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са привременим седиштем у Косовској Митровици

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СА ПРИВРЕМЕНИМ СЕДИШТЕМ У КОСОВСКОЈ МИТРОВИЦИ
ПРАВНИ ФАКУЛТЕТ



ЗБОРНИК РАДОВА
ПРАВО У ФУНКЦИЈИ РАЗВОЈА ДРУШТВА

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THE ROLE OF LAW IN SOCIAL DEVELOPMENT

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THE ROLE OF MORTGAGE IN THE REAL ESTATE TRADE

Abstract: The paper analyses mortgage as a right in rem and a real security used for securing of monetary claims or claims that can be expressed in monetary value. Subject to closer analysis is the contractual mortgage that, as research has shown, is the most commonly used real security by creditors that provide financial support in Macedonian real estate market. The analysis of contractual mortgage includes the legal requirements for acquisition of mortgage as prescribed by the Law for Contractual Pledge, types of immovable property that can be mortgaged in Macedonian legal system and the effects attributed to the termination of contractual mortgage when the legal conditions for termination have been fulfilled. Main objective of this paper is to demonstrate the possibilities that the legislation provides for mortgage creditors and mortgage debtor in securing of claims by contractual mortgage in the area where such a security is most commonly used – the real estate market. The paper examines the effectiveness in exercise of the rights of mortgage creditors and mortgage debtors and the challenges that they face in the process, the level of legal security that the legislation provides and what it lacks in the existing regulation. This paper also focuses on identifying the main reasons for disputes between mortgage creditor and mortgage debtor with respect to mortgage rights and offers possible solution on how such disputes can be overcome.

Key words: *real securities, mortgages, real property, immovable property, rights in rem, real estate market, real estate trade.*

Анстракт: У раду се анализира хипотека као стварно право и реално обезбеђење новчаних потраживања или потраживања која се могу изразити у новчаној вредности. Предмет ближе анализе је уговорна хипотека која, према нешем истраживању, је најчешће коришћено реално обезбеђење од стране повериоца који пружају финансијску подршку на македонском тржишту некретнина. Анализа уговорне хипотеке обухвата законске услове за стицање хипотеке прописане Законом о уговорној

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залози, врсте непокретности које се могу заложити у македонском правном систему и ефекте који се приписују престанак уговорне хипотеке када су законски услови за то испуњени. Главни циљ овог рада је да укаже могућности које законодавство нуди хипотекарне повериоце и хипотекарне дужнике у обезбеђивању потраживања путем уговорне хипотеке у области у којој се такво обезбеђење најчешће користи - тржиште некретнина. У раду се разматра ефективност у остваривању права хипотекарних повериоца и хипотекарних дужника и изазова са којима се суочавају, степена правне сигурности које законодавство обезбеђује и недостаци постојећој регулативи. Овај рад се такође фокусира на идентификовање главних разлога за спорове између хипотекарног повериоца и хипотекарног дужника у погледу права из хипотеке и нуди неке од могућих решења како би се такви спорови могли превазићи.

Кључне речи: *реално обезбеђење, хипотеке, некретнине, непокретна имовина, стварна права, тржиште некретнина, трговина некретностима.*

Real securities have become integral part of the real estate market. The real estate trade, almost always, is accompanied with the use of some form of security, most notably real securities such as mortgages and fiduciary transfer of ownership. Creditors who provide the financial support in the real estate trade prefer using real securities for their claims because of their many advantages before personal securities such as guaranties, penalties and etc. Real securities provide real guarantee for claims of creditor that consists of the value of the property encumbered with the security (movable or immovable things). By acquiring real securities creditors gain the right to demand payment of the debt form the value of the encumbered property before all other creditors who have claims against particular estate. As for the creditors preferences in use of real securities the practice has shown that they prefer mortgages over fiduciary transfer of ownership. The reasons for such a preference can be both subjective and objective. We can only deliberate over the objective reasons why creditors prefer securing their claims with mortgages and those are: more adequate and precise regulation of mortgage, grater balance between the right of the mortgage creditor and the mortgage debtor, the possibility for the mortgage debtor to fully enjoy the economic benefits of the mortgage property without effecting the rights of the mortgage creditor, a security for the mortgage creditor that doesn't involve any duties with respect to the mortgaged property.

Banks who are major creditor in the Macedonian real estate market have tailored their credit lines for purchase (or construction) of real estate using, almost exclusively, mortgages as real securities for their claims

from loan contracts. Sometimes mortgages are combined with some form of personal securities such as guaranties or bull of exchange. The value of the mortgaged property and the credited amount ratio varies from bank to bank, however by analyzing the different credit lines available on the market, we can derive that the ratio runs somewhere between 1,25:1 to 2,5:1, with one bank going up to 3:1 ratio.

1. MORTGAGE AS A RIGHT IN REM AND A REAL SECURITY

The Macedonian Law of Ownership and Other Real Rights (Закон за сопственост и други стварни права)¹ regulates mortgage as a type of pledge on immovable property. According to the legal definition pledge (pawn and mortgage) is „a right in rem on a thing belonging to another that secures a claim of the pledge creditor by pledging of a thing or a right in favor of the pledge creditor who is authorized to dispose with the pledge upon the due date for payment in a manner that will ensure payment from the value of the pledge by sale, prior to the creditors that have no pledge and also prior to the pledge creditors who have acquired the pledge at a later date, regardless of the change in ownership over the pledge property“². As we can see from the legal definition mortgage as a right in rem is intended to be used for securing of claims, although the Law of Ownership and Other Real Rights doesn't explicitly defines it as a form of real security. Mortgage may be used for securing of all types of monetary claims, and also claims that can be expressed in monetary value, including future claims and claims under terms and conditions³.

