

THE CONCEPT AND TYPES OF MORTGAGE IN SERBIAN LEGISLATION

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Abstract. *Mortgage is a real security right on another's immovable property which empowers the mortgage creditor to initiate a sale of mortgaged property (foreclosure) in order to settle the due debt claim from the proceeds of sale, i.e. out of the value obtained by sale of the mortgaged property. Although mortgage was originally created on immovable property (chattel real), in the contemporary legislation it may also be established on movable assets, primarily owing to the development of the so-called mortgage on movable assets (chattel mortgage) as a form of non-possessory pledge. Whereas the property owner (mortgagee) retains his right to possess, use and dispose of the mortgaged property, the mortgage creditor's right is secured by having his right entered in the public chattels register. In Serbian legislation, this "formula" is applied to the conventional mortgage of immovables (chattels real) and the registered pledge on movable assets (chattels personal) which may be constituted on ships and aircraft; however, in the last 10 years, it has also been applied to registered non-possessory pledge on movable assets (chattels mortgage). After introducing this new form of registered pledge in 2005, the Serbian legislator reformed the legal framework regulating the mortgage on immovable property.*

In this article, the author provides a brief overview of the most significant forms of non-possessory securities in Serbian legislation and their distinctive features. Focusing on the institutes on mortgage and registered pledge, the author provides a critical analysis of some legal solutions envisaged in the Serbian legislation as opposed to related comparative law solutions, particularly those envisaged in the German and Austrian legislation.

Key words: *non-possessory pledge, reform, mortgage, registered pledge (chattel mortgage)*

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INTRODUCTION

Ever since the Hammurabi's Code and the laws of Ancient Greece and Rome, a debtor's liability has always been an insufficient guarantee for the creditor's collection of debt claims. It is even more so in the contemporary law which is based on dynamic legal transactions and market-oriented economy. In case of the debtor's insolvency, the liability gets dispersed like a chimera. *Nemo dare potest, quod non habere* (no one can give what one does not have). It gave rise to the development of two groups of instruments for securing debts: personal securities (guaranty, surety) and real securities (pledge, mortgage), whose origins may be traced back to the laws of Ancient Greece and Rome. After abolishing debt bondage, the Romans favoured the institute of pledge over the institute of guaranty (surety). *Plus cautionis in re est, quam in persona* (Pomponius – D.50, 17, 25); there is more security in things than in people. Pledge is safer than guaranty. Such attitudes caused a more intensive development of the law of securities (pledge rights).

Mortgage is a real security right on another's immovable property which empowers the mortgage creditor (mortgagee) to initiate a sale of mortgaged property (the foreclosure of mortgage) in order to settle the due debt claim (costs, interest and the principal) and to have the claim paid from the value of the mortgaged property (proceeds of sale). The common feature in all forms of securities (pledge rights) is the holder's right to convert the pledged property into cash (by sale) in order to repay the debts. Being a non-possessory security right (where the asset remains in the owner's possession), mortgage is the most suitable security instrument which is aimed at safeguarding the legal position of the creditor until the secured claim maturity date and concurrently alleviating the factual position of the debtor (as much as possible). For this reason, the "formula" applied in mortgage has started being applied in the development of other forms of securities (similar to mortgage), such as registered (non-possessory) pledge on movable assets (chattel mortgage).

The primary advantage of mortgage (as a non-possessory form of security) over pledge lies in the fact that the owner of the mortgaged property retains his right to possess, use and dispose of the mortgaged property in pursuit of a more expedient repayment of debt. In the first "static" phase, mortgage primarily motivates the debtor to fulfill the obligation arising from the contractual relation in order to avoid the foreclosure of the mortgaged property. In case the "psychological" pressure of mortgage is ineffective, the mortgage creditor may settle the debt claim in the second "dynamic" phase (which occurs after the debt due date), by collecting the debt out of the value obtained by sale of the mortgaged property. *In cauda venenum* (the poison in the tail).

