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THE LEGAL STATUS OF THE MORTGAGE CREDITOR AND THE MORTGAGE DEBTOR

Abstract: *This paper analyses the legal status of the mortgage creditor and the mortgage debtor in the legal system of the Republic of Macedonia, with reference to the provisions of the Act on Ownership and Other Real Rights, and more closely the provision of the Contractual Pledge Act (2003) The legal status of the mortgage debtor as a financially dependent party is observed with reference to the provisions of the Contractual Pledge, regulating the obligatory and non-obligatory content (permitted clauses) of the mortgage contract as well as the rights and duties of the mortgage creditor and the mortgage debtor, in light of their effect on the legal position of the debtor. The protection of the mortgage debtor in EU regulations is analyzed in light of the recent adoption of the Mortgage Credit Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and the case law of the European Court of Justice.*

Keywords: *mortgage, mortgage debtor, mortgage creditor, credit loans, real securities, rights in rem, pledge.*

1. Introduction

The right of pledge is defined as a right *in rem* in the legal system of Republic of Macedonia and, as such, is regulated by the Act on Ownership and Other Real Right¹. According to the provisions in Article 225 par.1 of the Act on Ownership and Other Real Rights, "The right of pledge is a right *in rem* used for securing the claim of the pledge creditor by pledging certain items or rights in favor of the pledge creditor, who is thus authorizes to dispose with the object of pledge in such

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1 Law on Ownership and other Real Rights, *Official Gazette of Republic of Macedonia*, no. 18/2001.

a manner that, after the expiry of the time-limit for discharging the claim, he may request the payment from the value of the object of pledge (by selling the pledged item) before the creditors who have no right of pledge over the pledged item or right and before the creditors who acquired right of pledge over the same item or right at a later date, regardless of the changes in ownership of the pledged item”.

The Act on Ownership and Other Real Right also regulates that the mortgage creditor may acquire ownership of the object of pledge (*lex commissoria*)² under the conditions stipulated in the pledge agreement (Art. 225, par. 2). Considering the legal grounds for acquiring the right of pledge, this Act recognizes three types of pledge: contractual pledge (acquired by contract), judicial pledge (acquired by court decision) and statutory pledge (acquired by law). These three types of pledge are regulated by different legislative acts. Contractual pledge is regulated by the Contractual Pledge Act³. Judicial pledge is regulated mainly by the Act on Securing Claims⁴. The provisions regulating statutory pledge are found in different legislative acts, including: the Internal Navigation Act (art. 136)⁵, the Cultural Heritage Protection Act (art. 142)⁶, the Inheritance Act (art. 142)⁷, Act on Ownership and Other Real Rights (art. 52, 89), etc.

The subject matter of this paper is the analysis of the legal status of the mortgage creditor and the mortgage debtor under the Contractual Pledge Act (2003).

2. The Right of Pledge (Pawn and Mortgage) under the Contractual Pledge Act

As already noted, the Act on Ownership and Other Real Rights recognizes three types of pledge: contractual pledge, judicial pledge and statutory pledge. As this Act contains only a few articles on the right of pledge, there was sufficient lati-

2 Roman Laws recognized the legal practice that allowed the pledge creditor to acquire ownership of the object of pledge in cases of default on part of the debtor in payment of the secured debts. The legal scholars underline that this was a very common practice among ancient bankers that ensured them with profits that were considerably larger than the value of their claims since the object of pledge was always appraised to have a higher value than the secured claim. According to historical records, in order to protect the poorest Roman citizens from losing their possession, Emperor Constantine banned *lex commissoria* in 326 A.D. Marzec, 2014:60; A. Burdese 1949: 95, 131; Biscardi, 1962:584; Buckland, 1952: 316).

3 Law on Contractual Pledge, *Official Gazette of Republic of Macedonia*, no. 5/2003.

4 Law on Securing Claims, *Official Gazette of Republic of Macedonia*, no.87/2007.

5 Law of Internal Navigation, *Official Gazette of Republic of Macedonia*, no. 55/2007

6 Law on the Protection of Cultural Heritage, *Official Gazette of Republic of Macedonia*, no. 20/2004.

7 Inheritance Act, *Official Gazette of Republic of Macedonia*, no. 47/1996.

tude for enacting special legislation, such as the Contractual Pledge Act which specifically regulates the right of pledge acquired by means of contract.

In accordance with the provision in Article 2 of the Contractual Pledge Act, contractual pledge is used for securing the creditor's monetary and other types of claims, which are measurable in terms of monetary value and which are to be paid by the debtor in a contractual relation. Besides, in case the claims secured by pledge are not discharged on time, the pledge creditor may demand payment from the value of the pledged object or under conditions prescribed by the law or by acquiring ownership on the pledged object (*lex commissoria*).

Depending on the subject matter of pledge, the Contractual Pledge Act makes a distinction between two types of contractual pledge: pledge on movables (pawn) and pledge on immovables (mortgage). Pawn is a pledge on movable property, claims or other rights and assets (stocks, bonds, etc.). Mortgage is a pledge on immovable property (chattels real).

Before the Contractual Pledge Act came in to force, the right of contract pledge was regulated by two different legislative acts: the Act on Pledge on Movables and Rights⁸ and the Contractual Mortgage Act⁹. The main reason for passing the Contractual Pledge Act was an effort to regulate the right of contract pledge (pawn and mortgage) in a single act. However, considering the special characteristic of pawn and mortgage as two types of contractual pledge, the provisions of the Contractual Pledge Act may be divided in three groups. The first group includes the provisions applicable to both types of pledge, such as the provisions on the right of pledge as real security, the pledge creditor and the pledge debtor, the claims that may be secured by pledge, the pledge contract and partially the provisions regarding the extinction of the right of pledge as well as the rights and duties of the pledge creditor and the pledge debtor. The second group includes provisions regulating pawn, and they are not applicable to mortgage. The third group of provisions regulate mortgage but cannot be applied to pawn. The second and the third group of provisions regulate the manner in which pawn or mortgage is acquired, as well as other special characteristics of the two different types of pledge that demand special regulation.

