

- extending the time limit for keeping the position on the rank scale from one to three years;
- expressly restricting the possibility of prescribing privileges only to the tax law regulations and the regulations in the field of enforcement;
- adopting certain, among the above mentioned mechanisms, of facilitating the realisation of mortgage, i.e., introducing departures from the principle of official nature of the process of realisation.

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## THE PLEDGE ON MOVABLES

### *I Introduction*

The issue of security transactions on moveable property in the SFRY was regulated by the Code of Obligations, and the Basis of Ownership Relationships Act. Both these acts were federal statutes, and were applied on the entire territory of the former SFRY. There is a general consent that the Code of Obligations was one of the best legislative texts from this period, drawing largely upon Swiss law. Precisely due to its high quality, after the dissolution of the SFRY, the former republics have continued applying it, with minor amendments. However, with the development of market economy and the need of creating a corresponding legal framework, the necessity of additional regulation became apparent. Croatia and Slovenia have embarked on the reform of property law and law of obligations long before Serbia and Montenegro.

Bearing in mind the decades of common legal tradition, we find that, in addition to the analysis of domestic regulations, it would prove most useful to carry out a comparative analysis of legislation in these two countries. We firmly believe that an overview of the manner in which these states that had the same starting point have developed their legislation shall contribute in assessing the domestic reforms and finding the course it should take in the future.

### *II Croatia*

#### *a. Introduction*

The field of security transactions in Croatia is regulated by the Act on Ownership and Other Property Rights<sup>1</sup> and Enforcement Act.<sup>2</sup> The pledge on airplanes is regulated by the Act on Obligations and Property

<sup>1</sup> Official Gazette, 91/1996.

<sup>2</sup> Official Gazette, 57/1996.

Relations in Air Transport.<sup>3</sup> The manner in which the security transactions are regulated have certain similarities with the existing legislation in Serbia. However, there are also particular differences. The accessory principle, *ex officio* principle and principle of indivisibility have been retained from the joint legal regulation. However, the possibility of non-possessory pledge was introduced long before than in Serbia. Since the Croatia recognises the institute of a public notary, a public notary document has also, on certain conditions, the capacity of a title of execution.

The statute defines that the provisions relating to the pledge will be implemented in a certain manner also on the transfer of ownership for the reason of securing, as well as to every other securing of settlement of claims. A pledge may be a court, statutory or contractual one.

### b. Contractual Pledge

A contractual pledge on an object or right is based on a legal transaction of a pledgor. It is acquired when the object pledged on the basis of a contract is transferred to the possession of a pledgee or of a person he specifies. The pledge on securities is acquired according to the same rules as in domestic legislation.

The provisions envisaging *lex commissoria* are prohibited in the contract on pledge, as well as those where a debtor can never redeem a pledge, or cannot allow anyone else to establish the pledge on the same object. It is also not allowed to envisage that a pledgee cannot require the sale of the pledged object even after the claim became mature. Moreover, the provisions prescribing that the pledgee can, at his will or at the beforehand defined price, dispose of the object of pledge or keep it for himself are null. However, they are not null if the pledged object has a prescribed price.

Croatian statute expressly envisages the possibility of the establishing of several rights of pledge on the same object. In that case, the latter right of pledge shall be acquired by a new pledgee, when the pledgor informs the pledgee in whose possession is the object hereof.

Voluntary pledge on the bearer securities is acquired in the same way as on movables – by handing over, on the order securities by the pledge endorsement and on the registered securities, like on claims, by the cession for the reason of security. On the rights that are established by the inscription into the public books or registers, and for which the securities are not issued, the right of pledge is acquired by the inscription in the book or register, on the basis of an application for the creation of a pledge. The application is submitted by a pledgor with the contract on

pledge enclosed. The priority of pledges is established by the implementation of land-registry rules.

The voluntary pledge on airplanes is regulated by the Act on Obligations and Property Relations in Air Transport and is based on the inscription of a mortgage in the Croatian register of civilian airplanes as an encumbrance on the airplane.

### c. Non-Possessory Pledge

The Croatian statute recognises, as already mentioned, the possibility of non-possessory pledge – according to the definition from the statute<sup>4</sup> the voluntary right of pledge established on an object without that object being handed over to the possession of the pledgee and not entitling the pledgee to keep the pledged object is the mortgage (*hypothec*). The mortgage can be established on movables and rights that can be acquired only by inscription in the public books, or that cannot be used without the inscription into such a book. Special statutory provisions shall be applied to such a mortgage. Moreover, the provisions of the Act on Ownership and Other Property Rights shall also be applied, in a certain manner, if they are not opposite to the special statutory provisions or to the nature of such a mortgage.

The pledge on securities is regulated by the Securities Act. It prescribes that, in case that the issuer of a security ensures its obligation to pay the principal and the interest from the security by pledging the securities, these securities shall be deposited with the central deposit agency for the whole duration of the pledge. The value of the pledged securities must be established by the authorised court assessor, and it cannot be lower than the obligation of issuer deriving from all securities pledged.

The creditor shall realise its right to settle claims secured by pledge through court, according to the rules on enforcement of pecuniary claims. The creditor has also the right to settle his claims out of court from the value of the pledged object, if the pledged object is a movable or right not considered a real estate, and the pledgor has allowed, in the moment of establishing the pledge or afterwards, such settlement expressly, in writing. In commercial contracts, the possibility of out-of-court settlement is presumed, if it is not expressly excluded in the moment of establishing the right of pledge. The out-of-court settlement is realised through the public sale. If the object has a market or stock exchange price, the creditor can sell the object for that price freely. If the object of pledge is money, the pledgee can settle his mature claim by keeping a certain amount for himself. The same applies to the money received from the pledged claim or as interest and other temporary allowances.

