

CHATTEL COLLATERAL LAWS OF BULGARIA, RUMANIA AND HUNGARY AND JAPANESE ENTERPRISES' BUSINESS

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SUMMARY

Japanese manufacturers' investments for the EU market, which was prone to be concentrated into Britain, are being directed to Central and East Europe where the market economy has been in progress, partly triggered by the weak Euro. In Central and East European countries, using the EBRD's 1994 Model Law on Secured Transactions as a reference, legislation of chattel collateral laws as their business laws of market economy has been under way. Legislating operations of chattel collateral laws have also been in progress in the ASEAN countries, such as Indonesia, Vietnam and Thailand, after the ASEAN currency crisis, receiving advice from the World Bank. In Asia, legislation of the chattel collateral law is in motion as means of reforming the financial institutions that were too much dependent on real estate collateral financing. On the other hand, in Central and East Europe where enterprises cannot easily offer real estate as a security, legislation proceeds from the standpoint of developing a new corporate finance so as to supply fund procurement means using movable properties and claims as securities.

There is not much significance in legislation unless the law is actually used. To examine whether or not the law is actually used, the analysis of conative impulse proposed by Häger Ström, a legal philosopher, is necessary. Doing the analysis of will impetus, while introducing the content of the Law on Registered Pledges of Bulgaria, we can see a characteristic of forming chattel collateral as right of pledge and not as collateral of fiduciary transfer. Although there is an inconvenience that certain pledges require to be

registered twice, the merit of clear processing in collateral execution exceeds the former. A tendency of doing unsecured business in case no Japanese collateral nor guarantee of Japanese enterprises is available is seen in the business of Japanese enterprises in developing countries, but concerning business in countries like Bulgaria, Rumania and Hungary, it is advisable to keep in mind doing business based on registration of the right of pledge of local companies including local subsidiaries. Otherwise, insufficient debt collection, or a situation such that the local subsidiary as a successful result of local investment becomes the target of LBO (leveraged buyout), using the account receivables as a security, might occur.

CHAPTER I

NEW LEGISLATION OF CHATTEL COLLATERAL LAWS IN CENTRAL AND EAST EUROPE AND ASIA

1. CAUSES OF JAPANESE ENTERPRISES' LAUNCH INTO CENTRAL AND EAST EUROPE

(1) Japanese Enterprises' Launches into Central and East Europe and Chattel Collateral Law

Japanese enterprises' launches into Central and East Europe, including Hungary, Poland and Slovakia have become marked since 2000. The sudden drop in Euro rate after 2000 can be considered a direct cause. Production bases in EU of Japanese enterprises were located Britain by an overwhelming majority. As the British pound does not join Euro, its rate has increased

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about 30% by the sudden drop in Euro, and the attractiveness of Britain as a production base in EU has rapidly decreased. The choice is either to decrease the production capacity in Britain or to move factories to Euro countries, or otherwise the competitive force in the Euro market will drop by 30% of the higher pound. For example, Bulgaria adopts the currency board using Deutsche mark. Mark is closely linked with Euro, and since the financial policies of the country receives wide restrictions under the currency board, there is no significant inflation or devaluation. Located within the Eurozone as a production base aiming at the Eurozone as a consuming area, Bulgaria where the level of per capita national income is much lower is hopeful as a production base with lower production costs. However, in Bulgaria the investment environment must be clearer. Countries like Hungary, Poland, Slovakia and Czech are known for the advanced destatization, and foreign-based enterprises can have a conviction that they can do business on international business rules, to a degree. Whereas, compared with these four countries, the investment environment in Bulgaria and Rumania can be said to leave subjects toward further clarification, including the degree of progress of market-oriented economic reform.

Although it is said that, in connection with the expansion of the EU to the east, there are merits of launching into Central and East Europe where quality human resources are available at low costs, for the author the explanation seems too general. In Hungary, Czech and Slovenija, production costs of export-oriented foreign-based enterprises are increasing drastically. In Slovakia and Poland too, the situation can be said to become the same. Namely, it can be said that the time of participation in the EU is approaching can be said that their living standards has come up to the EU level. Although there is still time before joining the EU (probable 2007 or later), Bulgaria and Rumania are promising as target countries of investment where the investment can be collected in five years or so, if only the business environment becomes clarified. The chattel collateral law to be discussed in this text is important as a legislation to ease business. Because, local companies can get local finance, using their own accounts receivable. This

minimizes the parent companies' burden as to invest and finance their local subsidiaries by procuring funds and bearing exchange risks themselves. Each parent company can secure an additional chattel collateral corresponding to the exchange risk, and by securing the export account receivable, on the same currency as that of the finance, as a collateral, they can even get rid of the exchange risk.

(2) Is the Reason for Launch into Britain Applicable to Launch into Central and East Europe?

When Japanese enterprises launched into Britain, (1) personnel expenses in Britain were overwhelmingly lower compared with production in consuming markets like Germany, France and Benelux, (2) communication with workers at local factories in English, which Japanese engineers could use, and (3) Britain that has been accepting a lot of Japanese tourists for years is familiar to Japanese people, are major reasons. Other reasons many include the following: (4) while labor unions were weakened under the Thatcher government, trade unions in Germany and France had an image that they were powerful and had strong requests for improving labor conditions; (5) facts that there was an international finance market of London and Japanese banks had launched there from before, and that those Japanese banks acted as useful information sources for launching areas also contributed to making decisions about launch into Britain; (6) for launch into Italy, the reason that it was not examined so much seems that the image of a country involving high inflation and political complication was strong among Japanese people; and (7) Launch into Ireland where English as the official language had been popular during the 1980s, but launch rash was not so much compared with Britain due to reasons of it being a small country with poor access of physical distribution and that it would not be possible to expect local finance there.

Of the above reasons of launch into Britain, reasons that can be applied to launch into Central and East Europe are only items (1) and (4). On the other hand, as reasons that were not applicable to countries other than Britain but seem to be applicable to Central and East Europe, items (2), (3), (5), (6) and (7) can be mentioned, as commented below. For item

(4), the organization power of trade unions, including the Solidarity Union of Poland, rapidly became weak under the old system after the collapse of the socialistic system, and not only new trade unions do not readily come out but also the power of newly born trade unions is weak. For item (3), tourists going to Czech and Hungary are increasing but it is only because these countries have become popular for reasons of curiosity and enjoyment of medieval Europe at low prices, and, these countries are not yet so familiar to the Japanese as to prepare direct flights and we shall not be able to have so much expectation even in the future. For item (2), the number of English-speaking human resources is very small, and local languages are not so easy for the Japanese to master. For item (7), Central and East European countries are small, each having a small population.

(3) Weak Euro and M&A

As described above, launch into Central and East Europe is given consideration despite but a few points common to launch into Britain, just because the weak Euro and non-participation in Euro of the sterling pound are expected to continue for the time. Expansion of EU enterprises' overseas investments in the United States, mainly M&A, is one of the causes of weak Euro. EU enterprises' M&A in countries outside the Eurozone means selling Euro and buying dollar¹. Enterprises of the Eurozone buying British enterprises means selling Euro and buying pound. Since funds for EU enterprises to have their production bases in Central and Eastern countries, in Southeast, South and East Asia and in South America is dollar, they have to sell Euro and buy dollar. Of course, European investors once bought dollar and invested it in the US stock market when the US stock market continued to be brisk. It seems that the decline of Euro has proceeded further because speculative players handling hedge funds and the like, judg-

ing that the basic tone of selling Euro and buying dollar will not change, are reacting susceptibly and increasingly applying the pressure of Euro selling.

2. CHATTEL COLLATERAL LAW AS PART OF LEGAL SYSTEM REFORM

(1) Chattel Collateral Law and M&A

M&A outside the Eurozone by EU enterprises will be continued so far as competitions with US enterprises adds severeness in the global market. One of arms for promoting M&A outside the EU is the chattel collateral law discussed in this text. In the legislation of the chattel collateral law, often the collateral registration of unspecified accounts receivable of the future, as well as the collateral registration of collective movable properties in stock and specified future credits, are recognized. Namely, by opening the way for movable properties as well as real estate, it is intended to facilitate financing by financial institutions. The unspecified account receivable of the future is in a word the future cash flow of the enterprise. When the future cash flow of the enterprise is expected to be fairly above the market value of stocks of the enterprise, it is worth buying. Buying by securing finance, using the future cash flow of the target enterprise of leveraged buyout (LBO), is also possible when the unspecified account receivable of the future can be registered as a collateral. The chattel collateral system under UCC Article 9 of the United States has an aspect of promoting M&A, including LBO in USA².

EBRD recommends the legislation of the chattel collateral law as part of the legal system reform necessary for promoting system transition in Central and East Europe/CIS countries. The key point of the Model Law on Secured Transactions announced by EBRD in 1994 is this chattel collateral registration system. However, the intention of EBRD's recom-

1 According to Financial Times of October 24 2000, overseas investments by enterprises in Eurozone include 49% for the United States and 22% for Britain. In 1999, US\$73.6 billion, one third of M&A across the whole world, flew into the United States, and Deutsche mark dropped 39.4% against dollar during 22 months since January, 1999.

2 As an example of the chattel collateral system, UCC Article 9 of the USA and the Floating Charge of Britain can be mentioned. Although there can be many M&A cases done by methods other than LBO via chattel collateral registration, it seems that the fact the LBO by chattel collateral is available lowers the hurdle to M&A for management people.

mentation of legislation is not promotion of M&A. It is because of an expectation that, in these countries that were once under the USSR-type socialist system and where land cannot easily be available as a collateral, financing will be activated and the private enterprise sector will grow when new collateral means are supplied. In the future after the private enterprise sector grows, the chattel collateral registration system may be used as means of M&A, but it must be gratifying that enterprises attractive as the target of M&A are increasing. Since M&A by big Western enterprises will deepen economic relations with them, it will make economic integration as EU more close.

(2) Necessity of Chattel Collateral in Central and East Europe

Under the USSR-type socialist system, land was either state-owned or public-owned. Not allowing private land holding makes it difficult to secure finance using land as a collateral. Of course, there was a way to obtain finance by using the right of land use instead of the land ownership, but it was not easy to use the right of land use as a collateral because of a difficulty in evaluation compared with the land ownership. Since a consciousness that naturally land is public-owned and the right of residence is secured by the state even after the collapse of the socialist system rooted among the nation, the use of land ownership as a collateral does not easily proceed in Central and East Europe³. For the people of Central and East Europe, it is acceptable to borrow money on the security of the land on which his/her house is built but it is not agreeable to lose the land and house and driven out of the place of residence when he/she cannot repay the debt. Further, the question is land for business operation. Since land for business operation had been occupied by state-owned enterprises before, formation of the market for the ownership of land for business operation has not been developed.

For privatized state-owned enterprises, land is to lease and not to sell. Also, when land is sold, since only foreign capitals have funds to purchase big land lots, it will only promote land purchase by foreigners and cause a political issue.

Under the situation there is no distributing market of the land ownership, it is not easy to use the land ownership as a collateral. The building ownership can be used as a collateral, but since the land and building are filed in the same register, often it is difficult to set the mortgage right to the building when owners of the land and the building are different. Thus, as collaterals other than real estate, such as land and buildings, movable properties and credit can be considered. We can take products in stock, raw materials, factory machinery, cars, stocks and other movable properties as collaterals. Further, by taking accounts receivable as collaterals, this will make it easier for newly established enterprises having only small physical assets and enterprises supplying services to obtain finance. Also, there are companies like leasing companies that need to get finance on the security of their lease credits. For a company at the foundation stage, the burden to purchase systems and machinery themselves is heavy and a big depreciation adversely affects the profitability. And, in fields of rapid technological innovation, the systems and machinery need to be replaced before the depreciation is finished. Promotion of the leasing industry is necessary for creating new, growing private sectors, and in this sense provision of credit collateral finance is desired.

Locally capitalized financial institutions in Central and East European countries are generally said as they lack abilities to supply funds to the private enterprise sector due to little accumulation of know-how to cope with nonperformance loans and check credit standing. So, they sell their equity capitals to foreign capitals to supply funds, by investing fund

*3 For example, in Bulgaria, the "Law relating to possession by people" stating that the real estate owned by a household is limited to one 100m² real estate for normal living and one 60m² real estate for cottage use was alive till 1990, after the collapse of the socialist system. Also, under the "Law relating to farming land and its possession," possession by a non-resident is not allowed even today, and, even for a resident, farming land holding per household is limited to 300,000m² (Sergei Milanov "Legal System in Bulgaria," NBL vol.496, p.36)

procured overseas as foreign-based financial institutions, too.⁴ However, newly established private enterprises have only small assets that are available as collaterals. Making use of their know-how, the foreign capitals offer loans based on the cash flow, but they cannot believe the newly established enterprises so much as to offer unsecured finance. Thus, unspecified accounts receivable of the future and products in stock are taken as collaterals. They come to think it worth taking movable properties of which, unlike the case of real estate, the ownership itself is transferred by occupancy when these collaterals are registered at national institutions and transfer itself is easy, and, when the private auction of collaterals is permitted by the chattel collateral law, collateral execution is also easy.

