JUNHE
SPECIAL REPORT

JUNHE

January 15, 2021

JunHe Special Situation Investment Legal Review: Will real estate mortgages be transferred automatically along with the transfer of principal claims?

— A legal analysis on the implementation of the *Civil Code*

Introduction

The question of whether or not security interests can be transferred automatically along with the transfer of the principal claims has always been a key point in transactions involving non-performing assets. A top priority now for many domestic and overseas investor is whether the mortgages on real estate will be transferred automatically along with the principal claims.

Contract Law, *Property Law* and other relevant judicial interpretations provide an important legal basis for the automatic transfer of security interests; however, the *Administrative Measures for the Mortgage of Urban Real Estate* (in Chinese, 城市房地产抵押管理办法) (the "**Urban Real Estate Measures**") and *the Detailed Rules for the Implementation of the Interim Regulations on Real Estate Registration* (in Chinese, 不动产登记暂行条例实施细则) (the "**Real Estate Registration Regulations**") require registration for the transfer of mortgages. The *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases Involving the Assets Generated from the Acquisition, Management, or Disposal of Non-Performing Loans of State-owned Banks by Financial Asset Management Companies* (in Chinese, 最高人民法院关于审理涉及金融资产管理公司收购、管理、处置国有银行不良贷款形成的资产的案件适用法律若干问题的规定) (Fa Shi [2001] No. 12) (the "**Provisions on Non-Performing Loans**") [1] were promulgated by the Supreme People's Court on November 4, 2001. According to these provisions, a more specific rule was formed regarding the past transactions of non-performing loans. A financial asset management company was entitled to the real estate mortgages after acquiring the claims originally owned by a state-owned bank. As for the transfer of other types of non-performing loans, it remains to be seen whether real estate mortgages can be transferred automatically

[1] Pursuant to the Decision of the Supreme People's Court on the Abolition of Certain Judicial Interpretations and Related Normative Documents (Fa Shi [2020] No. 16) adopted by the Judicial Committee of the Supreme People's Court on December 23, 2020, the Regulations on Non-Performing Loans shall be abolished on January 1, 2021.

along with the principal claims. Meanwhile, certain lower level courts hold that the transferee of the principal claims shall only acquire the mortgages on real estate after completing registration for the change of a mortgage[2]. In this context, many domestic and overseas investors are worried about the transfer of the mortgages on real estate, and we have received inquiries from investors.

The *Minutes of the National Court's Civil and Commercial Trial Work Conference* (the "**Jiu Min Minutes**"), the *Civil Code* and other relevant judicial interpretations promulgated in recent years have endorsed the principle of the automatic transfer of mortgages on real estate along with the principal claims. On the occasion of the official implementation of the *Civil Code*, this article aims to put forward our understanding and views on the transfer of mortgages on real estate based on our legal research, case studies and practice analysis[3].

1. Disputes over the transfer of mortgages on real estate in past transactions

In the basic theories of civil law, security interests shall be subordinated to principal claims, which are specifically embodied in the subordinate nature of the creation, transfer and extinction of the security interests, i.e. the security interests are conditional on the existence of the principal claims, transferred along with the principal claims and extinguished due to the extinction of the principal claim[4].Mortgages on real estate are the most typical and common type of security interest contemplated under financing transactions, and in theory, the mortgages on real estate shall be transferred along with the transfer of the principal claims; otherwise, it will go against the protection of the principal claims or the facilitation of transactions, and it also contradicts the legislative intent of the relevant basic civil laws.

a) Confusion due to a conflict of laws and regulations

Prior to the promulgation of the Jiu Min Minutes and the *Civil Code*, numerous laws and judicial interpretations provided that the security interests shall be transferred along with the transfer of the principal claims, where registrations are not required for the transfer of security interests. For example, Article 81 of the *Contract Law* provides that where the creditor assigns its rights, the assignee shall acquire the accessory rights related to the claims, except for the accessory rights exclusively belonging to the creditor; Article 192 of the *Property Law* provides that the mortgages may not be separated from the principal claims to be transferred, or to be used to secure other claims, and if the principal claims are transferred, the mortgages shall be transferred together, unless otherwise

[2] For example, such views were shared in the Civil Judgment ((2016) Lu 0113 Min Chu No. 12) made by the People's Court of Changqing District, Jinan on May 12, 2016 and the Civil Judgment ((2017) Xiang 11 Min Zhong No. 2785) made by the Intermediate People's Court of Yongzhou, Hunan Province on December 13, 2017.

