

THE CENTENARY OF A REGISTERED PLEDGE. ON THE HISTORY, PRESENT AND FUTURE OF RIGHTS *IN REM* SECURING DEBTS

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Abstract. First of all, this article is devoted to the institution of a registered pledge, which is discussed from the perspective of historical analysis considering the centenary of its creation and implementation in the Polish legal system. It presents the genesis of the solutions applied so far, including a number of registered pledges introduced into the Polish legal system in the 1920s, such as, in particular, a timber pledge, an agricultural pledge, a pledge on machinery and devices and a registered pledge on motor vehicles. Secondly, applying a legal-dogmatic and comparative method, it analyses the court-registered pledge in force to date as a way of securing debts, the mechanism for establishing the pledge, as well as the advantages and disadvantages of the solutions applied so far. The shortcomings include, among others, the existence of two parallel registers, one for court-registered contractual pledges and the other for fiscal pledges. Thirdly, the article points out the directions of the development of registered pledges from an international perspective. It postulates that for registered rights and items, i.e. those for which registers are maintained, the laws governing rights *in rem* as defined by Polish Private International Law should be the laws of the state of registry. It discusses the regulations of the 2001 Cape Town Convention on International Interests in Mobile Equipment and argues for the creation of a single, universal international pledge register, in which pledges could be entered directly, upon their establishment. An alternative option is to create a database of registered pledges already established in the national registers of individual states and then to retrieve (import or feed) this information to include it in a single international register using AI.

Keywords: registered pledge; pledge register; debt security; pledge on rights; international pledge.

INTRODUCTION

Nearly a hundred years have passed since the concept of non-possessory pledges, based on the idea of registration, was implemented in the Polish legal system. This centenary provides an opportunity for a reflection on the reasons for the introduction of non-possessory security interests in receivables, based on registration, into legal systems of various countries, including

Polish law, elaborate normative solutions related to the emerging security, the function of pledge registration, rights and obligations of the parties to the pledge agreement, as well as the advantages and shortcomings of this kind of security *in rem*. It also enables a proper understanding of the genesis and origin of the current solutions, their critical assessment and, finally, the indication of the further development of this right. In the era of cross-border transactions, the question that needs to be raised is one concerning the further evolution of non-possessory pledge rights in international trade.

1. GENERAL REMARKS

In the aftermath of World War I, not only the defeated states, such as Germany, Austria or post-revolutionary Russia, but also the victorious ones found themselves in a poor economic condition. Poland regained its independence as a state, but it had to undergo the programme of political, legal and economic reform and unification, as it was, in the sense of the legal systems in force, an amalgam of the five legal orders governing the areas formerly partitioned between different states.¹ This caused the need for, among other things, the introduction of regulations resolving (inter-district) conflicts with regard to the application of the law of individual districts by indicating which of the five legal orders should be applied in a particular case [Widło 2013, 601; Górnicki 2013, 301-302].

In order to rebuild the economy and develop entrepreneurship, the most important was access to capital, including the capital generated by credit and loans. In this respect, modern legal regulation was the most wanted.

Increasing the creditworthiness of entrepreneurs could be achieved, among others, by securing claims arising from credit agreements. The first concept to be implemented was to secure the availability of credit for enterprises by means of state guarantees. This idea was introduced in many countries, including the United Kingdom, Germany and Poland. Initially, the Republic of Poland awarded state guarantees to individual institutions.²

¹ This concerned the applicability of the normative acts of the former partitioning states in individual districts, which included: the German Civil Code (BGB) of 1896 and the Reich Land Book Act of 24 March 1897 (RGLB I, no. 15, p. 139); the Austrian Civil Code (ABGB) of 1811 together with the Land Book Act of 25 July 1871 – RGB 1871, no. 95, the Napoleonic Code of 1804 (NC and the Mortgage Acts of 1818 and 1825 amending it); the Civil Code of the Kingdom of Poland of 1825 and the Marriage Act of 1836, the Digest of Laws of the Russian Empire of 1832, the Digest of Laws and temporarily the Civil Code of the Kingdom of Hungary, replaced in 1922 by Austrian Law (Spiš and Orava areas). See Ciągwa 1986, 120-49; Idem 1996, 199.

² As of 31 December 1926, the following guarantees were awarded: 100 million Polish zlotys in gold, 225 million Polish zlotys in traditional money, 104,809 Dutch guilders, 500,000

However, the involvement of the state was counterproductive, costly and inefficient over the long term. As Professor Jan Gwiązdomorski pointed out, for poor societies, which included Polish society, it was of paramount importance to expand the forms and possibilities of providing security for credit and thus to increase access to capital in the economic sense as well as in legal terms [Gwiązdomorski 1932, 3-4].

It was therefore necessary to create a legal framework to facilitate credit availability. The creditworthiness of entrepreneurs could be increased by providing collateral, in particular on business assets – movables and rights that the debtor needed in the course of its business activity.

The existing form of a pledge – a security interest – resulting from different district legislations provided that, upon the establishment of the pledge, it was necessary to surrender its object to the creditor or a third party (real act). Starting in the Middle Ages until the great codifications of the 19th century (Napoleonic Code, BGB), all the legal systems on the European continent adopted the regulation of the pledge, which had not changed since the Roman times (with the exception of England and Wales) [Zwalve 2004, 43]. Therefore, as a principle, the possessory pledge was applied.³

The Napoleonic Code, the new codification of the 19th century, admitted a pledge on intangible things in Article 2075 [Weber 1934, 215]. The evolution of doctrinal views led to the admission of a mortgage on an enterprise⁴ in France. As a result of the expanded definition of things in Austrian law, the so-called intangible items could be subject to a pledge [Till 1892, 33, Zoll 1947, 215].