In the regulation of contract pledge as a right *in rem*, the general principles of regulating civil law relations are taken into consideration. One of the most important principles is the principle of equality. It is one of the basic principles in regulating civil law relations, party autonomy or free initiative, transfer of rights and monetary sanctions (Р. Живковска, 2011: 23-33). According to this

8 Law on Pledge of Movables and Rights, *Official Gazette of Republic of Macedonia* number 21/1998.

9 Law on Contractual Mortgage, *Official Gazette of Republic of Macedonia* number 59/2000.

principle, all parties in civil law relations must be equal in regard of acquisition, enjoyment and protection of their rights. The implementation of this principle also means that no party in civil law relations is granted a position of authority and the possibility to impose its will on the opposite party (Р. Живковска, 2011:27-30). The full exercise of the principle of equality is not possible only by providing formal equality of the parties; therefore, in modern civil law, legal measures are taken for protection of the economically weaker party. Concerning the right of pledge, the pledge debtor or the mortgage debtor is perceived to be the economically weaker party who needs to enjoy adequate legal protection in relation to the mortgage creditor. In this regard, the of Contractual Pledge Act tries to balance out the rights and duties of the mortgage creditor and the mortgage debtor in order to prevent any abuse of rights, especially on part of the mortgage creditor. However, closer analysis of the Contractual Pledge Act shows that most of the provisions give priority to the principle of free initiative, which is not uncommon when regulating civil law relations since the free initiative is considered to be the core principle in civil law (Р. Живковска 2011: 24). The leeway provided by certain provisions of the Contractual Pledge Act in exercising free initiative may enable the mortgage creditor to impose unfavorable conditions to the mortgage debtor, which the debtor will be compelled to accept in order to ensure the conclusion of the mortgage contract.

The next part of this paper will analyze the provisions regulating the permitted clauses of the mortgage contract, as well as the rights and duties of the mortgage creditor and the mortgage debtor in light of the legal position of both parties provided thereby.

3. Permitted Clauses of the Mortgage Contract

Article 17 paragraph 1 of the Contractual Pledge Act states that “*mortgage is acquired by signing the mortgage contract and registering the mortgage in public records*”¹⁰. The conclusion of the mortgage contract is the first condition for acquiring mortgage. It is a formal contract that must be concluded in written form and certified by a notary public¹¹. If the mortgage contract is not concluded in written form, it is considered void¹².

The Contractual Pledge Act also regulates the content of the contract, regarding the obligatory elements that must be included. The obligatory elements of the mortgage contract are: the precise identification of the contracting parties

10 According to Macedonian law, mortgage is registered in the Real Estate Cadastre. See: Law on Real Estate Cadastre, *Official Gazette of Republic of Macedonia*, no. 55/2013.

11 Art. 21, par. 1, Law on Contractual Pledge.

12 Art. 21, par. 2. Law on Contractual Pledge.

(including personal data) and precise identification of the debtor (only if it is not the same person as the mortgage debtor), the description of the mortgaged object with sufficient specification that enables its identification, the source of the secured claim, the notification on when the claim is due for payment, and the time and place of signing the contract¹³. The Act also regulates the non-obligatory elements of the mortgage contract (the permitted clauses) but contains no special provision regarding the forbidden clauses¹⁴

In terms of the permitted clauses in the mortgage contract, the Contractual Pledge Act states that the contracting parties may give the mortgage contract the effect of an enforceable document by including explicit statements of contracting parties that they have agreed for the contract to become an enforceable document. This clause enables the mortgage creditor to demand immediate enforcement of the mortgage after the debtor's default.

Another permitted clause in the mortgage contract is the selection of the authorized subject for enforcement of the foreclosure proceedings. This enables the contracting parties to select the authorized subject and, by doing so, to determine how the foreclosure proceedings will be performed. Although the Act provides several options in terms of entities that may execute these proceedings (a notary public, an enforcer, a real estate agency, stock-exchange, etc), the foreclosure proceedings are performed only by notaries public and enforcers.

The mortgage debtor and the mortgage creditor are also entitled to include a clause in the mortgage contract that enables the mortgage creditor, in case of the debtor's default, to undertake measures to protect or increase the value of the mortgage object but without the possibility of obtaining ownership by investing resources into the mortgaged object. The clause protects the interest of the mortgage creditor in regard of keeping the value of the mortgaged object

13 Art. 23, Law on Contractual Pledge.

14 For example, the Mortgage Act of the Republic of Serbia contains provision on clauses of the mortgage contract which are considered to be null and void. The contract clauses that are considered to be null are: the contract clause obligating the mortgage debtor to sell the mortgaged object in a manner other than prescribed by law; the contract clause specifying that the mortgaged real estate may be transferred to the mortgage creditor or a third party by a predetermined price; the clause stipulating that the mortgage creditor has the right to use the mortgaged real estate and to collect fruits from it; and the clause preventing the mortgage debtor to transfer the ownership right of the mortgaged object or to instate other mortgages on the same object. See: Art. 13, Mortgage Act, *Official Gazette of Republic of Serbia*, 115/2005. The Mortgage Act of Montenegro also contains a provision prohibiting contract clauses such as: the right of the mortgage creditor to acquire ownership over the mortgaged object in case of the debtor's default, to collect the fruits or otherwise use the mortgaged object (art. 21, Mortgage Act, *Official Gazette of Montenegro*, 52/2004).

and concurrently excludes the possibility for the mortgage creditor to use the situation for acquiring ownership over the mortgaged object.

