Floating Charge as Security in Debt Finance Transactions

Analysis from a Swiss Law Perspective

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The granting of security by the way of a floating charge is a common law concept which allows the entirety of a company's assets to be used as collateral. Borrowers and lenders profit from this highly flexible means of providing a comprehensive security interest in debt finance transactions. This article examines whether the concept of floating charge is recognized under Swiss law or not. For this assessment the requirements for creating a right of pledge under Swiss law over different types of assets commonly used as security in debt finance transactions are analyzed, taking into account fundamental Swiss law principles governing the right of pledge and certain reform efforts. It concludes that only with respect to intermediated securities does Swiss law allow the creation of a security interest which is, to a certain extent, similar to a floating charge. In relation to the other assets which can be subject to a pledge, the concept of a floating charge contradicts fundamental Swiss law principles. The authors argue that in the context of debt finance transactions a revision of the principle of pledging of chattels would be appropriate for movable assets, to a certain extent approaching the concept of the floating charge.

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I. Introduction

Debt finance is a major source of capital for companies. In order to secure default risks in debt finance transactions, lenders (e.g. banks and other financial institutions involved in the lending business) normally request security over certain assets in order to minimize their risk exposure of non-repayment. When effective security is in place, lenders can in the event of default by a borrower, sell the secured assets and use the proceeds to pay off the debts under a loan. Depending on the default risks of the relevant loan and on the meaningful assets of a borrower respectively its group companies, the scope of the security may vary. If a lender chooses to take security over all assets of a company, certain common law jurisdictions offer the options of a fixed charge or a floating charge. A fixed charge generally provides a lender control over the charged assets which are identified in the charge document. In contrast to a fixed charge, a floating charge can be taken over a variety of (existing and future) assets which fluctuate from day to day.[1]

This article's focus is limited to the concept of a floating charge (and not a fixed charge). In common law jurisdictions borrowers and lenders profit from this highly flexible means of providing a comprehensive security interest in debt finance transactions. While the chargor can continue to operate its business unhindered, the chargeholder benefits from having the entirety of the company's assets as collateral. A number of common law jurisdictions, in particular the United Kingdom, Australia, Hong Kong and Singapore recognize the floating charge as a form of credit protection.[2] It primarily serves as security for com-

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1 *Barbara Graham-Siegenthaler,* Kreditsicherungsrechte im internationalen Rechtsverkehr, Bern 2005, 418 f.

2 In the United States of America the "floating lien" exists which is a similar but not identical concept to the floating charge. One difference is that a floating lien can be granted by anyone, including individuals; *Richard Mann/Barry Roberts,* Smith & Roberson's Business Law, 17th ed., Boston 2018, 801.

mercial loans. In addition, it is used as collateral for debentures *(Anleihen)*.[3]

This article examines whether the concept of floating charge is recognized under Swiss law or not. For this assessment the requirements for creating a right of pledge over different types of assets commonly used as security in debt finance transactions are analyzed, taking into account fundamental Swiss law principles governing the right of pledge and certain reform efforts.

Some statements in this article contain the authors' personal view.

II. What is a Floating Charge?

A floating charge is commonly understood as a charge over all or substantially all movable and immovable assets and rights owned by an incorporated company from time to time, irrespective of their type or nature as security for borrowings, other indebtedness or other obligations.[4] The chargor remains the owner of the charged assets, i.e. the legal title is not transferred to the chargeholder as secured party. While a fixed charge covers certain identified assets of which the chargor may not dispose without consent of the chargeholder, a floating charge is not limited to certain specific assets. When the chargor acquires new assets, they are automatically covered by the floating charge and, *vice versa,* assets fall out of the scope of the floating charge when the legal title of such assets is transferred to a third party.[5] This means that the assets, which are covered by the floating charge, change from time to time. The main advantage of a floating charge is that as long as no event of default (such as for instance, default in payment of interest or repayment of the loan or insolvency of the borrower) occurs, the chargor retains the power of disposal over the assets (i.e. buy and sell the charged assets or just use them for its daily business) in the course of its business without reference to the chargeholder. This enables the chargor to continue to operate its business unhindered. Hence, the floating charge is a highly flexible means for providing comprehensive security interest in debt finance transactions.

Thus, the main characteristics of a floating charge are that (i) the chargor remains the owner of the charged assets, (ii) the charge covers a class or all of the present and future assets of a company (not of an individual), (iii) the charged assets change in the ordinary course of the chargor's business and (iv) the chargor retains the power of disposal over its charged assets in the course of its day-to-day business until an event of default occurs. In the United Kingdom, the floating charge needs to be registered in a public register.[6]

The floating charge typically "crystallizes" into a fixed charge as soon as an event of default occurs under the underlying contractual arrangement (e.g. loan agreement). At that stage, the floating charge is converted to a fixed charge over the existing assets that it covers at that time. As a consequence, the chargor loses its power of disposal over the assets without the chargeholder's consent and the chargeholder may generally take control of the company's assets. In such a crystallization event, the assets are retained for the creditor to sell or remove to recover the outstanding sum owed to it. If the security was created over all or substantially all of the company's assets, the chargeholder is typically entitled to appoint an administrator to take control of the company's assets and to enforce the charge.[7]

III. Types of Securities *(Sicherheiten)* under Swiss Law

Swiss law knows different types of securities *(Sicherheiten),* which can be divided into personal securities *(Personalsicherheiten)* and real securities *(Realsicherheiten)*.

Personal securities grant the creditor a security claim against a third party which the creditor may assert in the event of default by the debtor. Such a per-

3 *Eilis Ferran/Look Chan Ho,* Principles of Corporate Finance Law, 2nd ed., Oxford 2013, 367 et seqq.; *Louise Gullifer/Jennifer Payne,* Corporate Finance Law, Principles and Policy, 3rd ed., Oxford 2020, 298 et seq.; BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 1034 f.

4 *Ferran/Chan Ho* (Fn. 3), 367 et seqq.; BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 1034; *Graham-Siegenthaler* (Fn. 1), 418 f.; *Konstantin Simitis,* Das besitzlose Pfandrecht, AcP 1971, 119 and 149.

5 *Graham-Siegenthaler* (Fn. 1), 418 f.

6 Section 859A et seq. UK Companies Act 2006, as amended; *Ferran/Chan Ho* (Fn. 3), 402.

7 See *Simitis* (Fn. 4), 104; *Graham-Siegenthaler* (Fn. 1), 414; BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 1034 and 1087.

sonal security granted by a third party may take the form of a guarantee pursuant to art. 111 of the Swiss Code of Obligations[8], a surety *(Bürgschaft)* pursuant to article 492 et. seq. CO or a cumulative assumption of debt *(kumulative Schuldübernahme)*[9]. Usually, the third party is liable with all its assets.

In contrast to personal securities, real securities do not provide the creditor with an obligatory claim *(obligatorischer Anspruch)* against an additional subject of liability, but rather a right *in rem* to a liability object which can belong to the debtor or a third party (which is typically associated with the debtor). Such real securities may consist of a *limited* right *in rem,* i.e. in the form of a pledge over movable assets ("chattels") or immovable assets as well as claims and other rights,[10] or a *full* right *in rem* when the full title of an asset is transferred to the creditor by way of transfer of ownership for security purposes *(Sicherungsübereignung)*[11] respectively security assignment *(Sicherungsabtretung)* of receivables.[12] In the case of real securities, the creditor as secured party can typically realize the liability object and use the enforcement proceeds if the debtor fails to fulfill the secured obligations.

Security assignments of receivables and transfers of ownership for security purposes conclude a full legal title transfer.[13] As mentioned above, this is not the case in respect of a floating charge under common law.[14] Since a charge under common law is similar to a limited right *in rem,* i.e. a right of pledge under Swiss law, this article will proceed to focus on the right of pledge.

