



Association
Henri Capitant

DRAFT EUROPEAN BUSINESS CODE

BOOK 5

LAW OF SECURITY INTERESTS

DRAFT WORKING DOCUMENT FOR
DISCUSSION

Working group members

Michel GRIMALDI, Professor Emeritus at Panthéon-Assas University, Honorary President of Association Henri Capitant, Co-Director

Eva-Maria KIENINGER, Professor at Julius-Maximilians-University of Würzburg, Co-Director

Ole BÖGER, Judge of the Hanseatic Court of Appeal of Bremen

Mauro BUSSANI, Professor at the University of Trieste

Wolfgang FABER, Professor at the University of Salzburg

Charles GIJSBERS, Professor at Panthéon-Assas University

Thierry VACHON, Notary in Meudon

Agnès REINHOLD, trainee lawyer at the École de Formation du Barreau

Caroline RAPATZ, Professor at Christian-Albrechts University of Kiel

DRAFT WORKING DOCUMENT FOR
DISCUSSION

TITLE ONE: EUROPEAN PERSONAL SECURITY INTERESTS

CHAPTER I: EUROGUARANTEES

Article 5.1.1.1 Definition

A euroguarantee is an agreement under which the guarantor agrees to be liable to the creditor for the main debtor's debt if the main debtor defaults.

Article 5.1.1.2 Freedom of contract

Unless otherwise provided for, the parties may derogate from the provisions of this Chapter.

A euroguarantee is an optional instrument supplementing personal security interests under national law. It requires an express choice by the parties.

Article 5.1.1.3 Scope of application

A euroguarantee may be obtained by a natural or legal person to guarantee one or more business debts of the main debtor.

Article 5.1.1.4 Form

The guarantor's consent must be given in writing, on paper or electronically, failing which it shall be null and void.

Article 5.1.1.5 Guaranteed obligation

(1) A euroguarantee may be obtained to guarantee one or more existing or future obligations, provided that they are ascertained or ascertainable.

(2) In addition to the principal obligations, a euroguarantee guarantees interest and other ancillary costs as well as the costs reasonably incurred by the creditor in recovering the guaranteed obligations.

(3) Where the guaranteed obligation is not monetary in nature, the guarantor is liable only for the damages owed by the main debtor.

Article 5.1.1.6 Accessory nature and scope

(1) A euroguarantee is accessory in nature and may only be entered into to guarantee a valid obligation.

(2) The scope of a euroguarantee is dependent on the guaranteed obligation.

(3) Agreements between the creditor and the main debtor entered into after a euroguarantee has been entered into is not effective against the guarantor; in particular, they may not increase the amount of the guaranteed obligation or defer the date on which it becomes due.

Article 5.1.1.7 Term of euroguarantees of future obligations

- (1) A euroguarantee of future obligations may be granted for a fixed or indefinite term.
- (2) A euroguarantee of future obligations requires the guarantor to pay all debts arising before the euroguarantee comes to an end, whether or not they have become due, as well as interest and other ancillary costs, even if they have not yet arisen at that date.
- (3) The guarantor may unilaterally terminate a euroguarantee of future obligations in accordance with Article 8. If the guarantor is a natural person, it always ends with the guarantor's death, notwithstanding any provision to the contrary.

Article 5.1.1.8 Termination of euroguarantees of future debts

- (1) An indefinite-term euroguarantee of future obligations may be terminated unilaterally by the guarantor upon giving at least 30 days' prior notice.
- (2) The guarantor may terminate the euroguarantee at any time in accordance with the general principles of national law.

Article 5.1.1.9 Time period that terminates a payment obligation

- (1) Euroguarantees for existing or future debts may be subject to a time period beyond which the guarantor may no longer be sued by the creditor.
- (2) Upon expiry of such a time period, the guarantor shall be fully released unless the creditor has previously commenced proceedings against the guarantor in respect of an obligation that has already arisen, is due and remains unpaid. If the guarantor is not jointly and severally liable, the creditor must have pursued recovery of the guaranteed obligation against the debtor by that date and must have informed the guarantor of the proceeding it has brought immediately thereafter.

Article 5.1.1.10 Principle of joint and several liability of the guarantor

- (1) The guarantor is jointly and severally liable with the main debtor. It shall not require the creditor to sue the main debtor first.
- (2) Notwithstanding this, where there is an express stipulation that the euroguarantee is subordinated, before demanding payment of the guaranteed obligation from the guarantor, the creditor must have made reasonable efforts to obtain such payment from the main debtor and, where applicable, from other guarantors guaranteeing the same obligation whose commitment is not subordinated. However, the creditor shall be relieved of this obligation if it was manifestly impossible or excessively burdensome to obtain satisfaction from that person. This exception may apply in particular if insolvency or similar proceedings have been commenced against the same person or if the commencement of such proceedings has failed due to insufficient assets.

