

A non-accessory Security Right over Real Property for Central Europe

Gage immobilier non-accessoire pour l'Europe Centrale – Nicht akzessorisches Grundpfandrecht für Mitteleuropa – Pegno immobiliare non accessorio per Europa centrale - Derecho real de garantía inmobiliaria no accesoria para Europa Central

DR. HANS WOLFSTEINER, Munich, and DR. OTMAR STÖCKER, Bonn/Berlin*

Summary

In many Central and Eastern European states, there is only an accessory security right over real property**. Accessoriness, however, causes problems for financing, in particular for refinancing. Therefore, a non-accessory security right over real property is desirable.

The Association of German Mortgage Banks (*Verband Deutscher Hypothekenbanken* - VDH) has thus initiated the setting up of a working group* of academics and practitioners. The group has produced a discussion paper containing basic guidelines as well a **draft law**. The draft law has taken ideas in particular from the Swiss *Schuldbrief* (certificate of indebtedness) and the German *Grundschuld* (land charge). However the draft law could be implemented in any legal system.

The basic elements of the proposal are:

- The security right is **independent of the secured claim**. The security right can exist prior to the claim. It continues to exist even after the secured debt has been repaid and can be used to secure another claim instead.
- The creation of the security right requires a notarial act and **registration in the land register** (constitutive registration).
- A **security agreement** must regulate the use of the security right and lay down the preconditions for realising and redeeming the security right.
- The **transfer** also requires registration in the land register or - if there is a certificate (registration document) the transfer of this certificate.
- The security right is **extinguished** when it is deleted from the land register with the consent of the creditor and the owner.
- The security right is **enforceable by execution**. It gives the creditor satisfaction even in case of insolvency.

Now, another research group of scientists has been founded to continue the work for a unitary, non-accessory security over real property (**Euro-mortgage group**)**. Also, the EU-Commission has instituted the **FORUM** group, consisting mainly of bank experts, to consult on how to remove obstacles to a common European market for real estate finance.

Sommaire

Dans les **Etats de l'Europe de l'Est et de l'Europe centrale** il n'existent souvent que des droits de gage immobiliers accessoires**. Cependant, l'accessoriété pose des problèmes pour le financement - notamment pour le refinancement. Il serait souhaitable d'introduire un droit de gage immobilier qui ne soit pas accessoire.

Sur l'initiative de l'Association des Banques Hypothécaires Allemandes (*Verband Deutscher Hypothekenbanken* - VDH), un groupe de travail* de scientifiques et de prati-

ciens a repris les approches antérieures visant l'**introduction d'un droit de gage immobilier non-accessoire valable dans toute l'Europe**. Le groupe de travail a élaboré des critères pour ce droit de gage et présenté un premier projet de loi concret. Le **projet de loi** se base sur les éléments de la cédula hypothécaire suisse (*Schuldbrief*) et de la dette foncière allemande (*Grundschuld*). Ce projet de loi peut être transposé indépendamment de l'ordre juridique interne.

Voici les éléments les plus importants du projet de loi:

- Le droit de gage immobilier est **indépendant de la créance garantie**. Il peut être constitué avant la naissance de la créance. Et il ne s'éteint pas par l'extinction de la créance. Il peut alors servir de garantie à une autre créance.
- Le droit de gage immobilier est constitué par un acte notarié. Le droit naît au moment de l'**inscription au livre foncier** ou dans le registre des hypothèques (inscription constitutive).
- Une **convention de garantie** est nécessaire pour déterminer les conditions sous lesquelles le créancier peut faire valoir son droit garanti et sous lesquelles le propriétaire le peut revendiquer.
- La **cession** requiert soit l'inscription dans le livre foncier (lorsqu'il s'agit d'un droit qui ne demande pas la remise d'un titre), soit la remise de la lettre hypothécaire (lorsqu'il s'agit d'un droit qui demande la remise d'un titre).
- Le droit de gage immobilier ne **s'éteint** que s'il est radié dans le livre foncier et que le créancier et le propriétaire y ont expressément consentis.
- Le droit de gage immobilier est **exécutoire**. Il garantit la sécurité même dans le cas de l'insolvabilité.

Entretemps, un groupe de travail de scientifiques s'est formé pour continuer les travaux pour un droit de gage immobilier non accessoire unifié.*** La Commission de

* The guidelines and the draft law are the result of a working group. The people who contributed to the working group were: JOHANNES E. BEUTLER, formerly of Rheinboden Hypothekenbank, Cologne; PROF. ULRICH DROBNIG, Max-Planck Institute for Foreign and International Private Law, Hamburg; DR. KLAUS-PETER FOLLAK, Württembergische Hypothekenbank AG, Stuttgart; PETER HELLER, Süddeutsche Bodencreditbank AG, Munich; PETER NEUBAUER, Bayerische Vereinsbank AG, Munich; OTTO SOERGEL, Frankfurter Hypothekenbank Centralboden AG, Cologne; DR. OTMAR STÖCKER, Verband deutscher Hypothekenbanken, Bonn (executive editor); PROF. ROLF STÜRNER, University of Freiburg; DR. HANS WOLFSTEINER, Notary, Federal Chamber of Notaries, Cologne (production of the draft law under letter B). This article is the English version of an article published in German in the legal journal „ZBB“ (Zeitschrift für Bankkredit und Bankwirtschaft - journal for bank law and economics) (and also in DNotZ 1999, 451). This translation is published with kind permission of ZBB.

