

Chapter 17

Hungary

*Chrysta Bán**

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*Bán, S. Szabó & Partners Budapest, Hungary

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§ 17:1 Introduction

This chapter¹ is based on the draft legislative guide on secured transactions prepared by United Nations Commission on International Trade Law (UNCITRAL) Working Group VI (Security Interests) in the course of 2002.² The chapter follows the structure of the guide,

[Section 17:1]

¹The author expresses her appreciation to András Gyertyánfy for his assistance in the preparation of this chapter.

²See A/CN.9/WG.VI/WP.6/Add. 1, 2, 3, and 5, and A/CN.9/WG.VI/WP.2/Add. 5, 6, 7, 8, 9, 11, and 12.

and it addresses the subjects contained in it. It leaves aside subjects which would theoretically be covered by the title of the report but are not addressed in the UNCITRAL draft legislative guide for reasons explained there.³

The chapter focuses on consensual security rights in movables. Hungary was among the first countries in Europe to introduce a centralized filing system for non-possessory security rights, extending to all economic sectors and all types of movable assets in 1996.

Non-consensual security rights, security rights in immovables, and security rights in securities as original encumbered assets fall outside of the scope of the legislative guide and, thus, of this chapter. The latter subjects are referred to only if the context so requires (mainly in priority issues).

§ 17:2 Basic approaches to security—In general

The Hungarian legal system adopted a uniform legislation for both possessory and non-possessory security rights in 1996. The security right legislation covers all economic sectors. The new set of rules was inserted into the Civil Code,¹ and it has been modified several times.

The names of the old security devices have been retained under the new regulation. The set of articles on security rights in the Civil Code is entitled “The Pledge”, and it is divided into five parts, namely:

1. The common rules on security rights;²
2. The rules on security rights in tangibles,³ which are divided into (a) non-possessory⁴ and (b) possessory⁵ security rights;
3. The rules on security rights in rights and claims;⁶
4. The rules on all-asset security rights;⁷ and
5. The rules on non-accessory security rights.⁸

The above rules in the Civil Code are completed by accessory rules contained in the revised version of Law-Decree Number 11 of 1960 (the “Law-Decree Implementing the Civil Code”) and in Decree Number 11 of 2001 of the Minister for Justice (the “Filing System

³See A/CN9/WGVI/WP6/Add. 1, paragraphs 8 and 9.

[Section 17:2]

¹Act IV of 1959 (the “Civil Code”), articles 251–269.

²Civil Code, articles 251–260.

³Civil Code, articles 261–265.

⁴Civil Code, articles 261–264.

⁵Civil Code, article 265.

⁶Civil Code, articles 267 and 268.

⁷Civil Code, article 266. The rules on non-possessory security rights are subsidiary to the rules on all-asset security rights.

⁸Civil Code, article 269.

Decree”). The enforcement of security rights is made under Act LIII of 1994 (the “Enforcement Act”) and Government Decree Number 12 of 2003 on the Sale of Pledged Items Outside of Court Proceedings (the “Rules of Sale Decree”), and insolvency is regulated by Act XLIX of 1991 (the “Insolvency Act”).

In addition, Hungary has implemented Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings. Here, only those regulations which apply to local Hungarian proceedings are addressed.

§ 17:3 Basic approaches to security—Instruments traditionally designed for security—Security rights in tangible movable property

Possessory Security

A possessory security (a pledge) requires for its validity that the debtor (or the grantor) effectively give up possession of the encumbered tangibles and that these be transferred either to the secured creditor or to a third party as trustee or holder of the security agreed on by the parties.

The return of the encumbered assets to the debtor extinguishes the pledge; the pledge also extinguishes if the creditor’s involuntary dispossession of the encumbered asset is continued for a year without the creditor’s initiating a court procedure in this matter.¹

Non-Possessory Security

The rules of the Civil Code on non-possessory security cover all economic sectors. To be created, a non-possessory security right must be registered in one of the public filing systems. Security rights in immovables must be registered in the Land Registry, while security rights in movables must be registered in the security right filing system.

The latter public filing system was initiated in 1997 by the new security right legislation and is operated by the National Chamber of Public Notaries.²

The Civil Code provides for an all-asset type security right in the entirety of the movable and immovable assets of a company or any other legal person. The security may be limited to divisible parts of the company that can be operated separately. This type of security right requires registration in the security right filing system to be effectively created.³

[Section 17:3]

¹Civil Code, article 265.

²Civil Code, articles 261–264.

³Civil Code, article 266.

§ 17:4 Basic approaches to security—Instruments traditionally designed for security—Security rights in rights and claims

The Civil Code provides for security rights in rights and claims. A security right in a right or a claim is effectively created through the security agreement of the creditor and the debtor. The creation and full effectiveness of the security rights require neither the notification of the debtor of the encumbered right or claim nor registration in a public filing system.

If, however, the existence of a right or a claim is attested by a public filing system, the law requires the security right in such right or claim to be registered in the same filing system to be effectively created.¹ This is the case with security rights in trade marks and in patents, as well as a pledge over a business quota of a limited-liability company.²

§ 17:5 Basic approaches to security—Use of title for security purposes

Retention of title and security are regulated separately in the Civil Code. Retention of title is regulated in the section on sales law. The title can only be retained by the seller at the time the sales contract is concluded, and the retention is valid no longer than the purchase price is paid in full.

The buyer is precluded from selling or encumbering the asset as long as the title is retained by the seller (nevertheless, rights acquired onerously by *bona fide* third persons are valid).¹

§ 17:6 Basic approaches to security—Uniform comprehensive security

As mentioned above, the Hungarian legal system has adopted the idea of a uniform comprehensive security for immovable and tangible movable assets, as well as for rights and claims.

Retention-of-title agreements are not under the security regime but are regulated under the sale of goods.

§ 17:7 Creation—In general

The Hungarian security right system is based on two types of filing systems, namely:

[Section 17:4]

¹Civil Code, articles 267 and 268.

²Act XI of 1997, article 20; Act XXXIII of 1995, article 54; Act V of 2006, article 61/A.

[Section 17:5]

¹Civil Code, article 368.

1. The land registry for security rights in immovables; and
2. The security right filing system for movables.

In both cases, filing is a constitutive element of creating the security right: the security right is non-existent until the security right has been filed. Security rights in claims and rights are by contrast created by mere consensual agreement and neither filing nor notification of the debtor of the encumbered right or claim is necessary for validly creating it.

§ 17:8 Creation—Basic elements of a security right— Obligations to be secured

Connection between Security and Secured Obligation

With the exception set out below, security rights are accessory to the secured obligation. This means that the scope of the security right cannot exceed the actual amount of the secured obligation plus interest, expenses of enforcement, and necessary expenses spent on the encumbered asset.

The transfer of the secured obligation results automatically in the transfer of the security right to the new creditor. The security right can only be transferred together with the secured obligation.¹ The security right terminates if the secured obligation is terminated, or if the grantor of the security right acquires the secured obligation, or if the creditor acquires the ownership of the encumbered asset.²

A non-accessory security right also may be agreed to. In this case, the encumbered asset will serve as primary means of payment of a certain amount and its interests defined in the security agreement. The parties may agree on the condition triggering payment; in absence of such agreement, any of them may terminate the agreement with a six-month termination notice, at the expiry of which payment is due.

The non-accessory security right is transferable. A non-accessory security can be transformed into an accessory security and *vice versa*. Otherwise, a non-accessory security is governed by the same rules as an accessory security.³

Limitations

Security rights may relate to all types of obligations that can be expressed in a monetary claim, with the exception of claims that can-

[Section 17:8]

¹Civil Code, article 251(3) and (4).

²Civil Code, article 259(4).

³Civil Code, article 269.

not be validated at court through litigation (e.g., claims arising from a game or a bet).⁴

Varieties of Obligations

Obligations comprise monetary and non-monetary obligations and future, fluctuating, and conditional obligations.

Monetary and Non-Monetary Obligations

Security rights may relate to monetary obligations or to non-monetary obligations capable of being converted to monetary obligations.⁵

The monetary value of obligations secured by non-possessory security in tangibles must be determined and registered when filing is made.⁶

Future, Fluctuating, and Conditional Obligations

The secured obligation does not need to be specific but can encompass future, fluctuating, and conditional obligations.⁷ An obligation is future if the contract from which it may arise has not been concluded at the time when it is secured. Future or fluctuating obligations may be secured up to a maximum amount.⁸

If a secured fluctuating obligation is transferred to a new debtor, the security automatically attaches to the debts owed by the new debtor.⁹ The debtor may require that the creditor renounce on its fluctuating security right if the obligation is terminated and there are no outstanding debts from it.¹⁰

Description

The secured obligation must be identified in the security agreement. Its title, amount (maximum amount), currency, and expiry must be registered in the filing system.¹¹

⁴Civil Code, article 251(1).