Article 5.1.1.11 More than one euroguarantee

- (1) Where there is more than one euroguarantee for the same main debt, the guarantors are deemed to be jointly and severally liable.
- (2) In such a case, the guarantors cannot require that the creditor divide its proceedings between them.

(3) Each guarantor is liable to the others in a proportion corresponding to the amount guaranteed by that guarantor relative to the aggregate commitments of all the guarantors.

(4) A guarantor that has paid more than its share has recourse against each of the other guarantors to the extent of their share of the guaranteed obligation and of the costs of the proceedings.

Article 5.1.1.12 Right to invoke the defences available to the main debtor

(1) A guarantor may invoke against the creditor all defences available to the main debtor, whether they arise from the guaranteed debt or from the relationship between the main debtor and the creditor.

(2) The guarantor may invoke these defences even if the main debtor may no longer invoke them because of an action or omission by the main debtor that occurred after the euroguarantee took effect.

(3) However, a guarantor may not invoke the incapacity of the main debtor or the fact that it had not yet acquired legal personality on the date of the commitment, if the guarantor knew such facts when it granted the euroguarantee.

(4) Where the main debtor is entitled to contest the contract from which the guaranteed obligation arises for a reason other than those referred to in the preceding paragraph and has not exercised that right, the guarantor may refuse to perform the obligation. The same applies if the guaranteed obligation can be set off.

Article 5.1.1.13 Right to invoke defences specific to a guarantor

(1) A guarantor may invoke all defences against the creditor arising from the euroguarantee contract and from its personal relationship with the creditor.

(2) The guarantor may not rely on the fact that it no longer has a relationship with the main debtor or on the circumstances of that relationship in order to avoid payment.

Article 5.1.1.14 Insolvency of the main debtor

(1) The commencement of insolvency proceedings against the main debtor shall not affect either the term or the amount of a euroguarantee.

(2) A guarantor may not invoke any time limit or extension that may be granted to the main debtor by law or by a court by reason of the main debtor's insolvency.

Article 5.1.1.15 Enquiries of the main debtor before payment

(1) A guarantor against whom a proceeding for payment has been brought shall seek information from the main debtor as to any defence before making payment.

(2) If the main debtor wishes to assert such a defence, it shall bring them to the guarantor's attention no later than 15 days thereafter.

(3) A guarantor who fails to make such enquiries is liable to the main debtor to the extent of the main debtor's loss of opportunity.

Article 5.1.1.16 Recourse after payment

(1) A guarantor who has paid all or part of the debt has a remedy against the main debtor in respect of the amounts paid by the guarantor and the interest and costs incurred by the guarantor.

(2) It acquires by way of subrogation the guaranteed obligation and all the rights and security interests which the creditor had against the main debtor and the other guarantors.

Article 5.1.1.17 “No effective subrogation” exception

(1) Where, through the fault of the creditor, the guarantor can no longer effectively be subrogated to the rights and security interests held by the creditor, as provided for in paragraph 2 of Article 16, it shall be released from its obligation to the extent of the harm sustained. This is particularly the case if the creditor has allowed one or more security interests that could have benefited the guarantor to expire or has waived them without the guarantor’s consent.

(2) Any provision to the contrary is deemed not to exist.

Article 5.1.1.18 Transfer by operation of law

(1) The guarantor’s obligation shall be transferred by operation of law together with the guaranteed obligation.

(2) However, the parties may provide that the euroguarantee shall not be transferred to the successor. The guarantor’s obligation is extinguished if the main debt is transferred.

CHAPTER II: INDEPENDENT PERSONAL EUROGUARANTEES

Article 5.1.2.1 – Definitions

(1) An independent personal euroguarantee is an agreement by which a person, the guarantor, undertakes to pay a certain agreed amount to the creditor, the beneficiary, in consideration of a guaranteed obligation entered into by a third party, the debtor, but does not have the right to invoke against the beneficiary any objections arising from the relationship between the debtor and the beneficiary.

(2) The instructing party is the party at whose request the guarantor agrees to act. It may be the debtor of the guaranteed obligation or a third party.

Article 5.1.2.2 – Freedom of contract

Unless otherwise provided for, the parties may derogate from the following provisions.

Article 5.1.2.3 – Different types of independent personal euroguarantees

(1) An independent personal euroguarantee is an on-demand guarantee where the guarantor must pay the agreed amount upon demand by the beneficiary. Unless the guarantor is a credit institution, its consent to an independent personal on-demand guarantee cannot be based solely on its acceptance of the beneficiary's general terms and conditions.

(2) A guarantee is conditional if the beneficiary must state the obligations, failure to perform which will give rise to the demand.

(3) A guarantee is conditional with a documentary requirement if the beneficiary must provide certain documents in support of its demand.

Article 5.1.2.4 – Distinction from guarantees and application to standby letters of credit

(1) If there is any doubt as to the nature of the guarantor's commitment, the security interest is a euroguarantee.

(2) An independent personal euroguarantee granted by a consumer is null and void. It is valid as a euroguarantee if it meets the applicable requirements.