** SOERGEL/STÖCKER, *Elargissement de la Communauté européenne aux pays de l'Est et questions dogmatiques soulevées par le droit immobilier - causalité, droit accessoire et objet du contrat de garantie - EU enlargement in Eastern Europe and dogmatic property law questions - Causality, Accessoriness and Security Purpose*, Notarius International 2002, 227.

*** www.eurohypotheec.com

L'UE a également institué un groupe d'experts, notamment de représentants de banques (le soi-disant groupe **FORUM**), afin de développer des propositions pour éviter les entraves à un marché unique de financements immobiliers.

Zusammenfassung

In den Staaten **Mittel- und Osteuropas** gibt es häufig nur akzessorische Grundpfandrechte**. Die Akzessorietät wirft jedoch Probleme für die Finanzierung und vor allem für die Refinanzierung auf. Wünschenswert wäre ein nicht akzessorisches Grundpfandrecht.

Auf Initiative des Verbandes Deutscher Hypothekenbanken (VDH) hat daher eine Arbeitsgruppe* aus Wissenschaftlern und Praktikern frühere Initiativen zur **Schaffung eines einheitlichen nicht akzessorischen Grundpfandrechtes in Europa** wieder aufgegriffen. Die Arbeitsgruppe hat Leitlinien erarbeitet und einen **konkreten Gesetzentwurf** vorgelegt. Der Gesetzentwurf greift Elemente des Schweizer Schuldbriefes und der deutschen Grundschild auf. Er kann aber unabhängig von der jeweiligen Rechtsordnung umgesetzt werden.

Die wichtigsten Elemente des Vorschlages sind:

- Das Grundpfandrecht besteht **unabhängig von der gesicherten Forderung**. Das heißt, es kann bestellt werden bevor die Forderung entstanden ist. Und es besteht fort, auch wenn die ursprüngliche Forderung erloschen ist, und kann etwa zur Sicherung einer anderen Forderung verwendet werden.
- Das Grundpfandrecht wird durch notarielle Urkunde bestellt. Es entsteht mit der **Eintragung in das Grundbuch** oder Hypothekenregister (konstitutive Eintragung).
- Eine **Sicherungsvereinbarung** ist erforderlich, um zu regeln, unter welchen Voraussetzungen der Gläubiger von der Sicherheit Gebrauch machen darf und wann der Sicherungsgeber die Sicherheit zurückverlangen kann.
- Die **Abtretung** erfordert entweder eine Grundbucheintragung (wenn das Grundpfandrecht als Buchrecht ausgestaltet ist) oder die Übergabe des Briefes (wenn es als Briefrecht ausgestaltet ist).
- Das Grundpfandrecht **erlischt** nur, wenn es mit Zustimmung des Eigentümers im Grundbuch gelöscht wird.
- Das Grundpfandrecht ist **vollstreckbar**. Es gewährt Sicherheit auch im Fall der Insolvenz.

Mittlerweile hat sich eine neue Arbeitsgruppe von Wissenschaftlern gebildet, um die Arbeiten für ein einheitliches, nicht akzessorisches Grundpfandrecht fortzusetzen (**Euro-Hypothek Gruppe**)***. Auch hat die EU-Kommission eine beratende Expertengruppe v.a. aus Bankvertretern eingesetzt (die sogenannte **FORUM-Gruppe**), um Vorschläge zu entwickeln, wie Hindernisse für einen einheitlichen Markt für Immobilienfinanzierungen beseitigt werden können.

Sommario

Negli **Stati dell'Europa centrale e dell'est**, spesso esistono unicamente diritti di pegno immobiliare accessori.** Però, l'accessorietà è legata a problemi per quanto riguarda il finanziamento - inanzitutto il rifinanziamento. Sarebbe utile introdurre un diritto di pegno immobiliare non accessorio.

L'Associazione dei Banchi Ipotecari Tedeschi (*Verband Deutscher Hypothekenbanken* - VDH), ha composto un gruppo di lavoro* di scientifici e pratici che hanno ripreso le iniziative anteriori di introdurre un **diritto di pegno immobiliare non accessorio che vale in tutta l'Europa**. Il gruppo di lavoro ha elaborato criteri per questo diritto di pegno e ha presentato un primo **progetto di legge** concreto. Il progetto di legge si basa su elementi della cartella ipotecaria svizzera (*Schuldbrief*) e del debito fondiario tedesco (*Grundschild*). Questo progetto di legge può essere attuato indipendentemente dal sistema giuridico interno.

Gli elementi più importanti del progetto di legge sono i seguenti:

- Il diritto di pegno immobiliare è **indipendente dal credito garantito**. Può essere costituito anche prima della nascita del credito. Non si estingue al momento dell'estinzione del credito. Può allora servire di garanzia ad un altro credito.
- Il diritto di pegno immobiliare si costituisce con un atto notarile. Il diritto nasce al momento **dell'iscrizione nella conservatoria** (iscrizione costitutiva).
- Una **convenzione di garanzia** è necessaria per fissare le condizioni sotto le quali il creditore può far uso della garanzia e il momento in cui il creditore può richiedere la garanzia.
- La **cessione** richiede o l'iscrizione nella conservatoria (se si tratta di un diritto che non domanda la consegna di un titolo) o la consegna della cartella ipotecaria (se si tratta di un diritto che domanda la consegna di un titolo).
- Il diritto di pegno immobiliare **si estingue** unicamente se è annullato nella conservatoria e se il creditore e il proprietario ci hanno espressamente consentito.
- Il diritto di pegno immobiliare è **esecutorio**. Garantisce la sicurezza anche nel caso di insolvibilità.