Alpha Bank, which the author visited in Rumania on April 26, 2000, is the type of such foreign-based banks. Greek Alpha Bank bought the capital of a Rumanian state-owned bank and obtained the right of management, and due to a shortage of fund, finally bought the whole capital of the Rumanian side. Finance has become concentrated on Greek-based enterprises operating in Rumania. Finance to Rumanian-capital enterprises is also considered. However, as the cash flow of those enterprises itself is unstable, and without collaterals, financing has to be made little by little through the introduction of correspondent Greek-based enterprises. The chattel collateral law under Law on Promotion of Economic Reform, 1999 has been established, but as collateral registries are not available yet, no finance on account receivable is offered. Their purchase of the Rumanian bank merely means that it bought the physical branch network, and relations with branch correspondents during the time of socialism are mostly discarded.

3. DIFFERENCE IN LEGISLATIVE BACKGROUND OF CHATTEL COLLATERAL LAW BETWEEN ASIA AND CENTRAL AND EAST EUROPE

(1) Asia: Too much Dependence on Real Property Mortgage Finance

In Asia, too, the movement of legislation to recognize chattel collaterals by registration is rising. In 1999, in Indonesia and Vietnam, chattel collateral registration was legislated by the Fiduciary Transfer Act and the Government Ordinance No. 165 on Registered Movable Collaterals, respectively. In Thailand, the draft Business Collateral Law is almost finalized at the Ministry of Justice and legislation is expected during 2001.⁵ The Japanese “Law relating to Special Cases of the Civil Code on Perfection of Credit Transfer of 1998” can be considered as part of it.

The background of such successive legislation in Asian countries is different from the background of legislation in Central and East Europe. In Central and East Europe, where real estate centering on land is actually not available as a collateral, they try to newly supply fund procurement means of enterprises by registering movable properties and credits as collaterals. In Asian countries, where the excessive supply of finance dependent on real estate collateral soared the value of real estate, and financial institutions had nonperformance loans with them when the investment boom was over. Thus, development of collateral means, other than real estate collateral, became necessary. In Asia, under the pretext of diversifying fund procurement means of enterprises, the aim of legislation is to make financial institutions sound.⁶

It is possible to argue that, in Vietnam, a socialist country, the situation is the same as in the formerly socialist countries of Central and East Europe

4 According to Financial Times of October 20 2000, as of the 1999 year end, 41% of total bank assets of the formerly socialist countries of Central and East Europe was occupied by foreign-based banks. Viewed by countries, 55% in Bulgaria, 18% in Rumania, 51% in Hungary, 44% in Poland, 49% in Czech, and 25% in Slovakia. The newspaper also reported that while the ratio of total bank assets to GDP was 254% in the whole of Euro countries, it was only 69% in the whole of formerly socialist countries of Central and East Europe.

5 These contents are discussed by Koji Suzuki “Draft Business Collateral Law of Thailand,” Report of Research Institute for Development and Finance, vol.4, Oct. 2000.

6 Besides, legislation to make financial functions sound have been realized, including revision of the central bank law, revision of the bank law, and establishment of the nonperformance loans buying agency (AMC).

in that land cannot be used as a collateral. However, in Vietnam where state ownership of land is the only way, the right of using the land where the factory is located was naturally taken as a collateral by taking a real estate of factory building as a collateral. For Vietnam, it can be said that banks were too much dependent on real estate collaterals in a sense that, since the one-enterprise-one-bank account system lasted till around 1997, banks had no other choice but to repeatedly finance enterprises by using the same real estate, namely the same land and buildings. In China, land is either state-owned or cooperative-owned. It is also pointed out as a reason that state-owned commercial banks came to have nonperforming assets as a result of financing to state-owned enterprises because, in financing to province and prefecture-class national enterprises, executives of province and prefecture-class people's committees worked on executives of the state-owned commercial banks. Since only secured finance was allowed till the making of the Rules on Loans of Central Bank of 1996, in the above cases, too, they made additional financing on the same land and buildings. In this sense, they were also too much dependent on finance on the security of real estate.

(2) Local Banks, Enterprises and Foreign Banks

After the Asian Currency Crisis, the World Bank has given advice of legal reform in Asian countries. Both the bankruptcy law and competition law put stress on legislation of the chattel collateral law and at the same time on judicial reform. It is because the slow proceeding of bankruptcy procedures and collateral execution has generated special relations between financial institutions and enterprises and this exerts adverse effects on fund supply. As the chattel collateral law allows collateral execution by collateral registration, without passing through courts (so to say "private sales"), prompt collateral execution is expected.

Characteristic relations between financial institutions and enterprises on collateral supply are mentioned, by countries, in the following. In Indonesia, real estate mortgages are formally supplied to state-managed commercial banks, and finance from finan-

cial clique-based banks to local financial cliques is generally unsecured finance. In Thailand, four major private commercial banks occupy real estate mortgages, and foreign banks and foreign-based banks finance these four major private commercial banks using the BIBF (Bangkok offshore finance market). In Malaysia, racial local financial cliques (Bumiputra financial cliques) and Chinese local capitals give the first priority of real estate mortgage to banks closest to them. In Philippines, local financial cliques have capital relations with commercial banks, however, as these banks are small in scale and as the compliance of financial institutions became strict since the Mexican crisis of 1982, conditions has continued to be against procurement of business finance.

A fact that is common to these Asian countries is that finance to local financial cliques offered by onshore or offshore foreign-based banks is not secured by real estate collaterals. Partly due to their anxiety about court functions, they seem to have offered loans to local foreign-based enterprises either by taking the guarantee from their parent companies at home or without taking any security. The chattel collateral law will enable these onshore and offshore foreign-based banks to finance local financial cliques by taking reliable local collaterals. Since legal reform is centered on making financial institutions robust in Asian countries, it seems they do not think of promoting M&A using the chattel collateral law like in the United States. It is because M&A is means of reforming enterprises and not of financial institutions.

In Central and East European countries, where no local financial cliques are formed, finance to local enterprises by offshore foreign-capital banks has not proceeded except for finance to foreign-based enterprises, and instead the transfer of capital and management to foreign capitals is in progress by local-capital banks that lack funds and know-how. Whether both banks and enterprises are domestic- or foreign-capital, legislation of the chattel collateral law means supply of new collateral means. Especially, it will be useful as financing means for newly established enterprises, domestic- or foreign-capital.

4. CHATTEL COLLATERAL LAW AND BINDING FORCE OF LAW

(1) Degree of Adoption of Chattel Collateral Law in Central and East Europe and CIS

On September 12 2000, Gerald Sanders, Legal Dept. of the EBRD gave a lecture titled the “Legal Reform Plan of EBRD and Collateral Law Project” at the Bar Hall, Tokyo. As a commentator for his lecture, the author spoke about the purpose of legislating the chattel collateral law and the difference in use. According to him, the EBRD evaluates the degree of adoption of the EBRD Model Law for Secured Transactions in the zone into the following four classes.

Countries with excellent status: Bulgaria, Hungary, Latvia, Lithuania, Poland

Countries with high degree of adoption: Albania, Azerbaidzhan, Kirghiz, Moldova, Ukraina

Countries with low degree of adoption: Armenia, Belarus, Estonia, Georgia, Kazakhstan, Makedonia, Russia, Slovenija, Uzbekstan

Non-adoption countries: Czech, Slovakia, Croatia, Bosna i Hercegovina

Rumania is excluded from this classification. Rumania legislated the chattel collateral law in May 1999, but perhaps evaluation was not possible because the collateral registration system was not established. However, in the sense that the content of legislation is almost the same as the Model Law for Secured Transactions, it can be included in “Countries with excellent status.” The country that interests us is Czech and Slovakia. Among the countries where market economy has proceeded and that have achieved marked economic growth, there are countries like Czech and Slovakia where the chattel collateral law is not adopted, as well as all the countries with excellent status with regard to the degree of adoption of the law.

Why does the market economy proceed without introducing the chattel collateral law? One reasoning is a thought that financial transactions based on

the principle of market economy apart from the chattel collateral law is realized in these countries. As an aspect, many of enterprises that made investments and have achieved success in Czech, both foreign-based enterprises and domestic capitals, are small and middle-scale enterprises, and since they did not need to procure funds by bank loans, they could secure capitals by using their own capitals or investments from venture capitals. Large-scale manufacturers like Skoda, too, does not need bank loans. Skoda Motors were sold to Volkswagen, so there is no need of fund procurement and no need of local collaterals. On the other hand, Plzen Skoda, which originally was an engineering enterprise does not need any large-scale facility investments and product stocks, could maintain international competitive force based on the devalued Czech crown (local currency of Czech) and high technological force, and since small-scale orders continue to come overland from governmental and private customers of the EU, they did not need finance.⁷

Since Slovakia succeeded in introducing foreign-based manufacturing businesses based on the low-cost, ample labor force, there was no need of local finance. Material type manufacturing businesses, including petrochemical, are formerly state-owned enterprises. Since they were not divided, they secure daily earnings using the pipeline. The Slovakia-capital enterprises that failed in military-private conversion went bankruptcy, indeed, but the foreign-based enterprises and successful privatized enterprises worked as a driving force of economic growth well covering the former.

Thinking this way, it seems that when an enterprise has a technological force and does not need any large-scale facility investment, the chattel collateral law is not always indispensable. However, perhaps it is not off the point to assume that in the formerly socialist countries of Czech and Slovakia, transactions between enterprises and bank-enterprise transactions, except for certain political items, were conducted based on proper legal rules to an extent that legislation of the chattel collateral law was not particularly required.

⁷ Harvard Fund, a leading stockholder of Plzen Skoda, famous for the buying up of the privatized Voucher, appointed an excellent manager from among the former management, and it led to successful operation. It can be said that the concept of the Velvet Revolution in state system reform was also realized at the enterprise reform level.

(2) Legislation and Application of the Law

Since the chattel collateral is formed as the right of pledge in Hungary and since provisions about the registration of the right of pledge and collateral execution are given as descriptions about the nature of the right of pledge, legislation is made in the form of carrying out the legislation for revising the pertaining 19 articles of the 1959 Civil Code. The chattel collateral law of Bulgaria is provided as the right of pledge without transfer of occupancy, however, as it also contains provisions about the registration of the right of pledge and collateral execution, it is made up as the 1996 Law on Registered Pledges, a separate law comprising 48 articles. In Bulgaria, there was no uniform civil code, and conventionally provisions on collaterals were stated in the obligation and contract law, which was announced in 1950 and largely revised based on shift to the market economy. So, perhaps there was no hesitation to formulate a separate law combining a substantive law and a procedural law.

The Rumanian chattel collateral law is made up with 104 articles as a legal framework relating to Part 6 of the 1999 Law on Promotion of Economic Reform. Although there are a civil code and a commercial code in Rumania, the former covering the right of pledge and the latter the right of mortgage, the chattel collateral law does not only replace these provisions on the right of pledge but provisions of the law also precedes laws on state registration and the civil procedure code so far as chattel collaterals are concerned.

The reason why it is such a long-sentence law containing 104 articles is that provisions of collateral registration and execution, which normally provided by government or ministerial orders, are also included. It is quite interesting to know why it was necessary to provide items this way. The author thinks that, when the Rumanian state sector was to put the law into function, perhaps the World Bank and the EBRD gave advice on legislation, placing importance on the exclusion of possibilities of arbitrary use. The author

also learned that partly because of the legislative process, the 1999 Law on Promotion of Economic Reform is generally called Law obliged by the World Bank inside the country.

As Rumania has a large population among Central and East Europe and took the independent course, leaving the COMECON, under the Ceausescu system, they have a full-set type industrial structure.⁸ So, the Rumanian have an aspect that looks as if they want to join the EU, leaving the domestic industry, as is. The EU Committee has started negotiations for participation, showing the Rumanian government legislation/political measures for them to provide before joining the EU, as *acquis communautaire* (reform schedule). There the adoption of EU standards and criteria as well as laws of market economy are said to be important items of the reform schedule a . The EU Committee positions the economic reform promotion law, containing the chattel collateral law, as an important law of market economy. The EU Committee seems to consider that the adoption of laws of market economy will minimize the protective measures for the domestic industry.

The people who operate the Rumanian government are mainly those who were formerly executives of the Communist Party that replaced ex-president Ceausescu, who probably opposed to a rapid introduction of market economy. In the presidential election of November 2000, the middle-left faction regained the administrative power. Under the middle-right government started in 1996, there was no drastic replacement in governing group. In this sense, Rumania may be an "excellent country" in adopting the EBRD Model Law for Secured Transactions but may be a "country with law degree of adoption" in applying laws. Generally speaking, an attempt to let those who execute laws and those who interpret laws formulate a law that leaves no space of interpretation, the completed law is a long one.⁹

8 Because of this, Rumania is called an "India in East Europe."

9 In this sense, legal reform in Asian countries after the Asian Currency Crisis contains many problems. Since legal advice is given by paying respects as a sovereign states, the state sector tends to interpret it favorably to themselves. In an extreme case, the text of a new legislation itself is opposed to the legislative intention. Having no goal like participation in the EU of Central and East European countries, awareness to build up a legally common basis of market economy is low in Asia. The WTO can only prepare a common basis by means of the legal system related to trade, and the APEC is a mere place of deepening mutual understanding.