As a general law, the Law of Ownership and Other Real Rights recognizes three types of mortgage, depending on the bases on which it has been acquired: contractual mortgage (acquired on the bases of a contract), judicial mortgage (acquired on the bases of a court decision) and legal mortgage (acquired by law)⁴. However, this Law doesn't precisely regulate any type of mortgages since it contains only ten provisions in its entire text relating to the right of pledge⁵. Contractual mortgage is regulated by the Law for Contractual Pledge (Закон за договорен залог)⁶, and the judicial mortgage is regulated by the Law for Securing of Claims (Закон за обезбедување на

¹ “Службен весник на Република Македонија”, бр. 18/01, 92/08, 139/09 и 35/10.

² Art. 226, par. 1, Law of Ownership and Other Real Rights.

³ Art. 230, par. 2, Law of Ownership and Other Real Rights.

⁴ Art. 226, Law of Ownership and Other Real Rights.

⁵ Art. 225-235, Law of Ownership and Other Real Rights.

⁶ “Службен весник на Република Македонија”, бр. 5/03, 4/05, 87/07, 51/11, 74/12, 115/14, 98/15, 215/15 и 61/16.

побарувањата⁷. Provisions pertaining to legal mortgage are found in the Law of Ownership and Other Real Rights regarding claims deriving from division of co-ownership, also in the Law for Internal Sailing (Закон за внатрешна пловидба)⁸, the Law for Protection of Cultural Heritage (Закон за заштита на културното наследство)⁹, the Law for Obligations and Property Relations in Air Traffic (Закон за обигационите и стварноправните односи во воздушниот сообраќај)¹⁰ and other laws.

Contractual mortgage is the type of mortgage used as a real security on the real estate market. The other types of mortgages (judicial mortgage and legal mortgage) find their use in cases of compulsory securing of claims or in securing of claims that arise from legal relations between parties regulated before the courts or other public authorities.

1.1. CONTRACTUAL MORTGAGE

As it was previously noted, the contractual mortgage is the type of mortgage that is commonly used as a security for credit lines intended for purchase (or construction) of real estate on the real estate market. Since contract mortgage has taken the role of being an indispensable instrument in the real estate trade special regulation has been implemented in order to provide higher level of legal security for creditors and debtors who participate in that trade, and also to provide efficient foreclosure of mortgages when debtors fail to ensure the payment of the debt.

The Law for Contractual Pledge regulates the two types of contractual pledge - pawn and mortgage. Before the implementation of this Law, the contractual mortgage and pawn were subject to separate regulation. Contractual mortgage was regulated with the Law for Contractual Mortgage (Закон за договорна хипотека)¹¹, and contractual pawn was regulated with the Law on Pledge of Movables and Rights (Закон за залог на подвижни предмети и права)¹². Considering the legal nature of contractual pawn and contractual mortgage it was ultimately decided that it would be more effective if both types pledge are regulated in a same law - The Law for Contractual Pledge from 2003. Although, from the general overlook of the law we can conclude that its

provisions refer to both types of contractual pledge, a closer look shows that the provisions of the Law can be classified into three groups of regulations. The first consists of provisions that are generally applicable to both types of contractual pledge, the second consists of provisions applicable only for contractual pawn, and the third consists of provisions that can only be applied to contractual mortgage. This paper will only examine provisions of the Law applicable on contractual mortgage.

1.1.1. LEGAL REQUIREMENTS FOR ACQUIRING CONTRACTUAL MORTGAGE

According to the provisions of the Law for Contractual Pledge, the contractual mortgage is acquired solely as a non-possessory pledge¹³, enabling the mortgage debtor to fully use the mortgaged property without any interference by the mortgage creditor. There are two legal requirements for acquiring contractual mortgage: 1. the mortgage contract (*iustus titulus*) and 2. registration of the mortgage in public records - the Real Estate Cadastre (*modus acquirendi*). The right of contractual mortgage is considered as fully acquired upon completion of the second legal requirement - the registration of the mortgage.

1. Concluding the mortgage contract is the first legal requirement for acquiring contractual mortgage. It is a strictly formal contract that must be concluded in written form and notarized by notary public¹⁴. In addition, if the contract is valued to be over 10,000 Euros in worth, than it must be drafted by a lawyer¹⁵. The mortgage contract that is not concluded in a form and manner prescribed by law is considered to be null and void¹⁶. The strict formality of the mortgage contract is due to its effect with respect to the rights of the mortgage creditor arising from the contract, such as the right to demand sale of the mortgaged property when the debtor defaults payment.

For the mortgage contract to be fully valid, it must contain the obligatory content prescribed by the Law for Contractual Pledge¹⁷. The mortgage contract must contain personal information of the contract parties - the mortgage creditor and the mortgage debtor (name, address, personal identification number, etc.). If the mortgage debtor and the obligation debtor are not the same person, then the mortgage contract must contain personal

⁷ "Службен весник на Република Македонија", бр. 87/07 и 31/16.

⁸ "Службен весник на Република Македонија", бр. 55/07, 26/09, 22/10, 23/11, 53/11, 155/12, 15/13, 137/13, 163/13, 42/14, 166/14, 146/15, 193/15, 31/16 и 64/18.

⁹ "Службен весник на Република Македонија", бр. 20/04, 71/04, 115/07, 18/11, 148/11, 23/13, 137/13, 164/13, 38/14, 44/14, 199/14, 104/15, 154/15, 192/15, 39/16 и 11/181.

¹⁰ "Службен весник на Република Македонија", бр. 85/08, 148/11, 10/15 и 150/15.

¹¹ "Службен весник на Република Македонија", бр. 59/00 и 86/00.

¹² "Службен весник на Република Македонија", бр. 21/98, 48/99 и 86/2000.

¹³ Art. 3, Law for Contractual Pledge.

¹⁴ Art. 21, par. 1, Law for Contractual Pledge.

¹⁵ Art. 55, par. 2, Law for Notary Public (Закон за нотаријатор, "Службен весник на Република Македонија", бр. 72/16 и 142/16).

¹⁶ Art. 21, par. 2, Law for Contractual Pledge.

