

**RECOMMENDATIONS
AS TO THE AMENDMENT OF THE CIVIL CODE RULES PERTAINING TO LIENS
(discussion document II)**

December, 1997

Introduction

The new Civil Code rules on liens have been in effect as of 1996, and partly May this year. The Bank and Securities Laws Section of the Hungarian Lawyers' Society has organised a number of discussions to clarify the issues raised by the amendment of the law, then in early summer this year the Section has sent a discussion document to the members of the Section and other interested and competent experts (from ELTE University, and the Ministry of Justice). The discussion document summarised the most important issues for discussion in relation to the new rules on liens. A number of observations have been sent to the Lawyers' Society in response to the discussion document. The observations have confirmed the statement of the discussion document that, based on the new rules of the Civil Code, no answers can be given to the fundamental questions raised by the new legal institutions (primarily those related to mortgage lien on personal property and floating charge). Participants of the discussion supported almost unanimously the idea that the rules on liens must be further developed and made more accurate. Meanwhile, a decision was made by the Ministry of Justice under which the new rules on liens have to be reviewed in order that the rules can be interpreted in a standard way and be applicable indeed to implement the economic and legal policy objectives originally set. Based on the above, the Ministry of Justice has requested the European Bank for Reconstruction and Development (EBRD), that has supported (by developing a sample law and providing technical assistance) the Central and Eastern European countries in modernising their legal systems on liens, to get actively involved in reviewing the new law. The Gárdos, Benke, Mosonyi, Tomori Lawyers' Office, as the Hungarian legal advisor to EBRD and as a member of the Lawyers' Society, participated in processing the observations on the discussion document and, with the help of EBRD (John Simpson) and the Ministry of Justice (Dr András Nemes), developed the recommendations below.

The recommendations on the amendment of the lien related rules of the Civil Code are made up of two main sections. Part I is on material issues, Part II includes recommendations as to the amendment of procedural rules. The EBRD, as an external advisor to the government, has been involved in the development of Part I exclusively, since they thought that the issues discussed in Part II can primarily be answered based on special Hungarian legal and institutional characteristics. EBRD also warned us not to delay or thwart carrying out a material reform of the law on liens by possible debates on procedures. The observations received in response to the discussion document proved that a wide circle of national practitioner lawyers agree that public notary responsibilities regarding to placing liens on personal property and maintaining related records must be reviewed, and some procedures should be developed that will not require anything more than the activities required when placing a mortgage lien on real property; and additionally, the procedures should reflect that mortgage lien on personal property has a

limited “right to thing” nature.

The purpose of this document is to serve as a basis for further discussions on the new rules of liens, and to serve as a basis for ultimately developing specific recommendations of amendment that enjoy the support of wide circles of experts. When developing the recommendations, we have pursued two objectives: the recommendations set out here should, to the highest possible degree, meet the requirements of safe lending as far as the content is concerned, and be as concrete as possible as far as the format is concerned, in order that they can serve as a clear and applicable basis when it comes to actual legislation after the discussions are over.

Part I Material Rules

1. Mortgage Lien on Personal Property

Recommendations:

(1) In order to place a mortgage lien on items of personal property that are registered, the lien shall be entered in that special register under the rules pertaining to that special record.

(2) The rules pertaining to the fact that the public notary record on mortgage liens placed on things that are not registered is of public credibility should be superseded or brought in line with one another (the duplicate regulations should possibly be eliminated), and should be framed in a way that clearly reflects that public credibility is not associated with the existence of the mortgage lien, but only with the fact that the parties have implemented the procedures required under law when placing a mortgage lien.

(3) When a mortgage lien is placed on an item of personal property, the collateral shall be defined in a way that is applicable for identification. When several things serve as collateral, such items can be defined one by one or by a general description but in a way that the general description should also meet the requirement of being applicable for identification.