(3) These provisions apply to standby letters of credit.

Where there is any uncertainty as to whether a personal guarantee is accessory or non-accessory, the agreement must not be interpreted so as to preclude objections arising from the relationship between the debtor and the beneficiary of the secured obligation from being invoked, where there is any doubt in this regard.

Article 5.1.2.5 – Demand for performance

(1) The guarantor is only required to satisfy demands that are in accordance with the guarantee and are made in writing.

(2) The demand, together with the required documents if the guarantee is conditional with a documentary requirement, shall be notified to the guarantor at the place identified in the instrument or, if no such place is identified, at the place where the guarantee was issued.

Article 5.1.2.6 – When payment is due

A guarantor shall perform its obligation as soon as it has been notified and at the latest within seven business days.

Article 5.1.2.7 – Objections arising from the relationship between the beneficiary and the guarantor

(1) A guarantor may invoke against the beneficiary objections based on their personal relationship.

(2) However, in the case of an on-demand guarantee, it cannot invoke set-off as an objection. It may only invoke other objections if they are not contested by the beneficiary, have been established beyond dispute, or are apparent from the instrument creating the guarantee.

(3) No clause may deprive the guarantor of the right to raise an objection that the guarantee is null and void.

(4) A clause that allows the guarantor to invoke set-off may only relate to obligations that the guarantor has acquired from the debtor of the guaranteed obligation if it provides for this expressly.

Article 5.1.2.8 – Objections arising from the relationship between the beneficiary and the guarantor

A guarantor may only invoke objections based on the guaranteed obligation in the case of fraud or manifest abuse at the time of the call.

Article 5.1.2.9 – Term

(1) If the guarantee is subject to a certain or uncertain term, the guarantee comes to an end when the term expires.

(2) If it is for an unlimited term, the guarantor may terminate it unilaterally upon giving at least thirty days' prior notice.

(3) A guarantor is only required to satisfy demands that are notified before the guarantee expires and for which all conditions have been met by that date. However, the guarantee may be called during the fourteen days preceding its expiry date even if the conditions have not been met, but the guarantor is only required to pay if the conditions have been met by that date.

Article 5.1.2.10 – Notification obligations and protection of the principal against abusive or fraudulent execution of the guarantee

(1) A guarantor shall immediately inform the principal of a request for performance notified to it.

(2) The principal may only prohibit the guarantor from paying if the demand for performance is fraudulent or manifestly abusive.

(3) Within seven days of notification, the guarantor shall inform the principal and the beneficiary as to whether or not it intends to comply with the demand for performance.

Article 5.1.2.11 – Guarantor’s recourse against the principal and the debtor

(1) After the beneficiary has been paid, the guarantor shall have personal recourse against the principal for the amounts it has paid.

It also has a subrogated claim under which it may exercise the rights that the beneficiary had against the debtor.

(2) However, the guarantor has no personal claim if it did not give the principal the information that would have allowed the principal to prevent the guarantor from paying the beneficiary, where the guarantee call was fraudulent or manifestly abusive.

Article 5.1.2.12 – Guarantor’s right to claim against the principal and the debtor

The guarantor has the right to recover any amounts paid to the beneficiary that were not due.

Article 5.1.2.13 – Transfer of the guarantee in the event of transfer of the guaranteed right

A guarantor’s payment obligation is transferred with the guaranteed obligation.

However, in the case of an on-demand guarantee, only the transferor may enforce it.

TITLE TWO: EUROPEAN SECURITY INTERESTS IN REM

CHAPTER I: EUROPEAN SECURITY INTERESTS ON IMMOVABLE PROPERTY IN REM: EUROLIENS AND EURO-RETENTION OF TITLE

SECTION 1: GENERAL RULES

§ 1: Application

Article 5.2.1.1.1.1. Application

Any tangible movable property situated within the territory of a Member State of the European Union may be the subject of a eurolien or euro-retention of title.
The grantor and beneficiary must be traders.

Article 5.2.1.1.1.2. Application by agreement of the parties

The parties must clearly express their choice to make their security subject to the eurolien or euro-retention of title scheme.

Article 5.2.1.1.1.3: Exceptions

Registered ships and tangible movable property over which security interests may be granted, the registration of which is provided for by international conventions, may not be the subject of a eurolien or euro-retention of title.

§ 2: Definitions

Article 5.2.1.1.2.1: Euroliens

A eurolien is a right in rem which gives the creditor the right to be paid in priority out of the encumbered movable property.

Article 5.2.1.1.2.2: Euro-retention of title

A euro-retention of title is title retained by a creditor as security for the performance of an obligation against the buyer of the property subject to the obligation.
A transfer of title subject to the condition precedent of payment of the secured obligation is equivalent to it.

Article 5.2.1.1.2.3: Security interests related to financing purchases

- (1) A euro-retention of title or eurolien is an “security interest related to financing a purchase” where the security interest secures payment of the purchase price of the movable property subject to it, or repayment of the loan taken out with a view to that acquisition.
- (2) They remain so if the secured obligation is transferred.

