Real Securities in Movables - European Unification Prospects and Transition Countries

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REAL SECURITIES IN MOVABLES - EUROPEAN UNIFICATION PROSPECTS AND TRANSITION COUNTRIES

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Stručni članak

Stvarnopravno osiguranje na pokretnim stvarima - izgledi unifikacije u pravu europskih zemalja i zemlje u tranziciji

Iznose se polazne premise za ocjenu mogućnosti unifikacije europskog civilnog prava u oblasti osiguranja tražbina na pokretnim stvarima. Pri tome se ukazuje na razlike koje postoje u nacionalnim pravima europskih država članica, koje se odnose na pravna pravila o stjecanju vlasništva na pokretnim stvarima, a umanjuju ili čak onemogućavaju izglede unifikacije u toj domeni. Skreće se pozornost na izmjene pravnih propisa u pravu zemalja u tranziciji, koje unošenjem instituta bliskih angloameričkom pravu povećavaju elemente divergencije u oblasti europskog prava osiguranja tražbina. Ukazuje se na stanovitu podvojenost među zemljama u tranziciji: dio slijedi uzore europskog kontinentalnog zakonodavstva, a neki se više priklanjaju common-law-u. Bez obzira što izmjene u zemljama u tranziciji rađaju novi pravni krajolik u domeni zaloga pokretnih stvari bez predaje u posjed, u nekim nacionalnim pravima konstatira se perzistentnost instituta osiguranja koji se temelje na vlasništvu, koje daje vjerovniku više nego što mu je gospodarski potrebno za osiguranje tražbine i koje nije uvijek popraćeno ispunjenjem publicitetne funkcije stvarnog prava. Iznosi se nova struktura instituta osiguranja, usvojena reformiranim propisima iz polja osiguranja tražbina i zaštite vjerovnika. Novo je zakonodavstvo uz zalog bez predaje u posjed kooptiralo i prijenos vlasništva radi osiguranja pa se podredno ukazuje na moguće razloge izbora jednog od tih pravnih okvira osiguranja tražbina.

Ključne riječi: *zalog bez predaje u posjed, fiducijarni prijenos vlasništva, sredstva osiguranja na pokretnim stvarima, unifikacijski izgledi, zemlje u tranziciji.*

1. Introduction

Many articles have been written about the development of the European Civil Code.[1] It has been stated that in the past decade EC directives have led to the introduction a sort of unified civil law at the European level.[2] As far as the law of property is concerned, a comparative survey reveals a variety of diverging basic principles among European countries.[3] Drafters of the European Civil Code would find themselves in the position of having to carefully examine the advantages and disadvantages of the contrasting principles, when selecting a solution for the European Civil Code.

Outside of the European Union, there are countries in transition whose legal systems are rapidly changing. As far as secured transactions are concerned, countries in transition are trying to strengthen their legal frameworks in accordance with the principles of the market economy. Many observers from the developed western countries are involved in this law-making process, offering their legal expertise, and some of them are actually playing an important role in national legislative projects.[4] In the process of redrafting their laws, transition countries are not only influenced by those legal transplants from the donor countries, but are also taking into account international unification instruments, EEC directives and regulations. However foreign or international legal expertise has been greatly influenced by common-law legal institutions, which rises the question of compatibility of the institutions transplanted into the legal system of a transition country.[5] Moreover, this fact has led some authors to the conclusion that the legal institutions of Central and East European countries in transition can no longer be identified as a pure part of the Roman-Germanic legal family, neither conventional division in legal families persists in comparative law.[6]

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[1] REMIEN, O. *Illusion und Realität eines Europäisches Privatrecht*, JZ, 1992, p. 277; CORDINI, G. *Colloque sur la future codification europeene en matiere d'obligations et de contrats*, Revue int. dr.comp, 1991, p. 894. GANDOLFI, G. *Per un codice europeo dei contratti*, Riv. trim. dir. proc. civ., 1991, p. 781. DALHUISEN, J.H. *Security in Movable and Intangible Property, Finance Sales, Future Interest and Trusts*, in: "Towards European Civil Code", Nijmegen, Dodrecht 1994, p. 361.

