Certain Problems of Enforcing Liens under Hungarian Laws

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The role of liens has increased substantially in the past few years among creditors' securities, and together with it some fundamental changes have occured in the laws that relate to liens and lien enforcement.

When the recovery of a loan by a creditor, in the absense of voluntary repayment, depends on the enforcement of the securities stipulated in the contract, it becomes especially important how the risks of the individual securities were assessed at the time of making the contract. Important factors to assess include how rapidly and at what cost a creditor can realize his claims from the securities or collateral.

If it is difficult to assess the expected time and cost implications of perfecting collateral and in addition to that they have to face legislative uncertainties and those of interpretation of laws, creditors will be too cautious and hesitant to make loans.

I want to summarize those major problems that any creditor will face in the present legal environment if he uses a lien as a legal security.

Of the legal securities, mortgage lien is the one that has been used the most frequently in the past and recently as well. Most borrowers have only their home or possibly some other real property to offer as collateral, though creditors prefer to use non-residential property as collateral.

The above mentioned circumstances justify that we should deal with issues and problems relating to mortgage lien.

When interpreting the most recent, and not yet effective, legislation on lien, I will cover legal institutions and approaches that are new or reintroduced after having been used in the Hungarian law in the past.

I.

The first major amendment of law in that area was when the new execution law took effect. Law LIII of 1994 on Execution by Court (hereinafter EL) took effect on September 1, 1994, and its provisions on the new organizations of execution have to be applied as of January 1, 1995.

The most important change was related to foreclosure.

What happens with a bank's registered mortgage lien when a third party initiates foreclosure on the same property and the borrower is current with his payment under the contract?

1) In addition to the mortgage lien, the bank has requested a prohibition of sale and encumbrance of the property to be registered in order to secure the lien on the property that has been bought from the loan made by it.

   Decree of Force of Law (DFL) No. 31 of 1972 on property registration, that is still in effect, says that:

   "When a prohibition of sale or encumbrance had been registered, any other rights or right to foreclosure can only be registered with the consent of the holder or the prohibition." (Para. (3) of Art. 27)

   When listing the rules of foreclosure, the new EL says in a general way that:

   "The property owned by the borrower … can be foreclosed upon regardless of any encumbrances or prohibitions on the property." (Para. (1) of Art. 36 of EL)

   The former practice, under which the Land Registry, after receiving a request to register a right of execution, would request the consent of the holder of the prohibition of sale and encumbrance, has been abolished by Land Registries by saying that the rules of property registration are contrary to a legislation that is of higher rank and was issued later.

   It works against the security of legal practice that the relevant regulation has not been changed (provided the legislator's intention was that indeed) either at the time of the EL's taking effect or during the period of almost two years that has elapsed from then on.

2) In addition to liens secured by prohibition of sale and encumbrance, an even larger circle of creditors are affected by the mortgage liens in the real property register that have been entered as a side obligation that secures the contract.

   The problem related to this type of mortgage lien revealed itself first after the EL has taken effect, in spite of the fact that the change in the text of the legislation does not seem to justify that.

   The procedure basically is the following: the mortgagee who is not a person requesting foreclosure at the auction of the property will not receive his claim that is secured by a lien on the property from the distribution of the sale proceeds and his mortgage lien will be cleared from the property register.

   In its statement (published in no legal regulation form), the Ministry of Justice

(MoJ) has supported the legality of this practice:

> "The rules of the EL are in line with the mortgage lien related provisions of the Civil Code and other laws. These rules reflect the difference that exists between a right to foreclosure and a lien.
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> The creditor's right to foreclosure enables him to actually satisfy a claim, specifically through state force.
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> Laws in effect, specifically the EL in the case of foreclosure by court, require that certain special preconditions be fulfilled before any state force can be applied, including that the maturity date of the claim should have passed, i.e. the claim should be overdue.
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> In contradiction to that, the Civil Code considers mortgage lien as only a supplementary right, that creates a side obligation for the borrower in order to secure the contract. Notwithstanding that, a claim that is secured by mortgage lien can only be satisfied through foreclosure if the preconditions required by the EL are fulfilled.
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> Therefore a bank's claim that is secured by a mortgage lien but has not yet matured cannot be satisfied through foreclosure by court. This is why it is of decisive importance whether the bank's claim has matured before the foreclosure procedure against the borrower has been started or during the procedure (but before the distribution plan of the proceeds from foreclosure is prepared). The bank can achieve that its claim that is secured by mortgage lien be satisfied with proceeds from foreclosure by court only when it initiates a foreclosure procedure by court as a person requesting foreclosure or when it joins, as a person requesting foreclosure, a foreclosure procedure initiated by another person.
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> Under Art. 170 of the EL, the mortgage lien undoubtedly brings benefits to the holder of the claim when satisfying claims. These benefits, however, do not go as far as that they would give preference to claims that are not matured over claims that are matured and enforced through foreclosure.
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> It is an important aspect how a bank can accelerate a claim that is secured by mortgage lien and how the bank can become a person requesting foreclosure based on that. That can be achieved by stipulating in the loan contract that the total amount of borrowing becomes payable (matured) when, for any reasons, a right to foreclosure is registered on the borrower's property pledged as security. If, in turn, the loan contract has been notarized, then, without pursuing court procedure or the procedure of sending a notification to pay, the lender may go to court to obtain a foreclosure judgement and therefore the bank as a person requesting

foreclosure can, without delay, join the foreclosure procedure against the borrower and can achieve that its claims be satisfied." (3564/1994 MoJ)

The following provisions of the effective law provide grounds to the above:

Para. (1) of Art. 170. When also a claim secured by a mortgage lien should be satisfied from the sale proceeds of the real property or water or air vehicle, such claim, contrary to the provisions of Art. 168, should be satisfied by giving a preference to it among the liens in the same priority position and regardless of proportion considerations.

(2) In the case of several claims that are secured by mortgage liens, such claims should be satisfied as per paragraph (1) above in the order of their registration.

The implementation decree (MoJ Decree 14/1979 (IX.27)) of the old EL (Law 18 of 1979) includes a relevant rule:

Art. 70 When also claims secured by mortgage liens should be satisfied from the sale proceeds of the real property, they should be satisfied in the order the liens have been registered.

The legislative justification of the above is repeated word for word in the article of the effective law quoted above.

Based on the above, we can see no legal reason, which would come from the change of the text of the law, why a mortgagee's claim, who is not a person requesting foreclosure, should not be taken into consideration in the distribution plan and his mortgage lien should be cleared without satisfaction from the real property register.

The interpretation quoted above unambiguously determines the priority of the execution to foreclosure over the lien, though it admits that they are two different legal institutions.

We agree with the statement that only matured claims can be satisfied through foreclosure, but the rest of the conclusions we consider substantially contradictory.

On one hand, a claim is very "simple" to be "made mature" by accelerating it. Under Point c) of Para. (1) of Art. 525 of the Civil Code, the creditor has the right to terminate the contract with immediate effect and thereby making the full claim matured.

Therefore, since there are some other existing legal means for that, it is not necessary to include in the loan contract a provision under which "the borrower's total debt will become payable (matured) when, for any reason, a right to foreclosure is registered on the property pledged as collateral".

Even under the quoted interpretation, the only effect of this provision is to make claims matured. In order that the claims that are secured by mortgage lien can be satisfied from the auction sale proceeds, the interpretation by MoJ requires also that the obligee should participate in the auction as a person requesting foreclosure, i.e. he should hold an enforceable document about the claim.

A similar provision is included in the amendment of the Civil Code by Law XXVI of 1996 and the justification attached to it.

> "Para. (1) of Art. 268 The mortgage lien will cease to exist . . . unless otherwise required by law . . . when the collateral is sold through foreclosure. In that case the lien-holder can enforce his right to satisfaction, with regards to the sale proceeds."
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> Justification:
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> ". . . unless otherwise provided by law, the lien ceases to exist when the collateral is sold through foreclosure procedure. At the same time, the mortgage liens of lien-holders in lower positions will also cease to exist, but, under the proposal, these lien-holders (who do not participate in the procedure as persons requesting foreclosure or, in the lack of matured claims, are not able to join the creditor who requests the foreclosure) can enforce their rights to satisfaction with regards to the sale proceeds, and under Para. (2) of Art. 256, can request from the obligee some security that replaces the collateral to their satisfaction or provide additional collateral; and if the obligee fails to meet such request, they can enforce their right to satisfaction. In such case, the right to satisfaction can only be efficiently enforced when there is a notarized lien document in hand."