⁵Civil Code, article 251(1).

⁶Civil Code, article 262(3).

⁷Civil Code, articles 251(2) and 267(1).

⁸Civil Code, articles 262(3) and 263(1).

⁹Civil Code, article 263(2).

¹⁰Civil Code, article 263(3).

¹¹Law-Decree Implementing the Civil Code, article 47(5c).

§ 17:9 Creation—Basic elements of a security right—Assets to be encumbered**Object of the Security Right**

The object of the security right can be every tangible good (both immovable and movable) and every transferable right or claim.¹

Security can be limited to a part of a divisible claim, but it cannot be limited to a part of a tangible good with one exception, i.e., a non-possessory security can relate to the whole or an identifiable part of a company's assets.²

Future Assets

Future assets also may be encumbered except for possessory security.³

Assets Not Specifically Identified

For some types of assets, a specific item-by-item identification may not be possible. Therefore, the parties are allowed to describe the assets to be encumbered in general terms or according to class and quantity.⁴

All-Asset Security Rights and Floating Charges

Encumbrance of the entirety of the movable and immovable assets of a company or another legal person also is possible. Assets need not be identified individually.

The debtor company has the authority to dispose of its encumbered assets in the ordinary course of its business. The security in the disposed assets extinguishes, and it attaches automatically to the proceeds taking the place of the disposed assets. The security may be limited to divisible parts of the company that can be operated separately.⁵

§ 17:10 Creation—Basic elements of a security right—Proceeds

The law distinguishes between civil or natural fruits and proceeds. Civil or natural fruits are property generated by encumbered assets without a transaction occurring, while proceeds are tangible or intangible goods received in exchange when encumbered assets are disposed of (or leased or licensed).

[Section 17:9]

¹Civil Code, article 252(1).

²Civil Code, articles 261(3), 265(2), and 266(1).

³Civil Code, articles 262(5) and 267(1).

⁴Civil Code, articles 262(2) and 267(1).

⁵Civil Code, article 266(1).

Parties may agree that the security extend to civil or natural fruits of the encumbered asset. If the security is non-possessory, it may not extend to a separated natural fruit except if the enforcement procedure for the security has been launched before the separation.¹

The security right is not affected by subsequent rights created in the encumbered asset.² The secured creditor in most cases retains the security right if the encumbered asset is transferred from the debtor to another person. Exceptionally, a non-possessory security extinguishes if:

1. The ownership of the encumbered tangible movable asset is transferred in a commercial transaction or in the ordinary course of business to a person in good faith; or
2. The ownership of a habitual good of everyday life is acquired onerously by a person in good faith.³

Good faith must be presumed if the transferee relied upon the security right filing system; bad faith cannot be based on the fact alone that the transferee could have known about the security right by way of the security right filing system.⁴

In the cases set out above, the security does not attach to the proceeds taking the place of the disposed assets. By contrast, in the case of an all-asset security, the security in the disposed assets of the indebted company extinguishes on disposal, and it automatically attaches to the proceeds taking the place of the disposed assets.⁵

In other cases, the creditor and the debtor (grantor) also may agree (either at the time of the creation of the security right or later) that the security right in the disposed assets extinguishes on disposal and that it attaches automatically to the proceeds taking the place of the disposed assets.

§ 17:11 Creation—Security agreement—Definition and functions

The security agreement minimally defines the parties, the obligation to be secured (except for the non-accessory security right), and the assets to be encumbered.

The security agreement is, with the exception of security rights in certain rights, not sufficient in itself: filing in the security right filing system is a constitutive element of creating a security right.

[Section 17:10]

¹Civil Code, article 252(2).

²Civil Code, article 256(1).

³Civil Code, article 262(6).

⁴Law-Decree Implementing the Civil Code, article 47(2).

⁵Civil Code, article 266(1).

§ 17:12 Creation—Security agreement—Parties

The security agreement is concluded between the debtor as grantor of the security right and the creditor as the secured party.

If a third person grants the security for the benefit of the debtor, this person also becomes a party to the agreement.

§ 17:13 Creation—Security agreement—Minimum contents

The security agreement must identify the parties, describe the obligation to be secured, and define the assets to be encumbered.

The parties may clarify in the security agreement additional matters, in absence of which the rules of the Civil Code apply.

§ 17:14 Creation—Security agreement—Formalities

The security agreement must be in writing.¹ The security agreement for non-possessory security in movable tangible assets must even be in notarized form (with the exception of individual tangible assets identifiable beyond doubt),² and it needs to be registered in order for the security right to be effectively created.

§ 17:15 Creation—Security agreement—Effects

The security agreement is generally not sufficient in itself to create a security right either between the parties or against third parties. A possessory security is created when the possession is delivered. A non-possessory security and an all-asset security are created on registration in the filing system.

By contrast, the encumbrance of a right or a claim by way of security is fully effective without registration or even notification of the debtor of the encumbered right or claim, with the exception of rights the existence of which is attested by a public register. For such rights, filing in the same registry is necessary (i.e., trade marks and patents).

§ 17:16 Creation—Proprietary requirements—Ownership or right of disposition of the grantor

The grantor of the security must be the owner of the assets to be encumbered. There is a minor exception to this requirement. In a commercial transaction, it also is possible to acquire a possessory security right if the grantor was not owner of the asset, provided that

[Section 17:14]

¹Civil Code, article 254(2).

²Civil Code, article 262(2).

the creditor acted in good faith (this exception is meant, for instance, for pawn shops).¹

With respect to future assets, it suffices if the grantor becomes the owner of the encumbered asset at a future time. The security right is terminated if the creditor acquires the ownership of the encumbered asset.²

No effect is given to contractual restrictions on dispositions. The creditor is free to claim damages from the grantor if it has granted a further security right in the same asset in breach of the original security agreement; nevertheless, the further security right is valid against all persons, including the creditor having made the restriction.

§ 17:17 Creation—Proprietary requirements—Transfer of possession, control, notification, and publicity

To create a security right that is effective as between the parties as against all persons, either transfer of possession or registration into the filing system is necessary or, exceptionally, the agreement in itself suffices.

The possessory security is created by agreement and transfer of possession of the asset to the creditor or to an agreed third person acting as the creditor's agent.¹ Registration in the filing system is required for the creation of non-possessory security rights in tangible assets, over a business quota of a limited-liability company and of an all-asset security.²

For the creation of a security right in rights and claims, no notification of the debtor of the claim or right is necessary. In case the existence of the right or claim is registered in a public filing system (as is the case with trade marks and patents), registration of the security right in the same filing system is necessary for the creation of the security right.³ Notification of the debtor of the encumbered right or claim is only necessary for enforcement purposes; the creditor may require the grantor to hand over the documents necessary for the enforcement of the claim or right.⁴

§ 17:18 Publicity—In general

Public registration is required for non-possessory security rights in

[Section 17:16]

¹Civil Code, article 265(1).

²Civil Code, article 259(4).

[Section 17:17]

¹Civil Code, article 265(1).

²Civil Code, article 262(2).

³Civil Code, article 267(1).

⁴Civil Code, article 267(2).

immovables (falling outside the scope of this chapter) and in movable tangibles.

With the exception of trade marks and patents, security rights in rights and claims are not registered. The rules contained in the revised version of the Law-Decree Implementing the Civil Code regulate the details of the publicity of security rights.

§ 17:19 Publicity—Public registration for non-possessory security in movables—Title transactions and security transactions

Public registration is required for non-possessory security rights. Title transactions in immovables are registered in the land registry, and title transactions in movables are not registered.

§ 17:20 Publicity—Public registration for non-possessory security in movables—Consensual and non-consensual security rights

As discussed above, public registration is required for most consensual security rights. Non-consensual (statutory) security rights are mainly of possessory character.

§ 17:21 Publicity—Public registration for non-possessory security in movables—Single encumbrance registry and multiple encumbrance registry

The Hungarian legal system has created a centralized registration system for all non-possessory security rights in tangible movables. Security rights over a business quota of a limited-liability company are registered by the courts of registration in the Company Register.