¹⁷ Art. 23, Law for Contractual Pledge.

information about the obligation debtor as well. Mortgaged property must be precisely described in the mortgage contract so it could be easily identified (type of land/building, number of property sheet, number of parcel, surface per square meter). The description of the mortgaged property also includes information about its value¹⁸. Information about the secured claim is also mandatory in the content of the mortgage contract and it includes data about the source (legal base) of the claim, its amount and its maturity date. Mortgage contract must include two clauses: *clausula intabulandi* and the enforcement clause. The first – *clausula intabulandi* is relevant because it enables registration of the mortgage in the Real Estate Cadastre¹⁹. The second – enforcement clause is relevant because it enables the mortgage creditor to initiate foreclosure proceedings directly before authorized enforcers without court approval. Besides the mandatory content of the mortgage contract, the contract may also include other clauses and limitations for the contract parties. In that regard, the mortgage contract may contain protection clauses such as the right of the mortgage creditor to undertake protection measures in order to maintain or increase the value of the mortgaged property in case of default on part of the debtor²⁰. The mortgage contract may contain possession clause that enables the mortgage creditor to take possession of the mortgaged property in order to ensure protection, preservation and sale of the mortgaged property in cases of default on part of the debtor. There can also be a clause determining the manner of sale of the mortgaged property (direct sale, public bidding, real estate agency and etc.). However in practice this clause can't be fully effected due to lack of adjoining legislation, so from all the possibilities recognized by the Law for Contractual Pledge, only two are really available – sale by notary public or sale by enforcement officer. As for the limitations for the contract parties, we need to note that the Law for Contractual Pledge explicitly names some general limitations such as the limitation of the right to transfer the

¹⁸ Since 2010, when the Law for Appraisal was enforced, it is mandatory for the value of the mortgaged property to be determined by authorized appraisers (Art. 6, Закон за процена, "Службен весник на Република Македонија", бр. 115/10, 158/11, 185/11, 64/12, 188/14, 104/15, 153/15, 192/15 и 30/16). The goal of the appraisal is to determine the market value of the appraised property by an impartial third party (the appraiser) using widely accepted standards and methodology. In Macedonian legal system the accepted appraisal standard are the European Valuation Standard (TEGo VA) and the International Valuation Standard (IVSC).

¹⁹ See: Z.P. Rašović, *Shvarno pravo*, Podgorica, 2008, 554-555. О. Станковић М. Опрлић, *Смеарно право*, Београд, 2001, 348.

²⁰ With respect to the protection clause, the Law for Contractual Pledge clearly states that when the mortgage creditor chooses to invest in the maintenance or improvement of the mortgaged property, that investment doesn't grant any ownership rights over the mortgaged property (art. 23, par 1).

pledge, limitation of the right to use the pledged property and the limitation of the right to transfer ownership on the pledged property. The limitation of the right to transfer the pledge is a limitation that affects the pledge creditor as a contract party. When imposed in the mortgage contract, this limitation usually means that the mortgage creditor isn't allowed to transfer the mortgage without the consent of the mortgage debtor, rather than an absolute prohibition of transfer. Due to the accessory nature of the mortgage, the mortgage creditor isn't able to transfer the mortgage without transferring the secured claim as well, so the contractual limitation for transfer of the mortgage in effect boils down to limitation of the transfer of the secured claim. The limitation of use of the mortgaged property, when it refers to all forms of use, we consider it to be unjust limitation for the mortgage debtor. That type of limitation will prevent the mortgage debtor to fully enjoy the economical benefits from the use of the mortgaged property, which in addition could make the payment of the debt more difficult. However, the limitation of use could be justified if it refers only to types of use that could decrease the value of the mortgaged property such as demolitions, decrease in fertility of agricultural land, repurposing and etc. The limitation of transfer of ownership on mortgaged property is seemingly unnecessary limitation since the transfer of ownership doesn't affect the right of the mortgaged creditor to demand foreclosure against that property. However, in practice mortgage creditors have vested interest to ensure full payment of the secured claims without having to initiate foreclosure proceedings. By limiting the right of the mortgage debtor to transfer the mortgaged property, mortgage creditors put themselves in a position to negotiate the payment of the secured claim at the moment of sale. In comparative law this is known as the due-on-sale clause or acceleration clause and it enables the mortgage creditor to demand payment of the debt upon transfer of the ownership on the mortgaged property. Although Macedonian law doesn't recognize the clause as such, it is common practice between mortgage creditors and mortgage debtors to agree on full payment of the secured claim from the sale price of the mortgaged property when the mortgage debtor decides to sale it to a third party. Regarding the possibility for the mortgage creditor to limit the right of the mortgage debtor to transfer ownership on the mortgaged property we would like to note that such limitation should be allowed only in case of sale on to third parties, and not for other forms of transfer of ownership such as inheritance or gift contracts.

Regarding the *lex commissoria* clause, we note that the Law for Contract Pledge does contain provision allowing the mortgage creditor to acquire ownership over the mortgaged property instead of payment of the secured claim, but that doesn't signify that the mortgage contract could contain

such clause²¹. The Law clearly states that *lex commissoria* may be exercised under strict condition determined by law during the foreclosure proceedings if the sale by public bidding has been unsuccessful²².

2. Registering the mortgage in the Real Estate Cadastre is the second legal requirement for acquiring contractual mortgage. All types of mortgages are registered in the Real Estate Cadastre as right in rem. The information about the existing mortgages on the real estate is found in G – section of the property sheet²³. If the mortgaged property is an infrastructural object, then the mortgage is registered in the Cadastre of Infrastructural Objects which is as a part of the Real Estate Cadastre²⁴. The information about the mortgage is found in section 4 of the property sheet for infrastructural objects. For buildings under construction, the mortgage is registered in the pre-registration sheet²⁵, and for infrastructural objects under construction the mortgage is registered in the pre-registration sheet for infrastructural object²⁶.