The mortgage contract may also contain a clause permitting the mortgage creditor to take possession of the mortgaged object in case of the mortgage debtor's default, but only if the mortgage contract is an enforceable document.

There is also a possibility for the mortgage creditor to impose limitations on the mortgage debtor in terms of the right to use or transfer ownership of the mortgaged object. Given the fact that the provisions of the Contractual Pledge Act are not precise in terms of the type of limitations that may be imposed on the mortgage debtor, the given freedom of contract may be easily abused by the mortgage creditor in order to impose unfair limitations that may impede the mortgage debtor from free enjoyment of the ownership right over the mortgaged object.

The Contract Pledge Act includes another ambiguous provision that may lead to infringement of the mortgage debtor's rights. According to Article 23 par. 4 of the Contractual Pledge Act, "*the pledge is acquired on all assets of the debtor including future assets that he might obtain if the contracting parties have not stated clearly in the contract that the object of pledge are only part of the assets at the disposal of the debtor at the moment of the conclusion of the contract*". It is unclear from the cited provision which "*assets*" the Act refers to. This provision might easily lead to an interpretation that the Macedonian legal system makes provisions for the general mortgage to be acquired on the property of the mortgage debtor.

Regarding the *lex commissoria* clause, it is notable that the Contractual Pledge Act contains a provision permitting the mortgage creditor to acquire ownership of the mortgage object as payment of the secured claim¹⁵. However, this does not mean that the mortgage contract may contain such a clause. The Contractual Pledge Act clearly states that *lex commissoria* may be exercised under the condition determined by the law (which excludes the possibility for *lex commissoria* to be determined by the mortgage contract)¹⁶. In fact, according to the Contractual Pledge Act, the mortgage creditor may acquire ownership of the mortgaged

15 Contemporary law prohibits the "*lex commissoria*" clause in mortgage contracts, 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; therefore, *lex commissoria* may be permitted (Lazić, 2009: 117-115; Rašović, 2007:190-192).

16 The Mortgage Act of Montenegro does not state that the mortgage creditor has the right to demand payment by acquiring ownership on the mortgaged object; it only states that the payment of the secured claim is performed from the value of the mortgaged object (Art. 1, Mortgage Act). For more on this Act, see: Rašović, 2007: 1-4. Article 1 of the Mortgage Act

object only in foreclosure proceedings, if there is only one mortgage creditor and if the public bidding for sale of the mortgaged object was unsuccessful.

When the foreclosure proceedings are executed by authorized enforcers under the Enforcement Act, the mortgage debtor may propose for the mortgaged object to be sold to him/her at a price determined in the second public bidding¹⁷. The mortgage creditor may give such a proposal only if the public bidding for sale of the mortgaged object was unsuccessful. If there is positive difference between the value of the mortgaged object and the value of the secured claim, the mortgage creditor is obligated to pay out the positive difference.

4. Rights and Duties of the Mortgage Creditor and the Mortgage Debtor

As already noted, most of the provisions regulating the rights and duties of the pledge creditor and the pledge debtor are applicable regardless of the type of pledge (pawn or mortgage). However, there are certain provisions that only apply to pawn as a type of pledge.

In general, the rights and duties of the mortgage creditor and the mortgage debtor are distinct, depending on the time of establishing the creditor's right to secure his claim and the period of time elapsed after the debtor's default.

4.1. Rights and Duties of the Mortgage Creditor and the Mortgage Debtor during the period of Securing the Claim

Notably, the Contractual Pledge Act contains a number of provisions regulating the rights of the mortgage creditor, which imply specific duties of the mortgage debtor.

In the course of securing the claim, the mortgage creditor is authorized to protect the value of the object of mortgage against the mortgage debtor. In terms of exercising this right, the mortgage creditor is authorized to inspect the condition of the object of mortgage; if the mortgage debtor is devaluating the object of mortgage, the mortgage creditor may demand for such actions to be prevented; if the object of mortgage has legal or material defects, the mortgage creditor may demand for such defects to be removed.

According to the provision in Article 28 of the Contractual Pledge Act, the mortgage creditor has the right to inspect (supervise) the condition of the object

of the Republic of Serbia contains similar provisions (art. 1), as well as the Croatian Act on Ownership and Other Real Rights (art. 1, NN, 91/96).

¹⁷ Art. 180, par. 1, Law on Enforcement, *Official Gazette of Republic of Macedonia*, number 35/2005.

of mortgage. The Act does not contain more precise provisions regarding the manner in which this right may be exercised; however, it states that the mortgage creditor is not permitted to exercise this right in inconvenient time. Determining what may be considered as “*inconvenient time*” for inspection of the object of mortgage is left to interpretation. The “*inconvenient time*” may refer to the moment when the inspection causes expenses to the mortgage debtor (travel expenses, interruption or delay of business activities) or disturbs the debtor’s private and family life (in case the mortgaged object is the debtor’s residence). In terms of exercising the right of inspection, the question that remains unanswered is how the mortgage creditor will exercise this right if the mortgage debtor is unwilling to provide access to the mortgaged object for inspection.