The basic right of the secured creditor is *the right to settle* the debt claims from the value of mortgaged property, which does not exclude the debtor's liability.¹ The secured creditor may file a claim under the law of contractual obligations (which is aimed at the debtor's property) and/or a real law claim (which is aimed at the pledged property). In case one of these claims is insufficient for full settlement, the creditor may file both claims. These two forms of claim settlement are not mutually exclusive or conflicting; they are not alternative and there is no strictly set order concerning their application. The right to settle a debt claim is further reinforced by the *ius ad sequelam* and the priority

¹ F. Baur, *Lehrbuch des Sachenrechts*, München, 1970, p. 28; C. Karl-Herman: *Bürgerliches Recht Sachenrechts*, Wiesbaden, 1963, p.101; B. Soergel - W. Siebert: *Kommentar zum Bürgerlichen Gesetzbuch*, IV, 1968, p. 668 (commentary to § 1147 BGB); L. Marković: *Hipotekarno pravo (Mortgage Law)*, Beograd, 1911, p.172 onwards.

right. The *ius ad sequelam* enables the mortgage creditor to collect the debt claim from the mortgaged property, irrespective of who the owner/holder of such property is at the moment of the mortgage foreclosure. The mortgage creditor has the right of prior settlement, i.e. to be paid before other ordinary creditors and before the mortgage creditors of a later mortgage rank.

All these features make mortgage one of the safest security instruments. For all these reasons, the “formula” applied in mortgage (which is traditionally perceived as a security right on immovable property) has started being applied to movable property as well. Thus, in addition to the conventional mortgage on immovable property, there are new forms of mortgage on movable assets, such as: mortgage on ships or aircraft, registered pledge on movable assets (chattel mortgage), and fiduciary transfer of ownership.

In this article, the author provides a brief overview of the most significant forms of non-possessory securities in Serbian legislation and their distinctive features. In that context, the Serbian law recognizes the conventional mortgage on immovable property (chattels real) and the registered pledge on movable assets (chattel personal). In addition to the mortgage on a ship and an aircraft, it is also possible to constitute a fiduciary transfer of ownership as a form of non-possessory security (even though fiduciary relations are not explicitly regulated in Serbian legislation).

I. REFORMS IN SERBIAN MORTGAGE LAW

In the period after World War II and during the socialist system of government (before the year 2000), the institute of mortgage was completely neglected and abandoned in the Serbia legal theory and practice. It was due to the dominance of the state and societal ownership which imposed limitations in terms of private ownership, market-oriented economy and the system of crediting.

In Serbian law, the institute of mortgage was reaffirmed and gradually developed in conjunction with the initiated process of social reforms aimed at instituting the principles of market economy, promoting foreign capital investment and further development of private ownership and crediting system. These are the assumptions for exercising the role of mortgage as an instrument for securing investments by loans. Yet, in the conditions of market economy, the new role assigned to the mortgage credit (loan) calls for a reform of mortgage legislation. The reform was instituted by adopting the 2005 Mortgage Act.²

However, in order to make the institute of mortgage fully effective and to provide for a more extensive use of mortgage credits, it is necessary to undertake a more substantial reform of mortgage legislation, particularly concerning the rules on mortgage rank, which will be discussed in more detail further on.

A mortgage rank is a concept reflecting the position and correlation among several mortgage rights on the same property. A mortgage rank is established by entering the rights on movable and immovable property in real estate registries and other public registers. The legal significance of determining a mortgage rank lies in eliminating the conflict between persons entitled to exercise several real rights on the same property, particularly in circumstances when all these rights cannot be fully exercised.

² Zakon o hipoteci (Mortgage Act), “Sl. glasnik RS”, no. 115/2005.

The priority rank is established according to the principle “*Prior tempore potior iure*” (Sec. C.J. 8, 17, 3); the earlier in time, the more powerful in right. The priority of mortgages on the same asset is determined according to the time when the mortgage is created (i.e. the moment of filing a request for the registration of mortgage). There are two types of priority rank: a fixed mortgage rank and a sliding mortgage rank.