(3) Binding Force of Law

About the power to actually function a law, many discussions are made in an academic field of legal philosophy. A theory of legal philosophy, which the author thinks it appropriate in following the legal reforms of business laws in Asia and Central and East Europe/CIS, is the theory of conative impulse in the binding force of laws proposed by Häger Ström, a jurist of Northern Europe, introduced by Setsuko Sato, Professor, Aoyama Gakuin University.¹⁰ Häger Ström argues as the law does not exert its binding force upon the objective people merely by legislation. The law does not have binding force unless a “consideration that they should act according to the action patterns stated by the law,” namely conative impulse is present. The “binding force, though subjective, is an idea having a commensurable language and common to community members who were inculcated socially formed values.” When conative impulse is ready, the “binding force of the law is established with an extension called inter-subjectivity, or joint subjectivity in the community.” Since the idea of binding force is formed with uniformity through a certain procedure in a state where social formation is successful, it causes an illusion that the idea of inter-subjective binding force is an objective attribute that belongs to the law.”¹¹

Prof. Setsuko Sato argues that the legal sociology of the norm by Häger Ström is a work to answer the following question.¹² “(I) A study about a question: In a society of a certain time, what action pattern and conative impulse are actually connected, or were connected, and, what are social, political and cultural factors that bring forth the connection?” ... (II) A study about a question: Normally, an action matching the connection of an action pattern and conative impulse is performed actually.

However, ... after a careful consideration or reflectively, sometimes I give up realizing the action. What are factors acting there?”

Prof. Setsuko Sato says that such an opinion of Häger Ström differs basically from the following opinion. “... Obligation to tell the truth is universal. However, the universality can vary about the way it appears in each situation and by various factors, ... Human rights are universal, however, the realization can vary by the difference in period and social conditions, but the universality of human rights are not lost because of this ...”

The argument of Häger Ström, to the author, seems to have much significance in that one can consider how to let each positive law function, without maintaining, for example, an opinion about Asia such that “there is an Asia-like sense of value, Asia-like development or a law peculiarity to Asia.”

Each country has a pride as a national state and a sovereign state. They repulse when a foreign country or an international organization foists a law on them, saying there is a universal law, even if it is a law useful for the market economy.¹³ There, it seems that international organizations like the World Bank, the EBRD or the Asian Development Bank in giving legal advice to member countries, indicate the importance of establishing legal governance and introduction, while showing successful cases of the same law model in other countries. As the same law models, there are the Model Law for Secured Transactions of EBRD and the Insolvency Law Guidelines of the World Bank, and the World Bank held an international seminar about judicial reform with a theme of governance of law in June 1999 and plans to hold it each year for the future. However, “governance of law” itself is the concept of the common law countries. Central and East Europe and CIS countries that were formerly socialist countries, and the Asian countries excluding formerly governed by Britain and the Philippines are not a common law country because of governance by Spain before the United States belong to the civil code countries, they tend to interpret

10 Setsuko Sato, *Right and Obligation - Binding Force of Law*, Seibundo, 1997

11 Quoted from *10, p.23-24.

12 Quoted, including the following, from *10, p.196-197.

13 As examples of the universal law, sometimes the Universal Declaration of Human Rights, the WTO Law, market economy laws and the natural law are named, but these allow a contradiction “We are not yet ready to accept these because period and social conditions are different.” This is what is called the discussion about the development stage of laws, which is to be discussed on a subject of “law and development”.

“governance of law” as “governance by statute law” and deny creation of laws by courts.

By seeing what decomposition has the Model Law for Secured Transactions of EBRD made in Bulgaria, Hungary and Rumania, we can see the way the conative impulse proposed by Häger Ström. It seems that this will not only show the collateral transactions in these countries but also give suggestions how business can be successful, as a whole.

CHAPTER II CHATTEL COLLATERAL LAW OF BULGARIA

1. METHOD OF COLLATERAL AND OBJECT OF COLLATERAL

(1) Pledge Right or Transferable Collateral

In the Law on Registered Pledge, the chattel collateral law of Bulgaria, the pledge right is used instead of the chattel collateral. There the setter of chattel collateral is the pledgor and the setting of chattel collateral is pledge setting. Hereunder, basically the term the pledge right is used. In Bulgaria, Article 209 of the Law on Obligations and Contracts states “A sales with a repurchase clause shall be invalid.” Milanov, a Bulgarian lawyer acting with this as an important ground in Japan says “Article 209 of the Law on Obligations and Contracts prohibits transferable collaterals(fiduciary transfer) and provisionally registered collaterals, floating collaterals(floating mortgages) are not known, and reserve of ownership is discussed in theories.”¹⁴ This should mean that the pledge right applies because, as collateral means for movable properties, there is reserve of ownership but not the transferable collateral. Since the fact that the transferable collateral is not recognized means that the transferable collateral of liability is not recognized, it goes to collateral registration as credit pledge.

Obtaining an acceptance by notice for transfer of a credit as collateral seems to involve an anxiety of being judged as invalid.¹⁵

As a difference between the pledge right and the transferable collateral, the former prohibits a pledge forfeiture contract while the latter recognizes collateral forfeiture. This can be taken as an understanding that, since formally the ownership is transferred to the owner of the transferred collateral from the time it is set, in case the obligation is not performed the owner of the transferred collateral may fix the ownership before the time of repayment. Whereas in the case of pledge, the understanding is such that, since the pledgor consistently hold the ownership, it is not agreeable if the ownership moves to the pledgee(pledge holder) due to nonperformance of the pledgor before the due date of the time of repayment. Prohibition of the pledge forfeiture contract is a traditional concept since the Roman Law and is provided in laws of France, Germany, Switzerland and Japan, and Article 152 of the Bulgarian Law on Obligation also provides the following. “A contract that previously provides a provision stating that, by nonperformance of the obligation, the creditor either obtains the ownership of the security or may get repayment by a method other than that stated by the law.” Since the provision is provided as a general rule common to both the pledge and mortgage, it means that mortgage forfeiture as well as the right of pledge is prohibited.

Article 37.1 of the Law on Registered Pledge states as “The pledgee is entitled to sell the pledged property two weeks after the statement for commencement of foreclosure is recorded. If a sales is not completed within six months, any other creditor who has recorded a commencement of foreclosure shall be authorized to sell the pledged property.” and Article 11 of the same law states as “In case the pledgor does not perform its obligations under the pledge agreement, the pledgee may demand performance before the debt

14 Sergei Milanov “Legal System in Bulgaria,” NBL vol.496, p.42.

15 This is expected to come into question when taking the long-term electric power sales contract as collateral in the thermal power generation BOT project announced in 2000. A long-term, specific nominative claim, it is a registered credit. Registration is valid only for five years but can be extended, so as a result a long-term finance period can also be covered.

matures, as well as satisfy its claim from the pledged property.” Since the pledgee gets only the right of selling and not the ownership of the security, it can be said that the conception of prohibiting pledge forfeiture is observed. When a careful handling is desired, one may let the debtor forfeit the benefit of terms and advance the time of repayment (acceleration) and then get the debt repaid from the security.

EBRD’s Model Law on Secured Transactions also prohibits collateral forfeiture in Article 24.2,¹⁶ and states in Article 24.3.2 as “The chargeholder must advise the purchaser that he is transferring title to charged property in the capacity of chargeholder.” The attitude of the Model Law on Secured Transactions cannot be along the concept of the transferable collateral. And, taking into account the conative impulse as to utilize the tradition and laws of the country under the influence of the Model Law on Secured Transactions, Bulgaria introduced the chattel collateral system, employing the pledge right and leaving the transferable collateral as prohibited.

In Japan, a concept that prohibition of the pledge forfeiture contract should be abolished on account of the following is a popular view.¹⁷ If an expensive pledge security is taken on account of a small debt, it may be made void in violation of public order and good morals; since collateral forfeiture is possible by handling it as transferable chattel collateral, actually an evasion of the law is recognized; since only the liquidation type is recognized for the transferable collateral by a judicial precedent, there is no problem; actually it is possible to evade the law by the repurchase contract; in commercial transactions, the pledge forfeiture contract is recognized by the express statement; and pledge forfeiture is recognized for pawnbrokers. It should be noted that these sorts of concepts are not acceptable in Bulgaria.

(2) Pledgor and Pledge Security

The pledge setter is a merchant along the concept of the EBRD, or one who is regarded as trader in the

Law on Commerce.

The object of pledge covered by the law includes (1) accounts receivable, uncertificated securities, and chattel exclusive of ships and aircraft; (2) share of equity in general and limited partnerships, with shares or limited liability companies; (3) groups of accounts receivable, of machines and equipment, of inventory or materials; and (4) commercial enterprise (4I). The pledge security, if not specified individually, is acceptable if it is specified generally, and can also be one that is generated in the future (4II). When the pledge right is an accounts receivable, the interest is also included. The pledge right includes the processed works, too.

That, by stating the pledge security generally, an unspecified/future account receivable becomes a collateral as the pledge right is stated expressly. And, since pledge registration can be done, the provision means borrowing is made possible by using a future cash flow of the pledgor as collateral, namely LBO is made available. However, speaking from the present conditions in Bulgaria, this aims to supply finance to newly-emerging enterprises and service businesses having not physical collaterals. The collective collateral, for which specifiability is required in Japan, should be identified with a plate and the like, but this is not necessary in Bulgaria.

As an example of objects that are not stocks/investment shares (but not (2)) and stocks/holdings/debts ((1) uncertificated securities), deposit credit and trust benefit (that can be securitized) may be considered. An ordinary contract credit cannot be considered as the object of pledge under the law. Thus, regardless of whether securities are issued or not, contract credits that cannot be securitized are excluded from the provision, and these credits are excluded from the object of pledge registration. This differs greatly from the Model Law on Secured Transaction where contract credits that are available as money credits can be collateral securities. Rights, such as tenant right, mining right, concession (development

¹⁶ Article 24.2 reads as “Any agreement entered into prior to delivery of an enforcement notice pursuant to Article 22.2 which provides for the transfer of title to charged property by way of sale by or to the chargeholder after delivery of the enforcement notice is invalid.”

¹⁷ Koji Ohmi, “Collateral Security Law”, Kobundo, 1998, pp.77-80.

right, rights), intellectual property right, know-how and trade secret are not included in these categories and cannot be registered as pledges. However, the way to bring to pledge registration the money credits generated from these as accounts receivable can be considered. If a claim is transferable, it can be used as a pledge (Law on Obligations and Contracts, Article 162), the pledge setting itself is possible. Also, in Bulgaria, the mining right and concession are not recognized as transferable and so excluded from the object of the right pledge.¹⁸

Bearer securities like national/corporate bonds that are regarded as movable collaterals are available as collateral securities. Directed credits like the warehouse securities/bills/bills of lading are excluded from this category. This probably means that directed credits, of which the credit is securitized and processed by endorsement/issue of the security, may be processed by occupancy and pledge endorsement to take these as collaterals, and do not particularly need to be registered as pledge. The provision of Article 163 of the Law on Obligations and Contracts "A pledgor must hand over to the pledgee the documents providing the pledged claim, if there are such." is applied to. According to the EBRD Model Law on Secured Transactions, these fall under the object of the possessory charge that need not collateral registration. Article 10.2 of the Model Law on Secured Transactions states that at any time while possession as referred to in Article 10.1 continues a possessory charge may be converted into a registered charge by registration in accordance with Article 8.2. It seems that, in Bulgaria, ordinary movable properties of which the pledge right is established by occupancy can be pledge registered as (1), while the directed credit that is not an ordinary movable property cannot but be met by occupancy and pledge endorsement so as to set the pledge right. The Japanese Bills of Exchange and Promissory Notes Law provide pledge endorsement, but it is seldom used, and mostly the transferable collateral is used.¹⁹

To take an insurance money as collateral in Bul-

garia, generally a method to set the creditor as the beneficiary is applied to. The method to pledge registration for the claim right of insurance money as accounts receivable is not used, and the method to transfer the insurance note(certificate) as collateral is not employed as it might offend against the prohibition of collateral forfeiture. Both in Japan and Bulgaria, the commercial codes let the insurer reserve the right to designate/change the beneficiary, without the beneficiary's consent, with declaration of a particular intention. To cope with this, both in Japan and Bulgaria, practically a special contract is exchanged so as not to change the designated beneficiary without the consent of the creditor and the creditor holds the insurance note(certificate) so as not to allow endorsement to change the beneficiary.

