Procedure speaks of the "Recognition of ownership", which may be interpreted as the acquisition of property under the circumstances of bankruptcy.

²³¹ Sect.342 par.1 fig. 4 Bankruptcy and Composition Act.

²³² Sect.481 Art. 1 Civil Code states that when the debtor is late in making payment of a pecuniary liability, the creditor may request interest on the period of the delay even if the creditor does not suffer damages and the delay has occurred due to reasons for which the debtor is not responsible.

mortgage. Legal precedents²³³ indicate that the interest on the capital is not included in the secured mortgage, but only the interest on arrears.

C. Extension of the Guarantee of the Full Faith and Credit of the Land Register to the Secured Claim

The assumption of the existence of a right recorded in the land register also includes mortgage-secured claim²³⁴ (excluding maximum amount mortgages²³⁵). This infers a *formal legitimacy* of the person identified as registered in the land register. Thus, the persons who demand payment from the mortgage debtor do not need to prove their claim. In the case of *the assignment* of a mortgage-secured loan, the acquirer of this claim can call on the guarantee of full faith and credit of the land register for the satisfaction from the mortgaged real estate, also with regard to the secured loan and the defence and objections that can be put forth against the lienee.²³⁶ This means that a claim that the lienee is not entitled to can be effectively acquired by a *bona fide purchaser* on the basis of not free-of-charge²³⁷ legal transaction.²³⁸ This provision also leads to the *exclusion of objections and pleas*, because it protects acquirers in their faith that the amount of the debt is as stated in the land register.

D. Object of the Mortgage

The mortgage applies to the *encumbered real estate including appurtenances*.²³⁹ Such appurtenances are movable assets, which, in agreement with their intended purpose, are subordinate to the use of another property (the main property) if they stand in true association with it serving their appointed purpose and if they are owned by the owner of the main property.²⁴⁰ This may include in this context, for example, machinery or agricultural equipment that serve the purpose of the mortgaged real estate. Assets that have *lost their character as appurtenances* are covered by the mortgage for the period of their permitted retention on the real estate, except if they are assigned within the framework of normal economic activity²⁴¹ and the assignment contract was agreed in writing and has an officially certified date.²⁴² Up until the levy of

²³³ Supreme Court decision of November 24, 1998 (I CKN 864/98, OSN 6/1999 pos. 111); a.A. *Śługiewicz*, Hipoteczne zabezpieczenie odesetek ustawowych (Securing statutory interest by mortgages), in: *Przegląd Sądowy* 5/2003, p. 26-28.

²³⁴ Sect.105 Act on Land Register and Mortgages.

²³⁵ Sect.71 Act on Land Register and Mortgages.

²³⁶ Sect.80 Act on Land Register and Mortgages.

²³⁷ According to the opinion of *Zaradkiewicz*, the acquirer is also protected in a legal transaction concluded free of charge according Sect.80 Act on Land Register and Mortgages (Tzw. zastaw nieakcesoryjny w polskim prawie cywilnym. Uwagi ogólne na tle ustawy o zastawie rejestrowym i rejestrze zastawów (so-called non-accessory lien in Polish civil law. General remarks in connection with the law on registered liens and the lien register), in: *Kwartalnik Prawa Prywatnego*, 2/2000, p. 293). This view cannot be agreed with as the ratio legis of Sect.80 only grants an extension of public credibility to rights that would otherwise not be protected by said public credibility. This rule does not intend to introduce new principles.

²³⁸ In legal technical terms, this is not an acquisition but the option of satisfying a claim from the object of a mortgage, *Zawada*, Uprawnienie do przeniesienia wierzytelności. Nabycie w dobrej wierze wierzytelności od nieuprawnionego, cz. VI (Right to assign a claim. Acquisition in good faith of a claim from an unauthorized party, Part VI), in: *Rejent* 6/1992, p. 9.

²³⁹ Sect.84 Act on Land Register and Mortgages.

²⁴⁰ Sect.51 Art. 1, 2 Civil Code.

²⁴¹ The inclusion in the concept of orderly business practice is decided on a case-by-case basis.

²⁴² Sect.86 Act on Land Register and Mortgages.

execution of the real estate, the mortgage lender cannot oppose the disposal of movable fixtures and appurtenances if the owner does not infringe the basic principles of orderly business practices thereby.²⁴³

Those assets that are separate from the plot of land, which the *leaseholder*, the *usufructuary* (beneficiary of the fruits) and the *service beneficiary* are entitled to, are not covered by the mortgage if the latter two rightful claimants have priority over the mortgage.²⁴⁴

The mortgage also comprises *rental and lease* payment claims. The owner is, however, entitled to collect the interest until the real estate is seized by the mortgage creditor. If execution is levied upon the real estate, the mortgage creditor is not entitled to any interest payment that was paid in advance for more than a full payment period after the levy of execution; unless it was recorded before the mortgage was registered in the land register. In principle, an insurance company cannot pay the owner of the real estate any insurance for damages connected to the plot of land without the agreement of the mortgage lender, unless it concerns cover for expenses made for the purpose of restoring the former state of affairs.²⁴⁵

E. Protection of the Mortgage

The mortgage is in fact a limited right in property, from which it follows that for the protection of such rights the provisions relating to legal protection of ownership are applicable.²⁴⁶ These provisions are not applicable to the preferential satisfaction of claims. In this case the provisions of the Act on Land Register and Mortgages regarding mortgage protection apply. In principle the mortgage creditor is granted *the right to require* someone (owner or a third party) *to refrain* from taking any action that would reduce the value of the real estate covered by the mortgage to a risky low level. If the value of the mortgage due to circumstances, which are the responsibility of the owner, is so adversely affected that the collateral of the mortgage is infringed, the creditor may set a reasonable period of time for the restoration of the previous condition of the real estate or for the creation of adequate additional collateral. After the unsuccessful expiry of the deadline, the creditor may demand *immediate satisfaction from the mortgaged real estate*. If the value of the real estate declines due to circumstances that are beyond the owner's control, the mortgage also includes a possible claim of the owner for damages.²⁴⁷

F. Assignment of the Claim Secured by a Mortgage

A mortgage-secured loan must be *transferred together with its mortgage*. Only in the case of a maximum amount mortgage can the secured claim be transferred without the mortgage which, however, results in the cancellation of the mortgage.²⁴⁸ As the mortgage is accessory, it *cannot be transferred without the*

²⁴³ Sect.87 Act on Land Register and Mortgages.

²⁴⁴ Sect.85 Art. 2 Act on Land Register and Mortgages.

²⁴⁵ Sect.88 f. Act on Land Register and Mortgages.

²⁴⁶ Sect.251 Civil Code.

²⁴⁷ Sect.91-93 Act on Land Register and Mortgages.

²⁴⁸ Sect.107 Civil Code.

secured claim.²⁴⁹ Thus, the transfer of the mortgage is only valid once the new creditor is registered in the public land records.²⁵⁰

The provisions covering the assignment of a mortgage-secured claim differ from the regulations governing a general assignment. There are three significant differences as regards the assignment of a mortgage-secured claim:

- There is the possibility of the acquisition in good faith of a claim from an unauthorized person;²⁵¹
- The debtor is disqualified from filing personal objections and pleas against the seller if the debtor is not registered in the land register (unless the purchaser acted in bad faith);
- The third-party debtor cannot be discharged from the debt to the former creditor within the meaning of 512 of the Civil Code despite the lack of a third-party debtor agreement. The payment of interest to the seller only has a debt discharging effect in this regard if the debtor was not informed by the seller, the purchaser or the land registry of the assignment. The possibility mentioned last is limited, however, to interest for a full payment period unless the payment was registered in the land register. Furthermore, the purchaser is only required to make payments to the seller for more than one payment period before the assignment if it is registered in the land register or if the purchaser had knowledge of the payment at the time of the assignment.

The special provisions covering the assignment of a mortgage-secured loan are not applicable to the assignment of a claim on outstanding interest on a mortgage loan.²⁵² In this case, the general regulations on assignment of the Civil Code are applicable.

G. Maximum Amount Mortgage

1. Scope of the Secured Claim

If the amount of the loan to be secured is not yet fixed, especially with regard to existing or future claims resulting from a specified legal relationship, the claim can only be secured by creating a maximum amount mortgage. This type of mortgage can also secure debts linked to the mortgage loan that the law does not cover in ordinary mortgages, as well as claims covered by documents made transferable by endorsement (even if the amount of the claim has been fixed precisely).²⁵³ When a variable interest rate is agreed at the time the credit is granted, such interest claims can only be secured by a maximum amount mortgage.²⁵⁴ In addition, fixed liability mortgages cover interest and proceedings costs up to the maximum amount recorded in the land register.²⁵⁵ This provision amends Article 69 of the Act on Land Register and Mortgages in that the interest on arrears must be included in the maximum amount recorded in the land register.

²⁴⁹ Sect.79 Act on Land Register and Mortgages.

²⁵⁰ Cf. also *Niezbecka*, in: *Niezbecka/Jakubecki/Mojak, Prawne...*, p. 295.

²⁵¹ Cf. also *Zawada*, *Uprawnienie...*, p. 9.

²⁵² Sect.80 to 83 Act on Land Register and Mortgages.

²⁵³ Sect.102 f Act on Land Register and Mortgages.

²⁵⁴ Supreme Court decision of March 12, 2003 (III KKN 1026/00, Lex no. 78898).

²⁵⁵ Sect.104 Act on Land Register and Mortgages.

2. Accessoriness

The *accessory nature* of the relationship between the mortgage and the secured claim is *weakened* in the case of a maximum amount mortgage. This is particularly evident in the divergent regulations on assignment. In this case, the claim may be transferred *without the mortgage*, which results in the cancellation of the mortgage. When the claim is transferred together with the mortgage, the assignment must be registered in the land register for it to be valid.²⁵⁶

In the case of a maximum amount mortgage, the existence of the claim is not contingent on any *presumption rules*. Therefore, the secured creditor cannot refer to an entry in the land register to prove the existence of his or her claim with regard to a maximum amount mortgage.²⁵⁷ Thus, *no purchase in good faith* of the secured claim from an unauthorized person is possible.