Nel frattempo, si è formato un gruppo di lavoro di scientifici per continuare i lavori per la creazione di un diritto di pegno immobiliare unitario (**gruppo Euro-ipoteca**)***. La Commissione dell'UE ha anche formato un gruppo di esperti, in particolare di rappresentanti di banche (il cosiddetto gruppo **FORUM**), per sviluppare proposizioni per evitare gli ostacoli a un mercato unificato di finanziamenti immobiliari.

Sumario

En los Estados de **Europa Central y Oriental** normalmente sólo existen derechos reales de garantía inmobiliaria accesorios. No obstante, la accesoriedad conlleva problemas respecto a la financiación y, sobre todo, a la refinanciación. Un derecho real de garantía inmobiliaria no accesorio sería deseable.

A iniciativa de la Asociación de Bancos Hipotecarios alemanes (*Verband Deutscher Hypothekenbanken*, VDH), un grupo de trabajo* formado por científicos y prácticos ha retomado anteriores iniciativas para el establecimiento en Europa de un derecho real de garantía inmobiliaria unitaria no accesorio. Este grupo de trabajo ha elaborado líneas maestras y ha presentado una **proposición de ley** concreta, que recoge elementos de la hip-

*/**/*** Fußnoten s. Seite 116
nota vedi pagina 116
notas véase a la página 116

teca independiente suiza (*Schuldbrief*) y de la deuda territorial alemana (*Grundschild*) pero que puede trasponerse a todos los ordenamientos jurídicos.

Los elementos más importantes del propuesto de ley se exponen a continuación.

El derecho real de garantía inmobiliaria es independiente de la deuda asegurada. Es decir, puede existir con anterioridad a la deuda asegurada y continuar existiendo tras su extinción y, por ejemplo, asegurar otras deudas.

- El derecho real de garantía inmobiliaria es **independiente de la deuda garantizada**. Es decir, puede ser creada antes que el crédito garantizado y puede continuar existiendo incluso aunque queden extinguidos los créditos garantizados; además puede servir para garantizar otros créditos.
- Para crear un derecho real de garantía inmobiliaria no accesorio, se requiere escritura pública. Nace por inscripción en el Registro de la Propiedad (**inscripción constitutiva**).
- Debe llegarse a un **Acuerdo de Garantía** con el fin de establecer bajo qué condiciones podrá el acreedor utilizar la garantía independiente y cuándo podrá reclamarla el propietario.
- El derecho real de garantía inmobiliaria solamente se **extingue** con la cancelación de la inscripción en el Registro de la Propiedad, que presupone el consentimiento del acreedor y del propietario.
- El derecho tiene carácter ejecutivo. También garantiza en caso de concurso.

Ahora, un nuevo grupo de trabajo de académicos se ha formado para continuar las iniciativas para el establecimiento de un derecho real de garantía inmobiliaria no accesorio unitario en Europa (**grupo Eurohypotheck**)***. En este mismo sentido, la Comisión Europea ha instituido el grupo **FORUM** para aconsejarlo como eliminar obstáculos de un mercado común de financiación inmobiliaria en Europa.

A non-accessory Security Right over Real Property for Central Europe

Introduction

Within the context of the consultative role of the Association of German Mortgage Banks (VDH - *Verband Deutscher Hypothekenbanken*) in central and east European countries in transition the central question of the practicability of existing security rights over real property continually arises. Insofar as detailed mortgage regimes are to be found, such as, for example, in central Europe, most only offer mortgages which are strictly accessory to the claim which they secure, at best in the form of the maximum amount mortgage (*Höchstbetragshypothek*).

In endeavouring to achieve fundamental reorganisation of the economic system and to organise it on free market lines, the means of providing security for loans is consequently also being generally investigated in the countries in transition to determine whether they permit modern financing techniques.

In connection with the discussion regarding the problems that arise with strictly accessory mortgages in lending practice, the possibility is increasingly being discussed of

introducing a new, non-accessory security right over real property into the relevant legal systems.

The Association of German Mortgage Banks (VDH) has thus initiated the setting up of a working group which has produced a discussion paper containing basic guidelines for a non-accessory security right. For this purpose ideas were taken from several legal systems, in particular from the statutory provisions and the practice developed by the courts and the banks in relation to the Swiss '*Schuldbrief*' (certificate of indebtedness) and the German '*Grundschild*' (land charge).

The working group did not limit itself to producing abstract guidelines: in addition a **draft law** developed from the guidelines was drawn up in order to demonstrate clearly the need for regulation. This draft law was formulated independent of any specific legal system.

The proposal is conceived as a **discussion paper** and attempts to reconcile the provision of a flexible form of loan security with the requirements of legal security and consumer protection. The discussion paper is being published in order to stimulate public debate as to how central European mortgage regimes could be modernised.

A) Basic guidelines for a new security right over real property

I. General

1. The objective of the present discussion paper is to put forward a proposal for a non-accessory security right over real property that can also be used to secure debts.¹
2. In contrast to the mortgage which is strictly accessory to the claim it secures, this security right offers a high degree of flexibility in safeguarding the relationship, governed by the law of obligations, between the debtor and its creditor.