<sup>3</sup> Official Gazette, 132/1998.

<sup>4</sup> Article 304 of the Act on Ownership and Other Property Rights.

#### *d. Court Pledge*

In Croatia the court pledge can be compulsory or voluntary. The compulsory pledge is established by the court decision passed in the procedure of compulsory securing of claims, as well as after the inventory of objects in the enforcement procedure.<sup>5</sup> There is also the possibility to create a pledge for securing the claims on the basis of the parties' agreement. The only difference between the domestic and Croatian statute lies in the explicit provision (Croatian statute) envisaging that the public notary document or certified private document having a particular content, replaces the agreement of parties, and that the pledge so established shall be fully governed by the provisions relating to the court pledge. The Act on Obligation and Property Relations in Air Transport envisages the compulsory court pledge on airplane on the basis of a court decision passed in the procedure of compulsory securing of claims. The presumptions for the establishment of such a pledge are those regulating the court procedure of the securing of pecuniary claims. A person acquiring the right of pledge is authorised to require the inscription of that right in the Croatian Register of Civilian Airplanes.

#### *e. Fiduciary Transfer*

The Enforcement Act of the Republic of Croatia recognises also the possibility of court and public notary securing by the transferring of ownership on objects or by transferring rights. Here, in fact, we talk about the fiduciary transfer of ownership right, where the agreement is entered into the court register. The register has the effect of the court settlement. In this way, both pecuniary and non-pecuniary claims (but than the agreement must include the specified pecuniary counter-value of such a claim) can be secured. The ownership on an object or right belonging to a debtor or a third party is transferred.<sup>6</sup> The transfer of ownership on real estates is entered in the land registers. The announcement on the transfer of ownership on real estates that are not entered in the land register and on movables, as well as on the transfer of rights shall be published in the "Narodne novine" (Official Gazette). The announcement shall comprise the designation of the court which publishes the announcement, number of the case, parties, real estates or movables on which the ownership was transferred, i.e. rights transferred, with the notice that the transfer has been performed for the reason of securing claims. The real estates, movables, i.e. rights should be designated in such a way that their identity can be established without difficulties. Therefore, since there is no relevant public book, the Croatian legislator

decided to provide the publicity of fiduciary transfer by the public announcement. This approach has been criticised,<sup>7</sup> because it cannot be equalised with the inscription in the central register, and is, in fact, the breach of the principle of publicity.

As for the effects of such a transfer, the Enforcement Act envisages that a debtor still has right to use the object, while the creditor cannot dispose of the object nor can encumber it. Furthermore, the creditor is obliged to take measures for preserving the claims transferred to him, to collect interests or other subsidiary claims that shall be later compensated with the expenses for which the creditor has the right of refund, with the interests owed to him and with the capital sum. He has also the obligation to collect the transferred claim or to receive its fulfilment. A debtor who fulfils his obligation towards a creditor within the time-limit, is entitled to have the ownership on the object returned to him by a creditor without delay or to have the right retransferred to him again. Moreover, in case of enforcement or bankruptcy against a creditor, a debtor would have secured right on objects and rights that he transferred to a creditor for the reason of securing claims. If a debtor fails to fulfil his obligation towards a creditor within the time-limit, a creditor may, through public notary, require a debtor to inform him, also through public notary, whether he requires that the object on which the right of ownership has been transferred be sold or that the transferred right is cashed through a public notary. On that occasion, the debtor must also define the lowest price at which the object may be sold, i.e. at which the right may be cashed. This lowest price cannot be lower than the amount of the secured claim.

The public notary shall sell the object or cash the claim after he receives the notice by the creditor. If the sale of object or the cashing of claim are not successful, the creditor shall be considered to have become the full owner of the object or right and the secured claim shall be considered settled. However, if the creditor informs the debtor that he does not want to retain the object or right, he is entitled to realise his claim towards the debtor independently of authorisations he has on that grounds. In that regard, he may sell the object or cash the claim independently, through public notary or other (for that) authorised persons. Compulsory pledge shall cease when the ruling abolishing the activities that have been carried out and measures establishing such right become effective. If the settlement has been carried out in the procedure, the compulsory pledge shall cease when the ruling on settlement becomes effective.

<sup>5</sup> Article 135 of the Enforcement Act.

<sup>6</sup> See Article 262, paragraph 1 of this Act.

<sup>7</sup> *Christa Jessel-Holst*, "Reforma prava o obezbeđenju potraživanja na pokretnim stvarima u Jugoistočnoj Evropi", Budimpeštanski simpozijum "Doprinos reformi stvarnog prava u državama jugoistočne Evrope", ["Reform Of the Law on the Securing of Claims on Movables in South-Eastern Europe", Budapest Symposium "Contribution to the Reform of Property Law in the Countries of the South-Eastern Europe"] GTZ, 2003, p. 82-97.

tive. However, a mortgage shall cease only after the deletion from the land registers.

