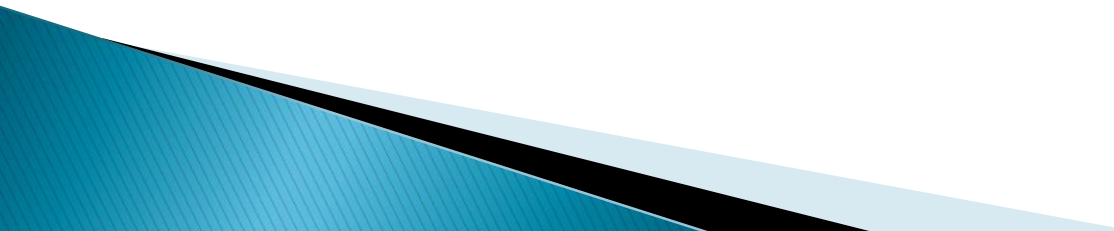


Polish commercial law Security interest

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Purpose of security interest

- ▶ Significance of security interest for the availability of credit in the economy → possibility of using the value of assets for obtaining financing without losing ownership and/or control of the assets
 - ▶ Significance for the stability of credit institutions → protection of credit institutions from borrowers' defaults → lower cost of credit
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General types of security interest

- ▶ by liability of third parties („personal” securities)
 - e.g. guarantees
 - effective between the parties
 - as good as the solvency of the guarantor

- ▶ collateral arrangements
 - by reference to a particular asset or set of assets (rights *in rem*), used as collateral
 - priority in satisfaction from the collateral
 - as good as the value of the collateral

General principles of security interest

- ▶ **priority**

solves the conflict between multiple security rights on the same collateral

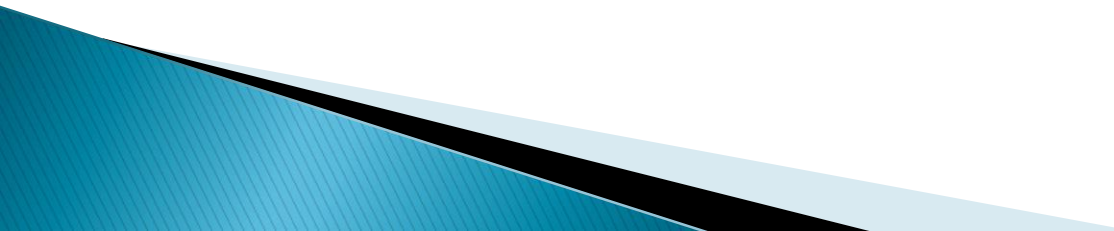
- ▶ **publicity**

- discloses the situation of the collateral to all potential buyers or new creditors of the debtor
- discloses the economic situation of the debtor to all possible counterparties

- ▶ **accessory**

- connection of the security interest to the underlying claim
- protecting the debtor from excessive dependence on a particular creditor
- drawback: impracticality

„Personal” security interest in Polish law

- ▶ guarantee
 - ▶ banking guarantee
 - ▶ documentary credit
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Guarantee (Polish: *poręczenie*)

- ▶ Articles 876 – 887 of the Civil Code
- ▶ a liability of the guarantor towards the creditor to fulfill the obligation of the debtor in case of non-fulfillment by the debtor
- ▶ full accessority – the extent of the guarantor's liability depends on the extent of the debtor's liability
- ▶ joint and several liability of the debtor and the guarantor (the contract may provide otherwise)

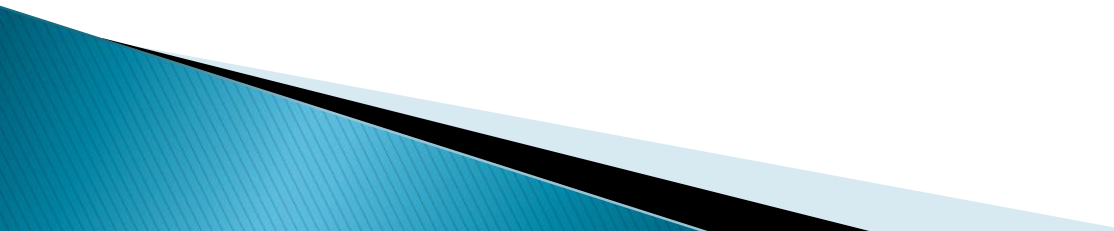
Banking guarantee (Polish: *gwarancja bankowa*)