§ 17:22 Publicity—Public registration for non-possessory security in movables—Notice and document filing

The public registry for security rights does not contain the full text of security agreements. Instead, a simple notice setting out the basic information about the nature and scope of the security is filed.¹ The security agreement forms the basis for the registration.²

[Section 17:22]

¹Law-Decree Implementing the Civil Code, article 47(5).

²Law-Decree Implementing the Civil Code, article 47(4).

§ 17:23 Publicity—Public registration for non-possessory security in movables—Timing of registration

The creation of a non-possessory security right in tangible movables is subject to registration, i.e., registration in the public register is a constitutive element for the creation of the security right.¹

As a consequence, no problems arise as to the difference between the timing of the agreement and the timing of the registration. The security right is effective between the parties as *vis-à-vis* third parties from the time of registration.

§ 17:24 Publicity—Public registration for non-possessory security in movables—Required content of registered notice

The notice must contain:

1. The personal data of the grantor, the debtor (if different from the grantor), and the creditor; and
2. Reference to the encumbered asset and the secured obligation (title, currency, date of expiry, and maximum amount).¹

The encumbered assets may be referred to by quantitative and generic description if there are several encumbered assets or if the specific nomination of the encumbered assets is impossible.² The notice must contain the amount of the secured claim or the maximum amount if the assets secure future obligations.³

§ 17:25 Publicity—Public registration for non-possessory security in movables—Need for protection of remote transferees of encumbered assets

There may be a change in the person of the parties to the security agreement, the extent of the secured obligation, or the encumbered asset. The termination or the diminution of the secured obligation affects the extent of the security right irrespective of the content of the registration.¹

To preserve the reliability of the registry, the law requires the party triggering a change or interested in it to ask for the registration of the

[Section 17:23]

¹Civil Code, article 262(2).

[Section 17:24]

¹Law-Decree Implementing the Civil Code, article 47(5) and (6).

²Civil Code, article 262(2).

³Civil Code, article 262(3).

[Section 17:25]

¹Civil Code, article 262(3).

change within 15 days from taking notice of it. The parties to the security agreement must mutually cooperate in the fulfillment of this obligation.²

§ 17:26 Publicity—Public registration for non-possessory security in movables—Linkages to registries for immovables

There are obvious advantages of creating a link between public registries for movables and for immovables, as a security agreement may cover both types of assets.

Nevertheless, as appears to be the case in other jurisdictions, the Hungarian Land Registry operated by the Land Registry Office, the Security Right Registry operated by the National Chamber of Public Notaries, and the company register operated by the courts of registration are not coordinated.

§ 17:27 Publicity—Public registration for non-possessory security in movables—Linkages between a general encumbrance registry and asset-specific title registries

All non-possessory security rights in movables must be registered in the sole security right filing system; there is no asset-specific registry. The only asset-specific registries concern security rights in rights and claims, which need not generally be registered, but there is an exception for a pledge over a business quota and certain intellectual property rights, such as trade marks and patents, which must be registered in the Company Register, the Trade Mark Register, and the Patent Register.¹

These registries are not linked to the general security right filing system. An all-asset security extending to patents and trade marks is registered in the security right filing system while not registered in the Company Register, the Trade Mark Register, or the Patent Register.²

§ 17:28 Publicity—Public registration for non-possessory security in movables—Private registration or publication

Limited registration methods, such as registration in the debtor's own books, the books of a court, or a notary, do not exist in Hungary.

²Civil Code, article 7(1) and (2).

[Section 17:27]

¹There is no copyright register under Hungarian law.

²Civil Code, article 266(6).

§ 17:29 Publicity—Public registration for non-possessory security in movables—Registration and enforcement

A judicial enforcement procedure against encumbered assets must be registered in the security right filing system. The burden of registration is imposed on the court ordering enforcement.¹

If the parties agree to avoid judicial enforcement, no registration of the fact that the encumbered asset is to be sold is required.

§ 17:30 Publicity—Debtor dispossession and equivalent control mechanisms—Debtor dispossession as a substitute for registration

In Hungarian law, possessory security rights are exempt from registration. Possessory security rights are constituted through the security agreement and the possession of the secured assets.¹

The security right is terminated in case of a repossession of the grantor or even if the creditor loses possession and does not undertake to regain it for a period of one year.²

§ 17:31 Publicity—Debtor dispossession and equivalent control mechanisms—Quality of possession

Possessory security exists not only if the assets are stored within the creditor's premises.

If they remain on the grantor's premises, they may be stored in a room to which the secured creditor has exclusive access, provided there is a continued secured creditor control.

§ 17:32 Publicity—Debtor dispossession and equivalent control mechanisms—Symbolic possession

Symbolic possession (such as the delivery of a car key) also satisfies the condition of dispossession of the debtor.

§ 17:33 Publicity—Debtor dispossession and equivalent control mechanisms—Third-party notice or control

Effective possession may be achieved not only by the creditor, but also through a third person. The encumbered asset may be transferred

[Section 17:29]

¹Law-Decree Implementing the Civil Code, article 47(5g).

[Section 17:30]

¹Civil Code, article 265(1).

²Civil Code, article 265(6).

not only to the creditor, but also to a third person effectively holding the asset for the creditor.¹

In the context of security rights in rights and claims, neither registration nor notification of the account debtor is necessary to create the security right. Notification is necessary simply to have the claim or right enforced.

The account debtor who has been notified of the security right in the claim must, if the debt is due before the security right is enforced, pay the debt to the hands of the secured creditor and the grantor together. A receivable must be paid through deposit with a court if either of the parties to the security agreement so desires.² The account debtor or the court can be considered a third person holding the encumbered asset, in this case, for both the creditor and the debtor.

§ 17:34 Publicity—Third-party effects of unpublicized security rights

In the Hungarian legal system, registration (for non-possessory security rights) or possession of the creditor (for possessory security rights) is a constitutive element for the creation of a security right. Problems arising from unpublicized security rights are excluded in this respect.

However, security rights in rights and claims need not be publicized in any way; the debtor of the encumbered claim or right must only be notified for enforcement purposes. This does not appear to raise problems *vis-à-vis* third persons.

§ 17:35 Publicity—Third-party effects of publicized security rights

Security rights are *in rem* rights and thus effective *vis-à-vis* third parties. Nevertheless, third-party effects of security rights are limited to protect certain *bona fide* transferees of secured assets.

Buyers in good faith who acquire their interest either in a commercial transaction or in the ordinary course of business of the seller or onerously acquire habitual goods of everyday life acquire property free of security.¹ Bad faith cannot be based exclusively on the fact that the buyer could have known about the security right by means of the security right filing system.²

[Section 17:33]

¹Civil Code, article 265(1).

²Civil Code, article 268(1).

[Section 17:35]

¹Civil Code, article 262(6).

²Law-Decree Implementing the Civil Code, article 47(2).

§ 17:36 Filing system—In general

Hungary was among the first countries in Europe to introduce a centralized and unified filing system for non-possessory security rights extending to all economic sectors and all types of movable assets in 1996 (operational from 1 May 1997).

The rules designing the security right filing system are contained in the revised version of the Law-Decree Implementing the Civil Code and the Filing System Decree.

§ 17:37 Filing system—Key design issues—Notice filing and document filing**In General**

The Hungarian system is a notice filing system. The term “notice” does not refer to a document but an aggregate of information outlined in article 47(5) of the Law-Decree Implementing the Civil Code. One notice refers to one security agreement.

Identification of Grantor

Identification of the grantor (and, if different, the debtor) is required by law. The name, birth date and, with the consent of the person, address are used to identify natural persons; the legal name and identification number (Company Register or Tax Register) are utilized for legal persons.¹

Identification of Secured Creditor

The same requirements as for the grantor are set by law to identify the secured creditor.²

Description of Assets Covered in Notice

The description of the assets in the notice need not be identical with the description on the security agreement; it is enough to refer to the security agreement or its annex and give the usual business name of the asset.³

Maximum Amount

The notice must specify the amount of the secured obligation or a maximum amount in case of future or fluctuating obligations to be

[Section 17:37]

¹Law-Decree Implementing the Civil Code, article 47(5a).

²Law-Decree Implementing the Civil Code, article 47(5a).

³Law-Decree Implementing the Civil Code, article 47(6); Filing System Decree, article 6.

secured. Title, currency, and expiry also must be specified in the notice.⁴

Pre-Filing

The filing of the notice is a constitutive element of a non-possessory security right. Filing must occur on the basis of the security agreement made in notarized form. Consequently, filing before the security agreement is made is not possible.