Article 5.2.1.1.2.4: Characterisation

(1) The characterisation of “tangible movable property” is a matter for the applicable national law.

(2) The characterisation of “bearer negotiable instruments” is a matter for the applicable national law.

SECTION 2: GRANTING AND EXTENT OF THE SECURITY INTEREST

§ 1: Granting a eurolien

Article 5.2.1.2.1.1. Requirements for granting a eurolien

(1) The requirements for granting a eurolien are as follows:

- (a) the encumbered property must be clearly identified;
- (b) the grantor must have the right or power to grant a eurolien; and
- (c) a security ceiling must have been agreed, in accordance with Article 5.2.1.2.3.

(2) The encumbered property, whether existing or future, may be identified by indicating its nature, characteristics, quantity, location or value.

Article 5.2.1.2.1.2: Clause restricting disposal rights

Any agreement given by the owner not to transfer or encumber the property on which the owner has granted a eurolien is not effective against a creditor acting in good faith.

Article 5.2.1.2.1.3: Euroliens on future, fungible or inalienable property and on conditional rights

(1) The beneficiary of a eurolien granted on future, fungible or inalienable property does not acquire a right in that property until it exists, is identified or becomes alienable.

(2) The beneficiary of a eurolien granted on a right subject to a condition precedent acquires the right only when the condition is met.

§ 2: Granting a euro-retention of title

Article 5.2.1.2.2: Requirements for granting a euro-retention of title

The requirements for granting a euro-retention of title are as follows:

- (a) the creditor must hold title to the property provided or be vested with the required powers in this regard;
- (b) the property must be clearly identified; and
- (c) the secured obligation must exist.

§ 3: Extent of the security interest

Article 5.2.1.2.3: Secured obligations

(1) The security interest covers the principal of the secured obligation and ancillary costs up to a maximum ceiling. Ancillary costs include, in particular:

- (a) compensatory interest and default interest;
- (b) damages, liquidated damages or any amount payable by agreement if the debtor fails to perform its obligations; and
- (c) reasonable costs incurred in recovering such amounts out of court.

(2) The right to payment of the reasonable costs of legal proceedings and enforcement measures against the grantor, or against the debtor if the debtor is not the grantor, is covered only if the grantor has been informed in good time of the creditor's intention to bring proceedings or take other enforcement measures, and has thus been put in a position to avoid such costs.

(3) The creditor and the grantor may limit the security interest provided for in the preceding paragraphs.

SECTION 3: ENFORCEMENT AGAINST THIRD PARTIES

§ 1: General rules

Article 5.2.1.3.1.1.: Effectiveness against third parties

A validly granted security interest may be made effective against third parties by registration or repossession.

Article 5.2.1.3.1.2: Registration of security interests related to financing purchases

(1) A security interest related to financing a purchase may only be made effective against third parties by registration.

(2) It may be invoked against third parties from the date on which it is granted if the registration is completed within sixty days of delivery of the property.

(3) If registration takes place more than sixty days after delivery, the security interest related to financing a purchase becomes effective against third parties only at the time of registration and does not benefit from the superpriority provided for in Article 5.2.1.4.2.

Article 5.2.1.3.1.3: Effect of registration on the buyer's good faith

Once the security interest has been registered, a buyer of the encumbered property whose rights have been granted by the grantor may not rely on the buyer's good faith. The same applies to a person who holds another security interest from the grantor, including one created under national law.

§ 2: Repossession from the grantor

Article 5.2.1.3.2.1: Repossession

Repossession is only effective against third parties if:

(a) the creditor or the creditor's agent has direct and exclusive control over the encumbered property;

(b) a third party agreed with the grantor holds the encumbered property exclusively on behalf of the creditor; or

(c) the grantor no longer has access, without the express consent of the creditor, to the encumbered property which have remained on the grantor's premises.

Article 5.2.1.3.2.2: Bearer negotiable instruments

(1) A eurolien over property covered by a bearer instrument is effective against third parties by delivering the instrument.

(2) It remains effective against third parties where the property covered by the instrument is returned to the grantor or to a third party, for a maximum period of ten days, upon being provided with a dated bill of lading.

Article 5.2.1.3.2.3: Creditor's obligation to provide information on the secured debt

Article 5.2.1.3.3.d. is applicable to euroliens with repossession.

§ 3: Registration

a) General provisions

Article 5.2.1.3.3.a.1: Structure and operation of the register

(1) Euroliens and euro-retentions of title shall be registered in the grantor's name in the European register of security interests in rem.

(2) This register is electronic. It is accessible online.

(3) The organisation of the register and the procedures and effects of registration shall be governed by an implementing regulation.

Article 5.2.1.3.3.a.2: Electronic identification as a prerequisite for making statements to the registration office

(1) Any statement entered in the register must identify the person making it.