Regarding the registration of mortgages it is important to note that this registration is not optional. According to the Law for Real Estate Cadastre (Закон за катастар на недвижности) „the registration of ownership and other real rights in the real estate cadastre is mandatory...“²⁷. In addition, the registration is required for full acquisition of the right (constitutive nature of the registration)²⁸. In practice, the application for registration of the mortgage is

²¹ Contemporary law prohibits the “*lex commissoria*” clause in mortgage contract in order to protect the rights of the mortgage debtor and to prevent unjust enrichment on part of the mortgage creditor since the value of mortgaged object is always higher than the value of the secured claim. However, scholars consider that after the initiation of the foreclosure proceedings there is no more need for protection of the mortgage debtor, so therefore *lex commissoria* may be permitted. See: M. Lazić, *Prava Realnog obozbeđenja*, Niš 2009, 117-115; Z. P. Rašović, *Komentar zakona o hipoteci*, Pravni fakultet u Podgorici, Podgorica, 2007, 190-192).

²² Art. 64j, Law for Contractual Pledge.

²³ The property sheet is a public instrument that is used as proof of ownership over immovables. It contains all relevant information including information about rights in rem, and other rights, bans and limitations on immovables - Art. 156 (Закон за катастар на недвижности, “Службен весник на Република Македонија”, бр. 55/13, 41/2014, 115/14, 116/15, 153/15, 192/15, 61/16 и 172/16).

²⁴ Art. 177, Law for Real Estate Cadastre.

²⁵ Art. 158, Law for Real Estate Cadastre.

²⁶ Art. 158-a, Law for Real Estate Cadastre.

²⁷ Art. 142, par 1, Law for Real Estate Cadastre.

²⁸ Art. 143, Law for Real Estate Cadastre. For more on the constitutive nature of registration in The Real Estate Cadastre see: P. Живковска, Т. Пирјеска, С. Димова, Н. Петрушевска, *Коментар на Законот за катастар на недвижности*, Еуропа 92, Скопје, 2013, 243-244.

submitted by the notary public who has notarized the mortgage contract. The submission is done in the name of the interested parties who also bear the expenses related to the registration of the mortgage. The base for such practice is found in the provisions of the Law for Real Estate Cadastre where a duty is imposed for the notary public to deliver to the Agency for Real Estate Cadastre all legal documents from which rights subject to registration in the Real Estate Cadastre originate²⁹. When these provisions came into force, their implementation was met with resistance by the notary public offices and other public authorities claiming that the provisions create unnecessary imposition on their work. However, the need for legal security of mortgage creditors with regard to acquiring mortgages and maintaining the priority afforded at the moment of registration prevailed over any other argument. Due to the fact that notary public offices are those who submit the applications for registration of the mortgage in the Real Estate Cadastre any delay of the registration is avoided. Also, the system in place makes it impossible for two separate notary public offices to file for mortgage registration on the same real estate at the same time so that the priority afforded by the moment of registration is not put into question.

1.1.2. PROPERTY THAT CAN BE MORTGAGED

Object of mortgage is immovable property. There are two basic conditions that must be fulfilled in order for immovable property to be eligible for mortgaging³⁰. The first condition is that immovable property must be tradable. Immovable property that can't be traded isn't eligible for mortgaging because that is contrary to the nature of the mortgage. The essential function of the mortgage as a real security is to provide the mortgage creditor with the opportunity to collect payment on his claim from the value of the mortgaged property if the obligation debtor defaults in payment. If the immovable property is untradeable, than it has no market value so it can't be used for payment of the secured claim. The second condition is that the mortgaged property must be owned by the mortgage debtor. This condition is derived from the fact that only the owner is authorized to dispose with his or her property which includes (among other things) mortgaging it³¹. Exception is made in case of mortgaging property that the mortgage debtor doesn't own but has mortgage rights over³².

Immovable property that can be mortgaged includes: land, buildings and other structures permanently fixed on land, infrastructure and things treated

²⁹ Art. 141-v, par. 5, Law for Real Estate Cadastre.

³⁰ Art. 10, par. 1, Law for Contractual Pledge.

³¹ See: Art. 8, Law of Ownership and Other Real Rights.

³² Art. 10, par. 2, Law for Contractual Pledge.

as immovable property (boats and aircrafts)^{33,34}. Mortgage may encumber the entire immovable thing, part of it, or several immovable things together. Mortgage may also encumber the so called "future immovable property" such as buildings and infrastructural objects under construction³⁵.

The mortgage over immovable property, in accordance to the elasticity principle, encumbers all component parts that are permanently attached to it (fixtures). Fixtures (or attachments) are component parts of the land that are by law considered as part of that real estate and can't be owned independently – the superficies solo credit principle³⁶. For example if a parcel of land is mortgaged, then the mortgage encumbers not only the land, but also all buildings and other structures erected on that land with a building permit. The mortgage on the land also encumbers other fixtures such as trees and plants. The mortgage over buildings encumbers all its future improvements such as reconstruction, adaptation, additional construction work and etc. However, the theoretical elasticity of the mortgage should have some limitation. In that sense the component parts of the immovable property that aren't fixtures and are eligible to be owned independently should not be encumbered with the mortgage unless the contract parties have agreed differently. For example, the interior decoration of the mortgaged building such as furniture, paintings and other decorations are component part of the building, but are not fixtures, and since they can be removed and owned independently they should not be encumbered by the mortgage over the building. The same can be said about the temporary structures on the construction grounds. According to the Law for Construction (Закон за градење), temporary structures are not intended to permanently remain on the construction ground as its fixtures³⁷. Therefore, such structures are treated as movables that could be owned independently of the land they are placed on.

If the mortgaged property gives fruits and other benefits, according to the provisions in article 7, paragraph 2 of the Law for Contractual Pledge they

³³ The Italian Civil Code among things treated as immovable property, besides boats and aircrafts, also includes motor vehicles - art. 2810 (Codice Civile Italiano, Regio Decreto 16 marzo 1942, n. 262).

³⁴ Art. 3, Law for Contractual Pledge.

³⁵ Art. 7, par. 1, Law for Contractual Pledge.

³⁶ See: Р. Живковска, *Степно право*, Европа 92, Скопје, 2005, 159-160.