Justification:

It is important that the legal regulations make it clear for anyone that mortgage lien on personal property can provide collateral for the borrower to a very limited degree due to the nature of personal property. The available legal means can, only to a limited extent, ensure that both the lien is placed indeed and that the lien remains in existence during economic activities and trade pursued with the lien. This stems mainly from the fact that, unlike real property and some special items of personal property, usually there is and can be no full, credible and secure record available on personal property. When placing mortgage lien on personal property that is not registered, one cannot establish either the existence of the collateral or whether the collateral is in the ownership of the borrower, and when the collateral is not in the ownership of the borrower, the lien will not exist even if registered. (In theory the same situation applies for mortgage over real

property as well; in practice, however, there is a special importance to the fact that the real property register narrows down the opportunities for legal disputes, whereas the public notary record fails to fulfil a similar function.) Records of liens, furthermore, fail to ensure that they reflect any changes in owners to the collateral, therefore they fail to provide reliable information to those obtaining ownership subsequently about whether there is a lien on the thing.

The uncertainties that are linked to placing mortgage lien on items of personal property that are not registered cannot directly be reflected in laws, they are, however, direct consequences of the fact that the public notary record contains no entries on property but only entries on liens. A number of recommendations of amendment regarding to mortgage lien over personal property will be explained below under separate headings: lien on things over which the borrower will obtain right of disposal later only (point 4 below), obtaining ownership free of encumbrances (point 5 below), floating charge (point 6 below).

(1) Exceptionally, there are such items of personal property that are **registered** similarly to real property. At present such items of personal property can be certain ships and air planes, and a similar register is expected to be maintained on cars as well in the near future. These records substantially improve the trade of such items and make it possible that the value of such items as collateral come near to that of real property. This is why it is important that such liens, identically to mortgage lien over real property, should be placed by entering them in such special record. In order to achieve that goal, the Civil Code and additionally these separate laws might have to be amended.

(2) Both the Civil Code and the Government Decree on the Lien Record (hereinafter "the Government Decree") includes rules pertaining to the **public credibility** of the public notary record that are not in line with one another (the Government Decree puts certain limitations on public credibility in comparison with the Civil Code). The lien record, due to its limited nature, serves only to draw attention to the fact that there may be some lien over the things entered in there. The fact that this record is declared to be of public credibility under law will raise unrealistic expectations in those applying the law. The public notary record can be maintained and offered as a service even if it is of no public credibility, therefore it is recommended to eliminate the phrase or state that such public credibility is only applicable to properly implementing the procedures necessary to register the mortgage lien.

(3) The effective Civil Code does not, the Government Decree does contain the requirement that **the collateral shall be defined in a way that is adequate for identification**. This rule, however, is such an important rule that comes from the nature of mortgage lien over personal property, which, if not met, results in the lien contract's being null and void, and the lien will not come to existence; therefore this rule should be included in the law. It is also important to state that when a lien encumbers several items of collateral (a possibility that is provided for in Art. 255 of the effective Civil Code), then the items of collateral can be defined either by an **itemised list** or by a

general description. In that respect, the situation is not clear today, because Art 254 suggests as if this double possibility is only available for floating charge. A general description of items of collateral is an important element of floating charge indeed, such general description in itself, however, will not make a lien a floating charge (refer to point 6 below). A general description of items of collateral may be necessary for not only floating charge but also for static liens.

2. Lien over Claims and Rights

Recommendation:

(1) The Civil Code should unambiguously reflect that lien can be established over claims and rights either by registering the lien (mortgage lien), or without registration by transferring the documents (like general lien).

(2) In both cases of lien, the borrower should be obligated to notify the obligors of the claim pledged, at the same time when the lien is placed, about the claim's being pledged, the lien-holder's name, and whether the claim should be settled to the lien-holder or to the borrower. The obligor of the claim pledged, when receiving a notification from the line-holder, may require a confirmation that the lien is placed.

(3) In order to place a mortgage lien, a lien contract is necessary to be made and, in addition, the lien shall be entered in the public notary record, therefore the government decree on the public notary record should also be amended accordingly.

(4) When the claim pledged becomes due before the right to satisfaction from the collateral is open, the lien over the claim will automatically turn into a lien over the thing provided, under the following rules:

- I. the lien over the claim will turn into a mortgage lien over personal property when the lien over the claim has been entered in the public notary record, and, under the agreement between the parties, the borrower takes possession of the thing provided;
- II. the lien over the claim will turn into a general lien when the lien over the claim has not been registered in the lien record, or the lien-holder takes possession of the thing provided.