¹ More than 30 years ago the Commission of the European Communities charged a group of experts under the leadership of Prof. CLAUDIO SERGÉ with the task of carrying out a comprehensive investigation of the problems arising from the liberalisation of movement of capital and the implications of the integration of capital markets. In 1966 this group of experts produced a paper entitled "Development of a European Capital Market", the so-called Sergé Report, in which it was proposed, inter alia, to harmonise the legal provisions in the individual member states dealing with security rights over real property, with the German certificated land charge being put forward as the model.

This initiative was taken up later by the International Union of Latin Notaries' Commission for European Affairs and on 22nd May 1987 they forwarded to the European Council of Ministers the proposal that

- along with the currently existing security rights over real property in the individual member states, a European mortgage uniformly regulated in all member states be made available to lending institutions;
- this uniformly regulated security right over real property should be structured largely on the example of the Swiss certificate of indebtedness;
- lending institutions and borrowers within the EEC would thereby be offered a more marketable and versatile security right over real property as an alternative to the security rights over real property already existing in each member state and
- in this way the legal, economic and practical disadvantages of a conventional, strictly accessory mortgage would be avoided.

On the Euro-mortgage see, for example, the following literature: *INTERNATIONAL UNION OF LATIN NOTARIES, L'Eurohypotheque/Die Eurohypotheck/The Euro-mortgage*, 2nd edition, Amsterdam, 1994 (in French and German) (with an example of a security agreement and confirmation of ranking); WEHRENS, *Überlegungen zu einer Eurohypotheck*, (Observations on a Euro-Mortgage), WM (Wertpapier-Mitteilungen) 1992, 557 ff. (in German); STÖCKER, *Die „Eurohypotheck“* (The Euro-mortgage), Berlin, 1992 (in German).

- The security right can already **exist prior to a loan** being paid out or the loan agreement actually being concluded. The payment operation is thereby made easier without the bank having to bear the risk of making a payment without a security right being in existence.
- If the claim to be secured has been partially or wholly repaid a **new claim can be secured** by the same security right without a new one having to be created. The security right can be used to secure claims of fluctuating amounts; this is a major advantage for phased construction and development financing, as well as for current account-related claims.
- It is also possible to retain this security right as a security device when the claim secured is to be replaced by a new claim (e.g. a rescheduling facility by the same creditor). The same applies when several small claims are to be replaced by one large claim.
- The security right can be used to **secure several claims of the same creditor**.
- The security right permits the securing of claims that are not in monetary form.

It should be taken into account that greater independence between the security itself and the claim to be secured and thereby higher negotiability may also bring greater risks with regard to the possibility of misuse. Consideration might therefore be given to **restricting the circle of possible creditors by statute** (e.g. to banks, insurance companies and other institutions under state supervision).²

3. The flexibility of the new security right makes the **change to a new creditor** easier and thus promotes competition among lenders. For, by reason of its non-accessory nature, the security right can be transferred to a new creditor without the previously secured claim being thereby affected. This is of significance in the case of the rescheduling of a loan. Furthermore, a security right of this type supports the development of new refinancing techniques by the banks.
4. A **security agreement** must regulate the use of the security right and lay down the preconditions for realising and redeeming the security right. The law should stipulate a minimum content for security agreements. Loss occurring to the owner (security provider) or the creditor from the breach of the terms of the security agreement must be compensated.³
5. The new security right is to be capable of being created both for the owner and for the creditor, depending on the wishes of the contracting parties. Creation of a **security right for the owner** is, for example, useful if the owner is dealing with several banks regarding the granting of a loan and once its decision has been made wants early payment of the loan funds. In this way the owner can get ahead with the formal requirements for the creation of the security right and have the security right available 'in stock'.
6. Holding a security right in a **fiduciary** capacity for one or more creditors should be made possible. In this regard care should be taken that this form of trust continues to exist also in the case of the fiduciary's bankrupt-

cy, so that the security right does not fall into the bankrupt's estate. These constructions are of practical significance in the case of bridging finance and syndicated financing.⁴

7. The security right should be able to be arranged **both as a registered right and certificated right** (registration document). A certificated right makes transfer easier. This has advantages for the borrower in the case of debt restructuring. The creditor can use the simplified transfer procedure for its refinancing.
8. It should also be possible for the security right to be created by the owner of a piece of real property who is **not simultaneously debtor** in respect of the claim to be secured. In this case the claims to be secured must be specified in the security agreement.
9. The creation of the security right requires **notarial attestation**. The security right is **enforceable** without an additional enforcement judgment.
10. The possibility should be opened up for it to be agreed as the subject matter of the security right that along with the liability of the real property, **the respective owner is personally liable** for the amount of the security right with its other personal assets. This has the advantage that through an enforceable title over the security right, enforcement on the personal assets of the owner is also opened up. In the event of payment difficulties on the part of the borrower the bank thus does not need to levy execution on the real property immediately, but rather can be satisfied (at least temporarily) with enforcement on the personal assets (e.g. attachment of employment earnings). In no event is a double demand permissible.

The possibility should be provided for personal liability also to be made subsequently to the contents of the security right. Consideration could be given to excluding this personal liability in the case where the owner of the real property (at the time when the security right is created) is not the same as the debtor in respect of the claim to be secured (see above No.8).⁵

11. The security right should be structured so as to be **interest bearing**. It should be possible for the interest rate to be able to be agreed at a rate higher than the initial lending rate.⁶ In the enforcement it should be possible to apply the interest claims arising from the security right against the capital claims in respect of the debt and conversely for a limited period.
12. It should be possible to create and record or register the security right in a **foreign currency**.