The traditional possessory pledge (when the physical possession of the pledged item is retained), therefore, could not be used in business activity where security would relate to machinery, equipment, assets or products needed in the course of it.⁵

Swiss francs, 16,372,132 dollars, 2,840,386.97 pounds sterling, 3,000,000 Czech crowns, 500,000 Danish crowns, 1,700,000 gold roubles and 50,000 Turkish pounds – Monitor, issue 16 of 1927. See Peretz 1927, 165.

³ It was assumed that the only effective way of securing the creditor's interest was to surrender the object of security (Lat. *traditio*) to the creditor to avoid the unauthorised use of the item by the debtor (which was ensured by the possessory pledge arising through the surrender of the item). This principle "lay the foundation for all the great codifications of the German-speaking area starting in the late 17th century: the Prussian General Land Law (ALR-Allgemeines Landrecht), the Austrian General Civil Code (ABGB), the Saxon Civil Code, the Swiss Code of Obligations (OR-Obligationenrecht) and, finally, the German Civil Code (BGB-DBürgerliches Gesetzbuch)," see Widło 2008, 79.

⁴ The French law of 1898 made an enterprise in its entirety the subject of a mortgage, whereas the law of 1909 restricted mortgages to intangible assets only, see Weber 1934, 215.

⁵ The right of ownership could also serve as a collateral in the institution of a mortgage by demise (*die Sicherungstilbereignung*) and with the reservation of ownership (*der Eigentumsvorbehalt*), see Gwiązdomorski 1932, 4.

The Congress of German Lawyers dealt with the issue of security interests in claims on four occasions in the 20th century.⁶ The admission of a registered pledge (as well as, for example, a mortgage by demise or an assignment of accounts receivable as a security device) was dependent on the fulfilment of the postulate of security disclosure, which must be effective against third parties [Hromadka 1980, 90]. In the past, in the absence of information technology, the problem of the disclosure of security rights was not satisfactorily solved in Germany [ibid.].

In 1937, in the memorial of the Academy of German Law, Lehmann identified eight means of disclosure which could serve as an alternative to the surrender of the pledged thing, such as: 1) affixing the bailiff's seal on the seized thing, 2) written agreement establishing a security interest, 3) a document prepared by the court or a notary public, 4) public certification, 5) a report prepared by the bailiff, 6) an entry in the security book, 7) an entry in the public register of debts, 8) an entry in the register of pledges [Hromadka 1980, 91].

The solutions provided by foreign legislation at the beginning of the 20th century set out certain directions for the development of non-possessory pledge rights. In the French model, on which the legislation of Belgium, Luxembourg, Italy and Spain was based, a number of separate registers of non-possessory pledges for strictly defined categories of goods (generally involving the so-called registered items or goods for which relevant registers were maintained) were introduced by means of individual acts of law [Kieninger 2004, 10]. This model was also followed by the Polish pre-war legislature, which is discussed hereinafter. The Germanic model – Austrian and German – did not allow registered pledges, except for the security interests introduced in the second half of the 20th century as a result of international obligations (a maritime mortgage on ships and aircraft, a pledge on submarine cables).⁷ The third direction was set by the common law system of the Anglo-Saxon countries (the USA, England) and the Scandinavian countries, which followed them. These solutions have become models for contemporary registered security rights [Widło 2008, 100, 112, 127].

The essence of the pledge as a secured right lay in the fact that the pledgor (debtor *in rem*), irrespective of whether or not it was also a bond issuer (on account of the secured claim), established security for the creditor's

⁶ The Congress of German Lawyers in 1912, the 32nd Congress in 1921, the 41st Congress in 1955, the 51st Congress in 1976; two bills were drafted and subsequently rejected (the Bill of the Parliament of the Reich (Reichstag) on the introduction of a registered pledge – RT-Dr III 1924/26, no.1811), see Hromadka 1980, 90.

⁷ *Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken* of 11 November 1940, *Gesetz über Rechte an Luftfahrzeugen* of 26 February 1959, see Rosener 1998, 68; Baur and Stürner 1999, 144.

(pledgee's) claim on its property right (movables, right, real property), the content of which was the possibility, in the event of a payment default within a specified period of time, of satisfying itself from the object of the security with priority over other bond creditors or creditors *in rem* with lower priority [Longchamps 1922, 73; Widło 2008, 34; Górnicki 2013, 344-45]. The surrender of the pledged object (e.g. an item) to the creditor was replaced by registration.

2. THE PROPOSAL OF A REGISTERED PLEDGE ON COMMERCIAL GOODS

The first attempt to introduce non-possessory security based on registration in the Polish legal system was made when a draft law on a registered pledge on commercial goods⁸ was proposed. The bill on the so-called pledge on movable assets which were retained by debtors⁹ was developed by the Ministry of the Treasury in 1926-1927. Article 1 of the proposed regulation provided for a non-possessory pledge as a parallel institution to those provided for by the district legislations. Thus, it did not exclude the existing regulations on a possessory or statutory pledge arising from BGB, ABGB or the Napoleonic Code, but supplemented them with an optional legal instrument.¹⁰ In terms of pledgors, it was restricted to large entrepreneurs (buying up the so-called industrial certificates), however, the need for such a non-possessory instrument for small entrepreneurs was recognised [Peretz 1927, 167]. At the same time, it applied to goods only, i.e. items intended for trading, excluding machinery, equipment and tools as well as securities, which were needed in business activity. Doubts raised in relation to the draft concerned the absence of protection for the creditor – pledgee (a privilege by virtue of securing a claim with a registered pledge) in the event of the pledgor's bankruptcy in the situation when the secured amounts were no more than PLN 30,000. Article 6 of the draft stipulated that the pledge agreement was to be concluded in writing and include certified signatures. The agreement was to contain certain elements, such as: 1) the designation of the company of the counterparties; 2) the value of the registered pledge; 3) the precise indication of the object of the registered pledge; 4) the permission for the registration of the pledge in the pledge register.