IV. The Right of Pledge under Swiss Law

1. General

A right of pledge under Swiss law is a limited right *in rem* over an asset that secures a claim. The right of pledge gives the pledgee the right to realize the pledged assets if the debtor defaults and to apply the proceeds for the repayment of the secured claims.[15] Due to the accessory nature of a right of pledge, it only exists to the extent and as long as there is a secured claim.[16] Further, the right of pledge provides the pledgee (as creditor of the secured claims) with priority in a bankruptcy situation of the pledgor compared to unsecured creditors since claims secured by a pledge are paid in advance from the bankruptcy proceeds.[17]

When obligations under debt finance transactions are secured by Swiss law governed securities, a security package is typically entered into. Its scope depends on the default risks to be borne by the lender(s) in the relevant transaction and on the meaningful assets of a borrower respectively its group companies. A common Swiss law governed security package consists of pledges over bank accounts held with banks in Switzerland, shares in Swiss corporations and/or intellectual property rights of Swiss companies, security assignments of intercompany receivables, trade receivables and/or insurance claims and guarantees. Hence, bank accounts, shares and intellectual property rights are normally subject to a pledge, whereas intercompany receivables, trade receivables and insurance claims are typically assigned by way of security. Further, if the debtor or any of its group companies owns real property (land) located in Switzerland, security may be taken over such real property. The common forms used to create a security interest over property are a security transfer over mortgage notes

8 Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911, as amended, RS 220 **("CO").**

9 The cumulative assumption of debt is not regulated in the CO. It means that a third party undertakes vis-à-vis the creditor to be jointly and severally liable alongside the debtor. In contrast to a surety, the third party has its own interest in the fulfillment of the secured obligation. Further, the purpose of a cumulative assumption of debt is to create a genuine joint and several obligation towards the creditor, while a surety is only liable subsidiary to the principal debtor.

10 See section IV below.

11 The subject of the transfer of ownership for security purposes are assets *(Sachen)* in the legal sense, including certificated securities *(Wertpapiere); Reto Arpagaus,* Das Schweizerische Bankgeschäft, in: Reto Arpagaus/Ralph Stadler/Thomas Werlen (Hrsg.), Das Schweizerische Bankgeschäft, 8. Aufl., Zürich 2021, N 1318 f.

12 See *Arpagaus* (Fn. 11), N 1318 f.

13 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 294; *Heinz Rey,* Die Grundlagen des Sachenrechts und das Eigentum, 3. Aufl., Bern 2007, N 320.

14 See section II above.

15 *Hans Kuhn,* Schweizerisches Kreditsicherungsrecht, 2. Aufl., Bern 2023, § 6 N 369.

16 See section IV.3.2 below.

17 See art. 219 para. 1 Federal Act on Debt Enforcement and Bankruptcy of 11 April 1889, as amended, SR 281.1.

(Schuldbriefe), a pledge over mortgage notes or a land charge *(Grundpfandverschreibung)*.[18]

2. Acts to create a Right of Pledge

A right of pledge under Swiss law may be created over various types of assets, including immovable property[19], movable assets[20] (also known as "chattels") such as machinery, inventory, vehicles, precious metal etc. as well as uncertificated *(unverbriefte)* and certificated *(verbriefte)* claims *(Forderungen)* and other rights (than claims), e.g. legal positions under company law and intellectual property rights[21].

To create a right of pledge under Swiss law, two different types of legal transactions are necessary: (i) a transaction creating an obligation *(Verpflichtungsgeschäft)* consisting of the pledge agreement and a transaction perfecting the right of pledge *(Verfügungsgeschäft)*.

As a rule, the pledge agreement *(Verpflichtungsgeschäft)* does not have to meet any specific formal requirements.[22] In particular, it could also be concluded orally, i.e. does not have to be in writing. Nevertheless, in some cases specific formal requirements regarding the valid conclusion of the pledge agreement apply. A pledge agreement must be in writing when it relates to the pledge of claims or other rights that are not embodied in a certificated security *(Wertpapier)*.[23] Further, rights of pledge over movable assets, e.g., airplanes and ships which are regulated in special legislation and which are created by entry in a register[24] also require the written form for the valid conclusion of a pledge agreement.[25]

The written form under Swiss law means that a declaration is permanently attached in writing to a physical document, normally a paper document, and that it must contain the signatures of all persons who are to be bound by it.[26] The signatures must be wet-ink or qualified electronic signatures,[27] whereby a qualified electronic signature is an authenticated electronic signature combined with an authenticated time stamp within the meaning of the Federal Act of 18 March 2016 on Electronic Signatures[28].

The requirements to be met in order to validly perfect a right of pledge depend on the type of the asset to be pledged.[29] For different types of assets these perfection requirements are described in section IV.5 below. Due to its relevance in the analysis of the compatibility of the floating charge concept under Swiss law, this article focuses on the perfection requirements applicable to the right of pledge. Since the perfection requirements are driven by certain fundamental Swiss law principles, the following section IV.3 contains an overview of such principles.

3. Fundamental Principles applicable to a Right of Pledge

There are fundamental principles under Swiss law which apply on Swiss law governed security, in particular relating to a right of pledge and a security assignment. This section will expand on these principles.

3.1 Principle of Specificity *(Spezialitätsprinzip)*

According to the principle of specificity *(Spezialitätsprinzip),* a right of pledge may only be created with respect to individual identifiable assets.[30] In principle, this means that a right of pledge can only be created

18 See section IV.5.3 below.

19 See art. 793–865 of the Swiss Civil Code of 10 December 1908, as amended, SR 210 **("CC")** and section IV.5.3 below.

20 See art. 884–894 CC and section IV.5.1 below.

21 See art. 899–906 CC, art. 24 and 25 of the Federal Act on Intermediated Securities of 3 October 2008 **("FISA"),** as amended, SR 957.1, art. 973*g* CO and section IV.5.2 below.

22 Art. 11 and art. 16 CO.

23 Art. 900 para. 1 and para. 3 CC; see sections IV.5.2.4, IV.5.2.7 and IV.5.2.8 regarding the requirements for the pledge of certificated securities, intermediated securities and ledger-based securities.

24 See section IV.5.1.1 below.

25 See art. 41 of the Federal Act regarding the register of ships *(Schiffsregister)* of 28 September 1923, as amended, SR 747.11 and art. 28 para. 2 Federal Act regarding the aircraft record *(Luftfahrzeugbuch)* of 7 October 1959, as amended, SR 748.217.1.

26 Art. 13 para. 1 CO; BSK-OR I, *Schwenzer/Fountoulakis,* Art. 13 N 3.

27 Art. 14 para. 1 CO and art. 14 para. 2bis CO.

28 Federal Act on certification services in the field of electronic signature and other applications digital certificates *(Zertifizierungsdienste im Bereich der elektronischen Signatur und anderer Anwendungen digitaler Zertifikate)* of 18 March 2016, as amended, SR 943.03.

29 See section IV.5 below.

30 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 257.

in respect of individualized objects or rights. At the time the pledge agreement is entered into, it is sufficient if the object of pledge is identifiable even if it does not exist yet (e.g. an asset which is still in production or a claim which has not yet arisen).[31] The identification may happen later when the pledge is perfected.[32] The principle of specificity is expressly foreseen for immovable assets in art. 796 para. 1 and art. 797 para. 1 CC.[33]

Accordingly, an aggregate of assets *(Sach- oder Rechtsgesamtheiten)* (e.g. stock of goods or fortune) may not be pledged by means of a single act. If, for instance, part of a stock of goods is to be pledged, the individual assets to be pledged must be separated out in order to become individually identifiable. Thus, the principle of specificity contradicts the general right of pledge *(generelles Pfandrecht)* which covers an entirety of assets that vary in quantity and existence (which is typically the case with respect to a floating charge).[34]

However, the principle of specificity does not mean that several different individual assets cannot be the object of a pledge agreement. In order that this is possible it is sufficient if each asset that is to be subject to a right of pledge is identifiable and meets specific perfection requirements applicable to the relevant asset.[35]

3.2 Accessory Principle *(Akzessoritätsprinzip)*

Under Swiss law a pledge is of an accessory nature. This means that the pledge depends on the continued valid existence of the underlying obligation it is intended to secure. Accordingly, in the event that the secured obligations are discharged, replaced or become invalid, the right of pledge automatically ceases to exist.[36] Furthermore, the creditor of the secured obligation needs to be the same person as the creditor of the security.

3.3 Principle of *Numerus Clausus*

The principle of *numerus clausus* means that only those rights *in rem,* which are expressly provided for by the law, can be validly established. It limits the rights *in rem* to a fixed number.[37] As a consequence, a pledge may only be created over certain specific types of assets. The law defines the number and content of the several limited types of a right of pledge in a binding manner from which parties to a contract cannot validly deviate.[38] Since the principle of *numerus clausus* is mandatory Swiss law, a deviation from this principle would be null and void.

