

## **“Propertization of Obligatory Rights” and the Principle of Numerus Clausus**

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### **Abstract**

The article talks about the meaning of the so-called “propertization of obligatory rights (Verdinglichung obligatorischer Rechte)” and its scope.

The term “propertization of obligatory rights” is used to describe that the obligation develops unusually a legal relationship between the creditor and the third party, which is contrary to the doctrine of privity. The “abnormalities”, such as “sale does not break lease” and “covenant to use co-owned property”, are aimed at protecting the particular obligation against the certain interference from the third party. The means of protection is so diverse that the consequence of the “propertization of obligatory rights” can be also very varied, which is a piece of legislation. The propertized obligatory rights remain as “in personam rights”, despite the fact that the third party is bound by these obligations, which is seen as one of the distinguishing features of “in rem rights (dingliches Recht)”. But their theoretical bases and consequences differ from each other. Therefore, the principles of the property law such as principle of numerus clausus (in property law) do not apply to the “propertized obligatory rights”.

When it comes to the scope of “propertization of obligatory rights”, this article contends the principle of “mild numerus clausus (milder Typenzwang)”, under which the legislature monopolizes the creation of propertization forms, but the analogical extension of statutory provisions is, in contrast to Article 757 of the Taiwan Civil Code, not prohibited. On the one hand, according to the private autonomy, it cannot be up to the parties of the obligation to create a new form of “propertized obligatory rights”. On the other hand, the “brand-new” propertization

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can also not to be created by the judges. The restriction is not only due to the legal methodology but also due to the fundamental rights, which is protected from the state interference, including the judiciary. But this does not forbid law analogy in the unprovided cases. Therefore, the uncodified propertization of the obligatory right can be, and can only be, accepted, when a “gap” exists in a similar case.

**Keywords: Propertization of obligatory rights, principle of numerus clausus, the doctrine of privity, private autonomy, analogy in personam rights, in rem rights**