

SECURED TRANSACTIONS LAW IN EASTERN EUROPE: THE POLISH EXPERIENCE AS AN EXAMPLE*

By John A. Spanogle**

INTRODUCTION

Poland has enacted a law on secured transactions. It does not look anything like Article 9 of the Uniform Commercial Code (“UCC”). In fact, it is not called a “secured transactions” law. Instead, it is The Registered Pledge Act of 1996.¹ Starting in 1991 from the core principles of UCC Article 9 and other, similar acts, Polish professors drafted the statute in their own style, using their own principles and civil law values to adjust and adapt those core principles so as to be acceptable in Poland. The result was a statute that was accepted by both the Polish Government and its commercial actors, the creditors and debtors. Because Poles specifically drafted the law for Poland, it has been successful, even though it has flaws from the American perspective. At first, it was very successful, achieving a rate of usage greater than that of any other Eastern European country.

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1. Ustawa o zastawie rejestrowym i rejestrze zastawow z dnia 6 grudnia 1996 r. (Dziennik [Dz.] Ustaw [U.] nr 149, poz. 703 [officially, The Law of 6 December 1996 on the Registered Pledge and the Pledge Registry] [hereinafter The Registered Pledge Act]. See WILLIAM RICH ET AL., THE LAW OF 6 DECEMBER 1996 ON THE REGISTERED PLEDGE AND THE PLEDGE REGISTRY: A NEW TOOL FOR BANKERS, PROCEEDINGS OF THE CONFERENCE ON 24–25 MARCH 1997 IN WARSAW AND THE ANNOTATED TRANSLATION OF THE LAW, 82–109 (BookWorld Publication 1997) (for an English translation of the Act). See generally *id.* (background information on the Act).

Later, the flaws became more apparent, and its usage fell. However, even after that decrease in usage due to its flaws, the Polish Law's current usage is still at least as great as that of similar statutes in other Eastern European countries.

I. POLAND IN 1991: AN OVERVIEW OF SECURED FINANCING METHODS

The Polish experience is a tale of a transplanted concept adapted so much that many people cannot recognize it. It involves good people, well meaning people, but also people with priorities and traditions which are different from ours, who, working together, have made the transplant work.

The tale begins in Poland in 1991. The Berlin Wall has just fallen. Most of the people in power are communists. They have been told that markets are supposedly wonderful things. They are not certain whether they believe in markets, but they know they must adapt. And they are exploring ways to help finance small businesses.

Prior to the fall of the Berlin Wall, for small business financing, there were three types of devices available that involved collateral. Two were statutes: a traditional mortgage² and a non-possessory pledge. The third was court-created, and not in any statute.

The traditional mortgage had at least three drawbacks. One problem was that it applied only to land. A second problem was that mortgages could only be registered by court order. That might seem to be a minor matter, but it was not. For example, the World Bank was part of a consortium that offered to make a mortgage loan to modernize a steel plant. The consortium applied to the Polish court to register their proposed mortgage. In the beginning, the court said there was no way to apply for it; there were no forms or procedures. Polish lawyers, however, discovered a way to create forms, and a procedure for the court to handle them. Thus, the court accepted the filing of the application.

2. See Adam Brzozowski, *Civil Law (Law of Contracts, Property and Obligations)*, in INTRODUCTION TO POLISH LAW 67-68 (S. Frankowski ed. 2005) (discussing the 1982 Land and Mortgage Registers and Mortgages Act).

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Five months later, the court issued its disposition of the World Bank's application to register the proposed real estate mortgage. The court rejected the mortgage on two grounds. The first ground was that there was no authority for the World Bank to do business in Poland. The second ground was that there was no affidavit in the papers submitted, showing that the person who actually brought the papers to the court had a power of attorney to do so. That steel plant was therefore still rusting in the 1990's, waiting for someone either to modernize it or to tear it down and build condominiums. But the judicial author of the opinion was still proud that he had upheld the best of Polish legal traditions.