A maximum amount mortgage can be *converted into an ordinary mortgage*. This requires a contract between the legitimate claimant and the owner of the mortgaged real estate as well as registration in the land register.²⁵⁸ The declaration of the owner must be submitted in the form of notarial instrument.²⁵⁹ The agreement of those individuals is required whose rights take priority over this mortgage (Article 108 Act on Land Register and Mortgages). However, the interest and proceedings costs due at the time of the conversion are also settled after the conversion within the scope of the maximum amount of the fixed liability mortgage.²⁶⁰

H. Mortgage on a Claim Secured by a Mortgage

A mortgage-secured loan may become the object of a mortgage (*subintabulat*). This type of mortgage gives the legitimate claimant the right to *direct satisfaction from the real estate* assuming that the claim secured by this subintabulat as well as the mortgaged claim are *payable*. The subintabulat also entitles the secured creditor at *maturity* to *directly demand payment from the debtor of the mortgaged claim*.²⁶¹ When a subintabulat is created, repayment of the secured claim, up to the amount of the subintabulat, can only be made to the person entitled by the subintabulat, even if said person's claim is not yet due.²⁶² Without the agreement of the person entitled by the subintabulat, the debtor cannot be absolved of debt nor can the claim, which is the object of the subintabulat, be cancelled.²⁶³

IV. Judgment Lien

As well as the contract mortgage, a claim may be secured by a judgment lien (*hipoteka przymusowa*). The creditor, whose claim is established by a title of execution, can create a judgment lien *on all* of the debtor's *real estate*, whereby

²⁵⁶ Sect.107 Act on Land Register and Mortgages.

²⁵⁷ Sect.105 Act on Land Register and Mortgages.

²⁵⁸ Sect.248 par. 1 Civil Code.

²⁵⁹ Sect.77 Art. 1 in conjunction with Sect.245 Art. 2 Civil Code.

²⁶⁰ *Niezbecka*, in: *Niezbecka/Jakubecki/Mojak, Prawne...*, p. 264.

²⁶¹ Sect.108² Act on Land Register and Mortgages.

²⁶² Sect.108¹ 1. Hs. Act on Land Register and Mortgages.

²⁶³ *Drapała*, *Zwolnienie z długu* (Sect.508 k.c.) (discharge of debt (Sect.508 Civil Code)), *Przełąd Sądowy* 7-8/2002, p. 117 f.

the *registration in the land register is constitutive*.²⁶⁴ Such a judgment lien may be created by a provisional order or by order of the public prosecutor.²⁶⁵ A judgment lien created on the basis of a non-binding decision, a provisional order, an order by the public prosecutor or an inconclusive decision is registered as a maximum amount mortgage in the land register records.²⁶⁶

V. Principle of Priority

Article 20 par. 1 of the Act on Land Register and Mortgages basically defines the priority of the rights registered in the land register by making a reference to the general priority regulations of the Civil Code. In accordance with the principle set down in Article 249 par. 1 of the Civil Code, *rights created at a later point in time cannot be exercised to the detriment of rights established earlier*. However, the right registered in the land register has *priority over unregistered rights*.²⁶⁷ The priority of rights registered in the land register is decided by *the date* that the application to register the right was received by the court.²⁶⁸ If the applications are submitted at the same time, they enjoy the same priority.

The *priority* according to which *claims from mortgages are satisfied* defines that mortgage claims are satisfied in the fifth class. The ranking within the fifth class is decided by the above mentioned priority rules.²⁶⁹ The explanations given above apply accordingly to the satisfaction of interest.

In accordance with Article 115 Par. 1 of the Administrative Process and Enforcement Act, procedural and collection expenses are satisfied in the first class, while the mortgage-secured loans of mortgage banks registered in the land register are satisfied in the second class. Other mortgage claims are satisfied in the third class. This order is modified when the execution according to administrative law occurs together with a judicial enforcement.²⁷⁰ In such a case belonging to the first class – after procedural and collection expenses – the alimony costs, wage claims for three months up a maximum of PLN 760,000 per month, claims for benefits due to illness, work incapacity, disability or death as well as the cost of a decent funeral are then satisfied. In accordance with the fiscal code, tax mortgages enjoy priority over other mortgages created to secure loans. An exception is when the object of a tax mortgage is charged with a mortgage that serves to secure claims relating to a bank loan. In this case, the order of the registration applications decides the ranking for the satisfaction of claims.²⁷¹

²⁶⁴ Sect.109 par.1 Act on Land Register and Mortgages.

²⁶⁵ Sect.110 Act on Land Register and Mortgages.

²⁶⁶ Sect.111 Act on Land Register and Mortgages.

²⁶⁷ Sect.11 Act on Land Register and Mortgages.

²⁶⁸ Sect.12 in conjunction with Sect.29 Act on Land Register and Mortgages.

²⁶⁹ Sect.1026 Art. 1 Code of Civil Procedure.

²⁷⁰ Sect.115 Art. 2 Execution under Administrative Law.

²⁷¹ Sect.36 Fiscal Code.

VI. Realization

A. General

1. Realization in Judicial Enforcement Proceedings

The satisfaction of a mortgage creditor from a secured object is done in accordance with the provisions governing judicial enforcement proceedings unless the mortgaged asset is subject²⁷² to an execution according to administrative law by an administrative body.²⁷³ This provision is mandatory, which means that an agreement on out-of-court settlement would be invalid. A title of execution is required to start execution proceedings. In the distribution of the proceeds, all persons having acquired rights before the pledging of the real estate and who were registered and ascertained in the description and valuation of the real estate at the latest on the day of the legally binding adjudication shall be included.²⁷⁴ This provision also holds true for mortgages; thus mortgages that secure claims not yet falling due constitute a reason for the satisfaction of the creditor. Only if the maximum amount mortgage has not been depleted and can still serve to satisfy the creditor will the remainder of the total be deposited with the court until the legal relationship which justifies the existence of the mortgage expires.

2. Realization in the Event of Bankruptcy

The mortgage creditor has the right *to register* his or her claim. If the creditor does not do this, the claim will be included in the list *ex officio*.²⁷⁵

When the bankrupt's estate is liquidated, the mortgage creditor has the *right to separate satisfaction from the bankrupt's estate*.²⁷⁶ Generally, this means that the proceeds from the sale of the pledged object, after the deduction of proceedings costs, will be transferred to the creditor. However, in the case of a mortgage the right to satisfaction from the separated assets is weakened by *execution privileges*.²⁷⁷ Alimony claims enjoy priority within the limits of Article 343 par. 1 of the Bankruptcy and Composition Act.²⁷⁸ Furthermore, wage claims "of the undischarged bankrupt's employees who worked on the premises of the real estate sold" have priority for settlement, but only for a three-month period prior to the day of the sale and only up to three times the minimum wage. Finally, claims from benefits for illness, work incapacity, disability or death also have priority.

When bankruptcy proceedings with the possibility of reaching a composition are opened, the claims secured by a mortgage are *not included in the com-*

²⁷² E.g., by the tax authority.

²⁷³ Sect.75 Act on Land Register and Mortgages.

²⁷⁴ Sect.1036 Art. 1 Code of Civil Procedure.

²⁷⁵ Sect.236 par.2 Bankruptcy and Composition Act.

²⁷⁶ Sect.345 par.1 Bankruptcy and Composition Act.

²⁷⁷ Sect.346 Bankruptcy and Composition Act.

²⁷⁸ *Jakubecki*, in: *Jakubecki/Zedler, Prawo...*, Sect.346 note 3. Support entitlements that arise after the opening of bankruptcy proceedings are paid only up to the amount of the minimum wage per month. The minimum wage is PLN 824.00, Rozporządzenie Rady Ministrów w sprawie wysokości minimalnego wynagrodzenia za pracę w 2004 r. (Decree of the Council of Ministers of Sept. 9, 2003 in matters relating to minimum wages in the year 2004, Dz.U. no. 167 pos. 1623).

position unless the secured creditor has unconditionally and irrevocably agreed to submit the secured claim to such a composition by the start of the decision-making process for said settlement.²⁷⁹

B. Problems

The practical implementation of Article 343 par. 1 of the Bankruptcy and Composition Act has two inherent difficulties. First, it is unclear, whether, when one of several plots of land is realized, all the alimony claims are satisfied from the proceeds of the sale of this plot of land with the result that the bankrupt's estate is "discharged". To date, neither the legal academia nor legal precedent has provided a solution. Up to now, a literal interpretation has been more likely. A distribution of risk is then possible if a collective mortgage is created.

The second problem arises from the unclear formulation that the wage claims of "the undischarged bankrupt's employees who worked on the premises of the real estate sold" are to be given priority in satisfying their claims from the real estate. It is unclear who is included in this category of employee.

²⁷⁹ Sect.273 par.2 Bankruptcy and Composition Act.

Chapter 5: Assignment by Security – Fiduciary Transfer of Receivables

I. General

By way of an *assignment*²⁸⁰, a *receivable* is transferred from an *existing creditor* (assignor) to a *new creditor* (assignee). The existing creditor may transfer the claim without the agreement of the third party (debtor) unless this contravenes a law, a contractual condition or the nature of the obligation.²⁸¹ Assignment is regulated in Article 509 ff of the Civil Code.

If an assignment is undertaken to secure another claim of the new creditor (bank) against the existing creditor (e.g. a loan) then it is referred as assignment by security. According to Polish law, the assignment by security (*przelew dla zabezpieczenia*) is not explicitly regulated. It is only mentioned in Article 101 par. 2 of the Bankruptcy and Composition Act, which requires a *written document* with a *certified date* for it to apply against the bankrupt's estate. However, to date the *permissibility* of this type of security has not been generally questioned.