The principle of *numerus clausus* foresees that a right *in rem* may, in particular, be created in respect of (i) immovable property in the form of a land charge *(Grundpfandverschreibung)* or a mortgage note *(Schuldbrief)*[39], (ii) movable assets[40] and (iii) claims and other rights[41]. Further, the CC provides the possibility for a special lien *(Retentionsrecht)*[42] and pawnbroking *(Versatzpfand)*[43].

31 See section IV.5.2.1 below regarding future claims.

32 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 257; BSK-ZGB II, *Bauer/Bauer,* Art. 884 N 34.

33 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 258.

34 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 259 f.

35 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 500; BSK-ZGB II, *Schmid-Tschirren,* vor Art. 793–823 N 12 f.; BSK-ZGB II, *Bauer/Bauer,* Art. 884 N 44; ZK-ZGB, *Oftinger/Bär,* Art. 884 N 26.

36 BSK-ZGB II, *Bauer/Bauer,* Art. 884 N 51 f.; *Stephanie Hrubesch-Millauer/Barbara Graham-Siegenthaler/Vito Roberto,* Sachenrecht, 5. Aufl., Bern 2017, N 10.27; *Jörg Schmid/Bettina Hürlimann-Kaup,* Sachenrecht, 6. Aufl., Zürich 2022, N 1872.

37 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 291.

38 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884-887 N 291 f.

39 See section IV.5.3 below.

40 See section IV.5.1 below.

41 See section IV.5.2 below.

42 The special lien is the right of the creditor to retain a movable object, securities or book-entry securities as security for a claim and to have them realized like a pledge, if he is not satisfied or secured for his claim. It is regulated in general form in art. 895–898 CC.

43 See art. 907–915 CC; the pawnbroking *(Versatzpfand)* is a pledge to secure loans from so-called pawnbroking institutions *(Pfandleihanstalten)*. Such institutions grant loans at a fixed interest rate against non-banking collateral. This type of pledge is regulated in art. 907–915 CC. In addition, many cantons have issued cantonal implementing ordinances. In terms of the pawnbroking, the debtor is not (also) personally liable. Pawnbroking institutions have lost much of their importance in practice.

3.4 Principle of Publicity and Principle of Pledging of Chattels *(Faustpfandprinzip)*

3.4.1 General

The principle of publicity means that rights *in rem* must be made recognizable (evident) to everyone. The rationale of this principle lies in the legal nature of rights *in rem* which are absolute in nature and affect third parties *(erga omnes)*. Therefore, rights *in rem* must be recognizable to third parties.[44] In the case of movable assets, this principle is generally based on possession of the asset.[45] With respect to special regulated rights of pledge, publicity is created by entering the right of pledge in a register. With respect to the right of pledge over claims, the principle of publicity only applies in a limited manner.[46]

Historically, the rationale behind the principle of publicity is that creditors are protected against being misled about the creditworthiness of the debtor.[47] In addition, the principle of publicity legitimizes the position of the person holding the right.[48] The *erga omnes* recognizability creates a rebuttable presumption of the valid existence of the right. This means that the person in possession of a movable asset is presumed to be its owner.[49] Such a presumption also exists for the right of pledge, i.e. the person, who is in possession of a movable asset and claims a right of pledge, is presumed to have such right of pledge.[50]

In Swiss law, for movable assets, the principle of publicity is closely linked to the principle of pledging of chattels *(Faustpfandprinzip)* (in the following **"FP Principle"**) which has existed in Switzerland for over 150 years.[51] The FP Principle is set out in art. 884 CC and means that in order to validly perfect a right of pledge over movable assets the relevant asset has to be transferred to the pledgee or a third party who exercises possession on behalf of the pledgee or the pledgor has to give up exclusive control of the relevant asset (i.e. must not have access to the asset without assistance of the pledgee).[52] When the pledgor regains exclusive possession over the relevant movable assets, the right of pledge ceases to exist.[53]

Since the movable assets that could be subject to a right of pledge are typically inventory, machines or vehicles that the pledgor requires to conduct its business, the pledge over movable assets is not practical and thus, typically not part of a Swiss law governed security package. Nevertheless, Swiss law provides for a limited number of exceptions to the FP Principle.[54]

The FP Principle also applies to certificated *(verbriefte)* claims and other rights in respect of which possession is possible.[55] However, this principle is not applicable with respect to the reservation of ownership *(Eigentumsvorbehalt)*[56] and leasing agreements. Thus, these are two of very few types of security for which non-possessory collateral is permissible. Since, this article's focus is on the right of pledge, these types of security will not be discussed further.

3.4.2 Ordre Public Related Enforceability Issues

In practice, the question sometimes arises as to whether there would be any issue from a Swiss law perspective if a floating charge under common law (e.g. English law) was entered into which also covers movable Swiss assets and/or certificated securities *(Wertpapiere)* of Swiss companies located in Switzerland. Such an arrangement would be problematic from a Swiss law perspective for the following reasons:

Swiss conflict of laws rules generally allow the parties to freely choose the governing law of an agreement. Hence, under the Swiss Federal Private International Law Act [57] the parties could enter into an

44 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 272 f.; *Hrubesch-Millauer/Graham-Siegenthaler/Roberto* (Fn. 36), N 10.31.

45 *Hrubesch-Millauer/Graham-Siegenthaler/Roberto* (Fn. 36), N 10.31 f.; *Schmid/Hürlimann-Kaup* (Fn. 36), N 1872.

46 See section IV.5.2 below.

47 BSK-ZGB II, *Bauer/Bauer,* Art. 884 N 8.

48 BK-ZGB, *Zobl/Thurnherr,* Systematischer Teil Art. 884–887 N 274.

49 Art. 930 para. 1 CC.

50 Art. 931 para. 2 CC.

51 The old Code of Obligations from 1881 already provided for the FP Principle.

52 See BGE 123 III 367 E. 3c; BGE 89 II 192 E. 2; BSK-ZGB II, *Bauer/Bauer,* Art. 884 N 60 f.

53 BSK-ZGB II, *Bauer/Bauer*, Art. 888 N 7.

54 See section IV.5.1 below.

55 See section IV.5.2 below.

56 The reservation of ownership *(Eigentumsvorbehalt)* is set out in art. 715 et seq. CC. It is a means of security whereby the parties to a purchase contract typically agree that the seller remains the owner of the asset until the purchase price has been paid in full. The possession of the asset is transferred to the purchaser. The principle of publicity is adhered to through the requirement to register the reservation of ownership in a public register.

57 Swiss Federal Private International Law Act of 18 December 1987, as amended, SR 291 **("PILA").**

English law governed floating charge which also covers movable Swiss assets.[58] However, this choice of law is not enforceable against a third party (i.e. a debtor of the security provider) who challenges this choice of law.[59] If such a challenge is made, enforceability of the choice of law is merely *inter partes* whereas the third party may invoke the law objectively governing the agreement.[60] Thus, in order to ensure enforceability of a security interest over pledged Swiss assets, it is market practice in Switzerland that such a security interest is governed by Swiss law.

Moreover, pursuant to art. 17 PILA, the application of provisions of foreign law is excluded if such application leads to a result that is incompatible with Swiss public policy *(ordre public)*. A violation of public policy is presumed to exist when fundamental principles of Swiss law are violated and the act is incompatible with the Swiss legal system and values in its reasoning and outcome.[61]

The FP Principle is a fundamental Swiss law principle and has public policy character according to the Swiss Federal Tribunal, which is why a choice of law with the intention and effect that this principle is avoided likely[62] violates Swiss public policy.[63] As a consequence, an arrangement under an English law governed floating charge according to which movable Swiss assets or certificated securities located in Switzerland shall remain with the chargor, would contradict the FP Principle. Thus, a (competent) Swiss court would not apply the foreign law provisions responsible for the avoidance of the FP principle.[64]

Further and above all, Swiss courts can refuse to recognize and enforce a decision of a foreign court for one of the reasons specified in the PILA.[65] According to such provisions, a foreign court decision would not be recognized and enforced in Switzerland if it would be manifestly incompatible with Swiss public policy,[66] whereby Swiss courts generally exercise great restraint when confronted with foreign decisions *(favor recognitionis)*.[67] This nonetheless leaves a considerable risk that a Swiss court would refuse to recognize and enforce a decision of a foreign court affirming the obligations of a chargor relating to movable Swiss assets or certificated securities *(Wertpapiere)* located in Switzerland if the FP Principle was not complied with.