The pledgor had a right to dispose of the object of the pledge (Article 7 of the draft), which enabled trading in commercial goods, including those

⁸ As J. Weber pointed out, for the first time the pledge that did not require the surrender of its object – goods and machinery – to the pledgee was already provided for in the 1919 Act on State Guarantees for Small Businessmen O.J. of 1919, no. 44, item 314, see Weber 1934, 212.

⁹ Earlier, the pledge was regulated in the statutes of, for example, 'Bank Gospodarstwa Krajowego', see Peretz 1927, 166.

¹⁰ As to the criticism of this solution, in my opinion unjustified, see Peretz 1927, 166-65.

pledged. If so stipulated, the pledge also extended to goods of the same kind acquired after the pledge was created as soon as the debtor took possession of them. In fact, it was envisaged that the pledge could be created on goods of variable composition, a solution that was applied in the institution of a mortgage by demise in German law and later in Anglo-Saxon regulations and the 1996 Polish registered pledge law. The pledge was also to extend to manufactured or processed goods that had originally been encumbered by a registered pledge [Peretz 1927, 169].

Pursuant to Article 8 of the draft: “The registered pledge was made effective against third parties by an entry in the pledge register maintained by the court of registration with jurisdiction over the debtor. However, the register itself was non-public due to the protection of the debtor’s business secrets. This solution was inconsistent. A third party could only gain access to the register with the debtor’s written consent. At the same time, it weakened the effectiveness of the pledge against third parties. A conflict between several established registered pledges was resolved by applying the principle of the priority of their establishment, except for the conflict with the possessory pledge, in which case the latter had priority in the conflict with the registered pledge.”

In summary, such a pledge was an interesting novelty, particularly because it could be made on collections of goods of variable composition that could be retained by the debtor. Disclosure to third parties occurred when the pledge was registered in the court register, however the register was not public, which undeniably reduced the pledge effectiveness to a large extent. Moreover, it did not provide adequate protection in the event of the debtor’s bankruptcy or in enforcement proceedings. Ultimately, the registered pledge on goods in its draft version did not become law.

A commercial pledge regulated in the Commercial Code (Article 507 *et seq.* of the Commercial Code)¹¹ is also worth mentioning. As it applied to commercial trade only, it was adapted to it [Mojak et al. 1998, 10]. The establishment of a commercial pledge required a written agreement with an officially certified date. The certification of the date was intended to safeguard the interests of third parties and, in the legislator’s view, served as a sufficient form to externalise the pledge to third parties, similarly to the German concepts indicated above.¹² Its most important advantage was that the pledgee’s secured claims could be quickly satisfied by the sale of the pledged object, which bypassed enforcement proceedings carried out by a bailiff or notary public. It should be recognised that this pledge did not require the surrender of its object to the creditor or a third party [ibid., 10-11, Goldsztein 1934, 203-204].

¹¹ Journal of Laws of 1934, No. 57, item 502 as amended.

¹² Lehmann in the memorial of the Academy of German Law in 1937, see Hromadka 1980, 91, earlier remarks and footnote 11.

3. A REGISTERED PLEDGE AS A MEANS OF SECURING A LOAN IN THE LEGAL REGULATIONS OF THE SECOND REPUBLIC OF POLAND

Responding to the demands of trade, Polish legislature in the interwar period finally introduced mechanisms to increase the creditworthiness of entrepreneurs and implemented regulations concerning registered pledges on various categories of assets – machinery, devices, rights on motor vehicles, timber and agricultural products [Zoll 1937, 29 *et seq.*; Stworzewicz 1932, 220; Zoll 1947, 86].

3.1. Registered agricultural pledge

A registered agricultural pledge was regulated by the Ordinance of the President of the Republic of Poland of 22 March 1928 on a registered agricultural pledge.¹³ This pledge was not defined as a separate pledge right. Its content corresponded to an ordinary pledge right¹⁴ with modifications resulting from the regulation. The key characteristics of this right deserve to be pointed out. The pledge could only be made on certain categories of assets as indicated in Article 4 of RAP, which were products of agriculture and agricultural industry owned by the pledgor, provided that they did not constitute real property (real property appurtenances) under the laws in force and at the same time were located on real property – either owned, leased or used by the pledgor (limitations regarding the pledged object).

The registered agricultural pledge was characterised by restrictions with regard to the entities that could become parties to the pledge agreement.¹⁵ In order to establish a registered agricultural pledge, it was necessary to conclude an agreement, in the form of an official or private deed with a signature certified by a notary public or court, containing a precise description of the pledged object and the secured claim (Article 5 of RAP).

Such a pledge was subject to registration in the pledge register at the request of the pledgee or pledgor submitted to the court of registration. The effect of the entry in the pledge register was a controversial issue. Under

¹³ Journal of Laws No. 38, item 360 [hereinafter: RAP]; Widło 2025, 113-26.

¹⁴ On the subject of the registered agricultural pledge, cf. Fenichel 1936, 237; Zoll 1937, 29 *et seq.*; Idem 1947, 86; Allerhand 1935, 1048; Gołaczyński 2002, 65-66; Widło 2025, 113-26.

¹⁵ The pledgee could only be: 1) the state and 2) municipal credit institutions including *Gminne Kasy Pożyczkowo-Oszczędnościowe*, 3) credit cooperatives, and 4) credit institutions designated by the Minister of the Treasury (Article 3 of the ordinance). The pledgors could only be natural and legal persons running farms or agricultural industrial enterprises, i.e. those whose predominant business activity was the processing of their own agricultural production (Article 2 of RAP).