II. Creation

1. Only the **owner** shall be in the position to create a security right.

² The draft law (under B) does not yet contain such a restriction.

³ The provision in section 18 of the draft law at present only regulates the compensation claim of the security provider.

⁴ The draft law does not yet contain such a provision.

⁵ Section 3 of the draft law does not yet take this possibility into consideration.

⁶ In accordance with section 1 para. 4 of the draft law the interest rate can be subsequently increased by up to 10% without the consent of the equal or subsequent ranking creditors.

2. The security right must be entered in the **land register** or record. It is to come into existence upon registration in favour of the registered creditor. Registration has constitutive effect.
3. The security right has a **fixed rank** in relation to other security rights on the property and to all other burdens on it. The rank depends on the order of registration in the land register or record. Only those rights not entered in the land register, constituted by statutory provisions, which are property-related, limited in time and calculable, should be able to rank prior to the security right. This ranking relationship also applies in enforcement proceedings and on the insolvency of the owner.
4. Creation of the security right requires **notarial authentication**.
5. If a **registration document** is to be granted, it must be drawn up by the land registry or registration office. The grant must be entered in the land register. The registration document reproduces the entries in the land register or registration office relating to the security right. The registration document does not contain declarations regarding ranking.
6. The **security agreement** should be subject to the requirement of the written form. It does not have to be notarised and does not have to be entered in the land register or record. The possible invalidity of the security agreement does not affect the valid creation of the security right. In this event the security right is to be restored.
7. A procedure should be set up which makes it possible, in the event of the **loss of the certificate**, to exclude the actual - non-entitled - holder of the certificate and to have the document itself declared to be null and void.

III. Transfer

1. An important objective in introducing the new security right should be easy transferability while preserving the requisite legal security. Thus the creator of the security right is given wide flexibility in relation to the further application of the security. Therefore **various different possibilities for transfer** should also be permitted.
2. The style of transfer depends on the specific structuring of the security right. The legal form of a **deed of assignment** (hereafter simply 'the assignment') must, however, always be observed.
 - a) In the case of a **registered right**, in order for the assignment to be valid it must be entered in the land register or record. As changes to the land register or record cannot be made on the basis of holograph instructions, the assignment must be effected in notarially authenticated form.
 - b) If a **certificate (registration document)** is established in respect of the security right, a holograph declaration of assignment together with the transmission of the certificate (registration document) is necessary in order for transmission to a new creditor to be legally effective. In addition an announcement can be made in the land

register or record. It should also be permissible for the certificated security right to be assigned outside the land register or record. A precondition for this is that the establishment of the certificate can be perceived from the land register or record itself. It will thus be obvious to a third party inspecting the land register or record that status of the land register potentially does not correspond to the actual legal position.

In this way various aims can be fulfilled, e.g. **fiduciary and syndicated relationships** between several lending institutions participating in one financing operation are completed comparatively practicably and without delay. Also, in the case of temporary bridging finance by a third party institution, it would be possible to guarantee legal security for a lender without causing a burden of expenditure for the security provider (owner, borrower) for what might possibly be only a short period of time. It is also conceivable that a creditor could assign the certificated security right for its own refinancing purposes, either permanently or also only from time to time.

As soon as an announcement, now declaratory, as to the current creditor is to be made in the land register or record, as in a), notarial assignment from the registered holder to the new creditor is again required. In this regard an unbroken chain of assignment is necessary. In the land register or record only the current creditor is then, however, registered. The certificate established in respect of the security right is correspondingly amended. Any divergence between announcements in the land register or record and in the certificate should be avoided. Assignments outside the land register or record should not in the first place therefore be documented in the certificate itself.

3. The security right is not tied to the debt which it is created to secure. That means that it should be possible to **transfer the security right without simultaneously transferring the secured claim**. Thus it would be possible for the security provider to conclude a new security agreement with a new creditor in order to secure another claim with this security. This would then naturally be achieved at the earliest upon the deed of assignment becoming effective, which in the case of registered rights would be upon registration in the land register or record and in the case of certificated rights, upon conclusion of the deed of assignment and delivery of the certificate. If the original claim of the assignor of the security right as creditor is not yet fully repaid, it would then be unsecured or have to be secured by new security. Thus the flexibility of the security provider in structuring its security agreements is increased. The possibility should nevertheless exist to exclude the isolated transfer of the security right, that is without transfer of the underlying claim, from the outset in the original security agreement or make it possible only with consent of the security provider.⁷

⁷ In the case of contravention, in accordance with section 18 para. 2 of the draft law the secured party makes itself liable to pay compensation.

In the case where the secured claim passes to the new creditor along with the security right, all pleas/objections under the original security agreement should be retained by the debtor and be able to be cited to the assignee in opposition. Protection of the debtor should predominate here.⁸

4. The **costs of the transfer** are determined by the notary's fees in the case of a deed of assignment in a form capable of entry in the land register together with the actual fees for registration in the land register or record. In the case of certificated rights without registration of the current creditor in the land register or record, cost reductions as described under No. 2 b) are possible.