4. Overcollateralization

Swiss civil law is governed by the principle of party autonomy, which means, in particular, that the parties to a contract are free to conclude a contract with any content they choose, subject to certain limitations.[68] This means with respect to loan agreements that borrowers and lenders are basically free to determine the value ratio between the credit claims and the security. When it becomes apparent that this value ratio is substantially and not only temporarily disproportionate, this is called overcollateralization. According to Swiss doctrine an overcollateralization is generally permitted in Switzerland. Only in some extreme scenarios must it be assessed whether an overcollateralization is still within the limits of art. 21 CO (unfair advantage) and art. 27 para. 2 CC (protection of economic freedom). A breach against these provisions could in particular result in a reduction of the excessive security interest to a reasonable level or (partial) nullity of the relevant security agreements.[69] However, the risk that an overcollateralization with a floating charge between professional parties could have such consequences is low and would be theoretically most conceivable when the borrower agreed to an all asset security due to an emergency situation such as financial distress. But especially in such a situation the lender has a justified interest in overcollateralization. Further, an overcollateralization, which is the result of a floating charge, might only be temporary as the assets covered by the floating charge change from time to time. Hence, a floating charge

58 See art. 105 para. 1 PILA.
59 See art. 105 para. 1 and para. 3 PILA.
60 ZK-OR, *Müller-Chen,* Art. 105 N 15 f.
61 BSK-IPRG, *Mächler-Erne/Wolf-Mettier,* Art. 17 N 13 f.
62 A violation of public policy cannot be abstractly determined as courts assess each case individually; OFK-IPRG, *Kren Kostkiewicz,* Art. 17 N 4; ZK-IPRG, *Vischer/Widmer Lüchinger,* Art. 17 N 36.
63 BGE 42 III 173, 174 et seq.; BGE 94 II 297 E. 3.c; ZK-IPRG, *Mayer,* Art. 149*c* N 226.
64 See OFK-IPRG, *Kren Kostkiewicz,* Art. 17 N 1.
65 See art. 25 lit. c PILA in conjunction with art. 27 para. 1 PILA.
66 See art. 25 lit. c PILA in conjunction with art. 27 para. 1 PILA.
67 See ZK-IPRG, *Müller-Chen,* Art. 27 N 2.
68 BSK-OR I, *Meise/Huguenin,* Art. 19/20 N 1 f.
69 BK-ZGB, *Zobl/Thurnherr,* Art. 884 N 390; *Mirko Stiefel,* Die Übersicherung des Kreditgebers im Schweizer Recht, AJP 2017 16, 20 ff.

that covers all assets of a borrower is not *per se* problematic from a Swiss law perspective.

5. Creation of a Right of Pledge over Different Types of Assets

Depending on the object of the pledge, different requirements for the creation of a right of pledge apply. Below is an overview of different types of assets – including those which are commonly used as security in the form of a pledge in debt finance transactions – and the respective perfection requirements as well as whether these requirements are compatible with the concept of the floating charge or not.

5.1 Pledge of Movable Assets

5.1.1 Perfection Requirements

Assets qualify as movable assets *(bewegliche Sachen)* under Swiss law if they are corporeal *(körperlich)*[70] and movable, i.e. assets which may re-locate or be re-located at will without loss of substance, and do not qualify as immovable property.[71] Examples are equipment, machines of companies, inventory, airplanes, ships etc.

As mentioned above,[72] the FP Principle applies to movable assets and thus, in order to validly perfect a right of pledge over movable assets the relevant asset has to be transferred to the pledgee or a third party who exercises possession on behalf of the pledgee or the pledgor gives up exclusive control of the relevant asset.[73] For instance, it is sufficient to perfect a right of pledge over heavy machinery if the means for controlling the asset are transferred to the pledgee, while the pledgor's access to the pledged asset has to be restricted.[74] According to jurisprudence of the Swiss Federal Tribunal, a pledge over heavy machinery, which is practically impossible to move due to its size and weight, exists validly as long as the pledgor does not have the keys to access the areas where the heavy machinery is stored.[75] These areas can be separate areas equipped with bars and padlocks to which the pledgor must not have access. Further, an aggregate of assets *(Sach- oder Rechtsgesamtheiten)* may be object of a pledge if the principle of specificity is complied with, i.e. each asset is identifiable and meets the specific perfection requirements applicable to the relevant asset.[76]

Nevertheless, there are a limited number of exceptions to the FP Principle with respect to movable assets. These exceptions are expressly foreseen by the law. A non-possessory right of pledge may be created over livestock[77], ships[78] and airplanes.[79] In order to validly perfect a right of pledge over these movable assets, the entry in a public ownership register is required instead of the transfer of possession.

Hence, the required publicity is effected by entry in a public register. The registration in such register is binding *in rem* against the counterparty and third parties.[80] The perfection of a right of pledge over airplanes requires an entry in the aircraft record *(Luftfahrzeugbuch)*.[81] A registered pledge covers the airplane including all components and accessories. Due to the fact that the pledgor may continue to use an airplane which is pledged, this type of security is often used as collateral in aircraft debt financings and thus, has a great economic importance in Switzerland.[82]

70 BK-ZGB, *Graham-Siegenthaler,* Das Eigentum – Allgemeine Beziehungen – Art. 641–654*a* ZGB N 249.

71 Art. 713 para. 1 CC; BK-ZGB, *Graham-Siegenthaler,* Das Eigentum – Allgemeine Beziehungen – Art. 641–654*a* ZGB N 362.

72 See section IV.3.4 above.

73 Art. 884 CC.

74 See art. 922 para. 1 second case CC.

75 BGer 5A_315/2009 of 13 August 2009 E. 5.

76 See section IV.3.1 above.

77 See Art. 885 CC and Ordinance regarding the pledge of livestock *(Viehverpfändung)* of 30 October 1917, as amended, SR 211.423.1. Pledges on livestock have no significance with respect to debt finance transactions in practice. They are established by entry in the livestock register *(Viehverschreibungsprotokoll)*. The pledgee may only be a bank or cooperatives that have obtained a corresponding permission from the competent authority. In contrast to the land register *(Grundbuch)* however, the livestock register does not offer a protection of public-faith. As a consequence, third parties may, in good faith, acquire rights *in rem* over livestock even if a pledge is registered in the livestock register.

78 Art. 38 et seq. Federal Act regarding the ship register *(Schiffsregister)* of 28 September 1923, as amended, SR 747.11.

79 Federal Act regarding the aircraft record *(Luftfahrzeugbuch)* of 7 October 1959, as amended, SR 748.217.1.

80 *Arpagaus* (Fn. 11), N 1533, 1538 and 1541.

81 Art. 14 para. 1 Federal Act regarding the aircraft record *(Luftfahrzeugbuch)* of 7 October 1959, as amended, SR 748.217.1.

82 *Arpagaus* (Fn. 11), N 1544.

Similarly, ships may be pledged by entry in the ship register *(Schiffsregister)*.[83]

The necessity of such exceptions by way of special legislation were justified in the legislation process by the fact that such companies, in particular shipping and aircraft companies, have no other means which can be used as collateral for loans.[84]

Further, it is worth mentioning that there is a public law right of pledge which can be created on licensed railway, shipping and trolley bus companies. It is created by way of authorization of the Federal Council on the basis of an administrative act and subsequently published in the Federal Gazette *(Bundesblatt)*.[85]

5.1.2 Compatibility of the Pledge of Movable Assets with the Concept of Floating Charge?

Since the perfection of a right of pledge over movable assets requires the transfer of these assets to the pledgee or at least the giving up of exclusive control by the pledgor due to the FP principle, the concept of a floating charge is not recognized under Swiss law in relation to movable assets.