The third problem with the traditional mortgage was that the mortgage lender was not first in line for the proceeds of the sale of collateral. In Poland, the mortgage lender was seventh in line for the proceeds of the collateral. Tax claims were first, then unpaid social security withholdings, unpaid wages, some tort claims, and claims of state banks. All of these were paid prior to the mortgage lenders. This traditional mortgage system did not work very well.

The alternative statutory method, the Polish non-possessory pledge, worked somewhat better than the Polish traditional mortgage method. It was created by a statutory provision that allowed the borrower to keep possession of the collateral, which could be goods or chattels, while the lender retained its interest.³ This Polish non-possessory pledge, however, had some limitations. It could only be made by state banks. Registration was simple. The borrower and lender signed a non-possessory pledge agreement, and then registered their agreement in a registry book kept by a state bank on its premises. The loan process was quick and easy, and everyone was pleased with the system. The borrower had the money and the bank had a pledge interest in the collateral.

However, there were some interesting angles to this system. One was that the bank with the *latest* registration was the one that had priority. You may laugh at a rule that provides that the

3. POLISH CIVIL CODE, art. 308 (repealed). See Karen Buschardt-Pisarczyk & Piotr Tomaszewski, *A New Form of Securing Claims in Poland: The Registered Pledge*, 8 INT'L COMPANY & COM. L. REV. 369, 369-70 (1997) (discussing the Polish possessory pledge system).

last registered creditor had priority; but consider it from the standpoint that this was a pledge. In a *possessory pledge*, logical legal theory would dictate that the person with the *latest possession* is the one that gets priority. Polish state banks were using the pledge model for their legal theory. But that rule on priority meant that Polish banks did not need to check the records of other banks when they made a loan. After making loans, however, the banks had to periodically check the records of other banks to make certain that their loan was the latest registered pledge, and therefore first in priority.

The other small complication was that, similar to the traditional mortgage, the registered pledge creditor was not first in line for the proceeds of the collateral. Although these secured creditors, as state-owned banks, had priority over mortgage holders, the “secured” creditor still yielded to state claims such as taxes, unpaid social security claims, and unpaid wages. Additionally troublesome, the state banks found that most foundering enterprises had not paid their wages and taxes for a very long time. Many times the first notice of bankruptcy trouble was when the employees sat down and said: pay or we don’t play.

Because of these problems, the state banks would make loans secured by pledges, but usually only when the state economic plan said that they should. Such a loan was only a central planning budget accounting entry, not a commercial lending decision. If the loan and pledge had been executed according to the state economic plan, any subsequent default would usually be repaid through the next state economic plan’s capital budget provision. As a result, the Polish state banks had very little experience evaluating the worth of the pledge in a capitalist system because they had been making loans according to the state economic plan.

The non-possessory pledge created a cozy, self-contained system, until the Berlin Wall fell. In 1991 after the Wall fell, non-state banks began to operate in the Polish economy. Other entrants were non-bank financial institutions. And by law, none of the new entrants could use either the mortgage or the non-possessory pledge.

The third financing method in Poland, the *przewłaszczenie*,

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was an unregistered one.⁴ It was basically a fiduciary transfer of the type discussed in other papers in this symposium. It was not registered, and under Polish law, the creditor was protected against the debtor, but not against third parties. Thus, if the debtor sold the asset to somebody else, the creditor had no claim to the goods. The *przewłaszczenie* was basically a creation of the courts. There are similar attempts by courts in other civil law systems to create some similar type of secured financing device. But major financial institutions never found the *przewłaszczenie* or other similar devices to be sufficiently acceptable for industrial or commercial loans. It was, however, used for many car purchases. Even there, though, unless the creditor also held the title documents, it was not very trustworthy.

The traditional mortgage, the non-possessory pledge, and the *przewłaszczenie* were the financing methods available in Poland in 1991. There was recognition of a need to make further financing available for small businesses. One survey of Polish small businesses stated that the average employee roster was two. Since that was the about the size that family savings would support, business could not grow further without outside commercial financing. And, secured financing would be a more efficient method of providing the commercial financing required to increase the business.