§ 17:38 Filing system—Key design issues—Authority to file and signature

The filing of a security right in tangible assets can be made by a public notary on the basis of a notarized security agreement or, in the case of an individual tangible asset identifiable beyond doubt, on the basis of a more simple document, the rules for which will be regulated by the lawmaker in the near future.¹

The filing system is maintained, and the legality of the notarial process is supervised, by the National Chamber of Public Notaries.² Under such circumstances, it is highly unlikely that a notice that has not been authorized by the grantor is filed. The notaries are responsible for damage caused through their operation according to the general rules of civil law.

§ 17:39 Filing system—Key design issues—Grantor or asset-based index

The system is grantor-based,¹ which means that it can be searched according to the grantor's names and not according to assets. This puts great importance on the grantor's name being correct.

The notary registers the exact name and other personal data of the parties on the basis of an official document (identity card and extract from the company register).²

⁴Civil Code, article 262(3); Law-Decree Implementing the Civil Code, article 47(5c).

[Section 17:38]

¹Law-Decree Implementing the Civil Code, article 47(3) and (4).

²Law-Decree Implementing the Civil Code, article 47(1); Filing System Decree, article 14.

[Section 17:39]

¹Filing System Decree, article 10.

²Filing System Decree, article 5(2).

§ 17:40 Filing system—Key design issues—Filing process

The filing system is computerized.¹ A single system is operated by the National Chamber of Public Notaries, but multiple intake sites exist with several public notaries.² Simultaneous filings with the same debtor are excluded because the filing process is preceded by a priority reservation which is valid until the end of the working day.³

The notary decides on the admissibility of registration.⁴ There are no grounds for rejection of filings if all necessary data are provided in the required form. The notary registers the filing electronically and gives the parties a notarial deed proving the registration.⁵ The data necessary for filing include:

1. The identification of the parties, the assets, and the secured obligation;
2. The data relating to the document on the basis of which the notice is filed (specification, signature, number, and identification of the notary);
3. The date of the agreement or its modification;
4. The upholding of the priority range of a cancelled notice or renouncement on such upholding;
5. The enforcement (date, authority's name, and number of the file); and
6. The transformation of an all-asset security.⁶

The data for the filing must be proved in a documentary form required by law. The first notice must be based on the notarized security agreement (except in case of individual assets identifiable beyond doubt), any later modification or termination on a private deed having the value of full evidence, on which the authenticity of the signatures must be notarized.⁷

Maintenance of the system is provided by the notaries who must check on a daily basis whether their filings correspond to the data provided by the system and signal any contradiction to the person in

[Section 17:40]

¹Law-Decree Implementing the Civil Code, article 47(3).

²Filing System Decree, article 2(3).

³Filing System Decree, article 4(1).

⁴Law-Decree Implementing the Civil Code, article 47/A(4).

⁵Law-Decree Implementing the Civil Code, article 47/A(1).

⁶Law-Decree Implementing the Civil Code, article 47(5d-h).

⁷Law-Decree Implementing the Civil Code, article 47/A(2).

charge of the system.⁸ Notaries must archive a copy of all expedited notarial deeds.⁹

§ 17:41 Filing system—Key design issues—Duration of effectiveness of filed notice

The law on the security filing system is silent on any limitation of the duration of a filed notice. As a consequence, effects of filings are of unlimited duration, ended only by a filing of termination effected by public notaries.¹

Mischievous or erroneous terminations are unlikely because of the high standard of security provided for filings.

§ 17:42 Filing system—Other basic elements—Public access to database

Searchers of the database need not establish a *bona fide* interest; anyone may request data from the security rights filing system.

The system is not technically available through the Internet, but at any public notary's office against payment of a fee.¹ Furthermore, anyone contracting with the Chamber of Notaries can use a search terminal with the payment of a fee.²

§ 17:43 Filing system—Other basic elements—Extent of detail in statutory text

The Civil Code, the Law-Decree on the Implementation of the Civil Code, and the Filing System Decree contain rules relating to:

1. The types of data and formal requirements of documents necessary for the filing;
2. The operators of the system and the filing process;
3. The search facilities;
4. The fees;
5. Maintenance and archiving;
6. The specific filing processes (modification of filings, transforma-

⁸Filing System Decree, article 14(3).

⁹Filing System Decree, article 11(2).

[Section 17:41]

¹Law-Decree Implementing the Civil Code, article 47A(1).

[Section 17:42]

¹Filing System Decree, article 10.

²Filing System Decree, article 2(4).

tion of an all-asset security, and the filing of a security right securing bank credit);¹ and

7. Confidentiality.²

§ 17:44 Filing system—Other basic elements—Fees

Filing fees are set at a relatively low level (approximately €20 for filing and €4 for searching).¹

At the same time, the fee payable for the notarial form which is required in some cases for a security agreement is relatively high, varying from 0.25 to four per cent of the value of the obligation to be secured, up to a maximum of approximately €2000, plus disbursement to a maximum of 40 per cent of the fee.²

§ 17:45 Filing system—Other basic elements—Public or private operator

The system is operated and supervised by the National Chamber of Public Notaries, while filing terminals are operated by every public notary. Anyone contracting with the Chamber may, by paying a fee, operate a search terminal.

§ 17:46 Filing system—Other basic elements—Effect of registry error and allocation of risk of loss

The registry is computerized, and filing is effected by public notaries only. Registry error or loss of data is highly unlikely. The legality of acts of public notaries is supervised by the National Chamber of Public Notaries.¹

The notary is responsible for its operation according to the general rules of civil law. The notaries are obliged to keep themselves insured for damage caused through their operation.²

§ 17:47 Filing system—Other basic elements—Proof of content of database

The document that is the basis of the registration serves as a legal

[Section 17:43]

¹Filing System Decree, articles 7–9.

²Filing System Decree, article 13.

[Section 17:44]

¹Filing System Decree, article 12(2).

²Decree Number 14 of the Minister for Justice of 1991, articles 9 and 22.

[Section 17:46]

¹Filing System Decree, article 14.

²Act XLI of 1991, article 10.

proof of content of the filing system database, and it may serve as authentic evidence in legal proceedings.¹

§ 17:48 Filing system—Other basic elements—Alternative systems

Security over the business quota of a limited-liability company is registered from 1 September 2007 by the courts of registration in the Company Register.

The Land Register serves for filing security rights in real estate and the Trade Mark Register and the Patent Register for security rights in trade marks and patents.

§ 17:49 Filing system—Other basic elements—Non-discrimination

The security right filing system is accessible to anyone, including foreign creditors, without any discrimination.

§ 17:50 Priority—Concept of priority and its importance

Priority determines the chance of competing secured creditors to realize the economic value of the encumbered asset if the debtor has defaulted.

Priority is determined by law. It strictly follows the order of creation of the security right and, with the exception set out below, it may not be altered by the agreement of the parties.

§ 17:51 Priority—Priority rules—General rules

If there are several security rights in the same asset, priority is determined by the order of creation of the security right, with priority being accorded to the earliest created security right.¹

In the case of security rights in rights and claims, the time of creation is the time of the conclusion of the security agreement; in the case of non-possessory security rights, the time of creation is the time of filing; in the case of possessory security rights, the time of creation is the date on which possession was delivered to the creditor.

§ 17:52 Priority—Priority rules—Limitations

The grantor may, at the time of canceling a previously registered security right registration, either have a new security right registered

[Section 17:47]

¹Filing System Decree, article 10(3).

[Section 17:51]

¹Civil Code, article 256(1).

in the same rank not surpassing the value of the old one, or uphold the priority range of a cancelled registration for a security to be registered later up to one year. The newly registered security will have the same priority as the old registration had.

The grantor may transfer the aforementioned rights to a third person or to the creditor directly following in priority the range of the cancelled security right. The notary filing the termination of a security right must ask for a declaration by the grantor whether it wishes to have a new security right registered or uphold the priority range; the notary cancels the upheld priority range if no registration is made within the one-year period.¹

Certain statutory security rights have priority over other creditors. Secured creditors may not ascertain their priority in the encumbered asset either in an insolvency proceeding against the grantor or in a judicial enforcement proceeding extending to the encumbered asset.

After the judicial decision on winding up has been published (in an insolvency proceeding) or the asset has been seized (in an enforcement proceeding), the secured creditors may seek to realize the economic value of their security rights in a privileged position according to the rules of the procedure in question.²

§ 17:53 Priority—Types of competing claimants—Other consensual secured creditors

The legal system allows the grantor to grant more than one security right in the same asset, giving priority to the earlier created security right. Nevertheless, some of the later created security rights may have priority over the earlier created if property is after-acquired.