#### *f. Statutory Pledge*

The statutory pledge is regulated in our country by the Act on Obligations. The same situation is in Croatia, since most provisions of the mentioned act have been taken over from former Yugoslav legislation and are still in operation. Statutory pledge is also envisaged in the Act on Obligation and Property Relations in Air Transport.<sup>8</sup>

The pledge on airplanes is entered in the register. Claims secured by the statutory pledge are settled prior to all other rights. Publicity and effects of statutory, as well as court pledge on airplanes are not regulated precisely. Namely, the act envisages that the holder of this type of pledge is authorised to require its inscription in the register. However, it is also prescribed that the statutory and court pledge<sup>9</sup> cannot be confronted with the right of a person who inscribed, with confidence, its right on an airplane in the Croatian register of civil airplanes, in good faith, before the pledge was inscribed. Although the principle of preserving confidence in public books and principle of protection of confident third parties is reasonable, the question is what shall happen if the acquirer of the pledge does not use its authorisation from a particular reason without delay.

Regulations relating to the cessation of the statutory pledge on an airplane are almost identical with those existing in domestic legislation. However, in Croatian law the time limit for the cessation of the right after inscription is extended from 90 days to one year.

### **III Slovenia**

#### *a. Introduction*

In Slovenia, the pledge is regulated by the Property Law Code,<sup>10</sup> as well as by the Obligations Code<sup>11</sup> (statutory pledge). The object of pledge may be objects, rights and securities, if they can be disposed of or if they have market value.

The pledge may emanate from a legal transaction, from a statute or a court decision. For the establishment of the pledge there should be a valid legal transaction, and other conditions envisaged by statute must be fulfilled. *Lex commissorica* is prohibited like in Croatian and Serbian

law. On the other hand, it is allowed to stipulate the price for the sale of the pledged object, but only after the claim becomes mature.

In principle, the pledge includes also the right of pledgee to have the possession of the pledged object. However, the Slovenian statute has a separate chapter containing provisions regulating non-possessory pledge.

Court pledge is established by an effective court decision. Statutory pledge is established when the conditions of the statute are fulfilled. The accessory principle stands for all types of pledge, but there is also the possibility of fiduciary transfer of ownership where the principle should not apply. However, this basic principle is modified in Slovenian legislation, and this shall be explained later in more detail.

#### *b. Contractual Pledge*

The contractual pledge is established by the handing over of the object on which a pledge was established by valid contract on pledge. The object can be handed over to a creditor or to a third party he designates.

The *ex officio* principle is also applied to pledge, i.e. if the debtor does not fulfil the secured claim after it becomes mature, the creditor is entitled to require of court to sell the pledged object, according to the rules of the statute regulating the enforcement. However, the creditor may also have the right to the out-of-court sale, if there is a written contract on the out-of-court sale. In case that the secured claim is from the commercial contract, the existence of the contract on out-of-court sale for the pledged object shall be presumed. Therefore, if the debtor does not fulfil the claim after it becomes mature, the pledgee is entitled to sell the pledged object on public sale or according to the existing market or exchange price. The sale may be performed eight days after the informing of the debtor, or pledgor, if it is not the same person, about the fact that the pledged object shall be sold. The creditor must inform them about the date and the place of the sale.

The pledge shall cease when the pledgee willingly return the pledged object to the possession of the pledgor.

#### *c. Non-Possessory Pledge*

The non-possessory pledge in Slovenian law is established by an agreement, in the format of a directly executable public notary record. The record must contain data on a pledgee, pledgor and owner of the pledged object (if these two differ), than the identification number of the movable or indicators on the basis of which the object can be identified. The public notary record is the title of execution, and in enforcement

<sup>8</sup> See Article 157 of this Act.

<sup>9</sup> Articles 153, paragraph 1 and 158, paragraph 2.

<sup>10</sup> Official Gazette, No. 87/2002, October 17<sup>th</sup>, 2002 (page 9559)

<sup>11</sup> Official Gazette, No. 83/2001.

procedure it has the effect of the seizure of a movable.<sup>12</sup> This solution was criticised in the professional literature.<sup>13</sup> However, it was explained that, since no constitutive inscription in the corresponding registers exist, there is still a need to prescribe the legal way of acquiring of non-possessory pledge.<sup>14</sup>

If the debtor fails to fulfil the secured claim within the time limit, the pledgee is entitled to the possession of the pledged object. The pledge is established in the moment of the handing over of the pledged object, where the existence of a contract on out-of-court sale shall be presumed.

The Slovenian act also envisages the establishment of the register of non-possessory pledges for the unified identification of the movables. In that case, the provisions of the Property Law Code regulating mortgage shall be applied on the non-possessory pledge. However, the problem is the fact that, actually, the keeping of two records is foreseen – the non-possessory pledge register and records in which the movables are inscribed – that seems to be an expensive and impracticable solution.<sup>15</sup>

The establishment of the pledge on rights is, in Slovenian legislation, regulated in the similar manner as in the Serbian and Montenegrin legislation. The same applies to the pledging of securities, where the Slovenian law envisages also the possibility of the issuing of dematerialised securities, the pledging of which is regulated by a separate statute.

### c. Fiduciary Transfer of Ownership

The fiduciary transfer of ownership is also regulated by the Property Law Code,<sup>16</sup> and the main characteristic of this legal solution is the fact that it relates only to the movables. This right is established by the agreement of parties in the form of executive public notary record. The presumption that the creditor (fiduciary) acquired ownership on resolutive condition of paying secured claim is introduced in the paragraph 2 of Article 201. Hence, the ownership is automatically returned to the debtor in the moment he fulfils the secured claim.<sup>17</sup>

<sup>12</sup> Article 171, paragraph 3.