Before the adoption of the 2005 Mortgage Act, the Serbian legislation recognized the sliding mortgage rank. After the extinction of debt claim secured by a mortgage of the first priority rank, this position was taken by the mortgage creditor of the next priority rank. Consequently, after the debt has been repaid to the creditor of the first priority rank, the owner of the mortgaged realty is thus barred from taking over this mortgage before other mortgage creditors and precluding the sliding of their mortgage rank.

The rank “sliding” is justifiable in the phase of mortgage enforcement as it implies the payment of matured debt claims. However, in comparison to the fixed rank system, this kind of rank shifting is unfair in the “static” phase of mortgage. For the creditor, the sliding rank is an uncertain advantage that cannot be always relied upon; moreover, it undermines the established “equivalence” between the debt claims and the pledge agreement, considering that this equivalence serves as the ground for determining the terms and conditions of crediting (amount of loan and interests).

The legal systems recognizing the fixed rank system envisage a different solution: the possibility of retaining the mortgage rank and transferring it to a new creditor. After the discharge of the debt claim to the mortgage creditor earlier in rank, his place is not taken by the mortgage creditor next in rank; instead, the owner of the mortgaged property acquires a mortgage on his/her own property, which he/she may freely dispose of.

Hypotheca in re propria is a mortgage of the mortgage debtor on his/her own property. The Roman law did not recognize this type of mortgage because it was inconsistent with the accessory character of mortgage and its function to serve as an additional security for debt claim. *Rei suae pignus non consistit* (Ulpianus – D.50, 17, 45); there is no pledge on one’s own property. In Roman law, *iura in re aliena* could exist only on the property of others.

The German legislation has accepted the principle of abstract constitution of real right, which provided for establishing mortgage on one’s own property, both *ab initio* (*Grundschild* and *Rentenschuld*) and *a posteriori* (*Sicherungshypothek*). In the latter case, the security mortgage (*Sicherungshypothek*), which is generally accessory in nature, is *a posteriori* transformed into a mortgage on one’s own property.³ In German law, the mortgage on one’s own property is enhanced by accepting the fixed rank. Thus, in case a mortgage creditor of an earlier rank has been paid, his place is not taken by a mortgage creditor later in rank; instead, the owner of mortgaged property retains the existing mortgage rank. Certainly, consolidation does not necessarily imply the termination of mortgage. “The right to another’s real estate does not cease to exist when the estate owner acquires that right or when the holder of that right acquires title to that real estate” (§ 889 BGB).

Similarly, the Austrian legislation does not make provisions for constituting a mortgage on one’s own property *ab initio*. However, the Austrian law indirectly makes the mortgage on one’s own property licit. The *Novelle* III § 469 ABGB stipulates that the owner of the mortgaged real estate, who has discharged the debt, may transfer the mortgage that has been securing the extinguished debt to another.

³ V., C. Karl-Herman, op.cit., p. 103.

The mortgage on one's own property enables the owner of the mortgaged real estate to keep the mortgage in the rank of "extinguished" mortgage and to transfer it (if necessary) to a creditor for the purpose of obtaining a new loan under more favourable conditions. This type of mortgage does not jeopardize the interests of other mortgage creditors because it has no effect in the phase of mortgage foreclosure. By establishing a mortgage on one's own property, one can only "book" the position of a mortgage rank in the Land Registry for a future creditor. The transformation of conventional mortgage into the mortgage on one's own property (and vice-versa) may be put into effect even without the approval of the holders subsequent in rank because they retain the values and positions established at the time of constituting the mortgage. When the mortgage is constituted, the mortgage creditors later in rank are aware that their mortgage will not advance in rank unless they provide adequate compensation.

The sliding mortgage rank is more unfair than the fixed rank because the mortgage creditors later in rank move forward, thus gaining "benefit" and a more favourable position for which they have given "nothing in return". The fixed mortgage rank facilitates the placement of multiple pledges on the same property.