Another right that enables the mortgage creditor to protect the value of the mortgaged object is the right to request that the mortgage debtor stops all activities that may devalue the mortgaged object¹⁸. The exercise of this right also includes authorization for the mortgage creditor to demand that the mortgaged object be restituted to its previous condition. In case the mortgage debtor is unwilling to respond to the demands of the mortgage creditor concerning the devaluation of the mortgaged object, the mortgage creditor may take legal action in a court of law. By rendering a judicial decision, the court will obligate the mortgage debtor to refrain from any actions that may devalue the mortgaged object. The mortgage creditor is also authorized to demand early payment of the secured claim if the mortgage debtor does not comply with the obligation to refrain from any action that may devalue the mortgaged object.

Given the fact that the value of the mortgaged object is the essence of mortgage as a real security, it is important that the mortgaged object does not have any material or legal defects. In case such defects exist, the mortgage debtor is obligated (upon demand of the mortgage creditor) to remove any existing defect on the mortgaged object in the timeline determined by the mortgage creditor¹⁹. If the defect is not removed in a timely manner, the mortgage creditor may demand replacement of the mortgaged object. The mortgage creditor is also authorized to undertake legal action before the courts²⁰ against the mortgage debtor that has not complied with the demand to remove legal or material defect or has not provided replacement. The novelties in Article 32 of the Contractual Pledge Law of 2007 also enable the mortgage creditor to avoid court proceedings on these matters and direct the legal action to one of the subjects authorized to enforce the foreclosure proceedings (a notary public or an enforcer), but only if the

18 Art. 26, Law on Contractual Pledge.

19 Art. 32, Law on Contractual Pledge.

20 The legal action includes a request to oblige the mortgage debtor to comply with the duty to remove all legal or material defects of the object of pledge or to provide replacement.

mortgage contract is a enforceable document²¹. Beside the right of the mortgage creditor to demand a removal of legal and material defect or replacement of the mortgaged object, the mortgage creditor may also demand early payment of the secured claim.

When it comes to the protection of the mortgaged object value, the Contractual Pledge Act also contains a general provision according to which the mortgage debtor is obligated to use the object of pledge as a good host or as a good steward, and to keep the object of pledge secured from all types of risks²².

During the period of securing of the claim, the mortgage creditor is also authorized to protect the mortgage right from any infringement on part of the mortgage debtor or third parties. Since the right of pledge is acquired on the object owned by the mortgage debtor, the mortgage creditor is authorized to demand that the owner (mortgage debtor) tolerate the right and to refrain from actions that he would normally perform if no right of mortgage existed²³. The same refraining obligation falls on all third parties that may illegally impede or prevent the mortgage creditor in exercising the mortgage right. Such claims of the mortgage creditor are not subject to statute of limitation. However, when legal action is undertaken for infringement of the mortgage right, the mortgage creditor is expected to prove the existence of such right and the the defendant's actions leading to infringement of that right. The Contractual Pledge Act also comprises a general provision stating that the mortgage creditor may take any legal action to protect the mortgage right provided for the protection of real rights²⁴.

Another right given to the mortgage creditor during the period of securing of the claim is the right to dispose of mortgage by instating mortgage on the existing mortgage right to secure the creditor's claim. The mortgage creditor may use this right without the mortgage debtor's consent. When sub-mortgage is acquired, the debtor needs the permission of the sub-mortgage creditor before the payment of the claim. If the debtor fails to ask for the sub-mortgage creditor's permission before the payment of the claim, the mortgage will remain on the mortgaged object. These provisions are aimed at protecting the rights of the sub-mortgage creditor from infringement by the mortgage creditor and the mortgage debtor. However, the Act provides the debtor with the opportunity to pay out the secured claim, without consent of the sub-mortgage creditor, if

21 The mortgage contract is an enforceable document if it is made by notary public and if it contains the contracting parties' statement that they have consented for the mortgage contract to become an enforceable document. See: art. 22, Law on Contractual Pledge.

22 Art. 27, par.1, Law on Contractual Pledge.

23 Art. 39, Law on Contractual Pledge.

24 Art. 34, Law on Contractual Pledge.

the payment is performed by depositing the amount with a court of law or a notary public office.

The mortgage creditor may also exercise the mortgage right regardless of the change in ownership on the mortgaged object²⁵. In that regard, the person who acquires ownership of the mortgaged object must tolerate the exercise of the right of mortgage, except in case the mortgage object is sold within the scope of the business practices of the mortgage debtor, but only if the mortgage right has not been registered in the Real Estate Cadastre²⁶.

One of the most important rights emerging from mortgage is the priority in payment from the value of the mortgaged object. The priority is guaranteed in view of the other mortgage creditors that acquired the mortgage on the same object at a later date, as well as the remaining creditors of the mortgage debtor that have not acquired the right of mortgage²⁷.

With respect to the rights of the mortgage debtor, the Contractual Pledge Act contains very few provisions. Regarding the lack of provisions regulating the rights of the mortgage debtor, it can be argued that in case of mortgage the mortgage debtor has possession of the mortgaged object during the period of securing of the claim and is, therefore, in a better position than the mortgage creditor.

Most of the provisions of the Contractual Pledge Act regulate the rights of the pledge debtor in cases of possessory pledge²⁸. Since mortgage can only be acquired as non-possessory pledge,²⁹ those provision will not be subject of further analysis in this text. However, there is a provision in paragraph 2 of Article 27 of the Contractual Pledge Act that guarantees the right of the mortgage debtor to collect the fruits of the pledged object if the contracting parties have not agreed differently in the pledge contract. This provision may be applied to all types of pledge regardless of the manner that the right has been acquired, even though a provision in Article 27 regulating the obligation of the mortgage debtor in

25 Art. 37, I Law on Contractual Pledge.

26 In reality, this provision is not applicable since the right of mortgage cannot even be acquired if it is not registered in the Real Estate Cadastre. See: art. 17. Law on Contractual Pledge. The Law on Real Estate Cadastre also prescribes that all real right must be registered in the Real Estate Cadastre, which is a necessary condition for the acquisition of such rights. See: art. 143, Law on Real Estate Cadastre.