II. Form

Generally, an assignment is *informal*. However, if the claim is set down in writing, its assignment must also be in writing.²⁸² The non-observance of the correct form is sanctioned by the difficulties that arise when *establishing evidence*.²⁸³ When the written form is not used, testimonial evidence and evidence from the examination of witnesses with regard to the facts of the legal transaction concluded are not admitted to the proceedings. If the assignment is between enterprises, there is no mandate to use a specific form.²⁸⁴ With regard to assignment by security, it must be ensured that the assignment is agreed on in writing and bears a certified dated as set out in Article 101 Par. 2 of the Bankruptcy and Composition Act.

III. Object of the Assignment by Security

A. General

As mentioned above, receivables are the object of the assignment. It is not clear whether future receivables, i.e., those that do not yet exist but are expected to arise in the future, can also be the object of an assignment. In this context, a *differentiation* must be made between receivables that do *not yet exist, but* for which a *legal relationship* is already given from which such receivables may arise, and those claims for which such a *legal relationship does not yet even* exist.

As regards receivables for which a legal relationship already exists, some consider it as understood that the provisions on assignment are applicable

²⁸⁰ A contract that stipulates the assignment of a claim also has a material effect unless the parties have agreed otherwise or there is a special provision that contravenes such an agreement. The assignment is contingent on another event, meaning that the effectiveness of the assignment depends on the existence of an effective obligation; Sect.510 Civil Code.

²⁸¹ Sect.509 Art. 1 Civil Code.

²⁸² Sect.511 Civil Code.

²⁸³ Sect.74 Art. 1 Civil Code.

²⁸⁴ Sect.74 Art. 3 Civil Code.

mutatis mutandis, others consider them to apply directly. In practice, both solutions lead to the same result.

The second category of future receivables is problematic. According to prevailing opinion such receivables cannot be assigned. Thus, an agreement on the assignment of such receivables is only effective as a contractual obligation.

B. Interest

Generally, interest received from receivables is subject to the assignment. Therefore, interest shares the same fate as the object of the assignment. Thus, interest can only be claimed within the framework of the content of the contract and cannot be claimed beyond the purpose of the assignment. If there is no agreement, Article 319 of the Civil Code applies mutatis mutandis. Accordingly, if there is no agreement to the contrary, the lienor is to collect the proceeds and shall net these amounts against his or her claim and any other related claims.

IV. Global Assignment

In practice, use is made of the possibility of global assignment. The global assignment is understood as the transfer of several or all of the existing or future receivables by the borrower to the bank. In legal academic circles, the permissibility of global assignment is controversial.²⁸⁵ There is no legal precedent on the problem of the permissibility of global assignment. In this context as well, only future receivables for which a legal relationship already exists can be assigned.

V. Multiple Assignment

When a creditor assigns a receivable several times, *only the first assignment is effective*, as after this the creditor is no longer able to effectively dispose of the receivable. In accordance with Article 516 of the Civil Code, the creditor is liable toward every other purchaser for the existence of the receivable, and he shall assign receivables only to the extent that these are effective vis-à-vis the debtor.

²⁸⁵ Szpunar generally rejects this possibility. However, global assignment is permitted if the future claims are defined to a sufficient extent in concrete terms. What is required is the definition of the total amount of the future claims, the designation of the debt relationship and of the future debtors (Szpunar, *Przelew na zabezpieczenie* (Sicherungsabtretung), in: Rejent 11/1995, p. 23; *ib.*, *Zabezpieczenia...*, p. 257). According to Karasek an agreement that contains all claims to which the debtor is entitled to in connection with, for example, the sale of certain assets, shall suffice for meeting the requirement of concreteness. Karasek rejects the requirement of naming the future debtor of the assigned claims. She stresses that the concrete terms stated at the time the claim is established must be guaranteed (Karasek, *Zabezpieczenia wierzytelności na zbiorze rzeczy lub praw o zmiennym składzie. Zagadnienia konstrukcyjne* (Securing claims to the entirety of assets or to a collection of rights with changing contents. Construction issues), Kraków 2004, p. 116). Mojak also views the global assignment as permissible, but excludes the third group of future claims (see above) (Mojak, in: Niezbecka/Jakubecki/Mojak, *Prawne...*, p. 182; *ibid.*, *Obrót wierzytelnościami – Podstawowe zagadnienia prawne* (Claims in the Transfer of Rights – Fundamental Legal Issues), Lublin 1995, p. 105).

VI. Prohibition of Sale

Generally, the parties have the option of agreeing on the prohibition of sale in connection with the claim. If the claim is agreed in writing, the prohibition of sale must also be agreed in writing. Otherwise, the assignment is effective, unless the assignee had previous knowledge of the ban.²⁸⁶

VII. Requirement of Consent of Third-party Debtor for Assignment

Basically, the effectiveness of the assignment does not depend on the agreement of the third-party debtor.²⁸⁷ However, the third-party debtor may continue to provide services to the assignee without coming under the obligation of debt as long as he or she has not been informed of the assignment and does not find out about the assignment from another source.²⁸⁸ Recently, a discussion has arisen about whether the *Data Protection Act*²⁸⁹ is infringed upon when the *third-party debtor is a consumer* and the assignment has been done without his or her consent. The Warsaw Voivodship Court's²⁹⁰ most recent decision ruled that this was an infringement.²⁹¹ However, this judgment is not yet legally binding. Opinions in legal publications are very divided.²⁹² The proposition that an assignment requires the consumer's agreement is championed by the Inspector General for the Protection of Personal Data.²⁹³ Thus, there is legal uncertainty with regard to this question due to the latest development.

VIII. Objections and Pleas of the Third-party Debtor

A. General

The third-party debtor has the right to raise all the objections against the assignee that the debtor had against the assignor at the time he or she *gained knowledge of the assignment*.²⁹⁴ A restriction applies only to *netting*. Basically, the third-party debtor is allowed to net an own claim that he or she is entitled to receive from the assignee against the claim vis-à-vis the assignor, even if the claim the third-party debtor is entitled to falls due after the notification of the debtor about the assignment. However, netting is ruled out if both claims fall due only after the third-party debtor has been informed and the claim of the third party-debtor against the assignee falls due at a later time than the claim assigned.

²⁸⁶ Argument from Sect.514 Civil Code.

²⁸⁷ Sect.509 Art. 1 Civil Code.

²⁸⁸ Sect.512 Civil Code.

²⁸⁹ Ustawa o ochronie danych osobowych of August 29, 1997 (repromulgation of 2002, Dz.U. no.101, pos. 926 with amendments).

²⁹⁰ Wojewódzki Sąd Administracyjny.

²⁹¹ Az: 1603/03 (not published).

²⁹² *Matela/Niewiarowska*, Dłużniku, GIODO twoim obrońcą (Debtor, The Inspector General for Personal Data Security is Your Protector), in: Rzeczpospolita of March 10, 2004, legal section; *Konarski/Sibięga*, Nierozdzielny związek (An Inseparable Relationship), in: Rzeczpospolita of Apr 19, 2004, legal section.

²⁹³ *Kalużyńska-Jasak* (Press Officer of the Inspector General), Przepisy chronią konsumenta (Rules Protect Consumers), in: Rzeczpospolita of March 20-21, 2004, legal section.

²⁹⁴ Sect.513 Art. 1 Civil Code.

In the event of *multiple assignments*, the debtor may raise objections and pleas against the last assignee that have arisen against every creditor in the course of the multiple assignments.

B. Waiver of Defence and Objections

Generally, it is permissible to waive *defence and objections*. However, it is disputed whether the *consent on the assignment* of the third-party debtor also means a waiver by the third-party debtor vis-à-vis the new creditor. Some assume that the consent is solely a waiver of the debtor's rightful and known objections at the time consent was given as well as of those that the debtor could easily have found out about. Others demand an explicit waiver of any objections and pleas. There are no rulings on this problem. With regard to the uncertainty of this legal situation, it is recommended that the formulation of the consent given by debtor should be worded so as to acknowledge the debt and thus qualify without doubt as a waiver of defence and objections.

IX. Realization of Assignment by Security

A. Agreement between the Assignor and Assignee

The question of the realization of an assignment by security is uncertain from the perspective of legal precedent and in legal academic circles. The type of realization is basically guided by the agreement between the existing and new creditor. The *limits* of the agreement are defined by the purpose of the security.

B. Realization in the Event of Bankruptcy

The legal situation in the event that *bankruptcy proceedings with liquidation* are initiated against the borrower is disputed. Prevailing opinion tends towards the creditor's right to segregate assets from the bankrupt's estate.²⁹⁵ This argument is used mainly to speak for the assignment as collateral, whereas a small part of the legal academia tends towards the right to separate satisfaction from the bankrupt's estate. The jurisdiction is silent on the matter.

When *bankruptcy proceedings with the possibility of composition* are opened, the claims secured by assignment by security will be included in the composition. Until the time of the legally binding confirmation of the composition, the creditor is not allowed to satisfy his or her claim. After the legally binding confirmation, the creditor is only allowed to satisfy the claim within the defined scope of the composition.

X. Problems with Assignments

As soon as one deviates from the traditional assignment model, it becomes unclear to what extent it must be possible to clearly define the legal relationship from which the receivable derives. The more vague, the greater the doubt about the effectiveness of assignment. A gradual liberalization of these conditions are perceptible, but as of yet no fixed limits have been set. From the view of the creditor, the formal legal requirements for bankruptcy (certified date) make the situation more difficult, because these involve additional expenses and costs.

²⁹⁵ *Jakubecki*, in: *Jakubecki/Zedler, Prawo...*, Sect.101 note 9.

The consequences of bankruptcy law for assignment by security are not entirely clear, but it may be assumed that in the case of bankruptcy with liquidation, the creditor has the right to satisfaction from segregated assets. In cases of bankruptcy with the possibility of composition, assignment by security is not particularly beneficial for the creditor, because the creditor must agree to have his or her claim made subject to the composition procedure. In comparison to registered liens it must be noted that assignment by security is less favorable, especially if one takes into account the legal risk and the legal consequences of a composition. In the case of consumer contracts, the problem of a possible infringement of the Data Protection Act, as discussed above, has recently become evident, which further impairs the creditor's position due to the existing legal uncertainty.