[3] The relevant analysis and discussion in this article are based on the assumption that the mortgagor and the creditor have not reached an agreement to restrict transfer of the security interests.

[4] Wang Liming, ed. Civil Law, Renmin University Press, 2010.

provided for by law or agreed upon by the parties; Article 72 of the *Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Security Law of the People's Republic of China* (in Chinese, 最高人民法院关于适用〈中华人民共和国担保法〉若干问题的解释)[5] provides that if the principal claims are divided or partially transferred, each creditor may enforce the mortgages to the extent of its share in the claims.

However, according to Article 37 of the *Urban Real Estate Measures*, when the mortgages are transferred, a mortgage transfer contract shall be entered into, and registrations for the change of mortgages shall be completed; according to Article 69 of the *Real Estate Registration Regulations* released by the Ministry of Natural Resources, where the mortgages are transferred due to the transfer of the principal claims, the parties concerned may apply for registration of the mortgage transfer, with the real estate ownership certificate, the real estate registration certificate, the agreement on the transfer of the secured principal claims, the materials proving that the debtor has been notified by the creditor and any other relevant materials as supporting documents. The aforementioned regulations have successively posed specific requirements for the registration of mortgage transfers, which, to a certain extent, have heightened the worries of investors regarding the transfer of real estate mortgages.

According to Article 9 of the *Provisions on Non-Performing Loans*, a financial asset management company is entitled to the mortgages after acquiring the secured claims, and the original mortgage registrations shall remain effective. Although the *Provisions on Non-Performing Loans* has been abolished, it provided solid legal grounds for the automatic transfer of mortgages on real estate when a financial asset management company acquired the claims from a state-owned bank in the previous transactions. Whereas, in terms of other types of non-performing loans such as loans provided by banks, trust companies and other non-financial enterprises, it was controversial whether the mortgages on real estate may be transferred automatically when the lenders transferred the non-performing loans to investors directly.

b) Difficulties in completing registration for the transfer of mortgages

As the *Urban Real Estate Measures* and the *Real Estate Registration Regulations* specifically require registrations for the transfer of real estate mortgages, in order to seek protection to the fullest extent, certain domestic and overseas investors have considered registering such transfers pursuant to the aforesaid regulations upon acquiring the

[5] Pursuant to the Decision of the Supreme People's Court on the Abolition of Certain Judicial Interpretations and Related Normative Documents (Fa Shi [2020] No. 16) adopted by the Judicial Committee of the Supreme People's Court on December 23, 2020, the Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Security Law of the People's Republic of China shall be abolished on January 1, 2021.

principal claims.

However, in practice, it is rather difficult to complete registration for the transfer of mortgages on real estate following the transfer of non-performing loans. One of the reasons is that most real estate registration authorities require mortgagors to cooperate in completing the registrations. However, once loans have become non-performing, the relevant mortgagors are less likely to cooperate in completing the registrations for mortgages transfer solely for the benefit of the creditor.

In order to better demonstrate the requirements for registration for the transfer of mortgages on real estate, we consulted with several real estate registration centers in regions where non-performing assets are actively traded, including Beijing, Shanghai, Zhejiang Province, Jiangsu Province, Chongqing and Guangdong Province, and the requirements raised by the relevant real estate registration centers are as follows:

No.	Location of Registration Centers	Registration Requirements
1	Haidian District in Beijing	The mortgagor, the original creditor and the transferee of the claims are required to be present at the registration center to complete the registration together.
2	Jing'an District in Shanghai	
3	Hangzhou, Zhejiang Province	
4	Nanjing, Jiangsu Province	
5	Yubei District in Chongqing	
6	Guangzhou, Guangdong Province	It is impossible to complete the registration for the transfer of mortgages on real estate directly. The original mortgage registration should be cancelled first, and then the mortgagor and the transferee of the claims should complete a new registration for mortgages.
7	Shenzhen, Guangdong Province	The original creditor and the transferee of the claims should be present at the registration center to complete the registration together, provided that the documents signed by the mortgagor acknowledging the receipt of the notice of mortgages transfer is submitted.