- ▶ Articles 81–84 and 87 of the Banking Law
- ▶ Unilateral obligation of a bank to pay an amount of money to the beneficiary on fulfillment of specified conditions (e.g. presentation of specified documents)
- ▶ Used to secure claims – “specified conditions” refer to non-fulfillment of the underlying claim by the debtor
- ▶ issued usually on request of a debtor, subject to payment of a fee

Documentary credit (Polish: *akredytywa dokumentowa*)

- ▶ Article 85 of the Banking Law
- ▶ Unilateral obligation of a bank to pay an amount of money to the beneficiary on fulfillment of conditions specified in a document, on presentation of specified documents
- ▶ Wider use – not only to secure claims but also to settle transactions, often in international business relations (wide degree of international harmonization)
- ▶ issued usually on request of a debtor, subject to payment of a fee

Collateral arrangements (rights *in rem*)

- ▶ mortgage (*hipoteka*)
 - ▶ pledge (*zastaw*)
 - ▶ registered pledge (*zastaw rejestrowy*)
 - ▶ title transfer (*przewłaszczenie na zabezpieczenie*)
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Mortgage (*hipoteka*)

- ▶ Articles 65–112 of Law of 6 July 1982 on Real Estate Register and Mortgage
- ▶ right to be satisfied from **real estate**, regardless to the person of its owner, with priority to the owner's personal creditors
- ▶ secures a specified claim or claims resulting from a specified legal relationship
- ▶ publicity: by disclosure in real estate register
- ▶ accessority – relaxed since 2011
- ▶ creditor satisfaction: only by enforcement proceedings

Pledge (*zastaw*)

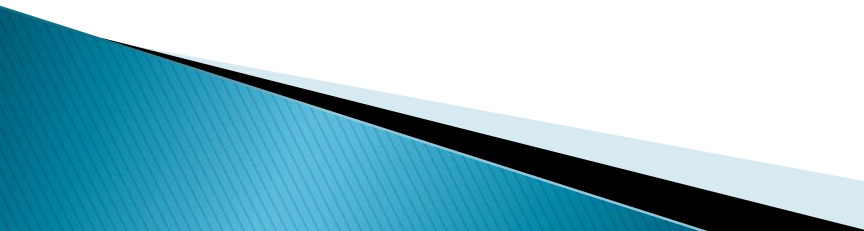
- ▶ Articles 306–335 of the Civil Code
- ▶ a right to be satisfied from a moveable asset or a claim, regardless to the person of its owner, with priority to the owner's personal creditors
- ▶ strict accessority – only to secure a specific claim
- ▶ publicity: by possession of collateral by the pledgee (creditor) → impracticality
- ▶ creditor satisfaction – only enforcement proceedings

▶

Registered pledge (*zastaw rejestrowy*)

- ▶ Law of 6 December 1996 on Registered Pledge and Pledge Registry
- ▶ the unpractical possession requirement replaced by an entry into the pledge registry
- ▶ publicity: entry into the pledge registry (unsorted and unsearchable)
- ▶ creditor satisfaction – in principle by enforcement proceedings, but takeover of collateral by the creditor possible if provided for in the contract

Title transfer (*przewłaszczenie na zabezpieczenie*)

- ▶ developed in practice – lack of regulation
 - ▶ transfer of full ownership of an asset (collateral) to the creditor, with an agreement to transfer the ownership back on payment of the secured claim
 - ▶ lack of formal requirements for movable assets and rights
 - ▶ lack of publicity (transfer of possession not needed)
 - ▶ lack of accessory
 - ▶ unregulated creditor satisfaction (keeping the collateral possible)
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Main drawbacks and reform efforts

- ▶ excessive rigidity, in particular overreliance on court procedures (registered pledge, mortgage) → streamlining of the procedures without dropping them altogether, reducing the accessory of the mortgage
 - ▶ attractiveness of title transfer in comparison to pledge and registered pledge → streamlining the regulation of registered pledge, regulating some aspects of the title transfer
 - ▶ general inefficiency of enforcement proceedings
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