Justification:

(1) Based on the effective legal regulations, it cannot be established unambiguously what kinds of lien can be established on claims. The prime objective, therefore, is to eliminate this uncertainty in the interpretation of laws. It would not be justified to put limitations on the present possibilities to place two kinds of lien over claims and rights, either by **registering in the lien record**, or **without registration**.

(2) In order to strengthen the security of lien over claims and rights, and to prevent the borrower from taking measures that may adversely affect the lien, as well as to allow the obligor of the pledged claim to meet the obligations contained in Art. 258 (2),

the borrower should be made obligated to send notification to the obligor of the claim. The borrower's such obligation would differ from the regulations effective now and earlier with regard to the following:

- III. The notification will not be a precondition to the lien to come to existence but only an obligation of the borrower, the violation of which would bring about the general consequences of any breach of contract.
- IV. The obligation will be discretionary in nature, from which the lien-holder and the borrower may deviate.
- V. The obligation to notify will be there when the lien comes to existence and not when the lien is enforced.
- VI. The notification will be the prime responsibility of the borrower, and when a notification is sent by the lien-holder, the rule pertaining to the obligor of the pledged claim should be identical to the rules pertaining to obligors of assigned claims. (Art. 328 of the Civil Code).

The notification to the obligor should include an indication of the lien-holder's person and whether the obligor should settle the claim with the lien-holder or the borrower, depending on whether the parties have placed a general lien or a mortgage lien over the object of the claim for the period after the claim is settled (see paragraph (4) of this point above).

(3) The Government Decree contains provisions on mortgage lien placed over things of personal property only, consequently there is no possibility at present to register a mortgage lien over claims or rights in the public notary register. Therefore the **Government Decree should also be amended**. The notification of the obligor is no precondition to placing a mortgage lien, and in that case the obligation contained in the effective Art. 258 will rest with the obligor of the claim after the notification is received only.

(4) It is recommended that, in order that the lien over the claim should not cease to exist when the claim pledged is settled before the right to satisfaction from the collateral is open, the Civil Code should state one of the cases of the lien's transforming under law. As a result, under the rules pertaining to transforming lien (point 8), the priority position of the lien replacing the lien over the claim will be determined by the time when the lien was placed.

3. Lien Over Securities

Recommendation:

(1) It should be made unambiguous that both general and mortgage liens can be established over securities (being either physical ones or dematerialised), similarly to other things.

(2) When placing general lien over dematerialised securities, taking possession of securities will be replaced by entering the lien into the securities account (blocking the

account).

Justification:

(1) Based on the effective regulations, it cannot be established unambiguously, by comparing the rules on liens and rules on securities, whether mortgage lien can be placed on securities or not. Due to interests in a secure securities trade, **the special rules to securities must be given priority**. It is recommended that the problem coming from a contradiction between the “right to thing” capacity of lien and Art 338/B of the Civil Code should be eliminated in relation to mortgage over physical securities by increasing the number of cases of obtaining ownership free of encumbrances (see point 5 below). This solution will offer wider opportunities for the contracting parties than eliminating the possibility of placing mortgage lien, and is in line with the recommendation that the cases of obtaining ownership free from encumbrances should be widened for personal property encumbered with mortgage lien. It is recommended that both kinds of lien should be allowed to be placed over dematerialised securities as well, since, in practice, situations might arise when it is not advisable to use general lien (e.g. in the case of floating charge). The contracting parties, however, must be aware that the “right to thing” capacity of **mortgage lien** will be there to a limited degree only in the case of securities, which will be manifested in the fact that the person obtaining ownership of the securities in good faith will obtain ownership free of any encumbrances (see point 5).

(2) Special rules are necessary for placing **general lien** over dematerialised securities, since one cannot take possession of dematerialised securities in a traditional way. The physical possession of securities is replaced by **blocking the securities account**, which, similarly to taking possession, ensures that the existence of the lien can be recognised, and that the obligee is “within possession” when it comes to lien enforcement. Therefore it is recommended that general lien should be placed on dematerialised securities by registering the lien in the securities account. This solution will best serve the needs of securities trading, and is in line with the principles of the Securities Act..