Another exception is if the grantor has, within one year of canceling the registration, a new security right registered which will have the same priority as the old registration had. Furthermore, there are two other limitations to the priority accorded to an all-asset security, namely:

1. That *vis-à-vis* the holders of security rights filed in a filing system other than the security right filing system (e.g., the Land Register, the Company Register, the Trade Mark Register, or the Patent Register); and
2. That *vis-à-vis* the holders of possessory security rights or secu-

[Section 17:52]

¹Civil Code, articles 264(2); Law-Decree Implementing the Civil Code, article 47/A(3).

²Law-Decree Implementing the Civil Code, article 48(1).

riority rights in rights and claims, acquired in good faith in a commercial transaction.¹

§ 17:54 Priority—Types of competing claimants—Unsecured creditors

Secured claims have priority over unsecured claims.¹

§ 17:55 Priority—Types of competing claimants—Sellers of encumbered assets

There are no special “purchase money security rights” in the Hungarian legal system. Instead, sellers of assets may agree with buyers in the retention of the title until the purchase price is paid in full. As the seller retains the title, the buyer cannot allow any competing security rights in the purchased asset until the retention of title is terminated (usually until the purchase price is paid in full).

This solution enables sellers to have a stronger position with respect to the assets sold *vis-à-vis* other creditors of the buyer (such as having an all-asset security in the assets of the buyer, e.g., in a term loan or an inventory revolving loan financing transaction). Retention of title does not require registration.

§ 17:56 Priority—Types of competing claimants—Buyers of encumbered assets

The sale of an encumbered asset outside the ordinary course of business of the grantor generally does not destroy security rights in the asset. An exemption to this rule is provided for goods purchased by *bona fide* buyers either in a commercial transaction or in the ordinary course of business of the seller or if it acquires onerously habitual goods of everyday life.¹

Good faith must be presumed if the buyer acquiring onerously trusted the security right filing system; bad faith cannot be based exclusively on the fact that the buyer could have known about the security right by means of the security right filing system.² In the case of an all-asset security, the security automatically terminates on goods and assets sold.

[Section 17:53]

¹Civil Code, article 266(3b–c).

[Section 17:54]

¹Civil Code, article 251(2).

[Section 17:56]

¹Civil Code, article 262(6).

²Law-Decree Implementing the Civil Code, article 47(2).

§ 17:57 Priority—Types of competing claimants—Judgment or execution creditors

Secured creditors may not ascertain their priority in the encumbered asset either in an insolvency proceeding against the grantor or in a judicial enforcement proceeding extending to the encumbered asset.

Priority between secured and unsecured claimants is decided on according to the rules of judicial enforcement or those of insolvency; in both cases, secured creditors are given priority against unsecured creditors.

§ 17:58 Priority—Types of competing claimants—Statutory (preferential) creditors

Certain statutory security rights have priority over other creditors (including creditors that have an earlier-in-time security right in the same asset), for example, the security right in the transported goods in favor of the carrier,¹ in the property of the lessee in favor of the lessor,² and in goods kept in the warehouse in favor of the warehouseman.³

§ 17:59 Priority—Types of competing claimants—Creditors storing encumbered assets

Warehousemen have a statutory security right in assets to secure storage costs. This security right ranks ahead of other secured claims in the same assets.

§ 17:60 Priority—Types of competing claimants—Insolvency administrators

In the course of an insolvency proceeding, the costs of the proceeding have priority against secured claims up to five per cent of the realized value of the encumbered asset.

§ 17:61 Priority—Priority in future advances and after-acquired property—Future advances

Future obligations covered by the security agreement are afforded priority according to the time of the conclusion of the security agreement.

The law requires that security right filings set forth a maximum amount of debt that may be secured by any given security right. The priority of the security right is limited to such maximum amount.

[Section 17:58]

¹Civil Code, article 499(4).

²Civil Code, article 429.

³Act XLVIII of 1996, article 20(5).

§ 17:62 Priority—Priority in future advances and after-acquired property—After-acquired property

A grantor may provide for a security right in property to be acquired in the future. Such security right is obtained simultaneously with the grantor's acquisition of the property. Priority dates from the time of the creation of the security agreement, except *vis-à-vis* the holders of security rights created by previous holders of title in the asset.¹

Similarly, the priority of an all-asset security is based on the time of the creation of the all-asset security, except *vis-à-vis* the holders of security rights created in an asset before it was purchased by the company.

§ 17:63 Priority—Priority in proceeds

In the case of an all-asset-security, the priority in proceeds is determined according to the time of the creation of the security.

Holders of security rights created in an asset before it was purchased by the company will still enjoy priority *vis-à-vis* the earlier created all-asset security.¹

§ 17:64 Priority—Voluntary alteration of priority: subordination agreements

The priority order of security rights may not be altered by the creditor's agreement. The Civil Code declares that priority is given to the earlier-created security right except for an opposite statutory provision.

As a consequence, the parties may not change the priority through a private agreement. Nevertheless, the grantor may, if a security right is terminated, create a new security right in the same asset having the same priority range as the terminated old one, or the grantor may renounce on the priority in favor of a third person or the creditor ranking directly following the priority of the terminated security right.

§ 17:65 Priority—Relevance of priority prior to enforcement

Priority only has a relevance in enforcement. It determines the order of the secured creditors in which they are entitled to the realized value of the security right in the encumbered asset.

[Section 17:62]

¹Civil Code, article 262(5).

[Section 17:63]

¹Civil Code, article 266(3a).

§ 17:66 Pre-default rights and obligations of parties—Party autonomy

The security agreement must define, at least minimally, the parties, the obligation to be secured, and the assets to be encumbered. The parties may define other subjects, such as the duty of care of the parties and the duty to use or to preserve rights in the encumbered assets.

§ 17:67 Pre-default rights and obligations of parties—Default rules—Meaning

The pre-default rules of the Civil Code apply only to the extent that the parties have failed to cover certain points in their agreement; the statutory rules apply, and they are enforceable on the condition that the parties did not agree otherwise.

§ 17:68 Pre-default rights and obligations of parties—Default rules—Types of default rules

Possessory Security

A number of duties and rights arise in relation to a possessory security.

Duty of Care

The creditor is imposed an obligation to take reasonable care of the encumbered asset. This duty means preserving the asset in good condition, which includes collecting its natural fruits.¹

The debtor or the grantor may, offering proper security, require the return of the encumbered asset if there is a risk for its condition to deteriorate or for its value to suffer a considerable loss.²

Right to Be Reimbursed for Reasonable Expenses

The expenses that are reasonably incurred in pursuance of the secured creditor's duty of care are borne by the debtor; the secured obligation extends to the expenses necessary to maintain the encumbered asset.³

Right to Make Reasonable Use of the Encumbered Asset

In absence of an agreement to the contrary, the secured creditor is not allowed to use or to make use of the encumbered asset.⁴

Duty to Keep Encumbered Assets Identifiable

The duty of the secured creditor to keep the encumbered asset

[Section 17:68]

¹Civil Code, article 265(3).

²Civil Code, article 265(5).

³Civil Code, article 251(3).

⁴Civil Code, article 265(4).

identifiable is not included *expressis verbis* in the Civil Code, but it flows from its duty to return the asset on termination of the security right.⁵

Duty to Take Steps to Preserve Debtor's Rights

The duty of the debtor to take care of assets may include an obligation to take active steps to maintain the debtor's rights in the asset like the payment of taxes, the amount of which may be imputed to the obligation secured by the assets.

Duty to Allow Inspection by Debtor

The Civil Code is silent on the duty to allow inspection by the debtor.

It may be argued that the debtor's inspection may be necessary to check whether the asset is in good condition so that it may require the substitution of the asset if its condition is deteriorated.

Right to Impute Revenues to Payment of Secured Obligation

The creditor is allowed and obliged to collect the natural fruits of the encumbered asset, which serve primarily to cover the necessary expenses incurred in pursuance of the secured creditor's duty to maintain the encumbered asset; the secured creditor is under a duty to account for the natural fruits collected.⁶

Right to Assign Secured Obligation and Security Right

Normally, the secured creditor may assign the secured obligation; the security right attached to it is transferred to the assignee by handing over the encumbered asset.⁷

Right to "Repledge" Encumbered Asset

The grantor must be the owner of the asset. The possessing creditor, not being the owner of the asset, may not validly repledge it.