As the strict de-possession requirement does not apply with respect to airplanes and ships and thus, the pledgor may use the pledged assets, there is a commonality with a floating charge in this respect. However, the principle of specificity still needs to be complied with when such a right of pledge is created. This means that there is a fundamental difference to a floating charge also with respect to pledges over movable assets that are created by way of entry in a register.

5.2 Pledge of Claims and other Rights

5.2.1 General

As a general rule, claims and other rights may be pledged if they are transferable.[86] Claims and other rights are not transferable if their transferability is restricted by law, nature of the underlying legal relationship or agreement *(pactum de non cedendo)*.[87]

Also future claims and an aggregate of claims may be pledged provided that they are identifiable.[88] To be identifiable, the claim must be sufficiently determined or at least identifiable with regard to (i) the debtor of the claim, (ii) the legal ground and (iii) the amount, whereby it is sufficient if the future claim is determined or identifiable at the time it arises.[89] Even the legal relationship from which the claim will arise need not yet exist. However, according to the jurisprudence of the Swiss Federal Tribunal a pledge of all current and future claims against any third person would not be valid under Swiss law insofar as the pledge could violate personality rights *(Persönlichkeitsrechte)* or offend common decency *(Verstoss gegen die guten Sitten)*.[90] If the pledgor becomes bankrupt, future claims which arise after the opening of bankruptcy proceedings fall in the bankruptcy estate.[91]

Further, the pledge of claims and other rights is subject to the rules on the pledge of chattels unless otherwise provided by the law.[92] This also means that the FP Principle is generally applicable *mutatis mutandis* to the pledge of claims and other rights.

As to the requirements applicable to the pledge of claims and other rights a distinction must be drawn

83 Art. 41 Federal Act regarding the ship register *(Schiffsregister)* of 28 September 1923, as amended, SR 747.11.

84 Botschaft des Bundesrates an die Bundesversammlung über die Entwürfe zu einem Bundesgesetz betreffend Abänderung und Ergänzung des Bundesgesetzes betreffend die Verpfändung und Zwangsliquidation der Eisenbahnen auf dem Gebiete der schweizerischen Eidgenossenschaft vom 8. August 1916, BBl 1916 III 441, 445 f.

85 Art. 1 et seqq. of the Federal Act regarding the pledge and forced liquidation of railway and shipping companies *(Verpfändung und Zwangsliquidation von Eisenbahn- und Schiffahrtsunternehmungen)* of 25 September 1917, as amended, SR 742.211; *Kuhn* (Fn. 15), § 20 N 1005.

86 See art. 899 para. 1 CC.

87 For instance, the transferability of claims and other rights is restricted by nature if they are of a highly personal nature, see art. 164 CO; OFK-OR, *Schaufelberger/Keller,* Art. 164 N 8 f.

88 See BGE 142 III 746 E. 2.2.1; BSK-ZGB II, *Bauer/Bauer,* Art. 899 N 19.

89 See BGE 84 II 355 E. 3; BGE 113 II 163 E. 2b; BGE 122 III 361 E. 4c; ZK-OR, *Spirig,* Art. 164 N 39 f.

90 OFK-OR, *Schaufelberger/Keller,* Art. 164 N 4; ZK-OR, *Spirig,* Art. 164 N 8; Präjudizienbuch OR, *Krauskopf,* Art. 164 N 9.

91 When claims are assigned for security purposes, assigned future claims that come into existence only after the opening of bankruptcy proceedings against the assignor fall into the assignor's bankruptcy estate and thus, are not assigned to the assignee, i.e. under Swiss law a "true sale" is not possible in relation to the assignment of future claims in such a situation; see BGE 111 III 73 E.3.

92 Art. 899 para. 2 CC.

between (i) uncertificated *(unverbriefte)* claims for which no certificate *(Urkunde)* exists, (ii) uncertificated claims, for which a borrower's note *(Schuldschein)* exists, (iii) certificated securities *(Wertpapiere*) and (iv) other rights. Further, special provisions apply for intermediated securities and ledger-based securities *(Registerwertrechte)*. The following sections IV.5.2.2 to IV.5.2.8 contain an overview of such requirements.

5.2.2 Requirements for the Pledge of Uncertificated Claims without Certificate

Claims and other rights that are not embodied in a certificated security *(Wertpapier)* are pledged in accordance with art. 900 CC. Pledges of uncertificated claims for which no certificate *(Urkunde)* exists are perfected by way of written pledge agreement.[93] In addition to the legal obligation *(Verpflichtungsgeschäft),* the written pledge agreement constitutes the act of perfection *(Verfügungsgeschäft)*.[94] Thus, the FP Principle is not applicable. The pledgor needs to have the right to dispose of the claim in order to validly create a right of pledge. Otherwise, the pledge is invalid.[95] According to the prevailing doctrine, art. 900 para. 1 CC also covers the pledge of uncertificated securities *(Wertrechte)* within the meaning of art. 973*c* CO.[96] Shares or quotas for which no certificates exist and which are not registered in the uncertificated securities register *(Wertrechtebuch)* exist in the form of untitled *(titellose)* shares or quotas. For such shares or quotas the right of pledge is created over the relevant membership rights. Before art. 973*c* CO entered into force, the doctrine stated that uncertificated shares and quotas are "other rights" within the meaning of art. 900 para. 3 CC. From today's perspective, however, a pledge over untitled *(titellose)* shares or quotas is to be considered as a pledge over uncertificated securities in a broader sense, which is created like a claim in accordance with art. 900 para. 1 CC.[97] In any case this distinction between art. 900 para. 1 CC and art. 900 para. 3 CC has no practical implications in terms of the creation of a pledge over untitled *(titellose)* shares or quotas. Either way, the pledge is created by written pledge agreement.

For the avoidance of doubt it should be noted that for the pledge of intermediated securities *(Bucheffekten)* and ledger-based securities *(Registerwertrechte)* different rules apply.[98]

When claims relating to third party debtors (e.g. customers) are pledged, as a rule it is not necessary to notify them in order to validly perfect the pledge.[99] An exemption applies, however, to claims under insurance contracts. In order to perfect such a pledge, insurance companies have to be notified.[100] It should be noted that in Swiss debt finance transactions it is more common for intercompany receivables, insurance claims and/or trade receivables to be assigned instead of creating a right of pledge. Debtors may validly discharge their obligations when making payments in good faith to the assignor as former creditor as long as they are not notified about the assignment.[101] Therefore, it is customary practice in Switzerland that third party debtors are notified about the assignment (whereby debtors of trade receivables are typically notified only after the occurrence of an event of default in order to not jeopardize the business relationship [so-called "silent assignment"]).

5.2.3 Requirements for the Pledge of Uncertificated Claims with a Borrower's Note

In the case of pledges of uncertificated claims, for which a borrower's note exists, the written pledge agreement only constitutes the legal obligation *(Verpflichtungsgeschäft)*. The pledge is perfected in accordance with the FP Principle, by way of transfer of the original document to the pledgee.[102] The pledge terminates when the original document is returned to

93 Art. 900 para. 1 case 1 CC.

94 BK-ZGB, *Zobl,* Art. 900 N 35.

95 BK-ZGB, *Zobl,* Art. 900 N 41.

96 Pursuant to art. 973*c* para. 3 CO uncertificated securities *(Wertrechte)* are created by registration in the uncertificated securities register *(Wertrechtebuch)* and continue to exist only in accordance with such registration.

97 See *Bastian Heinel,* Zwangsverwertung von Drittpfändern im Unternehmenskonkurs, Luzerner Beiträge zur Rechtswissenschaft Bd. 167, Zürich 2022, N 29 und 185 ff.; *Peter Böckli,* Schweizer Aktienrecht, 5. Aufl., Zürich/Genf 2022, § 3, Fn. 210; *Mirjam Eggen,* Sicherheiten an Wertrechten – eine Untersuchung der Rechtslage ab Inkrafttreten des Bucheffektengesetzes, SZW 2009, 116, 118; BSK-ZGB II, *Bauer/Bauer,* Art. 900 N 2; BSK-Wertpapierrecht, *Pöschel/Maizar,* Art. 973*c* OR N 58.

98 See sections IV.5.2.7 and IV.5.2.8 below.

99 See art. 900 para. 2 CC.

100 See art. 73 of the Federal Act regarding the Insurance Agreement *(Versicherungsvertrag)* of 2 April 1908, as amended, SR 221.229.1.

