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## NON-POSSESSORY PLEDGE – WHAT IS THE ROLE OF THE REGISTER?

### Summary

*The non-possessory pledge has become part of the legal regime of many a country. This is a modern tendency worldwide. The non-possessory pledge usually requires registration. It has been often said that the register provides for protection. The register, however, protects the interests of the secured creditor only to a very limited extent. The register cannot provide for strong protection for creditors of the secured creditors either. Nor can it strongly protect the creditors of the debtor. What are then the true reasons for providing for a register? With the registration the time of the establishment of the non-possessory pledge can quickly and easily be evidenced, which shows the rank of the security. A deed issued by a notary public has the same effect. However, it would most probably be more costly (if the costs of establishing and maintaining a register are disregarded) and less quick. These disadvantages might suffice to justify the establishment of a register, if the legislator of a country decides to provide for a non-possessory pledge.*

**Key words:** *non-possessory registered pledge, register, comparative law.*

## I New Age of the Registered Non-Possessory Pledge

The registered non-possessory pledge has become part of the legal regime of many a country.<sup>1</sup> This is a modern tendency worldwide, and more than one legislative guide on secured transactions contains model rules for this form of security.<sup>2</sup> All countries, which formed part of Yugoslavia some decades ago, have introduced it into their modernized legal systems.<sup>3</sup> Tran-

- 1 It is known not only for example in the U.S. (H. C. SIGMAN, *Security in movables in the United States – Uniform Commercial Code Article 9: a basis for comparison*, in: E.-M. KIENINGER (ed.), *Security Rights in Movable Property in European Private Law*, Cambridge University Press, Cambridge 2004, p. 54 et seq.) and, under the influence of Art. 9 UCC (Uniform Commercial Code), also in Australia, Canada, and in New Zealand, but also in Spain (E. CORDERO LOBATO, *Prenda sin Desplazamiento e hipoteca mobiliaria*, in: M. E. LAUROBA/J. MARSAL (ed.), *Garantias reales mobiliarias en Europa*, Marcial Pons, Madrid/Barcelona 2006, p. 77 et seq.) and France as well as in transition countries like for instance Bulgaria, Hungary (N. CSIZMAZIA, *Reform of the Hungarian Law of Security Rightd in Movable Property*, *Juridica International XIV/2008*, p. 183 et seq.), Poland, Romania, Russian Federation, Slovakia, The Czech Republic, and The Ukraine.
- 2 Article 9 of the Uniform Commercial Code (see J.-H. RÖVER, *Secured Lending in Eastern Europe, Comparative Law of Secured Transactions and the EBRD Model Law*, Oxford University Press, Oxford 2007, N 6.14 et seq.), has been a fountain of inspiration for various model laws, e.g. the EBRD and the UNCITRAL model laws. It shows the aim to simplify the law on securities by providing one model. Art. 6 of the EBRD Model Law on Secured Transactions also contains the non-possessory pledge and shows a similar tendency like Art. 9 UCC, in: <http://www.ebrd.com/downloads/research/guides/secured.pdf>. See for further modern guides also the UNCITRAL Legislative Guide on Secured Transactions, N 12, in: [http://www.uncitral.org/pdf/english/texts/security-ig/e/10-57126\\_Ebook\\_Suppl\\_SR\\_IP.pdf](http://www.uncitral.org/pdf/english/texts/security-ig/e/10-57126_Ebook_Suppl_SR_IP.pdf). See also DCFR IX. – 1: 101 (I)(a), 2: 103, 3:102 (I), in: [http://webh01.ua.ac.be/storme/2009\\_02\\_DCFR\\_OutlineEdition.pdf](http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf). See on the UNCITRAL Legislative Guide G. McCORMACK, *The UNCITRAL Legislative Guide on Secured Transactions – Functionalism and Form*, in: L. THÉVENOZ/CH. BOVET (ed.), *Journée 2005 de droit bancaire et financier*, Schulthess, Zurich/Basel/Geneva 2006, p. 43 et seq., S. V. BAZINAS, *Key Policy Issues of the UNCITRAL Draft Legislative Guide on Secured Transactions*, in: L. THÉVENOZ/CH. BOVET (ed.), *Journée 2005 de droit bancaire et financier*, Schulthess, Zurich/Basel/Geneva 2006, p. 19 et seq., B. FOËX, *Les types et la creation de sûretés selon le Guide Législatif de la CNUDCI, Quelques enseignements pour le droit Suisse* and B. FOËX, *Opposabilité, registre et priorité: Les Chapitres V à VII du Guide Législatif de la CNUDCI*, in: L. THÉVENOZ/CH. BOVET (ed.), *Journée 2005 de droit bancaire et financier*, Schulthess, Zurich/Basel/Geneva 2006, p. 63 et seq and p. 73 et seq. For an overview over the significance of the EBRD Model Law for the EBRD and the transition countries F. DAHAN/J. SIMPSON, *The European Bank for Reconstruction and Development's Secured Transaction Project: a model law and ten core principles for a modern secured transactions law in countries of Central and Eastern Europe (and elsewhere)*, in: E.-M. KIENINGER (ed.), *Security Rights in Movable Property in European Private Law*, Cambridge University Press, Cambridge 2004, p. 98 et seq.; J.-H. RÖVER, (No. 2), p. 63 et seq.; see also B. REICH, *Das stille Pfandrecht der Niederlande, Ziel oder bloßer Schritt auf dem Weg zur Reformierung der deutschen Sicherungsübereignung?*, Universitätsverlag Göttingen, Göttingen 2006, p. 96 et seq.
- 3 See M. POVLAKIĆ, *Aufbau und Funktion der Register für Mobiliarsicherheiten in Südosteuropa*, *Evropski Pravnik* (2008), p. 29 et seq.