[2] HONDIUS, E.: *Towards European Civil Code. General Introduction*, in: "Towards European Civil Code", Nijmegen, Dodrecht 1994, p.1.

[3] DROBNIG, U. *Transfer of Property*, in: "Towards European Civil Code", Nijmegen, Dodrecht 1994, p.345.

[4] E.g. American Bar Association and CEELI, World Bank, International Monetary Fund, Soros Fundation etc.

[5] *Polish Law on Registered Pledge and Pledge Registry* has transplanted peculiar common-law notion of the floating charge, that is acording to English law understood as security right on the shifting assets, that are not individually defined. This strongly opposses the doctrine of certainty of the object of a real right that is cornerstone principle in continental property law.

[6] AJANI, G. *La circulation de modeles juridiques dans le droit post-socialiste*, R.I.D.C., 4, 1994, p.1087.

Many international conferences have been devoted to the various aspects of the legal transformation in transition countries. As far as the transformation of credit and securities are concerned, in Hamburg conference held in 1996. It was concluded that some countries were inspired by common law legal institutions, i.e. Hungary and Poland, whereas others, like Czech Republic and Croatia, seemed to follow principles that are rooted in the continental law.[7]

2. Modern Approach to Asset-based Secured Lending

As far as movables are concerned, the key question in secured lending is whether it is possible to create a valid pledge without transfer of possession. Even from Roman times, delivery of a movable into possession of the creditor was and still is an essential element in the creation of the pledge. The fact that a movable is possessed by a creditor serves as a public notice that object is pledged, and that a third person should be aware of that fact.

The advantages and disadvantages of a possessory pledge are quite obvious. In commercial context, a debtor who has pledged a movable has no possibility of disposing of an object in the ordinary course of business, and therefore lowers the chances that the debt will be repaid. On the other hand, a creditor (usually a bank) has no particular interest in possessing a movable, because possession requires additional expenses. Therefore, debtor and creditor have a mutual interest that the debtor retains a possession of a movable, i.e. to create a non-possessory pledge.

As far as a non-possessory pledge is concerned, the position of third parties is somehow different. Without visible control of the movable on the part of the creditor, third parties may have strong reason to believe that nobody is going to exercise real rights on the movable in order to satisfy a claim. Therefore, a buyer in good faith could acquire a movable from a dishonest debtor free from the third party's pledge, or any similar real right whose existence he was not aware.

If a non-possessory pledge is deemed permissible it is then necessary to solve the publicity issue vis-a-vis third parties. In comparative law we can extract a few different approaches, although various in effects and conditions to fulfill.[8] For the sake of simplicity one should notice two contrasting solutions. The first is to establish a registry where a non-possessory pledge (or similar right) on a movable ought to be registered to be effective against third parties. If this condition is not fulfilled, the pledge would be effective only between the parties. This principle is

[7] Statement given by Prof. Drobnig, chairman in his concluding remarks on the Symposium *"Systemtransformation in Mittel und Ost Europa und ihre Folgen für Banken, Börsen und Kreditsicherheiten"* held in June 1996.

[8] For exhaustive comparative analysis see: *UNCITRAL Report of the Secretary General: study on security interests (A/CN.9/131),* written by Prof. Urlich Drobnig.

followed in France,[9] Italy,[10] Spain,[11] England[12], Sweden and Finland[13] although the registries are differently organized. Another important distinction lies in the fact that in French and Italian law the object of the pledge must be individually defined, while in contrast to Swedish, Finnish and English law, it is possible to create a security on complex units of charged goods.[14]

Countries that have adopted the institution of the so called l'hypotheke mobiliere, especially France and Belgium, are traditionally hostile toward fiduciary transfer of ownership. It is usually regarded null and void as a result of the prohibition of the *lex commissoria.*[15]