<sup>13</sup> *Melika Povlakič*, "Stvarnopravna sredstva osiguranja na pokretnim stvarima u zemljama nasljednicama bivše SFRJ", Budimpeštanski simpozijum "Doprinos reformi stvarnog prava u državama jugoistočne Evrope" ["Property Law Security Instruments on Movables in Former SFRY Countries", Budapest Symposium "Contribution to the Reform of Property Law in the Countries of South-Eastern Europe"], GTZ, 2003, p. 220-245.

<sup>14</sup> *M. Povlakič*, *op.cit.*, p. 226.

<sup>15</sup> *Ibid.*

<sup>16</sup> Articles 201-209.

<sup>17</sup> *Renato Vrenčur*, "Fiducijarni prenos vlasničkog prava u osiguranje na pokretnim stvarima u novom slovenačkom pravu", Budimpeštanski simpozijum "Doprinos reformi stvarnog prava u državama jugoistočne Evrope" ["Fiduciary Transfer of Ownership Right in the Security on Movables in New Slovenian Law", Budapest Symposium "Contribution to the Reform of Property Law in the Countries of South-Eastern Europe"], GTZ, 2003, p. 291-296.

The most obvious issue in this rule is the deviation from the non-accessory principle of fiduciary transfer, because, the agreement on the transfer of ownership must also include the secured claim amount and due date. This would practically mean that the object, on which the ownership has been transferred by fiduciary transfer, could not be the security instrument for future and conditional claims between the same creditor and debtor.

However, the same statute foresees the possibility that when it is not necessary for the agreement on fiduciary transfer to contain also the amount and due date, and thus, the transfer is not accessory – those will be the situations where the parties have agreed so! Because, if the parties have not agreed otherwise, the resolutive condition shall be presumed – for example, the transfer of ownership is performed on suspensive condition of non-paying the claim or without any condition.<sup>18</sup>

Important characteristic of the Slovenian Property Law Code is the fact that it allows the stores to be the object of the fiduciary transfer, where the principle of speciality is departed from.<sup>19</sup> The stores are established in relation to a precisely defined place.

The Property Law Code regulates also the issue of settlement of the secured creditor. If the debtor fails to fulfil his due obligation, the transferor must hand over the movable in the direct possession of the fiduciary. The fiduciary is entitled to keep the object with himself according to the adequate price, or he can sell it in the manner envisaged in the agreement on fiduciary transfer. The fiduciary must give the surplus remained after the settlement of the claim to the transferor. The provisions on non-possessory pledge shall be applied if the parties do not envisage anything.

Articles 205 and 206 of the Property Law Code envisage that the fiduciary debtor and the fiduciary creditor can agree that, in the case of insolvency of the fiduciary or the debtor, other creditors cannot settle their claims in enforcement and bankruptcy procedures from the object on which the ownership was transferred. Fiduciary creditor, or fiduciary debtor, however, have a secured right only if there is an agreement between them thereon. This solution was also criticised,<sup>20</sup> since the one important issue of bankruptcy law (composition of the bankruptcy estate) can be amended by the agreement of the fiduciary and the debtor.

The Property Law Code also recognises the possibility of fiduciary cession as type of ceding claims. If it is not agreed otherwise, it shall be considered that the acquirer obtained the claim on resolutive condition of the paying of secured claim. The provisions on the cession of claims shall be applied to the fiduciary cession accordingly. If the secured

<sup>18</sup> *Renato Vrenčur*, *op.cit.*, p. 294.

<sup>19</sup> Article 173 of the Property Law Code. The same applies to the non-possessory pledge.

<sup>20</sup> *M. Povlakič*, *op.cit.*, p. 236. Contrary: *Renato Vrenčur*, *op.cit.*, p. 296.

claim is not fulfilled on due date, the creditor is entitled to settle himself from the ceded claim. In case of insolvency of the assignor or assignee, the mentioned provisions of Articles 205 and 206 of the Property Law Code shall apply.

#### *e. Statutory Pledge*

The statutory pledge in Slovenian law is mostly regulated by the Code of Obligations.<sup>21</sup> This act envisages the pledge of a warehouseman, mandatory, carrier, commission agent, contractor, agent, dispatching agent, controller, thus it is regulated in the same manner as in domestic Code of Obligations.

### *IV Serbia and Montenegro*

In the law of the **Republic of Serbia**, depending on type, the pledge on movables is regulated in several statutes. The contractual pledge is regulated by the Code of Obligations (hereinafter: CO). This Code regulates the contractual pledge where the object is transferred into the possession (classical *pignus*). The Act on Pledge on Movables Entered in the Register<sup>22</sup> passed on May 30<sup>th</sup>, 2003 regulates the contractual pledge without the handing over of movables into the possession and pledging of rights for the reason of securing claims. Statutory pledge is regulated by the Enforcement Act (hereinafter: EA) and the Tax Procedure and Tax Administration Act, while court pledge is envisaged by the EA.

#### *a. Pledging of Movables*

##### 1. CONTRACTUAL PLEDGE WITH HANDING OVER PROPERTY IN POSSESSION

Pledging of movables is regulated in the CO in articles 966 to 988. The pledgor is obliged to hand over the object to the pledgee or a third party who is obliged to keep the object with the care of a good householder. The right of pledge terminates by loss of possession or by cessation of claim.

Thus, according to the CO pledge is characterised by two features:

- possession of the pledged object is not in the hands of the pledgor but with the pledgee or a third party,
- *ex officio* principle in realisation of the right of settlement.

In this respect, the CO also envisages two exceptions from the *ex officio* principle that are contained in articles 98 and 1071.