101 See art. 167 CO.

102 Art. 900 para. 1 second case CC.

the pledgor.[103] In cases where both the pledgor and the pledgee are not aware of the existence of a borrower's note, a valid perfection in good faith may be possible under specific circumstances.[104]

Since "borrower's note" is not defined in the CO, there is some uncertainty as to what exactly this term encompasses. According to the doctrine, a borrower's note is a certificate *(Urkunde)* which contains a unilateral written acknowledgement of debt.[105] Examples of borrower's notes are insurance policies and deposit receipts (but not synallagmatic contracts).

5.2.4 Requirements for the Pledge of Certificated Securities

A certificated security *(Wertpapier)* is a certificate *(Urkunde)* to which a right is attached in such a way that it cannot be asserted or transferred without that certificate.[106] The perfection requirements for the pledge of certificated securities depend on the type of securities, i.e. bearer securities *(Inhaberpapiere),* registered securities *(Namenpapiere)* or order securities *(Ordrepapiere)*. They all have in common that the pledge agreement as *causa* of the pledge is not bound to the written form.[107] In this respect, there is a facilitation compared to the pledge of claims and other rights pursuant to art. 900 CC.

For the perfection of a pledge of bearer securities the certificate has to be physically transferred to the pledgee.[108]

In the case of registered securities or order securities, in addition to the transfer of the certificate, it must be either endorsed or accompanied by a declaration of assignment.[109] Thus, for all types of securities, the FP Principle is realized through the transfer of the certificate.[110]

In debt finance transactions, the pledge of shares of Swiss stock corporations *(Aktiengesellschaften),*[111] respectively quotas of Swiss limited liability companies *(Gesellschaften mit beschränkter Haftung),*[112] is often part of a Swiss law governed security package.[113] Since it is not intended that the secured party gets full legal title over the shares, they are typically pledged and not assigned. The most common form of shares in Swiss stock corporations are registered shares *(Namenaktien)*.[114] Although, under Swiss law registered shares may exist in uncertificated form and thus, Swiss stock corporations are not required to issue share certificates, lenders normally request the pledgor to procure that share certificates representing the registered shares of a non-listed stock corporation are issued (if none have been issued so far). For the perfection of the pledge the original share certificates duly endorsed in blank have to be handed over to the pledgee respectively to the security agent (acting for itself and as direct representative *[direkter Stellvertreter]* in the name and for the account of all other secured parties) in case there is a syndicate of lenders.[115] As long as the pledgee respectively the security agent is in possession of the original share certificates, a first ranking pledge agreement may not be validly created in favor of a third party. Thus, such a set-up provides lenders with a certain level of control over the valid continuance of the senior ranking pledge.

5.2.5 Requirements for the Pledge of Bank Accounts

In debt finance transactions bank accounts held with banks in Switzerland are typically pledged and not assigned. First, it is normally not the intention that the secured party will get full legal title over the ac-

103 BK-ZGB, *Zobl,* Art. 900 N 80.

104 See BK-ZGB, *Zobl,* Art. 900 N 76 f.

105 BSK-ZGB II, *Bauer/Bauer,* Art. 900 N 5; BK-ZGB, *Zobl,* Art. 901 N 13.

106 Art. 965 CO.

107 BGE 93 II 82 E. 5; BGE 51 II 24 E. 3; BGE 42 III 286 E. 5; BGE 38 II 156 E. 2.

108 Art. 901 para. 1 CC.

109 Art. 901 para. 2 CC.

110 Although not relevant in practice with respect to debt finance transactions, it should be noted for the sake of completeness that alternatively, the rights certificated in the securities may also be pledged in accordance with art. 900 CC. In this case it is not the certificated securities *(Wertpapiere)* that are subject to the pledge but only the rights certificated in the securities. For the perfection of the pledge a transfer of the certificate to the pledgee is required (in addition to the written pledge agreement). See BK-ZGB, *Zobl,* Art. 901 N 107 et seq.

111 Art. 620 et seqq. CO.

112 Art. 772 et seqq. CO.

113 For the sake of simplicity the statements are limited to "shares" in Swiss stock corporations. These statements apply also with respect to quotas in limited liability companies.

114 In accordance with art. 622 para. 1bis CO, bearer shares are only permitted if the equity securities are listed on a stock exchange or if the bearer shares are organized as intermediated securities in accordance with the FISA and are deposited with a custodian in Switzerland designated by the stock corporation or entered in the main register.

115 Art. 901 para. 2 CC.

counts. Second, an assignment of bank accounts would cause lengthy know-your-customer checks.

When cash deposits held in bank accounts are pledged, the object of the pledge is any claim the pledgor as account holder has against the bank. As a consequence, the creation of a right of pledge over cash deposits is subject to the same conditions as the creation of a right of pledge over uncertificated claims.[116]

Normally, the object of the pledge in a Swiss law governed bank account pledge agreement is the net balance held in the cash deposit from time to time and thus, also includes future and variable claims. Nevertheless, it would also be possible to pledge a specific net balance or specific account entries underlying the net balances.[117] The right of pledge does not expire if the net balance is below zero from time to time.[118] Due to the accessory principle, the pledged amount is limited to the amount of the secured obligations, even if the net balance is higher.[119]

In addition, it needs to be taken into account that the general terms and conditions of Swiss banks usually provide for a first ranking pledge over bank accounts held with them in order to secure their claims under the bank relationship with the client (such as fees and claims arising from overdrafts on accounts). This means that the claims of the secured parties under a bank account pledge agreement typically rank junior to the claims of the account bank. The CC provides that in order to prefect a junior pledge, the senior pledgee (i.e. the account bank) needs to be notified in writing of the junior pledge by the creditor (i.e. the account holder and pledgor) or the junior pledgee.[120] Therefore, the notification of the account bank is typically a requirement in debt finance transactions in order to validly perfect a right of pledge over Swiss bank accounts.[121] In the notification letter the account banks are often requested to waive their priority claims (including their rights of set-off) they may have over the relevant bank account pursuant to their general terms and conditions. It is, however, very rare in practice that an account bank is willing to waive such priority rights.

5.2.6 Requirements for the Pledge of Other Rights

The expression "other rights" in the sense of art. 899 para. 1 CC and art. 900 para. 3 CC means rights other than claims, e.g. intellectual property rights. If a Swiss company has patents, trademarks, domain names, designs and copyrights (in the following **"IP Rights"**) which are material to its business, lenders often request them to be made part of the Swiss law governed security package and normally in the form of a right of pledge. IP Rights qualify as other rights in the sense of art. 899 para. 1 CC and art. 900 para. 3 CC. Therefore, for the creation of a right of pledge over IP Rights, the applicable requirements for each specific IP Right have to be complied with. To create a valid right of pledge over patents, trademarks and designs a written pledge agreement is sufficient. The entry of a pledge in the relevant register is of declaratory nature only but grants the pledgee good faith protection due to its publicity function.

5.2.7 Requirements for the Pledge of Intermediated Securities

The FISA regulates the custody of certificated securities *(Wertpapiere)* and uncertificated securities *(Wertrechte)* by intermediaries *(Verwahrungsstellen)* and their transfer. The FISA does not differentiate between types of securities, but applies to all securities, which are traded by ways of book-entry.[122] Shares of listed Swiss companies are typically issued as uncertificated securities within the meaning of art. 973*c* CO and established as intermediated securities within the meaning of the FISA. Intermediated securities within the meaning of the FISA are personal or membership rights of a fungible nature against an issuer which are credited to a securities account and over which the account holder has the power of disposal in accordance with the FISA.[123] In the doctrine, intermediated securities within the meaning of the FISA are often described as legal objects *sui generis*.[124]

Art. 901 para. 3 CC foresees that the pledging of intermediated securities is exclusively governed by

116 See section IV.5.2.2 above.
117 See BGE 30 II 606 E. 1.
118 *Annabelle Peschke,* Das Fahrnispfandrecht und die Sicherstellung künftiger Forderungen, Zürich 2021, 37 f.; BK-ZGB, *Zobl,* Art. 884 N 263 f.
119 *Peschke* (Fn. 118), 37 f.; ZK-OR, *Aepli,* Art. 117 N 83 f.; BK-ZGB, *Zobl,* Art. 884 N 267 f.
120 See art. 903 CC.
121 *Arpagaus* (Fn. 11), N 1500 f.
122 SC-FISA, *Graham-Siegenthaler,* Art. 1 N 1.
123 See art. 3 para. 1 FISA.
124 SC-FISA, *Eigenmann,* Prel. Cmts. Arts. 24–26 N 1.