Right to Insure against Loss of Encumbered Asset and Right to Pay Taxes on Behalf of Debtor

The Civil Code is silent on the right to insure against the loss of an encumbered asset and the right to pay taxes on behalf of the debtor. However, these may arguably flow from the duty of care.

Non-Possessory Security

A number of duties and rights arise in relation to a non-possessory security.

Duty to Keep Encumbered Asset Properly Insured and to Pay Taxes

The debtor in possession is under the duty of maintaining the

⁵Civil Code, article 265(3).

⁶Civil Code, article 265(4).

⁷Civil Code, article 251(4).

encumbered asset. The creditor may ask for “proper measures” if the debtor or a third person endangers the condition of the encumbered asset; these “proper measures” also may mean the duty to insure the asset.⁸

The security right is terminated if the encumbered asset perishes. The creditor may require the encumbrance of a new asset if the owner was responsible for the perishing of the old asset or the diminution of its value. The insurance payment, damages, or other compensation takes the place of the perished asset or its diminished value. The owner or the creditor may require that the original asset be restored from this amount.⁹

The grantor must sell the encumbered asset if this is necessary to avoid a threatening damage in the encumbered asset. The consent of the owner of the asset is necessary for the sale of the asset except for the case of *vis maior*. The purchase price takes the place of the encumbered asset.¹⁰ The duty to pay taxes flows from the fact that the debtor is the proprietor of the asset and that taxes must be borne by the proprietor.

Duty to Allow Secured Creditor to Inspect

In the case of an all-asset security, the debtor is under the duty of informing the creditor of a loss of value of the encumbered company which endangers enforcement of the security right. The parties may agree on the measure of such loss in the security agreement, including an obligation that the debtor must provide for additional security to meet its secured obligation. They also may agree that the creditor may inspect the course of business of the debtor.¹¹

If the condition of the asset has deteriorated and there is a danger of diminishing the value of the security right, the creditor may ask for the restoration of the asset or for additional security corresponding to the endangered value. The creditor may proceed to enforcement if the debtor does not fulfill this request in due time.¹²

In the case of an all-asset security, the creditor may transform the all-asset security into actual, individual security rights in distinct assets of the company, if the value of the company diminishes to an extent which would endanger the realization of the value of the all-asset security.¹³

Duty to Account and to Keep Adequate Records

As proceeds and civil fruits derived from the encumbered asset and

⁸Civil Code, article 261(1).

⁹Civil Code, article 260(1)–(3).

¹⁰Civil Code, article 260(4).

¹¹Civil Code, article 266(5).

¹²Civil Code, article 261(2).

¹³Civil Code, article 266(4).

received by the secured creditor may be imputed to the payment of the secured obligation only if the parties so agree,¹⁴ it is reasonable for the parties to provide for accounts and records of the proceeds in their agreement.

Duty to Take Steps to Preserve Rights in Encumbered Asset

In the case of encumbered rights or claims, the debtor's obligation of care includes the taking of necessary steps to preserve rights serving as encumbered assets. This flows from the rule that the proprietor responsible for the loss of value of the encumbered asset must, in the form of a new asset or that of another security, compensate for the loss suffered.¹⁵

The debtor is especially precluded from making, without the consent of the creditor, a legal declaration reducing or extinguishing the encumbered right or claim. This limitation only extends to an encumbered bank account if the parties so agreed in the security agreement.¹⁶

Right to Receive Revenues

Proceeds, natural and civil fruits, derived from the encumbered asset are received by the debtor in possession. They are only subject to the security right in the encumbered asset if the parties so agree; non-possessory security does not extend to separated fruits, except if enforcement has been initiated before the separation.¹⁷

The account debtor who has been notified of the security right in the claim must, if the debt is due before the security right is enforced, pay the debt to the hands of both the secured creditor and the grantor. A receivable must be paid through deposit with a court if any of the parties to the security agreement so desires.

If the encumbered claim relates to the delivery of an object and the parties provided for the creditor's possession in the security agreement, the debtor of the encumbered claim must deliver to the hands of the creditor. Rules of bailment¹⁸ apply if the payment had to be made to the hands of the creditor, and rules of the possessory security if delivery had to be made to the hands of the creditor.¹⁹

¹⁴Civil Code, article 252(2).

¹⁵Civil Code, article 260(2).

¹⁶Civil Code, article 267(3).

¹⁷Civil Code, article 252(2).

¹⁸Civil Code, articles 270 and 271.

¹⁹Civil Code, article 268(1) and (3).

Right to Use, Mix, Commingle, and Process Encumbered Asset

The debtor in possession is entitled to use or make use of the encumbered assets in a proper way.²⁰

Disposition of the encumbered assets in the ordinary course of business is allowed in case of an all-asset security.

Right to Grant Another Security Right in Same Asset

The power of the debtor to confer a subsequent security right over an already encumbered asset is a consequence of its proprietary rights.

§ 17:69 Default and enforcement—In general

The enforcement of security rights is governed by Act LIII of 1994 (the “Enforcement Act”) or the alternative rules contained in the Civil Code and the Rules of Sale Decree.¹ Either the judicial enforcement procedure must be followed or the parties may agree to sell the assets themselves.

The default by the debtor may not lead to automatic acquisition by the creditor of the property of the encumbered asset; such agreement made before the default of the debtor is null and void,² although it is possible after the default.

§ 17:70 Default and enforcement—Default—Meaning of “default”

There is no definition of “default” contained in Hungarian security law. The Civil Code states that the creditor may seek enforcement if the debtor has defaulted,¹ leaving the definition of “default” to the parties’ agreement and the general law of obligations.

The Civil Code states that the debtor is in default if the time destined for the fulfillment of the obligation (defined by the contract, flowing from the nature of the obligation, or through explicit demand of the creditor) has expired and the debtor has not fulfilled (paid) the obligation.²

§ 17:71 Default and enforcement—Default—Cure of default

The creditor must set a reasonable new expiry date for the fulfillment of the obligation, until which the debtor may still fulfill it (although it is responsible for the delay).

²⁰Civil Code, article 261(1).

[Section 17:69]

¹Civil Code, articles 257 and 258.

²Civil Code, article 255(2).

[Section 17:70]

¹Civil Code, article 251(1).

²Civil Code, article 298.

In this case, the debtor may cure the default if it fulfils the obligation until the time limit set by the creditor. Or, in certain cases defined by law, it may immediately avoid the contract, which makes cure of the default impossible.¹

§ 17:72 Default and enforcement—Default—Notice of default

Notice of default need only be given in the course of the judicial enforcement procedure to other secured creditors.

The bailee must on seizure of the encumbered assets notify persons who are likely to have a security right in the assets in question. The bailee must check the security right filing system to find out the possible secured creditors.¹

§ 17:73 Default and enforcement—Default—Judicial or administrative review

The debtor may, in the course of the judicial enforcement procedure, challenge the secured creditor's position and may produce a *prima facie* documentary evidence that the obligation:

1. Is not due;
2. Has been fulfilled; or
3. Has been extinguished.¹

If the creditor does not agree to the debtor's statement, the debtor may institute court proceedings and ask the court to stay the procedure.²

§ 17:74 Default and enforcement—Options following default—In general

If there are several assets securing the same obligation, in case of doubt every asset secures the whole obligation.¹ The creditor may determine the order of assets to be sold; the enforcement can only extend to a number of assets necessary to pay the secured debt.²

If the assets belonged to different grantors, the grantors are

[Section 17:71]

¹Civil Code, article 300.

[Section 17:72]

¹Enforcement Act, article 114(1).

[Section 17:73]

¹Enforcement Act, article 41(1).

²Enforcement Act, article 41(5).

[Section 17:74]

¹Civil Code, article 253(1).

²Civil Code, article 256(2).

responsible between themselves in the proportion of the value of their assets encumbered; a grantor whose asset was sold may require reimbursement for the difference from the other grantors.³

§ 17:75 Default and enforcement—Options following default—Judicial action to enforce security right

Judicial enforcement procedure is to be initiated by the secured creditor. The enforcement procedure is the same as for any other claim under the Enforcement Act, without any modification with respect to the secured character of the claim.

While, in general, a court proceeding and judgment are necessary for enforcement, enforcement of a claim agreed in the form of a public deed (a registered security agreement is necessarily such) is ordered by the competent notary based on the deed if the time open for the payment has elapsed. The bailee gives, on seizure of assets that are likely to be encumbered, notice to possible other secured creditors. The seized assets are sold in auction.¹

§ 17:76 Default and enforcement—Options following default—Freedom of parties to agree to enforcement procedure

The parties may by common accord avoid the judicial enforcement procedure and agree to sell the encumbered assets together. Such terms may be agreed to at the time the security agreement is concluded or following it or after the debtor has defaulted.