A mortgage on one's own property may be transferred and takes effect from the moment of discharging the debt it has secured until the moment of initiating the settlement of debt claim by sale of the mortgaged property. A mortgage on one's own property is a legal construct which initially exists as a potential "kinetic energy" but its economic power may be activated (or not) only by the holder of this right.

This type of mortgage may allow the owner of the mortgaged real estate to freely dispose of the mortgage rank for the purpose of being granted a new loan, as a counter-value whose payment is guaranteed by the "value" of mortgage. A mortgage on one's own property is a distinctive real right which has its real value, expressed in the market value of the mortgaged property.

In principle, the mortgage later in rank implies a higher interest rate in comparison to the debt secured by the preceding mortgage. Each mortgage later in rank bears a higher risk as there is a possibility that the debt claims (costs, interest rate, the principal) cannot be repaid after the public sale (or foreclosure) of the mortgaged property. Consequently, as the higher mortgage rank implies a higher risk, the higher risk calls for a higher interest rate. In German legal practice, there is a proverbial saying: "The first mortgage creditor sleeps better, but lives worse (owing to a lower interest rate). The third or the fourth mortgage creditor sleeps worse, but lives better (owing to a higher interest rate)"⁴. In terms of the interest rate alone, the debtor is unnecessarily burdened with 3 – 4% higher interest rate, which further aggravates his position and increases the loan costs.

The existence of the fixed mortgage rank and the mortgage on one's own property would enable the mortgage debtor to be granted a new favourable loan with a lower interest rate (as it is secured by the first mortgage rank), without any change in the legal status of the second and third mortgage creditors.

The current 2005 Mortgage Act (Articles 53-56) of the Republic of Serbia includes three options on the disposition of the mortgage rank, which are similar to the solutions envisaged in the Swiss legislation. These legal solutions enable the mortgage debtor to retain

⁴ W-R. Bub, M. Schmid, H-G. Jatzek: Grundstücke - erwerben, besitzen, belasten und verkaufen, München, 1996, p. 111: "Der Hypothekar an erster Rangstelle schläft besser, aber lebt schlechter (geringere Zinsen). Der Hypothekar an dritter oder vierte Stelle schläft schlechter, aber lebt besser (höhere Zinsen)".

the mortgage rank after repaying the debt. Thus, the mortgage debtor may: a) freely dispose of an undeleted mortgage (i.e. a vacant mortgage rank); b) enter a priority notice (in view of registering a new mortgage); or c) record a provisional entry of a new mortgage.

a) *Disposition of an undeleted mortgage (a vacant mortgage rank)*: Within a period of 3 years after the extinction of debt claim, the owner of mortgaged property may transfer the mortgage to a new or existing mortgage creditor in order to secure a new claim. The new mortgage has the same rank as the former one but it may not exceed the total amount of debt claim secured by the former mortgage. The mortgage creditors later in rank may not object to the owner's disposition of mortgage because their legal positions remain unchanged. In case the new debt claim exceeds the claim secured by the deleted (vacated) mortgage whose rank it assumes, the higher amount of claim has to be secured in the same rank upon the consent of all subsequent mortgage creditors.

The debtor's waiver of the right to dispose of the undeleted mortgage is effective only if the owner of mortgaged property has been contractually obligated to a third party, particularly to a mortgage creditor later in rank, that he will have the mortgage deleted from the register for the benefit of that party. It means that the debtor has expressly accepted the sliding mortgage rank. The waiver must be entered into the real estate register by a waiver notice, by which the debtor renounces the right to dispose of an undeleted mortgage. If the waiver has not been entered in the real estate register, it is deemed to be ineffective.