the FISA. The FISA contains rules on how a security interest on intermediated securities can be perfected and follows a functional concept, so that in principle the regular and irregular pledge as well as the security transfer are covered.[125] Under the FISA a pledge (on which the focus of this article lies) can be created in three different ways: According to the prevailing doctrine a pledge can be created by the pledgor as account holder instructing the intermediary to transfer and credit the intermediated securities to the securities account of the pledgee, but the pledgor does not lose its rights to the intermediated securities since no full title transfer occurs. The pledge is perfected with the credit entry.[126] Further, intermediated securities can be pledged under the FISA by an irrevocable control agreement between the pledgor and the intermediary according to which the intermediary is required to comply with the instructions of the pledgee without further consent or involvement of the pledgor as account holder.[127] Often the control agreement grants the pledgor a right to continue to dispose over the accounts covered by the control agreement until the intermediary receives a blocking notice from the pledgee.[128] Finally, a right of pledge may be created in favor of the intermediary, by entering into a security agreement between the account holder and the intermediary.[129]

The conclusion of the pledge agreement is not regulated by the FISA since it only contains the perfection requirements. The pledge agreement on intermediated securities is valid without any form, i.e. the written form requirement under art. 900 para. 1 CC does not apply.[130] Thus, in order to create a security interest over intermediated securities as set out in the FISA, neither a physical transfer nor registration in a public register is required. This means that the FP Principle and the principle of publicity do not apply to intermediated securities.[131] With respect to the FISA, the FP Principle is replaced by the control principle. According to this principle, a security interest can be created by granting the secured party the possibility to dispose of and realize the security without the consent of the security provider.[132]

When a right of pledge is created over intermediated securities in debt finance transactions, this is typically done by way of an irrevocable control agreement according to art. 25 FISA. Pursuant to art. 25 para. 2 FISA, a security interest created by a control agreement may refer to (i) specific intermediated securities, (ii) all intermediated securities credited to a securities account or (iii) a portion thereof up to a specific value.[133] The objects of security may fluctuate and vary.[134] In all three constellations of this provision, the security does not relate to a specific intermediated security, but to a specific class of intermediated security.[135]

With (i) the collective custody of certificated securities *(Wertpapiere)* over shares, (ii) the registration of uncertificated securities *(Wertrechte)* over shares in the main register of an intermediary and (iii) the transfer of ledger-based securities over shares to an intermediary, a type of quota shares comes into existence. These quota shares remain in existence upon further wrapping *(Umhüllung)* when intermediated securities are created by crediting the respective rights to a securities account.[136] Accordingly, when disposing of intermediated securities such disposal always relates to quota shares. Thus, any disposition of intermediated securities is actually a quota disposition, although art. 25 para. 2 lit. a and lit. b FISA indicate that there are other disposition possibilities than quota dispositions when disposing over intermediated securities by means of a control agreement.

125 BSK-Wertpapierrecht, *Hünerwadel/Fischer,* Art. 24–26 BEG N 15.

126 BSK-ZGB II, *Bauer/Bauer,* Art. 901 N 11; different view *Luca Dalla Torre/Benjamin Leisinger/Olivier Mosimann/Matthias Rey/Ansgar Schott/Martin Karl Weber,* Sicherheiten nach Bucheffektengesetz – theoretische und praktische Aspekte, recht 2010, 16 ff.

127 See art. 25 FISA.

128 According to the prevailing doctrine, the security provider may continue to dispose over the account covered by the control agreement unless there is an agreement to the contrary; see BSK-Wertpapierrecht, *Bahar/Peyer,* Art. 25 BEG N 56–58 with further references. This view is to be agreed with.

129 See art. 26 FISA.

130 BSK-ZGB II, *Bauer/Bauer,* Art. 901 N 12.

131 Botschaft zum Bucheffektengesetz sowie zum Haager Wertpapierübereinkommen vom 15. November 2006, BBl 2006 9315, 9370 f.; SC-FISA, *Eigenmann,* Prel. Cmts. Arts. 24–26 N 21 et seqq.

132 BSK-Wertpapierrecht, *Bahar/Peyer,* Art. 25 BEG N 13.

133 Art. 25 para. 2 FISA.

134 See art. 25 para. 2 lit. c FISA.

135 BSK-Wertpapierrecht, *Bahar/Peyer,* Art. 25 BEG N 20.

136 See *Markus Vischer,* Aktien als individualisierte Rechte und die dadurch in der Trias Mitgliedschaft–Wertpapier/Wertrecht–Bucheffekte verursachten Probleme, SZW 2022, 213 ff.; BK-Aktienrecht, *Vischer,* Art. 690 OR N 6.

Further, it is not even possible anymore to specify individual intermediated securities as soon as a plurality of intermediated securities of the same class are credited to an account.

Therefore, the principle of specificity does not apply in relation to intermediated securities under the FISA.[137] In the legislation process such an exemption from the fundamental principle of specificity was justified with the argument that secured parties are normally not interested in a specific security interest in certain categories of intermediated securities, but merely in a value quota.[138]

This having been said, the security interest created over intermediated securities in accordance with the rules of the FISA is, to a certain extent, similar to the concept of a floating charge.

5.2.8 Requirements for the Pledge of Ledger-Based Securities

With the introduction of the DLT Act on 25 September 2020,[139] ledger-based securities *(Registerwertrechte)* have been implemented into the CO.[140] Pursuant to art. 973*d* CO a ledger-based security is a right which (i) is registered in a register of ledger-based securities and (ii) may be exercised and transferred to others only via this register.

In view of the principle of publicity, the creation of a right of pledge is possible in two ways, namely as possessory security by transferring the ledger-based securities to the secured party or as non-possessory collateral according to art. 973*g* para. 1 CO.[141] As non-possessory security is also permitted, the FP Principle is abandoned for such ledger-based securities. Essential in both cases is the recognizability of the granting of security interests. In the case of possessory security interests in ledger-based securities, the transfer of *de facto* control over the registered security interest to the secured party is required; the modalities depend on the system used. In practice, methods of double or multiple subscription are likely to be used so that the transfer of the ledger-based securities is only possible with the participation of the secured party. In respect of non-possessory security, the legal situation is more complex.[142] In this case the CO requires that the security interest is visible in the securities ledger and that in the event of default it is ensured that only the secured party can dispose of the ledger-based securities.[143] The technical specification is therefore complex and is not likely to be applied often in practice. Further, in all other respects, the right of pledge over ledger-based securities is governed by the provisions that apply to certificated claims and other rights pursuant to arts. 899–906 CC.[144] This does not include art. 900 para. 1 CC which only applies to non-certificated claims.[145] Thus, for a pledge agreement creating a pledge over ledger-based securities, no written form is required.

5.2.9 Compatibility of the Pledge of Claims and Other Rights with the Concept of Floating Charge?

Generally, it is required that the pledge agreement sufficiently identifies and determines the claims and other rights to be pledged. This conflicts with the flexibility of a floating charge, where the specific identification of assets is not necessary. The only exception from the principle of specificity applies to the pledge of intermediated securities in accordance with the FISA.

In addition to this, the FP Principle is applicable in relation to uncertificated claims, for which a borrower's note exists, and certificated securities *(Wertpapiere)*. Thus, the perfection of a pledge over these assets requires the physical transfer of the original borrower's note, respectively the original certificate, to the pledgee. In terms of the pledge over uncertificated claims for which no certificate exists, intermediated securities and ledger-based securities, all of which do not exist in non-corporeal form, the FP Principle does not apply.

As a consequence, the concept of a floating charge is generally not recognized under Swiss law with respect to the pledge of claims and other rights with the exception of the pledge of intermediated securities under the FISA since such a security interest is, to

137 See BSK-Wertpapierrecht, *Bahar/Peyer,* Art. 25 BEG N 19 with further references.

138 Botschaft Bucheffektengesetz (Fn. 131), 9371.

139 Federal Act of 25 September 2020 on the adaption of federal law to developments in distributed ledger technology, BBl 2020 7801.