³⁷ Art. 2, par. 1, Закон за градење, "Службен весник на Република Македонија", бр. 130/09, 124/10, 18/11, 36/11, 54/11, 13/12, 144/12, 25/13, 79/13, 137/13, 163/13, 27/14, 28/14, 42/14, 115/14, 149/14, 187/14, 44/15, 129/15, 217/15, 226/15, 30/16, 31/16, 39/16, 71/16 и 132/16. In addition, the Law for Construction Ground (Закон за градежно земјиште) clearly states that temporary structures aren't part of the construction ground - art. 10, par. 2 (Закон за градежно земјиште, "Службен весник на Република Македонија", бр. 15/15, 98/15, 193/15, 226/15, 31/16, 142/16 и 190/16).

are also encumbered by the mortgage unless the contract parties have agreed differently. This provision on its own is inconsistent with the general concept of the Law regarding contractual mortgage which is to provide the mortgage debtor with the opportunity to fully enjoy the economical benefits of the mortgaged property, including the collection of fruits and other benefits, without interferences on part of the mortgage creditor. However, the provisions of article 27, paragraph 2, found in the section of the Law where rights and duties of the mortgage creditor and the mortgage debtor are regulated, clearly state that the mortgage debtor has the right to keep all fruits arriving from the mortgaged property, unless the contract parties have agreed differently³⁸. Obviously these two provisions are contradictory to one another. The dilemma is solved by provisions found in article 27, paragraph 3 where it is clarified that mortgage encumbers only fruits and other benefits from the mortgaged property found at the moment of initiation of foreclosure proceedings unless the contract parties have agreed differently³⁹.

When a building (or other structure) is erected under the right of long term lease (building right) the superficies solo credit principle doesn't apply, meaning that the building is not legally part of the construction ground as its fixture. In such cases the erected building is considered to be a fixture on the right of long term lease, and as such is transferred or encumbered by mortgage along with the right of long term lease⁴⁰. However, once the right of long term lease is terminated, the building becomes part of the construction ground it has been erected on, and as such it becomes ownership of the land owner⁴¹. When that happens, according to the provisions of the Law for Construction Ground (Закон за градежно земјиште), the existing rights in rem over the building transfer on to the construction ground as well, keeping their order of priority⁴². These provisions refer to all right in rem including mortgages encumbering the building. However, the law doesn't state if the same applies to mortgages that have encumbered the construction ground prior to the termination of the right of long term lease. Such mortgages, by principle of elasticity, should encumber all fixtures found on the construction ground, and that includes the building

³⁸ Art. 27, par. 2, Law for Contractual Pledge.

³⁹ In comparative legislation fruits are considered as movable property that may be independently owned and pledged. Such legislation is found in the Croatian Law of Ownership and other Real Rights - art. 298, par. 5 and 6 (Закон о власништву и другим stvarnim pravima, "Narodne novine" br. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 143/12, 152/14), and in Slovenian Property Code - art. 159 (Stvarnopravni zakonik, "Uradni list Republike Slovenije" št. 87/02 in 91/13).

⁴⁰ Art. 25, par. 3, Law for Construction Ground.

⁴¹ Art. 36, par. 1, Law for Construction Ground.

⁴² Art. 37, par. 2, Law for Construction Ground.

once the right of long term lease is terminated. The problem in this situation is determining the order of priority between the mortgages that have primarily encumbered the building and consequently the construction ground once the right of long term lease has been terminated, and the mortgages that have primarily encumbered the construction ground and consequently the building. In these types of situations it should be considered that both mortgages keep the same order of priority, and in case of foreclosure proceedings claims secured by mortgages that share the same order of priority will be paid out proportionally.

Infrastructures according to the Law of Ownership and Other Real Rights are considered as fixtures on the land or buildings they have been placed upon.⁴³ However, the provisions of the Law for Real Estate Cadastre from 2013 have change the legal regime of infrastructures declaring them as infrastructural objects subject to individual rights independently of the real estate they are found on. Infrastructural objects are: traffic infrastructure (land traffic, water traffic or air traffic), underground and aboveground installations and electronic communication networks and appliances with all their adjoining installations.⁴⁴ As independent immovable property, infrastructural object may be mortgaged, in which case the mortgage will encumber only the infrastructural object and not the real estate where the infrastructure is situated.

Regarding mortgages on boats and aircrafts, the Law for Contractual Pledge stipulates that its provisions are applicable unless it is otherwise prescribed by another law.⁴⁵ The legal regime of boats and aircrafts is subject to regulation by special laws. For boats the applicable law is the Law for Internal Sailing where special provisions about contractual pledge are found.⁴⁶ What is surprising about this Law is that it treats boats and boats under construction as movable things, something that is contrary to the concept adopted by the Law of Ownership and Other Real Rights and the Law for Contractual Pledge since both of these laws consider boats to be immovable things. Concerning aircrafts, the applicable law is the Law for Obligations and Property Relations in Air Traffic where contractual mortgage on aircrafts and aircrafts under construction is regulated.⁴⁷

Part of the immovable property can be mortgaged under the provisions of the Law for Contractual Pledge when such property is co-owned or jointly owned.⁴⁸ Co-owners of immovable property have at their disposal a so called "ideal part" or an "ideal share" of the immovable property that is expressed in