27 Art. 24. Law on Contractual Pledge.

28 The right of possessory pledge is acquired by concluding the pledge contract and giving possession of the object of pledge to the mortgage creditor.

29 The right of non-possessory pledge is acquired by concluding the pledge contract and by registration of the right in public records such as the Pledge Registry (for pawn) and the Real Estate Cadastre (for mortgage).

respect of the use of the mortgaged object implies non-possessory pledge. By guaranteeing the right of the mortgage debtor to collect the fruits of the pledged object, the Contractual Pledge Act prohibits the so called "*antichresis*", as do many other contemporary laws regulating the right of pledge. The reason why the *antichresis* is prohibited is for the protection of the mortgage debtor against the demands of the mortgage creditor that may extend to collection of fruits of the mortgaged object which will put the mortgage debtor in an unfavorable position and may lead to abuses by the mortgage creditor³⁰. It should be noted that the Contractual Pledge Act is not consistent with regard to the prohibition of the *antichresis* since it allows for the contracting parties (mortgage creditor and the mortgage debtor) to determine differently in the mortgage contract, meaning that the contracting parties may agree that the mortgage creditor may collect the fruits of the mortgaged object. This is seemingly a form of exercising the freedom of contract; however, taking in consideration the position of the mortgage debtor in light of conclusion of the mortgage contract, it is more than likely that he may feel compelled by the mortgage creditor to agree in order to ensure the conclusion of the contract. There is also a provision in Article 7 of the Contractual Pledge Act that states: "*Pledge may extend to future property. If the object of pledge gives fruits the fruits are object of pledge unless it is stated differently in the pledge contract*". Although unclear, this provision should be interpreted that the object of pledge are fruits that are still attached to the pledged object, but at the moment of their separation they belong to the mortgage debtor. The grounds for such interpretation of Article 7 of the Contractual Pledge Act may be found in the provisions of paragraph 3 of Article 27 where it is clearly stated that: "*If the object of pledge gives fruits, the pledge is extended to the fruits that are found at the moment of realization of the pledge, unless it is stated differently in the pledge contract*". Regarding the cited article, the same argument can be made that the mortgage debtor, who is in fact economically dependent on the mortgage creditor, may agree to such provision in the mortgage contract compelled by his difficult position.

Analyzing the legal position of the mortgage creditor and the mortgage debtor during the period of securing of the claim, it may be concluded that the Contractual Pledge Act contains provisions that are intended to protect the weaker party, i.e. the mortgage debtor. Such protection is offered by the provisions that guarantee the right of the mortgage debtor to keep possession of the mortgaged

30 Legal scholars note that contemporary legislation tends not to permit contracting of an *antichresis* because of the possibility for the mortgage creditor to use such clause to obtain unjust benefits on cost of the mortgage debtor. However, it is also noted that in legal practice there are different ways to circumvent this prohibition such as concluding a rent contract with the mortgage creditor as the tenant, or a usufruct contract with the mortgage creditor as a beneficiary of that right. (Kovačević – Kuštrimović, Lazić, 2004:332; M. Lazić, 2009: 116).

object, since the right of mortgage can only be acquired as non-possessory pledge. Keeping possession of the mortgaged object is important for the mortgage debtor because it provides him with the opportunity to fully exercise his right of ownership over the mortgaged object and, by doing so, to gain financial effects from his property. Another important provision guarantees the right of the mortgage debtor to collect the fruits of the mortgaged object. However, as we have shown, the Contractual Pledge Act is not consistent in providing protection to the mortgage debtor as the weaker party since there are ways to circumvent the legal provisions by the mortgage contract, as well as by other simulated contracts (rent, usufruct) that the mortgage debtor may be compelled to sign on demand of the mortgage creditor.

4.2. Rights and Duties of the Mortgage Creditor and the Mortgage Debtor in the Period after the Default of the Debtor

In the period after the default of the debtor, the mortgage creditor has the right to demand payment of the secured claim from the value of the mortgaged object in foreclosure proceedings (proceedings for sale of the mortgaged object). According to the Contractual Pledge Act, two conditions must be fulfilled. The first condition is the default on part of the debtor; the second condition is that the mortgage contract has to be an enforceable document³¹.

In order to prevent abuses on part of the mortgage creditor and protect the rights of the mortgage debtor, the foreclosure proceedings are official and they are performed by an authorized subject (a notary public, enforcer, real-estate agency, broker, etc.). However, due to lack of regulations, the only subjects that perform the foreclosure proceedings are notary publics and enforcers. The notary publics perform the foreclosure proceedings according to the provisions of the Contractual Pledge Act, whereas the enforcers execute it according to the provisions of the Enforcement Act.

According to the provisions of the Contractual Pledge Act, the mortgage debtor has the right to be duly informed about the initiation of foreclosure proceedings. The mortgage debtor also has the right to determine the minimal price for sale of the mortgaged object by giving written statement³². Exercising the right to determine the minimal price for sale of the mortgaged object enables the mortgage debtor to prevent devaluation of the mortgaged object. However, the Contractual Pledge Act gives certain parameters for determining the minimal price for sale of the mortgaged object, such as: the market value, the amount

31 Art. 61, Law on Contractual Pledge.

32 Art. 64-g, Law on Contractual Pledge.

of the secured claim, expenses in the foreclosure proceedings, etc³³. The Contractual Pledge Act also prescribes that during the first bidding the mortgaged object cannot be sold under the determined minimal sale price³⁴. The right of the mortgage debtor to determine the minimal price for sale of the mortgaged object extends to the second bidding in the foreclosure proceeding; however, in case of second bidding, the mortgage debtor is obligated to lower the sale price determined in the first bidding.