Article 6 of RAP “vis-à-vis third parties, the registered agricultural pledge acquires legal effects (Article 9) by means of the entry of the pledge right in the pledge register. At the same time, the pledgee’s rights last as long as the object of the pledge is situated on the agricultural holding” (Article 9 of RAP).

According to the literal wording of the provision, the first view indicated that all pre-war (registered) pledges were created by way of a contract between the pledgor and the pledgee, while the entry of pledges in the register was not constitutive [Gołaczyński 2002, 73]. The entry produced the effect of the pledge against third parties (*erga omnes*) and an additional condition for the existence of such an effective pledge (effective *erga omnes*) was that the pledged object was retained on the farm or agricultural enterprise. Removing the object of the pledge from the farm, in principle, resulted in the pledgee losing its rights (Article 16 of RAP).

In the second view, registration was constitutive and created the pledge [Fenichel 1936, 243]. It follows from the regulation under review that a registered pledge in the full sense of the word, as a limited right *in rem*, came into existence upon registration. At the same time, it was necessary for the existence of the right that the object of the pledge was located on the registered farm or enterprise. The entry was constitutive to the extent that it awarded the pledge right an *erga omnes* effect and priority over other creditors, thus giving it its full content as a limited right *in rem* – a security interest. It was necessary to regulate this new, modern institution and indicate, firstly, that the non-possessory pledge was effective against third parties; secondly, that this effect occurred by means of registration; and thirdly, that it was the moment of registration that determined its effectiveness – demonstrating normatively the different character of the pledge. For the duration of the pledge, its object was retained by the pledgor, but it had to be permanently and visibly marked (Article 8 of RAP). Under the law, the pledge extended to the pledgor’s claims against the insurance company if the pledged object was insured (Article 20 of RAP). It could, of course, be argued that the pledge was binding *inter partes* from the moment the contract was concluded. However, in terms of legal effects, it was irrelevant and did not award any rights. The right was not effective *erga omnes* as the pledgee could not even benefit from the enforcement privileges following from the pledge (they arose after registration). In such a situation, satisfaction would be based solely on personal liability, which nevertheless arises from the secured obligation. Therefore, the second view should be endorsed with regard to the effects of the pledge registration.

3.2. Registered timber pledge

A registered timber pledge was regulated by the Act of 14 March 1932 on a registered timber pledge.¹⁶ It contained similar legal solutions to the act on a registered agricultural pledge and the remarks¹⁷ presented above apply accordingly. It is important to point out the most important features of this right, including those that distinguished this pledge from the registered agricultural pledge.

The object of the registered pledge on timber could only be processed and unprocessed (felled) timber owned by the pledgor, an exemplary catalogue of which was set out in Article 1 of RTP.¹⁸ In addition, the timber had to be located on the property owned by the pledgor.¹⁹ Therefore, this pledge was characterised by the narrow scope of the assets it covered. The law also contained restrictions with regard to the entities that could become parties to the pledge agreement.

In order to establish such a pledge, it was necessary to conclude a pledge agreement in the form of an official or private deed including a certified signature (certified by a notary public or court) and a certified date of the agreement.

The agreement, which clearly distinguished this registered pledge from other pledges available in the interwar period in Poland, may have contained an additional clause providing for the possibility of replacing the pledged timber with other timber designated by its quantity and timber species (variable composition). Moreover, the agreement may have provided that the pledge right would extend to timber obtained by processing (registered pledge of variable composition – including new items in the scope of the encumbrance). The object of the pledge remained in the hands of the pledgor, except that it had to be permanently and visibly marked, and the pledgor was obliged to enable the pledgee, at its request, to examine the object of the pledge. Allowing, by way of surrogacy, the substitution of the object of the registered pledge (marked as to the timber species) was a distinctive novelty among Polish collateral regulations [Widło 2008, 66]. This pledge was subject to an entry in the open register of pledges.

¹⁶ Journal of Laws No. 31, item 317 [hereinafter: RTP].

¹⁷ On the subject of a registered timber pledge see Zoll 1937, 29 *et seq.*; Idem 1947, 86, Allerhand 1991, 1048. On the subject of the accessory nature of this pledge see Mojak and Widło 1999, 85.

¹⁸ The pledge could apply to sawn, hewn and split materials, plywood or veneers. The catalogue of materials was open.

¹⁹ Exceptionally, as in the case of an agricultural pledge, if the pledgor had a title to the land other than ownership, the pledgor had to obtain the formal consent of the landowner to establish the pledge (in the form required by the pledge agreement).

3.3. Registered pledge on motor vehicles

A registered pledge on motor vehicles was regulated by the Act of 28 April 1938 on registered rights *in rem* on motor vehicles.²⁰ This Act regulated two types of security rights on motor vehicles, which were similar to registered rights *in rem*: 1) a registered reservation of the title until the purchase price was paid; 2) a registered pledge (Article 2 of RRMV). For the purpose of an entrepreneur's credit, the second method of security was relevant.

In light of Article 3 of RRMV, a motor vehicle could not be encumbered with a registered reservation of the title and a registered pledge at the same time.²¹

This type of a registered pledge could only be made on motor vehicles propelled by an engine (motor vehicles according to modern nomenclature) of the capacity of over 100 cm³ and not intended to be driven on rails (the scope of assets covered by a registered pledge – Article 2 of RRMV). The law also contained restrictions with regard to the entities that could become parties to the pledge agreement. The registered pledge contract needed to be concluded in writing.

The object of security could remain in the possession of the debtor (pledgor). The pledgor had the right to examine the object of security.