The above provision of the Civil Code fails to provide solution to the problem of the mortgagee that arose after the new EL has taken effect.

The lien is deleted in the property register after the sale through foreclosure has been effected. The real property can only be encumbered with encumbrances as per Art. 137 of the EL and mortgage lien is not one of them. The following provision of the old EL is still in effect, unchanged:

> "Para. (2) Art. 151 The auction buyer may enter into an agreement with the mortgagee that if the mortgagee is satisfied from the sale proceeds the lien will continue to encumber the property."

Under former foreclosure rules, the procedure followed in such cases was that when the bank considered the purchaser a borrower of acceptable risk, the lien remained on the property and the borrowing was assumed.

At that time it had no importance whether the mortgagee participated in the

foreclosure process as a person requesting foreclosure or whether the debt has matured or not!

Though the wording of Para (1) of Art 151 of the EL quoted above is unchanged, its interpretation has changed completely! Under that interpretation, the buyer may decide whether he will assume the claim or not.

In a book by Dr István Vida and Dr Olga Balogh titled The New Rules of Execution By Court (CO-NEX-TRADING Bt 1994), in answering to specific questions, the writers of the book say the following:

> "There is a possibility that the auction buyer assumes the mortgage claim (Art 151), and if so, that is good for the creditor. But when the buyer does not assume the claim, the lien will cease to exist, because under Art 157 the lien will not encumber the property that is obtained by the new owner."

The answer can be misunderstood, because Art 151 speaks exclusively about a mortgagee whose claim would be satisfied from the distribution plan but renounces from the satisfaction and agrees that the buyer assumes the borrower's debt, and this is why the lien remains on the property.

If this case is only about a mortgagee who participates in the foreclosure process as a person requesting foreclosure, then this creditor is the best off when there is no agreement, since then the loan made by him will be repaid!

Similar is the situation when the paragraph is also applicable to mortgagees who do not participate in the foreclosure process.

It is true that "it is good for the creditor" - since this is why an agreement can be made -, but when there is no agreement, the creditor's position is even better, since he will be satisfied from the sale proceeds and after that it has no importance for him whether the lien is cleared from the register or not.

The Supreme Court has published an individual decision on this issue under Court Order No. 1966/598, that includes the following important statement:

> "The rules of auction included in Decree of Force of Law no. 1979/18 (EL) and MoJ Decree no 14/1979 on implementation (EX), that were effective in the past, have set out the method and conditions of sale at auction in details.
> Para (1) of Art 91 of the EL stipulated that only easement on land, as well as usufructs that are entered in the property register and allowed by law can encumber an ownership obtained by an auction buyer. This provision, however, is not contrary to the provision of Art 70 of the EX on payment of sale proceeds, under which if also claims secured by mortgage liens have to be satisfied from the sale proceeds, the satisfaction of them should be in the order the liens were

registered. If the two provisions are applied together, then it is clear that the satisfaction of a claim secured by a mortgage lien is a precondition to the deletion of the lien, and the auction buyer will obtain unencumbered ownership only as a result of that process."

(A substantial element of the legal situation is that the obligees of the objective mortgage liens did not participate, with their claims, in the foreclosure phase.)

Considering that the above individual decision includes references to the old EL, we have to analyze the change in the regulation again:

Para (1) of Art 91 of the old EL says the following:

"Only easement on land as well as usufructs that are entered in the real property register and allowed by law can encumber an ownership obtained by an auction buyer."

Art 137 of the new EL says that:

"The ownership of the owner that obtains the real property that is under foreclosure can only be encumbered by the following rights:

a) easement on land,
b) right to use for public interest,
c) usufruct that is entered in the property register,
d) any usufruct based on law even if it is not entered in the property register."

It is clear that though the number of encumbrances that remain in effect has increased, the essence of the provision is the same: the ownership of the auction buyer may be encumbered with some specific rights only.

The wording of Art 70 of the old EL is the following:

"(1) When also a claim secured by a mortgage lien should be satisfied from the sale proceeds of the real property …such claim, contrary to the provisions of Art. 168, should be satisfied by giving a preference to it among the liens in the same priority position and regardless of proportion considerations.