(2) Such identification shall be carried out by a process whose reliability is recognised at the level of the European Union or of the Member State where the register is kept.

(b) Registrations in the register

Article 5.2.1.3.3.b.1: Registrations to be made by the creditor

(1) Registrations in the register shall be made by the creditor.

(2) Unless otherwise agreed, they do not require the grantor's consent.

Article 5.2.1.3.3.b.2: Time of registration; pre-registration

(1) The registration may be made before or after the security interest is granted.

(2) Where a security interest has been registered before being granted, the creditor must cancel the registration if the security interest has not been granted within two months.

Article 5.2.1.3.3.b.3: Minimum information to be contained in the register

Registration in the register requires that:

- (a) the grantor of the security interest be identified; and
- (b) the encumbered property be identified by the category of property to which it belongs, without further identification being necessary.

Article 5.2.1.3.3.b.4: Additional information

Registration in the register may include the following additional information:

- (a) details of the encumbered property or the scope of the security interest ;
- (b) the time period during which the registration is effective, as provided for in Article 5.2.1.3.3.e.1; and
- (c) the security ceiling.

Article 5.2.1.3.3.b.5: Information to be contained in the register

For each registration, the register shall contain the following information, accessible to any interested party:

- (a) a registration number assigned by the registration office upon initial registration;
- (b) the grantor's name and personal details;
- (c) the creditor's name and personal details;
- (d) the registration date;
- (e) the mandatory information referred to in Article 5.2.1.3.3.b.3;
- (f) where applicable, the information referred to in Article 5.2.1.3.3.b.4; and
- (g) a statement that the security interest automatically extends to assets and new property corresponding to the encumbered property, as provided in Chapter 5, unless otherwise agreed.

(c) Consulting the register

Article 5.2.1.3.3.c.1: Access to the register

Anyone may consult the register.

Article 5.2.1.3.3.c.2: Searching the register

- (1) The registration office shall issue a certificate stating the results of the search.
- (2) Upon the grantor's request, the grantor shall be informed of the identity of the persons who have consulted the register.

(d): Registered creditors' obligation to respond to information requests

Article 5.2.1.3.3.d.: Obligation to provide information on the security interest and encumbered property

(1) Anyone who has consulted the register may, with the consent of the grantor of the security interest and upon providing the certificate referred to in the previous Article, request additional information from the creditor, in particular concerning the amount of the security interest, the encumbered property and the amounts remaining due.

If the grantor of the security interest is not the debtor, the debtor's consent is also required for a request relating to the amount of the secured obligation.

(2) The creditor shall respond within fourteen days.

(3) If the security interest has been transferred, the creditor shall specify the identity of the new holder.

(e): Duration, renewal and discharge on the register

Article 5.2.1.3.3.e.1: Duration

A registration ceases to have effect once the period for which it was made has expired and, in any event, after five years.

Article 5.2.1.3.3.e.2: Renewal

Before its expiry, the registration may be renewed on the initiative of the creditor, through a statement made to the registration office, for a period not exceeding five years.

Article 5.2.1.3.3.e.3: Discharge

The creditor is free to cancel the registration by making a statement to the registration office.

SECTION 4: PRIORITIES

Article 5.2.1.4.1: General provisions

Where several security interests encumber the same property, they are classified in the order in which they became effective against third parties.

Security interests that are not effective against third parties are classified in the order in which they were granted.

Article 5.2.1.4.2: Superpriority of security interests related to financing purchases

A security interest related to financing a purchase (Article 5.2.1.3.1.2), which are made effective against third parties in accordance with the rules of Chapter 3, takes priority over any other security interest granted by the grantor.

Article 5.2.1.4.3: Distraining creditor's priority right

For the purposes of ranking creditors, a distraining creditor is deemed to hold a security interest that can be enforced against third parties from the time of the distraint.

Article 5.2.1.4.4: Change in the ranking

(1) Where more than one security interest encumbers the same property, the ranking may be changed by written agreement of all the interested parties.

(2) Such change may not adversely affect the transferee of any such security unless the registration of that security was duly amended before the transfer.

SECTION 5: EXTENDING AND MAINTAINING SECURITY INTERESTS

§ 1: Assets replacing the encumbered property

Article 5.2.1.5.1: Extension to assets corresponding to the encumbered property.

Unless otherwise agreed, a security interest is automatically extended to the assets corresponding to the encumbered property, such as the sale price, insurance benefits or damages.

This extension does not apply where the creditor retains its rights against a third party purchaser of the property.

§ 2: Conversion and incorporation of encumbered property

Article 5.2.1.5.2: Maintenance of the security interest

If the encumbered property is converted or incorporated into other property, the security interest is maintained on the new property.

It is only maintained to the extent that the new property corresponds to the original one.

Article 5.2.1.5.3: No extension of security interest to accessories to the encumbered property

If encumbered property becomes an accessory to other movable or immovable property, the security interest does not extend to that other property.