4. Lien on a Thing or Right over Which the Borrower Obtains Right of Disposal after the Lien Contract is Made

Proposal:

(1) The law should make it clear that (i) in that case only mortgage lien can be established, (ii) the lien will only come to existence when the borrower obtains right of disposal over the collateral, and (iii) when the right of disposal is obtained, the lien will automatically come to existence.

(2) The following rule is recommended in relation to the priority of satisfaction provided by such lien. The order of satisfaction should be determined by the time of registration of the mortgage lien established by the borrower placing a lien over a thing to be obtained in the future as well as the mortgage liens established by any subsequent borrowers. The liens placed by owners preceding the borrower, even if they

are placed after the lien is registered, will precede (among one another also in the order of their coming to existence) the lien established by the borrower.

Justification:

(1) The main problem in the effective regulation on future liens is that the wording of Art. 253(2) suggests as if the lien would come to existence even before the borrower's obtaining a right of disposal over the thing (as it is defined by Art. 112 of the Civil Code). That suggestion is also confirmed by the provision of Art 254 as well, which states only in relation to floating charge that the lien over a future thing will only be effective after the borrower has obtained the right of disposal over the thing. Additionally, the effective law fails to give an answer to the question whether both kinds of lien can thus be placed, and fails to clarify unambiguously the issue of priority of satisfaction. Therefore the prime objective of amendment in relation to that topic is to make the regulation more unambiguous. It is recommended therefore that a provision that is included in the rules pertaining to floating charge should be moved to the rules on lien over future property, a provision, that has been interpreted by many as a rule to be part of rules pertaining to this latter lien, and which says that **the lien will come to existence only after the borrower has obtained a right of disposal** over the collateral. In the case of mortgage lien it is possible to meet any other conditions to the creation of the lien, i.e. to make the lien contract and to enter the lien in the Land Register. After that, when the borrower obtains the right of disposal (or, in practice, ownership most of the time), the mortgage will **automatically** be created, without any other actions by the parties. That fact should properly be reflected in the Government Decree. That fact, however, is only true in the case of **mortgage liens**, because a general lien will not be created before the collateral is transferred to the lien-holder.

(2) The time when the future lien is created (i.e. when the right of disposal is obtained) may be uncertain. The problems arising from that fact could be eliminated by the recommended rule under which the **priority of satisfaction** will be determined by the registration time of the lien, as the main rule also dictates, but all the liens will take priority that have been placed by those who have had a right of disposal over the collateral before the registered borrower.

5. Obtaining Ownership Free of Encumbrances

Recommendation:

The person obtaining ownership in good faith over a thing, claim or right encumbered with mortgage lien will obtain ownership free of encumbrances in the following cases:

VII.the thing has been sold in commercial trade;

VIII.the thing obtained is money or securities;

IX.the thing is one of the customary products the seller trades in;

X.the lien cannot be traced back in the public notary record or in any other record;

XI.the sale effected meets the conditions stipulated in the lien contract;

XII.the object of floating charge has been sold as part of regular economic activities.

Justification:

Some exceptions should be regulated here to a major rule under which the person who obtains ownership of a collateral will obtain an ownership encumbered with lien. That rule is applicable to any kinds of collateral in theory due to their nature, however, will, in practice, be applicable to personal property mainly.

(1) Lien is an institution that is similar to ownership in nature. In order to create legal harmony, in all those cases in which it is possible to **obtain ownership from a person other than the owner** (Art 118 of the Civil Code), it should be allowed that an ownership free of encumbrances could be obtained from the borrower.

(2) The recommended rule that ensures ownership free of encumbrances to a person obtaining securities in good faith (under the rules pertaining to securities) also serves to create harmony among the provisions of the Civil Code (refer to Art.s 119 and 338/B) as well as to ensure a smooth securities trade.

(3) Furthermore, secure trading requires that this exception should be made applicable also to those cases in which the sale is effected outside commercial trade though (e.g. between two production companies, producers or wholesalers), the thing, however, is **a product that is regularly traded by the seller**, in which case the buyer cannot be expected to check the lien record.

(4) For the sake of reflecting real life, the law should acknowledge the barriers of mortgage lien over personal property, the imperfections of the maintenance system, and consequently, in those cases where **the borrower cannot realise the existence of the lien by checking the lien record** (for instance because a previous change in ownership has not been reflected in the record), the bona fide buyer should be granted an ownership free of encumbrances for the sake of secure trading.