II. THE POLISH REGISTERED PLEDGE ACT OF 1996

The idea of translating the UCC or translating the English statutes on “charges”⁵ was raised and dropped almost instantaneously. Those models would have provided statutes that would not have fit into the Polish legal regime, both stylistically and conceptually.⁶ But some of the ideas in the UCC

4. See Tomasz Stawecki, *Secured Transactions in Poland: Coping with the Traditional Thinking and the New Challenges for Central and Eastern Europe*, 32 UCC L.J. 25, 29 (1999) (defining *przewłaszczenie* as a judicially created fiduciary transfer of ownership for security).

5. See *Gov't Stock & Other Sec. Inv. Co. v. Manila Ry. Co.*, [1897] A.C. 81, 83, 86 (H.L. 1896) (appeal taken from E) (describing English charges); *Companies Act, 1985*, c.6, Part XII (Eng.) (registration of charges).

6. See Stawecki, *supra* note 4, at 31. The drafters did not want to copy the law of another country, and the “protection of the creditor’s rights through public registration was an abstract concept in Poland.” *Id.* There was also sentiment amongst the drafter’s that successful Polish law and tradition ought to be continued and maintained. *See id.* at n.17.

and the English statutes were used, as well as some concepts from Swedish law.⁷ In fact, the drafters borrowed ideas from wherever they could. By and large, this was a statute that was created by Poles, for Poles. Further, the drafters borrowed concepts, but they did not borrow language because the resulting statute had to fit into the Polish system. This was a sensible approach, which produced a sensible result.

One suggestion was to take the mortgage and apply it to chattels. This was a heretical idea because there is a deep belief in civil law that mortgages are only for real estate. The drafters of the French “Code Civile” decided very early in their drafting process that primary assets consisted only of real estate, and that chattels were only secondary assets. Mortgages were limited to covering only primary assets. So the drafters paid little attention to commercial methods of using chattels for secured financing. At common law, the pledge is thought of only as possessory. But at civil law, the pledge is often applied to non-possessory situations, despite limitations in the various civil codes.

The question for Polish drafters was how to adapt their then-current primary financing device, the non-possessory pledge, to modern times. It was a device in which priority was given to the last to register, which only state banks could use and whose creditors stood fifth in line for the proceeds of the collateral. Thus, there were many drawbacks to any reform based on this device.

A. New Ideas Introduced by the Polish Registered Pledge Act

The Polish Registered Pledge Act presented new ideas to the Polish legislature. First, to satisfy the need for public notice to third parties, it used public notice registration, rather than the change of possession used in the possessory pledge.⁸ Second, the first to file would win.⁹ Third, this new law allowed the assets to remain in the debtor’s hands.¹⁰ It allowed almost any domestic

7. For a complete history of the drafting of the Polish Registered Pledge Act, see generally *id.* The United States Agency for International Development and the University of Maryland IRIS program assisted the drafting of the Act, and contemporary Scandanavian Laws provided “inspiration.” *See id.* at 31.

8. The Registered Pledge Act, art. 2(1).

9. *Id.* art. 15.

10. *Id.* arts. 2(2), 11.

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person or entity to make loans covered by pledges, and to register the pledges that were covering those loans.¹¹ Therefore, the law terminated any special status of the Polish state banks. Fourth, it allowed a wide range of assets to be pledged, including accounts, intellectual property rights, and future goods.¹² Finally, it did not apply to loans with real estate collateral.

The Act allowed assets to be described generally and allowed coverage of after-acquired property.¹³ As a result, the new law allowed a registered pledge to cover a shifting and fluctuating stock of changing assets. It also allowed a pledge to be registered on an entire enterprise, which allowed the creditor to take over the company upon default.¹⁴ And, this law allowed the debt to be defined generally, therefore allowing future debt to be secured.¹⁵ So again, a fluctuating pool of debt could be secured by the registered pledge. In theory, these provisions accomplished most of the concepts provided in UCC Article 9, but throughout the new law, the changes were accomplished by Polish drafting and not by use of UCC language.

The registry was envisioned to be in electronic format, thereby allowing electronic searches and registration. The underlying goal was that people could walk up to a public terminal in Krakow, search the central registry in Warsaw, and find out whether there were any pledges registered to a debtor anywhere in Poland. Thus, the Act's drafters created something that was very modern.