140 See art. 973*d* et seqq. CO.

141 BK-Aktienrecht, *Weber,* Art. 973*d*–973*i* OR N 54.

142 BK-Aktienrecht, *Weber,* Art. 973*d*–973*i* OR N 55 ff.

143 See art. 973*g* para. 1 CO.

144 Art. 973*g* para. 2 CO.

145 Botschaft zum Bundesgesetz zur Anpassung des Bundesrechts an Entwicklungen der Technik verteilter elektronischer Register vom 27. November 2019, BBl 2020 223, 287.

a certain extent, similar to the concept of a floating charge.

5.3 Immovable Property

When Swiss obligors own real estate, it is seen in practice, that the relevant property is made part of the security package. The common forms used to create a security interest over real estate are a security transfer over mortgage notes *(Schuldbriefe),* a pledge over mortgage notes or a land charge *(Grundpfandverschreibung)*.[146]

Mortgage notes represent a personal claim against the debtor.[147] They exist in the form of a register mortgage note *(Registerschuldbrief)* or paper mortgage note *(Papierschuldbrief)*.[148] Beside a written security transfer or pledge agreement, the security interest over mortgage notes is perfected by a physical transfer of the paper mortgage notes to the secured party or (in the case of the register mortgage note) by registration of the transfer in the land register.[149]

For creating a security interest in the form of a land charge (which is less commonly used as security in debt finance transactions than mortgage notes), a written land charge agreement needs to be concluded and notarized as a deed.[150] Further, the land charge has to be registered in the land register.[151]

When a security interest over real estate is created it is always clear to which specific property it is related. Therefore, the principle of specificity applies without restriction. Further, depending on the type of security interest, the above mentioned perfection requirements have to be complied with. Thus, the concept of a floating charge is not recognized with respect to immovable property.

5.4 Summary

In summary, it can be stated that the concept of a floating charge is not recognized under Swiss law with respect to the pledge of movable assets, claims and other rights and real estate. It is only with respect to the pledge of intermediated securities under the FISA that certain similarities to a floating charge exist.

146 See art. 793 para. 1 CC.
147 See art. 842 para. 1 CC.
148 Art. 843 CC.
149 See art. 859 para. 1 CC and art. 864 CC, respectively.
150 See art. 799 para. 2 CC.
151 See art. 799 para. 1 CC.

V. Reform Efforts

In recent years, a number of proposals have been made in relation to a revision of Swiss law relating to the security over movable assets. In October 2021, a report commissioned by the Federal Office of Justice and the State Secretariat for Economic Affairs (SECO) was published with the aim of providing the basis for a possible revision of the Swiss security law relating to chattels (the **"Report"**).[152] The Report in particular focuses on the effects of a revision on small and medium-sized enterprises (the **"SMEs"**).[153] Based on a comparative law analysis, it was concluded in the Report that in the European context, there is no other legal system which implemented the FP Principle as consistently and strictly as Swiss law. Although, the foreign civil law systems indicate that the FP Principle is important as a starting point for the laws regarding the pledge of chattels, exemptions to the strict de-possession requirement were introduced in other jurisdictions since practical experience has shown that security rights based strictly on the FP Principle have proved to be rather impracticable.[154] Foreign legal systems, including continental European jurisdictions, have generally permitted non-possessory securities in recent years.[155] The Report states that compared to companies in other jurisdictions Swiss SMEs face severe limitations in obtaining secured debt financing. Hence, the strict FP Principle is likely to impair the efficient use of capital for SMEs. It will likely finally lead to a competitive disadvantage for Swiss companies, in particular SMEs. The Report concluded that this also leads to a competitive disadvantage for the Swiss economy in general.[156]

The Report contains a recommendation for a revision of Swiss security law relating to movable assets to facilitate access for companies, in particular SMEs (not natural persons) to debt financings. The Report proposes three different scenarios with varying intensity of intervention. The Report states that one main

152 Interface Politikstudien Forschung Beratung GmbH, Regulierungsfolgenabschätzung zur Schaffung einer Rechtsgrundlage für eine allfällige Revision des Schweizer Mobiliarsicherungsrechts, Luzern/Lausanne 2021, 44 (zit. Report).
153 Report (Fn. 152), 3.
154 Report (Fn. 152), 87.
155 Report (Fn. 152), 75 et seq.
156 Report (Fn. 152), 87 et seq.

element should be the introduction of an electronic central register in which the security interests will be registered. Currently, it is not clear how the recommendations set out in the Report will be implemented.

In terms of the strict FP Principle the authors of this article are of the view that there is a need for reform. SMEs in particular have normally nothing to use as valuable collateral other than their movable and current fixed assets *(bewegliches Umlauf- und Anlagevermögen)* which are indispensable for them in their daily business. Therefore, they often have insufficient assets to secure bank loans. If they were able to pledge such assets without giving up possession, they would have better access to liquidity. The FP Principle which was introduced over 150 years ago should be adapted to today's conditions. For companies the creation of a pledge over movable assets should be made possible without the physical transfer of the assets. Requiring the transfer of possession is no longer practicable and should therefore be replaced with an entry in a public electronic register. Such registration could ensure that the principle of publicity is complied with. Further, it is not justifiable to only exempt airplanes and ships from the strict de-possession requirement. This legal situation should be made uniform for all movable assets.

With respect to the FP Principle applicable to certificated securities we see no absolute necessity to revise the current legal situation which is practicable and also has extensive legal clarity. In our view, the FP Principle works well in practice for certificated securities. The proposed revision limited to a company's movable assets could be integrated in the CC without having to enact a separate statute. Thus, the associated legislative effort would be limited. The introduction of the concept of floating charges under Swiss law would, however, require a far-reaching adaptation of the Swiss legal system (even after a corresponding revision relating to the proposed relaxation of the FP Principle in relation to movable assets). Such a fundamental change to Swiss legislation is not being seriously considered at the moment.

VI. Conclusion

The granting of security by the way of a floating charge is a common law concept which allows the entirety of a company's assets to be used as collateral. Borrowers and lenders profit from this highly flexible means of providing a comprehensive security interest in debt finance transactions. Similar to a charge under common law, a right of pledge under Swiss law does not result in a full legal title transfer. Under Swiss law the creation of a right of pledge over movable assets, claims and other rights is governed by fundamental principles, including in particular the principle of specificity and the FP Principle. The principle of specificity applies without restriction in relation to all assets which may be subject to a right of pledge, except to intermediated securities. The FP Principle generally strictly applies to movable assets and certificated securities with only a limited number of movable assets, including airplanes and ships being exempted. In respect of the latter an entry in a public register is required and thus, the principle of publicity is still complied with. Further, the FP Principle does not apply with respect to uncertificated securities, including intermediated securities and ledger-based securities.

De lege lata floating charges conflict with these fundamental Swiss law principles in varying degrees depending on the relevant assets. Hence, the concept of a floating charge is generally not recognized under Swiss law. Only the pledge of intermediated securities under the FISA is, to a certain extent, similar to a floating charge.

SMEs are particularly affected by the strict FP Principle. They typically have no valuable means that can be used as collateral other than their movable and current fixed assets. Since such assets are indispensable for them in the running of their daily business, they have only limited access to debt financings. Thus, the strict de-possession requirement results in an economic disadvantage for them.

Regarding movable assets it does not seem justifiable to only exempt specific assets (in particular airplanes and ships) from the strict de-possession requirement. For companies it would be appropriate to abolish the FP Principle in relation to all movable assets. The de-possession requirement could be replaced with an entry in a public electronic register which would be in line with the principle of publicity and grant Swiss companies, in particular SMEs, better access to debt financings. Finally, this would result in a certain approximation to the concept of a floating charge for moveable assets.

In relation to the pledge of claims and other rights as well as immovable property, the Swiss legal system governing the right of pledge has proven itself in practice and provides a high degree of legal certainty. If a

security similar to a floating charge were to be introduced in Switzerland, the abandonment of proven fundamental Swiss law principles might entail a certain loss of this legal certainty, at least initially. The authors of this article therefore do not see any absolute necessity to make any further moves towards an approximation of the concept of a floating charge at the moment, even if it would provide a higher degree of flexibility in debt finance transactions.