Another approach requires no registration duty. Creditor gets a secret lien on a movable. This concept is accepted in Germany and in the Netherlands, but with some institutional refinements in the latter.[16] As far as a pledge on A movable is concerned, German BGB insists that possession of the movable is to be transferred to the creditor. Therefore, if one wants to achieve the results of a non-possessory pledge, he could use the fiduciary transfer of ownership as a security. The debtor transfers to the creditor title, but not possession of the movable in question. The creditor retains title until the secured creditor is repaid, and then the title is retransferred to the debtor. This concept of fiduciary transfer of ownership is ambiguous and potentially fraudulent vis-a-vis BGB regulations on lex commissoria, but has been recognized in German case law.

Two consequences arise as a result of the application of the fiduciary transfer of ownership. Titled as an owner, even though it is temporal, the creditor is

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[9] *La loi sur le nantissement du fonds de commerce du 1909, La loi sur le nantissement de l'outilage et du materiel d'equipment professionel du 1951, and Decret sur la gage du vendeur a credit d'un vehicule ou engin automobile du 1953.* For details see: CABRILLAC, M. /MOULY, C. *Droit des suretes,* 13eme ed., Paris 1995.

[10] *R.D.L. 15 marzo 1927 n.436.*

[11] *UNCITRAL, Report of Secretary General: study on security interests (A/CN.9/131), Yearbook of UNCITRAL,* 1977, Vol.VIII, p.174.

[12] E.g. written chattel mortgages, floating charges. In England there are 11 different registries for different contractual securities. See GOODE, R.M. *Commercial law,* London 1982.

[13] For Sweden and Finland see: WENCKSTERN, M. *Hypotheken auf Unternehmen, Neue Gesetze in Schweden und Finnland,* RabelsZ 52 (1988), p.663-725.

[14] See WENCKSTERN, M. Hypotheken auf Unternehmen, Neue Gesetze in Schweden und Finnland, RabelsZ 52 (1988), p.663-725. and WENCKSTERN, M. Die Englische Floating Charge im deutschen Internationalen Privatrecht, RabelsZ 56 (1992), p.624-695.

[15] See WITZ, C. La fiducie en droit prive francais, Paris 1981, p.203 et seq. See DALHUISEN, J.H. Security in Movable and Intangible Property, Finance Sales, Future Interests and Trusts, in: "Towards European Civil Code", Nijmegen, Dodrecht 1994, p.371, observing recent French proposals concerning the introduction of the fiducia (art.2062 CC).

[16] REICH, N. Funktionsanalyse und Dogmatik bei der Sicherungs,bereignung, AcP, Band 169, p.247. SCHILLING, T. Besitzlose Mobiliarsicherheiten im nationalen und internationalen Privatrecht: Versuch einer vergleichenden Darstellung unter Berücksichtigung der Recht des deutschen und französichen Rechtskreises sowie des common law, München 1985, p.118.

empowered with the authority of any owner in a procedural and material sense, although the debtor retains the position of the so called economic owner of the movable. Moreover, the creditor holds more rights than it is necessary for security purposes. Namely for the security purposes it is not necessary that creditor becomes actual owner. It is only necessary that he acquires the right to satisfy the secured claim from the proceeds of sale if the debtor doesn't repay the debt. This surplus of rights is a major source of conflict in the relations between debtor and creditor as well as opposed to third parties.

Although there are some conceptual disadvantages when using ownership as security, paradoxically many countries are less suspicious of ownership, as opposed to other forms of non-possessory security. While the later are usually regulated rather strictly, the ownership is usually accepted as a pure and simple, irrespective of the concrete function it may be serving.[17]

One of possible reason for preferring ownership as a security lies in the fact that there is greater familiarity with the notion of ownership in comparative law than of security (pledge, charge etc.) which more obviously breaks down in local variants.