The registration of the pledge pursuant to Article 23, Clause 1 of RRMV, had effects against third parties. The register of rights *in rem* over motor vehicles was public (Article 17, Clause 2 of RRMV), and no one could plead ignorance of the entries in the register. Under the law, the pledgee could exercise its rights under the insurance contract. The law also provided special regulations for the satisfaction of the pledgee. If the pledgee was a registered buyer (Article 35 of RRMV) and the pledgor was in arrears with at least two instalments on the claim secured by the pledge, the pledgee had the right to request the bailiff to reclaim the pledged vehicle from the pledgor or a third party and to sell it at a public auction (Article 37 of RRMV).²²

3.4. Registered pledge on machinery and devices

A registered pledge on machinery and devices was regulated by the Act of 15 June 1939 on a registered pledge on machinery and devices.²³

²⁰ Journal of Laws No. 36, item 302 [hereinafter: RRMV].

²¹ On the subject of a registered pledge on a motor vehicle, cf. Zoll 1947, 87; Allerhand 1991, 1048; Mojak et al. 1998, 65 -66.

²² In the procedure applicable to commercial pledge provisions. The procedure for the auction was set out in Articles 510-514 of the Commercial Code and the provisions of the Ordinance of the Minister of Justice of 1 July 1934, on the procedure for public auctions, Journal of Laws No. 59, item 510.

²³ Journal of Laws No. 60, item 394 [hereinafter: RPMD].

The object of this pledge could only be new and unused machines and devices acquired for industrial plants and craft workshops [Zoll 1947, 87].²⁴ This pledge was also limited in terms of the scope of assets it covered. In order to establish a registered pledge on machinery and devices, it was necessary to conclude a pledge agreement.

The registered pledge on machinery and devices obtained a legal effect against third parties as soon as it was entered in the register (Article 22, Clause 1 of RPMD). The Act also provided for special regulations concerning the satisfaction of the pledgee. The object of the security could remain in the possession of the pledgor or a third party (Article 4 of RPMD), but it had to be visibly marked (Article 5 of RPMD).

The pledge register was open to the public (Article 17 of RPMD) and maintained by the municipal court with jurisdiction over the location of the industrial plant or craft workshop for which the machinery or devices had been acquired (Article 18, Clause 1 of RPMD).

The provisions concerning the above-mentioned registered pledges enacted in Poland in the interwar period were formally repealed under Article V of the Act of 23 April 1964 – Provisions introducing the Civil Code [Widło 2008, 45]²⁵ only when the Civil Code entered into force on 1 January 1965.

The principle of openness was implemented through a number of distributed registers maintained primarily by courts and, in the case of motor vehicles, through the disclosure of the pledge in the administrative register of motor vehicles (registered items).

From 1965 until 1998 in Poland, the so-called non-possessory bank-registered pledges could be established pursuant to Article 308 of the Civil Code. Under such a pledge, the object of the pledge could remain in the hands of the pledgor or a third party. They were limited in terms of creditors as they could only be established in favour of banks, but non-open registration in bank pledge registers was in fact more of a record-keeping method than an effective security [Mojak and Widło 1999, 86].

4. COURT-REGISTERED PLEDGE

The need to create a modern legal instrument allowing for the establishment of a registered pledge on movables and rights, which would be effective and could satisfy the legal security demand of the creditor-pledgee

²⁴ The Decree of 24 October 1946 amending the Act of 15 June 1939 on the registered pledge on machines and devices (Journal of Laws No. 64, item 349) extended the possibility of establishing a registered pledge to second-hand machines and devices. The pledgor was also obliged to insure the object of the pledge.

²⁵ Journal of Laws No. 16, item 94 as amended.

as well as third parties, lay the foundation for the creation of the institution of a court-registered pledge on the basis of the Act on Registered Pledges and the Pledge Register of 6 December 1996.²⁶ To design the institution, ideas were derived from modern Anglo-Saxon floating charge solutions, the pre-war experience of Polish legislature and Norwegian electronic court registers [Widło 2008, 112].

Due to the fact that the Act on Registered Pledges and the Pledge Register does not contain an independent definition of a registered pledge but only indicates the features that distinguish this type of a pledge from the possessory pledge defined in the Civil Code, such a definition should be inferred from the content of Article 306 *et seq.* of the Civil Code [ibid., 194].

In light of the provisions of Articles 306 *et seq.* of the Civil Code and the Act on Registered Pledges and the Pledge Register, it may be assumed that the essence of a registered pledge (its content) boils down to the fact that, in order to secure a claim, one may, in particular, encumber a movable item, a right insofar as it is transferable and sets of items or rights, even if their composition is variable, with a right by virtue of which the creditor will be able to seek satisfaction from the object of the pledge, regardless of whose ownership it has become, also using non-enforcement methods of satisfaction specified by law and with priority over the personal creditors of the owner of the pledged object [Widło 2008, 194-95].

A court-registered pledge is created by the conclusion of a written agreement (under pain of invalidity) and a constitutive entry in the court's electronic register, which makes it possible to leave the object of the pledge in the hands of the pledgor or a third party, who may thus use it in the normal course of business.

The above definition does not exhaust all possible aspects of the content of this right due to the admissibility of numerous clauses in the pledge agreement. The attractiveness of this type of debt security will probably be determined by the order of satisfaction from this right (preceding even public receivables of the State Treasury (cf. Article 20 of the Act)), and a number of additional clauses provided for by the Act. Thus, one may reasonably conclude that, apart from the pledgee's fundamental rights under Article 306(1) of the Civil Code in conjunction with Article 1, Clause 2, of the Act – the content of the registered pledge right is fluid and depends on the shape of the specific pledge agreement (far-reaching autonomy of the will of the parties in property law relationships, which is a particularly unconventional solution).