IV. Extinguishment

1. The security right is extinguished when it is released with the consent of the creditor and the owner and **deleted from the land register** or record. It is not extinguished by the passage of time.
2. The **interest** on the security right becomes time-barred. The **limitation period shall not exceed four years**. The time-barring should prevent the lien interest, which is to be generated from the income from the real property, excessively expanding the extent of liability to the disadvantage of subsequent ranking creditors and leading ultimately to the overindebtedness of the pledged property.
3. In the case of the secured claim being extinguished, the security right is not extinguished automatically (see above, I. No. 2), but rather, if the security conditions have provided for this, the owner (security provider) has a claim against the creditor for restoration of the security right. The security provider can, at its option, ask for restoration in the form of assignment or cancellation.
4. A process must be provided to facilitate the cancellation of the security right in cases where the **creditor is permanently unknown** or unattainable.

V. Realisation

1. The quality of a security right over real property depends decisively upon the possibilities for realisation. Thus there has to be an effective procedure for realisation.
2. Separate title for enforcement under the security right is not necessary, as the security right is **enforceable by execution** (see above, I. No. 2).
3. In principle the statutory enforcement procedure applies in relation to realisation.
4. Consideration could be given to providing the possibility in addition of permitting a state (or notarially) controlled or otherwise statutorily regulated **auction procedure or private sale**. Means of protecting the rights of the owner (security provider) should be provided in this regard.
5. In the state or state controlled auction procedure all rights ranking prior to the petitioning creditor should remain in existence; meanwhile equal ranking and **subsequent ranking rights as well as the right of the pe-**

tioning creditor itself are extinguished. The extinguished rights are satisfied from the proceeds in the order of their ranking.

6. The right shall be granted to each creditor who would suffer loss of a right through the sale or auction to supersede the creditor petitioning for the sale/auction.⁹

Replacement takes place through payment to the creditor petitioning for the sale/auction. The superseding creditor pays the amount on account of which the sale or auction is being petitioned for. For the security right independent of the debt secured this means that the superseding creditor does not pay on the secured claim but rather on the security right itself. Therefore the replacement also only brings about the transmission of the security right itself to the superseding creditors. The secured claim does not pass over, but rather remains with the superseded creditor. The latter is obliged in accordance with the security agreement to credit the repayment sum to the debtor account and set it off against the secured claim.

VI. Insolvency proceedings

The security right must give the creditor the possibility of full satisfaction also in the event of the insolvency of the owner. The order of ranking must not deteriorate as regards the realisation procedure.

Only those rights not entered in the land register, constituted by statutory provisions, which are property-related, limited in time and calculable should be able to rank prior to the security right.¹⁰

B) Draft Law

1st Chapter: Security Right Section 1 Security Right

- (1) A piece of real property can be burdened in such a way that the person in whose favour the encumbrance is effected is to be paid a certain sum of money from the piece of real property (security right). Rights which are entered in the land register in the same way as pieces of real property can also be burdened.
- (2) The security right can be made not contingent upon the existence of a claim.
- (3) The encumbrance can also be effected in such a way that interest on the sum of money from the piece of real property is to be paid. The interest is to be specified as a fraction of the sum of money and is to be paid for particular periods; the period consists of one calendar year or a particular part of a calendar year. Four years after expiry of the interest period the interest claim becomes time-barred unless the piece of real property was previously seized for the purposes of compulsory enforcement.
- (4) If the security right is non-interest bearing or if the interest rate is less than ten percent, the security right can be extended without the consent of entitled persons

⁸ Section 9 of the draft law does not yet contain detailed regulations on this.

⁹ Compare section 7 para. 7 of the draft law.

¹⁰ The draft law does not contain any regulations about this, as these are to be allocated to the relevant insolvency law.

with equal or subsequent ranking to the extent that the piece of real property is liable for interest of up to ten percent. The consent of these entitled persons is likewise not necessary for an alteration to the time or place of payment.

- (5) The security right can also be created for the owner. It is not extinguished by reason of the fact that it is combined with the ownership of the piece of real property in one person.

Section 2 Creation

- (1) The security right comes into existence through registration in the land register. This needs the approval of the owner, which requires notarial authentication.
- (2) Approval and registration must state the creditor, the sum of money and, if it is interest bearing, the rate of interest and the interest period. If nothing is specified regarding maturity, the sum of money is due immediately, while interest is due at the end of the relevant interest period.¹¹

Section 3 Personal liability

- (1) The security right can specify that the relevant owner of the piece of real property encumbered with the security right is liable for payment of the sum of money and the interest due also to the extent of its other assets (personal liability).
- (2) This personal liability must be entered in the land register. The approval of the owner to this requires notarial authentication.
- (3) The personal liability of the former owner is extinguished if, with the consent of the creditor, ownership of the piece of real property is transferred to someone else. Consent is deemed to have been granted if, within one year of registration of the transfer of ownership, the creditor does not apply to the land registry for the continuation of the liability to be registered in the land register.
- (4) If nothing to the contrary is agreed a successor in ownership is obliged to release the previous owner from its personal liability.

Section 4 Granting of a certificate or registration document

- (1) At the request of the creditor in respect of the security right, the land registry shall grant the creditor a certificate/registration document. This must reproduce the land register entry in full.
- (2) The registration document is worded in the name of the creditor. With the consent of the owner, which requires notarial authentication, the registration document can also be issued to bearer.
- (3) The issuing of a certificate/ registration document must be entered in the land register, as must the return (possible at any time) of the certificate/ registration document to the land registry.
- (4) If the registration document is lost or destroyed, it can be declared void by means of the public notice procedure.