b) *Entering a priority notice*: In addition to filing a request to delete the mortgage from the register, the owner of the mortgaged property may also file a request to enter a priority notice in view of registering a new mortgage (in the same rank) in place of the deleted mortgage. The entered priority right has an *erga omnes* effect, regardless of any changes in the real estate ownership (Art. 55 of the Mortgage Act). A new mortgage in this priority rank may be registered within a period of 3 years after the entry of the priority notice but it may not exceed the amount of debt claim secured by the extinguished mortgage. The notice of priority rank assumes the function of the mortgage on one's own property and it produces legal effect only upon being transferred to a new creditor.

c) *Recording a provisional entry of a new mortgage*: The owner of the mortgaged property may file a request for a provisional entry of a new mortgage alongside with and in the same rank as the existing one. The provisional entry of a new mortgage is recorded alongside with and in the same rank as the already registered mortgage in order to secure the debt claim not exceeding the amount of a prior mortgage. The provisional entry of a new mortgage will take effect only if the prior mortgage has been deleted within a period of one year from the date of obtaining approval to register a new mortgage, providing that the request for the deletion of the prior mortgage has been filed by the property owner or the mortgage creditor who will take benefit from the new registered mortgage (Art. 56 of the Mortgage Act). In case the prior mortgage is not deleted within the prescribed time limit, the new mortgage is deleted *ex lege*. If the prior mortgage is encumbered by a formerly established subordinate mortgage, the sub-mortgage has to be deleted in order to register a new mortgage; alternatively, the sub-mortgage creditor and the new mortgage creditor are both required to consent to the registration of the new mortgage. In case the prior mortgage has been established on several immovable assets (as a joint mortgage), the mortgage has to be deleted from all the appurtenant assets. A new mortgage may also be recorded in place of multiple mortgages successive in rank.

Therefore, the Serbian Mortgage Act has envisaged the possibility of retaining the rank of a prior mortgage and transferring it to new creditors. However, these rights may be exercised only if the mortgage has already been constituted but there **is** no possibility to establish a new mortgage on one's own property. We consider that the owner of the mortgaged property shall be allowed to enter a notice on the reservation of the priority rank (for a specific amount) either as a separate right or at the time of constituting mortgage in a different priority rank.

II. REGISTERED PLEDGE ON MOVABLE ASSETS (CHATTEL MORTGAGE)

Registered pledge is a non-possessory security right on movable property (chattels personal) which is established by registering the pledge right in specially designated public registers but without transferring possession.⁵ The increased value and economic importance of movable assets (such as production machinery, automobiles, stocks of goods, etc.) have given rise to legal transactions involving different non-possessory securities on movable assets. Thus, the debtor need not be deprived of the right to use a particular asset and his repayment of debt is facilitated by the fact that he does not have to discontinue or reduce his economic activity.

Movable assets are quickly "turned over" and easily change hands, which makes them difficult to track. The loss of possession often results in the loss of the right itself. For this reason, the publicity of the pledge on movable assets is an important means for securing the creditor's position, which subsequently ensures the *ius ad sequelam* and provides for the legal security of the mortgage creditor.

At first, special registers were established for movable assets of higher value (such as ships and aircrafts). Later on, there were registers for more valuable property in business transactions (such as stocks of goods, etc). The development of computer technology enabled the establishment of a general register (database) of most movable assets which could be individually identified and designated. A negative consequence of establishing the register on chattels is that the registration slows down the legal transactions involving chattels, but it is a concession made in the interest of legal security.

In comparative law, there are two prevailing forms of non-possessory pledge: the reservation of the ownership right (*pactum reservati dominii*) and the registered pledge. In addition, some legislations and legal practice also recognize the fiduciary transfer of ownership for the purpose of securing legal claims.