It appears that the *Urban Real Estate Measures* and the *Real Estate Registration Regulations* only took into account the registrations for mortgage transfers when claims are transferred under

normal circumstances but failed to take into full account the protection for the transferee of non-performing loans. Once the loans have become non-performing, it is difficult for the creditor to obtain friendly cooperation from the debtors (including the mortgagor), and very few mortgagors are willing to cooperate in completing the registration for mortgage transfers solely for the benefit of the creditor, which makes it difficult for the transferee of the claims to go through the registration procedures in non-performing loans transactions.

2 Attitudes of the courts towards the transfer of real estate mortgages in legal practice

In legal practice, most of the courts including the Supreme People's Court hold that mortgages on real estate are accessory rights which shall be transferred along with the principal claims; however, some lower level courts hold that mortgages on real estate can only be transferred upon the completion of registration for mortgage transfer.

The Supreme People's Court rendered a civil ruling ([2019] Zui Gao Fa Min Shen No. 5925) on 20 November 2019, explicitly stating that where the principal claims are transferred, the relevant mortgages shall be transferred together unless otherwise provided for by the law or agreed upon by the parties; to the extent that the mortgagor alleges that after the claims had been transferred, the transferee shall not be entitled to the priority of repayment with regard to the mortgaged property without completing registration for the mortgage transfer, such allegations shall be groundless. In addition to this case, the Supreme People's Court has also applied the principle that mortgages on real estate shall be transferred along with the principal claims in several other cases as follows:

No.	Case No.	Date of Judgment	Conclusion
1	[2019] Zui Gao Fa Min Zhong No. 459	June 27, 2019	Mortgages are accessory rights and shall be transferred along with the transfer of principal claims, which is in compliance with laws.
2	[2019] Zui Gao Fa Min Shen No. 1235	April 28, 2019	The transferee of principal claims obtained the existing mortgages on the strength of explicit regulations under the laws rather than a new mortgage contemplated under a new mortgage contract, thus the existing mortgage shall not be void due to an absence of registration for the mortgage transfer.
3	[2018] Zui Gao Fa Min Zhong No. 131	May 30, 2018	Mortgages shall be transferred along with the transfer of principal claims.
4	[2015] Min Shen No.2040	September 28, 2015	The transferee of principal claims obtained the existing mortgages on the strength of explicit regulations under the laws rather than a new mortgage contemplated under a new mortgage

No.	Case No.	Date of Judgment	Conclusion
			contract, thus the existing mortgage shall not be void due to the absence of registrations for the mortgage transfer.
5	[2014] Min Shen No.1725	27 November 2014	The principle that mortgages shall be transferred along with the transfer of principal claims is provided under the *Contract Law*, which also aligns with the *Provisions on Non-Performing Loans* and *Property Law*.

Meanwhile, we became aware that some lower level courts take the view that the registration of the change of mortgages must be completed after the transfer of the principal claims, otherwise the relevant mortgages on real estate cannot be vested in the transferee of the principal claims. For example, the People's Court of Changqing District in Jinan City rendered a civil judgment ((2016) Lu 0113 Min Chu No. 12) on 12 May 2016, stating that the registration of the change of mortgages shall be completed after the transfer of the principal claims, otherwise mortgages will not be transferred to the transferee of the principal claims. Further, in a civil judgment ([2017] Xiang 11 Min Zhong No. 2785) rendered by the Intermediate People's Court of Yongzhou City in Hunan Province on 13 December 2017, it held that after the transfer of the principal claims, if the transfer of the mortgages on buildings has not been registered, the change of mortgages shall not take place and the transferee of the principal claims shall have no priority of repayment with regard to the mortgaged buildings.

According to Article 62 of the Jiu Min Minutes published by the Supreme People's Court on 8 November 2019, mortgages are rights subordinate to the principal contract, and in light of the principle of "subordinating right attaching to the principal right", if the principal claims are transferred, the mortgages securing such claims shall be transferred concurrently, unless otherwise provided for by the law or agreed upon by the parties concerned; if the transferee enforces the mortgages against the mortgagor, and the mortgagor makes a defense that the transferee is not a party to the mortgage contract or that the registration of the change of mortgages has not been completed, the courts shall not uphold such a defense. When answering questions raised by reporters regarding the Jiu Min Minutes, the person in charge of the Second Civil Division of the Supreme People's Court emphasized that a specific provision has been accommodated in the Jiu Min Minutes on whether failure to complete the registration of the change of mortgages may derogate the transfer of the mortgages.