XI. The Assignment as Financial Collateral

The Financial Collateral Act states that financial collateral may consist of either cash or financial instruments.²⁹⁶

As already mentioned,²⁹⁷ it does not concern the cash itself, but the claim to payment of the cash from an account. In this sense, this is an assignment. As regards the relevant group of persons to whom it may apply, please refer to the explanation on financial collateral.²⁹⁸ As with liens, the contract must provide information about the creation of the security, the secured claim and the type of security. However, the Financial Collateral Act does not include any provisions on the form of an assignment. There is no parallel provision similar to that for financial liens in Article 7 par. 1 of the Financial Collateral Act. Article 101 par. 2 of the Bankruptcy and Composition Act requires a certified date for the assignment by security to be secured against the risk of bankruptcy. It is unclear whether Article 7 par. 1 of the Financial Collateral Act may be used as a precedent.

²⁹⁶ Sect.5 par.1 fig. 1 Financial Collateral Act.

²⁹⁷ See Chapter 6 II.

²⁹⁸ See Chapter 3 V.

Chapter 6: Assignment as Collateral – Fiduciary Transfer of Assets

I. General

Under the term “assignment as collateral” (*przewłaszczenie na zabezpieczenie*) one understands a *contract*, which for the purpose of *securing* a specified *financial obligation transfers the ownership* of an *asset*.²⁹⁹ In practice, assignment as collateral is widely used as an instrument to secure debts. The asset assigned as collateral can be either *movable property* or *real estate*.

It is possible for the contract to include a suspensive condition, i.e., one that allows the assignment as collateral to become effective only upon the failure to make payments. It is also possible for ownership to be subject to a cancellation clause, which means that the collateral is extinguished upon payment. The contract may be unconditional, which results in ownership being assigned to the creditor and payment giving rise to the right to reverse the assignment of the asset.³⁰⁰ The assignment as collateral of real estate is always unconditional.

There are almost no statutory regulations for the assignment as collateral. In accordance with Article 101 of the Banking Act, securing bank claims may be done by transferring the right of ownership in movable property or securities to the bank or to a third party until the debt together with outstanding interest and commissions is repaid. Article 2 of this Article provides for an obligation on the debtor to keep records of changes to the object of the assignment of collateral, and in the case of transfer of ownership, for the purpose of securing merchandise inventories or fungible goods, for the separation of the assets or for the designation of merchandise inventories.³⁰¹

The second regulation of assignment as collateral is found in the Bankruptcy and Composition Act. Section 101 par. 2 stipulates that a deed on the assignment of collateral must be in writing and must have a certified date, as this ensures the effectiveness of the assignment as collateral against the bankrupt’s estate.

There are few legal precedents on the question of assignment as collateral. Despite a large body of literature on the subject, there are many unresolved individual issues, which means that the legal risk of this type of collateral is relatively high.

II. Origins

A contract is required to create this type of collateral. A handover is not required as it is a *security without possession*. The circumstances of the realization – the obligation to identify the assets in a specified manner, the obligation to hand over the assets, etc. – must be set down in the contract. Basically, there is *no regulation* on the *form* of the contract. To attain *security against the risks of bankruptcy*, the *written form* with a certified date must be complied with. For

²⁹⁹ *Niezbecka*, in: *Niezbecka/Jakubecki/Mojak, Prawne...*, p. 380.

³⁰⁰ *Niezbecka*, in: *Niezbecka/Jakubecki/Mojak, Prawne...*, p. 386 f.

³⁰¹ The significance of this legal banking provision is unclear. It does not clarify the basic problems of security by assignment, especially not the disclosure issues or the possibilities of satisfaction. This provision does not cover security by assignment in legal relations that do not involve banks despite the apparently possible reverse applicability.

banks this formal requirement is easy to fulfill, because bank transactions and transactions that secure claims and are confirmed by documentation that is signed and bears the bank's seal, as do the authorized bank statements regarding asset rights and obligations, i.e., they bear a certified date.³⁰²

The assignment as collateral is not recorded in any register, which, on the one hand, has advantages (costs, simplified administration, etc.), but on the other hand, creates problems. This is because the creditor can easily lose the collateral through the acquisition in good faith by a third party, or the debtor can assign the asset as collateral several times. Legally these cases are unproblematic, but in practice, they cause many difficulties due to the complicated establishment of evidence.

III. Object of the Assignment as Collateral

As mentioned above, the object of the assignment as collateral does not need to be movable property, it can also be real estate. With regard to real estate, an assignment as collateral may constitute a way to avoid the principle of accessions.

Until recently, established case law regarded the assignment of real estate as collateral as impermissible. The most recent adjudication has changed this position, but this view is still rejected by parts of the legal academia. There is no full legal certainty.

IV. Realization

A. Out-of-court Realization

The assignment as collateral permits the creditor to liquidate the collateral in an out-of-court settlement. Even if it concerns the surrender of property by an unwilling debtor, the bank can exercise the privileges granted by the bank execution title if the debtor has submitted to enforcement by way of a bank execution title.³⁰³

The realization is possible by way of the final appropriation or disposal, whereby in this context an analogy may be drawn registered liens as regards the treatment of a surplus.³⁰⁴ However, the issue of the method of liquidation is not unambiguously decided. If the property is seized by a third party, the creditor is entitled to file a third-party appeal against execution in accordance with Article 841 of the Code of Civil Procedure.

B. Realization in the Event of Bankruptcy

In the case of *bankruptcy proceedings with liquidation*, the secured creditor has the right to satisfaction of claims from segregated assets³⁰⁵ according to prevailing opinion among the legal academia and legal precedent, if the requirements for securing against the risks of bankruptcy of Article 101 par. 2 of the Bankruptcy and Composition Act (*written form* and *certified date*) are observed.

³⁰² Sect.95 par.2 in connection with par1 Banking Act.

³⁰³ Sect.97 par.2 Banking Act.

³⁰⁴ See Chapter 4 VI B.

³⁰⁵ Sect.70 Bankruptcy and Composition Act.

As the financial liabilities of the undischarged bankrupt fall due with the declaration of bankruptcy, the creditor may demand the separation³⁰⁶ of the assets already on this day.³⁰⁷

In the event of *bankruptcy proceedings with the possibility of composition* two types of cases can be distinguished:

First, the case that the *maturity date is not yet reached* before the day bankruptcy is declared: In this instance, the claim secured by assignment as collateral will be included in the composition.³⁰⁸ The claim on the surrender of the collateral, in contrast, is not subject to the composition, as it may be classified as a claim on the surrender of assets within the meaning of Article 70 of the Bankruptcy and Composition Act (portion of assets that does not belong to the assets of the undischarged bankrupt).³⁰⁹ However, as the secured claim has been made subject to a reduction due to the composition, the value of the assigned asset will exceed the value of the claims. Therefore, the creditor is obligated to repay the surplus.³¹⁰

But if *maturity occurs* before the day bankruptcy is declared and the debtor has not made payment by this time, then the bank can satisfy its claim from the collateral in accordance with the contractual agreement. Its claims forms part of the composition only to the extent that it is not satisfied from the assigned asset.³¹¹

The assignment as collateral gives the secured party a strong position, especially in the liquidation of the bankrupt's estate (*right to separate satisfaction from the bankrupt's estate*). However, in bankruptcy proceedings with the possibility of *composition*, the *collateral is included in the settlement*, which reduces the attractiveness of this collateral.

³⁰⁶ Sect.91 Art.1 Bankruptcy and Composition Act.

³⁰⁷ Gołaczyński, Przewłaszczenie na zabezpieczenie. Przedmiot. Konstrukcja. Dopuszczalność. Praktyka (Security by Assignment Object. Construction. Permissibility. Practice), Poznań-Kluczbork 1998, p. 215 ff.; Zedler, in: Jakubecki/Zedler, Prawo..., Sect.70 note 7.

³⁰⁸ Sect.272 par.1 Bankruptcy and Composition Act.

³⁰⁹ Sect.273 par.1 fig. 2 Bankruptcy and Composition Act.

³¹⁰ Jakubecki, in: Jakubecki/Zedler, Prawo..., Sect.101 note 10; F. Zoll, in: F. Zoll (Ed.), Dochodzenie..., p. 332.

³¹¹ Zedler, in: Jakubecki/Zedler, Sect.272 note 3.

Chapter 7: Suretyship

I. Introduction

This Chapter will look first at the nature and conditions for the effectiveness of suretyship. It will then consider the problems of realizing sureties when used as security. At the end of the Chapter there are explanations on the sureties of specific legal entities such as sureties of the Agricultural Bank or the tax authorities.

II. General

Polish law regulates sureties (*poręczenie*) in Article 876 pp of the Civil Code. The guarantor undertakes to meet a liability on behalf of a debtor vis-à-vis a creditor in the event that the debtor fails to do so.³¹² Article 84 of the Banking Act includes a relegation clause whereby the regulations in the Civil Code are applicable to sureties granted by banks, subject to the provision that the surety of a bank can only refer to money.

There is a special regulation for sureties, which are granted by the *tax authorities* or the *Agricultural Bank* (Bank *Gospodarstwa Krajowego*) from the funds of the National Credit Guarantee Fund (*Krajowy Fundusz Poręczeń Kredytowych*) or by the *legal entities* named in Article 2 par. 2 fig.3 of the Act that act due to their assigned responsibilities or their economic activity. These sureties are regulated by the “Act on Sureties and Guarantees Issued by the Tax Authorities as well as Named Legal Entities”.³¹³

The Polish Act on Bills of Exchange and Promissory Notes follows the *Geneva Convention on Bills of Exchange and Promissory Notes of 1930/31*. The Polish regulations correspond to the Austrian wording.³¹⁴ The provisions of the Family Act³¹⁵ must also be taken into account in the case of bills of exchange and check guarantees, through which the *agreement of the other spouse* is required insofar as the issue of the bill of exchange goes beyond the scope of the proper administration of the married couple’s common assets.