The advantage of this type of a registered pledge is, firstly, the universal manner of its creation, regardless of the subject (movables, property rights),

²⁶ Journal of Laws of 2018, item 2017 [hereinafter: ARRRR].

which involves the conclusion of a written agreement (on pain of invalidity) and a constitutive entry in the court pledge register, irrespective of whether the pledge has been disclosed in other registers (e.g. the register of motor vehicles, the shipping register, aircraft or the patent register). Secondly, it allows for a privileged position of the pledgor's creditor *in rem*, also in the event of bankruptcy of the pledged asset's owner (the pledgor – the effectiveness of the registered pledge against unsecured creditors in bankruptcy proceedings). Thirdly, it allows security to be applied to any assets of the entrepreneur, i.e. not only to individual movables and rights (receivables, security interests, financial instruments, shares or stocks) but also to sets of movables and rights of variable composition. Fourthly, under the law, it allows the pledge to be extended to assets that have entered the property *in rem* of the debtor as a surrogate in lieu of lost assets (e.g. destroyed Article 10 of ARRR). Fifthly, a security interest once established may be transferred to the subsequent claim if the original claim, for example, has been paid off, with the priority of the pledge established and without the need to incur the costs of the subsequent deletion and registration of the pledge (Article 18 of ARRR). Sixthly, it is possible to take advantage of non-enforcement means of satisfaction such as a non-enforcement sale, assuming ownership of the pledged object by the creditor – pledgee or satisfying oneself from the income of the enterprise comprising the pledged object. This may be achieved by bypassing the enforcement procedure, which requires obtaining an enforceable title before the court first.

Also, the very concept of disclosing the establishment of a registered pledge on the basis of a constitutive entry in a court-held, uniform register of pledges of a universal and specific nature meets the modern needs of trade. The register, which is electronic and accessible online, satisfies the demands of trade security, discloses the pledge in an optimum manner, protects the interests of the creditor, i.e. the pledgee and third parties. At the same time, it allows, in principle, the item or right to be used by the debtor *in rem*, i.e. the pledgor, in the course of its business.

After analysing the practical aspects of this institution of law, certain postulates may be put forward *de lege ferenda* as they would further improve the institution of the court-registered pledge.

The first proposal concerns the introduction of a single, publicly accessible, on-line pledge register, which would also include the so-called fiscal pledges securing the State Treasury's interests under public law. In the current situation, Polish law provides for two parallel registers, one for court-registered pledges and the other for fiscal pledges, which is dysfunctional and undermines the principle of openness, certainty and security of trade for citizens. Compulsory pledges based on legal events other than a contract between the parties should also be entered in such a register.

The register could disclose the fact that apart from registered pledges other security interests have also been created on the debtor's specific assets (a broad concept of a so-called security register). The costs of establishing and removing a registered pledge should be minimised. Applications for an entry of the pledge in the register (or its removal) should be submitted online, with easy-to-use forms, automatically verified (validated) by AI, if errors occur upon completion.

The register should be accessible internationally and allow queries about the unique characteristics of the pledged object or the person of the debtor-pledgor.

De lege ferenda, this raises a broader issue concerning the function of a registered security interest in international trade. In particular, it applies to security interests *in rem* entered in the domestic court register and the effectiveness of the disclosure of such an entry in international (cross-border) trade, in other countries.

5. THE INTERNATIONAL ASPECT OF A REGISTERED PLEDGE

An international registered pledge arises in connection with the increasing cross-border (international) civil trade.

The considerations of the application of the registered pledge in international trade should start with determining the rules for the law applicable to the pledge in cases with a cross-border (international) element and the disclosure of that law. By classifying a given security right – an ordinary pledge or a registered pledge – as an interest *in rem*, property law (Articles 41-44 of Private International Law *et seq.*) needs to be applied to assess this right. If, on the other hand, the security right is a bond, bond law must be applied. Pledge rights, regardless of their subject matter, are generally treated as classic rights *in rem* [Drozd 1979, 153].

To indicate the applicable legal system for rights *in rem*, it is common in Poland and worldwide to adopt the principle of *lex rei sitae* – the law of the item's location, or, more broadly, the location of the object of the right *in rem*, which may also involve rights (a pledge on a debt, trademark, patent right, shares – Article 41 *et seq.* of Private International Law²⁷). The issue that needs to be determined is where the right is “located”. In general, the rules for searching for the law governing the pledge are identical regardless of the object of the pledge, i.e. whether it involves goods or rights (Article 41, Clause 1 of Private International Law). In such a situation, the principle applied is the one of the object's location (*lex rei sitae*), which is understood

²⁷ Act of 4 February 2011, the Polish Private International Law, Journal of Laws of 2023, item 503.

very broadly depending on the object of the pledge (the location of a claim may be the seat of the creditor, the seat of the party entitled to the right of domicile with regard to the enterprise of the issuer of securities or the seat of the trademark protection right holder, etc.) [Pazdan 2011, 185; Górecki 2015, 945-65].²⁸ In practice, however, some more complicated objects of the pledge (rights or sets) [Drozd 1979, 127] may be problematic as special regulations, including EU provisions, may apply to them. For example, there are separate regulations that apply to a pledge on debt (Article 14, Clause 3 of Rome I),²⁹ or a pledge on an EU trade mark. EU trade marks are governed by the Regulation of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.³⁰ In the case of a registered pledge, the pledge will arise upon registration in the national judicial register of pledges but its effectiveness will be constrained to the state of registry. Full effectiveness can only be achieved by disclosing, at the request of the creditor or trade mark owner, the fact that the registered pledge has been established on an EU trade mark and entered in the EUIPO register .

Special property law provisions apply to the so-called registered items or rights for which specific registers are kept (ships, aircraft, patents, motor vehicles). The solution chosen by Polish legislature provides that the governing law for the so-called registered objects – most often means of transport in international trade – is the law of the state of registry.³¹ The fact that the nationality of such items may change frequently and naturally does not affect the determination of the applicable law.

This should be taken into account when examining the disclosure of the pledge right in an international context and the way of its implementation by means of an international pledge register.