3 The Jiu Min Minutes, *Civil Code* and other relevant judicial interpretations enhanced certainty for the automatic transfer of mortgages on real estate along with the principal claims

According to Article 407 and Article 547 of the *Civil Code* which came into effect on 1 January, 2021, where the principal claims are transferred, the mortgages securing the claims shall be transferred concurrently, unless otherwise provided for by the law or agreed upon by the

parties concerned; when the creditor transfers its claims, the transferee shall acquire the accessory rights related to the claims, except for the accessory rights exclusively belonging to the creditor; the acquisition of accessory rights by the transferee shall not be affected due to an absence of the registrations for the transfer or failure in shifting possession. In addition, Article 39 of the *Interpretation of the Supreme People's Court on the Application of the Security System of the Civil Code of the People's Republic of China* stipulates that where the principal claims are divided among creditors or partially transferred, and each creditor alleges to enforce its respective security interests to the extent of its share in the claims, such allegations shall be sustained by the court pursuant to law, unless otherwise provided for by the law or agreed upon by the parties.

In light of the above, the Jiu Min Minutes, the *Civil Code* and other relevant judicial interpretations have provided a solid basis and effective protection for the automatic transfer of mortgages along with the principal claims, which will significantly dispel the concerns of domestic and overseas investors about the transfer of mortgages on real estate.

4 Conclusion

The *Civil Code*, the *Contract Law*, the *Property Law*, the Jiu Min Minutes and other relevant judicial interpretations, during each applicable period of time, have provided a solid legal basis for the automatic transfer of mortgages on real estate along with the transfer of the principal claims, even though the registration of the transfer of mortgages on real estate is still required under certain departmental rules and regulations, and some lower level courts have taken the view that the registration of the change of mortgages must be completed after the transfer of the principal claims. In the interim, most courts including the Supreme People's Court hold that mortgages on real estate are subordinate to the principal claims and shall be transferred along with the principal claims. Therefore, we tend to believe that once a creditor transfers its principal claims, the relevant mortgages on real estate shall be transferred automatically along with the principal claims, no matter whether the transferee of the principal claims has completed the registration for the mortgage transfer, provided that the relevant creditor and mortgagor have not reached an agreement to restrict the transfer of the mortgage.

We believe that with the implementation of the *Civil Code*, the principle that mortgages shall be transferred along with the principal claims will become more definite and widely applicable, which will further boost the market of non-performing assets.

Catherine Miao	Partner	Tel：86-21 2208 6350	Email：miaoqh@junhe.com
Li Yi	Associate	Tel：86-21 2208 6323	Email：liyi_Yi@junhe.com
Wan Ziqian	Associate	Tel：86-21 2208 6336	Email：wanzq@junhe.com

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of the Jun He Law Offices. For more information, please visit our official website at www.junhe.com or our WeChat public account "君法律评论"/WeChat account "JUNHE_LegalUpdates".

君合专题研究报告 JUNHE

2021 年 1 月 15 日

君合特殊机会投资法律研究：

债权人转让主债权时不动产抵押权是否自动一并转让

——写在《民法典》正式施行之际

引言

担保权利能否随着主债权的转让而自动一并转让一直以来都是不良资产处置的关键点，而其中不动产抵押权能否随着主债权自动一并转让更是诸多境内外投资人关注的重中之重。

在法律法规层面，《合同法》、《物权法》及相关司法解释均为担保权利的自动转让提供了重要依据，但《城市房地产抵押管理办法》[1]和《不动产登记暂行条例实施细则》[2]等却要求专门就抵押权转让办理登记。由于最高人民法院曾于 2001 年 11 月 4 日发布《最高人民法院关于审理涉及金融资产管理公司收购、管理、处置国有银行不良贷款形成的资产的案件适用法律若干问题的规定》（法释[2001]12 号）（以下简称“**《不良贷款规定》**”）[3]，在过往的不良资产处置实践中，得益于前述规定，金融资产管理公司在受让国有银行债权时可一并受让不动产抵押权的原则较为确定，而对于其他类型的不良债权转让，相关不动产抵押权能否随主债权一并转让颇具争议。与此同时，部分层级较低的人民法院认为只有在完成抵押权变更登记的前提下，主债权的受让人才能一并受让不动产抵押物上的抵押权[4]。在此背景下，诸多境内外投资人对收购不良债权时能否一并受让不动产抵押权感到担忧，我们也时常收到投资人就此提出的咨询。