III. Nature of the Law

A. Subsidiarity

According to prevailing opinion in legal academia, the guarantor is in principle liable as the *guarantor* and *payer*, i.e., the guarantor’s liability is not just subsidiary.³¹⁶ Although the creditor is obligated to inform³¹⁷ the guarantor immediately of a default by the debtor, according to prevailing opinion this is not to be interpreted as establishing subsidiarity. Rather, the regulation means

³¹² Sect.876 Art. 1 Civil Code.

³¹³ Ustawa o poręczeniach i gwarancjach udzielanych przez Skarb Państwa oraz niektóre osoby prawne of May 8, 1997 (repromulgation of 2003, Dz.U. no. 174, pos. 1689).

³¹⁴ Sect. 30-32 Act on Bills of Exchange and Sect. 25-27 Act on Checks of April 28, 1936 (Ustawa – Prawo czechowe, Dz.U. no. 37, pos. 283 with amendments).

³¹⁵ Sect. 36 Art. 2.

³¹⁶ A. A. Bączyk, *Odpowiedzialność cywilna poręczyciela* (Liability under Civil Law of Sureties), Toruń 1982, p. 67 ff.

³¹⁷ Sect.880 Civil Code.

that the omission of this obligation³¹⁸ shall result in the creditor's legal responsibility for compensatory damages. Only in accordance with Article 9 of the "Act on Sureties and Guarantees Issued by the Tax Authorities as well as Named Legal Entities" does the discharge of the obligation from the surety take place at the request of the creditor in the event the borrower loses creditworthiness and after the lender has presented documents and information that confirm the lack of creditworthiness.

B. Accessoriness

A surety is of *accessory nature* according to Polish law. The respective size of the principal obligation determines the volume of the obligation of the surety; however, a legal transaction between the debtor and the creditor undertaken after the surety was issued that would increase the volume of the obligation of the surety is not permitted.³¹⁹ The guarantor has the right to raise any objections vis-à-vis the creditor that a debtor would be entitled to.³²⁰ A waiver by the principal debtor of the right to raise such objections is of no significance for the guarantor.

There are a few cases where the *principle accessoriness is breached*. The guarantor of a debtor who lacks the capacity to contract is obliged to render the service as the principal debtor if he knew of the legal incapacity, or could easily have found out about it³²¹, at the time the surety was issued. Moreover, composition proceedings (in the case of the bankruptcy of the debtor) do not affect the surety.³²²

The accessoriness of the surety does not rule out the ability to stand surety for *future claims*. Therefore, a surety of up to a previously agreed maximum amount can be taken on for a future debt. Such surety may, however, be retracted at any point up to the origination of the debt.³²³ This right cannot be excluded by agreement.

IV. Execution of the Contract and Conditions for Effectiveness

A. Characteristics of a Surety

Special regulations rule out or limit the possibility of individual entities standing surety. Thus, for example, a mortgage bank cannot stand surety. In the case of cooperative banks, the articles of association are allowed to make the surety contingent on the assumption and payment of at least one cooperative share.³²⁴

³¹⁸ The only obligation is to inform, but it is not like in Austrian law an obligation to effectively collect the debt from the principal debtor without.

³¹⁹ Sect.879 Civil Code.

³²⁰ Sect.883 par. 1 Civil Code. Specifically, the guarantor may net a claim of the debtor vis-à-vis the creditor against a claim of the creditor vis-à-vis debtor.

³²¹ Sect.877 Civil Code.

³²² Sect.291 Bankruptcy and Composition Act.

³²³ Sect.878 Civil Code.

³²⁴ Sect.10 par.1 of the "Act on the Functioning of Cooperative Banks, Association Procedures and the Associated Banks".

B. Form

The form in which a surety agreement is executed is governed by special provisions of the Civil Code. In accordance with Article 876 par. 2 of the Civil Code, the declaration of the surety must be in *writing*, otherwise it is *null and void*. A personal signature on the document that comprises the declaration of intent is sufficient to comply with the written form. The surety³²⁵ is not excluded from the application of the “Act on Electronic Signatures”. Accordingly, an electronically formulated declaration of intent, which is furnished with a certified electronic signature is treated as equal to a written declaration of intent.³²⁶ The provisions for the adherence to the written form by electronic bank documents are regulated by decree.³²⁷ Contrary to the declaration of the surety, the declaration of the creditor requires no special form. Conclusive acceptance suffices.

The *conferral of the power of attorney* for standing surety requires the written form, but only if there is a risk of difficulties when furnishing evidence.³²⁸ When the written form is not used, testimonial evidence and evidence from the examination of witnesses with regard to the facts of the legal transaction concluded are not admitted to the proceedings. This provision is, however, not applicable to relations between enterprises.

C. Protection of the Surety

In contrast to Austria, there is no debate the Polish legal academia about the *conflict with public morals* of sureties, especially with regard to the perceptible poverty of the guarantor as well as to the so-called surety given by a relative of the debtor.

With regard to sureties issued by one spouse to another the following applies: Generally, no consent from a third party is required, especially not from the debtor. However, the agreement of the spouse could be required according to the Family Act.³²⁹ Article 36 par. 2 of the Family Act stipulates that the transactions of a spouse that go beyond the bounds of the *proper administration of the married couple’s common assets* require the agreement of the other spouse.³³⁰ The question of how far this provision applies to the issue of a surety has become one of the main problems in the area of surety legislation. Two *camp of opinion* are discernable:

The first camp purports that the issue of a surety in no way constitutes an administrative transaction with regard to the assets and therefore does not require the agreement of the spouse.³³¹ The other camp considers that undertaking a surety is an administrative transaction, which in the case it exceeds the

³²⁵ Ustawa o podpisie elektronicznym of September 18, 2001 (Dz.U. no. 130, pos. 1450 with amendments).

³²⁶ Sect.78 Civil Code.

³²⁷ Decree of the Council of Ministers of February 25, 2003, Rozporządzenie Rady Ministrów w sprawie zasad tworzenia, utrwalania, przechowywania i zabezpieczania, w tym przy zastosowaniu podpisu elektronicznego, dokumentów bankowych sporządzanych na elektronicznych nośnikach informacji (Decree of the Council of Ministers on the Principle for Creating, Preserving, Maintaining, and Storing and Backing Up Bank Documents on Electronic Data Storage Devices including with the Use of Electronic Signatures, Dz.U. no. 51, pos. 442).

³²⁸ Sect.99 Art. 1 in conjunction with Sect.74 Art. 1 Civil Code.

³²⁹ Ustawa – Kodeks rodzinny i opiekuńczy vom 25.02.1964 (Dz.U. no. 9, pos. 59).

³³⁰ Common assets is the principle statutory form of how property relations between spouses are regulated under Polish law.

³³¹ This also applies to the court of appeal Gdańsk (OSA 9/1996 pos. 46).

bounds of proper administration entails the requirement to obtain the consent of the other spouse.

The Supreme Court has ruled in favor of the second alternative.³³² This means that a surety related to common assets, which has been issued *without* the required *consent*, is provisionally and from the time of the refusal of consent it is null and void. The surety is, however, fully effective with regard to the guarantor's personal assets.

Parliament is considering an *extensive amendment* to the Family Act.³³³ According to this proposed amendment, the current system of managing common assets will be radically altered. Article 41 par. 1 of the draft says that if a spouse has entered into a commitment with the agreement of the other spouse, a creditor can also demand satisfaction from the common assets of the married couple. If the spouse has entered into a commitment without the consent of the other spouse, Article 41 par. 2 of the draft stipulates that the creditor may require satisfaction from the personal assets of this spouse. This would also affect the surety.

D. Contesting a Surety Agreement

A *mistake* by the guarantor about the solvency of the debtor cannot lead to the legality of the surety agreement being contested, because it does not concern a mistake as to the substance, i.e., a mistake regarding the content of the declaration of intent.³³⁴ Even the *malicious deceit* of the debtor about his or her solvency cannot result in the contesting by the guarantor on the grounds of malice.³³⁵

V. Duty of Due Diligence of the Bank under the Civil Code

The provisions in the Civil Code relating to sureties only contain two obligations on the part of the creditor. On the one hand, the *creditor is obligated* to inform *the surety* immediately of a *payment default* by the *debtor*;³³⁶ and on the other hand, the creditor is liable to the surety if he or she has disposed of security for a claim or has eliminated evidence to the disadvantage of the surety.³³⁷

A bank is obligated to inform the surety of every change in interest rates.³³⁸ If from the start interest rates in the loan agreement are subject to alteration and this is effective with regard to the borrower, it also holds true for the guarantor, even if the bank has not observed its duty of notification. In such case, the guarantor may demand compensation from the bank for damages arising from the failure to inform.

³³² Supreme Court decision of September 20, 1994 (III CZP 113/94, Wokanda 12/1994/1 p. 2, Supreme Court decision of February 10, 1995 (III CZP 2/95, Wokanda 5/1995 p. 7), Supreme Court decision of November 28, 2002 (II CKN 1355/00, LEX no. 75343).

³³³ Project – Ustawa o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw (Act on the Amendment to the Family Act and several other laws), received 23 Apr. 2003, printed materials no. 1566.

³³⁴ Sect.88 Art. 1 in conjunction with Sect.84 Art. 1, 2 Civil Code.

³³⁵ Supreme Court decision of September 30, 1996 (III CZP 85/96, OSN 12/1996 pos. 153) with corresp. note: *Bączyk*, in: *Prawo Bankowe* 1/1997, p. 87 ff.; *Kasprzyk*, in: *Palestra* 5-6/1997, p. 255 ff.; *Lewaszkiwicz-Petrykowska*, in: *OSP* 7-8/1997, p. 139 ff.

³³⁶ Sect.880 Civil Code.

³³⁷ Sect.887 Civil Code.

³³⁸ Pursuant to Sect.76 par.1 fig. 2 Banking Act.