fractions such as 1/2, 1/3, 1/4 and etc. A co-owner is free to mortgage the ideal share of the property without the consent of the other co-owners. In that case the mortgage will be registered in the real estate cadastre as a mortgage on the ideal share belonging to the co-owner who is a mortgage debtor. What is perplexing about the provisions of the Law for Contractual Pledge regulating mortgage on ideal share of the property is the fact that they allow for the entire property, not just the mortgaged ideal share, to be sold in foreclosure proceedings on demand of the mortgage creditor.⁴⁹ According to the provisions of the Law this is possible if the ideal share of the mortgaged property can't be physically detached from the rest of the immovable property. The economical logic of these provisions is clear and it is intended to benefit the mortgage creditor. By enabling the sale of the entire immovable property there is a better chance for the public bidding to be successful considering the fact that more people will be interested in bidding if the entire property is for sale, and not just a portion (an ideal share) of it. Putting the economical logic aside, these provisions of the Law are in direct violation of the constitutional guarantee of the right of ownership according to which no one could be deprived from his or her ownership unless it is in a public interest determined by law.⁵⁰ The provisions violate the right of ownership of the co-owners that haven't mortgaged their ideal shares of the immovable property, since they still may be deprived of it in the foreclosure proceedings. Arguing that the co-owners will be indemnified by receiving a monetary compensation in the amount of the appraised value of their ideal share is inadequate in light of the fact that they are deprived of their ownership in order for private interests of the mortgage creditor to be satisfied. These harmful provisions of the Law for Contractual Pledge should be subject to immediate revision. Joint owners can also potentially mortgage their share in the immovable property since the law stipulates that when a mortgage is placed over jointly owned property without the consent of all joint owners, it is considered that the mortgage encumbers the part of the property belonging to the mortgage debtor.⁵¹ The problem with mortgaging jointly owned property is in determining what part of it belongs to the mortgage debtor since by the legal definition for joint ownership the parts of the mortgage debtor are determinable, but are not pre-determined.⁵² The

⁴⁹ Art. 11, par. 2, Law for Contractual Pledge.

⁵⁰ Art. 30, par. 3, Constitution of the Republic of North Macedonia (Устав на Република Северна Македонија, "Службен весник на Република Македонија", бр. 52/92).

⁵¹ Art. 11, par. 4, Law for Contractual Pledge. Similar provisions are found in the Italian Civil Code where it is stated that jointly owned immovable property may be mortgaged, and in such cases the mortgage encumbers the part of the immovable property that will be

⁵² Art. 59, par. 1, Law of Ownership and Other Real Rights.

⁴³ Art. 13, par. 4, Law for Ownership and Other Real Rights.

⁴⁴ Art. 2, par. 1, Law for Real Estate Cadastre.

⁴⁵ Art. 35, Law for Contractual Pledge.

⁴⁶ See: Art. 121 - 135, Law for Internal Sailing.

⁴⁷ See: Art. 149-161, Law for Obligations and Property Relations in Air Traffic.

⁴⁸ Art. 11, Law for Contractual Pledge.

conclusion is that in case of mortgaging a part of immovable property that is jointly owned, the mortgage will encumber an undetermined part of the property. This causes problems with the registration of such mortgages in the Real Estate Cadastre, and also in foreclosure proceedings that can't be conducted until the part of the joint ownership belonging to the mortgage debtor is determined. By law, the part belonging to the joint owner is determined by an agreement between the joint owners or by a court decision when agreement hasn't been reached⁵³. The court proceedings may be initiated by the joint owner, by heirs or by creditors with respect to the part of their debtor⁵⁴. The fact that mortgage creditors are practically obligated to procure for the part in the joint ownership belonging to the mortgage creditor be determined before they can proceed with foreclosure, deters most creditors from accepting mortgages on parts of jointly owned immovable property.

Mortgage over several immovable things together for securing of a claim is known in legal literature as simultaneous mortgage⁵⁵. The simultaneous mortgage enables the mortgage creditor to encumber several immovable properties with a mortgage for securing a single claim⁵⁶. This type of mortgage is quite favorable for the mortgage creditors since they are able to choose which of the mortgaged properties will be subjected to foreclosure proceedings in case of default on part of the obligation debtor. The Law for Contractual Pledge, as it was previously stated, allows for several immovable properties to be mortgaged together, however it doesn't contain any specific provisions as for how simultaneous mortgage should be registered, nor how a foreclosure procedure should be enforced in case of simultaneous mortgage. In practice, the simultaneous mortgage is registered in each property sheet separately without referring to the other mortgaged properties under the same mortgage. Since there is no legal assumption that the simultaneous mortgage is acquired in the moment of the first registration, with each registration the mortgage is afforded different order of priority due to the consecutive manner of registration. The question is if and how should this affect the foreclosure proceedings? In our

⁵³ Art. 63, par. 3, Law of Ownership and Other Real Rights.

⁵⁴ Art. 64, Law of Ownership and Other Real Rights.

⁵⁵ See: N. Gavella, *Svarno pravo, Svezak drugi*, Narodne Novine, 2007, 310; O. Станковић М. Општи, *Снажно право*, 272-273; R. Kovačević Kuštrimović, M. Lazić, *Svarno pravo*, Niš, 2004, 333; T. Josipović, *Založno pravo na nekretnosti, Zastita vjerovnika – stvarno pravo, obvezno pravo i ovjstovno osiguranje tražbina*, Narodne Novine, Zagreb, 2005, 150.

⁵⁶ Comparatively, simultaneous mortgage is found in: the Slovenian Property Code – art. 147, par 1; the Serbian Mortgage Law – art. 4 par. 1 (Закон о хипотеци, "Службени гласник Републике Србије" бр. 115/05, 60/15, 63/15(УС), 83/15); the French Civil Code – art. 2333 (Code Civile, Version consolidée au 25 mars 2019); the Italian Civil Code – art. 2856 (Codice Civile Italiano).

opinion the priority in registration of simultaneous mortgages shouldn't affect the right of the mortgage creditor to choose which of the mortgaged properties will be subjected to foreclosure proceeding. The mortgage creditor should have the right to choose which mortgaged property will be sold to ensure easy and full repayment of the secured claim. If one of the mortgaged properties isn't sufficient for full repayment the foreclosure should be proceed on to another and so forth until the secured claim is paid out in full. We don't exclude however the possibility for the mortgage creditor and the mortgage debtor (or debtors) to pre-determine the order in which the foreclosure will take place with the mortgage contract.