sition countries in general were forced to do so. Otherwise they would not have been able to obtain credit for instance from the EBRD. In contrast to this, the *Acquis Communautaire*, which has to be implemented by those transition countries aspiring EC-membership, did have no such influence. This is because, so far, there have been taken almost no measures<sup>4</sup> by the European Community to harmonize the differing<sup>5</sup> substantive rules within the field of security rights.

However, the non-possessory pledge is not a complete novelty for the countries, which in earlier times had formed Yugoslavia.<sup>6</sup> Nor is it a com-

- 4 One instrument for harmonization in this field is the Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements; see for a short overview H. BEALE, *Secured Transactions*, *Juridica International* XIV/2008, p. 97; see with regard to harmonization within the EU also K. KREUZER, *Conflict-of-Laws Rules for Security Rights in Tangible Assets in the European Union*, in: H. EIDENMÜLLER/E.-M. KIENINGER (ed.), *The Future of Secured Credit in Europe*, *European Company and Financial Law Review*, Special Volume 2, De Gruyter, Berlin 2008, p. 301. For an overview of the existing EU property law S. VAN ERP/B. AKKERMANS, *European Union property law*, in: CH. TWIGG-FLESNER (ed.), *European Union Private Law*, Cambridge University Press, Cambridge 2010, p. 174 et seq. For the recent developments of the DCFR S. VAN ERP/B. AKKERMANS, *European Union property law*, in: CH. TWIGG-FLESNER (ed.), *European Union Private Law*, Cambridge University Press, Cambridge 2010, p. 180 et seq. and S. VAN ERP, *European property law: A methodology for the future*, p. 2 et seq., in: <http://ssrn.com/abstract=1734633>.
- 5 See for a short overview over the differences within the countries of the EC and the need for harmonization E.-M. KIENINGER, *Introduction: security rights in movable property within the common market and the approach of the study*, in: E.-M. KIENINGER (ed.), *Security Rights in Movable Property in European Private Law*, Cambridge University Press, Cambridge 2004, p. 9 et seq., p. 20 et seq. Please note, however, that the French law on security rights described by the aforementioned author has been changed substantially in 2006 by the “Ordonnance n° 2006–346 du 23 mars 2006, JORF du 24 mars 2006, relative aux sûretés”. The rules have been imported into the *Code civil* (gage: art. 2333–2354; nantissement de meubles incorporels: art. 2355–2366; la propriété retenue à titre de garantie: art. 2367–2372; privilèges sur les meubles).
- 6 In 1990 the Yugoslav Act on Judicial Execution of 1978 (*Zakon o izvršnom postupku*, ZIP, *Službeni List SFRJ* 20/1978) introduced with art. 251a-f a non-possessory pledge for movable and immovable assets without registration requirement to be established in court and based on agreement; the Serbian Act on Judicial Execution of 2004 (*Službeni glasnik* 125/2004) still contains comparable rules, see art. 268 et seq. ZIP; however, the law now provides for publicity, art. 76 para. 1 ZIP. See for more details with regard to Serbian law N. TEŠIĆ, *Registrovana Zaloga*, *Službeni Glasnik*, Beograd 2007, p. 204 et seq. In Croatia the development of the non-possessory pledge has taken a rather peculiar turn, as the legal norms inherited from Yugoslav times have been extended and a number of separate legislative Acts, one of which has undergone changes quite frequently (*Ovršni Zakon*, see for the latest changes *Narodne Novine* 139/2010), are applicable to the non-possessory pledge. This makes the Croatian law on the non-possessory pledge rather tricky. See T. JOSIPOVIĆ, *Nova Stvarnopravna Osiguranja Tražbina u Republici Hrvatskoj*, in: T. JOSIPOVIĆ (ed.), *Stvarnopravna Uređenja Tranzicijskih Zemalja – Stanje i Perspektive – Sachenrechtliche Regelungen in den Reformländern – Aktueller Stand und Perspektiven –*, Sveučilišna tiskara, Zagreb 2009, p. 438 et seq.

pletely new phenomenon in legal history. It has had a long tradition<sup>7</sup>. The only relatively new aspect about it is the registration requirement<sup>8</sup>. However, as non-possessory pledges in different legal regimes worldwide do not always require public registration for their effectiveness vis-à-vis third parties (see Art. 3–237 para. 1 NBW<sup>9</sup> [*Nieuw Burgerlijk Wetboek*], § 9–324 UCC and, to a certain extent, also § 9–201 [a] UCC), I shall analyse the function of the reg-