B. Polish Registered Pledge Act's Requirements and Problems with Enforcement

One requirement of the Polish Registered Pledge Act was a written pledge agreement. The written agreement could be fairly simple; or, it could be as complicated as the parties wanted it to be. There were only five requirements for a pledge

11. *Id.* art. 1.

12. *Id.* art. 7. *See also* Justyna Chabocka & Bruce Legorburu, "Implications of the Polish Act on Registered Pledge and the Register of Pledges," 13 J. INT'L BANKING L. 100, 100 (1998) (describing the different types of items that may be the subject of a registered pledge).

13. The Registered Pledge Act, art. 3(2) (items required to be in writing); art. 7(3) (registry of future acquired goods).

14. *Id.* art. 7(2) to (3).

15. *Id.* arts. 3(2), 7(3).

agreement: (1) name the debtor, (2) name the creditor, (3) give their addresses, (4) describe the property, and (5) describe the debt, including the maximum amount of debt.¹⁶ However, once that cap was placed on it, the debt could fluctuate as the parties saw fit.

Another requirement of the Pledge Act was that a pledge had to be registered within thirty days, to prevent any secret liens from being registered at the last minute in a bankruptcy situation.¹⁷ The absence of two requirements helped avoid two other problems. First, the pledge agreement did not have to be notarized, which was unusual but saved time and money. Second, there were no stamp tax duties assessed.

The date that the creditor filed an application for registration became the priority date for the pledge registration.¹⁸ Although processing delays were expected in the application for registration, the delays did not affect the pledge's priority. The date of the filing of the application was what mattered. The courts were directed to send out an early warning notice so that all potential creditors knew an application had been filed, and that the assets were subject to a potential pledge. Once a pledge was registered, it was protected against subsequent registered pledge creditors.¹⁹ It was also protected against unsecured creditors and buyers, but with the usual exception made for buyers of inventory in the ordinary course of business.²⁰

Enforcement was always a problem and always will be a problem in civil law regimes. There could be no self-help repossession provision; because it would violate their norms of citizen action. Instead, there was a provision that allowed a creditor to order the bailiff to seize and hold the goods.²¹ To obtain proceeds from the collateral, the creditor had several

16. *Id.* art. 3(2).

17. *Id.* art. 3(3).

18. *Id.* art. 16.

19. *Id.*

20. *Id.* art. 20.

21. See Stawecki, *supra* note 4, at 46 ("Neither the concept of 'peaceful repossession' such as that practiced in the USA, nor the concept of a creditor acting on the basis of a power of attorney granted by the debtor in the pledge agreement (such as that practiced in England with respect to the floating charge) were accepted.").

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choices.²² The worst choice available to a creditor was using the court process and having a judicial sale of the collateral. Judicial sales in Poland are designed poorly, and if the creditor secures a quarter of the value of the goods, it has done well. A second choice was that the creditor could have a notary, or the bailiff, sell the collateral within fourteen days without going through the court.²³ That would be similar to, but less costly and quicker than, using a judicial sale. The third choice was a transfer of title. This choice could be built into a pledge agreement, but it was not generally available. It was only available when there was a publicly listed price for the goods. Thus, it was available for pledges (hypothecation) securities and stocks listed on a public exchange.²⁴ In addition, the parties could agree on the value of the goods, either in the pledge agreement or after default.²⁵ Agreeing at the time of the pledge agreement on the value that the goods would have at the time of a later default was a crap shoot, and most creditors did not think that that was a useable alternative.

There were several interesting enforcement issues surrounding the Act. Even if the pledge agreement is enforceable, the pledge creditor is still not first in line, and probably never will be. The Polish drafters stated that it was their social policy to pay employees' wages before paying creditors holding a pledge. This was limited to the last three months of employee wages.²⁶ Another interesting issue was the status of tax claims. The Ministry of Finance was persuaded that, if it wanted to promote small business financing, it would have to give up its super-priority on unpaid tax claims on business assets. Under the Registered Pledge Act, the Ministry of Finance takes priority only from the date that it filed a tax lien. Thus, it was persuaded to file on a property only when it had a tax lien.²⁷

22. For further description of the enforcement process, see J. Chabocka, *supra* note 12, at 103.

23. Registered Pledge Act, art. 24(1). The creditor must give written notice to the debtor before the sale, and it is the debtor who must apply to the court for relief. See Chabocka, *supra* note 12, at 103.