(5) Flexibility and reasonable adjustment to the circumstances of economic life are the objectives of the recommended new rule under which the parties may stipulate in the **contract itself** the conditions under which the borrower is entitled to sell the collateral in a way that results in the termination of the lien (e.g. certain objects practically lose value after a certain period has passed, economic sense dictates in that case to allow to sell such items free of encumbrances). The importance of this rule also lies in the fact that it serves as one of the bases to floating charge (see point 6 below).

(6) Floating charge is a lien that provides most flexibility to the borrower in disposing over the items of collateral (see point 6 below). In order to express that nature of floating charge and to ensure secure trading, bona fide third parties may suppose that, when a mortgage lien has been registered as a floating charge, the borrower is authorised to

sell the thing free of encumbrances as part of his regular economic activities. Such third parties, therefore, will obtain ownership free of encumbrances when the sale is effected as part of the regular economic activities of the borrower even if the sale is against any possible contractual barriers.

6. Floating Charge I (Group Lien)

Recommendation:

Regulations on floating charge are recommended to be reviewed to the effect that

XIII. floating charge shall be a mortgage lien that can be placed on things of personal property, claims, and rights, which mortgage lien can be created by registration in the public notary record;

XIV. floating charge shall cover several items of personal property, claims and rights at the same time, in a way that

XV. the objects of the lien are not defined individually, and

XVI. the parties have agreed that, on one hand, the lien should cover any future accessions - real property, claims or rights - to the group of items of property that serves as collateral, and, on the other hand, the lien should cease to exist with regards to those items of property that leave the group of items of property as part of regular economic activities.

XVII. There is no need for having effective rules pertaining to the transformation of floating charge into a lien that encumbers individually defined items of property.

XVIII. In the lack of agreement by the parties, the floating charge will not cover the money replacing the thing sold.

Justification:

Under the effective regulations, it is difficult to separate floating charge from individual lien on one hand, and one cannot unambiguously determine its legal characteristics on the other hand. Strong arguments can be made in support of the fact that, under the effective regulations, floating charge is a lien of no real “right to thing” capacity, but is a *floating* lien of some binding capacity, and will turn into a lien with “right to thing” capacity only after a further step is taken. Due to all this, it is doubtful what priority rights a floating charge can offer.

There is a strong interest coming from economic life that floating charge should work as a lien with real “right to thing” capacity. In order to achieve that, the recommendation views floating charge as no new kind of lien but a lien that can be created by using the elements available in the legal system on liens. The recommended rules about floating charge, therefore, contain no new rule, only make it unambiguous, and draw the attention to the fact, that the parties have the possibility to create such a complex lien.

A lien will be a floating charge when each of the following characteristics is there:

XIX. The floating charge is an **individual lien**, the objects of which are items of personal property, claims and rights that are not registered, and in order to place a lien over such items there is no need to enter the lien in an itemised record (since a mortgage over registered items can only be placed by registration in the itemised record, as it is explained in point 1 above, which means that the items of property cannot be movable).

XX. The next characteristic of floating charge is that the lien usually covers **several things belonging to one group**. This is possible to do anyway, but in the case of floating charge the pledged things and rights do not represent the objects of lien in a static way, but the parties expressly allow that individual things that represent the objects of lien can change as per those contained in paragraph (4) above.

XXI. The assets that are the objects of floating charge are **defined by a general description** (in a way that the description, in line with general rules pertaining to mortgage over personal property, is adequate to identify the assets that are the objects of lien both at the time when the lien is created and later).

XXII. Floating charge is different from individual lien mainly in the fact that the parties have agreed to allow changes in the assets that serve as objects of lien by defining those cases where new assets can be added to the objects of lien and where individual items of collateral may leave the group of items the lien covers. This is nothing else but (i) expanding the scope of the lien over certain things or rights that belong to the group and the right to disposal over items the borrower obtains after making the lien contract (see point 4 above), and (ii) using the possibility that the parties may define in the lien contract the circumstances under which the lien will cease to exist (see point 5 above). As a consequence of all the above, the **rules of future lien** will apply to the items of property that are new accessions (especially as far as priority of satisfaction is concerned), and **the general rules of termination of lien** will be applicable to lien over items that leave the property. A special case of obtaining ownership free of encumbrances will be applicable to floating charge.