The parties (including other secured creditors who joined the judicial enforcement procedure) also may agree at a later stage to avoid the auction phase of the judicial enforcement procedure; they may request the bailee to sell the seized assets, outside auction, to the person and for a price agreed on by the parties. The creditor's consent is not necessary to the transaction if the expected income is sufficient to cover the debts owed by the debtor to all creditors participating in the enforcement, including interest and the costs of the procedure.¹

§ 17:77 Default and enforcement—Options following default—Acceptance of the encumbered assets in satisfaction of secured obligation

Following default, the secured creditor may propose to accept the

³Civil Code, article 253(2).

[Section 17:75]

¹Enforcement Act, article 118.

[Section 17:76]

¹Enforcement Act, article 133.

encumbered assets in full or in partial satisfaction of the secured obligation.

A pre-default agreement that automatically vests ownership of the encumbered assets in the secured creditor on default is null and void and unenforceable.¹

§ 17:78 Default and enforcement—Options following default—Redemption of encumbered assets

The debtor or the grantor may redeem the encumbered assets by paying the outstanding secured obligation, including interest and cost of the enforcement up to the time of redemption.

The bailee presenting the order of enforcement asks the debtor to pay its obligation.¹

§ 17:79 Default and enforcement—Options following default—Authorized disposition by grantor

The sale of the encumbered asset by the grantor is not allowed. The parties may agree that the creditor and the debtor together (or, in certain cases, the creditor alone or a third person) sell the asset.

§ 17:80 Default and enforcement—Options following default—Removing encumbered assets from grantor's control

The seized assets remain in the possession of the debtor. However, if there is a danger that the debtor will not preserve the seized assets safely, the bailee may put the assets in a box or in a separate room and close it down.¹

§ 17:81 Default and enforcement—Options following default—Sale or other disposition of encumbered assets

The parties may agree to avoid the judicial enforcement procedure. They may, at the time of the conclusion of the security agreement, following it, or after the debtor has defaulted, agree in writing to sell the encumbered assets together. They must agree to the minimum

[Section 17:77]

¹Civil Code, article 255(2).

[Section 17:78]

¹Enforcement Act, article 36(1).

[Section 17:80]

¹Enforcement Act, articles 104 and 105.

purchase price and a maximum period of time to be open for such sale following the default by the debtor.¹

If the encumbered assets have an officially registered market price or if the creditor is in the business of extending credit for security (including creditors who qualify as financial institutions under Hungarian law), the parties may agree, under the same conditions as indicated above, that the creditor may sell the encumbered assets.² The debtor must be notified of the manner, place, and time of the transaction.³

The parties also may agree, under the same conditions as indicated above, that the creditor may entrust a company that provides credit for security or organizes auctions to sell the encumbered assets.⁴ The debtor must be notified of the manner, place, and time of the transaction.⁵ The Rules of Sale Decree contains detailed rules on the sale of mortgaged items.

§ 17:82 Default and enforcement—Options following default—Allocation of proceeds of disposition

In the judicial enforcement procedure, the proceeds of the sale of the encumbered movable assets must be distributed in the following statutory order:

1. The costs of the procedure;
2. The secured obligations (according to the priority rule); and
3. Unsecured debts.¹

The proceeds of the encumbered assets, if the assets were sold by the parties avoiding the judicial enforcement procedure, must be paid to the hands of the creditor who must return the grantor the amount surpassing the secured obligation, its interests, and the costs of the sales transaction.²

§ 17:83 Default and enforcement—Options following default—Finality

The security right is terminated if the encumbered asset has been sold in the judicial enforcement procedure or by the parties avoiding

[Section 17:81]

¹Civil Code, article 257(1).

²Civil Code, article 257(2).

³Civil Code, article 258(2).

⁴Civil Code, article 257(3).

⁵Civil Code, article 258(2).

[Section 17:82]

¹Enforcement Act, articles 164 and 169.

²Civil Code, article 258(3).

the judicial procedure. If the debtor and the grantor are different persons and the encumbered asset has been sold to pay the debt, the security right is terminated, but the obligation is transferred to the grantor up to the realized value of the encumbered asset.¹

If the creditor has been paid by a third person, the security right is transferred to this person and this person may require handing over the encumbered asset or giving a declaration necessary for registering its security right.² The security right also is terminated if:

1. The obligation is terminated or transferred without the security right;³
2. The creditor acquires the ownership of the encumbered asset;
3. The owner of the encumbered asset acquires the secured obligation;⁴ or
4. The encumbered asset perishes.⁵

§ 17:84 Default and enforcement—Options following default—Variations on general framework

Special rules apply to encumbered claims and rights. The debtor of the encumbered claim must be notified of the security right in the claim for enforcement purposes. They can be sold similarly to other assets on default by the debtor; if the claim or right is not sold in the enforcement, the debtor of the claim or right must pay to the hands of the secured creditor at the time the claim or right is due.

If the payment of the claim or the exercise of the right is dependent on a declaration to be made or a condition to be satisfied by the creditor of the claim or right (i.e., the debtor of the secured obligation), the secured creditor may itself make on default the declaration or satisfy the condition.¹ An all-asset security can be enforced in two ways, namely:

1. According to the choice of the creditor, the company's assets may be sold as a whole; or
2. The all-asset security may be transformed into distinct security rights in the assets owned by the company.

The security rights arising from such transformation must be registered in the filing system to be created, but the creditor retains

[Section 17:83]

¹Civil Code, article 259(1).

²Civil Code, article 259(2).

³Civil Code, article 259(3).

⁴Civil Code, article 259(4).

⁵Civil Code, article 260(1).

[Section 17:84]

¹Civil Code, article 268(2) and (4).

priority in the assets according to the priority of the original all-asset security.²

§ 17:85 Default and enforcement—Judicial proceedings brought by other creditors

In the course of the judicial enforcement procedure, the bailee must notify every person who can be supposed to have a security right in the seized asset. The bailee checks the security filing system to find out these persons. The procedure must be stayed. The secured creditors may, within a short period of time, ask the court in charge of the enforcement procedure to allow them to join the procedure.¹

The competent court declares that the debtor is in default in respect of the secured creditors joining the procedure.² The secured creditors joining the procedure can assert their priority according to the general priority rule at the time of the allocation of the proceeds.

§ 17:86 Insolvency—In general

Insolvency is regulated by Act XLIX of 1991 (the “Insolvency Act”). Separate chapters relate to reorganization and liquidation.

The sphere of application of the law is limited to business organizations (e.g., private persons are excluded from the scope of the Insolvency Act).¹

§ 17:87 Insolvency—Key objectives

The relative priority of a security right is recognized in the Insolvency Act in two ways. With respect to securities created prior to the commencement of the liquidation proceedings, the proceeds from the sale of the secured assets (in an all-asset security up to 50 per cent of the collected purchase price) are transferred to the secured creditor, except that the costs of the preservation and sale of the secured asset and the fee of the liquidator (up to five per cent of the net sales revenue) must be first settled from the sales proceeds. In respect to any unpaid amount of the secured claim, the costs of the liquidation are the only claims which precede the secured claim.¹

The costs of liquidation, however, include a fairly broad range of

²Civil Code, article 266(2) and (3).

[Section 17:85]

¹Enforcement Act, articles 48(2), 114, and 114/A(1).

²Enforcement Act, article 114A(1).

[Section 17:86]

¹Insolvency Act, articles 2(1) and 3(1a).

[Section 17:87]

¹Insolvency Act, articles 49D(1) and (2), and 57(lb).

claims, such as wages and similar obligations of the creditor, including severance pay; costs incurred in connection with the preservation, sale, and collection of the creditor's assets and claims; costs related to the closing down of its operation; repayment of any funds received from the Wage Guarantee Fund; and costs occurred in connection with the liquidation proceedings, the settlement of environmental problems, and the archiving of the creditor's documents.

The realized income of the encumbered assets is due at the time of disposal of the assets, by contrast to most other claims payable either at the end of liquidation or, when an intermediary balance is made, one year after commencement of the process.²

§ 17:88 Insolvency—Security rights in insolvency proceedings—Inclusion of encumbered assets in insolvency estate

The Insolvency Act requires all assets, including those encumbered by a security agreement, to be subject to insolvency proceedings.¹ Assets whose titles are retained by seller-creditors are not part of the insolvency estate.