7 See for the development of *pignus* and *hypotheca* in Roman law, which both – in contrast to modern concepts, which would differentiate the two – did not require the debtor's dispossession W. HROMADKA, *Die Entwicklung des Faustpfandprinzips im 18. und 19. Jahrhundert*, Böhlau Verlag, Köln/Wien 1971, p. 18 et seq. They were, therefore, the base for the development of the non-possessory pledge during the period of the *Ius Commune*, see W. HROMADKA, *Geschichtliche Beiträge zu Fragen des Faustpfandprinzips im Schweizerischen Zivilgesetzbuch*, ZSR (Zeitschrift für Schweizerisches Recht) I 89 (1970), p. 127. See for a brief historical overview W. J. ZWALVE, *A labyrinth of creditors: a short introduction to the history of security interests in goods*, in: E.-M. KIENINGER (ed.), *Security Rights in Movable Property in European Private Law*, Cambridge University Press, Cambridge 2004, p. 38 et seq.

8 JOHANN CASPAR BLUNTSCHLI'S PGB written in the 1850-ies, which became known well beyond the borders of Zurich as it showed its author's great skills and the spirit of FRIEDRICH CARL VON SAVIGNY'S *Historische Rechtsschule*, contained rules on the non-possessory pledge, which required registration (§§ 874, 890 PGB). These rules inspired for instance those of the Civil Code of Schaffhausen (1863–65). The father of the Swiss Civil Code, Eugen Huber, however, was prevented to introduce a non-possessory pledge inspired by Bluntschli's ideas; see for Eugen Huber's concept of the non-possessory *Fahrnispfandverschreibung* E. Huber, *Erläuterungen zum Vorentwurf des Eidgenössischen Justiz- und Polizeidepartements*, Zweite, durch Verweisungen auf das Zivilgesetzbuch und etliche Beilagen ergänzte Ausgabe (1914), Zweiter Band, Sachenrecht und Text des Vorentwurfes vom 15. November 1900, in: M. Reber/Ch. Hurni (Ed.), *Schweizerisches Zivilgesetzbuch, Materialien zum Zivilgesetzbuch*, Bd. II, Stämpfli, Bern 2007, N 1955 et seq. For the debate in the Commission of the Experts see U. FASEL, *Sachenrechtliche Materialien, Von den ersten Entwürfen bis zum Gesetz 1912*, Basel/Genf/München 2005, p. 579 et seq.; see with regard to the *Fahrnisverschreibung* also the explanations in the *Botschaft* of 1904 of the Swiss Federal Executive (*Bundesrat*) U. FASEL, (No. 7), p. 1165 et seq.; see furthermore the parliamentary debates of 19 June 1906 (within the *Nationalrat*), U. FASEL, (No. 7), p. 1392 et seq., and of 11 December 1906 (within the *Ständerat*) U. FASEL, (No. 7), p. 1515 et seq. BLUNTSCHLI had been one of the teachers of VALTAZAR BOGIŠIĆ in Munich and they later on discussed some aspects regarding the artfully drafted General Property Code, which BOGIŠIĆ was preparing for Montenegro. However, BLUNTSCHLI'S death in 1881 deprived BOGIŠIĆ of his further advice, see M. LUKOVIĆ, *Valtazar Bogišić and the General Property Code for the Principality of Montenegro: Domestic and Foreign Associates*, *Balkanica* XXIX 2008, p. 184.

9 S. VAN ERP, *Globalisation or Isolation in New Dutch Property Law? The New Civil Code of the Netherlands and the New Civil Codes of the Netherlands Antilles and Aruba Compared*, *Electronic Journal of Comparative Law* 2003, p. 6, <http://www.ejcl.org/75/art75-2.PDF>. The Dutch NBW introduced with the non-possessory pledge a "fiducia-ban", which, however, has not been respected by the Hoge Raad, see W. H. M. REEHUIS, *Omvang en werking van het Nederlandse fiducia-verbod*, *J. S. Afr. L.* 66 (1997), p. 66 et seq. See also J. H. M. VAN ERP/L.P.W. VAN VLIET, *Real and Personal Security*, *Electronic Journal of Comparative Law*, vol. 6.4, December 2002, p. 119, p. 126.

ister and answer the question, whether a register for non-possessory pledges is necessary at all.

## II Nature of the Registered Non-Possessory Pledge

Non-possessory pledges just like for instance suretyship guarantees are personal securities.<sup>10</sup> This means that the secured creditor who wants to enforce his security depends entirely on the reliability of the debtor. That makes his position, when compared to the one of a creditor with a real security, e.g. a mortgage or a possessory pledge, relatively weak. And, as a rule, the creditor who is secured with a non-possessory pledge is also in a weaker position than the creditor who has a claim against the provider of the suretyship guarantee. This is because the suretyship guarantee entitles the secured creditor to a claim against the security provider.<sup>11</sup> In contrast, the non-possessory pledge, if provided by the debtor and not by a third party, gives the secured creditor only a privileged position (priority) with regard to a part of the debtor's assets in the insolvency (reinforced personal security<sup>12</sup>). The non-possessory pledge, therefore, only provides for protection against other creditors.<sup>13</sup>