XXIII. Since floating charge is built up from the elements of individual lien, and one can define those items of property that are covered by the lien at any point in time, **there is no need for transformation**, neither to turn floating charge into true lien, nor to be able to enforce the lien. When the possibility of enforcing claims is open for the lien-holder, he can act under the general rules to claim enforcement. There is a possibility, of course, also to turn floating charge into common individual mortgage or general lien under general rules (see point 8 below).

XXIV. It is difficult to interpret it, and it does not provide much benefit in practice that, under the effective regulation, when a thing belonging to the property encumbered with floating charge is sold, the lien will cover the sale price replacing the item. When creating a floating charge, the parties can define the mass of property that should be

encumbered with the lien. The lien will cover the things to be obtained later by the borrower that belong to that mass of property. That issue, therefore, can be adequately clarified in the lien contract, and there is no need for special regulations.

7. Floating Charge II

Recommendation:

The law should allow (even if the Execution Act and the Bankruptcy Act should be amended) that when several things serve as collateral to the lien and these things represent the full property of an enterprise or such part of the full property that can function as an independent unit, and the parties establish the lien in this way, then, even either directly under the contract, or under an instruction by the lien-holder, this mass of property should be treated as one functioning unit in the course of lien enforcement, let it be either individual enforcement or liquidation. In order to achieve that goal, a property supervisor should be appointed with a term ending with the sale of assets, who will ensure that the property is operated during the lien enforcement period.

Justification:

Another form of floating charge, of superior level, is when the items of collateral together represent a mass of property that is applicable to be operated as an independent **economic unit**. That unit can be the whole or part of an enterprise, but not any part of it, as it is contained in the effective regulation, but such part that meets the previous description (e.g. a factory site, a commercial unit, etc.). In that case, it is advantageous for both the creditor, the borrower and the national economy when such economic units (and the jobs they represent) can be maintained. The opportunity would be open for such solution by the recommended type of floating charge, the special characteristic of which would be, from a regulation perspective, that the regulation would expressly allow **the property to be sold as a unit**, and would define the rules of procedures. When creating that regulation, special care should be taken to ensure that the valid interests of both the lien-holder creditor and the borrower, and any other creditors should be observed in the course of enforcing floating charge.

8. Transforming Liens

Recommendation:

It is recommended that the law should allow to transform general lien into mortgage lien, mortgage lien into general lien, and floating charge into individual mortgage lien, in a way that the priority of satisfaction should be adjusted to the time when the original lien was created. A transformation can take place under an agreement between the parties, or, if the parties have agreed so, under a unilateral instruction by the lien-holder.

Justification:

Under the current regulation, there is no possibility to turn mortgage lien into general lien or vice versa; the effective law dictates the original lien to be terminated, and a new lien to be created, the satisfaction priority of which will be determined by the time when the new liens are created. **Allowing the different types of liens to be transformed into one another** would provide flexibility to the system, which would clearly serve the

interests of the parties. A special case to such transformation is where a lien placed on a claim turns into a lien over a thing provided (see point 2 above), as well as where a lien securing bank loan turns into individual lien or floating charge (see point 9 below).

9. The Fate of Lien Securing Bank Loan

Recommendation:

(1) The law should specify that any lien securing bank loan should be registered in the public notary record within 6 month after the law takes effect, otherwise the lien will no longer be in effect. Registration may be requested unilaterally by the lien-holder under a declaration about the lien contract and the outstanding claim amount.

(2) After 3 years have passed from the time when the amendment takes effect, the registered and current liens securing bank loans will turn into floating charges or individual mortgage liens.

Justification:

(1) It would enhance legal security if every lien would exist and be recognisable under the effective regulations, therefore it is recommended to **register any lien securing bank loan** that has been created before April 30, 1997 and remains valid under the effective regulations. The registration of liens securing bank loans in itself would not change either the rules pertaining to the lien, or its legal nature, or the associated priority of satisfaction. Lien-holders, in order not to lose their liens due to improper actions on the part of the borrowers, shall be entitled to request the registration of the lien under a declaration about the lien contract and that the claim is still outstanding.