<sup>21</sup> Official Gazette, 83/2001.

<sup>22</sup> RS Official Herald, No. 57/2003.

According to Article 981 of the CO, the creditor can, without applying to the court, in the case of commercial contracts, proceed to sell the pledged objects on the public sale, upon expiry of eight days from the warning to the debtor as well as the pledgor if those are not same persons. If the pledged objects have market or stock exchange price, the creditor can sell them for that price.

Article 1071 of the CO provides that a bank can sell the pledged securities if the credit user does not return the received credit when due.

##### 2. NON – POSSESSORY CONTRACTUAL PLEDGE

The Act on Right of Pledge on Movables Entered into Register introduces non-possessory pledge in law of the Republic of Serbia. This Act provides the existence of the Register of Pledges where movables and pledged rights are entered. If the pledgor has no right of ownership on the pledged object or the pledge is for some other reason not valid, the entry into the Register is without legal effect. The entry itself could be requested by the debtor and the creditor but if the creditor requests it, the express statement of the pledgor's consent has to be obtained (alike *clausula intabulandi* in land-registry law). The creditor whose right of pledge is entered into the Register has the right of priority payment out of the value of the subject of the right of pledge. In addition to the movables, the subject of right of pledge could also be the creditors claim towards the debtor and in the case that the creditor pledgee is the debtor of the pledgor, except claims which transfer is prohibited by statute and those which are connected to personality or could not be transferred to another. Pledge of intellectual property rights is also the subject-matter of this Act. The pledge on those rights is entered into the Register with the Directorate competent for intellectual property.

The provisions of this Act do not apply to ships and airplanes for which there are separate registers, nor to the securities as separate register is established for them by The Market of Securities and other Financial Instruments Act.

It is a characteristic of this Act that the pledgor keeps the possession on the subject of the right of pledge after the entry of the right of pledge into the Register. If he fails to fulfil the obligation towards the pledgee when due he loses the right to possession. In such way the pledgor can continue to use the pledged object and by the use of that object earn the means to repay the debt to the pledgee.

If the pledged object gives fruits, the pledgor collects them if it is not otherwise provided in the contract on pledge. He could also lease (rent) the subject of the right of pledge and conclude other contacts that give the subject of the right of pledge to third parties for use and collection of fruits.

According to Article 23 of the Act, the pledgor can dispose of the pledged object and transfer the right of ownership to a third party. Upon such transfer he is under the obligation to submit the application for entry of the right of pledge into the Register of Pledges without delay and to the burden of the new owner. The acquiring party acquires the right of ownership encumbered by the entered right of pledge. However, if the pledgor is selling the subject of the right of pledge in the course of his regular business, the buyer acquires the right of ownership without encumbrance.

The Act envisages that the use of the subject of the right of pledge can be limited.

According to this Act, it is permitted to envisage in contract on pledge the authority of the pledgee to sell the subject of the right of pledge himself on the public sale if his claim is not paid when due and the pledgor is commercial subject.<sup>23</sup>

If it is the matter of a natural person who concludes the contract on pledge outside the commercial activity, the contract on pledge cannot provide that the subject of the right of pledge can be transferred into the ownership of the pledgee or that the pledgee can sell it for the prior determined price or keep it for himself (prohibition of *lex commisoriam*). The prohibition of *lex commisoriam* ceases to have effect from the moment when the secured claim becomes due, in other words from that moment the agreement between the pledgor and pledgee that the subject of pledge is transferred into the ownership of the pledgee or that he could sell it for determined price or keep it for himself for that price produces effect. Contract on pledge can also provide that the registered non-possessory pledge becomes classical pledge from the moment when the payment is due, in other words the property is transferred into the possession of the pledgee.

The order of priority of different rights of pledge is regulated in accordance with the principle first in time stronger in law (*prior tempore potior jure*), with several concrete provisions:

- if the entry into the Register of pledges precedes the handing over into possession, the entered right of pledge enjoys priority;
- if the property is handed over to one creditor in possession, and thereupon the right of pledge is entered into the Register of Pledges in favour of another creditor, the creditor who holds the property in possession enjoys the right of priority, but only if it is based on the contract on pledge concluded in a written form and certified by court or other authority.

<sup>23</sup> Commercial subjects are enterprise, company, holder of small business and other natural person who conducts business activities as his occupation

Statutory right of pledge of the carrier, the warehouseman, the commission agent and the dispatching agent have the priority in relation to the right of pledge entered into the Register of pledge. The same applies to the statutory right of pledge of the party to the contract of service in relation to his claim of wages (award) for his work, the payment for the material used and other claims in relation to his work arising out of the contract of service.

If the debtor fails to fulfil his obligation when due, the pledgee acquires the right of possession on the basis of statute itself. He may settle his claim, the interest and costs of realisation from the value received by the sale of the object. He is under the obligation to notify in the recorded delivery letter both the debtor and the pledgor, when those are not same persons, or a third person having the possession of the object, about the intention to be paid up form the value of the subject of the right of pledge. The pledgee has the obligation to request that the fact that the payment procedure has started is entered into the Register of Pledges.

If the pledgor does not voluntarily perform the obligation of handing over the subject of the right of pledge into possession of the pledgee, the creditor can submit the request in court asking the court to rule on taking the object from the debtor and handing over of that object to the pledgee. If the nature of the subject of the right of pledge is such that it is not suitable for transfer into possession, the court, on the proposal of the pledgee, determines the administrator who will take care of the object until the moment when the claim is settled.