Until the foreclosure proceeding are terminated, the mortgage creditor and the mortgage debtor may agree for the mortgaged object to be sold by settlement³⁵. This type of agreement is in favor of both parties (the mortgage creditor and the mortgage debtor) because it gives them the opportunity to determine the the sale price and conditions.

The Contractual Pledge Act also recognizes *lex commissoria*, but only under the conditions prescribed by the law. As noted previously, in order to prevent the possibility for the mortgage creditor to abuse his right at the expense of the mortgage debtor who is in a less favorable position during the conclusion of the mortgage contract, the Act does not permit for such clause to be entered into the mortgage contract. However, the Contractual Pledge Act recognizes *lex commissoria* as a manner of payment of the claim in the foreclosure proceedings. Yet, the *lex commissoria* is permitted only in exceptional situations in the foreclosure proceedings: when there is only one mortgage debtor, and if the sale of the mortgaged object was unsuccessful after two scheduled biddings and no settlement was reached³⁶. The mortgage creditor may refuse to become owner of the mortgaged object. In that case, the foreclosure proceedings will continue with new public biddings.

The mortgage debtor has no legal remedies at his disposal in the foreclosure proceedings, but he may take legal action if he considers that his rights have been violated in the foreclosure proceedings. In such cases, the mortgage debtor may file a suit before the courts contesting the acts undertaken by the notary public during the foreclosure proceedings. The mortgage creditor may also demand from the courts temporary measures that will delay the acquisition of the right of ownership on the mortgaged object by the highest bidder³⁷. However, if the suit filed by the mortgage debtor is unsuccessful, he will be obligated to

33 Art. 64-d, Law on Contractual Pledge.

34 Art. 64-s, Law on Contractual Pledge.

35 Art. 64-l, Law on Contractual Pledge.

36 Art. 64-Lj, Law on Contractual Pledge.

37 Art. 67, Law on Contractual Pledge.

pay damages to the highest bidder for delaying the acquisition of the right of ownership over the mortgaged object.

When the foreclosure proceedings are executed by authorized enforcers, the Enforcement Act applies. The enforcer performs the foreclosure according to the provisions regulating enforcements over real estate. These are general provisions regulating enforcements over real estate. The Enforcement Act does not regulate in particular the foreclosure due to mortgage. Unlike the Contract Pledge Act where the mortgage debtor is given the right to determine the minimal price for sale of the mortgaged object, the Enforcement Act states that the value of the real estate which is subject to foreclosure is determined by an expert³⁸. The foreclosure proceedings are performed by public bidding over the mortgaged object. However, there is a possibility for the sale to be performed by direct settlement if the mortgage creditor and the mortgage debtor reach an agreement on such a sale³⁹. During the foreclosure proceedings, the mortgage debtor may use objection as legal remedy to protect his/her rights against irregularities in the enforcement performed by the authorized enforcer⁴⁰. The objection against irregularities in the enforcement proceedings is submitted to the president of the court, who is obliged to render a decision in 72 hours from the submission date of the objection. Rendering a decision on the matter, the president of the court may determine that there are irregularities in the enforcement proceedings and annul the actions of the enforcer. However, the president of the court is not authorized to stop the enforcement or to obligate the enforcer to undertake certain actions.

The decision of the president of the court regarding the objection for irregularities in the enforcement proceedings may be appealed before the Court of Appeals⁴¹. It is important to note that the submitted appeal does not delay the enforcement proceedings.

Regarding the foreclosure proceedings, especially disconcerting is paragraph 2 of Article 11 of the Contractual Pledge Act where it is stated that: *"If the pledged ideal part of the object cannot be separated from the rest of the object, the pledge creditor may demand the sale of the entire object to third persons in cases of default of the debtor..."*. The implementation of this provision in the foreclosure proceedings will mean violation of rights of third parties (the owners of the other ideal parts of the object). The cited provision of the law creates the possibility for sale to take place, where these owners will lose their right of ownership

38 Art. 164, Law on Enforcement.

39 Art. 169, Law on Enforcement.

40 Art. 77, Law on Enforcement.

41 Art. 77-a, Law on Enforcement.

over the object even though they have not participated in (or consented to) the acquisition of the mortgage. In this particular case, it is also important to note that the ideal part of the object (owned by the mortgage debtor) is mortgaged, and not the entire object that is co-owned by multiple persons. So the question remains: How can the mortgage creditor demand the sale of something that was not mortgaged in the first place?!