(2) The parties would be given the possibility to **transform** liens securing bank loans, under the rules described in the previous point, into e.g. mortgage lien over personal property under the general rules pertaining to transformation, with a priority that would be determined by the priority of the lien securing bank loan. In the case where the transformation is not effected within 3 years after the effective date of the law, liens securing bank loans will automatically be transformed.

10. Other Amendments

Recommendation:

(1) The rules contained in Art 268 of the Civil Code, on the right of disposal over priority of satisfaction (and waiving this right) should be made more unambiguous.

(2) It should be ensured in the Execution Act that lien-holders should not be ignored in execution procedures initiated by other creditors.

(3) It should be made unambiguous that the lien should not be prevented from coming to existence due to the collateral's being abroad at the time of placing the lien.

Justification:

Practice has raised a number of smaller, but practically important, issues in addition to the above, but these smaller issues associated with the rules on liens should be sorted out under an amendment of law, if possible. These issues are summarised in this point.

Part II Rules on Public Notary Proceedings

1. Registration in the Public Notary Record

Recommendation:

(1) It is recommended that the amendment should abolish the provision under which a precondition to registration in the public notary record is that the lien contract should be notarised. Registration requires that the document that creates a lien should be a public document or a private document with full probative force or a copy of it verified by a public notary.

(2) Registration should be effected based on a written request, the content of which should be mandated by law in line with the data to be recorded. Attached to the written request, should the contract, resolution, etc. be submitted to serve as a basis to the request. Based on an authorisation in the lien contract, the lien-holder may submit the request on his own.

Justification:

(1) From a legal perspective, nothing justifies the necessity to notarise the lien contract in order to create a mortgage lien on personal property. The **mandated notarisation of the lien contract is completely alien to the legal system**, and is not necessary either to create mortgage over real property or to transfer ownership of a thing of personal or real property. Similarly to the precondition to register mortgage over real property, a public document or a private document with full probative force should be required to create mortgage over personal property as well.

(2) The procedure could be further simplified if registration of liens would be effected based on a request form. The parties should not even be required to personally go to the public notary. The procedure, strictly speaking, is not a true public notary procedure, but a responsibility that is carried out by the Chamber of Public Notaries under a separate law (the Civil Code).

2. Public Notary Fees

Recommendation:

(1) It is recommended that the fee to be paid for registration in the public notary record should be a sum that ensures a return on the investment in creating a computerised maintenance system, ensures financial resources for maintaining and upgrading the system, as well as reasonable profit for the operator.

(2) No fees can be charged for searching for data in the public notary record other than established by law.

Justification:

(1) The elimination of the requirement to notarise lien contracts would mean a substantial drop in financial resources available for public notaries. In order to partly make up for this loss, **the fee charged for registration in the public notary record should be increased**. That change would finally create a realistic situation, since the funds necessary for the maintenance of the public notary record system could be financed from the fees charged for the use of this system and not from a fee charged for a service that is artificially and unnecessarily forced on customers.

(2) Under recent practices, public notaries tend to charge a public notary hourly fee for searching in the records, in addition to the fee for searching specified by law. This practice cannot be accepted even from a theoretical perspective, because the records should be accessible by the public the simplest possible way. Searching in the records is no responsibility of a public notary. It is not acceptable that data can be traced back in the system only at a time when the public notary is available.

3. Legal Remedy in Relation to Public Notary Proceedings

Recommendation:

(1) The amendment of the law should create wider opportunities to turn to court with regards to proceedings by public notaries, primarily when a request for registration is rejected.

(2) The Ministry of Justice should be given the right to require summary information on the operation of the public notary record and have full access to the records.

Justification:

(1) It is the responsibility of public notaries to ensure, before registration, whether all conditions necessary for registration are met. In the lack of such conditions, public notaries are supposed to reject registration. Such rejection is not expressed currently in a resolution with justification attached to it. Partly this is the reason why no **legal remedies** are available against such public notary action. Since it is a public duty to maintain the lien record, therefore it is by all means necessary to ensure that legal remedies are available against associated resolutions.

(2) The fact that the Ministry of Justice should be given information on the record is also associated with the task to be of public nature. The required information will not be related to the data contained in individual entries, but to the operation of the system and should be of such composition that the information can be extracted from the system easily without any major investment.