The first forms of non-possessory pledge (as a new instrument for securing loans) appeared in legal practice as a form of circumvention of legal rules, often *contra legem*. Thus, contrary to provisions §§ 451 and 1368 ABGB, the Austrian courts allowed the transfer of pledged property into the possession of a debtor's spouse or a debtor's employee.⁶ In French legislation, the provision in Article 2076 of the French Code Civil on the obligation to transfer possession was initially abandoned by making the contracting of indirect possession (*fond de commerce*) licit. A distinctive feature in French law is the reservation of ownership (*pactum reservati domini*), which is regarded as a "concealed

⁵ L. Josserand, *Cours de droit civil positif francais*, II, Paris, 1933, str. 893; K. Simitis, *Das besitzlose Pfandrecht*, "Archiv für die civilistische Praxis", Berlin-München, 2/1971, pp. 101, 128, 141.

⁶ Vid. D. Stojanović, *Bezdržavinska zaloga (Non-possessory Pledge)*, Zbornik Pravnog fakulteta u Nišu, 1971, p. 45.

mortgage”⁷. In English legislation, there are two forms of non-possessory pledge: “letter of hypothecation” and “letter of trust”. In German legislation, the non-possessory pledge appears in the form of “*Sicherungsübreigung*” and “*Sicherungabtretung*”. In Italian legislation, a non-possessory pledge (mortgage on chattels) may be created on vehicles, ships and aircrafts entered in public registers, as well as on state-issued securities entered in the Public Debts Register. In the USA, the non-possessory security interests are regulated by the Uniform Commercial Code of 1962.

In Serbian legislation, the non-possessory securities may be constituted on ships and aircrafts (as a non-possessory mortgage), as well as on other movable assets (as a registered pledge). In legal practice, it is also possible to constitute a fiduciary transfer of ownership for securing legal claims. Further on, we will focus on the concept of registered pledge on movable assets (chattel mortgage).

Registered pledge is a mortgage on movable assets and rights (chattels personal) which are registered in a special chattels register. In case the debtor’s payment is overdue, the registered pledge on chattels (chattel mortgage) entitles the pledge creditor to request a sale of the pledged assets and debt settlement.

In Serbian law, registered pledge on chattels (chattel mortgage) is regulated by the Act on Securities over Registered Chattels, which has been applied since 1st January 2004.⁸

Registered pledge may secure not only financial claims expressed in national or foreign currency but also prospective or provisional claims, in which case there must be a clear specification of terms and conditions as well as the specific date when the debt claim is due. Thereupon, the highest possible amount for securing the debt claim is entered in the Chattels Register.

A registered pledge (chattel mortgage) may be constituted on the following items:

- a) **chattels**, individually designated movable assets (e.g. a car, jewelry, etc.) which are used in legal transactions and may be freely disposed of by the pledgor (debtor). Generic assets (designated by kind or genus) may also be pledged provided that they can be individually designated (e.g. if the contract specifies the quantity or the number of items or the manner in which these items may be distinguished from other items of the same kind). A set of movable assets (e.g. a stock of goods in the warehouse, enterprise inventory, etc.) may be pledged as well.
- b) **a transferable debt claims**, which the pledgor owes to third parties, including the creditor.
- c) **a co-ownership share** in a chattel or in a set of chattels. The ideal share of the ownership right may be pledged without the consent of the other co-owners.
- d) **Future assets or rights** (but only conditionally); the chattel mortgage is constituted only after the pledgor has acquired title to property, an obligation right towards the debtor or some other real right on that asset.

By analogy with the mortgage creditor, the secured pledge creditor is entitled to settle the debt claim by relying on the priority right and the *ius ad sequelam*. Yet, in chattel mortgage, these rights include some departures from the entitlements provided in conventional mortgage:

⁷ R. Jeanepretre, La vente a temperament et la venteepargne de lege ferenda, "Zeitschrift für Schweizerisches Recht", Bazel, no. 5/1958, p. 361 onwards.

⁸ „Sl. glasnik“, no 57/2003, 61/2005 и 64/2006.

a) **The right to settle a debt claim** includes the right to sell and the right to collect the payment of debts secured by pledge. In the phase of sale of the pledged property, the legal position of the pledge creditor (pledgee) depends on whether the pledge debtor (pledgor) is an economic entity (an enterprise, a company, a shop-owner, or another natural person professionally involved in some economic activity), or a natural person (Art. 27 of the Mortgage Act).