(3) Utilization of Enterprise Collateral Right

A commercial enterprise itself is taken as collateral (4), is a provision recognizing the enterprise collateral right. EBRD Model Law on Secured Transactions also recognized the enterprise charge to take the entire of corporate assets. In Japan, setting of the enterprise collateral right can be used as collateral in issuing corporate bonds (Japanese enterprise collateral law, Article 1). However, both the EBRD and in Bulgaria, the enterprise collateral (pledge) is considered as collateral of ordinary bank finance. And, as method of collateral execution, it is allowed to sell out the whole enterprise as continuing enterprise, or sell individual assets of the enterprise (46, Model Law on Secured Transactions, Article 25.1). In Japan, the enterprise collateral right holder only precedes ordinary unsecured creditors and is subordinate to all other secured creditors (Japanese enterprise collateral law, Article 2). To precede the pledgees of individual corporate assets, these individual assets may be listed up in registering the enterprise collateral right (21 III). Then, the relative priority is fixed by the order in providing requirements for setting up the pledge right on individual assets and in registering the enterprise collateral. The financier may choose the enterprise

18 Explanation by lawyer Gouginski (Djingov, Gouginski, Kyutchukov & Velichkov Law Office) with whom consultation was made there. Incidentally, the concession law was legislated in 1995 in Bulgaria, and the law has been revised almost every year.

19 "2500 Lectures about Legal Measures at Bank Window (Part II)", Financial Affairs Research Group, 1993, p.603.

collateral rather than the accounts receivable collateral. However, when executing the enterprise collateral, selling as continuing enterprise will not be easy without a brand/technological force and the collateral execution needs an enterprise administrator and the cost. Also, as the enterprise collateral is not enough to check the cash flow, in collateral execution, selling of individual assets will be preferred to selling of a continuing enterprise. It seems, as a possibility, the enterprise collateral will be used for financing to an enterprise having huge fixed assets or inventory assets or for issuing the corporate bond of such an enterprise.

Yasunobu Sato etc. recognize the significance of the enterprise collateral as “With regard to the project finance used for the PFI and others, a collateral covering a whole enterprise has become recognized as a necessary legal technique.”²⁰ The author thinks that for a project finance like electric power, water and railroad projects of which users of credit sales are specified by the long-term sales contract, a combination of collateral registration of accounts receivable and mortgage registration of real estate to land and buildings is preferred to enterprise collateral registration. Because, more strict assessment of the cash flow is desired, and specified collateral securities can easily be supplied as collaterals or securitized. For projects such as roads, bridges and parks, of which users of credit sales are unspecified, use of the enterprise collateral can be considered. Especially, as it is difficult to set the mortgage right to public roads, it seems the use of the enterprise collateral can be more effective.²¹

When individual assets are listed up in an enterprise collateral contract, relevant assets even after separated continue to be the object of the enterprise collateral right (21 III, latter paragraph). This is a provision confirming that the object of collateral is

transferred with the collateral right. Even when a pledge security is transferred, it is accompanied with the pledge right. However, when an appendage on a mortgager security is transferred, the mortgage right does not accompany. Since some enterprise collaterals include real estate, this is considered a confirmation provision to prevent claims about limits due to the nature of the mortgage right. For example, machinery/equipment of a plant, as a collateral security of the enterprise collateral right, is often subject to separation. In the ordinary pledge right, when an appendage is separated from the objective real estate, the effect of the mortgage right is not exerted on it. This can be assumed as an effect that, with regard to the enterprise collateral right, the enterprise collateral right extends by listing up the machinery/equipment of the plant, if separated. In Japan, too, the Plant Mortgage Law provides the same context in Article 5.1.

(4) Collateral Credit

The collateral credit, when specified as a whole credit, is acceptable both individually and altogether, and even a future credit, a credit on a condition that a certain condition is satisfied is also acceptable (5 (1)). Since no restrictions are given to the collateral credit in pledge registration, pledge registration can be made by taking as pledge security a real estate currently present for securing a credit that is not yet generated or a currently present pledge right. Registration of a fixed pledge is recognized. In addition, pledge registration, taking as pledge security an unspecified future credit that is not generated yet can be pledge registered as security for a collateral that is not generated yet, is possible, too. Since pledge registration as to finance a purchase fund, taking an unspecified future account receivable of the debtor as collateral, is recognized, this means to facilitate LBO.²²

“Registration items of the collateral credit are the

20 Yasunobu Sato etc., EBRD - Introduction of Model Collateral Law and Commentary, NBL, Aug. 15, 2000, p.70.

21 Also, possibly the enterprise collateral right will be used for BOT project issuing US 144a bonds.

22 However, there is no provision stating “The collateral notice can be registered even when the collateral contract is not yet concluded and the collateral right is not established yet.” like US UCC Article 9-402. Whether or not more than one purchaser appear and increase the purchase price through collateral registration, like the LBO competition of the United States, will depend on the practical business of registration. Although making pledge registration without any pledge setting contract is ineffective, the collateral credit can be specified even if the contract date column of the collateral credit is left blank in the registration form, and in Article 26 providing items of registration, entry of the date of pledge setting is not required, so it seems checking is not possible.

content or the amount of collateral credit” (26 I (2)), so in case of the fixed pledge, entry of a limiting amount is required. For other cases, however, the amount of collateral credit may be left unfilled if only it is specified. Also, when the collateral credit is large while there is more than one pledge security, it is meaningful to enter the amount of collateral credit. With regard to the form of the notice of pledge registration, there are items, including the title and date of collateral credit contract, the content and interest, and entry of the effect and the amount of collateral credit if the credit is taken as collateral for another case. Normally the notice may be given by stating the amount, but following the provision of this article, probably registration of the notice is not rejected even if the amount is left unstated.

In addition to the principal of the collateral credit, the amount may also include amounts of interest and penalty (5 (2)). In Japan, the scope of collateral credit is the total amount of interest and delay damages in case of the pledge right, and the last two years of the same in case of the mortgage right. The Bulgarian Obligation and Contract Law, Article 174 provides that when the mortgage right is registered, the last two years of the interest are added to the collateral credit, and Article 172 provides that the effective period of registration of the mortgage right as 10 years, taking more strict attitude to the creditor of mortgage right than in Japan. As the reason of limiting to the last two years “It is meaningful to make known the collateral frame of the currently set mortgage right and at the same time raise the use of remaining value of the mortgage object.”²³ Although making the registered pledge right unlimited will cause inconvenience to the subordinate pledgers in setting their collateral frames, probably their understanding is such that it cannot be helped since there is no legislation restricting the scope of collateral credit of the pledge. The idea of two years about the mortgage right originates in the French law and it is not provided in the German law. In Japan, too, no consideration is required about the collateral frame when

there is no subordinate pledgers, the understanding that the interest and penalty can be charges in full is commonly accepted.²⁴

2. ESTABLISHMENT OF PLEDGE RIGHT AND SUBSTANCE OF THE PLEDGE RIGHT

(1) Setting of Pledge Right

The setting contract of the pledge to be registered must be made in writing (2). In Japan, this is not necessary. The unpaid seller collateral right, when there is a nonpayment period of 14 days and longer and when the object of sales is included in the collective movable collateral if not pledge registered, it cannot cope with the collective pledgers who made pledge registration earlier. So, for the seller to obtain the counterforce, the pledge setting contract should be concluded in writing. It is advisable to prepare a written sales contract & pledge setting contract, including the provision about the unpaid seller collateral right. In Japan, this question is discussed as the relative priority between the preferential right of movable properties and the collective transferable collateral, and there are three standpoints: (1) The judicial precedence in Japan takes it that since delivery by occupancy revision is allowed with regard to the transferable collateral, the transferable collateral creditor, a third acquirer, cannot press the preferential right holder, namely the transferable collateral precedes; (2) Civil law authorities like Rokuya Suzuki and Eiichi Hoshino recognize the immediate acquisition of preferential right and support the priority of the preferential right; and (3) Influential scholars of civil law like Koji Ohmi and Kiyoe Kaku see that the transferable collateral and the pledge right are ranked the same and the preferential right falls behind the pledge right, and support the priority of transfer.

EBRD Model Collateral Law states in Article 6 as requirements for the establishment of collateral right, preparation of the written collateral setting contract, collateral registration for the registered collateral right, and occupancy for the occupied collateral

²³ Koji Ohmi, *Collateral Right Law* (new edition), Kobundo, 1998, p.145.

²⁴ 23, p.145.

right. Bulgaria, does not take a concept like this and instead takes a composition of the traditional, establishment of the right, effectuation of the right, and the counterforce. Perhaps it is more easily accepted since this way conative impulse works on the use and application of laws. Establishment of the pledge right, in the registered pledge right that corresponds to the registered collateral right, is by preparation of the written contract, and in the chattel pledge right corresponding to the occupied collateral right, the agreement of pledge setting. The requirement for effectuation of the pledge right is delivery of the pledge security, and in the credit pledge, delivery of the certificate (Obligation and Contract Law, Articles 156 and 163, Pledge Registration Law).²⁵ The requirement for the registered pledge right to effectuate is the notice to the debtor in the account receivable, registration to the Central Depository in case of securities without issuance of the securities, and registration to the Commercial Register for stocks and the enterprise collateral right. And, counterforce requirement of the pledge right is the written contract of pledge setting in the case of a chattel pledge, the notice to the debtor for a nominative claim (Obligation and Contract Law, Articles 156.2 and 162), and registration to the Central Pledge Register under the Pledge Registration Law (Article 12). In the Obligation and Contract Law, there is no provision about the counterforce about the credit pledge of other than the nominative credit.

Since this law provides a pledge right set without moving occupancy (1), a change is made to the security requirement for the pledge right. There are two types of pledge right, one that obtains the counterforce by occupancy and the other the obtains the counterforce by pledge registration. The security requirement is met by occupancy of the pledge security. Since pledge registration itself is the counter requirement, it is not directly related with the security requirement of establishment. However, pledge setting of a pledge security that obtains the counterforce by pledge registration needs a legal a certain action to replace occupancy so that the secu-

urity requirement can be met. The Pledge Registration Law also observes the provisions of Article 156.1 of the Obligation and Contract Law stating “When a movable property is taken as pledge security, the pledge setting contract has not effect unless the pledge security is delivered to the creditor or another person nominated by the creditor and the pledge setter,” and of Article 161 thereof, stating “rules provided in this chapter that are related to the setting and effect of the pledge right shall not be abolished by a different provision of another law.” However, an interpretation such that “this chapter” stated in Article 161 refers to only the rules related to the chattel pledge provided under Articles 156 to 161 and not Articles 162 to 165 containing provisions about the credit pledge, is also possible. It is because, in the composition of the Obligation and Contract Law, this chapter is positioned in Introduction, Collateral of Part 7 Credit Collateral, Chapter 4 Pledge Right and Mortgage Right, Section B Chattel Collateral, Section C Credit Pledge and Section D Mortgage Right. Author does not agree to this interpretation, because, though “this chapter” directly refers to the chattel pledge, applying it as the principle of pledge right as a whole make the law a positive law that will more easily evoke the conative impulse proposed by Hegel.

In the account receivable, the pledge right is set when the pledger or pledge setter notices the debtor of the pledge setting (17). In securities without security issue (the stock/holdings/debt referred to in Article 4.1), pledge registration is to be made at the Central Depository (18). That is, pledge registration is required in addition to pledge registration at the Central Pledge Register. The pledge setting contract must be notarized about signatures and registration about the stock pledge in the Commercial Register (19). The enterprise collateral right must be notarized about the signatures of the setting contract and registered about the enterprise collateral in the Commercial Register (21). Registration to the Commercial Register is the setting requirement and registration of the enterprise collateral right at the Central Pledge Register is the counter requirement. Registration as

25 The pledge Registration Law is applied to only when the pledge setter is a trader, and the credit pledge set by others than the trader is covered by the Obligation and Contract Law.

setting requirement is to satisfy the security requirement, and registration at two places is because the chattel collateral right is composed as a pledge right and not a transferable collateral.

In the case of ordinary movable properties, the pledge right can be set without occupancy, and registration of the pledge right, as counterforce, is required (4 I 1). Oppositely speaking, this means that when the pledge right is set by occupancy alone, pledge registration as counterforce is not necessary. Consequently, the only legal action replacing occupancy, in the case the pledge right is set without occupancy, is the written contract of setting. Though eased, this opposes the concept requiring the security requirement. To make a reasonable explanation on condition that pledge setting by occupancy revision is not recognized, it is limited to certain cases, including the case in which delivery is recognized in the form of taking an object kept at the third party, as is, as the pledge security. However, there are no such provisions. This seems a biggest problem in matching a foreign chattel collateral system with the conventional pledge right.

Practically, pledge setting without occupancy will be limited to the case the pledge setter has a reason not to apply occupancy. A subordinate pledger is the typical case. If the use about this point is left without being clarified by a rule, attempts to make pledge registration, regardless of occupancy or not, will increase in the practical business. Perhaps concern to a concept of pledge setting by delivering occupancy will be lessened, and rather pledgers who try to make pledge registration even for movable properties of which the pledge right is set by occupancy, will appear. This may be favorable to the state sector in that it will increase fees of pledge setting and reduce make ups from the state budget to pledge setting business, but for the enterprise sector this may cause complicity in business procedures.