(2) In the case of several claims that are secured by mortgage liens, such claims should be satisfied as per paragraph (1) in the order of their registration."

The new execution law therefore has not changed, compared to the old one, in that respect either. By comparing the two paragraphs, we can draw a similar conclusion to the one contained in the individual decision quoted above:

". . . the satisfaction of a claim secured by a mortgage lien is a precondition to the deletion of the lien, and the auction buyer will obtain unencumbered ownership only as a result of that process."

The practice explained above, under which the mortgagee's claim will only be satisfied from the sale proceeds if he himself holds an absolute court order about his claim and therefore he himself is also a person requesting foreclosure, is not always followed! That practice is used in most of the cases, but we know about courts that have used different practices as well.

There are some courts according to whom the mortgage lien can only be cleared when the distribution plan of the sale proceeds has taken into consideration claims of all the mortgagees, even the ones who have not participated in the foreclosure process.

Under another approach, the executioner will make payment to a mortgagee who had been taken into account in the distribution plan when the mortgagee holds a foreclosure document that has been prepared based on an absolute court order.

Additional questions are raised by the position (experiences in counties!) under which the holder of a mortgage lien over a property, when learning that the real property pledged to him as security has been put to foreclosure, may announce his demand for preference.

The first problem may be caused by the fact that the concept of "demand for preference" is discussed in the EL under the section on Execution of Personal Property, and the expression "the payment of the foreclosure proceeds" is explicitly related to items of personal property in the section on General Provisions:

"When a demand for preference is announced (Art 114), the sale proceeds of the items of personal property that serve as collateral …" (Art 169 of the EL)

If a court/executioner accepts the demand for preference over the real property (under such title!), it /he has to take into consideration the following:

The part of the Justification of the EL that explains the legal standing of the person who announces demand for preference says the following:

If "in an execution procedure that has been started by someone else, a property encumbered with a lien is sold, the person that has a demand for preference should first of all be satisfied from the sale proceeds of such property, even if he himself cannot be considered as a person requesting execution." (legal justification attached to Art 169 of the EL).

Therefore, once a bank's demand for preference over some real property is accepted, we are right to cite the justification of the law.

The justification continues like that:

"All the above comes from the difference that exists between a lien and a right to execution."

While referring to the very same difference, the MoJ Decree, explained above, comes to an opposite conclusion: the holder of the mortgage lien will only then be satisfied for his claim when he himself is also a person requesting foreclosure. (Last sentence of the first paragraph of the MoJ interpretation.)

When the person who announces the demand for preference can be a holder of a lien over items of personal property only, and therefore it is only him who can "enjoy" the benefit of the difference between a mortgage lien and a right to execution, then the situation is further complicated by the fact that, under the new Civil Code rules, a mortgage lien can also be placed on personal property. Therefore under the effective rules of the Civil Code and the EL different rules may prevail in the course of executing mortgage lien on personal property and mortgage lien on real property: when the collateral is some items of personal property (that are the objects of a general lien or a mortgage lien), it is justified to announce demand for preference, and even if the lien-holder is not a person requesting execution, he will first be satisfied from the auction sale proceeds; when the collateral is some real property, the lien-holder will receive satisfaction as a person requesting execution only, regardless of the fact whether the lien he has is a general lien or a mortgage lien!!

Even if these rules of the EL, under which a demand for preference can be claimed over items of personal property only, have been introduced because no certified records have been maintained of liens over personal property but such records are available on real property, today even that fact is not an acceptable reason for the above distinction to make.

II.

In this second part of the paper, I will discuss the issues that arose in relation to the amendment of the Civil Code by Law XXVI of 1996, and I will specifically focus on the issues that are related to enforcement of mortgage lien on real property.

Creditors have "fought" against the interpretation problems of legislation discussed in Section I above at court procedures for years. The extraordinarily diverse judgement practice means a special difficulty in the area of claims enforcement. Therefore the new rules the law related to liens has been started to be "interpreted" right after the law had been published. When discussing the law, articles in professional literature highlight the uncertainties and interpretation problems of the law, and without giving clear-cut positions, they provide cautious approaches and possible solutions only.