The pledgee can, upon the completion of entry on the start of the settlement in the Register of Pledges, request that the court reaches the decision that the subject of the right of pledge is sold at public sale or for its current price when the object has the market or the stock exchange price. He can commence out-of-court sale after 30 days from the entry of the start of the settlement into the Register. If it is so provided in the contract on pledge, the pledgee can sell the subject of the right of pledge for the market or the stock exchange price.

*Bona fide* purchaser of the subject of the right of pledge on court or out-of-court public sale, acquires right of ownership without encumbrance.

The creditors right of pledge ceases upon the termination of the secured claim, payment of debt or in any other way not connected to the termination of the secured claim by a) the destruction of the subject of the right of pledge; b) on the basis of the public sale or other sale of the subject of the right of pledge; c) renunciation of the pledgee of the right of pledge which has to be made in written form d) consolidation. In such cases the right of pledge terminates upon erasing from the Register.

The Register of Pledges is the unified, public electronic data base. Local units of the Register are formed on the territory of Republic of Serbia.

It is considered that third parties are given notice of the existence of the right of pledge on the basis of the entry into the Register of Pledges.

### 3. STATUTORY PLEDGE

Statutory pledge is envisaged in the CO in individual types of named contracts when the contracting parties secure their claims from such contracts. It is the matter of the following contractual parties:

1. *The party to the contract of service (performer of service)*, who according to Article 628 of the CO has the right of pledge on the movables that he made or repaired, as on the other objects handed over to him by the ordering party in relation to his work, while he has possession of it and does not cease to voluntarily possess it for the securing of payment of claim of the wages for his work and the reimbursement for the material used as well as other claims on the basis of the contract of service;
2. *The carrier* who according to Article 679 of the CO has the right of pledge on objects handed over to him for transport and in relation to the transport, while he possesses it or has in hand the document authorising him to dispose of it, for securing the payment of transport fee and necessary expenses made in relation to transport.
3. *The warehouseman* who according to Article 736 for securing his claims from the contract of storage of goods and other claims that arise in relation to keeping of goods has the right of pledge on those goods.
4. *The agent* who according to Article 763 of the CO for the securing of the agency fee and expenses has the right of security on principal's movables that he receives on the basis of the agency instruction and on the pecuniary amounts that he realised for the account of the principal.
5. *The commission agent* who according to Article 786 of the CO has the right of pledge on the objects which are the subject of the contract of commission while those objects are in his keeping or in the keeping of a person who holds them for him or while he holds the document that authorises him to dispose of them.
6. *The commercial representative (agent)* who according to Article 809 of the CO, for securing the due payment of his claims arising in relation to contract, has the right of pledge on the amount that he received for the principle, according to his authorisation, as well as on all the principle's objects which in relation to the contract he received from the principal or from someone else, while he holds

them or while other person holds them for him or while he holds the document that enables him to dispose of it.

7. *The dispatching agent* who according to Article 846 of the CO has the right of pledge on objects handed over for dispatching and in relation to dispatching while he possesses them or has in hands document that enables him to dispose of them, for securing the payment of his claims that arise in relation to the contract of dispatching.
8. *The controller* who according to Article 853 of the CO for securing the contractual or usual fee and payment of necessary and useful expenses has the right of pledge on goods handed to him for control.

In addition to the above mentioned, the Tax Procedure and Tax Administration Act,<sup>24</sup> in Article 74 envisages as the means of securing the payment of the tax debt, among others, the pledge on the movables of the tax payer. Article 86 of the same Act regulates the procedure of enforced payment of the tax on objects and property rights of the tax payer where the statutory right of pledge is established in favour of the tax creditor, in this case the Republic.

### 4. COURT PLEDGE ON MOVABLES

Court pledge on movables is regulated by the Enforcement Procedure Act. The enforcement on movables is conducted by the inventory and evaluation of property, sale of property and payment of creditor from the amount received by sale. By inventory the creditor acquires the right of pledge on property subject to inventory.

#### b. Pledge of Securities

Securities are movables specific in their nature as they consist of the right on securities and the right from securities. According to the nature of rights incorporated in them, they could be divided to proprietary, obligation and securities with the right of participation. According to the determination of the legal holder they are divided to securities in name, securities by order and securities on bearer.

In pledging of proprietary securities the direct possession of property is usually in hands of a third party, and the owner is legitimised by the proprietary security. The CO in different way regulates the transfer of those securities depending in whose name are the securities. Article 241 of the CO envisages that the transfer of the right from the securities on bearer is performed by the plain handing over. It is envisaged in Article 242 of the CO that the right from the securities in name is transferred by assignment (cession) or exceptionally by endorsement with registration of the transfer if the issuer of securities keeps the register of the is-

<sup>24</sup> "RS Official Herald" No 80/2002, 84/2002, 23/2003, 70/2003.



sued securities. Article 243 of the CO regulates the transfer of securities by order. Precisely, the right from securities by order is transferred by endorsement.