(2) Pledge Right and Transferable Collateral Right

When the pledge setter has a ground to continuously

occupy the pledge security, it is not because delivery was made by occupancy revision but there is pledge registration. In this sense, it can be said that the concept of Japan, Germany and France that does not recognize pledge setting by occupancy revision is maintained.

In Japan, when the pledger returned the pledge security arbitrarily to the pledge setter, opinions (1) the pledge right extinguishes, and (2) only the counterforce extinguishes and the pledge right does not are opposed to each other. (2) takes the transferable collateral as (pledge setting + occupancy revision), and maintains that once the transferable collateral is approved, an interpretation that the pledge right extinguishes when the pledger loses occupancy breaks the balance.²⁶ Koji Ohmi, interpreting that the transferable collateral originally takes the form of repurchase + lease and it is named this way when transferred as collateral,²⁷ denies opinion (2).

According to the concept of Bulgaria that does not recognize a transferable collateral, opinion (2) seems appropriate. For Bulgaria's denial of the transferable collateral, a time-honored explanation is also possible, saying as they have passed through the times of socialism when the announcement function was made important and occupancy revision could not perform the announcement function. The Obligation and Contract Law states in Article 159, consistently from before the big revision of 1993, as "The pledger obtains the priority to receive repayment from the pledge security by compulsory execution on condition that the pledger will not return the pledge security of the chattel pledge to the pledge setter. If the pledge security is under occupancy of the pledge setter, it is regarded as the movable property is returned." Also, Article 162 of the same law provides that "The setting contract of the credit pledge cannot cope with the third party unless the debtor know the pledge setting." A clear-cut opinion about the counter requirement, it is considered a provision supporting opinion (2).

This pledge registration law also contains provisions like the following: Even when collateral credit

²⁶ *11 p.75.

²⁷ *11 p.284-285.

C that covers, as pledge security, collateral credit B that covers A as collateral exists, the pledge setting contract between A and B remain in effect (6); When the third party gets a pledge security transferred from a pledger in the normal business process and the third party acquires a right, conflicting with the pledge right, to the pledge security, the pledge right extinguishes (7). Article 7 is to the effect that, when a collective object like a stock is taken as collateral, and when the stock is partially discharged/added to, as merchandise, by trade, the purchaser obtains merchandise on which no pledge is set. However, from these two statements, it seems that a principle that the substance of the pledge right is the security requirement, since the pledge right does not extinguish by occupancy as pledge right (though the security requirement is eased) but extinguishes by transfer of occupancy by ownership.

By considering that the substance of pledge right is the security requirement and the substance of transferable collateral is (pledge setting + occupancy revision), the pattern of a universal action of collateral becomes clear to an extent, and the conative impulse proposed by Hega Strame, that people who are to newly use the system want to use it with understanding, sees the light. We should not give us as, “Since social conditions differ by countries, universality of collateral will appear differently,” and seek “What are the social, political and cultural factors that combine the pattern of an action of collateral and conative impulse?”

(3) Conative Impulse, Pure Jurisprudence, Possibility of Counterevidence and Business Method

Kelsen established pure jurisprudence as a method to grasp the substance of positive law, but it exclude all righteous ideology and argues as “What is important to jurisprudence is to systematically develop various possible hypotheses and think them out in terms of

consistence from all aspects.”²⁸ About whether or not this approach can obtain understanding of people who actually use laws, it seems the theory of legal order is inevitably required. Because of this, as a principle to overthrow the generally spoken “A bad law is also a law,” the natural law, a visionary discussion, is inevitably required. Kelsen had to say “The metaphysical discussion of justice ... is scientifically a “lie” ..., however, politically it is a “useful lie.”²⁹ The contradiction, an “effective lie,” by the natural law is effective for a state infringed on human rights like Nazis, Germany, indeed, but it will lose all when refuted as being a subjective value judgment. As an approach to press the principle of business law, which is often seen as a “question of decision, after all,” the approach by the North European realism jurisprudence by Hega Strame, which is not a natural law nor pure jurisprudence seems effective.

Also, in addition to the principle of business law, the approach of North European realism jurisprudence seems to be applicable, to an extent, to procedural laws such as the procedure law and to the theory of governing organization covered by the constitution. It should be noted that reasoning the human right theory under the constitution by the principle of natural law makes difficult contradiction to expressions like a development stage as to discuss such human right protection has not been reached yet.

Häger Ström reckoned that universality itself is like religion and puzzled the jurists who looked upon jurisprudence as science. According to Hega Strame, “A right called the ownership is a mysterious power to the object, and what creates and transfer this mysterious power ... is a sorcery act.”³⁰ However, the argument that the opinion that “The ownership should be protected” is true is doubtful. Being unscientific without any possibility of counterevidence has already been proved by Carl Popper. Being unscientific does not need to abandon the effort of finding a scientific

28 Koji Takahashi, *Method and Structure of Kelsen Jurisprudence*, Kyushu Univ. Publishing Association, p.121-122.

29 * 18 p.151.

30 *10 p.34: Thinking of the ownership by replacing it with the pledge right or the transferable collateral right is the author’s application.

truth. Bertory, a critical rationalist like Popper, mentions, as a method to criticize opinions and supposition, compatibility, contradiction by sensory observation, inconsistency with a scientific theory, and problem solution.³¹ And, as a method of problem solution, he mentions the principle of bridging for connecting a value and a fact. The principle of bridging is “When execution of a moral order legal order (or moral order) is impossible or difficult, obligation is reduced/remitted.” The author thinks that whether or not the text does not make people feel the execution of legal order impossible/difficult and instead generates a conative impulse as to make them feel like following the legal order, is the legislation and interpretation of business positive law.

3. REGISTRATION OF PLEDGE RIGHT AND THE RIGHT/OBLIGATION OF PLEDGOR

(1) Registration of Pledge Right and Counterforce

The counterforce to the third party is realized by pledge registration in the case of the pledge security provided by this law, and for pledge securities other than those provided by this law, by occupancy by the pledgor or by separate registration. That is, of things called the credit pledges, nominative national bonds, nominative corporate bonds, unsigned national/corporate bonds and endorsed directed securities cannot cope with the third party unless the pledgor occupies these. Pledge registration is not needed. Ships and aircraft are occupied by the pledge setter, but the pledge setter cannot cope with the third party without registering the pledge right in the register of the ownership. Since this law does not have provisions to the effect that a pledge right given the counterforce by occupancy can be changed to a pledge right having counterforce by pledge registration, what is the pledge security by occupancy is important. EBRD Model Collateral Law has a provision stating that an occupied collateral right can be changed to a registered collateral right whenever during the occupancy period (Article 102).

Of the pledge securities provided by Article 4 of the law, ordinary movable properties and stocks with security issue, as occupied by the pledge setter, enables the pledgor to cope with the third party by pledge registration. Even when the pledgor can obtain occupancy by the pledge right, occupancy is not required but pledge registration is necessary. The reason the author thinks that pledge registration will increase more irrespective of occupancy or not, is because pledgers who think the occupancy of pledge right is troublesome not only deposit it to the third party but they will also come to think they may leave it at the pledge setter.

With regard to collective accounts receivable, collective machinery/equipment and stock/raw materials, the pledgor can cope with the third party by pledge registration, with these being left occupied by the pledge setter. While the pledgor does not need to take any specifying method, unlike the collective transferable collateral in Japan, pledge registration is necessary. For accounts receivables, securities without security issue (deposit credit and trust benefit), stocks/equity holdings without security issue and enterprises, occupancy is not applied to because of their nature, while the pledgee is required to make pledge registration. For industrial property rights, copyrights, know-how, trade secrets, etc., when composed as accounts receivable thereof, the pledgee can cope with the third party by pledge registration.

In an enterprise collateral right setting contract, the secured enterprise creditor, when stating the list of individual assets, can exert the pledge right even after the listed assets are separated from the enterprise, but otherwise the pledge right cannot cover these separated individual assets (21).

Priority between multiple pledgees of the same pledge security follows the order of pledge registration (14).

(2) Unpaid Seller Collateral Right

Article 12 of the law further provides that for trades with ownership reserve, lease contracts and attachment of properties: made to secure execution to properties because of money debts, Law on Obligations

31 Yasuyuki Kageyama, *Conception of Critical Rationalism*, p.247

and Contracts Articles 180-182), too, the pledgee cannot cope with the third party without pledge registration. A typical example of the trade with ownership reserve is installment sales, and as an item that performs the same function, the unpaid seller collateral right can be mentioned. The ownership is not transferred in the case of ownership reserve, while it is transferred in the unpaid seller collateral right. As the unpaid seller collateral right provided by Article 9.1 of the EBRD Model Law on Secured Transaction, there are (1) trade with ownership reserve of movable properties and (2) written agreement to acquire the right to secure a collateral between the parties of trade. However, only the trade with ownership reserve is provided in Bulgaria. Article 205 of the Law on Obligations and Contracts only provides that the trade with ownership reserve is available for installment sales. The collateral referred to in (2) is probably the case the registered pledge is applied to instead of the occupied pledge in ordinary chattel pledges.

When the seller of raw materials has made pledge registration before the completion of sales payment, the pledge right can be executed to the processed movable property by applying Article 4.4 of the law. Even when the bank has pledge registered collective stock merchandise, when the materials supplier has pledge registered the ownership reserve, the materials supplier get priority payment from the pledge security.*32 Since normally the value by processing is considerably above the value of materials, normally the processor has the ownership of the processed work,*33 it should be noted that another case is generated by the pledge registration of ownership reserve. As there will be many parts supplying enterprises among the Japanese enterprises launching in Bulgaria, the pledge registration of ownership reserve will be an important method of credit collection from Bulgarian enterprises.

Unless the pledge registration of ownership reserve is made within 14 days of the contract, when the pledge security is included in the collective stock of the buyer, the pledge registration of the collective stock pledge right cannot precede the pledgee (15). The same applies to the right of a lessor (15 II). The time of ownership reserve and the pledge registration by lessor can be anytime, but to cope with the registerer, within 14 days is required. In the case of the registered pledge of (2) above, probably immediate pledge registration is necessary to cope with the registerer of collective stock collateral. When a company has already taken the vehicles and office equipment that an enterprise uses as collective collateral at a financial institution together with pledge setting, and when a leasing company newly leases the vehicles and/or office equipment like PC thereafter, pledge registration of the lease must be made within 14 days to cope with the financial institution.

Article 9.3 of the EBRD Model Law on Secured Transactions states that an unpaid seller collateral right can be converted to the registered collateral right by collateral registering within six months. In Bulgaria, it is discussed when the buyer or lessee included pertaining merchandise in collective objects and pledge registered for another party. This means that when the seller/lessor has confirmed no registration of collateral pledge right in the pledge register, it is not necessary to immediately pledge register the ownership reserve. However, considering required registration period is 14 days it seems advisable for those who sell/lease durable consumer goods/equipment to take the management policy “to uniformly pledge register ownership reserve” to avoid unnecessary troubles. Because, the provision about the 14th day may be legislated conveniently to the buyer/lessee.

A situation that due to delay in pledge registration, the sold object cannot be collected because the collective pledge right has already been set at time of

32 Koji Ohmi, *Collateral Security Law*, p.302 introduces that this problem caused a political issue of transferable collateral in Germany of early 20th century and the cases not used so much in Japan.

33 Article 246 Proviso of Japanese Civil Code, descriptions about German civil code, Akira Yonekura, *Study of Ownership Reserve*, p.69, 84-91. Yonekura proposes as “Since this is a legally technical provision of solving disputes between processors and materials holders, it should be understood that the agreement, if any exchanged between the two, precedes.” In Bulgaria, the processor must sign as pledgor to get the pledge registration recognized, their standpoint can be said to be the same as Yonekura’s.

the actual nonperformance of debt, can be well considered. The period of six months stated by the Model Law on Secured Transactions has the reason, because many Ls/C cover three to six months. However, the period of 14 days is too short and rather indicates a legislative intention. In Rumania where the Model Law on Secured Transactions was referenced in legislation, a clear-cut statement is given to the unpaid seller collateral right holder and one who supply the loan for purchase, saying that they cannot precede another chattel collateral registerer unless they make collateral registration before the start of occupancy by the debtor.

(3) Right and Obligation of Pledgor

Since the pledgor under the law continues to occupy the pledge security by easing of the security requirement, so the pledgor undertakes an obligation similar to that of the mortgagor. Besides (1) the general obligations stated below, the pledgor undertakes obligations (2) to respond to an inspection of the pledge security by the pledgee; (3) to register the transfer of right related to the pledge security; (4) not to dispose of the pledge security after receiving the notice of pledge execution; and (5) to undertake the obligation to extinguish the pledge right by repayment to the pledgee (9). In (1), obligations include insurance, notice when the pledge security gets damage, notice to the pledgee about the transfer of rights related to the pledge security, and selling of the perishable pledge security. As the pledgor is a merchant, the pledgor undertakes the duty of the diligence of a good manager as trader. When the right is transferred as in (3), setting of subordinate pledge right, disposal of the pledge security with the pledge right, and a change in style due to processing may be included. When the obligation is neglected, the pledgee can execute the pledge right prior to the term.