3. European Unification Prospects

Being aware of the variety of legal concepts of a non-possessory pledge within member states of the European Union, one can hardly confirm unification prospects. Therefore one may find opinions as Dalhuissen's "that from international perspective local codifications are not likely to be helpful but openness of the proprietary system".[18] Questioning the idea of codification in the area of security rights at all, same author concludes that "in a wider multi-state context uniform treaty law presents considerable dangers of rigidity, thus also curtailing development. Within area of such uniform law the result would in any event be uncertain because of lack of harmonization in other aspects of law, notably in the proprietary concepts generally, the ranking and other enforcement questions.."

Moreover, keeping in mind the practical importance of ownership when used for the security purposes, one has to notice that major difficulties arise because a contractual transfer of property is always located in the cross-road of contract and property. Comparative analysis shows a basic dichotomy between the principle of consent and delivery when transfer of property (in corporeal movable) is concerned. Dilemma is old: whether property passes by mere consent of the parties with respect to that transfer, or in addition to such consent, delivery of the object of the transfer is required. The second issue is whether the parties' consent resides in primary

[17] UNCITRAL, p.174.

[18] DALHUISEN, J.H. Security in Movable and Intangible Property, Finance Sales, Future Interests and Trusts, in: Toward European Civil Code, Nijmegen 1994, p.387-8.

contractual relationship (sale) or they need a secondary agreement to regulate the transfer of property issues.[19]

The suggestion is made that the future European Civil Code should avoid making the transfer of property dependent upon an abstract real agreement between the parties.[20] The concept of an abstract real agreement requires the parties to conclude a special agreement for the transfer of property *(Einigung)*, or to include an additional term in the underlying contract. That special agreement differs from the term contract *(Vertrag)*. But while in German law the validity of the real agreement does not depend on the continuing validity of the underlying contract, other countries require the validity of the underlying contract, and therefore the real agreement is not abstract but causal.

The concept of the abstract real agreement has its roots in German legal heritage. In the XIX century it was developed by von Savigny. Its function was to insulate transfer of proprietary rights from possible defects in the underlying transaction. In case of illegality, the transferee would be able to pass good title to a third person. But an abstract real agreement protects sub-transferee without asking whether he knew or should have known of the position of the transferee, i.e. even in the absence of good faith. Therefore even in Germany, the fatherland of the abstract real agreement, skeptical voices are gradually increasing.[21]

4. Achievements in Transition Countries

Countries in transition, having admitted that introduction of the nonpossessory pledge broadens the scope of asset-based secured lending, are in the process of selection of the various institutional models of the non-possessory pledge.

In "A Survey of the asset-based lending in Central and Eastern Europe", made by IRIS in 1995., 14 states were briefly explored.

It was found that in Bulgarian law a nonpossessory pledge is permitted only if the creditor is a bank or a foreign person, while in domestic transactions there is a requirement to transfer the possession. Except for ships, there is no registry for movables. Influenced by IRIS, EBRD and the World Bank, Bulgarians are working on the new collateral law and registry.

In Hungarian law, a new collateral law that permits floating charge is inspired by the EBRD Model Law on Secured Transactions, and was enacted in 1996 by virtue of the "Bill of on the Amendment of Certain Provisions of the Civil Code of the Republic of Hungary" (concerning secured transactions).

In Poland there is a Law on Registered Pledge and Pledge Registry which permits non-possesssory securities in movables, whether individualized or not. There is a court register of security interest and a process of execution is expeditious.

[19] DROBNIG, U. op.cit., p.346.

[20] Ibid.,. 359.

[21] Ibid., 358.

Slovenia and Croatia have similar roots because of the application of former Law on Execution that was amended in 1990, but with recent changes in the Croatian law the situation is somewhat different. According to the former law, it was possible to create a non-possessory pledge on a movable before the execution court. The advantage of such a pledge was that a quick execution was possible, because creditor might enforce his security without filing suit. Recently, Croatia has changed its securities law, as explained *infra.*

In the Czech Republic, pledges on the movables are generally possessory, but it has been stated that in commercial practice as far as foreign creditors are concerned, a non-possessory pledge is replaced by fiduciary transfer of ownership, although it is not expressly regulated.[22]

5. A Short Note on the Croatian Law

When observing the provisions of the new Croatian Law on Execution (LE)[23] one has to made several remarks.