There are many ways to approach the concept of the disclosure of registered pledges in international trade. It needs to be determined whether it should be done on the basis of national registers of pledges or security interests, an international register, or maybe an intermediate solution could be adopted. Firstly, for the categories of registrable goods (aircraft, motor vehicles, patents, financial instruments), a registered pledge could additionally

²⁸ On the pledge on a trade mark see Widło 2018, 1127.

²⁹ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177 4.7.2008, p. 6

³⁰ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154/1 [hereinafter: EU trade mark regulation].

³¹ Pursuant to Article 42 of Polish Private International Law, rights *in rem* – including a lien and a registered pledge on such movable assets, i.e. on aircraft and watercraft and on a railway vehicle, shall be governed by the law of the state in which the vessel or vehicle is registered or, in the absence of a register or entry in the register, by the law of the state of the home port, station or other similar place.

be disclosed in the relevant register of specific items. Secondly, it is also possible to envisage the creation of a single international register including all assets, rather than multiple registers for particular categories of objects only (goods or rights). It could apply to means of transport used in international trade, such as: aircraft, ships, watercraft, rail or road vehicles.

For the so-called registrable goods in international transport, the easiest way to determine the pledge effectiveness would be to find out whether it has been disclosed in the relevant national register. However, there remains the problem of the disclosure and effectiveness of such a pledge vis-à-vis trade participants from third countries other than the country of registry.

Therefore, it would be better to introduce international registers for individual categories of assets or, what seems to be the optimal solution, a single international register in which the fact of creating a security interest (e.g. a pledge) would be disclosed according to uniform criteria (VIN number of the motor vehicle, manufacturer's number, encumbering entity, etc.).

6. POSTULATES *DE LEGE LATA* AND *DE LEGE FERENDA*. CONCLUSIONS

In different countries, the content of security rights, including pledge rights, is very much alike.³²

In principle, a comparative analysis of security interests in movable assets in different legal systems demonstrates that the secured creditor: 1) has a right to satisfy itself from the object of the pledge in the event of non-performance by the debtor; 2) has priority over unsecured creditors and secured creditors with lower priority (often with priority over public levies); 3) its right should be respected by all market participants (effectiveness of the right against third parties) [Widło 2008, 126-27].

Pledge rights limit the ownership of the secured asset [Drobing 2004, 754]. This regulation has been implemented, in particular, in: Albania, England, Belgium, Belarus, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, Finland, France, Spain, Lithuania, Ukraine, Germany, Norway, Russia, Sweden, Hungary, Middle Eastern countries and the United States [Stawecki et al. 1997, 188].

In addition, satisfaction from the object of security is often associated with the pledgee's privileges (e.g. simplified enforcement procedure or non-enforcement methods of satisfaction).

³² The analysis leaves out the institutions that serve to secure a claim, such as a mortgage by demise or a retention of title, which may also be based on registration in some systems, cf. in relation to Swiss law, Tracz and Zoll 1996, 80, footnote 161.

Modern registered pledges maintain effectiveness and offer a privileged position to the creditor that was secured against the pledgor's bankruptcy and enforcement proceedings pending against the pledgor.

Based on special legal acts, the Roman model of pledges and distributed registers, which regulates the pledging of strictly defined goods (*numerus clausus* of objects of registered pledges), provides for separate pledge registers (in France and in fact in Spain, Italy, Belgium as well as in Poland in the interwar period – the principle of the specification of pledge rights) [Zwalve 2004, 43].

Finally, it is possible to distinguish the Anglo-Saxon model and the Scandinavian model based on it – the mixed model which allows all categories of goods to be secured by making an entry in a single universal collateral register (in the USA, Canada, the UK, Sweden and Finland) [Widło 2008, 128]. A universal security interest applies to entrepreneurs (limitation regarding the entities that may be a party to a pledge agreement), where universal liquid assets (limitation regarding the objects a pledge may cover) of an enterprise are encumbered and the pledge is entered in the commercial register (England, Finland, Estonia and Latvia).

An integrated pledge right model based on a single registration system (American concept) is envisaged for all types of goods – movables and rights (a universal collateral system modelled, to some extent, on Roman law [Zwalve 2004, 42-44]). It can be found in such countries as the Czech Republic, Slovakia, Hungary, Ukraine and Poland. In Poland, this model has not been consistently implemented by the legislator as, in parallel to the court register of contractual pledges, there exists a register of fiscal pledges – compulsory pledges for public law receivables maintained by the Minister of Finance. This results in the obfuscation of the disclosure of pledges [Widło 2008, 129].

Nowadays, there are two directions to follow in international trade: to design a single universal register of collateral in international trade or to create international registers for the so-called individual registered items (distributed registration system) used in international trade.

In the first case, the international register could operate under relevant provisions, either introduced by a convention (or an EU regulation, implementing the postulate of the free movement of capital, including collateral) or as unified type of collateral provided for in the currently designed European Civil Code [Drobing 2004, 754-55]. Until then, a pledge created in one country should be admitted to be re-registered in another jurisdiction – the applicable one after the change of the law governing the pledge *in rem*. A single unified register appears to be the optimal solution *de lege ferenda*, which best meets the postulates regarding the security of trade.

As the second approach has been implemented in practice, it is necessary to mention and briefly describe the convention that entered into force in 2006, which, to a certain extent, satisfies the postulates formulated.