With respect to mortgaging future immovable property we would like to note that the Law for Contractual Pledge contains only a single provision stating that future property may be mortgaged. There are no provisions determining what future property may be mortgaged, nor are there provisions regulating the manner in which the mortgage would be acquired. The lack of regulation of this type of mortgaging has created a legal vacuum in which all involved parties (lawyers, notary public, mortgage creditors and mortgage debtors) do as they see fit in each particular case. To this day there is no standardized practice established. However, there is a general understanding that as future immovable property that could be mortgaged are considered buildings and other structures under construction, and also infrastructural objects under construction.

Some attempts to further regulate mortgaging of future immovable property were made with provisions of the Law for Real Estate Cadastre where a special form or registration was put into place. According to the provisions of the Law for Real Estate Cadastre when a building permit is issued, the permit accompanied with all relevant documentation must be sent to the Agency for Real Estate Cadastre so that pre-registration sheet would be filled. The pre-registration sheet contains all relevant information relating to the building under construction such as: who is the investor, the number and date when the building permit was issued, information about concluded sales contracts for the future building and information about the mortgages over the future building⁵⁷. At the same time, the fact that construction is initiated on a certain land parcel is noted in the G-section of the property sheet for the parcel⁵⁸. Also noted in this section is the fact that there are mortgages encumbering the building under construction. Concerning infrastructural objects under construction the same type of information is found in the pre-registration sheet for infrastructural objects⁵⁹.

⁵⁷ Art. 158, Law for Real Estate Cadastre.

⁵⁸ Art. 173, Law for Real Estate Cadastre.

⁵⁹ Art. 158-a, Law for Real Estate Cadastre.

The pre-registration sheet gives publicity to the whole process of trade and mortgaging of buildings under construction, but doesn't solve other relevant issues such as: 1. Can a building under construction be mortgaged when no one technically owns it until the moment that construction is completed? 2. Who can mortgage buildings under construction, the investor or the buyer that concluded a sales contract with the investor? 3. How will the principle of elasticity apply with respect to mortgages encumbering the land before construction is initiated? 4. Could the land and the building under construction be separately mortgaged once the building permit has been issued? and 5. What is the guarantee for the mortgage creditor that construction will be completed as a condition for the foreclosure proceeding to be initiated?

The answer to the first question is that in this case there is an exception from the legal requirement for the mortgage debtor to own the mortgaged property. The exception is derived from the fact that the provisions of the Law for Contractual Pledge allow mortgaging of future property. The simple answer to the second question is that they both do, but at different moments in time. The investor can mortgage the building under construction until a sales contract is concluded. After the conclusion of the sales contract the right to mortgage the building under construction passes on to the buyer. As for the third question the answer is that the principle of elasticity of the mortgage will apply meaning that the mortgage acquired over the land before construction is initiated will consequently encumber the building under construction as well, with priority over all other mortgages over the building under construction. The answer of the fourth question is that the land and the building under construction can't be mortgaged separately once the building permit has been issued. This is because the building permit provides the bases for the legal unity between the land and the building that is erected on to that land. Exception however exists in situations when the building permit is issued under the right of long term lease, servitude on land for construction or concession agreements. In such situations the mortgage encumbers the right and the building that is erected under that right. Simple answer to the fifth question is that there is no guarantee that construction will be completed so that the mortgage creditor could initiate the foreclosure proceedings when necessary. That is the great down side of mortgaging buildings under construction. The banks as major creditors on the real estate market are quite aware of this down side, which is why they compose lists of trusted investors to whom they grant credit lines secured by mortgages over buildings under construction. This practice also extends to credit lines for purchase of buildings under construction. Some of these lists are even available online on web pages of banks, so that potential consumers of credit lines for purchasing of apartments and office space under construction could be promptly informed on the possibility of getting a loan secured by mortgage on buildings under construction. Smaller investors frown on this

practice of banks calling it unfair competition, and some of their argument are not without merit.

1.1.3. TERMINATION OF CONTRACTUAL MORTGAGE

Contractual mortgage is terminated by deleting its registration in the Real Estate Cadastre⁶⁰. Deleting of the registration is essential for termination of contractual mortgage not only according to the Law for Contractual Pledge, but also according to the Law for Real Estate Cadastre where it is stated that all rights in rem on real estate are terminated upon deletion from the Real Estate Cadastre⁶¹. However, before the contractual mortgage could be deleted from the Real Estate Cadastre, it must be proven that one of the conditions for termination has been fulfilled. The Law for Contractual Pledge recognizes the following conditions for termination of contractual mortgage: full payment of the secured claim, renouncement of the mortgage on part of the mortgage creditor, confusion (when the mortgage creditor acquires ownership on the mortgaged property), destruction of the mortgaged property (unless it has been insured with an insurance contract), sale during the foreclosure proceedings, when the mortgage creditor is a juridical person who has been terminated and has no successors, when the mortgage contract has been dissolved unilaterally or by an agreement between the parties and in other cases determined by law (this, among other things include declaring the mortgage contract as null and void)⁶².

It is important to note that the mortgage debtor may choose not to delete the contractual mortgage even if a legal condition for its termination has been fulfilled. The Law for Contractual Pledge provides mortgage debtors with the opportunity to secure a new claim with the existing mortgage once the previously secured claim has been paid out in full⁶³. The only condition for such transfer of the security is for the new claim to be of equal or lower value than the previously secured claim.

In practice the termination of mortgages usually results either by payment of the secured claim or by sale in foreclosure proceedings. There are two types of foreclosure proceedings one regulated by the provisions of the Law for Contractual Pledge, and the other (that refers to all types of forced sale and not exclusively to mortgage foreclosure) is regulated by the Enforcement Law. When foreclosure is conducted by notary public offices they obey by the regulation in the Law for Contractual Pledge, and when the foreclosure is

⁶⁰ Art. 42, par. 1, Law for Contractual Pledge.

⁶¹ Art. 143, Law for Real Estate Cadastre.

⁶² Art. 41, Law for Contractual Pledge.

⁶³ Art. 45, par. 2, Law for Contractual Pledge.

conducted by enforcement officers they obey by the regulation in the Enforcement Law.