One might think that the register could somehow compensate for the weakness of the security. Why else would the world so often insist on publicity<sup>14</sup> whenever non-possessory securities are at stake? However, the register is

10 Usually the definition is related to the classical personal securities like the suretyship guarantee U. DROBNIG, *Principles of European Law, Study group on a European Civil Code, Personal Security (PEL Pers. Sec.)*, Sellier. European Law Publishers, Munich, 2007, p. 88. Generally, and in contrast to the here discussed concept, “real” securities are defined to be those charging “things” (including rights like for instance debts); see J. S. ZIEGEL, *The EBRD Model Law on Secured Transactions – Some Canadian Observations*, in: J. BASEDOW/K. J. HOPT/ H. KÖTZ (ed.), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Mohr Siebeck, Tübingen 1998, p. 210. However, this concept has not been undisputed, see W. HROMADKA, (No. 6), ZSR I, p. 126; usually the definition is related to the classical personal securities like the suretyship guarantee U. DROBNIG, *Principles of European Law, Study group on a European Civil Code, Personal Security (PEL Pers. Sec.)*, Sellier. European Law Publishers, Munich, 2007, p. 88.

11 For this reason in Roman law the suretyship guarantee has always been the preferred personal security, W. HROMADKA, (No. 6), *Entwicklung*, p. 24 et seq.

12 W. HROMADKA, (No. 6), ZSR I, p. 126.

13 J. ZWALVE, (No. 6), p. 39 et seq.; W. HROMADKA, (No. 6), ZSR I, p. 127.

14 J. ZWALVE, (No. 6), p. 43; see also the ideas of the STUDY GROUP ON A EUROPEAN CIVIL CODE AND THE RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP), CH. VON BAR/E. CLIVE (Ed.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Full Edition, Sellier. European Law Publishers, Munich 2009, Section 3, p. 5494 et seq. H. BEALE, *The Future of Secured Credit in Europe: Concluding Remarks*, in: H. EIDENMÜLLER/E.-M. KIENINGER (Ed.), *The Future of Secured Credit in Europe*, *European Company and Financial Law Review*, Special Vol-

no such compensation. Only reliable observation systems providing effective control could convert the non-possessory pledge into a stronger security, i.e. a real security<sup>15</sup>. But such systems would be too expensive, time consuming and, therefore, of little practical value. Even criminal sanctions<sup>16</sup> cannot change the nature of the security.

Why is this?

The non-possessory pledge encumbers movable assets. Movable assets, however, can be removed, destroyed, damaged, hidden, and exported into another country<sup>17</sup> without the secured creditor being in the position to interfere. He lacks control, and therefore, he lacks the protection related to the possession of movable assets (possessory security) and the one related to the immovability of realty, where, for the creditor in order to be protected, it is sufficient to register the right (mortgage). That is why the non-possessory pledge even though it encumbers a movable asset never gains the quality of a real security. Thus, only a creditor, who is convinced of the debtor's honesty will accept to be secured with a non-possessory pledge, i.e. a (reinforced) personal security.

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ume 2, De Gruyter, Berlin 2008, p. 385 et seq. However, even where registration is a rule, exceptions are allowed: Art. 9 UCC allows for exceptions to the publicity requirement ("super priority") with regard to the "purchase-money security interest" (§ 9-324[a] UCC); see J. J. WHITE/R. S. SUMMERS, *Uniform Commercial Code*, 5<sup>th</sup> ed., West Group, St. Paul, Minnesota 2000, p. 846 et seq. To a certain extent also § 9-201 (a) UCC is an exception to the publicity rule; The UNCITRAL Legislative Guide on Secured Transactions provides also for exceptions, see Recommendation No. 34 (b), No. 39 et seq., p. 471 et seq., in: [http://www.uncitral.org/pdf/english/texts/security-1g/e/10-57126\\_Ebook\\_Suppl\\_SR\\_IP.pdf](http://www.uncitral.org/pdf/english/texts/security-1g/e/10-57126_Ebook_Suppl_SR_IP.pdf). However, the significance of publicity has also been disputed for instance by German scholars; see R. STÜRNER, *Perfection and Priority of Security Rights, Commentary*, in: H. EIDENMÜLLER/E.-M. KIENINGER (ed.), *The Future of Secured Credit in Europe*, European Company and Financial Law Review, Special Volume 2, De Gruyter, Berlin 2008, p. 168.

- 15 Banks always insist on contractual control rights vis-à-vis their debtors; however, such control rights are no "full-time" observation systems and, therefore, do not provide for full control.
- 16 Roman Law rendered it a crime to transfer property without the disclosure of the charges with which the property was encumbered D. 47,20,3,1 (ULPIANUS).
- 17 See for the problems, which security rights in movables encounter (i.e. the extinction due to the difficulties of many States to convert foreign security rights into a fully functional and equivalent domestic security right), when the movable asset is exported, CH. VON BAR/U. DROBNIG, *The Interaction of Contract Law and Tort and Property Law in Europe, a Comparative Study*, Sellier. European Publishers, Munich 2004, N 524 et seq. U. DROBNIG, *The Recognition of Non-Possessory Security Interests Created Abroad in Private International Law*, p. 289 et seq., in: Z. PETERI/V. LAMM (ed.), *General Reports to the 10th International Congress of Comparative Law*, Akademiai Kiado, Budapest 1981; K. KREUZER, (No. 4), p. 298 et seq.; H. BEALE, (No. 4), p. 96 et seq.