The right of pledgor includes the right of occupancy and use and the right of disposal (8). Since the right of disposal is considered to include also the right to transfer the pledge security, in this case the pledge security is transferred together with the pledge right. When the pledgee does not want transfer or another pledging of the pledge security, the pledgee cannot cope with the third party without making pledge reg-

istration to the effect that there is a special agreement prohibiting transfer and/or pledging. The Japanese civil code provides subpledging, but whether the subpledging that the pledgee does pledging without obtaining the consent of the pledgor is within the scope of the provision becomes an issue, because the pledgee, who does not have a disposal right of ownership, occupies the pledge security. However, the law has no provision about subpledging. Since the law provides that the pledge right is set with the pledge security left occupied by the pledgor and the pledgee cannot move the occupancy by subpledging, there seems no provision about subpledging. On the other hand, taking a pledge security that the pledgor occupies based on the ownership, without getting the consent of the pledgee, as a collateral of the pledgor is quite natural. Thinking this way, in Bulgaria the pledgee needs the consent of the pledgor to supply the pledge security for the pledge right of another pledgee.

Taking a credit accompanied with a special agreement prohibiting transfer seems practically impossible. Since pledge registration is made, the pledgee cannot say that he/she does not know that transfer is prohibited. In Japan, credits to government agencies are accompanied with the special agreement prohibiting transfer, and receipt as agent and deposit designation is used, while in Bulgaria it seems enough to obtain the consent about pledging from the government agencies as third debtor. Because, they can explain to the government authorities that the enterprise sector of Bulgaria will not grow without making the most of the chattel collateral law.

(4) Right and Obligation of Pledgee

The pledgee has the right to receive appropriation of the collateral credit either from: (1) the price of the pledge security or the substitute of the pledge security; (2) the sales amount obtained by transfer of the pledge security; or (3) (1) or (2) whichever is equivalent to the pledge security (10). Since the use right of the pledge security exists in the pledgor, in the case of the credit pledge, the interest and/or principal of the pledge security cannot be applied to repayment of the collateral credit. Article 164 of the Law on Obligations and Contracts provides as "The pledgee

undertakes the obligation to collect the interest and principal of the creditor, and the collected interest and principal must be kept as pledge security. When the collected object is cash, it must be deposited as pledge security in the bank.” Collection from the debtor is not a right but the obligation of collateral preservation.

4. REGISTRATION OF PLEDGE RIGHT

(1) Pledge Registry and Registration Fee

The entity that deals with the business of pledge right registration is the Central Pledge Registry, a corporation located in Sofia. It was installed by the Ministry of Justice, the president is appointed by Minister of Justice, and operating expenses are paid by the state budget (22). Everybody can have access to the registered content and can obtain the certificate about the presence or not of pledge registration (24).

Fees are set by the Cabinet, about which some may think exaggerated. However, if the fees are set too high, those who do not want to pay fees do not use the pledge registration system. In order for the system to be actually used, it had better be kept free from the Ministry of Justice that governs the system. Since generally discussions like: ministers of government agencies relating to business request to set fees at a low level; Minister of Justice asserts a practical maintenance cost; and the Prime Minister’s Office thinks of support to the maintenance cost from the budget, taking into account restrictions on the state budget, can be made, the provision is set in expectation that fees are set at a proper level.

(2) Items of Registration

In an application for registration, items of the agreement between pledge setter, buyer in installment and lessee to be registered by authenticated signature are the following: (1) Name, identification certificate number (commercial register number) and address of the debtor, third party pledgor, pledgee, trade parties of in ownership reserve, parties of the lease, and the collecting agent of account receivable; (2) indication of the collateral credit or the amount of collateral credit (it seems the upper limit of the collateral credit is not required and that entry of the amount of collat-

eral credit on foreign currency is also accepted); (3) the pledge security, and the amount of the pledge, if indicated (as a pledge security indicating the amount, the case of taking a specific account receivable as pledge security can be considered, but the evaluated amount of the pledge security is not required); (4) the period of registration (5 years at longest, but can be shorter); and (5) conditions of registration, if any.

The form of the notice of pledge registration is prepared in English, too, so it seems pledge registration in English is also acceptable. Even when the pledge security is in a foreign country, pledge registration can be made in Bulgaria. Although it is not possible to forcibly move the pledge security into Bulgaria, nonperformance of obligation can be charged when the pledge setting contract is violated. Also, if the pledge security is not available, pledge can be executed to money under Article 35.2, so pledge registration of a pledge security present in the country will probably function as effective means of credit collection.

When the person who makes the authenticated signature before the registration officer, it can replace the authenticated signature (26 I, 27). About (2), it seems the upper limit of the collateral credit may be left unstated. As the pledge security with indication of the amount as referred to in (3), the case of taking a specific account receivable as pledge security can be considered. The conditions referred to in (5) are conditions set between the parties who need to cope with the third party, and a special agreement prohibiting transfer of the pledge security and the like may be mentioned.

As items that need not authentication but are to be registered upon consent of the other party, the following can be mentioned: (6) transfer of collateral credit (including trade and lease); (7) subrogation of collateral credit; (8) modification of debtor; (9) acquisition of the right to the pledge security; and (10) extension, extinction of collateral period (26 II, 27).

When pledge execution was made without registering (9), it is ineffective unless the third party, who obtained the right, applies to the judge for a month allowance of pledge execution and register the pledge right in the meantime (36 II).

Article 8.2.2 of the Law on Registered Pledge

allows disposal of the pledge security for the pledgor. This provides the processing of the case the third party who hereby acquired the right to the pledge security does not give consent to pledge registration. If the third party wants to obtain the pledge security, the third party may let the pledge leave the pledge right by paying an equivalent amount to the pledgee. The negotiation period for this purpose is one month allowance period. Article 5.4 of the EBRD Model Law on Secured Transactions states that a money credit with a special agreement prohibiting collateral setting can be taken as collateral. Japanese Civil Code, Article 466.2, also recognizes pledging a credit with a special agreement prohibiting transfer, however, only the good-faith third party with regard to the special agreement prohibiting transfer can acquire the pledge right. Since presence of the special agreement prohibiting transfer can be known by seeing the credit certificate, one who want to the pledgee cannot claim good faith, and so normally the pledge right is not set on the credit having a special agreement prohibiting transfer. However, when the debtor takes from the third debtor a written statement that the third debtor agrees to setting of the pledge right to the credit, the third debtor cannot maintain the special agreement prohibiting transfer. In Bulgaria, free transfer of right of pledge securities far wider than in Japan, because while they do not take it so absolutely as in the Model Law on Secured Transaction, they secure prompt solution through monitoring by the court.

Items that can independently be registered include the following: (11) seizure of pledge security; (12) seizure of collateral credit; (13) start of pledge execution and forfeiture of execution; (14) depositor, if any; (15) in case of enterprise collateral right, the enterprise administrator and conditions to the enterprise administrator; and (16) petition for bankruptcy and adjudication of bankruptcy (26 III).

(3) Rejection of Registration and Term of Validity of Registration

When registration is applied for, it is not rejected except when the registration fee is not paid, and is done immediately. If any item is missing in the registration, registration is accepted by correction (28). When the application for registration is rejected, the claim

can be made to the Minister of Justice according to administrative procedure rules. If rejected by the Minister of Justice, too, the claim can be made under the administrative procedure law. When the application for registration is rejected about items of registration requiring the consent of the other party about transfer of right ((6) - (10)), and when rejection of the application for registration is reserved, registration is done by the registration officer. When the application for registration is rejected about other items of registration, and when the rejection of application for registration by the specified administrative/judicial organization is fixed, registration is annulled by the registration officer (29). The meaning of this provision stating different reactions by the registration officer by items of the rejected registration can be assumed as: for registration items other than (6) to (10), even when registration is rejected, in a priority dispute with the third party, it is possible to claim priority by supposing that the registration was made.

Registration is valid for five years and can be extended (30). When registration of the pledge right is made other than at the Central Pledge Registry, procedures related to access to registration is the same as the procedures under the law (31). The pledge registration made other than at the Central Pledge Registry refers to the pledge registration made at the Central Depository, with regard to securities without security issue, and that made to the Commercial Register with regard to stocks and the enterprise collateral right.

5. EXECUTION OF REGISTERED PLEDGE RIGHT

(1) Notice of Execution and Sell-out of Registered Pledge Right

When a nonperformance of obligation occurred the pledger starts the procedure of pledge execution (32 I). The case the pledger occupies securities/payment certificates, too, the procedure of pledge execution or pledge forfeit follows the law (32 II). The pledgee notices the pledge setter of pledge execution in writing and registers the pledge execution (32 III). The pledgee is entitled to move to its own custody and sell the pledge security (32 IV). As no pledge regis-

tration is provided about the pledge security by occupancy as stated in Article 32.2, there is no notice of execution to the registration officer, after all. The notice to the pledgor states the scope of the pledge security and the pledge right collected from the pledge security. In the case of enterprise collateral right, the manner of selling the enterprise is mentioned (33).

The pledgee is entitled to occupies the pledge security, notices it to the user of credit sales, keeps the pledge security, collect the pledge right from the pledge security, maximize the sell-out price and minimize the sell-out expenses (34). When the pledgor does not cooperate in the occupancy removal of the pledge security, the pledgee applies to the court judge for delivery under the Civil Procedure Law. If the pledge security is lost, the pledgee obtains the price. When there is more than one pledgee and creditors who think that the share is too small because the amount of sell-out is too low can bring the case to the court (35). Article 23.7 of the EBRD Model Law on Secured Transactions provides the system of execution officer considering that a delay in taking the court procedure and provision of requirements become the question when the pledgor does not cooperate in occupancy removal, however, no particular system of execution officer is placed in Bulgaria. They take that application to the court judge may replaces it. Rather than that the reaction of court judge is prompt, probably this is based on a judgment that in the execution of power as to forcibly deprive others of occupancy, no difference is needed between merchants and non-merchants. Since trade after removal of occupancy is not the forcible execution of power, handling may as well differ. Perhaps balance with a fact that in case of the pledge right occupied by a merchant who does not make pledge registration, one must go to the court for pledge execution (no problem about occupancy removal but sell-out is urged) is also taken into account.

(2) Dispute about Sell-out Price

The sell-out price may be maximized within a range it minimizes sell-out expenses, so there is no need to sell it to a party that actually proposed the highest price. This is because a case in which the highest price is proposed but is accompanied with conditions

can well be considered in private sell-outs, and sometimes it require time and cost to meet the conditions. The effect is the same as the EBRD Model Law on Secured Transactions states in Article 24.3.1 as “make efforts to sell it out at a fair price.”

As typical examples of disputes among multiple creditors, a dispute about the value in collecting money equivalent to the pledge security which is not available, and a dispute about the asset value between the enterprise collateral creditor and pledgers of individual assets, may be mentioned. The enterprise collateral creditor can ensure collection from individual assets of the enterprise or sell out the enterprise as continuing enterprise. The value of the continuing enterprise having debts can sometimes below the asset value of individual assets. Considering that repeatedly selling individual assets will bring on higher share, they claim to the court to suspend the blanket transfer as continuing enterprise.

(3) Liquidation by Sell-out and Share

The pledgee is entitled to sell out the pledge security after two weeks have passed from the notice of pledge execution (37 I). If the sell-out is not finished within six months thereafter, the right of sell-out moves to another pledge registerer (37 II). The amount of sell-out is obtained in money and deposited to the accountant appointed by the pledgee with the name of the accountant. The allotment procedure of the sell-out amount by the person receiving the deposit starts with the preparation of the allotment list based on the pledge registration and sending it to pledgees. If no objection is expressed to the list within two weeks of dispatch, the final allotment list is prepared within two weeks and noticed to the pledgor, pledgees and others involved. One who has any objection brings it to the court within seven days. If no court is held, allotment is made (39).

If the allotment leave any excess, it is returned to the pledgor within seven days, however, when the pledgor has any debt from the state or there is another execution right holder, the excess is moved to the pledgor account controlled by the court judge (41). Once the pledge execution procedure has started, it cannot not be suspended by the start of bankruptcy of the pledgor (43 I). Pledgees having

pledge registration receive repayment from pledge securities prior to other bankruptcy creditors (43 II). If no pledge securities are left by bankruptcy of the pledgor, or if there is more than one pledgee, pledge execution is done in the process of bankruptcy procedure (43 III).

Normally allotment takes five weeks or so, and after the preparation of the final list, allotment is done after the lapse of seven days. In order to make allotment as early as possible, Article 28.1 of the Model Law on Secured Transactions states that allotment be made when 30 days have passed after the preparation of the final allotment list. Interest parties are required to promptly take the reaction in Bulgaria. Especially the period of raising an objection to the court is extremely short in Bulgaria. Accordingly, creditors, including financiers, lessors, ones who transact business by reserving the ownership, and unpaid sellers, should note that avoiding unsecured transactions and always providing the pledge right with counterforce by pledge registration is a precondition of doing business.