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THE ROLE OF MORTGAGE IN THE REAL ESTATE TRADE

Summary

Contractual mortgage is one of the most commonly used real securities by creditor on the Macedonian real estate market. The research has shown that banks as major creditors in the real estate trade use mortgages as a real security almost exclusively in the credit lines they offer to their consumers for purchase of real estate.

Regulation of contractual mortgage as a right in rem and as real security in the Macedonian legal system is carefully constructed in order to provide mortgage creditors with the legal security they need in acquisition, registration and exercise of mortgage rights. The regulations also place a balance between the rights and duties of the mortgage creditors and the right and duties of the mortgage debtors.

The legal requirements for acquiring contractual mortgages are the conclusion of the mortgage contract and the registration of the mortgage in the Real Estate Cadastre. The mortgage contract is expression of the free will of the contract parties that they enter into freely and without coercion. The content of the mortgage contract is also left up to the will of the contracting parties. However the Law does impose some limitation such as: mandatory written form and notarization of the mortgage contract, prescribing mandatory content of the mortgage contract and defining the permitted and forbidden clauses in the mortgage contract. The imposed limitations aim to protect the rights of contracting parties, but due to their lack in precision fall short in reaching the intended goal. Registration of contractual mortgage in the Real Estate cadastre is also mandatory and it is performed by the notary public office that notarizes the mortgage contract. The duty to register mortgages was imposed on notary public offices in order to avoid any type of delay in registration of contractual mortgages.

With respect to immovable property that is eligible for mortgaging the Law takes rather liberal stand allowing all types of immovable property to be mortgaged such as: land, buildings and other structures, infrastructural objects, boats, aircrafts and even future immovable property like buildings and

infrastructural objects under construction. The mortgage may encumber the whole immovable property, a part of the property or several immovable properties together. This type of liberal approach provides mortgage creditors with wide range of immovable property that may be used for securing of claims by contractual mortgage. However, the lack of regulation, especially concerning mortgages over future immovable property has caused grave conflicts between right of mortgage creditors and mortgage debtors that ended up being disputed before the courts.

The termination of contractual mortgage is by deletion of the registration in the Real Estate Cadastre when the legal conditions have been fulfilled. In order to facilitate the securing of claims by contractual mortgage, the Law allows the mortgage debtor to use existing mortgage for securing a new claim once the old claim has been paid out in full instead of deleting it.

In general the Law for Contractual Pledge provides solid legal base for use of mortgage as a real security for securing of claims on the real estate market and beyond. However, as it was shown in the paper some revisions and improvements of the existing regulations are necessary to ensure a higher level of legal security for all parties involved.

Key words: *real securities, mortgages, real property, immovable property, rights in rem, real estate market, real estate trade.*

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УЛОГА ХИПОТЕКЕ У ТРГОВИНИ НЕКРЕТНОСТИМА**РЕЗИМЕ**

Уговорна хипотека је најчешће коришћено реално обезбеђење новчаних потраживања од стране кредитора на македонском тржишту некретнина. Истраживање је показало да банке као главни кредитори у промету некретнина користе хипотеке скоро искључиво у кредитним линијама које нуде својим потрошачима за куповину некретнина.

Регулисање уговорне хипотеке као стварног права и реално средство обезбеђење потраживања у македонском правном систему пажљиво је конструисано како би се хипотекарним кредиторима обезбедила правна сигурност која им је потребна за стицање, упис хипотеке и остваривање права на хипотеку. Регулатива такође успоставља равнотежу између права и обавезе хипотекарних поверилаца и хипотекарних дужника.

Законски услови за стицање уговорне хипотеке су склапање уговора о хипотеци и упис хипотеке у катастар непокретности. Уговор о хипотеци је израз слободне воље уговорних страна које склапају уговор слободно и без присиле. Садржај уговора о хипотеци је такође препуштен вољи уговорних страна. Закон, међутим, намеће нека ограничења као што су: писана форма и овјера уговора о хипотеци, прописивање обавезног садржаја уговора о хипотеци и дефинисање дозвољених и забрањених одредаба у уговору о хипотеци. Наметнута ограничења имају за циљ заштиту права уговорних страна, али због недостатка прецизности не постижу жељени циљ. Упис уговорне хипотеке у катастру непокретности је такође обавезан и врши га нотарска служба која оверава уговор о хипотеци. Обавеза уписа хипотека је наметнута нотарским службама како би се избјегла било каква врста кашњења у регистрацији уговорних хипотека.

Што се тиче непокретне имовине предмет хипотеке, Закон има прилично либералан став и дозвољава да се све врсте непокретне имовине стављају под хипотеку, као што су: земљиште, зграде и други објекти, инфраструктурни објекти, бродови, авиони, па чак и будућа непокретна

имовина као што су зграде у изградњи. Хипотека може оптеретити цијелу непокретну имовину, дио имовине или неколико некретнина заједно. Овај тип либералног приступа даје хипотекарним повериоцима широк спектар непокретне имовине која се може користити за обезбеђење потраживања путем уговорне хипотеке. Међутим, непостојање прописа, посебно у вези са хипотекама на будућу непокретну имовину, изазвало је озбиљне конфликти између хипотекарних кредитора и хипотекарних дужника који су на крају завршили пред судовима.

Престанак уговорне хипотеке настаје брисањем уписа у катастар непокретности када су испуњени законски услови. Како би се олакшало обезбеђење потраживања путем уговорне хипотеке, Закон дозвољава хипотекарном дужнику да користи постојећу хипотеку за осигурање новог потраживања након што је старо потраживање исплаћено у цијелости, умјесто да је брише.

Уопштено, Закон о уговорном залогу обезбеђује чврсту правну основу за коришћење хипотеке као реалног обезбеђења потраживања на тржишту некретнина и шире. Међутим, као што рад показује, потребне су неке ревизије и побољшања постојећих прописа у циљу постизања виши ниво правне сигурности за све стране.

Кључне речи: *реално обезбеђење, хипотеке, некретнине, непокретна имовина, стварна права, тржиште некретнина, трговина некретностима.*

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