### III Peculiarities of the Register: Inaccuracy

What then is the function of the register if it cannot convert the non-possessory pledge into a real security? If it does not protect the secured creditor in the way possession can protect him, does it protect other persons, e.g. the creditors of the debtor or the creditors of the secured creditor or third parties, who want to acquire the movable assets or the secured debt or, at last, does it protect the debtor himself from accepting too heavy a burden?

The answer is rather disappointing.<sup>18</sup>

The register is, even when it is run by civil servants, never as accurate as the land charge register (*Grundbuch*). This has firstly to do with the nature of the charged object, which is movable and therefore removable, destroyable etc. Even the duty to renew the registration from time to time<sup>19</sup> could not prevent the inaccuracy which is caused by the nature of the charged object usually in combination with the unreliability of the possessor. Secondly, if the law allows for property acquisitions based on good faith,<sup>20</sup> this, too, makes the register inaccurate. Thirdly, if it is for the parties to make the registration, errors and delays are inevitable. Fourthly, parties will all too often tend not to register a non-possessory pledge at all or to do so only later, when forced by the debtor's upcoming illiquidity.<sup>21</sup> This is because parties do not want to make public business information and the law very often lacks the necessary severeness to force them to do so anyway. And if the law-maker decides not to render public the creditor's or debtor's name in the register or decides to

18 This opinion seems not to be (openly) shared by the STUDY GROUP ON A EUROPEAN CIVIL CODE AND THE RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP), (No. 13), p. 5495 et seq. nor can it be found in the chapter concerning the registry system in The UNCITRAL Legislative Guide on Secured Transactions, p. 475 et seq., in: [http://www.uncitral.org/pdf/english/texts/security-ig/e/10-57126\\_Ebook\\_Suppl\\_SR\\_IP.pdf](http://www.uncitral.org/pdf/english/texts/security-ig/e/10-57126_Ebook_Suppl_SR_IP.pdf). But see B. FOËX, (No. 2), *Opposabilité, registre et priorité*, p. 83 with regard to the UNCITRAL Legislative Guide on Secured Transactions, who writes that the register can only show that a security right probably exists. However, this is only a part of the truth. The other part is that no inscription is also only maybe an indicator for the fact that no security right exists.

19 See for this idea Recommendation No. 69 of The UNCITRAL Legislative Guide on Secured Transactions <http://www.uncitral.org/pdf/english/texts/security-ig/e/Terminology-and-Recs.18-1-10.pdf>.

20 See for instance DCFR IX. – 6:102.

21 In Switzerland this frequent omission, which has never been sanctioned by the Federal Court, the *Bundesgericht*, has led to problems with the retention of property (*Eigentumsverbehalt*), see P. Tuor/B. Schnyder/J. Schmid, *Das Schweizerische Zivilgesetzbuch*, 12<sup>th</sup> ed., Schulthess, Zurich/Basel/Geneva 2002, p. 909; W. Scherrer, Art. 715/716 ZGB N70 et seq., in: R. Haab/A. Simonius/W. Scherrer/D. Zobl (ed.), *Kommentar zum Schweizerischen Zivilgesetzbuch, IV. Bd.: Das Sachenrecht, Erste Abteilung, Das Eigentum, Art. 641 bis 729*, 2<sup>nd</sup> ed., Schulthess, Zurich 1977.

allow for the concealment of the exact data of the encumbered movable asset in order to protect their sound business interests,<sup>22</sup> this, too, will deprive third parties of relevant information.<sup>23</sup> However, the register should not shed full light on the debtor's financial situation anyway.<sup>24</sup> Needless to say that the register cannot protect the debtor from too heavy a burden. However, other provisions (consumer protection law, insolvency law, debt enforcement law or the law on secured credit<sup>25</sup>) can do so.

In brief, the following scenarios related to the inaccuracy of the register are possible:

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- 22 See H.-J. LWOWSKI, "Quiet" Creation of Security Interests or Filing, in: H. EIDENMÜLLER/ E.-M. KIENINGER (ed.), *The Future of Secured Credit in Europe*, European Company and Financial Law Review, Special Volume 2, De Gruyter, Berlin 2008, p. 178 et seq.
- 23 Under Croatian law information on debtor and creditor as well as on the encumbered asset seems to be available to anyone, see art. 3 para. 6 of the Act on the Register related to Debts Secured by Judicial and Notarial Securities Encumbering Movable Assets and Rights of 2005 (*Zakon o upisniku sudskih i javnobilježnjičkih osiguranja tražbina vjetrovnika na pokretnim stvarima i pravima*, *Narodne Novine* 121/2005). The same seems to be true with regard to Serbian law: art. 58, 59, 62 of the Act on the Registered Pledge on Movable Assets of 2003 (*Zakon o založnom pravu na pokretnim stvarima upisanim u registar*, *Službeni glasnik* 57/2003, 61/2005). However, the name of the creditor is not a possible search entry (see for the search engine of the Serbian agency: <http://www.apr.gov.rs/eng/Registers/Pledges/Search.aspx>) or the provided information does not contain the name of the creditor, the name of which in combination with the description of the encumbered asset, however, can be entered to get search results (see for details of the Croatian solution: <http://zaloznaprava.fina.hr/WEB-upzapKorisnickadok24082006.pdf>). See also DCFR IX. – 3:308, 3: 317, and 3:318 as well as Recommendation No. 53 (c) and No. 64 UNCITRAL Legislative Guide on Secured Transactions, where the register, albeit it allows only for searches for entries filed against individual security providers or for entries containing descriptions of the encumbered assets, provides, once the result of the search is given, the name and contact details of the creditor. See for the problems connected to the asset-based searching United Nations commission on international Trade Law, Working Group VI (Security Interests), Nineteenth session, New York 11–15 April 2011, *Draft Security Rights Registry Guide*, A/CN.9/WG.VI/WP.46/Add.1 of 7 February 2011: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V11/805/98/PDF/V1180598.pdf?OpenElement>. According to art. 33 of the Draft model regulations on the registration of security rights in movable assets of UNCITRAL, search criteria shall only be the grantor identifier, the serial number of a serial number assets or the initial registration number.
- 24 R. Stürner, *Risikoauslagerung und Informationen in der kompetitiven Marktgesellschaft – Einige Bemerkungen zu systemimmanenten Schwächen des Informationsmodells*, in: A. Heldrich/J. Prölss/I. Koller et al. (ed.), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, Bd. I, Beck, Munich 2007, p. 1491 et seq. However, due to economic insecurity within the transition countries, there are agencies which can provide potential creditors with daily up-dated information on the bank accounts of potential debtor companies, if such companies have an account on a bank, which has a link to the agency, see for Croatia: <http://www.fina.hr/Default.aspx?art=8964>.
- 25 See H. BEALE, (No. 4), p. 99.



- 1) Non-possessory pledge has been registered – it stays registered, even though debt no longer exists – new debt has been formed – secured creditor and/or provider of the non-possessory pledge have become insolvent.
- 2) Non-possessory pledge has been registered – it stays registered, even though movable has been exported, destroyed, etc. – secured creditor and/or provider of the non-possessory pledge have become insolvent.
- 3) Registration has been made with an error – it erroneously relates to a more/less valuable object.
- 4) Non-possessory pledge has not been registered, even though the parties have agreed on a security – provider of the security becomes insolvent – non-possessory pledge becomes registered just in time before the insolvency.

What are the consequences of all this?

#### **IV Consequences of the Inaccuracy of the Register**

##### **1. Position of Second Security Taker and Acquirer of the Chattel respectively**

If no pledge exists, a wrong registration shall not render it valid.

Therefore, third parties, to whom the claim has been assigned, shall not be able to acquire *bona fide* a non-existing security.

And if there is no registration (or it is impossible to search for the encumbered chattel or the debtor due to an error), third parties can, as a rule, assume that the chattel is not encumbered and that it belongs to the vendor. However, it is necessary in certain situations (e.g. if goods are sold by a merchant, who trades with such goods;<sup>26</sup> or goods have very little value) to free purchasers from the obligation to search for an entry in the register, as it otherwise would hinder the trade flow. This is not always detrimental to the secured creditor's interest, as the debtor is paid and can, therefore, pay back his debt.<sup>27</sup>

<sup>26</sup> See art. 23 para. 6 of the Serbian Act on the Registered Pledge on Movable Assets.

<sup>27</sup> U. Drobniig, *Empfehlen sich gesetzliche Massnahmen zur Reform der Mobiliarsicherheiten?*, *Gutachten für den 51. Juristentag*, in: *Verhandlungen des einundfünfzigsten deutschen Juristentages*, Stuttgart 1976, Bd. I (Gutachten), Teil f, Beck, Munich 1976, F. 29.

## 2. Position of Creditors of the Secured Creditor and the Debtor respectively

If no pledge exists, creditors of the secured creditor, who trusted in their debtor's protected position (scenarios 1–3), as a rule, should not be able to rely on a wrong registration either. This is, because it would in most cases be inadequate to render valid a wrong registration just for the *bona fides* third parties have. And if the law provides that the secured creditor's name stays concealed vis-à-vis third parties (for the already mentioned business policy reasons) even though properly registered, the creditors lack information in any case, albeit not protection.