A pledge without transfer of possession is regulated in the part of "Security". Namely LE regulates two subject matters: (substantial and procedural issues of) the (civil) execution (undertaken by individual creditor), and the security consisting of the various institutions envisioned to secure claims whose fulfillment is somehow endangered, In these situations conditions for the (civil) execution are not fulfilled and judicial lien and other various protective measures can be obtained. In this part some voluntary (contractual) security devices can be found among them - voluntary non-possessory pledge on movables. This contractual security is vested in the form of the judicial act, and is therefore considered as *titulus executionis.*

For the sake of coherence the new Law on Property and other Real Rights (LP)[24] expressly names this institution the voluntary court pledge (art.213. LP). Moreover, the concept of the nonpossessory pledge before the execution court is broadened by introducing a new possibility, creating a non-possessory pledge before the notary public, since the notaries public were established in 1993. by virtue of the Law on Notary Public.[25] A non-possessory pledge before the notary public has substantially similar effects as the court non-possessory pledge. These institutions are regulated in art. 261 - 272 LE.[26]

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[22] BREIDENBACH, S. *Thesen zur Entwicklung des Mobiliarsicherheitenrechts in Mittel und Osteuropa,* Symposium zum 70-jährigen Bestehen des Hamburger Max-Planck Institut "Systemtransformation in Mittel und Osteuropa und ihre Folgen für banken Börsen und Kreditsicherheiten", p.2.

[23] Narodne novine, br.57/96.

[24] Narodne novine, br. 91/96.

[25] Narodne novine br.73/93.

[26] DIKA, M. *Sudsko i javnobilježničko založnopravno osiguranje na temelju sporazuma stranaka (Claims secured by pledge before the court and notary public on the basis of the agreement of the parties),* in: Zbornik radova Novo stečajno i ovršno pravo, Zagreb 1996, p.-75-98.

However, substantiallly new is the introduction of the fiduciary transfer of ownership in the Law on Execution (art. 273. - 279. LE).[27] Namely, if the parties want to offer a movable as security without a transfer of possession, they can opt for a voluntary court / notary public **pledge,** or a court / notary public **transfer of ownership**. The concept of fiduciary transfer of ownership is, unlike in Germany, formal contract. Unlike the pledge in Croatian law, the fiduciary transfer of ownership is independent in regard of the secured claim. Furthermore, the Law on Execution has developed special rules for extra-judicial execution of a claim secured by fiduciary transfer of ownership. A notary public plays an important rule in this extra-judicial execution.

For all four types of nonpossessory security interests in movables the law requires the announcement a contract for security in the official paper ("Narodne novine"). The nature of this announcement is only declaratory. This requirement was added for the reason of publicity and is supposed to be abandoned when a registry of secured transactions is instituted. For the time being, this "substitute" is a valuable and relevant source of information, how frequently parties opt for pledge or for ownership as a security.

Namely, if the parties want to secure claims that are non-existent at the time of the conclusion of the contract, they would opt for transfer of ownership. The same is true if they want to acquire a (real) right whose legal existence is not strongly attached to the claim. If one have in mind variety of legal construction of securities as well as various possible objects of security with proper selection of few security devices (i.e. prolonged transfer of ownership with future cession of the claims) creditor may obtain results of the floating lien without need to abandon doctrine of certainty of the charged object. That goal is hardly achievable in the context of the pledge. Finally, they would opt for transfer of ownership if they prefer extrajudicial execution of the secured claim, which is regulated in detail in the Law on Execution.[28]

[27] See, BARBIĆ, J. *Sudsko i javnobilježničko osiguranje prijenosom vlasništva na stvari i prijenosom prava, (Claims secured by transfer of ownership before the court and notary public on the basis of the agreement of the parties)* in: Zbornik radova Novo stečajno i ovršno pravo, Zagreb 1996, p.99-140.