In Polish law, the continuing duty to inform on the part of the creditor, even if it concerns a bank, is not discussed. Neither is there jurisdiction on this subject. In particular, there is no answer to the question of whether the provisions in the Consumer Credit Act are applicable *mutatis mutandis* to the issue of sureties.³³⁹

VI. Revocation of a Surety

In principle, a surety cannot be revoked by the guarantor. The already mentioned exception affects the surety for future claims which, if it is not limited, can be revoked at any time up until the origination of the claim. One possibility for the guarantor to release him or herself from the obligation is stated in Article 882 of the Civil Code for the case that the debt's maturity date is not fixed or maturity is dependent on termination. In such case the guarantor is allowed six months after the issue of the surety or if he or she has guaranteed future credit, from the time of the creation of the debt to demand that the creditor give notice to the debtor to pay or gives termination notice at the next date. The surety is cancelled if the creditor contravenes this demand.

VII. Consequences of Partial Payments

If the guarantor only paid part of the loan, he or she enters into the obligations of the creditor for this portion paid.³⁴⁰ The position of the partially satisfied creditor is not affected by this, as he or she has priority over the guarantor in the event of an enforced collection of the remainder of the loan.³⁴¹

VIII. Realization of the Surety

A. General

If a surety to secure a claim is issued that arises out of a bank transaction in accordance with Article 5 of the Banking Act, the bank may draw up a *bank execution title*³⁴² if the guarantor has agreed in writing to submit to judicial enforcement.³⁴³ In such case, the bank can apply to the bailiff for execution after obtaining an clause of enforceability from the court.

If, for any reason, the provisions for drawing up a bank execution title are not fulfilled, the bank can make use of the privilege granted by Article 485 par. 3 of the Code of Civil Procedure. According to this regulation, a bank can require the court to issue a *default summons*, if it has a claim based on an excerpt from the banking books, which is signed by two authorized persons and bears the official seal of the bank. In addition, the bank must furnish evidence that it has sent a written request for payment to the debtor.³⁴⁴

The fact that the claim is covered by a surety does *not* give the creditor any *special privileges for execution*. If the guarantor has several creditors, a claim

³³⁹ Ustawa o kredycie konsumenckim of July 20, 2001 (Dz.U. no. 100, pos. 1081).

³⁴⁰ Sect.518 Art. 1 fig. 1 Civil Code.

³⁴¹ Sect.518 Art. 3 Civil Code.

³⁴² See Chapter 1.

³⁴³ Sect.97 par.1 Banking Act.

³⁴⁴ This privilege puts the bank in a similar position like in the case of the procedures for the collection of claims from bills of exchange and checks and from other claims qualified by other documents.

secured by a surety is also subject to satisfaction in accordance with the ranking defined in the Code of Civil Procedure, i.e., under normal circumstances the claim will not be accorded priority satisfaction.³⁴⁵

Claims secured by a surety may be included in the discharge of residual debt.³⁴⁶

B. Realization of the Surety in the event of Bankruptcy of the Guarantor

1. Right to File an Application

It is to be assumed that the *legitimate claimant on a surety* will be able to file for bankruptcy. This results from the fact that in Polish law the guarantor is liable as a guarantor and a payer, unless otherwise contractually agreed. This establishes the primary liability of the guarantor with regard to the secured bank. If a subsidiary liability of the guarantor has been agreed, the bank only has the right to apply if the debtor has been requested to make payment without this request being met.

2. Applying for Satisfaction of a Claim

If the creditor wishes to participate in the bankruptcy proceedings against the guarantor, the creditor must register the claim with the bankruptcy judge³⁴⁷ within the prescribed time limit *in writing and in duplicate*. The content of the registration is regulated in detail in Article 240 of the Bankruptcy and Composition Act. If the claim is registered late, the actions already taken in the bankruptcy proceedings as regards this creditor remain in force and the creditor's recognized claim will simply be considered in accordance with the accepted plans to distribute the bankrupt's estate. If the claim is registered after the confirmation of the final plan, the application shall not bear fruit.³⁴⁸ The claims secured by the sureties including interest for the year prior to the initiation of bankruptcy proceedings are satisfied in the general third class.³⁴⁹ Other interest is satisfied in the fourth class.³⁵⁰

3. Effect of the Initiation of Bankruptcy Proceedings with the Possibility of Composition

In the course of the bankruptcy proceedings, the creditor may not be permitted to terminate the surety agreement without the consent of the creditors' committee. Composition can provide for a ban on giving notice until the composition has been executed.³⁵¹

³⁴⁵ Sect.1025 Art. 1 Code of Civil Procedure.

³⁴⁶ Sect.369 Bankruptcy and Composition Act. For details see Chapter 2 IV F.

³⁴⁷ Sect.236, 239 Bankruptcy and Composition Act.

³⁴⁸ Sect.252 Bankruptcy and Composition Act.

³⁴⁹ Sect.342 par.1 fig. 3 Bankruptcy and Composition Act.

³⁵⁰ Sect.342 par.1 fig. 4 Bankruptcy and Composition Act.

³⁵¹ Sect.90 par.2 Bankruptcy and Composition Act.

4. Initiation of Bankruptcy Proceedings Against a Bank

If bankruptcy proceedings are opened against a bank, a surety issued by the bank is cancelled if the bank has not received any commission on the issuance of the surety up until the day the bankruptcy proceedings are opened.³⁵²

5. Discharge of Residual Debt

Claims secured by a surety may be included in the discharge of residual debt.³⁵³

IX. Special Sureties of Certain Legal Entities

A. Agricultural Bank as a Surety

Sureties, which are issued by the Agricultural Bank, are financed from National Credit Guarantee Fund. This comprises funds from the government budget and from other funds.³⁵⁴ The law includes a few limitations with regard to the issue of sureties. Sureties are not allowed to exceed the equivalent of *EUR 5 million*.³⁵⁵ Furthermore, the claims to be secured are only permitted to serve the *purposes listed* in Article 38 of the law. This includes, among others, the financing of investments, creating new jobs and financing for the business of small and medium-sized companies. In addition, a condition for the granting of a surety by the Agricultural Bank is the *creation of a security* by the borrower in favor of the Agricultural Bank for the case that claims arise under guarantor's obligations.³⁵⁶ A surety granted by the Agricultural Bank is of *limited duration* and the *maximum amount* must be fixed in advance.³⁵⁷

The regulations of this Act are valid for sureties as well as for guarantees.

B. The Fiscal Authorities as Surety

The two last-mentioned regulations about the time limit and the ceiling also apply when the fiscal authorities act as surety.³⁵⁸ A deviation from the time limit requirements and the maximum amount fixed in advance is permitted if the surety is granted by an international financial institution, of which Poland is a member or with which Poland has a cooperation agreement.³⁵⁹ Generally, the maximum limit of the *equivalent of EUR 5 million* must also be complied with.³⁶⁰ Furthermore, the *purpose* of the secured claims is *mandatory*. For example, it must serve the purpose of an investment in capital goods such as for the development or maintenance of infrastructure, the export of goods and services or the protection of the environment.³⁶¹ The granting of a surety must be preceded by a *risk analysis*³⁶² for which reason the application for the surety must

³⁵² Sect.434 fig. 3 Bankruptcy and Composition Act.

³⁵³ Sect.369 Bankruptcy and Composition Act. For details see Chapter 2 IV F.

³⁵⁴ Sect.35 par.2 of the "Act on Sureties and Guarantees Issued by the Tax Authorities as well as Named Legal Entities".

³⁵⁵ Sect.37 of the Act mentioned.

³⁵⁶ Sect.38 par.2 in conjunction with Sect.8 of the Act mentioned.

³⁵⁷ Sect.35 par.2 in conjunction with Sect.2b Art.1 of the Act mentioned.

³⁵⁸ Sect.8, 2b par.1 of the Act mentioned.

³⁵⁹ Sect.2b par.2 of the Act mentioned.

³⁶⁰ Sect.3 par. 4 of the Act mentioned.

³⁶¹ Sect.7 of the Act mentioned.

³⁶² Sect.2a par.1 of the Act mentioned.

include information that makes it possible to conduct such an analysis and which is evidenced by the relevant documents.³⁶³ The validity of the security is in principle dependent on the payment of a *commission*.³⁶⁴

C. Certain Legal Entities as Sureties

The legislation we are discussing also applies to specific legal entities it mentions. These are legal entities that are not banks or insurance companies, and which due to special regulations are entitled to assume sureties within the framework of the sovereign responsibilities entrusted to them or within the scope of their business activities. These include:

- Government bodies created by legislation;
- Commercial companies in which state holds shares (stakes) that account for more than half of the nominal capital;
- Cooperative companies in which the value of the stock that is owned by the state is more than 50% of the funds created by member deposits;
- Legal entities, where the shares (stakes) held by the state or the legal entities listed in the items above exceed half of the nominal capital or the funds created by deposits of members of the cooperative company.
- Foundations, of which the founders are legal entities, and for which the first three items are relevant.³⁶⁵

Sureties taken on by legal entities are of *limited duration* and the *maximum amount* must be fixed in advance.³⁶⁶ As with the creation of sureties by the Agricultural Bank and the fiscal authorities, the creation of a surety by said legal entity is dependent on the depositing of collateral by the borrower in favor of the legal entity for the event that claims arise under the guarantor's obligations.³⁶⁷ There is no provision on the *purpose* of the loan, but there are *limitations with regard to the maximum amount* of the security, which is calculated according to the share capital of the legal entity.

³⁶³ Sect.2e of the Act mentioned. The precise details and the documents to be attached are contained in the Decree of the Council of Ministers on the Establishment of a Suretyship or a Guarantee by the Tax Authorities and on the Commission for a Suretyship and Guarantee of 20 Feb. 2003 (Rozporządzenie Rady Ministrów w sprawie udzielania przez Skarb Państwa poręczenia i gwarancji oraz opłaty prowizyjnej od poręczenia i gwarancji, Dz.U. Nr. 41, Pos. 348) .

³⁶⁴ Sect.2c par.1 of the Act mentioned.

³⁶⁵ Sect.2 Art.1 fig. 3 of the Act mentioned.

³⁶⁶ Sect.32 in conjunction with Sect.2b Art.1 of the Act mentioned.

³⁶⁷ Sect.32 in conjunction with Sect.8 of the Act mentioned.