近年来《全国法院民商事审判工作会议纪要》（以下简称“**《九民纪要》**”）、《民法典》及相关司法解释的颁布进一步明确了不动产抵押权随主债权一并转让的规则。在《民法典》正式实施之际，本文旨在通过法律研究、案例梳理及实践分析等方式，与读者分享我们关于不动产抵押权转让的理解与

---

1 《城市房地产抵押管理办法》第三十七条规定：“抵押权可以随债权转让。抵押权转让时，应当签订抵押权转让合同，并办理抵押权变更登记。抵押权转让后，原抵押权人应当告知抵押人。”

2 《不动产登记暂行条例实施细则》第六十九条规定：“因主债权转让导致抵押权转让的，当事人可以持不动产权属证书、不动产登记证明、被担保主债权的转让协议、债权人已经通知债务人的材料等相关材料，申请抵押权的转移登记。”

3 根据最高人民法院审判委员会于 2020 年 12 月 23 日通过的《最高人民法院关于废止部分司法解释及相关规范性文件的决定》（法释[2020]16 号），《不良贷款规定》于 2021 年 1 月 1 日起废止。

4 如济南市长清区人民法院于 2016 年 5 月 12 日作出的《民事判决书》（（2016）鲁 0113 民初 12 号）以及湖南省永州市中级人民法院于 2017 年 12 月 13 日作出的《民事判决书》（（2017）湘 11 民终 2785 号）中均持该观点。

观点[5]。

一、过往交易中关于不动产抵押权转让的争议

在民法的基本理论中，担保物权是从属于主债权的权利，具体表现为担保物权的设立、转移和消灭上的从属性，即担保物权的设立以债权成立为前提，并随债权的转移而转移，因债权的消灭而消灭[6]。在融资交易中不动产抵押权是最为典型和普遍的担保物权，理论上当主债权发生转移时不动产抵押权应当自动一并转移，否则既不利于保护债权，也不利于促进交易，这将与相关基本民事法律的立法本意相违背。

（一） 法律法规的冲突所造成的困惑

在《九民纪要》和《民法典》出台之前，诸多法律和司法解释都规定担保权利将随着主债权的转让而一并转让，变更登记并不是转让担保权利的必要条件。例如，《合同法》第八十一条规定：“债权人转让权利的，受让人取得与债权有关的从权利，但该从权利专属于债权人自身的除外”；《物权法》第一百九十二条规定：“抵押权不得与债权分离而单独转让或者作为其他债权的担保。债权转让的，担保该债权的抵押权一并转让，但法律另有规定或者当事人另有约定的除外”；《最高人民法院关于适用〈中华人民共和国担保法〉若干问题的解释》[7]第七十二条规定：“主债权被分割或者部分转让的，各债权人可以就其享有的债权份额行使抵押权”。

但是，根据原建设部发布的《城市房地产抵押管理办法》第三十七条规定，抵押权转让时，应当签订抵押权转让合同，并办理抵押权变更登记；根据自然资源部发布的《不动产登记暂行条例实施细则》第六十九条规定，因主债权转让导致抵押权转让的，当事人可以持不动产权属证书、不动产登记证明、被担保主债权的转让协议、债权人已经通知债务人的材料等相关材料，申请抵押权的转移登记。前述部门规章先后专门就抵押权转让提出了登记要求，这在一定程度上加剧了投资人对不动产抵押权能否自动一并转让的疑虑。

根据《不良贷款规定》第九条的规定，金融资产管理公司受让有抵押担保的债权后，可以依法取得对债权的抵押权，原抵押权登记继续有效。虽然《不良贷款规定》已经废止，但该规定在过往不良资产处置的实践中曾是金融资产管理公司在受让国有银行债权时一并受让不动产抵押权的有力依据，而对于其他类型的不良债权转让，如银行、信托公司和非金融企业直接向投资人转让不良债权时，相关不动产抵押权能否随主债权自动一并转让颇具争议。