A security right continues to exist until the encumbered assets are disposed of by the insolvency administrator.² As a consequence, the security right extends to proceeds acquired after the commencement of the insolvency proceedings provided it did extend to them before the commencement (i.e., if the parties so agreed).

§ 17:89 Insolvency—Security rights in insolvency proceedings—Limitations on enforcement of security rights

The Insolvency Act denies creditors, including secured creditors, the right to pursue any individual enforcement remedies against the debtor after insolvency proceedings are commenced.¹

In reorganization, a moratorium exists that lasts until the end of the reorganization period.² Secured creditors together with other creditors are invited to agree to the reorganization plan. They vote in two separate groups on the approval of the settlement proposal.³

Secured creditors do not have a privileged standing in the voting

²Insolvency Act, article 58(1).

[Section 17:88]

¹Insolvency Act, article 4(1).

²Insolvency Act, article 38(4).

[Section 17:89]

¹Insolvency Act, articles 11(2)d, 38(1) and (3).

²Insolvency Act, article 9(1).

³Insolvency Act, article 20(1).

process. The moratorium lasts for a minimum of 120 to a maximum of 365 days upon the approval of the creditor. Secured and non-secured creditors vote in separate classes.⁴

In liquidation, creditors, including secured creditors, are invited to have their claims registered within 40 days with the insolvency administrator.⁵ Registration is conditional on the payment of one per cent of the claim (but maximum of HUF 200,000) to the hands of the administrator, repayable in the class of non-privileged claims.⁶

Non-registered claims or a claim filed beyond 180 days are not enforceable in the liquidation process.⁷ The encumbered assets are sold by the liquidator in the course of the liquidation, which may last up to two years.⁸

§ 17:90 Insolvency—Security rights in insolvency proceedings—Participation of secured creditors in insolvency proceedings

In reorganization, secured creditors are invited to agree to the reorganization plan, wherein they have the same rights as any other creditor.

In liquidation, secured creditors must have their claims registered within a time limit set by law. Non-compliance with the time limit leads to loss of the secured claim. Secured creditors also may vote to agree to a reorganization plan to avoid winding up of the debtor.¹

Creditors vote in classes, and secured creditors form a separate class. The reorganization plan in a reorganization proceeding must be agreed to by at least half of the creditors in each class.² The creditors giving consent to a settlement in a liquidation proceeding must represent two-thirds of the debts owed by the insolvent debtor, including at least 50% of the secured creditors. The accepted agreement, with a few exceptions, binds all creditors.³

§ 17:91 Insolvency—Security rights in insolvency proceedings—Validity of security rights and avoidance actions

In liquidation, a creditor or the liquidator of the company may

⁴Insolvency Act, articles 10(4), 18(7) and (9).

⁵Insolvency Act, article 28(2f).

⁶Insolvency Act, article 46(7).

⁷Insolvency Act, article 37(3).

⁸Insolvency Act, article 52(2).

[Section 17:90]

¹Insolvency Act, article 41(1) and (5).

²Insolvency Act, article 20.

³Insolvency Act, article 44(1).

request the court to declare null and void a contract concluded within the two years preceding the filing with the court of the request for liquidation, under which the company undertook obligation without receiving due consideration.

If the contract without due consideration was made in order to abuse the rights of other creditors and the preferred creditor was in bad faith, the time for the challenge is five years. Contracts made within 90 days prior to the commencement of the liquidation proceedings also are challengeable if they provided a more favorable treatment for a creditor, especially those which provide collateral for a non-secured creditor. Payment made to a creditor prior to its due date within 60 days prior to the commencement of the liquidation proceedings can be demanded back by the administrator.

The lack of consideration and the bad faith element are presumed if the contract is made or the collateral is provided among or to the benefit of companies belonging to the same company group (controlling and being under control or having joint control or being under joint control).¹

The rules may deprive the holder of a security from its priority in a liquidation proceeding if the pledge was provided without due consideration, such as when the pledgor provides the collateral for the debt of a third person.

§ 17:92 Insolvency—Security rights in insolvency proceedings—Relative priority of security rights

Secured creditors' claims have a privileged standing in liquidation. First, they precede any other claim in respect of the realized purchase price of the encumbered asset; in respect of any unpaid amount, the costs of the liquidation (including several elements as discussed above) are the only claim which precedes the secured claim.¹ Second, the realized income of the encumbered assets is due at the time of disposal of the assets, in contrast to most other claims payable either at the end of the maximum two-year liquidation proceedings or when an intermediary balance is made one year after commencement of the process.²

Secured claims do not enjoy any privilege in reorganization. Enforcement of all claims, including secured claims, is stayed for the time of the moratorium.

[Section 17:91]

¹Insolvency Act, article 40.

[Section 17:92]

¹Insolvency Act, articles 49D(1) and 57(1b).

²Insolvency Act, article 58(1).

§ 17:93 Insolvency—Security rights in insolvency proceedings—Post-commencement financing

The use of encumbered assets by the insolvency administrator during the insolvency proceeding does not destroy the security rights in the assets. The security rights continue to exist until the encumbered assets are (in liquidation) disposed of by the administrator. Their realized economic value is paid out, with certain limitations, to the secured creditor at the time of the sale of the assets.¹

Outside the limitations on the payout of the realized value, the secured creditor may suffer a loss through both the eventual delay in the enforcement and the method of selling the assets. The delay may arise from the enforcement moratorium in reorganization and from the timing of the sale of the assets, which depends on the economic decision by the insolvency administrator in liquidation.

The encumbered assets are sold by the enforcement administrator in auction or by public offer in the liquidation process.² The secured creditor and the debtor are deprived of their right to seek realization of the economic value of the encumbered assets through other ways than in auction or public offer as if outside the insolvency procedure.

§ 17:94 Insolvency—Security rights in insolvency proceedings—Reorganization proceedings

As discussed earlier, secured creditors are invited to agree to the reorganization plan. They do not enjoy any privilege in a reorganization proceeding, but they do vote in a separate class. If the required majority (one-half of all creditors) in each class calculated in a weighed method based on the amount of the claim gives consent to the plan, the creditors voting against the plan are compelled to accept it.

No extra security is given to secured creditors who do not agree to the reorganization plan, although they might in fact suffer a loss through the method and timing of the enforcement of their security right.

§ 17:95 Conflict of laws and territorial application—In general

Hungarian private international law is regulated by Law-Decree Number 13 of 1979 (the “Law-Decree on Private International Law”).

Conflict rules have the object of determining which law is applicable to a security right issue if the relationship (the parties, the assets, or other elements) is international.

[Section 17:93]

¹Insolvency Act, article 49/D.

²Insolvency Act, article 49(1).

The ownership rules of Hungarian private international law apply to security rights,¹ the scope of the rules being confined to the proprietary aspects. In questions other than proprietary issues, the law governing the contract containing the secured obligation also will govern the security agreement.²

The parties are free to choose the law governing their contract; in absence thereof, Regulation (EC) 593/2008 of the European Parliament and the Council will apply where applicable. In other cases, the conflicts rules of the Law-Decree define the governing law.³ Title reservation agreements are governed by the law of the sales contract.

§ 17:96 Conflict of laws and territorial application—Conflict-of-law rules for creation, publicity, and priority

The conflict rule in proprietary matters is the *lex rei situ*, i.e., the law of the state on the territory of which the asset can be found at the time of the creation of proprietary rights.¹ This conflict rule is valid for creation, publicity, and priority, both for tangible and intangible property.

§ 17:97 Conflict of laws and territorial application—Effect of subsequent change in connecting factor

As the connecting factor is based on the moment of time of the creation of the security right, the connecting factor is not supposed to subsequently change. If the encumbered asset is transferred to the territory of another state, the security right still remains governed by the law according to which it was created.

§ 17:98 Conflict of laws and territorial application—Conflict-of-law rules for enforcement issues

The law of enforcement is subject to the *lex fori*. Hungarian law applies to the proceeding of a Hungarian court or other authority (including notarial procedure).¹

The *lex fori* rule only applies to the judicial enforcement procedure; the enforcement of the security right by the parties themselves remains governed by the law governing the security agreement.

[Section 17:95]

¹Law-Decree on Private International Law, article 21(1).

²Law-Decree on Private International Law, article 29(1).

³Law-Decree on Private International Law, article 24.

[Section 17:96]

¹Law-Decree on Private International Law, article 21(2).

[Section 17:98]

¹Law-Decree on Private International Law, article 63.