In the private execution of collateral right, the obligation of liquidation is imposed on the secured creditor, and this is natural for the pledge right of which the ownership remains untransferred. On the other hand, with regard to the transferable collateral of which the ownership is moved, why part of the ownership must be settled and returned should be covered separately by a provision. Bulgaria does not recognize the transferable collateral, because they do not want to recognize taking all the collateral security. EBRD Model Law on Secured Transactions states in Article 24.1 that sell-out can be done only after passing 60 days from the notice of execution, while it can be done in two weeks in Bulgaria. As a reason, it can be considered that, comparing with the EBRD configuration stating that the ownership is obtained by occupancy transfer by collateral execution and thereafter sell-out is done for the transfer of ownership, the Bulgarian configuration as to do collateral execution to cancel the pledge right does not need careful procedures and so the period can be far shorter. Besides, it seems they also take into account that, if two weeks, taking preservative measures for occupancy transfer only after the notice of collateral execution may suffice, without installing the system

of execution officer like in the EBRD. Setting a period to sell-out is also a consideration to facilitate sell-out, which the Model Law on Secured Transactions does not have. It is a device for private sell-out to prevent the secured creditor from manipulating so that no buyers of sell-out appear and from doing self-buying at a low price.

In Germany, when the value of collateral security and the amount of collateral credit lose balance in transferable collateral, it is taken as offense against public order and a long period of time is required till the establishment of a judgment denying taking all. EBRD Model Law on Secured Transactions takes it that since the obligation of liquidation is imposed on, transfer of the ownership or not is not a significant problem. For Bulgaria trying to provide a flexibility to allow collateral setting without writing the amount of collateral credit, the balance theory of Germany may extend disputes. Bulgaria composed the chattel collateral as pledge right, and this can be taken as a standpoint of being apart from both the EBRD and Germany. Or, this may be because legislators thought they could not cope with the simple theory of market economists stating that transfer to the market economy means introduction of the concept of absolute ownership.

(4) Possibility of Extension to Occupied Pledge

Execution of movable properties alone by occupancy and not by pledge registration is without the scope of the law. However, obviously it does not recognize the private sell-out. Articles 160 and 165 of the Law on Obligations and Contracts have provisions about movable properties and credit pledge to the effect that the pledge be executed by obtaining the writ title of obligation of execution from the court. And, the way to obtain the writ title of obligation should follow the example of title of obligation in the execution of mortgage right. It can be assumed that the execution of pledge will take time and money.

In the Japanese Civil Execution Law, conversion of movable properties is done either by auction/tender by the execution officer of the court or by voluntary sell-out when recognized by the court judge. Pledge execution of nominative claim under the Civil Execution Law does not need to obtain the title of

obligation. Also in Japan, under the Civil Code, simple repayment appropriation is recognized about chattel pledge and direct collection is recognized about the credit pledge of nominative claim (respectively Articles of 354 and 356 of the Japanese Civil Code). Further, in Japan where the transferable collateral is recognized, conversion by voluntary sell-out is also taken, and, practically voluntary sell-out is more popular.

In Bulgaria where only the pledge right is recognize, probably first the title of obligation is obtained, and then conversion, like that under the Japanese Civil Execution Law, is done under the supervision of the court judge specializing in execution. It seems the question is the extent the Bulgarian court judge recognizes the voluntary sell-out similar to that under the Japanese Civil Execution Law. Bulgarian Law on Obligations and Contracts does not recognize simple repayment and direct collection. As discussed in (6) later, in the pledge execution of securities, payment certificates and stocks, improvements are aimed at by adopting the system of voluntary sell-out, while about ordinary chattel pledge, the method to obtaining the title of obligation is not changed.

It is assumed that apart from occupancy as pledgee, they will come to think that the pledgee may as well make pledge registration so as to freely conduct private sell-out. Because, there will surely be chattel pledgees who think it will lose balance if, when the pledge security is not occupied, private sell-out is recognized by pledge registration but when the pledge security is occupied, private sell-out cannot be done freely without pledge registration.

(5) Bankruptcy of Pledgor

The provision that if the pledgor went bankruptcy and the pledge security is missing or in short, the processing of pledge execution is done in the process of bankruptcy procedure (43 II) can be considered as an exceptional case of the procedure of voluntary sell-out. However, for pledgees, it can be said that the receiver in bankruptcy, who seeks the pledge security and fix the priority order of the pledgees, cooperates in doing tasks to be done by the pledgees. When the pledge security is found, it is taken by pledgees and produces no interest for the bankrupt estate but

the receiver in bankruptcy takes initiative in the execution of collateral pledge. This is because, without the pledge security, under Article 10.3 of the law the pledgees are entitled to preferentially get repayment of an amount equivalent to the value of the pledge security from ordinary assets. Further, for portions that cannot be collected by execution, pledgees can join creditors in bankruptcy as ordinary creditors. Leaving the dispute among registered pledgees, as is, may sometimes result in improper processing of assets of the bankrupt who is also the pledgor.

(6) Pledge Execution of Securities, Payment Certificate and Stocks

Pledge execution of securities, payment certificates and stocks is subject to this provision regardless of occupancy or registration or not (44). Since conversion of these pledge securities is far easier by private execution, including voluntary sell-out in the market, than by auction and tender, the provision does not require the permission of voluntary sell-out by the court each time. Pledge execution of securities and payment certificates (promissory note, etc.) can be done by transfer, such as secured transfer, or by sell-out in the market (44). Pledge execution of stocks is made by the notice to the effect that the stockholder's right of the pledgor has extinguished, and the notice is registration of the pledge execution (45).

(7) Execution of Enterprise Collateral Right

The enterprise collateral creditor may choose collection by selling the enterprise itself or collection by selling individual assets of the enterprise (46 I). When the pledgee has chosen execution of the enterprise collateral right by selling the enterprise, the pledgee, in sending the notice of pledge execution, must also add to the notice that the pledgee obtained the consent of the enterprise administrator (46 II). After the commercial registration of the enterprise administrator has been done, the enterprise must not execute any right (46 III). The enterprise administrator covers all acts about management of the enterprise, but must not incur any new debt or dispose of asset portions or give the same as collateral (48 I). Since the task of enterprise administrator is to sell the enterprise as a whole unit, partial disposal and incurring a

new debt are not recognized. If the enterprise is not sold, the enterprise collateral creditor can discharge the incumbent enterprise administrator and appoint another enterprise administrator. However, if appointment is not done within two weeks, the enterprise administrator can regain the management right of the enterprise (51). Because, even if the enterprise administrator failed in selling the enterprise, the enterprise continues and the business must surely be continued.

The enterprise administrator make a guess beforehand, but probably commercial registration will be made after a nonperformance of obligation has occurred. Or, otherwise it is not possible to leave management to the management of the enterprise unless there is any particular agreement about normal enterprise management between the enterprise creditor and the management of the enterprise. The Model Law on Secured Transactions provides an accountant or a lawyer as qualification requirement in Article 25.6.1 probably because of consideration about fairness in sell-out and professional responsibility, but no qualification requirement is provided in Bulgaria. When actually selling an enterprise as continuing business, difficulties can be expected, including unavailability of a well-qualified person. To cover this, there is a provision stating that when enterprise sell-out was unsuccessful, another enterprise administrator is appointed or the management right is returned to the management of the enterprise. Perhaps the legislature knows in the process of privatization that enterprise sell-out is difficult. There may be opinions referring to cases in which the enterprise is divided and transferred or transfer of business and sell-out of individual assets are combined, where legally no sell-out as continuing business takes place and so no need of choosing an enterprise administrator, however, since enterprise division is possible only when selling of individual enterprise assets is considered as final means, actually the enterprise administrator will be required as one who will take the initiative.

CHAPTER III CHATTEL COLLATERAL LAWS OF RUMANIA AND HUNGARY AND REACTION OF JAPANESE ENTERPRISES

1. CHATTEL COLLATERAL LAW OF RUMANIA

(1) Method of Collateral and Object of Collateral

Features of Rumanian chattel collateral law are summed up in the following. Compared with the EBRD Model Law on Secured Transactions law, with regard to the chattel collateral, the law allows more free application of collaterals. Unlike Bulgaria, no consideration is given as to raise conative impulse in practical application of the law by maintaining compatibility with the existing legal system.

The law does not function substantially since the scheme of digital collateral registration has not been established yet as of November, 2000. However, when digital collateral registration comes into function, the coverage is so widespread as no business is possible without this chattel collateral registration, since business in Rumania requires the chattel collateral registration for both collateral transactions and other trades as well. The law replaces chapters of the Commercial Code relating to pledge right, texts of the Civil Procedure Law relating to the public notice of collateral execution in pawnbroker operation, and all the orders and regulations opposing the law (Rumanian Chattel Collateral Law (Section II of Law on Steps to Expedite Economic Reform), Article 104 (henceforth abbreviated as 104, etc.). The counter requirement of credit transfer was conventionally to notice of the debtor of the credit transfer or get the consent, but hereafter these will subordinate to the collateral registration of credit transfer (99). Also, when the digital collateral registration system start functioning, creditors need to re-register the collateral right within 120 days (102). Therefore, conative impulse of the law is not high in application, but it seems that when the digital collateral registration system is established, it will inevitably raise the conative impulse.

As Rumanian chattel collateral system is applied to all private and commercial contracts as well as

merchants (1), the scope of application is wider than the chattel collateral laws of Bulgaria and the EBRD. Transfer of accounts receivable that are not the object of collateral, conditioned transactions, lease including ones extending more than a year, consignment sales contracts, and the priority, registration and execution of warehouse securities and bearer stocks, are subject to the law (2). Movable properties and credits that can be transferred can be taken as collateral securities, and are specifically stated in Article 6. Collateral securities can be either currently present or generated in the future, whether tangible or intangible, indicated in domestic or foreign currency, or specific or nonspecific. Further, when the content and nature are fixed on the contract day, all the movable properties of the collateral setter are also acceptable (10). While the collateral of movable properties and rights is widely recognized, there is no express statement as to recognize the enterprise collateral right. Probably this is based on an understanding that since the collateral of movable properties held by enterprises, especially of the land, is done at the Land Registry handling all the rights related to land, it cannot be handled like registration of the collateral of movable properties at the Registry. There is a provision stating as, when the creditor makes the collateral registration of a movable property for the rebuilt portion thereof, it precedes the collateral registration of the mortgage right of land (35), and this recognizes the collateral registration of certain movable properties that precedes the mortgage right of land. If the debtor neglected the performance of obligation, the secured creditor is entitled to occupy, administer and sell the collateral security (11).

Collateral setting of collateral securities in foreign countries are subject to laws of the country, but when collateral registration is made within 60 days of delivery of the collateral security into Rumania or within 15 days of knowing the effect, the priority right, taking the time of collateral setting in foreign country as collateral registration in Rumania, is given (91). When a finance company leases a movable property

in a foreign country, and when the collateral right cannot be set in the foreign country, the company can secure the priority by registering the collateral right within 60 days of delivery into Rumania (92). Even a tangible asset moved to a foreign country or an intangible asset used in a foreign country, if it belongs to the debtor, registration of the collateral right can be made at the address place of the debtor (93). Even when the debtor moved the address to a foreign country, the same priority can be obtained in Rumania by registering the collateral right in the place (94). When there is no chattel collateral system in the foreign country to which the debtor moved the address or the movable property is not occupied by the creditor, priority in the collateral subordinates to the collateral setting to the receiving account in Rumania, or to the collateral registration in case the movable property is in Rumania (95).

The Rumanian Chattel Collateral Law provides chattel collateral in foreign countries so much in detail as above, and as a background, the presence of the Double Taxation Prevention Treaty with Cyprus, a tax haven can be considered.

Enterprises in Rumania and Russia/CIS move their legal personality to Cyprus aiming at taxation measures.³⁴ Bearing low tax rates in Cyprus, they report to taxation authorities in Rumania and Russia/CIS as tax paid. In 1998, Bulgaria discarded the Double Taxation Prevention Treaty with Cyprus and does not allow such tax cut measures by corporations and persons doing business in the country.

(2) Establishment of Chattel Collateral and Registration

The chattel collateral contract is not established unless it is made in writing with the signature of the debtor, but it can be replaced by endorsed transfer to securities (13, 14). The amount of collateral credit does not need to be stated (15), but the collateral setter can obtain the confirmation of the collateral setter by declaring the amount of collateral credit (26).

By registering to the digital collateral register,

34 When the author made interviews in Moscow in 1998, many of the Russian venture capitals invested by EBRD invested in Cyprus corporations as direct investment to Russia. Namely, they invested in Cyprus corporations having branches in Russia or doing business there. Many businesses via Cyprus were seen in Kazakhstan, too, where the author stayed from 1996 to 1997.

the counterforce can be obtained (29). The occupied collateral right of which the collateral right is established without digital collateral registration is 300 Euro or less in amount of collateral credit and includes money/securities/signed certificates (deposit certificate, B/L, check and promissory note, including endorsement as well as occupancy), listed securities (requiring registered pledge), and ships/aircraft (collateral registered to ownership register) (30). For loans for purchase supplied to the unpaid seller collateral right holder and the buyer, when the notice of collateral setting was registered before the debtor started occupancy and the existing registered collateral creditor received the notice, the collateral right precedes the existing registered collateral creditor (33). When the collateral security is changed to another object, which is a movable property other than money, deposit and checks, the collateral right extends to the object by changing the collateral notice (34). The fruit of the collateral security belongs to the collateral creditor, and is appropriated for the payment of maintenance costs and the amount of debt (39). Collateral registration is effective for five years and can be renewed repeatedly, as desired (44).