Chapter 8: Contractual Cumulative Assumption of Debt

I. General

Cumulative assumption of debt (*kumulatywne przystąpienie do długu*) means that a *third party enters into an existing debt* as a co-debtor with the result that said third party becomes *joint debtor*, but the *debtor is not discharged* from his or her *debt*.

II. Cumulative Assumption of Debt in the Consumer Credit Act

A. Disclosure Obligations of the Lender

1. Legislative Framework

The only regulation that pertains to contractual cumulative assumption of debt is found in the Consumer Credit Act.³⁶⁸ Article 10 par. 2 of this law says that in the event a consumer enters into a debt arising from a contract by virtue of which a consumer credit has been granted to another person, the lender is obligated *to inform the consumer entering into the debt in writing about the conditions of the loan*. Article 15 of the Consumer Credit Act deals with the *sanctions* if the statutory duty to furnish information is not complied with, whereby after the submission of a written declaration, the *consumer is solely required to pay back* the loan *without interest* or the other costs of the loan that the lender is entitled to. This does not, however, include the cost of establishing the security or the purchase of an insurance policy for the loan.

Cumulative assumption of debt is feasible in *two forms*: On the one hand, it can be established by a contract between the person entering into the debt and the creditor. On the other hand, it can be created as a result of the person entering the debt and the debtor agreeing on a contract to this effect. There are a few voices in the legal academia that view such a contract as a contract in favor³⁶⁹ of a third party.³⁷⁰ It is debatable whether the cumulative assumption of debt requires the *agreement* of the creditor or the debtor. According to prevalent opinion this is not the case, especially as no third party rights are affected by the accession.³⁷¹ The bank only gains from such accession. However, there is no legal certainty in this issue.

The contractual agreement between the person entering the debt and the debtor constitutes a *problem with regard to the application of Article 10 par. 2 of the Consumer Credit Act*. It is questionable whether in such a case the lender can be obligated to inform the consumer entering the debt about the conditions

³⁶⁸ The concept of consumer in Polish law coincides largely with the concept of consumer according to the Austrian Consumer Protection Act (Sect. 1 par. 1).

³⁶⁹ Sect. 393 Civil Code.

³⁷⁰ *Longchamps de Berier*, *Zobowiązania* (Schuldrecht), Poznań 1948, S. 324; *Łętowska*, in: *System prawa cywilnego* (System des Zivilrechts), Vol. III Part 1, Ossolineum 1981, S. 939; *Ohanowicz*, in: *System prawa cywilnego* (System of Civil Law), Vol. III Part 1, Ossolineum 1981, p. 245; *Radwański*, *Zobowiązania – część ogólna* (Contract Law – General Part), Warszawa 2001, p. 315.

³⁷¹ *Łętowska*, in: *System...*, p. 939; *Policzkiewicz*, *Odpowiedzialność stron stosunku kontraktacji w obrocie powszechnym* (Liability of the parties to an agricultural supplier relationship in general trade), Warszawa 1980, p. 64; a.A. *Czachórski*, *Zobowiązania . . .*, p. 275, he applies Sect. 519 Sect. 2 Civil Code (Requirement of consent upon the acceptance of debt) analogously.

of the credit granted. If one follows the prevalent opinion, whereby agreement is not required, it can be assumed that the lender must fulfill its duty to inform before the cumulative assumption of debt. But, this opinion is not undisputed.³⁷²

B. Joint Liability of the Debtor and the Person entering the Debt

Even when joint liability has not been expressly agreed, the debtor and the person entering the debt are jointly liable, according to a Supreme Court decision.³⁷³

III. Comparison to suretyship

A. Accessoriness

The main difference between a surety and the cumulative assumption of debt is limited to the fact that the cumulative assumption of debt is *not accessory*. This means that subsequent changes to the main contract only affect the principal debtor.

B. Analogous Application of the Regulations of the Surety

It is questionable in how far the provisions covering sureties can provide an analogous application, as the cumulative assumption of debt has been developed as the *antithesis to the surety*.

Entry into a non-existent principal debt means, of course, that there is no liability for the person assuming joint liability. An analogous application of the surety provisions of Article 877 of the Civil Code is ruled out if the principal debtor lacks the capacity to contract. Even if the person assuming the debt knew of the principal debtor's incapacity to contract, the cumulative assumption of debt is not valid. In such a case it might be possible to consider tortious liability as laid down in Article 415 of the Civil Code.

The question of *entry into a future debt* has not been debated in legal academic circles. It must be left open to question whether an analogous application of Article 878 of the Civil Code, whereby for a future debt up to a previously determined maximum amount a revocable surety can be taken on at any point up to the time the debt is incurred.

Finally, it should be noted that the legal risk of the cumulative assumption of debt is higher than that of a surety due to the lack of regulation and jurisdiction.

With regard to the cumulative assumption of debt of a spouse, the comments on sureties hold true (see Chapter 7).

³⁷² This obligation on the creditor results from the wording of the provision as the law does not make a difference between the situations described above. Neither does it explain how the creditor is to technically comply with this obligation. It may be assumed that the conclusion of an accession agreement does not depend on the giving of information by the creditor. The creditor, however, does carry the risk of ensuring the notification to the acceding party with the consequences of Sect. 15 Art. 1 in conjunction with Sect. 2 of the Consumer Loan Act.

³⁷³ Supreme Court decision of October 12, 2001 (V CKN 500/00, OSN 7-8/2000 pos. 90), with corresp. note *Drapala*, in: *Przegląd Sądowy* 10/2002, p. 119.

IV. Realization of the Cumulative Assumption of Debt

The recovery of a claim from a person assuming joint liability is structured in exactly the same way as the recovery of a claim from a guarantor.³⁷⁴ With regard to the bankruptcy of the person entering into an existing debt, the creditor can apply to initiate bankruptcy proceedings, as this gives the creditor a new debtor, who is a joint and several debtor and is primarily liable to the creditor. The claim must be brought forward by the creditor.³⁷⁵ Satisfaction takes place in the general classes 3 and 4.³⁷⁶ A bankruptcy proceeding with the possibility of composition from the assets of the joint debtor cannot impair the creditor's rights with regard to the other debtor. As this is the case even with regard to accessory sureties,³⁷⁷ it must certainly be the case for non-accessory cumulative assumption of debt.

³⁷⁴ Sect. 342 par. 1 fig. 3, 4 Bankruptcy and Composition Act.

³⁷⁵ Sect. 236, 239, 240, 252 Bankruptcy and Composition Act.

³⁷⁶ Sect. 342 Art. 1 fig. 3, 4 Bankruptcy and Composition Act.

³⁷⁷ Sect. 291 Bankruptcy and Composition Act.

Chapter 9: The Guarantee

I. General

The *guarantee* serves as *credit protection* for a loan *agreement*, which is concluded *between* a bank and a *principal debtor*. This contractual relationship is called the underlying debt relationship. The relationship between guarantor and borrower (principal debtor) can be designated as cover relationship (e.g. agency relationship). Ultimately, it creates a contract of guarantee between the bank (lender) and the guarantor (guarantee relationship). If the guarantor is also a bank, which is often the case, one talks of a bank guarantee.

Of interest here is the bank that protects its credit as the third party beneficiary, and not the bank granting a guarantee.

The bank guarantee (*gwarancja bankowa*) is regulated in Article 80 ff of the Banking Act. It is defined as the unilateral obligation of a bank to render a service either directly or via the mediation of another bank in favor of a beneficiary, after the beneficiary has fulfilled certain conditions.³⁷⁸

In Polish legal academic circles there is a debate about whether a bank guarantee is established by a *contract* between the guarantor and the beneficiary or whether the obligations of the guarantor rest on the construct of an *order* in accordance with Article 921 ff of the Civil Code.³⁷⁹ Widespread opinion assumes the contractual nature of the guarantee.³⁸⁰

As with a surety, a special regulation covers the granting of guarantees by the *fiscal authorities*, the *Agricultural Bank* as well as other *specified legal entities*. This is found in the “Act on Sureties and Guarantees issued by the Fiscal Authorities as well as by specified Legal Entities”.

The “Act on Insurance Activities”³⁸¹ states in Article 3 par. 3 fig. 1 that so-called insurance activities also includes the issuance of *insurance guarantees* and also mentions that authorized insurance broker may set up such guarantees. There is no legal regulation of substance for this type of guarantee. However, it may be assumed that an analogous application of the provisions of the Banking Act is recommended.

II. Form

The granting of a bank guarantee must be *in writing*. Non-compliance with this requirement invalidates the bank guarantee.³⁸²

III. Abstractness and Accessoriness of the Bank Guarantee

Unchallenged is whether the guarantee obligation is separate from the underlying debt relationship between the bank and the borrower. The contract in favor of a third party is also independent of the allowance relationship. The

³⁷⁸ Sect.81 Art.1 Banking Act.

³⁷⁹ Cf. *Pisuliński*, in: Fojcik-Mastalska (Red.), *Prawo Bankowe. Komentarz* (Bankrecht. Kommentar), Warszawa 2003, Sect.81 note 16; *derselbe*, Charakter prawny gwarancji bankowej (Die Rechtsnatur der Bankgarantie), in: *Monitor Podatkowy* 2/1994, p. 36.

³⁸⁰ *Blicharz*, Charakter prawny umowy gwarancji bankowej (Die Rechtsnatur des Bankgarantievertrages), in: *Prawo Papierów Wartościowych* 3/200, p. 32 ff.; *Radwański/Panowicz-Lipska*, *Zobowiązania...*, Rn. 680.

³⁸¹ Ustawa o działalności ubezpieczeniowej of July 28, 1990 (Repromulgation of 1996, Dz.U. no. 11, pos. 62 with amendments).

³⁸² Sect.81 par.2 Banking Act.

question of the ratio to the underlying debt relationship is a question of the accessory nature. General opinion with regard to bank guarantees assumes that the obligation derived from the guarantee is not accessory.³⁸³ The non-accessory nature exists only in the sense that the guarantee mandate (cover relationship), the guarantee, and the relationship between the guarantor and bank are not impaired.