2) The first problems have been raised by the new wording of Art 48 of the Civil

Code:

> "When pledging residential property, it should be stipulated that the mortgagor shall make the real property available free of inhabitants for the purpose of satisfaction in the case of enforcement of lien."

Under the current practice, when the owner fails to evacuate the house, the executioner will put the house to auction with inhabitants in it.

That is disadvantageous for the person requesting foreclosure, because the lower price might not cover his claims. If he decides to take over the real property himself, the value of the benefit that he can get possession of the property at half of the estimated value (the price of the occupied property) will largely be reduced by the procedure the he will have to face as an owner now.

It is likely that the person requesting foreclosure, especially when he has not yet received the full amount of his claims, will not wish to be the owner of a property with inhabitants.

The situation therefore is the following: the person who requested the foreclosure now became the owner of a real property with inhabitants in it, and the former owner (or someone else) is now a tenant.

In order for the owner to be able to sell the property free of inhabitants, he needs to enter into another lengthy procedure and finally hold an absolute court order in which the court obligate the former owner to evacuate the house.

In our view, Art 48 of the new Civil Code can simplify that complicated, lengthy and very costly procedure.

Provided the lien contract over the house (which can only be a mortgage lien here, since, in the case of general lien, the lien-holder is also the owner of the property) contains an obligation to evacuate, as mentioned above, then the lien-holder can launch a court procedure to enforce his claim that is secured by the lien, and request the court that the court should obligate the defendant (mortgagor) by order to evacuate, under the contract, the residential real property pledged as collateral to the claim.

There is a position according to which there is no need for such an order, since the contractual obligation is based on a legal regulations and as such can be enforced without being "agreed".

Going back to the absolute court order that obligates the defendant to make payment of the outstanding debt and to evacuate the home, we can say the following.

The question arises whether it is justified to request the above court order to enforce a claim before the foreclosure procedure has started?

Under the contract, the mortgagor is obligated to make the property available free of inhabitants "in the course of the enforcement of lien". The EL, that is used in the course of the foreclosure procedure to enforce the claim, sets out, as a general rule, that the obligation to foreclose should be applied proportionately and gradually. Thus the lien enforcement process should follow the priority order set out in Art 7 of the EL (wages, personal property, real property). Though the EL also says that it depends on the instruction of the person requesting foreclosure what items of the borrower's personal property he wants to use to settle his claim, but the law itself determines the order and the court may deviate from the instruction of the person requesting foreclosure "for the purpose of a proportionate and gradual utilization of the obligation to foreclose".

All that might mean that the court acting in order to settle the claim will consider premature the request for issuing an order for evacuation? If yes, then when, in what phase of the procedure the creditor/mortgagee may turn with such request to court?

If the court order on the enforcement of the claim sanctions the evacuation, how it should be effected?

Is it enough if the sanction on evacuation is included in the instructions part of the court order that is included in the foreclosure judgement document? Based on that the executioner, without any special action, possibly on the request of the person requesting foreclosure, should first take care of the evacuation, and only then make arrangements for the auction? How can it be done in line with the rules of the EL?

The answers to these questions can make it substantially easier but also much harder for the creditor to enforce lien. On the other hand a lack of answers to these questions, similarly to the fact that we can see completely different practices pursued by different courts and executioners, will increase uncertainty in relation to lien enforcement.

2) Para (2) of Art 268 includes a new rule on liens, that can be applied as of the law's effective date:

> "In the case of a mortgage lien, the owner may place a new lien in the position in priority order (position) that is occupied by the mortgage lien to be cleared, in the amount of the lien to be cleared, at the same time as the lien is cleared, without the new lien being more cumbersome then the lien to be cleared; or the owner may chose to maintain the position of the cleared entry for a period of one year. The owner may waive this right of his to a third party only."

The interpretation of the first sentence seems to be easy:

The owner, at the same time when the registered lien is cleared, may have two

choices: he can either place a new lien, or can maintain the position of the entry for a period of one year.

Thus when a request is received by the Record (real property record and public notary record), at the same time a request to enter a new mortgage lien should be made available, or a statement by the owner that he wishes to maintain the priority position.

If no other document is received together with the request to clear lien and the entry is cleared, the lien in that position will cease to exist and the liens in lower positions will step one position higher.