SECTION 6: TRANSFER OF ENCUMBERED PROPERTY, SECURED OBLIGATIONS AND SECURITY INTERESTS

§ 1: Transfer of encumbered property

Article 5.2.1.6.1.1: No effect on the existence or effectiveness of the security

(1) A transfer of title in encumbered property does not affect the existence or effectiveness of the security interest.

(2) The third party acquires the property free of the security interest if the security interest was not effective against third parties.

Article 5.2.1.6.1.2: Exceptions

By way of exception, a security interest is extinguished if the grantor disposes of the property in the normal course of its business operations.

Article 5.2.1.6.1.3: Conflict of priority with security interests of the transferee that became effective before the transfer

Security taken by the original owner that became effective before the property was transferred always takes precedence over security granted by the purchaser, regardless of the date on which the latter became effective.

Article 5.2.1.6.1.4: Conflict of priority with the transferee's security interests that became effective after the transfer

The security interest is only effective against the purchaser's successors by particular title if the transfer has been declared in the register in accordance with Article 5.2.1.6.1.5.

Article 5.2.1.6.1.5: Declaration of transfers in the register

(1) If encumbered property is disposed of, the registered creditor or, if there is no registered creditor, the third party purchaser shall declare the disposal in the register.

(2) The third party purchaser is liable to the registered creditor for any harm it causes to the creditor if it fails to perform its obligation.

§ 2: Transfer of secured obligations and security interests

a) General provisions

Article 5.2.1.6.2.a.1: Transfer of security interests with the secured obligation

If a secured obligation is transferred, the security interest is also transferred.

Article 5.2.1.6.2.a.2: Effectiveness and priority ranking

A security interest transferred to a new creditor remains effective, based on the original registration, on the new creditor taking possession or on the former creditor continuing to hold the property on the new creditor's behalf.

Article 5.2.1.6.2.a.3: Obligation to provide information

(1) The transferring creditor shall inform the transferee creditor that the security interest has been transferred.

(2) From the time the security interest is transferred, the creditor shall be bound by the obligations set out in Article 5.2.1.3.3.d., regardless of whether the declaration of transfer provided for in Article 5.2.1.6.2.b. has been made.

b): Declarations of transfer

Article 5.2.1.6.2.b: Registration of a declaration of transfer

(1) The transfer of the security interest may result in a change to the initial registration.

(2) Such a change shall be made on the transferor's request or, if the transferor consents, on the transferee's request.

SECTION 7: PARTIES' RIGHTS AND OBLIGATIONS

§ 1: General provisions

Article 5.2.1.7.1: Preservation of and insurance on encumbered property

(1) A person who has possession of encumbered property must keep and maintain such property with reasonable care. If the property is fungible, it must be kept in such a way that it can be identified.

(2) The other party may request, on reasonable terms, to inspect the condition of the encumbered property.

(3) The grantor shall insure the encumbered property.

§ 2: Special provisions

a): Grantors' rights and obligations

Article 5.2.1.7.2.a.1: General right to use

If the secured assets are not repossessed, the grantor of the security interest may freely use the encumbered property, provided that such use is reasonable.

Article 5.2.1.7.2.a.2: Use of raw materials and semi-finished products

If the secured assets are not repossessed, and if the security interest encumbers raw materials or semi-finished products, the grantor may use them for production purposes, unless otherwise agreed.

Article 5.2.1.7.2.a.3: Disposal of encumbered property by merchants and producers

(1) A merchant or producer may dispose of encumbered property, free of any security interest, in the ordinary course of its business.

(2) A merchant or producer may not dispose of encumbered property if it is equipment, unless the creditor expressly consents to this.

b) Creditors' rights and obligations

Article 5.2.1.7.2.b.: Limited right to use

(1) A creditor who is in possession of encumbered property shall not use it.

(2) It is responsible for preserving and safeguarding the encumbered property.

§ 3: Reparation

Article 5.2.1.7.3: Damages

A party in breach of its obligations must compensate the other party for the harm it has caused.

SECTION 8: TERMINATION AND RECOURSE

§ 1: Termination

Article 5.2.1.8.1.1: Extinguishment of security interests in rem

A security interest is extinguished:

- (a) by agreement of the grantor and the creditor;
- (b) upon the creditor's waiver, which, in the case of a pledge with repossession, may be inferred from the delivery of the property to the grantor;
- (c) upon the disappearance of the encumbered property, except where Article 5.2.1.5.1 applies; or
- (d) upon the extinguishment of the secured obligation.

Article 5.2.1.8.1.2.: Rendering of accounts for assets derived from encumbered property

When the security interest is extinguished, the creditor must account for and return the fruits and other assets it has received.

§ 2: Recourse by a guarantor in rem

Article 5.2.1.8.2: Referral to the euroguarantee scheme

Where the security has been provided by someone other than the debtor, the grantor benefits from the euroguarantee rules, which protect the guarantor.

CHAPTER II: EUROMORTGAGES

Article 5.2.2. Euromortgages

A euromortgage is an optional instrument supplementing immovable security interests under national law. It requires an express choice by the parties.