Section 5 Extent of liability

- (1) Along with the piece of real property itself, the compo-

nent parts of the property and appurtenances belonging to the owner are also liable in respect of the security right.

- (2) Appurtenances of an agricultural property are, in particular, cattle and horses and agricultural implements, machines and vehicles. Machines and mechanical plant on a commercial property are appurtenances only if they are affixed to the land or building and cannot be removed without being dismantled. Component parts of the property and appurtenant items are released from liability if they are sold in the course of due and proper business and are removed from the property before they are seized for the benefit of the creditor.
- (3) If the piece of real property is leased residentially or commercially, the security right extends to the claim for rent. An agreement whereby the rent is to be paid in advance for a period longer than three months is invalid vis-à-vis the creditor in respect of the security right, even if the agreement is reached prior to the creation of the security right. A residential tenant or commercial lessee who pays the rent due to the owner is released, so long as the creditor in respect of the security right has not had the claim attached.
- (4) If a right to recurring benefits is linked to ownership of the piece of real property, the security right extends to the claims to these benefits. Para. 3 applies correspondingly.
- (5) If items which are subject to the security right are insured for the owner of the property, the security right extends to the claim against the insurers. The owner is obliged to provide the creditor with information about insurance relationships. Liability for the claim against the insurer is extinguished when the insured item is restored or a replacement for it is obtained.
- (6) If liability is restricted in relation to these provisions, this requires to be entered in the land register.

Section 6 Several properties

- (1) A security right can be created over several pieces of real property in such a way that payment has to be made only once (collective security right). Each property is liable in this case for the whole amount. At its discretion the creditor can seek satisfaction in whole or in part from each of the properties.
- (2) The creditor is entitled to apportion the amount of the security right on the individual properties in such a way that each property is liable only for the apportioned amount.

Section 7 Satisfaction

- (1) Satisfaction of the creditor takes place by way of compulsory enforcement. The creditor does not require separate title for execution in this regard. If a certificate/ registration document is issued it must be produced.

¹¹ Consideration could be given to supplementing this provision with the following clause: (3) In connection with the creation of a security right the owner cannot undertake not to burden or sell the property or to do so only under restrictions. An obligation to sell the property to the holder of the security right or to a third party in the former's interests or to dispose of it in another way in favour of the holder of the security right is also void."

- (2) If the owner of the piece of real property created the security right to secure a claim or assigned it for this purpose, it can refuse to satisfy the creditor beyond the amount of the secured debt. If, however, the creditor acquired the security right from a third party, the owner has the right to refuse settlement only when the creditor, in acquiring the security right, knew or ought to have known that it was created to secure a claim. If on acquiring the security right the creditor was mistaken about the secured claim, the right of the owner to refuse satisfaction is excluded to the extent that the creditor is in good faith.
- (3) So long as the creditor is at the same time the owner of the property, it cannot seek compulsory enforcement.
- (4) The security right of the creditor levying execution is extinguished with the completion of compulsory enforcement; equal and subsequent ranking rights are also extinguished.
- (5) The owner can voluntarily satisfy the creditor at any time, irrespective of when the security right is payable. Insofar as the owner satisfies the creditor, the security right passes to it. In the case of partial satisfaction the owner receives a ranking in the part of the security right falling to the owner after the part which remains with the creditor.
- (6) If a certificate/registration document is issued, the owner can demand its delivery against satisfaction of the creditor; it can in any event demand delivery of the other documents necessary for rectification of the land register. If the owner satisfies the creditor only partially, it cannot demand delivery of the certificate/registration document. The creditor is, however, obliged to note the partial satisfaction on the registration document and submit it to the land registry for the purposes of rectification of the land register.
- (7) If the creditor demands satisfaction, anyone who runs the risk of losing a right in the property or possession of the property in the event of compulsory enforcement can satisfy the creditor. Paragraphs 5 and 6 have corresponding application subject to the proviso that the security right passes to the person who satisfies the creditor.

Section 8 Satisfaction in the case of a collective security right

- (1) If the creditor is satisfied as a consequence of compulsory enforcement in respect of one of the properties burdened with a collective security right, the collective security right on the other properties passes to the owner; if the other properties belong to several owners, each owner acquires a security right in the full amount on his property.
- (2) If an owner satisfies a creditor voluntarily, it acquires the collective security right. Section 7 para.2 then applies subject to the proviso that the other owners may refuse settlement insofar as they are not under an obligation of compensation in relation to the owner who satisfied the creditor.

Section 9 Transfer of the security right

- (1) The security right can be assigned. If assignment is to

be excluded or restricted, this requires to be entered in the land register.

- (2) Assignment requires to be entered in the land register. The registration must be approved by the previous creditor in notarially authenticated form.
- (3) If a certificate/registration document is issued, registration in the land register is replaced by delivery of the certificate/registration document together with a written declaration of assignment; if the declaration of assignment is not notarially authenticated, the creditor can only assert the rights arising out of the security right on the basis of a separate title.
- (4) Interest payable can be assigned only in accordance with the provisions generally applicable in respect of the transfer of claims; registration in the land register is excluded.