If the pledgor is an economic entity, a pledge agreement may stipulate the right of the creditor to sell the pledged property in an extra-judicial public sale when the debtor's payment is overdue. If the pledged asset has a market or stock-exchange value, the pledge agreement may include the creditor's right to sell the asset by entering an agreement or the right to keep the asset at the market price. Even if the pledged asset has no market value, the secured creditor may sell it directly "in a manner which would be pursued by a reasonable and cautious man, while safeguarding the interests of the debtor and the pledgor, when they are not the same person" (Article 27. para.5 of the Mortgage Act). This increases the efficiency of the public sale of pledged property.

In case the pledgor is a natural person, the pledge agreement may not contain a provision on the transfer of title to the pledged property to the secured creditor (due to the prohibition of contracting the *lex commissoria* clause), nor can it include a provision that the secured creditor may sell the asset at a pre-determined price (due to the prohibition of contracting the *pactum marcianum* clause). Such agreements are allowed only after the debt maturity date.

Bearing in mind that the sale of assets is the essential problem in registered pledge, the legislator has envisaged different kinds of sale, not only for the purpose of enabling the creditor to exercise the right to sell and protect his interests but also for the purpose of increasing the efficiency of the right to claim settlement. The envisaged forms of debt settlement include: the foreclosure (judicial sale) of the pledged property, the extra-judicial public sale by bidding (in public auction) and by the sale at market or stock-exchange price.

b) **The right of possession** is reserved by the pledgor. However, as the ownership on movable property is transferred by delivery, in case of selling the object of chattel mortgage, it is necessary for the creditor to secure possession over the pledged asset that is being sold.

The Act on Securities over Registered Chattels provides that the parties involved in registered pledge may contractually agree that the pledge creditor will acquire the right of possession over the pledged asset after the debt is due. Certainly, the secured creditor acquires the right of possession only after he has delivered a written notification to the debtor and/or pledgor to inform them about the sale of the pledged property.

In case the pledgor does not voluntarily transfer the possession, the secured creditor may pursue a judicial protection of his right of possession. The creditor may request from the court to issue a decision on the transfer of pledged property into his possession, no matter if the asset is in the possession of the pledgor or a third party (*ius ad sequelam*).

Until the debt due date, the pledgor has the right of possession as well as the right to use and collect fruits and profits from the property in compliance with the hitherto intended purpose of the property. The right to use the pledged property may be limited by a pledge agreement, which may also be used for transferring the right to use the asset to the creditor. The right to use the pledged asset may also be transferred to the creditor or to a third party by a rental agreement (lease).

The pledgor (debtor) may also transfer the pledged property ownership to a third party. In that case, the pledgor is obliged to immediately file a request for the registration of the security right as a charge on a new pledgor. Otherwise, the pledgor and the new owner of the pledged property could be jointly liable to the secured creditor for any damage incurred by the pledgor's failure to register.

In case the pledgor sells the pledged property within the scope of his regular business activities, the buyer acquires the title to that property, which is not encumbered by pledge (e.g. items from a stock of goods). A pledge agreement may also contain a provision precluding the pledgor's right to dispose of the pledged property. After he has been officially notified by the secured creditor that the sale of pledged property has been initiated, the pledgor is deprived of the right to dispose of the pledged property. The pledgor is also entitled to place several pledges on the same asset, unless such a right is expressly precluded in the pledge agreement.

The diverse options for the disposition of the pledged asset give rise to a number of pledgor's obligations, which are established to protect the value of the pledged property. Some of the basic pledgor's obligations are the obligation to secure and maintain the pledged property, the obligation to insure the pledged item, and the obligation to cooperate in the phase of debt settlement.

CONCLUSION

In Serbian legislation, the institute of mortgage has not been fully reformed, comprehensively regulated and adequately adjusted to the needs of the participants in credit relations. The development of mortgage law is proportional to the development of economic and credit relations in the society.