If the provisions of this Sub-title are silent, a euromortgage shall be governed by the law of the place where the immovable property is situated.

Anyone may grant a euromortgage.

The rules in this Sub-title are without prejudice to consumer protection provisions under national law.

SECTION 1 GENERAL PROVISIONS

Article 5.2.2.1.1. Definition

A euromortgage is a security interest in rem, which is accessory and contractual, whereby one or more immovable properties are used to secure one or more present or future obligations, while the grantor retains possession.

Article 5.2.2.1.2. Subject-matter

Any immovable property or right situated within the territory of a Member State of the European Union may be the subject of a euromortgage, regardless of the nationality of the parties and the law applicable to the secured obligation.

Article 5.2.2.1.3. Scope

In addition to the immovable property, a euromortgage encumbers all the assets which, according to the law of the place where the immovable property is situated, are attached to it.

A euromortgage extends to improvements to the immovable property and to property which, according to the law of the place where the immovable property is situated, is accessory to the immovable property.

Ranking of euromortgages and special movable security interests over movable property included in the scope of euromortgages is determined by the law of the place where the immovable property is situated.

If the immovable property is lost or damaged, a euromortgage is transferred to the compensation corresponding to the loss or damage.

SECTION 2 SECURED OBLIGATION

Article 5.2.2.2.1. Purpose of euromortgages

A euromortgage shall always be taken as security for an obligation.

Article 5.2.2.2.2. Special features of euromortgages

The secured obligation must be determined or determinable by indicating the creditor, the debtor, the source and, where applicable, the amount of the claim in principal and ancillary costs.

A euromortgage may be granted as security for future or contingent obligations, provided that such obligations are sufficiently ascertainable.

Article 5.2.2.2.3. Amount of security

A euromortgage secures the principal of the obligation, as well as interest and ancillary costs. It guarantees the capital up to a specified amount, which may be higher or lower than the secured obligation. It also secures interest and ancillary costs at the rate specified in the instrument granting it.

Article 5.2.2.2.4. Accessory nature

A euromortgage is transferred with the secured obligation.

Article 5.2.2.2.5. Subject to equity release

Unless otherwise agreed by the parties, a euromortgage is subject to equity release. It may therefore be used, after it has been granted, to secure obligations not referred to in the instrument granting it.

A euromortgage that is subject to equity release may only be used to secure new obligations up to the amount of the security provided for in Article 5.2.2.2.3.

Article 5.2.2.2.6. Euromortgages for third parties

A euromortgage may be granted as security for the debt of a third party, unless the grantor is a consumer.

The grantor then benefits from the rules applicable to euroguarantees, which protect the guarantor.

SECTION 3 GRANT AND REGISTRATION OF EUROMORTGAGES

Article 5.2.2.3.1. Euromortgages granted by contract

A euromortgage agreement must be set down in a document formally drawn up or registered as an authentic instrument, failing which it shall be null and void. The authenticity of the instrument refers to the signature and content of the authentic instrument. The instrument must have been issued by a public authority or any other authority empowered to do so.

The instrument granting a euromortgage shall contain the following information:

- (a) an express reference that the security interest is a euromortgage;
- (b) a description of the encumbered immovable property, with details necessary to register the security interest;
- (c) a description of the secured obligation, with the details specified in Article 5.2.2.2. (1);
- (d) the amount of the security interest provided for in Article 5.2.2.3; and
- (e) where applicable, a statement that the euromortgage is not subject to equity release.

Option 1: A euromortgage may be established by an instrument received by the authority referred to in Article 5.2.2.3.1. (1) of a Member State other than that in which the immovable property is situated. It shall be registered in accordance with the provisions of Article 5.2.2.3.2.

Option 2: The law of the State in which the immovable property is situated determines whether the document may be received by an authority referred to in Article 5.2.2.3.1. (1) of a Member State other than that in which the immovable property is situated.

Option 3: Only the public authorities or bodies authorised for this purpose in the place where the immovable property is situated are competent to receive a euromortgage instrument.

Comments:

The notary representatives in the working group prefer Option 3.

The other group members prefer Option 1.

Article 5.2.2.3.2. Registration

A euromortgage only takes effect from the date it is registered.

These effects are governed by the law of the place where the immovable property is situated.

The registration shall be made in the land register of the State in which the immovable property is situated, in accordance with local rules. Where the agreement has been received in another State, the registration shall be made through the authority competent to do so under the law of the State of the register. This authority shall ensure that the agreement complies with the rules governing euromortgages and the requirements of the land register.

The land registry offices of each Member State shall immediately register the euromortgage in a euromortgage register held electronically at the European level. Such registration is for information purposes. Access to the European register is granted to those who have access to the national registers.

Article 5.2.2.3.3. Power of disposal

To validly grant a euromortgage, the grantor must have free disposal of the right in rem subject to the mortgage. Title to this right and any restrictions on the freedom to dispose of it are governed by the law of the place where the immovable property is situated.