The CO separately regulates the transfer of securities in the case of pledge (Article 245) where holder to whom securities are transferred cannot transfer the securities further on. Such general rules on pledging proprietary securities apply for typical property law securities (bill of lading, transferable waybill) except warehouse warrant the pledging of whose is specifically regulated. Thus, warehouse warrant consists of receipt and receipt of pledge. Receipt is the ownership part of warehouse warrant. The holder of the receipt without the receipt of pledge can request the handing over of goods only if he pays the holder of receipt of pledge (or lay down to the warehouse holder for the holder of receipt of pledge) the amount of claim secured by pledge or can request that the goods are sold so the creditor pledgee is paid out of that amount and the remaining part is paid to him. The holder of the receipt of pledge has the right of pledge on the goods which he acquires on the first transfer of warehouse warrant. In order to have his claim paid (settled) the holder of the receipt of pledge has to raise a protest according to the legal regulation on draft (bill) law, and if he so proceeds he can also request within the time limit of eight days the sale of pledged goods. He can demand payment from the transferor (predecessor) if he cannot be paid from the value of pledged goods (subsidiary claim).

With regard to obligation securities, the rights incorporated in them are pledged, which are claims. The right of pledge in the case of those securities is acquired upon delivery (in the case of securities on bearer) or by pledge endorsement (regarding securities by order). Otherwise, the CO separately regulates securing of claims and other rights, including pledge of claims contained in securities as well as assignment (cession) for the reason of security provided in Article 445.

With respect to securities with rights of participation the most interesting is the pledging of shares. In our country the practice is not rich in cases of pledging of shares. Shares are securities which can be made out on bearer or in name. In that sense, the provision of the CO on securities can also apply to them if it is not otherwise provided in a special regulation.<sup>25</sup>

The rules of business of the Central Registry, depot and clearing of securities<sup>26</sup> introduced the pledge account into law of Republic of Ser-

<sup>25</sup> See further Miloš Živković, "O reformi realnih obezbeđenja u jugoslovenskom pravu", Budimpeštanski simpozijum "Doprinos reformi stvarnog prava u državama jugoistočne Evrope", ["On the Reform of Real Collateral in Yugoslav Law", Budapest Symposium "Contribution to the Reform of Property Law in the Countries of South-Eastern Europe"], GTZ, 2003, page 315 and 316.

<sup>26</sup> "RS Official Herald" No. 128/2003.

bia, as a special sub-account of the ownership account of securities where all securities with the subscribed right of pledge are recorded. The right of pledge is constituted by the registering of that right on the ownership account. By entry of the right of third parties on the securities, the position of such securities on the pledge account is blocked and they can be transferred only in accordance with the statutory rules and only while the obligation from the main contract still subsists. If the legal owner of securities fails to perform his obligations from the main contract within the time limit provided in the contract, the pledgee has the right, within the time limit of eight days from the warning made to the debtor or the pledgor, when those are different persons, to commence the procedure for the sale of the pledged securities.

In Montenegro, the right of pledge on movables is regulated in the Pledge as Means of Securing Claims Act<sup>27</sup> which entered into force on 1 January 2003. This act regulates the unified system of contractual pledge on movables in Republic of Montenegro. The implementation of the act is excluded:

- in transfer of claims on the grounds of wages from the employment relationship of the employed;
- in sale of claims on accounts as a part of the sale contract or other transaction (expression of will) from which they arise;
- in right of security on real property (mortgage), excluding real property according to purpose.

Article 2 of the Act contains the definitions of the terms used. Article 3 considers the question of the subject of pledge. The subject of pledge can be all movables in turnover, minerals and raw materials as well as the rights to their exploitation, uncut trees, uncollected fruits and unborn animals, future property, inventory, fixtures, contract of leasing where the seller lessor is the owner of the subject of leasing and gives the property in leasing to the buyer-user, as well as the contract where the seller of movables transfers the right of ownership to the buyer but makes it conditional upon the buyers payment to the seller of the considerable part or total sale price is considered as pledge on the subject of sale.

According to Article 4 of the Act, the claim secured by pledge can be determined or determinable. It is possible to secure a future claim. Contractual pledge secures the entire amount of the secured claim.

Contractual pledge is created when contract on pledge is concluded. Pledge that does not arise on the basis of contract is constituted in the moment of creation or in the manner prescribed by special statute and is perfected in the manner prescribed in this Act.

<sup>27</sup> "Official Journal of the Republic of Montenegro", No. 38/2002.

The contract on pledge is concluded in written form. The essential elements of the contract are the following: details of contractual parties (and the debtor in contract if that person is not the pledgor), subject of pledge, signature of the pledgor and the pledgee or signatures on their behalf.

Article 7 envisages the accessory principle of the contractual pledge and burden of proof of its creation bears the pledgee.

In Article 8 the Act provides possessory pledge that is perfected by entry into possession and the non-possessory pledge where, even after the creation of the contractual pledge, the pledgor has the right of possession, use and all other rights on pledged object. However, the pledgor cannot sell, lease or in other way dispose of the pledged object.

Non-possessory pledge is perfected by entry into the register.

Article 9 of the Act is dedicated to the hierarchy of the rights of pledge. In contractual pledges on the same property the priority is given to the first perfected pledge in relation to other perfected pledges. Each succeeding contractual pledge on the same object is ranked according to the chronology of the dates of perfecting. Unperfected pledges rank after all perfected pledges, according to chronology determined in relation to time of their constitution on the subject of pledge. Non-contractual pledges rank according to the moment of formation and also can be privileged. The Act separately envisages cases where pledge perfected by possession is always of the highest rank. Article 9 also regulates priority regarding real estates according to purpose and in relation to securities and especially bills (drafts) while it also contains the provisions of possibility of altering of order by consent.