5. Protection of the Mortgage Creditor in European Union

In the European Union, several attempts have been made to harmonize the EU laws regulating mortgage credits, or more precisely regulating the manner of providing services in respect to mortgage credits. One of the first steps towards the harmonization of the mortgage credit markets was taken by the European Commission in 1985, when a proposal was submitted to the Council for Council Directive on the Freedom of Establishment and the Free Supply of Services in the Field of Mortgage Credits⁴². As it was stated in the explanatory note of the Proposal, the main goal was to ensure abolishment of institutional and technical provisions that prevent credit institutions from undertaking mortgage business in the European Community. The Proposal also stated that the proposed Directive on the Freedom of Establishment and the Free Supply of Services in the Field of Mortgage Credits should serve as supplement to the First Banking Directive from 1977 (77/780/EEC). However, this Proposal was withdrawn by the European Commission in 1995. In 1997, the European Commission, consumer organization and European credit sector embarked on negotiations aimed at creating the Voluntary Code of Conduct on Pre-Contractual Information for Home Loans (2001/139/EC). The implementation of the Voluntary Code was supported by an Agreement negotiated and adopted by European associations of consumers and the European Credit Sector Associations offering home loans⁴³. The main idea behind the implementation of the Voluntary Code is for consumers to be provided with pre-contractual information concerning the various mortgages and housing loans across the European Union so that consumer may compare offers and make informed choices regarding mortgages. Such contractual information, according to the Voluntary Code, should be provided on information sheet with harmonized information standards within the European Union. The objective of the Voluntary Code is to provide protection of mortgage debtors who are regarded as consumers in the mortgage credit market.

42 Proposal for a Council Directive on the freedom of establishment and the free supply of services in the field of mortgage credit, (COM 84 730 final).

43 Legal theory has pointed out that, in cases like the one concerning the implementation of the Voluntary Code of Conduct on Pre-Contractual Information for Home Loans, the European Commission has the role of a sponsor of such rules. (Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H.Türk, 2011:329).

In the aftermath of the financial crises in the European Union, new attempts have been made for implementation of rules regarding the mortgage credit agreement that will, among other things, provide protection for mortgage debtors especially in the process of signing mortgage credit agreements. This resulted in the adoption of the Mortgage Credit Directive on credit agreements for consumers relating to residential immovable property on 4 February 2014 (2014/17/EU). The main objective of the Mortgage Credit Directive is to create a mortgage credit market across the European Union, with rules that provide high level of consumer protection⁴⁴. Provisions of the Mortgage Credit Directive contain minimum regulatory requirements for: consumer information, principles and standards for providing services regarding mortgage credits, rules for assessment of consumer creditworthiness, early repayment, foreign currency loans, etc.

The case law of the European Court of Justice shows that the protection of the mortgage debtor in the EU is primarily afforded by using Consumer Law, such as Unfair Contract Terms Directive 93/13/EEC⁴⁵, and in some cases protection was afforded on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁶.

6. Summary

The text analyses the legal status of the mortgage creditor and the mortgage debtor in light of the provisions of the Macedonian Act on Ownership and Other Real Rights and the Contractual Pledge Act of 2003. As it is shown in the text, the Contractual Pledge Act regulates the right of pledge acquired by contract in the Macedonian legal system, and it includes provisions that regulate both contract pledge on movables (possessory and non-possessory) and mortgage. The text underlines that the principle of equality, as basic principle in regulating civil law relations, applies in regard of pledge as a right *in rem*. According to this principle, as pointed out in the text, all parties in civil law relations must be equal in regard of acquisition, enjoyment and protection of their rights. The implementation of this principle also means that no party in civil law relations is granted a position of authority and the possibility to impose its will on the

44 The EU member states are obligated to transpose its provisions into their national law by March 2016. For more on the Mortgage Credit Directive, see: http://ec.europa.eu/finance/finservices-retail/credit/mortgage/index_en.htm.

45 One of the most discussed cases lately is the Courts decision in *Aziz v. Catalunyaacaixa* Case C-415/11, where the Court found that Spanish legislation on enforcement proceedings are not in compliance with the Unfair Contract Terms Directive. For more on the case law of the European Court, see: Sein., Lilleholt, 2014: 20-46.

46 In the case *Rousk v Sweden* (Application No. 27183/04) the European Court found violation of Article 8 and Article 1 of Protocol 1 of the Convention.

opposite party. The text also notes that the full exercise of the principle of equality is not possible by providing only formal equality of the contracting parties; therefore, in modern civil law, legal measures are being taken for protection of the economically weaker party. Regarding pledge as a right *in rem*, the pledge debtor or the mortgage debtor is perceived as the economically weaker party that needs and should enjoy adequate legal protection in relation to the mortgage creditor.

The legal position of the mortgage debtor has been analyzed by identifying the provisions of the Contractual Pledge Act that may be both favorable and unfavorable for the mortgage debtor, such as: the provisions that permit the pledge to be extended to the fruits of the object of pledge (if not determined otherwise in the pledge contract), the possibility for the pledge creditor to demand foreclosure on the entire object even when the mortgage is placed on the ideal part (co-ownership), the lack of legal remedies in favor of the mortgage debtor in the foreclosure proceedings, etc.

The text also analyzes the protection of the mortgage debtor as an economically weaker party in EU regulations, where the need for protection of the mortgage debtors has emerged as a pressing issue in recent years due to the devastating effect of the economic crisis on the mortgage market, which ultimately led to adopting documents such as the Mortgage Credit Directive on credit agreements for consumers relating to residential immovable property. The case law of the European Court of Justice (most notably the Courts decision *Aziz v. Catalunya-caixa* Case C-415/11) shows that the protection of the mortgage debtor in the EU is primarily afforded by using Consumer Law (such as, the Unfair Contract Terms Directive 93/13/EEC), although other measures of protection are being considered as well.