（二） 办理抵押权转移登记的现实困难

由于《城市房地产抵押管理办法》和《不动产登记暂行条例实施细则》专门要求就不动产抵押权的转移办理登记，部分境内外投资人为了寻求最大程度的保障，也曾考虑过在受让债权后按照前述规定办理抵押权的转移登记。

但是，实践操作中，在不良债权转让后办理不动产抵押权的转移登记相当困难，原因之一在于大多数的不动产登记机关都硬性要求抵押人配合办理不动产抵押权的转移登记。然而当债权形成不良后，抵押人几乎不会同意仅为了债权人的利益而配合办理不动产抵押权的转移登记。

为了更直观地展现不动产抵押权转移登记的要求，我们向北京市、上海市、浙江省、江苏省、

---

[5] 本文系基于担保人与债权人未约定担保权利不得转让的前提下，进行相关分析和论述。

[6] 王利民主编：《民法》，中国人民大学出版社，2010 年。

[7] 根据最高人民法院审判委员会于 2020 年 12 月 23 日通过的《最高人民法院关于废止部分司法解释及相关规范性文件的决定》（法释[2020]16 号），《最高人民法院关于适用〈中华人民共和国担保法〉若干问题的解释》于 2021 年 1 月 1 日起废止。

重庆市、广东省等不良资产交易活跃地区的不动产登记中心进行了电话咨询，相关不动产登记中心反馈的登记要求如下：

序号	咨询单位	不动产抵押权转移登记要求
1	北京市海淀区不动产登记中心	需要抵押人、原债权人、债权受让人三方到现场共同办理登记
2	上海市静安区不动产登记中心	
3	浙江省杭州市不动产登记中心	
4	江苏省南京市不动产登记中心	
5	重庆市渝北区不动产登记中心	
6	广东省广州市不动产登记中心	无法直接办理不动产抵押权的转移登记，需要先注销原抵押权登记，再由抵押人和债权受让人办理新的抵押权设立登记
7	广东省深圳市不动产登记中心	由原债权人和债权受让人到现场共同办理登记，但需提交由抵押人签署的确认收到抵押权转移通知的文件材料

由此可见，《城市房地产抵押管理办法》和《不动产登记暂行条例实施细则》在出台时仅考虑在一般情况下发生债权转让后进行的抵押权转移登记，未充分考虑不良债权转让后对于债权受让人的保障。因为一旦债权形成不良，债权人很难再获得债务人（包括抵押人）的友好配合，鲜有抵押人愿意为了债权人的利益配合办理不动产抵押权的转移登记，这就使得债权受让人在不良资产交易中办理抵押权转移登记将遭遇重重困难，难以成功办理登记。

二、司法实践中人民法院的裁判思路

在司法实践中，包括最高人民法院在内的大多数人民法院都认为不动产抵押权属于从权利，应当跟随主债权一并转让；但也有少部分层级较低的人民法院认为只有在完成抵押权变更登记的前提下，不动产抵押权才能发生转让。

最高人民法院于 2019 年 11 月 20 日作出《民事裁定书》（（2019）最高法民申 5925 号），明确表示：债权转让的，相关抵押权一并转让，但法律另有规定或者当事人另有约定的除外；抵押人主张债权转让后，债权受让人未办理抵押登记则不得就抵押物享有优先受偿权的，该主张不成立。在此案之外，最高人民法院还在许多案件中适用了不动产抵押权应当跟随主债权一并转让的裁判思路：

序号	案件	案号	裁判时间	裁判理由
1	山西欣如置业有限公司与山西阳曲农村商业银行股份有限公司、山西昕尼科工贸有限公司、彭占龙、樊旭英金融借款合同纠纷[8]	（2019）最高法民终 459 号	2019 年 6 月 27 日	欣如公司与中江信托公司签订了两份《抵押合同》及《抵押合同之补充协议》，并在太原市房产产权登记中心办理了抵押权登记，2017 年 12 月 4 日的《抵押合同之补充协议》明确约定，中江信托公司有权将主合同项下全部债权及从权利转让给第三方，而无需经过欣如公司同意，中江信托公司转让主合同项下贷款债权及担保权益，欣如公司仍应承担合同（《抵押合同》及《抵押合同之补充协议》）项下的所有义务。《物权法》第一百九十二条规定，“抵