The role of mortgage in our legislation is affirmed by the latest tendencies in the development of our society leading to privatization of socially owned and state-owned property, the development of market economy and credit relations. Mortgage on movable property and mortgage on immovable property have become the most appropriate instruments for securing debt claims both for the creditor and the debtor. For this reason, we think that the Republic of Serbia has to pursue substantial reforms of mortgage legislation, which may be put into effect as follows:

1. The civil law relations should be regulated by adopting a civil code. In the 19th century, Serbia was among the first three counties in Europe that adopted their civil codes but the continuity of the Serbian Civil Code of 1844 was interrupted by the communist rule (1945 – 2000). The Republic of Serbia must return to the European civil law tradition by adopting a new civil code, which is not only a practical necessity but also a reflection of legal culture. In view of reforming mortgage legislation, all forms of securities may be regulated in a single legislative act which will be applicable until the enactment of the Serbian civil code.

2. The mortgage rank should be reformed by accepting the fixed mortgage rank or providing for the retention the existing rank and constituting mortgage on one's own property. Relying on the model envisaged in German or Swiss⁹ legislation, the Serbian legislator should

⁹ The Swiss legislation recognizes the fixed mortgage rank (Article 893 ZGB) but the fixed rank model may be modified by an agreement, which has to be entered in the land register (Article 814 ZGB). A security right may be established in a later rank even if a pledge has not been constituted in an earlier rank (Article 813 ZGB).

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recognize the possibility of constituting mortgage on one's own property both *ab initio* and *a posteriori*.

3. In order to increase the efficiency of contractual mortgage, it is necessary to simplify the procedure governing the sale of mortgaged property and collection of debts. Thus, the enforcement procedure could be initiated on the basis of a deed of trust or a letter of hypothecation, which would be regarded as executive titles (*titulus executionis*) and issued at the time of constituting a mortgage. In the enforcement proceedings, the mortgage debtor would be entitled to challenge the legal presumptions on the debtor's obligation and the existence of mortgage.

4. The legislator shall also ensure adequate conditions for the operation of the registered pledge (chattel mortgage), which primarily implies establishing a register of chattels.

Having in mind the overall significance of real rights and mortgage, it comes as a surprise that the Serbian legislator has demonstrated quite an indolent attitude towards the need to enact a new legal act on ownership, mortgage and other real rights.

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POJAM I VRSTE HIPOTEKA U PRAVU SRBIJE

Hipoteka je založno pravo koje služi poveriocu dužnika da naplati svoje potraživanje nakon docnje iz prodajom realizovane tržišne vrednosti založene stvari. Iako je hipoteka izvorno nastala na nepokretnim stvarima, u modernom pravu ona se koristi i na pokretnim stvarima razvojem tzv. mobilijarne hipoteke kao oblika bezdržavinske zaloge. „Formula“ hipoteke da založena stvar ostaje u državini vlasnika, a poverioca štiti upis prava hipoteke u javni registar, koristi se u pravu Srbije za zalaganje nepokretnosti i „nepokretnosti po nameni“ (brodovi i vazduhoplovi), ali u poslednjih desetak godina i za zalaganje pokretnih stvari upisom u poseban registar, korišćenjem novog oblika - registarske zaloge (mobilijarne hipoteke). Nakon uvođenja ovog novog oblika zaloge (2005), zakonski je reformisana i hipoteka na nepokretnim stvarima.

Tema našeg rada je kratak prikaz najvažnijih karakteristika zakonskih oblika bezdržavinskog založnog prava u srpskom pravu i njihovih specifičnosti. Uz kritičku analizu pojedinih rešenja u odnosu na uporedno pravo, posebno nemačko i švajcarsko založno pravo, u radu se bavimo analizom hipoteke i registarske zaloge.

Ključne reči: *bezdržavinska zaloga, reforma, hipoteka, registarska zaloga.*