References

- Burdese A. (1949). *La 'lex commissoria' e il 'ius vendendi' nella fiducia e nel pegno*. Torino
- A.Biscardi (1962), *La lex commissoria nel sistema delle garanzie reali*. u: *Studi in onore di Emilio Betti*, Milano: Giuffrè (vol. II). 584
- Application No. 27183/04. *Rousk v Sweden*
- Buckland W. W. (1952). *Roman Law & Common Law A Comparison In Outline*. CUP Archive
- Case C-415/11. *Aziz v. Catalunya-caixa*
- Herwig C.H. Hofmann, Gerard C. Rowe Alexander, H.Türk (2011). *Administrative Law and Policy of the European Union*. Oxford University Press

- Law on Inheritance. *Official Gazette of Republic of Macedonia number 47/1996*
Kovačević – Kuštrimović R., Lazić M. (2004), *Stvarno pravo*, Zograf, Niš
- Law on Protection of Cultural Heritage. *Official Gazette of Republic of Macedonia number 20/2004, 2007, 18/11, 148/11, 23/13, 137/13, 164/13, 38/14, 44/14, 199/14*
- Law on Contractual Mortgage. *Official Gazette of Republic of Macedonia number 59/2000, 86.2000*
- Law on Contract Pledge. *Official Gazette of Republic of Macedonia number 5/2003, 4/2005, 87/2007, 51/11, 74/12, 115/14*
- Law on Enforcement, *Official Gazette of Republic of Macedonia, number 35/2005, 50/2006, 129/2006, 8/2008, 83/2009, 50/10, 83/10, 88/10, 171/10, 148/11, 187/13*
- Law on Internal Navigation. *Official Gazette of Republic of Macedonia number 87/2007, 26/2009, 22/2010, 23/2011, 53/2011, 155/2012, 15/2013, 137/2013, 163/2013, 42/2014, 166/14*
- Law on Mortgage, *Official Gazette of Montenegro, 52/2004*
- Law on Mortgage, *Official Gazette of Republic of Serbia, 115/2005*
- Law on Ownership and Other Real Rights of Croatia, *NN. 91/96*
- Law on Ownership and Other Real Rights. *Official Gazette of Republic of Macedonia number 18/2001, 92/2008, 139/2010, 35/2010*
- Law on Pledge on Movable and Rights. *Official Gazette of Republic of Macedonia number 21/1998, 48/99, 86/2000*
- Law on Real Estate Cadastre, *Official Gazette of Republic of Macedonia, number 55/2013, 41/14, 115/14*
- Lazić M. (2009). *Prava Realnog obezbeđenja*. Niš
- Marzec Ł. (2014). May contracts be entirely free? Some comparative remarks on various approaches to freedom of contract. *Krakowskie Studia z Historii Państwa i Prawa:7(1)*. www.ejournals.eu/Krakowskie-Studia-z-Historii-Panstwa-i-Prawa. 59-60
- Proposal for a Council Directive on the freedom of establishment and free supply of services in the field of mortgage credit, (COM 84 730 final)
- Rašović Z. P. (2007). *Komentar zakona o hipoteci*. Pravni fakultet u Podgorici, Podgorica
- Sein K., Lilleholt K. (2014). Enforcement of Security Rights and consumer Protection: An Assessment of Estonian and Norwegian Law, *Oslo Law Review (1)*. 20-46
- Живковска, Р.(2011), *Општ дел на граѓанското право*, Скопје: Европа 92

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ПРАВНИ СТАТУС ХИПОТЕКАРНОГ ПОВЕРИОЦА И ХИПОТЕКАРНОГ ДУЖНИКА

Резиме

У раду се анализира правни статус хипотекарног повериоца и хипотекарног дужника у Републици Македонији у светлу Закона о својини и другим стварним правима и Закона о уговору о залози из 2003. У македонском правном систему, Закон о уговору о залози регулише право залогe стечено уговором, и обухвата одредбе које уређују уговорну залогу на покретним стварима (својину и државину) као и хипотекарне односе.

Аутор наглашава да се принцип равноправности као основни принцип у регулисању грађанскоправних односа примењује на залогу као право *in rem*. У складу са овим принципом, све странке у грађанскоправним односима морају имати једнака права у погледу стицања, уживања и заштите својих права. Примена овог принципа такође подразумева да ниједна од страна у грађанскоправним односима не може имати доминантан положај као ни могућност да наметне своју вољу супротној страни. Аутор такође наводи да се принцип једнакости не може у потпуности применити уколико постоји само формална једнакост страна. Из тог разлога, у савременом грађанском праву су предвиђене мере правне заштите економски слабије стране. Што се тиче залогe као права *in rem*, заложни дужник или хипотекарни дужник се сматра економски слабијом страном којој треба пружити адекватну правну заштиту у односу на хипотекарног повериоца.

У тексту се даље анализира правни положај хипотекарног дужника, позивањем на одредбе Закона о уговору о залози које могу бити повољне или неповољне за хипотекарног дужника, као што су: одредбе које омогућавају да залогa буде проширена на плодове предмета залогe (осим ако није другачије уређено уговором о залози); могућност заложног повериоца да захтева судску продају целог објекта, у случају када је заложен идеални део (удео); недостатак правних лекова у корист хипотекарног дужника у току поступка судске забране, и слично.

Аутор такође анализира заштиту хипотекарног дужника као економски слабије стране у прописима Европске уније, где је потреба за заштитом хипотекарних дужника постала суштинско питање у последњих неколико

година због разорног ефекта економске кризе на хипотекарном тржишту. Као што је наведено у тексту, судска пракса Европског суда правде (а пре свега одлука овог суда у случају Aziz v.Catalunyasaixa C-415/11) показује да је заштита хипотекарног дужника у Европској унији првенствено доступна преко регулативе из области права потрошача (нпр. Директива 93/13/ЕЕЗ о непоштеним одредбама у потрошачким уговорима), мада се приликом одлучивања узимају у обзир и друге заштитне мере.

Кључне речи: хипотекарни поверилац, хипотекарни дужник, македонско законодавство, прописи ЕУ, судска пракса ЕУ.