[8] 本案引述的说理部分由原一审法院作出，而最高人民法院在二审裁判中予以支持。

序号	案件	案号	裁判时间	裁判理由
				押权不得与债权分离而单独转让或者作为其他债权的担保。债权转让的，担保该债权的抵押权一并转让，但法律另有规定或者当事人另有约定的除外”，抵押权作为从权利随债权转让而转让符合法律规定。阳曲农商行作为债权受让人取得的抵押权系基于法律规定，并非基于新的抵押合同而重新设定的抵押权。因此，阳曲农商行对欣如公司已办理抵押登记的抵押物享有优先受偿权。
2	洋浦建丰物业发展有限公司与天津市裕丰隆资产管理有限公司、深圳市国融房地产开发有限公司、中国长城资产管理股份有限公司广东省分公司、长城融资担保有限公司债权债务合同纠纷	（2019）最高法民申 1235 号	2019 年 4 月 28 日	《合同法》第八十一条规定：“债权人转让权利的，受让人取得与债权有关的从权利，但该从权利专属于债权人自身的除外。”由此可知，我国法律采取从权利随主债权转移而自动转移的原则，专属于债权人自身的从权利除外。《物权法》第一百九十二条规定：“抵押权不得与债权分离而单独转让或者作为其他债权的担保。债权转让的，担保该债权的抵押权一并转让，但法律另有规定或者当事人另有约定的除外”。由此可见，债权受让人取得的抵押权系基于法律的明确规定，并非基于新的抵押合同重新设定抵押权，故不因受让人未及时办理抵押权变更登记手续而消灭。因此，即使债权转让时未通知洋浦公司，抵押权仍应认定继续有效。
3	河北裕泰实业集团有限公司与吉林省信用担保投资集团有限公司借款合同纠纷、抵押合同纠纷[9]	（2018）最高法民终 131 号	2018 年 5 月 30 日	《合同法》第八十一条规定：“债权人转让权利的，受让人取得与债权有关的从权利，但该从权利专属于债权人自身的除外”。《物权法》第一百九十二条规定：“抵押权不得与债权分离而单独转让或者作为其他债权的担保。债权转让的，担保该债权的抵押权一并转让，但法律另有规定或者当事人另有约定的除外”。吉林信托公司的债权的已设定抵押权，故吉林信用担保公司作为受让人，将案涉债权及抵押权一并取得。
4	湖南绿兴源糖业有限公司、丁兴耀与怀化市鹤城区城市建设投资有限公司、庄彪借款合同纠纷	（2015）民申字第 2040 号	2015 年 9 月 28 日	《物权法》第一百九十二条规定：“抵押权不得与债权分离而单独转让或者作为其他债权的担保。债权转让的，担保该债权的抵押权一并转让，但法律另有规定或者当事人另有约定的除外”。本条系关于抵押权处分从属性的规定，抵押权作为从权利应随债权转让而转让。债权受让人取得的抵押权系基于法律的明确规定，并非基于新的抵押合同重新设定抵押权，故不因受让人未及时办理抵押权变更登记手续而消灭。本案中城建投公司受让农发行怀化分行对绿兴源公司享有的债权，依据法律规定有权受让与案涉债权相关的抵押权，一、二审法院据此判定抵押权继续有效，并无不当。
5	浙江金华科技园开发有限公司与	（2014）民申字第 1725 号	2014 年 11 月 27 日	《合同法》第八十一条规定：“债权人转让权利的，受让人取得与债权有关的从权利，但该从权利专属于债权人自

[9] 本案引述的说理部分由原一审法院作出，而最高人民法院在二审裁判中予以支持。

序号	案件	案号	裁判时间	裁判理由
	浙江省发展资产经营有限公司及金华市机电设备有限公司、李伟献、胡晓岚债权转让合同纠纷			身的除外” 。从上述规定看，我国法律采取从权利随主债权转移而自动转移的原则，专属于债权人自身的从权利除外。也即是说，担保权利的转移并不以通知担保人为生效条件。本案两次债权转让都已通知到债务人机电设备公司，受让人资产经营公司据此对机电设备公司享有主债权，并相应取得抵押合同项下对抵押人科技园公司的担保权利。 本案所涉的不动产抵押办理了抵押登记，抵押权已依法成立，根据《规定》第九条“金融资产管理公司受让有抵押担保的债权后，可以依法取得对债权的抵押权，原抵押权登记继续有效”的规定，资产经营公司受让有抵押担保的债权后，即依法取得抵押权。《规定》对抵押权转移的规定，与《物权法》第一百九十二条“债权转让的，担保该债权的抵押权一并转让，但法律另有规定或者当事人另有约定的除外”的规定是一致的。二审判决适用法律并无不当，科技园公司关于资产经营公司因未办理抵押变更登记而不能取得抵押权的申请再审理由，本院不予支持。