24. Registered Pledge Act, art. 22(1)(2), (2)(1).

25. *Id.* arts. 22(1), (3).

26. *Id.* art. 20(1).

27. *Id.* art. 20(2).

III. THE REGISTERED PLEDGE ACT IN OPERATION

The Polish Registered Pledge Act, at least at first, was very successful. Over three hundred thousand registered pledges were filed in the first full year of operation, and almost a million were filed in the first two years. However, this is not simply a tale of a successful transplant. There are always problems in a transplant. To understand those problems requires a review of the politics of its enactment. Many ministries wanted to take ownership for the registry. After all, the registry could generate money which, at that point, was a big deal to any ministry.

The ministry that prevailed in the intra-governmental negotiations over ownership of the registry was the Ministry of Justice. At one point, it thought that the registry's revenues would sustain not just the court system, but the entire Ministry of Justice. It was willing to support the registry system, but its price was that the registry system be run by judges, and that every registration require a judicial authorization.

The Ministry of Justice and the judges were steeped in the German tradition, which was quite different from the notice filing philosophy of UCC Article 9, that any registry needed to provide definitive information, like the land registry system in Germany, and the Torrens land registry system in the United States. Thus, to the Ministry of Justice, the registration of a pledge was not just notice of the existence of a claim of priority; it was also judicial confirmation that there was a pledge and that the terms of the pledge conformed to all the requirements of Polish law. Such a definitive confirmation could only be given by judges, not by administration officials, and judges were therefore to be in charge of the registry.

This system would be maintained in an atmosphere where neither the judges nor the ministry were commercially or market oriented. To be fair, though, judges were probably the least corrupt officials available in the early '90s, so that was a good reason for giving them the responsibility. This combination of non-market oriented Ministry of Justice officials and judges had some interesting effects.

The first effect started out as somewhat benign. The Act was designed for an electronic registry, which could be searched, not just by debtor, but also by asset class, to see what collateral was already pledged. The drafters wanted to be able to search

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by asset item to see whether a particular asset had been pledged to any third party. The idea was to classify each asset registered so that it could be put into a separate field in the registry system. That is not a totally strange idea, compared, for example, to a SWIFT message system, where different classes of information are put in different fields of the form as the message is sent.²⁸ That was the idea behind this design and the drafters were thinking in terms of 1991 computers.

Unfortunately, this created a disaster. The first designation system for assets looked similar to the World Trade Organization's custom duty classification system for imported goods, and it was equally complex.²⁹ After lengthy negotiations,³⁰ the Ministry of Justice made the designation system slightly better, but it is still complex, confusing, and ambiguous in many places.³¹

The combination of an ambiguous classification system and the requirement that judges participate and rule that every term in the registration statement was correct was a mistake. The judges had two reactions: The first was to take a lot of time to make a decision. The attitude of many judges was aptly illustrated during one of the briefing sessions. A judge from Poznan stood up and said, "I have never made a decision on anything or entered a decree in less than thirty days and I'm not about to start now." That alone might not have damaged the

28. See FOLSOM, GORDON AND SPANOGLE, *PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS, TRADE & ECONOMIC RELATIONS*, 155 (West 2005) (discussing SWIFT's role as a binding credit instrument); RALPH H. FOLSOM, MICHAEL WALLACE GORDON & JOHN A. SPANOGLE, *INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL*, 144–147 (8th ed. 2008). SWIFT is an acronym for the Society for Worldwide Interstate Financial Telecommunications. *Id.* at 144.

29. See Peggy Chaplin, *An Introduction to the Harmonized System*, 12 N.C.J. INT'L L. & COM. REG. 417 *passim* (1987) (describing the United States' Harmonized Tariff Schedule).