Article 11 addresses pledge of claims. In relation to pledge of claims the written notice to the debtor is obligatory. Contractual pledge (application) of pledge can be perfected only through the registration of the entrance

A person acquires the right of ownership on the pledged object encumbered by pledge if it is not otherwise provided in this Act. Exceptionally from the previously mentioned, a person acquires the right on pledged object and not encumbered by pledge when the property is acquired in the course of the usual business activity of the pledgor, if the pledgees agree for the pledge to terminate or if the subject of the pledge is share, instrument of debt (obligation securities) or cash.

In order that pledge is perfected, the application of pledge has to be registered. The registering is considered performed by delivering the application of pledge to the register. It is possible to supplement the application and register non-contractual pledge.

Application of pledge is valid three years from the date of registration. Upon expiry of registration contractual pledge becomes unperfected, unless it has not become perfected through transfer of the

subject of pledge to the possession of the pledgee. There is a possibility of extension of registration for period of further three years.

Article 18 regulates the cessation of contractual pledge. The registered pledge terminates when the pledgee notifies the termination. The pledgee who fails to register the notice of termination is liable to the pledgor for the damage which arises as the consequence of such omission. Contractual pledge terminates consensually, when claim ceases, when the subject of pledge is released.

The Government of Republic of Serbia establishes the register that is accessible to public.

Articles 20 and 21 are considering the non-fulfilment of obligation and enforcement.

#### IV Conclusions and Recommendations

On the basis of the previous analysis we can reach the conclusion that the contractual right of pledge on movables (except ships and airplanes) is regulated in law of Serbia in several legal acts, thus contributing to a lesser degree of coherency in regulation of this matter. For the sake of an example this is shown in regulation of the order of priority of possessory and non-possessory pledge in the 2003 Registered Pledge Act which is not entirely clear and precise. Moreover, this is because we can say in general that the editors of the 2003 Act have been exceptionally careful in aspiration that, to the greatest possible extent, they adhere to the ways in which pledge is regulated in the CO.

When we consider court and statutory pledge we could say that they are regulated in an appropriate way, so the only remaining question is the extent of the privilege of the tax claims of the state.

The right of pledge on movables ought to be regulated in one place as only this would ensure coherency of legal regulation and guarantee the correct implementation of those, otherwise complex, provisions of law. The starting point ought to be the regulation of the CO which should be left to regulate the matter of contract on pledge, while all the remaining and especially the creation, legal effects and termination of the right of pledge and with it related questions ought to be regulated in a code of property law. In addition to the mentioned increase of coherency of the provisions on movable pledge, the main aims that ought to be attained by the new regulation are improvement of technical level and applicability of norms and as the most important a greater degree of practical operational application. It is recommendable to consider the alternatives to registered pledge, alike fiduciary transfer of right of ownership for security (which is not recognized in current court practice in Serbia through invocation of the prohibition of *lex commissoria*). This is espe-

cially so bearing in mind that Register of Pledges which according to the 2003 Act had to be established and operative starting from 1 January 2004 is still not functioning (end of February 2004). Indolent attitude of the state authorities in implementation of their own provisions can have for a consequence the adoption of those models on non-possessory security, which are possible without the involvement of the state, for the sake of example fiduciary transfer of ownership for security, although they are legally less perfect (as they provide a lower level of legal certainty). Regarding this matter the experiences of the states in the region and especially the states of former SFRY ought to be taken into consideration.

## ROUND TABLE

This study was presented at the Round Table under the title "The Situation of Property Law in Serbia", organised by the Institute of Comparative Law from Belgrade with the support of the German Organisation for Technical Cooperation (GTZ), held on January 26<sup>th</sup>, 2005 in the premises of Aeroclub in Belgrade. The aim of the meeting was to present the attitudes of the authors of the Study and to exchange opinions on the direction of legislation reforms in the field of property law in Serbia.

The Round Table was attended by about sixty lawyers dealing with this topic, among which there were numerous judges from municipal and district courts from Serbia, as well as from the Supreme Court of Serbia.

The introductory speech at this meeting was given by dr Thomas Meyer, Chief of the GTZ Office for Legal Reform. The participants were also addressed by Mr Folkert Milch, Senior coordinator for judicial and legal reform in the OSCE Mission to Serbia and Montenegro, while dr Jovan Ćirić, Deputy director of the Institute of Comparative Law was the moderator of the discussion.

First part of the Round Table included presentation of papers comprising this Study.

Professor Vodinelić introduced his paper *Codification of Property Law in Serbia*, as well as paper having the topic *Possession and Detention*. Ph. D Jasna Pak presented her article *Neighbouring Rights*, and dr Ivanka Spasić hers under the title *Condominium*. Contribution of Mr Saša Gajin, MA, having the title *Article 1 Protocol 1 with the European Convention on Human Rights (Standards of Protection of Property Interests)*, could not have been, unfortunately, in whole part, orally presented, due to the fact that the author could not have participated at the meeting. However, the main consequences arising out of the European standards which are significant for the work on codification were emphasised. Mr Miloš Živković, LL.M presented his three papers: *Acquisition of Right of Property (With Special Emphasis on Immovable Property)*, *Real Estate Registers* and *Mortgage and Lien on Land*. Finally, at the very end, Ms Vesna Živković and Ms Ana Knežević presented their paper *Pledge on Movable*.

Second part of the Round table was dedicated to the discussion of participants. Special attention was given to the issue of calculation of time-limit for adverse possession on objects in social ownership. Present judges shared their experiences on the fact how this topic is being solved in practice, having in mind that it was not explicitly regulated by the Amendments to the Act on the Basis of Ownership Relationships of 1996. Prevailing stand of judges is that the time-limit for adverse pos-