If there is no registration, even though the parties have agreed on a non-possessory pledge, (which – as the parties want it – is to be registered only just in time should the debtor become illiquid – scenario 3), the creditors of the debtor might, if the movable asset is of big value, get the wrong impression that there is no need to ask for security or that they will later on be able to get a secured position. The correct way to try and inhibit the parties' abusive secrecy, is to provide for a remedy comparable to an *Actio Pauliana*.<sup>28</sup> The US-law is a good example for such a concept:<sup>29</sup> the remedy should render invalid the non-possessory pledge (to the detriment of the *prima facie* secured creditor and his creditors), which is registered right before or some time before the debtor becomes illiquid under two presuppositions: 1) the debtor has been provided with a credit by a non-secured creditor which has not been paid back and 2) the debtor and the secured creditor cannot prove that they have registered the security right after the agreement on a credit and security. The law would presume abusiveness and it would be for the parties to prove the contrary. This solution is, in my opinion, prefer-

28 Under Swiss law the *Actio Pauliana* in its current form (especially the general rule) lacks sufficient severeness; and it does not render void the *titulus* of the “attacked” transaction, but only provides for the duty to return a good; see H. PETER, *Art. 285 SchKG* N 10, in: L. DALLÈVES/B. FOËX/N. JEANDIN (Ed.), *Commentaire Romand, Poursuite et faillite, Commentaire de la Loi fédérale sur la poursuite pour dettes et la faillite ainsi que des articles 166 à 175 de la Loi fédérale sur le droit international privé*, Helbing & Lichtenhahn, Basel/Geneva/Munich 2005; D. STAEHELIN, *Art. 285 SchKG* N 8 et seq, in: A. STAEHELIN/T. BAUER (ed.), *Kommentar zum Bundesgesetz über Schuldbetreibung und Konkurs, Unter Einbezug der Nebenerlasse, SchKG III, Art. 221–352, Nebenerlasse*, Helbing & Lichtenhahn, Basel/Geneva/Munich 2005. Art. 717 para. 2 of the Swiss Civil Code is no good help either.

29 11 USC (United States Code) § 544 (a) provides for the strong-arm power of the insolvency trustee, as it allows the trustee to avoid the security right, which, as long it has not been perfected (§ 9–203 [a] and [b] UCC), is valid *inter partes* and, to a certain extent, even vis-à-vis unsecured creditors (§ 9–201 [a] UCC). Exceptions to this strong-arm power rule are made, when the parties to the contract have done everything to get the perfection of the security right done, see 11 USC §§ 546 (b), 362 (b)(3), § 9–317 (a)(2) (B) UCC.

able to the one provided by Art. 8.1 of the EBRD Model Law on Secured Transactions,<sup>30</sup> which requires registration within 30 days after the date of the charging instrument in order to create the security (it also shows a different concept of creation of the security right). This is, because the parties will almost always be able to write the required dates, even when the facts are different, and it is difficult to prove that the parties abusively postponed the entry. An analogous solution like the one here suggested should be taken into consideration, where there is a wrong entry instead of no entry.<sup>31</sup>

It has to be noted here that even with the possessory pledge creditors of the debtor are not entirely protected. The fact that charged objects cannot stay in the debtor's possession, can only to a certain extent shed light on the debtor's liquidity. The dispossession has only a limited effect: it does not inform on leased objects in the possession of the debtor, which can also lead to a wrong impression on the debtor's creditworthiness; it does not inform on other debts of the debtor;<sup>32</sup> and it cannot prevent the debtor from giving away, destroying etc. a valuable object in the future, the existence of which was taken into consideration when the credit was provided. In addition, many Civil Codes do not consequently enough insist on the dispossession (see for instance Art. 888 para. 2 Swiss Civil Code).<sup>33</sup> And courts very often tolerate the development of clandestine non-possessory pledges.<sup>34</sup>

30 “In order to obtain registration of a registered charge as referred to in Article 6.2 a registration statement must be presented at the charges' registry not later than 30 days after the date of the charging instrument as defined in Article 7.3.6. If a registration statement is not presented by that date the charge is not created.”

31 See for a somewhat different concept The UNCITRAL Legislative Guide on Secured Transactions. It states that the consequences of an incorrect statement or insufficient description should, as a rule, not render ineffective the registered notice, p. 479, in: [http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126\\_Ebook\\_Suppl\\_SR\\_IP.pdf](http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126_Ebook_Suppl_SR_IP.pdf). The registration should only become ineffective (and therefore the security would not be opposable vis-à-vis third parties), when it would seriously mislead a reasonable searcher; however, as the secured creditor's name is not a search criterion anyway, in this respect accuracy is never necessary for the registration to become effective, see N 36, in: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V11/805/98/PDF/V1180598.pdf?OpenElement>.

32 D. Girsberger, *Ist das Faustpfandprinzip noch zeitgemäss?*, SJZ (Schweizerisches Juristenzeitung) 93 (1997), p. 102; L. Aeschlimann/B. Foëx, *Sûretés mobilières: limites et réforme du droit suisse*, in: L. Thévenoz/Ch. BOVET (ed.), *Journée 2005 de droit bancaire et financier*, Schulthess, Zurich/Basel/Geneva 2006, p. 18 et seq.

33 See with regard to Swiss law W. HROMADKA, (No. 6), ZSR I 89 (1970), p. 157 and for Austrian law W. HROMADKA, (No. 6), ZSR I 89 (1970), p. 137.

