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Partial Revision of the Swiss Civil Code - Immovable Property Law - Introduction of a Paperless Register Mortgage

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Asset Class:	None

Description

A partial revision of the Swiss immovable property law will take effect in January 2012.

The most important change concerns the introduction of a paperless register mortgage (Register-Schuldbrief). The register mortgage is governed by the Swiss Civil Code and the Swiss Ordinance on the Land Register. The revision aims to facilitate the mortgage business of banks. The main features of the register mortgage can be summarised as follows:

- In contrast to the existing law, the new provisions do not provide for the automatic novation of the underlying claim on the creation of a mortgage. If the parties wish to novate the underlying claim, they must explicitly agree to do so.
- The revised law allows mortgages to refer to a separate agreement with regard to interest, repayment and termination. This reflects existing practice and increases the flexibility of the parties since there is no need to file such separate agreements with the land register.
- It is possible under the new law to pledge register mortgages and to grant a usufruct on register mortgages.
- The new provisions facilitate the conversion of existing paperform mortgages into register mortgages.

Another important change concerns the provisions on the contractor's lien (Bauhandwerkerpfandrecht). The scope of the work that may be protected by a contractor's lien is broadened and the deadline for registration is extended from three to four months.

Background

Under the current law, a mortgage must be created in the form of a negotiable security, either as a bearer or as a registered mortgage-certificate. The existence of negotiable securities in paper form causes safe-keeping and transportation issues. Moreover, if a mortgage certificate is lost, a lengthy and costly court procedure for its cancellation is necessary.

As a result of the said revision, a paperless register mortgage may be created which:

- is a registered lien comparable to stocks that are traded on the capital market;
- has no physical form but only consists of an entry into the land register; and
- does not depend on the issue of a negotiable security (Wertpapier).

The "non-accessory" character of a mortgage is maintained. In other words, a register mortgage is independent of the relevant debt and may be further used after the amortisation of the underlying debt. Under the revised law and in contrast to the existing law, the creation of a mortgage (both, traditional paperform mortgages and the new register mortgage) does not result in a novation of the underlying claim. Therefore, unless the parties agree to the contrary, the mortgage claim does not replace the claim to be secured. This reflects existing bank practice, pursuant to which the novation of the underlying claim, as provided for by existing law, is usually excluded.

In addition to the new register mortgage, the current physical paperform mortgage is maintained. Unless a creditor prefers having a register mortgage, no action is required in relation to existing mortgage certificates. Thus, it remains possible for creditors not to disclose their identity to third parties by using a bearer mortgage-certificate or by not updating the creditors' register after acquiring a registered mortgage-certificate.

Advantages

In our view, the main advantage of paperless register mortgages is that they facilitate the mortgage business of banks. In particular, register mortgages do not

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lead to safe-keeping and transportation costs. There are no insurance issues and there is no risk of loss of a physical certificate. Also, the transferability of register mortgages is simplified (see below), which reduces transfer costs. From the perspective of the owner of the mortgaged property, transparency is increased because the creditor of a register mortgage is registered in the land register. This is not always the case under the current law, where mortgages may be transferred from one creditor to another without updating the land register.

Creation

A register mortgage is created by the registration of the creditor in the land register ("constitutive requirement"). An owner's mortgage in the form of a register mortgage (explained below) is created by the registration of the landowner as creditor in the land register.

The basis of such registration is a pledge agreement, i.e. the contract to create a charge on immovable property between the creditor and the debtor, who is usually also the property owner. A pledge agreement must be executed as a public deed, in contrast to the underlying loan agreement, which is not subject to a particular formal requirement and which in practice is entered into in written form. Furthermore, a pledge agreement is also required to increase or reduce the pledged amount. The revised law also requires a public deed for the creation of an owner's mortgage. This is an additional formal requirement since under the existing rules, the written form is sufficient for the creation of an owner's mortgage.

The revised law facilitates the conversion of existing paperform mortgages, created under the old law, into register mortgages under the new law. A joint written declaration of the property owner and the creditor (but not of the debtor, if he is different from the property owner) to the land register is sufficient to achieve this and no public deed is required.

In contrast, there is no facilitation for the conversion of paperform mortgages, created under the new law, into register mortgages. Thus, such a conversion requires the execution of a public deed by the property owner and the creditor as required for the creation of a new register mortgage.

Upon the conversion of a paperform mortgage into a register mortgage, the existing mortgage certificate is invalidated.

Transfer

The transfer of a register mortgage is achieved by registering the new creditor in the land register, based on a written declaration by the previous creditor. In contrast to paperform mortgages, no transfer of mortgage certificates between banks, the notary public and the land register is required. The underlying contract, i.e. the undertaking to transfer a register mortgage (Verpflichtungsgeschäft), is not required to be in a particular form. Also, there is no need for informing the debtor or obtaining its approval.

An owner may take back an outstanding mortgage after repaying the relevant loan, then hold the mortgage as so-called "owner's mortgage" (Eigentümerschuldbrief) and re-use the same mortgage at a later stage as security for a new loan. This requires the registration of the owner in the land register for the period during which the mortgage is held as owner's mortgage and the registration of the new creditor once the mortgage is transferred to it. These are additional formal requirements compared to the existing rules.

Under the current law, it is possible contractually to restrict the transferability of a paper mortgage. Such restrictions must be noted in the land register otherwise they only bind the parties to the relevant contract. Such restrictions are also available to register mortgages.

Pledges

Under the revised law it is also possible to further pledge register mortgages and to grant usufruct on register mortgages. As with the transfer of register mortgages, pledging them and granting usufruct requires the registration of the pledgee and of the usufructuary in the land register.

Cancellation

A register mortgage can be cancelled by deleting the land register entry relating to it based on a joint written declaration by the property owner (usually the debtor) and the creditor (beneficiary). The revised law repeals cantonal rules on the cancellation of mortgages. This concerns the Cantons of Zurich, Lucerne, Uri, Zug, Solothurn, Schaffhausen, Appenzell-Ausserhoden, Valais and Geneva.

Practical Impact

The register mortgage will certainly facilitate the mortgage business of the banks. In view of its advantages, we expect the register mortgage to become the standard form of mortgages in Switzerland.

Other Amendments - Contractor's Lien

Other revisions concern provisions relating to contractor's liens (Bauhandwerkerpfandrecht) and aim to improve the protection of building contractors. The new rules provide for the following changes:

- The scope of the works that may be protected by the contractor's lien is

broadened. In particular, claims resulting from demolition work, putting up scaffolding and excavation securing works are also entitled to a contractor's lien.

- The definition of relevant debtors is broadened to include lessees, tenants and other persons entitled to the property, provided that the land owner agrees to the works in question.
- The time limit for registering a contractor's lien is extended from three to four months. In practice, meeting this deadline often turns out to be critical. Therefore, this extension significantly improves the position of contractors.
- For certain works to public real property, the owner is liable according to the rules governing a guarantee (Bürgschaft).

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