与此同时，我们注意到，部分层级较低的人民法院认为主债权转让后必须办理抵押权的变更登记，否则主债权的受让人无法取得相关不动产抵押权。例如，济南市长清区人民法院于 2016 年 5 月 12 日作出《民事判决书》（（2016）鲁 0113 民初 12 号），认为不动产抵押权随主债权转让后仍要办理抵押权变更登记，否则抵押权转让未生效，债权人受让人对抵押物暂不享有抵押权。再如，湖南省永州市中级人民法院于 2017 年 12 月 13 日作出《民事判决书》（（2017）湘 11 民终 2785 号），认为债权转让后，房产抵押权未办理相应的抵押权变更登记的，应当认定抵押权变更未发生法律效力，债权受让人对抵押房产没有优先受偿权。

三、《九民纪要》、《民法典》和相关司法解释为不动产抵押权的一并转让增强确定性

最高人民法院于 2019 年 11 月 8 日发布了《九民纪要》，《九民纪要》第 62 条规定，抵押权是从属于主合同的从权利，根据“从随主”规则，债权转让的，除法律另有规定或者当事人另有约定外，担保该债权的抵押权一并转让；受让人向抵押人主张行使抵押权，抵押人以受让人不是抵押合同的当事人、未办理变更登记等为由提出抗辩的，人民法院不予支持。最高人民法院民二庭负责人在就《九民纪要》答复记者提问时，也强调《九民纪要》对抵押权随主债权转让时未办理变更登记是否影响受让人享有抵押权作出了规定。

在 2021 年 1 月 1 日开始施行的《民法典》中，第四百零七条和第五百四十七条规定，债权转让的，担保该债权的抵押权一并转让，但是法律另有规定或者当事人另有约定的除外；债权人转让债权的，受让人取得与债权有关的从权利，但是该从权利专属于债权人自身的除外，受让人取得从权利不因该从权利未办理转移登记手续或者未转移占有而受到影响。此外，《最高人民法院关于适用〈中华人民共和国民法典〉有关担保制度的解释》第三十九条规定，主债权被分割或者部分转让，各债权人主张

就其享有的债权份额行使担保物权的，人民法院应予支持，但是法律另有规定或者当事人另有约定的除外。

由此可见，《九民纪要》、《民法典》和相关司法解释共同为抵押权随主债权自动一并转让提供了坚实的依据和有力的保障，将有利于显著减少境内外投资人对不动产抵押权转让的担忧。

四、结语

尽管少数部门规章要求对不动产抵押权转让办理登记，且部分层级较低的人民法院认为主债权转让后必须办理抵押权的变更登记，但《民法典》、《合同法》、《物权法》、《九民纪要》及相关司法解释都在各自适用的阶段为不动产抵押权随主债权转让而自动一并转让提供了充分依据；同时，在司法实践中包括最高人民法院在内的多数人民法院均认为不动产抵押权属于从权利，应当跟随主债权一并转让。因此，我们倾向于认为在相关当事方未约定不动产抵押权不得转让的前提下，只要债权人转让主债权，不动产抵押权应当自动一并转让，无论债权受让人是否就相关抵押权的转让办理转移登记。

我们相信随着《民法典》的正式施行，司法实践中不动产抵押权应随主债权自动一并转让的规则将具有更强的确定性和更广的适用性，这将更加积极地推动不良资产交易的蓬勃发展。

缪晴辉　合伙人　电话：86-21 2208 6350　邮箱地址：miaoqh@junhe.com
李　毅　律　师　电话：86-21 2208 6323　邮箱地址：liyi_Yi@junhe.com
万子千　律　师　电话：86-21 2208 6336　邮箱地址：wanzq@junhe.com

本文仅为分享信息之目的提供。本文的任何内容均不构成君合律师事务所的任何法律意见或建议。如您想获得更多讯息，敬请关注君合官方网站“www.junhe.com”或君合微信公众号“君合法律评论”/微信号“JUNHE_LegalUpdates”。