The 2001 Cape Town Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment were adopted at a diplomatic conference held in Cape Town on 29 October – 16 November 2001 under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organisation (ICAO).³³ Subsequently, the Rail Protocol to the Convention was drafted in 2007 and the Space Protocol, which has not yet entered into force, was formulated in 2012 [Górecki 2015, 949].³⁴ Additionally, the Mining, Agriculture, and Construction (MAC) Protocol was adopted.³⁵

Under the Council Decision of 6 April 2009 (Decision 2009/370/EC),³⁶ the European Community acceded to the Cape Town Convention with the reservation that the Convention had binding limitations due to the EU competences [Górecki 2015, 949]. Article 47 of the Convention provides that in order to enter into force the Convention should be ratified by the signatory states.³⁷

The Convention defines the scope of international security interests, contains basic definitions and provides formal prerequisites for the establishment of international security interests and default remedies. The Convention also addresses issues relating to the international system of registration, clarifies the effects of an international security interest as against third parties, contains provisions on the assignment of secured rights and international security interests (subrogation rights), and, additionally, regulates jurisdiction.

The Cape Town Convention includes relevant provisions creating a new legal instrument – a security interest in mobile equipment in international transactions – based on the concept of registration (registered pledge). Pursuant to Article 2, Clause 1 of the Convention, it applies only to certain categories of mobile equipment and associated rights, which are inherently cross-border and involve means of transport. These categories, defined in Article 2, Clause 3 of the Convention, include: 1) aircraft equipment

³³ See <http://www.unidroit.org> [accessed: 12.10.2025].

³⁴ On the Convention see Goode 2013, 3; Walulik 2011, 111-25; Kunert-Diallo 2011, 55-57; Osiecki 2016, 77-88.

³⁵ See <http://www.unidroit.org/work-in-progress-studies/current-studies/mac-protocol>, a conference on this Protocol with Annexes was held in Rome on 2-6 October 2017.

³⁶ Council Decision 2009/370/EC of 6 April 2009 on the accession by the European Community to the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment, adopted jointly in Cape Town on 16 November 2001 (Convention on International Interests in Mobile Equipment), OJ EU.L.2009.121.3.

³⁷ See the List of States that have acceded to and ratified the Convention www.unidroit.org [accessed: 24.02.2025].

(airframes, aircraft engines and helicopters), 2) railway rolling stock 3) space assets, 4) mining, construction and agricultural equipment.³⁸

Article 16 of the Convention provides for the need of registration and the international register of security interests.³⁹ The purpose of the Convention is to regulate the rights of creditors financing the purchase or lease of the above listed asset categories. The solution envisaged will undoubtedly have an impact on the certainty and ease of security, the predictability of its effects and the open nature of the international register. The Convention regulations and the security created within its framework will enable the reduction of credit risk for companies leasing, for example, aircraft and machinery. It will also facilitate access to credit for entrepreneurs from developing market economies.

To conclude, it should be stated that, in essence, the international solutions applied so far have been based on the concept of distributed registers of items, which are separate for different groups of assets. This solution is known and applied in the systems based on Roman law, however, it would be more optimal to create a single international register, accessible online, offering a possibility of the disclosure of any security interest in assets according to uniform rules for the description of the object of the security interest.

De lege ferenda, it should be postulated to create an international pledge register (including, for example, a pan-European one), which should not be difficult in the era of the Internet and artificial intelligence systems. It would include the records of all encumbrances made as part of international transactions (with the possibility of transcribing previously recorded security interests from national pledge registers), according to objective, universal criteria, such as the entity designation using its Personal Identification Number, Tax Identification Number or the VIN number of the motor vehicle). Such a register would operate under relevant provisions introduced by the Convention (or, within the Community, the EU regulation implementing the postulate of the free movement of capital, including collateral, within the Community), or as a unified type of non-possessory collateral under the currently designed European Civil Code. Until then, *de lege ferenda*, there should be a procedure of application for the re-registration

³⁸ The draft of the fourth protocol, which is available at <http://www.unidroit.org/work-in-progress-studies/current-studies/mac-protocol> [accessed: 25.01.2025], was opened for signature in Pretoria on 22 November 2019 to the States participating in the Diplomatic Conference for the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment for matters specific to Agricultural, Construction and Mining equipment, at a conference held in Pretoria on 11-22 November 2019 (Article 23 of the Protocol).

³⁹ There is a separate register for each equipment type. The registrar for aircraft equipment is Aviaretto, a Dublin-based company operating as a joint venture between the Irish government and SITA SC. It acts as a registrar within the meaning of Article 17 of the Convention, supervised by ICAO, see Kunert-Diallo 2011, 56.

of a pledge registered in one jurisdiction to another (e.g. as a result of the change of governing laws or the transfer of the item encumbered by a registered pledge to another state). The register and registration proceedings should enable electronic application with the option of data and error validation using AI [Widło 2024, 1255-263], so as to eliminate formal defects at the stage of application, or queries to the register. An alternative solution could be a single international register in which pledges would be entered directly (by submitting online applications). Another option is the creation of a data base (pledge register) of the previously established pledges which were entered in national pledge registers of individual countries. The pledge data would be re-registered – transcribed – or fed (implemented) from national registers into the single international register using AI.

Under Private International Law, registered items and pledged rights (registered industrial property rights, aircraft) should be governed by the law of the state of registry. The conflict of laws rules within property law should be harmonised directly within the EU [Idem 2008, 600-601].

The most significant deficiency of the Polish system at present is the existence of two parallel pledge registers, one for contractual pledges, which are entered in the court register of pledges, and the other for fiscal pledges maintained by the Minister of Finance.⁴⁰ This compromises the disclosure of these rights and the transparency of the legal system. Currently, there are no barriers preventing the entry of both contractual and mandatory pledges in one register. *De lege ferenda*, both registers should be merged.

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⁴⁰ The Register of Fiscal Pledges is maintained by the President of the Third Tax Office in Szczecin, see the Ordinance of the Minister of Development and Finance of 12 October 2017 on the designation of the authority to maintain the Register of Fiscal Pledges, Journal of Laws of 2017, item 1919.

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