This rule is without prejudice to the acquisition of a euromortgage under a law of the place where the immovable property is situated that protects bona fide purchasers of immovable property rights.

Article 5.2.2.3.4. Ranking

A euromortgage becomes effective on the date on which it is registered in the national register of the place where the immovable property is situated. Registration on the European register is for information purposes only.

The effects of a euromortgage on the rights that third parties may have in the immovable property, and in particular its ranking relative to other security interests, are governed by the law of the place where the immovable property is situated.

A creditor may, by a transfer of priority, transfer its priority position to a creditor ranking below it and take its place, if the law of the place where the immovable property is situated so permits.

SECTION 4 TRANSFER, EXISTENCE AND EXTINGUISHMENT OF EUROMORTGAGES

Article 5.2.2.4.1. Transfer of euromortgages

A euromortgage is transferred together with the secured obligation, whether the transfer takes place by contract, by law or by the effect of an enforcement measure.

The principle and procedures for registering the transfer of a euromortgage in the land register are governed by the law of the place where the encumbered immovable property is situated. If the requirements of this law are not met, a euromortgage cannot be enforced by the creditor to whom it has been transferred.

Article 5.2.2.4.2. Subrogation in the secured obligation

A third party subrogated to a secured obligation is entitled to the benefit of the euromortgage, up to the limit of the amount provided for in Article 5.2.2.2.3, to secure the interest and other ancillary costs owed to it personally.

Article 5.2.2.4.3. Acquisition in good faith of a registered euromortgage

If the law of the place where the property is situated so permits, a euromortgage that is entered in the land register but does not exist may be acquired in good faith.

However, such acquisition assumes that the secured obligation exists and cannot deprive the debtor of any defences it may invoke.

Article 5.2.2.4.4 Extinguishment

A euromortgage that is not subject to equity release is extinguished together with the secured obligation.

Immovable property encumbered by a euromortgage may be released from the security interests in rem that encumber it in accordance with the law of the place where the immovable property is situated.

The acquisition of an immovable property extinguishes euromortgages whose existence was not recorded in the national land register.

Article 5.2.2.4.5. Equity release

The instrument granting a euromortgage or a subsequent instrument prepared in the form provided for in Article 5.2.2.2.3 (1) may provide that the euromortgage is not subject to equity release. However, where it is granted by a consumer, a euromortgage is subject to equity release notwithstanding any provision to the contrary.

Equity release of a euromortgage may be agreed upon by the grantor and any creditor. The equity release agreement is governed by the rules governing the agreement granting the euromortgage (art. 5.2.2.3.1). In particular, it must contain a precise description of the obligation to be secured or, in the case of a future obligation, information allowing it to be identified.

The equity release of a euromortgage takes effect upon being registered. It shall be registered in the same way as a euromortgage: first in the register of the Member State in which the encumbered immovable property is situated, and then in the European register for information purposes.

If an equity-released euromortgage secures the obligations of different creditors, they are ranked according to the order of registration.

Article 5.2.2.4.6. Extinguishment of a euromortgage subject to equity release

A euromortgage subject to equity release is not extinguished by the extinguishment of the secured obligation, although it cannot be enforced until it has been used to secure new obligations. It may be discharged in accordance with the law of the place where the immovable property is situated. However, the grantor may require that full or partial payment of the obligation be recorded in the register.

A euromortgage subject to equity release is extinguished by discharging it on the register. Where it is no longer used to secure an obligation, the grantor alone may request that it be discharged; otherwise, the creditor's agreement is required. The request is made in accordance with the law of the place where the immovable property is situated.

The provisions of Articles 5.2.2.4.3. and 5.2.2.4.4 (3) are applicable to euromortgages subject to equity release.

SECTION 5 ENFORCEMENT OF EUROMORTGAGES

Article 5.2.2.5.1. Enforcement

For a euromortgage to be enforceable, the secured obligation must exist and be exigible.

The beneficiary of a euromortgage may proceed to sell the encumbered immovable property in accordance with the enforcement procedures of the place where the property is situated.

If the law of the place where the immovable property is situated so permits, the beneficiary may seek compulsory administration of the immovable property or a court order granting it title to the immovable property, or to avail itself of a forfeiture agreement.

In the case of a court order granting title or a forfeiture agreement, the immovable property must be valued at its current value by an expert appointed by the parties or, if they disagree, by the court. If the appraised value exceeds the amount of the secured obligation, the creditor must pay

the owner an amount equal to the difference or, if there are other registered creditors, deposit it for their benefit.

Article 5.2.2.5.2. Situation of a buyer of the immovable property

A euromortgage gives the creditor the right to follow the immovable property into whatever hands it passes.

A third party purchaser of the immovable property may invoke against the creditor all defences, whether personal or arising from the debt, belonging to the main debtor.

DRAFT WORKING DOCUMENT FOR
DISCUSSION