Digital collateral registration is controlled by collateral setters and collateral securities, held by associations of private citizens and corporations selected by tender under the supervision of the supervisory government agency, mutual connected via a computer network, and made accessible even outside the business hours (45, 53). The register is a database. Collateral registration fees are set by the principle of competition between registration organizations, and the supervisory agency must not guide them (51, 52). The collateral notice is inputted either manually or digitally, and the noticer obtains a copy of the collateral notice within 24 hours (57, 58).

(3) Execution of Chattel Collateral

Execution of chattel collateral is done either by the Civil Execution Law or by the voluntary sell-out of the law (62). When the effect that the execution of chattel collateral is made by starting occupancy/conversion to cope with the nonperformance of obligation is written in the collateral setting contract with letters 0.5cm square and larger, collateral execution

may be done without the prior notice and fees, but the start of occupancy must not accompanied by civil servants or the police and must not disturb public order (63). Even without occupancy, the creditor can sell the collateral security (65). If it is not possible to start occupancy in a peaceful manner, occupancy can be restored by asking the execution officer (67). As the method of selling the collateral security, voluntary sell-out to the third party, auction via newspaper announcement, and sell-out in the market, however, the sell-out price must be a commercial price equivalent to a proper highest price (69). Sell-out must be noticed to the debtor and other creditors by seven days before the planned date of sell-out so that they can bring an action against the sell-out (71, 75).

The share procedure of the sell-out amount can be done by the collateral creditor, and unlike the EBRD Model Law on Secured Transactions, there is no system of money keeper aimed to secure the fairness of distribution. An excess amount after paying the debt from the sell-out amount of the collateral security is returned to the debtor within three days of sell-out (78). Even when bankruptcy or corporate reorganization procedure is started before the collateral execution procedure is finished, the procedure can be continued (86: In Japan, collateral execution, if not finished yet, is suspended.). The creditor who made sell-out violating the law pays damages corresponding to 30% of the collateral credit or the difference between sell-out price and market price, whichever is the larger (88).

2. HUNGARIAN CHATTEL COLLATERAL LAW

(1) Features of Collateral System Reform in Hungary

The content of legislature of the Chattel Collateral Law in Hungary is summarized. In Hungary, legislation of the Chattel Collateral Law is done by revising chapters of pledge right and mortgage right of the Civil Code (Act 26 of 1996 on the amendment of Certain Provisions of the Civil Code). So, more consideration is given to compatibility between chattel pledge and credit pledge and between pledge right and mortgage right. The distance from the EBRD

Model Law on Secured Transactions is farther in order of Rumania, Bulgaria and Hungary. Polish Chattel Collateral Law may be positioned between Rumania and Bulgaria.

Points in the Amended Civil Code are: (1) in pledge on credit right, collateral registration and voluntary sell-out are recognized; (2) the floating pledge and floating mortgage right are recognized; (3) one year of extension is recognized for the extinction of collateral right; and (4) collateral execution on condition of evacuation is recognized for immovable properties for dwelling.

In the Model Law on Secured Transactions, (1) and (2) are provided but (3) and (4) are not. (2) states as “When taking the credit right generated from a last-ing contract relations as collateral, a collateral security can be obtained by setting a limiting amount (Article 260.4 of the New Civil Code under Article 1 of Hungarian Act 26 of 1996 on the amendment of certain provisions of the Civil Code (henceforth abbreviated as H260, etc.), and further “The pledge right (“lien” in English transaction in Official Gazette) can be set even when there is no credit right or the credit right is extinguished, and in this case the pledgee (“lien” in English transaction in Official Gazette) receives payment from the pledge security according to the amount stated in the pledge setting contract (H269 I).” By setting a limiting amount, the floating pledgee receives preferential payment with an actual credit amount realized at time of cristalization. In this case, the pledge right comes to extinction by the notice of finished payment made by the pledgor (lienee) or the pledgee (lienor), and the notice is made within six months from the payment (H269 II).

(4) expressed that an idea that immovable properties for dwelling will never be taken, a remain of the socialistic times, is abolished. They set forth a capitalistic concept as the people’s dwelling right is not the one the state guarantees. In this sense, too, it can be said that among other Central and East European countries, Hungary is closest to participation in the EU. (3) seems to be a concept developed from the concept of floating pledge and floating mortgage. Even when the mortgage right is extinguished, the mortgagor must keep free the disappeared mortgage order for one year after the extinction registration and

can give the order to a new creditor (H268 II). Since the order of subordinate mortgagee does not rise as the natural result of extinction of the priority mortgage right, the system is favorable to collateral creditors in a special relationship with the debtor. Registration to secure the priority order of mortgage right is made to the land register (Article 7.1 of the Revised Real Estate Registration Law under Article 5 of the Act 26 of 1996 on the amendment of certain provisions of the Civil Code). This seems influenced by the order reserve system of real estate mortgage right in Germany.

The pledge right comes to extinction when the pledge security is returned to the pledgor, but when occupancy is not voluntarily lost, the law provides that the pledge right remains in effect for one year, allowing one year as period for taking another pledge security (H268 III).

(2) Object of Pledge Right

Object of the pledge right includes movable right and credit, so the pledge right is partly not established, and in real estate, the pledge right or mortgage right are established for the registered portion or the entire real estate of the secured creditor (H252). Unlike Bulgaria, this recognizes real estate pledge, too.

In the case of the credit pledge, the pledgee can execute the pledge right by registering the notice of pledge setting agreed by the pledgor to the Notary Public Association and obtaining the written document of voluntary sell-out from the pledgor. Here the concept of the EBRD Model Law on Secured Transactions is introduced, as is. However, unlike the EBRD Model Law on Secured Transactions, the text of the law is made by adding the minimum revision on the conventional Hungarian Civil Code and the related laws. Because of this, unlike the EBRD and Bulgaria, the pledgor that can register credit pledges is not limited to traders. This is the same in Rumania, but since Rumania newly introduces a totally different law, there the conative impulse to secure the binding force of law does not easily grow among targets of the law.

When the pledge security is the credit or right, the pledgee can prepare the legal statement (or the notice of pledge setting) relating to the collateral by

obtaining the consent of the pledgor (H258 I). The pledgee can execute the pledge right by showing the legal statement to the debtor of the credit or right, namely the pledge security (261 II). The legal statement can be registered to the Notary Public Association under Article 47 of the New Civil Code Implementation Order, under Article 2 of the Hungarian Act 26 of 1996 on the amendment of certain provisions of the Civil Code. The secured creditor can ask voluntary sell-out to an auctioneer or a collateral loan professional by a prior written agreement, without the collateral execution procedure by the court (H264 II, III).

To let the pledge right to the fruit of pledge right, an agreement must be reached between the parties (H253 II). When the agreement is available, the pledgee can use the collateral security and obtain the fruit, and, in addition to appropriating the fruit for storing the pledge security, can appropriate it to the credit (H257 II). From the provision that the pledge right extends to an object that will come in the future, too (H253 II), it is clear the a floating pledge is available. Corporations (legal entities) and an incorporated economic association can set the enterprise collateral right to an entire of enterprise assets or the specified assets thereof (H254 I). In the execution of the pledge right, if changes in pledge security is not pledge registered, it cannot cope with the third party who obtained the pledge security with good faith and onerously (*bona fide* and for consideration, H254 II).

(3) Establishment of Collateral Right and Registration

Pledge setting must be made first by the contract, and when the credit or the conditioned pledge right is taken as pledge security in the future, or when the pledgor obtains the disposal right about the pledge security after exchanging the contract, it must be made by a written contract (H259). Mortgage setting to the real estate register is made by a written contract and mortgage right setting should be registered to the real estate register (H260). In the practical registration, however, it is provided that the mortgage setting contract must be made by the notarized deed (Article 47.2 of the Revised Civil Code Implementation Law under Article 2 of the Act 26 of 1996 on the amendment

of certain provisions of the Civil Code). When pledge setting to movable properties on the real estate to which the mortgage right is set is desired, the pledge contract must be authenticated and collateral registered to the Notary Public Association (H260 II). It should be understood as all the contracts relating to real estate collateral are to be made via the notary deed and collateral registered. Collateral registration requires the amount of collateral credit and the fruit/expenses covered by collateral to be registered, but the reduction of amount/extinction of the collateral credit is effective irrespective of registration (H260 III).

Pledge setting required, in addition to the contract, occupancy for pledge securities of which occupancy can be transferred and collateral registration for pledge securities comprising rights and credits (H261). Registration rules and fees at the Notary Public Association that handles collateral registration of the pledge right are subject to the government order (Act 26 of 1996 on the amendment of certain provisions of the Civil Code, Article 9). Since the law is applicable to the collateral right that remains effective passing May 1 1997 (Article 8 of the Act 26 of 1996 on the amendment of certain provisions of the Civil Code), contracts setting pledge securities earlier need to re-register the pledge right. Incidentally, the law does not provide anything about the validity term of pledge registration.

According to the interview at a local law office, the social position of notaries, who are not government agencies, is high in Hungary from before, this pledge registration procedure goes quite smoothly and is used very popularly. Practical pledge registration procedure is done as: the Notary Public Association forms computer networks and the results are made into a database. Accordingly, by visiting a notary public office, everybody can confirm the presence of the pledge right of relevant enterprises and persons at low fees. Chattel collateral is composed along the conventional legal scheme and registration procedure of chattel collateral is left to notaries, who have a high social status but are non-government agencies. While this has realized a business-like collateral registration system, it seems this allows the conative impulse to secure le-

gal execution force to work more easily, a big difference from Rumanian Chattel Collateral Law where assumably conative impulse cannot work so easily.

(4) Execution of Pledge Right

Pledge execution basically requires the court decision about execution (H262). The pledge forfeiture contract is prohibited (H263 I). Payment from pledge execution is subject to the order of pledge collateral (H263 II). In pledge execution, the parties can reach an agreement about the lowest price at auction and the terms of pledge execution, and if conditions are not met, pledge execution by auction cannot be done (H264 I). When the pledge security has a market price or when the collateral loan professional (such as a pawnbroker) is the pledgee, an agreement can be reached by a written agreement about voluntary sell-out without the collateral execution procedure by the court, and in other cases, too, an agreement can be reached by a written agreement about voluntary sell-out by an auctioneer or a collateral loan professional by a written agreement, without the collateral execution procedure by the court (H264 II, III).

Before the sell-out, the pledge setter receives the notice (H265 I). This gives the pledgor a chance of redemption. The sell-out amount of pledge security belongs to the pledgee, but when it exceeds the amount of collateral credit, the excess must be returned to the pledgor, and a prior agreement of non-liquidation is ineffective (H 265 II). Pledgees who can get paid only partly by pledge execution can collateral register the remaining collateral credits (H266 II). The pledge right or the mortgage right of which the exclusive preference right or collateral right can be executed at time of bankruptcy/liquidation must be the collateral right set six months prior to the start of bankruptcy/liquidation (Article 57.1.b of the Revised 1991 Bankruptcy/Liquidation Procedure Law under Article 6 of the Act 26 of 1996 on the amendment of certain provisions of the Civil Code).

3. NOTES FOR JAPANESE/JAPAN-BASED ENTERPRISES

Generally, points to be noted by Japanese enterprises/Japan-based enterprises are the following: (1) Start business only after confirming whether chattel collateral registration is possible or not. Even for ordinary sales and lease contracts, such as the unpaid seller collateral right, ownership reserve and installment sales, sometimes credit collection becomes insufficient without chattel collateral registration; (2) When financing a local enterprise, take the chattel collateral locally; (3) Take the possibility of LBO, by blanket collateral registration of unspecified future accounts receivable in Central and East European countries, as a management strategy; (4) Recognize, not generally but as business-legal affairs related to each business transaction, that the national situation differs by countries in Central and East European countries; (5) Take economic problems like restoration of the macroeconomy and development of the market economy as management problems, such as the influence of weak Euro currency or whether or not factors allowing the power/energy to use, execute and observe laws of market economy actually exists; and (6) Collect local laws relating to business, especially the text with reliable English translation, and exchange information accumulated this way, aiming at quality improvement of information.³⁵

In this text, chattel collateral laws of Central and East European countries were analyzed, centering on that of Bulgaria, but for Rumania and Hungary, only the summaries were given. The author believes that making analyses like this about other specific business laws of individual countries, compiling and openly supplying the results to possible investors, will increase direct investments in Central and East Europe and lead such direct investments to success.

³⁵ Of course the legal information and translation by Japanese/local staff who can understand local languages are useful, but their interpretation/understanding about local laws is sometimes insufficient.

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