The case when the request for clearing a lien entry is submitted by a person other than the mortgagor is governed by the Government Decree on Public Notary Record. In such a case the public notary will notify the mortgagor and ask whether the mortgagor wants to maintain the priority position.

There is no regulation in effect as far as the Real Property Record is concerned.

The registered lien-holders' interest is that no new lien should be placed in the positions higher than theirs and such positions should not be maintained.

A creditor from whom the owner requests a borrowing by offering a mortgage lien as collateral, whose object is encumbered with a mortgage lien registered earlier is interested in his lien to be registered in a favorable position, possibly as a first lien. This new creditor can get information about the encumbrances on the real property from the Record.

In practice, it very rarely happens that the new loan contract is concluded at the same time when a former lien is cleared, but it may happen that a lien in a favourable position ceases to exist in the near future (compared to which the new loan is "not more cumbersome" under the law).

The primary interest of the new creditor is that his lien be entered in that position. If it is not possible because the borrower needs the borrowing before the lien is cleared, then the creditor wants to be assured that the owner will place no new lien in the position of the cleared lien, that is higher than the new creditor's lien priority, either at the time of the contract or within a year of the contract.

Law XXXV of 1927 on liens, that has been superseded by law XXVI of 1996, had the following provision on that:

> "The owner, however, may waive, to the advantage of a subsequent creditor or third party, his right that he can use the priority position of the mortgage lien entry after the mortgage lien is cleared, or that he can have this position entered into the Land Register for the purpose of a new mortgage lien registration." (Art 21)

We can only assume that the second sentence of Para (2) of Art 268 of the Civil Code quoted above provides for a similar case.

"The owner may renounce from this right to the advantage of a third person only."

Considering that the first sentence explains two rights, is it possible that this sentence talks about only one of them, reasonably the last one? If the legislator's intention was to regulate the "right to use the position", which covers both rights, it would have been more practical to formulate the sentence accordingly.

A lot of "guesswork" is caused by the term "third person" too. Who is the third person: excluding the owner, and the lien-holder registered in the position to be cleared, any other obligee or only a person who has not yet been entered as a lien-holder (in any other positions) in the Record?

If, as a starting point in trying to answer the question, we take those persons to "the advantage of" whom the owner may waive his right to use the position, it the is even more difficult to interpret the sentence. The owner's waiving his right to use the position brings the most benefit to the lien-holders that have been registered earlier in lower positions, since each of them will step one position higher. Therefore, the owner's waiving is mainly to their "advantage", even if the owner waived his right, on the new creditor's request, to the new creditor. Of course it serves the new creditor's "advantage" as well, since after his lien is registered, the lien waived will cease to exist and thereby he will be in a better position as well.

Instead of using the phrase "to the advantage" the term "towards" would have been more practical and unambiguous to use.

Based on the second sentence, however, after all the above guesswork, I think the only acceptable interpretation is that the owner may waive his right to use a specific priority position (meaning the right to place a new mortgage lien at the same time the old one is cleared, or to maintain the position for a year) to any person (who may be either a subsequent creditor not yet registered or a creditor already registered in any other position) but the holder of the given position.

This interpretation is confirmed by point 1) of Para (2) of Art 4 of Government Decree 7/1977 (I. 22.), under which the public notary record should include:

"the waiving of the right to use a position".

The law does not include any time limitation relating to the waiver, therefore I think there is no obstacle for the owner to issue a statement to the effect that he waives the right to use a position during the period after he is entered in a position and before that entry is cleared.

The relevant provision of the Civil Code raises many problems of interpretation as well, but the main problem is represented by a lack of co-ordination with other regulations, including mainly Decree of Force of law No. 31 of 1972 on the Real Property Record. The rules of real property registration at present “do not know” the term of priority position and the rules about its registration.

3) A new form of collateral in the Civil Code is the “lien over property”. I will focus mainly on those aspects of lien over property that are related to the situation when some part of the property is or becomes real property.

The legal regulation of lien over property is very short and seems incomplete.

A claim based on lien over property can, if necessary, later enforced by court based on a contract made in accordance with an appropriate interpretation of the intent of the legislator and the wording of the law.