Section 10 Renunciation

- (1) If the creditor renounces the security right it is acquired by the owner.
- (2) The renunciation must be declared to the land registry or to the owner and requires to be registered in the land register. Renunciation of interest due cannot and must not be entered in the land register.
- (3) If the creditor renounces part of the security right, section 7 para. 5 2nd sentence is to be applied correspondingly.
- (4) If the creditor renounces a collective security right and the burdened properties belong to several owners, each owner acquires a security right in the full amount on its property. If the creditor's renunciation is made only with regard to one of the burdened properties, the owner of this property acquires a security right on its property in the full amount, while the security right on the other properties remains.
- (5) If the owner is entitled to a plea through which enforcement of the security right is permanently excluded, it can demand that the creditor renounce the security right.

Section 11 Public notice to the creditor

- (1) If the security right is due and payable, but the creditor is unknown or if its whereabouts are unknown, it can have its right excluded by means of the public notice procedure if
 - a) ten years have elapsed since the security right became payable and the creditor has not asserted its right or a claim secured by means of the security right within this time limit in any way, or
 - b) the owner deposits the amount of the security right and the interest due for the creditor.
- (2) With the pronouncement of the decision barring the creditor's title the creditor is deemed to have been satisfied. Any certificate or registration document given to the creditor becomes void.

2nd Chapter: The Security Agreement

Section 12 Security right for the securing of claims

- (1) If it is agreed by contract that the security right should be used to secure a monetary claim (security agree-

ment), the person who provided the security right (security provider) can require its return by assignment from the other party to the agreement (secured party) insofar as the sum of money to be paid out of the piece of real property exceeds the amount of the secured claim. If a claim is to be secured that is not in monetary form, its value shall take the place of the amount of the secured claim. If the security right is to secure several claims, their amounts or values shall be aggregated.

- (2) If a future claim is to be secured, return of the security agreement can be claimed as soon as and insofar as it is certain that the claim will not come into existence.
- (3) If the security provider provided a collective security right, the secured party must release the properties to be chosen at its discretion if, on the criteria which are the basis of the security agreement, the remaining properties are sufficient security; release must be effected by renunciation (section 10 para. 4).
- (4) Para. 3 applies correspondingly if there are several holders of security rights or if other types of security are also to be provided along with holders of security rights or if several persons have to provide security.

Section 13 Securing fluctuating claims

- (1) If it is contractually agreed that the security right is to be used to secure fluctuating claims, the security provider can terminate the agreement at any time. The consequence of the termination is that only those claims that were already in existence at the time of termination are deemed to be secured.
- (2) Termination may not be carried out at an inopportune time.
- (3) If the secured party can expect in good faith that security will not be withdrawn in respect of certain future claims, these are considered to be secured despite termination of the security agreement.

Section 14 Payments

- (1) In case of doubt, contrary to section 7 para. 5 the security provider is not authorised to make payment on the security right, as long as the secured party does not claim this.
- (2) In case of doubt the security provider is authorised to settle the secured claim in place of the debtor; it can demand the concurrent return of the security right.
- (3) If a certificate/registration document is issued the security provider can demand that payments towards the secured claims are also noted thereon. The issuing of a new certificate/registration document without the payment entries requires the notarially authenticated approval of the security provider.

Section 15 Restitution

- (1) If the secured claim is extinguished, the secured party must return the security right. With the agreement of the security provider return may be effected by means of renunciation.
- (2) If the secured claim is partially extinguished, section 12 applies correspondingly.

- (3) The secured party is also then under an obligation of restitution if, with the agreement of the security provider, it has passed on the security right to a third party to secure liabilities of its own.
- (4) Restitution cannot be renounced in advance. Assignment of the claim to restitution is not thereby excluded.
- (5) If the secured claim is interest bearing and if all interest due is paid, in case of doubt it is to be assumed that the creditor has renounced the interest due from security right. The same applies in respect of the interest due in each case from the security right when the secured claim is not interest bearing.

Section 16 Realisation

- (1) The secured party may satisfy its claims from the security right as soon as it can require settlement of the secured claim.
- (2) If the owner of the piece of real property burdened with the security right is not also the debtor in respect of the secured claim, the secured party must in the first place call upon the debtor for payment and supply proof of this to the owner of the property burdened with the security right. Then the secured party must give the owner of the property burdened with the security right a reasonable opportunity to satisfy its claims before it commences realisation.
- (3) Apart from having its claims satisfied by compulsory enforcement¹², the secured party may also have its claims satisfied by having the security right sold at public auction in accordance with the provisions regarding realisation of an attached claim.¹³

Section 17 Multiple securities

- (1) If the security provider has provided a collective security right, or if there are multiple security right holders, or if other types of security have also been provided along with security right holders, or if several persons have provided security, and if the secured party does not wish to realise all securities at the same time, in making its choice the secured party must pay reasonable regard to the interests of the security provider or multiple security providers.
- (2) The interest of the secured party in obtaining satisfaction takes precedence over the interests of the security providers. This does not apply in respect of satisfaction of claims which are not the subject matter of the security agreement.

Section 18 Compensation

- (1) If the secured party effects realisation of the security right, although it was not authorised to do so in accordance with the regulations laid down in this Chapter, it is obliged to compensate the security provider for the loss arising to the latter.
- (2) The same applies if the secured party makes other unauthorised disposals from the security right.

¹² Or, depending on the applicable law regarding enforcement of civil judgment, also by means of another type of auction or by means of controlled private sale.

¹³ Consideration could be given to the possibility of supplementing this provision with the following clause: "The secured party cannot be empowered in advance to carry out another type of realisation".