Only in exceptional cases does the legal academia apply the construct of the so-called guarantee misuse based on Article 5 of the Civil Code.³⁸⁴ According to this provision, no-one is allowed to exercise his or her right against the principles of a social community or the socio-economic purpose of law. This is the case, for example, if a guarantee at first request is issued and the creditor demands the entire claim, even though the principal debt has already been repaid.

IV. Types of Guarantees

A. General

Legal academia differentiates between the various types of guarantee depending on the object being secured, the substance of the guarantee and the number of committed banks.³⁸⁵

B. Payment and Contractual Guarantee

The first group is formed by payment and contractual guarantees. If a bank takes on the risk of failure to meet an obligation, a payment guarantee is used. So-called contractual guarantees are also issued that serve to protect an auction, the proper fulfillment of a contract, future claims for damages etc.

Special regulations cover the customs guarantee³⁸⁶ and the travel guarantee³⁸⁷, which may also be subsumed under the payment and contract guarantees. The legal consequences mainly conform to how the liability risk of the guarantor is described in the guarantee commitment. It follows from this that various challenges may arise from the guarantee commitment itself.

³⁸³ Supreme Court ruling of Apr. 16, 1993 (III CZP 16/93, OSN 10/1993 Pos. 166) effective as a principle legal rule, i.e., the ruling is binding on all appointees to the Supreme Court, with krit. note. *Szpunar*, in: *Państwo i Prawo* 9/1993, p. 106; resolution of the entire senate of the civil tier of the Supreme Court from 28 Apr. 1995 (III CZP 166/94, OSN 10/1995 Pos. 135) with note *Tracz*, *Prawo Bankowe* 2/1996, p. 74 ff.

³⁸⁴ Supreme Court decision of January 25, 1995 (III CRN 70/94, OSN 5/1995, pos. 86) with crit. note. *Litwińska*, *Przegląd Prawa Handlowego* 3/1996, p. 29 ff.; *Osada/Wędrychowski*, *Zabezpieczenie spłaty pożyczek, kredytów i gwarancji bankowych* (Sicherung der Rückzahlung von Darlehen, Krediten und Bankgarantien), Warszawa 1996, p. 37.

³⁸⁵ *Pisuliński*, in: *Fojcik-Mastalska* (Red.), *Prawo...*, Sect.81 note 2; see also *Niezbecka*, in: *Niezbecka/Jakubecki/Mojak*, *Prawne...*, p. 149 ff.

³⁸⁶ Sect.52 of the Customs Act (Kodeks celny) of March 19, 2004 (Dz.U. no. 68, pos. 662), which entered into force on May 1, 2004.

³⁸⁷ Sect.5 par1 fig 2 lit. a), par 5 of the Travel Service Act (Ustawa o usługach turystycznych) of 29 Aug. 1997 (repromulgated in 2001, Dz.U. No. 55, Pos. 578 with amendments); see *Pisuliński*, in: *Fojcik-Mastalska* (Red.), *Prawo...*, Sect.81 note 4.

C. Conditional and Unconditional Guarantees as well as Revocable and Irrevocable Guarantees

In accordance with the substance of the guarantee one can differentiate between the conditional and unconditional guarantee as well as the revocable and irrevocable guarantee.³⁸⁸ The unconditional guarantee (guarantee at first request) defines the obligation of the bank to pay upon a request for payment without any requirements to present documents or any other evidence.

The conditional guarantee includes the obligation of payment on the presentation of specified documents, which prove the existence of the circumstances mentioned in the guarantee.

A guarantee is generally irrevocable. In the guarantee commitment, however, the right to revoke it may be retained, but the circumstances must be described in exact detail.

Contrary to Austrian law, where a guarantee is typically unconditional and irrevocable, it is quite normal in Poland to make use of conditional and revocable guarantees as security.

D. Counter-Guarantee and the Confirmation of Guarantee

Apart from the basic form of the guarantee, Polish law also recognizes the so-called *counter-guarantee* and the *confirmation of guarantee*.

A counter-guarantee is a guarantee, which the guarantor issues for the case that if certain circumstances are occur, the payment to be rendered by the guarantor is covered by the counter-guarantee.³⁸⁹

The confirmation of guarantee exists so that the bank guarantee can be secured by a guarantee of another bank.³⁹⁰ In this case the beneficiary can direct its claim on the guarantee against its guarantor or against the confirming bank or demand payment from both banks, specifically up to the full satisfaction of the claim. As the law does not explicitly mention joint indebtedness, some authors question whether this means joint liability.³⁹¹ This argument could have an influence on the rights of recourse between the two financial institutions.

V. Consequences of a Change in Debtor

It is disputed whether a *change in debtor* can lead to the *cancellation* of the *guarantee* obligation. In accordance with Article 525 of the Civil Code, in the case of securing a claim by a surety or by limited rights in property, which are created by a third party, this collateral is cancelled at the time the debt is taken on, except if the guarantor or the third party has agreed to the continued existence of this collateral. The Supreme Court has spoken in favor of an analogous appli-

³⁸⁸ *Pisuliński*, in: Fojcik-Mastalska (Red.), Prawo..., Sect.81 note 5.

³⁸⁹ Until the Banking Act was changed in May 2004 the Counter-Guarantee was defined by law in Sect.82 par 3 of the Banking Act in this manner. Although these provisions have been repealed, the permissibility of such a guarantee cannot be questioned.

³⁹⁰ Sect.83 par.1 Banking Act.

³⁹¹ For liability in solidum: *Pisuliński*, in: Fojcik-Mastalska (Red.), Prawo..., Sect.83 note. 4; *Rudnicki*, O umowie gwarancyjnej (Über den Garantievertrag), in: Przegląd Prawa Handlowego 9/1993, p. 2. For joint and several liability: *Szpunar*, Zabezpieczenia osobiste wierzycelności (Persönliche Forderungssicherheiten), Warszawa 1997, p. 148; see also decision of the Supreme Court of Oct. 12, 2001 (V CKN 500/00, OSN 7-8/2002 pos. 90).

cation of this provision in the case of a bank guarantee.³⁹² However, legal academic circles are divided over this issue.³⁹³

VI. The Guarantee in International Private Law

With regard to International Private Law (IPL) the same regulations apply as for sureties, which means that if there is no *choice of law* the *place where the contract was concluded* is decisive. Also the possible non-contractual eligibility of the guarantee would have no influence on the above mentioned regulation, as according to Article 30 of the IPL this regulation can be applied to unilateral legal transactions.

Solely with regard to the *insurance guarantee* can doubts arise, because if there is no choice of law for insurance agreements, the headquarters of the insurance institution is decisive.³⁹⁴ A bank guarantee may be regarded as a special form of insurance agreement. However, legal academia has not commented on this question.

VII. Realization of Bank Guarantees

As regards the use of bank guarantees, the same regulations as for sureties apply.³⁹⁵ If bankruptcy proceedings are opened against a bank, the bank guarantees issued by this bank are nullified if the bank has not received any commission as a result of issuing the bank guarantee up until the start of the bankruptcy proceedings.³⁹⁶ Any agreed-on settlements by the principal debtor have no influence on the guarantee.

³⁹² Decision of January 7, 1997 (I CKN 37/96, OSP 5/1997 pos. 97).

³⁹³ The following have spoken in favor of this: *Drapala*, Zwalniające przejęcie długu a zabezpieczenia wierzytelności (Discharging assumption of debt and securing claims), in: *Monitor Prawniczy* 1/2002, p. 15. Against an extension of Sect.525 Civil Code to the guarantee: *Pisuliński*, in *Fojcik-Mastalska* (Red.), *Prawo...*, Sect.82 note 15; crit. note on the decision of the Supreme Court of 7 Jan. 1997 (see Fn. 86): *Szpunar*, in: OSP 5/1997 Pos. 97 und *Zedler*, in: *Państwo i Prawo* 8/1997 p. 109.

³⁹⁴ Sect.27 fig. 3 Act on International Private Law.

³⁹⁵ See Chapter 7.

³⁹⁶ Sect.434 fig. 3 Bankruptcy and Composition Act.

Chapter 10: Concluding Comments

A comparison with the Austrian Credit Protection Act reveals the following significant differences:

Apart from a court decision or settlement, a so-called *bank execution title* (see Chapter 2) can also serve as a execution title for the realization of security in judicial enforcement proceedings.

To enforce a claim arising from loan there are essentially four special proceedings for banks: the *summons proceedings*, the *summary proceedings*, the *simplified proceedings* and the proceedings in *commercial cases* (see Chapter 2).

In *bankruptcy proceedings* as well as in *execution proceedings*, the *satisfaction* of the creditors takes place according to *classes*. Only after the complete satisfaction of one class is the next class satisfied. The claims in the different classes are satisfied according to the type of proceeding (enforcement, bankruptcy proceedings) and the security (surety, simple lien or registered lien). Here it must be noted, in particular, that *liens do not always have preferential satisfaction rights* (see Chapter 2).

According to Polish law, there is the possibility to create a *non-possessory lien* on *movable property*, by which the lien is created by being recorded in the *lien register* while the borrower can use the property concurrently for economic purposes. A *lien on a claims* can also be *recorded* in the register. In addition, there is the possibility of setting up a so-called *simple lien*, which requires the transfer of property (see Chapter 3).

For the creation of a *mortgage* it is not necessary to record the lien establishment agreement in a *notarial instrument*, but rather a declaration *in writing* by the lien owner is sufficient (see Chapter 4).

If the formal requirements are infringed, Polish law recognizes the sanction of *lack of evidence*, such as for example with regard to the assignment or granting of a power of attorney for a guarantor's undertaking. This means that testimonial evidence or evidence from examination with regard to the legal transaction is inadmissible in the proceedings (see Chapter 5 and Chapter 7).

An *assignment as collateral* can be created on *movable property without* the physical *transfer* of the property. To ensure that the security interest is *financially sound* (right to separate satisfaction from the bankrupt's estate) the *written form* is required (see Chapter 6).

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