A creditor will always be cautious when a new type of collateral is introduced and new rules are applied. But if he can also see that the legal regulation gives rise to a number of, sometimes totally contradictory, interpretations, his uncertainty and cautiousness will further increase. Of course a creditor does not wish to assume the risk that a court establishes during the claim enforcement process that the contract made by him is not suitable to serve its purpose due to inappropriate legal interpretation.

As long as creditors know primarily about the uncertainties and weaknesses of lien over property, that type of security will not be widely used.

The essence of lien over property is that a claim can be secured by the property or some part of the property of the legal person mortgagor or an economic organization without legal personality, without defining even the rights or things that constitute the property.

In order to place a lien over property, the following are necessary:

- the lien contract should be notarised, and
- the lien should be registered in the record maintained by the Hungarian National Chamber of Public Notaries.

If we accept that a real property that is part of the property does not have to be “defined” as such since it is encumbered by the lien only as part of the property, then we have to take the following into account:

Decree of Force of Law (DFL) No. 31 of 1972 on the Real Property Record says that:

"The Real Property Record … credibly certifies the data included, as well as the existence of the rights and facts registered therein." (Para (1) of DFL 72)

Para (1) of Art 260 of the Civil Code in turn has the following provision:

"In order to place a lien over property, a lien contract must be written and the lien should be entered in the real property record."

No doubt that the real property that constitutes part of the property is "encumbered" with the lien over property.

If that fact is not registered somehow in the real property record, it will violate the provision of Para (1) of Art 260 of the Civil Code, which does not distinguish between types of liens, therefore specifies it as a precondition to encumbering a real property with any type of lien that the lien should be registered.

The lack of registration violates the principle that the real property record is credible.

The buyer, who, relying on the data of the real property record, purchases some real property from a legal person or an economic organisation without legal personality, trusts quite rightly that the real property has no other encumbrances than the rights reflected in the real property record.

If that economic organisation does not deal with real property trade and is not entitled to sell real property as its "normal business activity", then the buyer will obtain possession of the real property encumbered with the lien over property?

Further trying to interpret the law, we can ask that if the purchase is made in commercial trade or as a normal business activity, even than only the buyer of good faith will obtain unencumbered ownership?

Para (2) of DFL 2 says that:

"Up until the opposite is proved, good faith should be assumed on the part of the person who obtains right in return of some counter-value by relying on the real property record."

If the lien over property should be registered in the real property record as well, then other, but equally numerous questions should be answered.

First of all we have to take into consideration that the "procedure" of registration is regulated by no laws. The real property record system would not be able to support appropriately a request to that effect.

Who should take care of the registration?

This task cannot be considered as part of the government decree that governs the procedures to be followed by public notaries, who prepare the notarised document on pledging the property.

That solution would raise the problem of what happens when some new real property becomes part of the property later.

If the lien over property would be placed on such new real property by registration only, how would the lien-holder learn about the increase of the obligor's property. Who and how can request the registration in the real property record?

After a lien over property has been placed on the property of an economic organisation, some real property that is part of the property can be pledged by a mortgage lien? If yes (and I can see no legal obstacle to that), what will the relationship of the two liens be like?

Claims secured by mortgage liens should be satisfied in the order of registration (Para (2) of Art 170 of the EL).

If a lien over property is not entered in the real property record unless it is fixed, then the holder of that lien will be in a disadvantageous situation, i.e. in a lower priority position.

There is a standpoint which says that a lien over property can only be placed by fixing it, and only that fact should be entered in the real property record. Thus as long as only a floating lien encumbers the property, there is no importance of the order of registration, the real property that is part of the property is free to be encumbered before fixing.

The questions that have been raised in this point 3 are only seemingly extreme ones to my view, they might even have seemed artificial. But in the course of practical implementation, first creditors and public notaries and land registries, later also the courts will be forced to give answers to similar questions. Therefore we should let opinions "clash" in the phase of preparation, before contracts are made.

I think that as long as there are many questions that are difficult to answer about this area, most creditors will chose the solution that they will place mortgage lien over items of real property belonging to economic organisations, and lien over property on the part of the property that does not include any real property. Today it seems that this is the simplest and safest procedure. It is questionable, however, that by introducing the lien over property, the legislator's intent was that indeed?