[28] ČULINOVIĆ HERC, E. *Ugovorno osiguranje tražbina zalaganjem pokretnih stvari bez predaje stvari u posjed vjerovnika (Contractually secured claims by pledging movables without transfer of possession to the creditor)* Diss., Zagreb 1996, p.160.

Summary

REAL SECURITIES IN MOVABLES - EUROPEAN UNIFICATION PROSPECTS AND TRANSITION COUNTRIES

In this article the author deals with European unification prospects and the potential problems in the field of securities in movables, when securities in movable things without transfer of possession are concerned. Having admitted that the European legal landscape has changed due to the newly implemented laws in transitions countries as far as securities in movables without transfer of the possession are concerned, the author argues that implementation of the common-law legal principles (institutions) lowers yet minor chances for European unification in that particular field. Although few modern systems of asset based secured lending have been implemented, it can be ascertained that there is a persistent tendency to revive the ownership as a mean of security. In cross border secured lending the legal content of ownership is comparatively more certain then are various (other) real rights peculiar to a specific legal system. The author concludes the article with a short note on Croatian law. Recognizing the possibility that a movable can be offered as security both by pledging it (without transfer of the possession) and by transferring fiduciary ownership, parties may choose the legal framework that they find the most suitable.

Key words: *non-possessory pledge, fiduciary transfer of ownership, securities in movables, contractual securities, unification prospects, transition countries.*

Zusammenfassung

SACHENRECHTLICHE SICHERUNG FÜR BEWEGLICHE SACHEN - AUSSICHTEN ZUR UNIFIZIERUNG IM RECHT DER EUROPÄISCHEN UND TRANSITIONSLÄNDER

Es werden Ausgangsprämissen für die Bewertung der Möglichkeiten zur Unifizierung des europäischen Zivilrechts im Bereich der Forderungssicherung von beweglichen Sachen aufgezeigt. Dabei wird auf Unterschiede hingewiesen, die im Nationalrecht der europäischen Mitgliederstaaten bestehen, die sich auf Rechtsregeln über den Erwerb von Eigentum an beweglichen Sachen beziehen, und welche die Aussichten auf Unifizierung in diesem Bereich verringern oder sogar vereiteln. Es wird die Aufmerksamkeit auf die Änderung von Rechtsvorschriften in den Transitionsländern gelenkt, die, indem sie dem angloamerikanischen Recht nahe Institute einführen, die Elemente der Divergenz auf dem Gebiet des europäischen Rechts der Forderungssicherung vergrößern. Es wird auf eine gewisse Zweiteilung

unter den Transitionsländern hingewiesen: ein Teil folgt den Beispielen der europäischen, kontinentalen Gesetzgebung, doch der andere beugt sich mehr dem common-law. Ungeachtet dessen, daß die Änderungen in den Transitionsländern eine neue Rechtslandschaft im Bereich des Pfandrechts ohne Übergabe des Besitzes hervorgebracht haben, wird in einigen Nationalrechten eine Persistenz des Instituts der Sicherung, die sich auf Eigentum gründet, konstatiert, die dem Gläubiger mehr gibt als wirtschaftlich für die Forderungssicherung notwendig ist und nicht immer von der Erfüllung der Publizitätsfunktion des Sachenrechts begleitet wird. Es wird eine neue Struktur des Instituts der Sicherung dargelegt, das durch die reformierten Vorschriften auf dem Feld der Forderungssicherung und des Gläubigerschutzes angenommen wurde. Die neue Gesetzgebung hat neben dem Pfandrecht ohne Übergabe des Besitzes auch die Übertragung des Eigentums zur Sicherung kooptiert, so daß außerdem auf mögliche Gründe zur Wahl eines dieser Rechtsrahmen der Forderungssicherung hingewiesen wird.

Schlüsselwörter: *Pfand ohne Übergabe des Besitzes, Eigentumsicherungs Übereignung, Kreditsicherungsmittel für bewegliche Sachen, Aussichten auf Unifizierung, Transitionsländer.*