30. See RICH, *supra* note 1, at 18–22.

31. See Blazej Lepczynski & Marta Penczar, The Gdansk Academy of Banking; and Pawel Ignatjew, The Law Offices of Baker & McKenzie, Slideshow Presentation at The Second Annual Regional Symposium on Registered Pledge Systems in Transition Economies: The Economic Impact of the Registered Pledge System in Poland, 8, 10, 12–14 (Dec. 11, 2003), www.pfsprogram.org/banking2.php (follow hyperlink "Presentation - The Polish System - December 11, 2003.ppt." It is located underneath "Second Annual Regional Symposium on Registered Pledge Systems in Transition Economies.").

system, because priority of the pledge dates from the date of application; but the judges were also lax in sending out the required early warning notices. The judges' second reaction was to reject many of the applications. The law was unclear as to whether priority of the security interest dated from the original application date, or from the date of a second or third application which was accepted. Therefore, banks started demanding guarantees during the application period. The average application period is now about fourteen days from filing to judicial approval.

Today, there are about 100,000 applications for pledges each year and about 100,000 pledges registered each year.³² The World Bank thinks that is a disaster. Interestingly enough, however, that is about the same number of registrations as there are in Hungary and Bulgaria, which the World Bank thinks are doing just fine.³³ So I do not believe that it is as much of a disaster as the World Bank indicates, but it could be improved.

The Ministry of Justice is proposing many small improvements, none of which take care of the basic problem, the judges. To make real improvements, they must take the judges out of the equation. That would alleviate one problem. The other problem is in the enforcement of the pledge. The Ministry could issue several decrees which would make some of the enforcement methods practical, but it has not done so. If it did issue such decrees, the Ministry of Justice could revive the pledge registry system to its prior usage of 300,000 to 500,000 filings per year.

CONCLUSION

The Polish Registered Pledge Act is a highly modified transplant, written by Poles especially for the Polish legal system, which works, but not as well as it could. It appropriately provides a security interest that can cover a shifting stock of

32. Frédérique Dahan, Counsel, European Bank for Reconstruction and Development, Slideshow Presentation at the World Bank Brown Bag Lunch: EBRD Guiding Principles for the Development of Charges (Collateral) Registry, 22 (May 17, 2005), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/May172005.ppt>. See also HEYWOOD FLEISIG, MEHNAZ SAFAVIAN & NURIA DE LA PEÑA, REFORMING COLLATERAL LAWS TO EXPAND ACCESS TO FINANCE 88 (World Bank 2006).

33. See Dahan, *supra* note 32. See also FLEISIG, *supra* note 32.

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goods, future goods, changing loan amounts, and future loans. This security interest provides priority security to the first creditor to file, and also provides the registered creditor with protection against all buyers, except those who purchase from a merchant at retail. Thus, it reflects many of the concepts from UCC Article 9.

The failings of the Act are due to two pairs of faults. One pair is home-grown, and the other is due to its transplantation. The home-grown faults are its use (or misuse) of judges, and the attempt to designate the collateral in an overly-concrete manner. The use of judges results mostly from the intra-ministry politics of the era; but it also results from a fundamental misunderstanding by the politicians (though not the drafters) of notice filing. They were not satisfied with having the registry provide mere notice of claims of transactions, but wanted each item in the registry to be judicially tested and adjudged to be correct. The problem of overly-describing and classifying the collateral has been avoided by all other Eastern European countries in providing secured financing, and, thus, it seems correctable here.

It may be more difficult to deal with the other pair of faults, but many Polish lenders seem to have learned to live with them. The faults created by the transplantation of secured financing concepts into a civil law system are both related to enforcement. One problem is that self-help repossession is not available and there is no particularly good substitute for it. The other problem is that the secured creditor is not, and probably never will be, first in line for the proceeds of the collateral. Both of these concepts deny to the secured creditor the ability to take charge of the sale of the collateral, which both reduces and makes ambiguous the value of the goods upon default.

However, the World Bank statistics make clear that the Polish system, as flawed as it is, is doing as well as most of the other secured financing transplants in Eastern Europe.

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