34 Art. 717 para. 2 of the Swiss Civil Code renders a non-possessory pledge only invalid, if the judge is convinced of the abusiveness of the lack of the dispossession. See for clandestine non-possessory pledges under Swiss law D. GIRSBERGER, (No. 30), p. 101 et seq. W. Wiegand, *Eigentumsvorbehalt, Sicherungsübereignung und Fahrnispfand*, in: W. Wiegand (ed.), *Mobiliarsicherheiten, Sicherungszession und -übereignung, Pfandrechte und Eigentumsvorbehalt aus privat- und verfahrensrechtlicher Sicht*, Stämpfli, Bern 1998, p. 97

### 3. Consequences of Corrective Mechanisms to Prevent Partly the Inaccuracy of the Register

Due to the manifold causes for inaccuracy within the register, there are but few corrective mechanisms: one is a remedy comparable to the *Actio Pauliana*. Another is the duty to renew the registration periodically. The first one might be more effective.

It could have the following effect: If the debtor feels forced to register the pledge due to the remedy comparable to the *Actio Pauliana*, this might hinder him to charge his chattel with a non-possessory pledge, since he might feel his business interests (secrecy of credit needs) in danger. If possible, he might provide for securities, which require no registration (e.g. assignment of debts). All in all this would, in general, lead to less credits or to credits without securities.

If the remedy, which should work like a severe *Actio Pauliana*, should not have the wished effect, the debtor will provide frequently for a non-possessory security without it being registered. As creditors will become aware of such a potential danger, they will, whenever possible, ask for security. That way the number of secured credits will rise and non-secured creditors will hardly ever get anything in the insolvency proceeding. In Germany this situation has occurred and been called “*Konkurs des Konkurses*” (insolvency of the insolvency), and it has led to changes in the German law of insolvency. However, as the root of the problem has not been eradicated, not much has changed since then.

## V Conclusions

The secured creditor lacks protection due to the mobility of the security object and the rules on the *bona fides* acquisition. Therefore, the register protects the interests of the secured creditor only to a very limited extent. The register cannot provide for strong protection for creditors of the secured creditors either. Nor can it strongly protect the creditors of the debtor. However, even a possessory pledge has only limited effects in that respect.

What are then the true reasons for providing for a register? With the registration the time of the establishment of the non-possessory pledge can quickly and easily be evidenced, which shows the rank of the security.<sup>35</sup>

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et seq., G. Walter, *Sicherungsrechte heute – Probleme und Lösungsansätze*, in: H. Honsell (ed.), *Festschrift für Heinz Rey zum 60. Geburtstag, Aktuelle Aspekte des Schuld- und Sachenrechts*, Schulthess, Zürich 2003, p. 146 and B. Foëx, *Sûretés mobilières: propositions pour une réforme*, ZSR II (2007), p. 297.

35 J.-H. RÖVER, (No. 2), N 6.18; see also The UNCITRAL Legislative Guide on Secured Transactions, p. 103, in: [http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126\\_](http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126_)

A deed issued by a notary public has the same effect. That is why the Dutch regulation provides it as an alternative (Art. 3–237 para. 1 NBW). However, it would most probably be more costly (if the costs of establishing and maintaining a register are disregarded<sup>36</sup>) and less quick. These disadvantages might suffice to justify the establishment of a register, if the legislator of a country decides to provide for a non-possessory pledge.

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## БЕЗДРЖАВИНСКА ЗАЛОГА – КАКВА ЈЕ УЛОГА РЕГИСТРА?

### Резиме

*Бездржавинска zaloга је постојала део правног уређења великог броја земаља. Ово је модерна тенденција широм света. Бездржавинска zaloга уобичајено захтева регистрацију. Често се каже да регистар обезбеђује заштити. Међутим, регистар ипак није интересе обезбеђених поверилаца само до одређеног степена. Регистар не може да обезбеди снажну заштиту повериоцима обезбеђених поверилаца, Такође, он не може да заштити у постојаности ни повериоце дужника. Који су онда прави разлози за постојање регистра? Са регистрацијом се брзо и једноставно утврђује време успостављања бездржавинске zaloге, а то указује рани обезбеђења. Исправа издава од стране јавног бележника има исти ефекат. Међутим, она би највероватније била скупа (ако се занемаре трошкови успостављања и одржавања регистра) и спорна. Ови недостаци су довољни да оправдају успостављање регистра, ако се законодавац одлучи да уведе бездржавинску zaloгу.*

**Кључне речи:** *бездржавинска регистрована zaloга, регистар, упоредно право.*

*Ebook\_Suppl\_SR\_IP.pdf.* See also B. REICH, (No. 2), p. 195 et seq. with regard to the Dutch non-possessory pledge. A. VENEZIANO, *Mobiliarsicherungsrecht im zukünftigen akademischen gemeinsamen Referenzrahmen*, in: M. Schmidt-Kessel (ed.), *Der Gemeinsame Referenzrahmen, Entstehung, Inhalte, Anwendung*, sellier. european law publishers, Munich 2009, p. 134.

36 See with regard to the costs A. VENEZIANO, (No. 33), p. 133 and H. BEALE, (No. 4), p. 102, which – in Canada and New Zealand – do not seem to be too high.