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LEGAL ASPECTS OF PLEDGING THE MOVABLE ASSETS

Abstract

Since the property liability of the debtor, as a rule, does not make the legal position of the creditor sufficiently secure, this increasingly creates the need to make this position more favourable. In this paper, we will refer to the right of pledge on movable assets as a means of securing the creditor's claim. The collateral function is realized, through psychological and property, i.e. legal aspect. We believe that the existence of a pledge right exerts psychological pressure on the debtor. The debtor is aware of the fact that the debtor or another person will lose ownership of the asset or some other property if he does not fulfil its obligation. Therefore, the debtor, as a rule, approaches the fulfilment of the obligation with a greater degree of responsibility and conscientiousness than he would do if there were no such collateral. In the further presentation, the focus will be on the legal aspect, i.e. the legal effects produced by the constitution of a pledge on the movable assets. We shall analyse the features of manual pledge and registered pledge, as special forms of the pledge in positive law.

Key words: *movable assets, pawn, registered pledge.*

1. General characteristics, legal nature and principles of pledge

A pledge right can be defined as a property right on someone else's asset, which authorizes the owner to, if his claim is not settled by maturity, settle it as a priority from the value of the pledged asset, regardless of where the asset is located. The holder of this right is the pledge creditor, i.e. the person who has a certain claim whose fulfilment the pledge right ensures. Hence, the basic feature of the pledge right: accessory - dependence on another, the obligation right. As the primary purpose of the pledge right is to secure the obligation that pledge

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right is affirmed as a mean constituted, above all, in the interest of the creditor from the obligation relationship. The statement is certainly indisputable and arises from the legal nature of the pledge. First of all, if the debtor, despite the additional collateral, does not fulfil his obligation upon maturity, the pledge creditor has the right to capitalize the subject of the pledge, and the right to settle the received amount as a priority. However, seen from the perspective of the debtor, the pledge right does not have to be viewed as a burden, i.e. a means of pressure. The possibility of constituting a pledge right increases the creditworthiness of a person, which contributes to a more adequate economic usability of its property.[3]

There is no single position on the legal nature of pledge right in doctrine and legislative practice. Attitudes that emphasize the property right character prevail.[4] First of all, property right acts *erga omnes*, and for its object it has an asset, a right on assets (*ius in rem*). On the contrary, the obligations act between certain persons, and is directed to a certain act. Further, the pledge right is provided with the right of succession, it is opposable. Also, the survival of the right does not affect to whom the object of pledge belongs. The right of the pledge creditor to settle is not affected by who is the owner of the pledged asset. Every person with whom the asset is located is obliged to suffer the stated right to settle the pledge. The pledge creditor, as the titleholder, may by exercising his powers within the limits of legal norms, exclude all persons from using the asset. Therefore, we can conclude that the pledge right is directed to the asset itself. It is, from the aspect of legal and factual authority, depersonalized on assets, considering that it follows the asset regardless of in whose ownership the asset is, or in whose possession the asset is. Attitudes that start from the obligatory nature of the pledge right are especially evident in the institution of pledge of claims. These attitudes start from the fact that the subject of the pledge right is a claim, and thus determines its obligatory nature. The starting point is that by constituting a pledge, a legal construction similar to a cession is created.

Undoubtedly, there is no perfect collateral, because the claim in its nature always hides a certain dose of uncertainty and cannot exist without the risk. By agreeing on collateral, the pledge creditor only raises the limit of the probability that the claim will be settled.[5] The predominant function of the pledge right is to secure a claim from the obligation relationship, and therefore this right cannot arise if there is no claim - *the principle of accessory*. There are many definitions of accessory in legal theory. We consider the most complete

[3] See more: Stošić, S. (2017), *Обезбеђење потраживања заснивањем заложног права на непокретности – докторска дисертација,* 29.

[4] This position is expressed in most European civil codifications: Austrian Civil Code, German Civil Code, Serbian Civil Code, etc.

[5] D. Medić (2013), "*Право обезбјеђења потраживања*", Banja Luka, 7.

definition according to which accessory represents the direct and law-based dependence of one right, which is called accessory or dependent, on another right, which is called the main right, where the goal of accessory law is the realization of the main right goal.[6] As the right of pledge follows the fate of the secured obligation, hence its existence depends on the validity of the obligation it secures. The non-independence of the pledge conditions a certain "connection" with the claim and certain consequences in the phase of occurrence, duration, transfer, realization and termination of the pledge.[7] The principle of accessory suffers from certain exceptions - the constitution of a pledge right to secure a future, conditional and obsolete claim, and the securing the ancillary collection costs, and the disposal of an unwritten mortgage. In the case of securing a future and conditional claim, there is no claim that is secured at the time of the creation of the pledge.[8] The statute of limitations of the claim produces certain consequences on the pledge relationship, it represents a sanction for the pledge creditor who failed to demand the settlement of his claim before the statute of limitations occurs. In that sense: "when the statute of limitations expires, the pledge creditor whose claim is secured by a pledge or mortgage can be settled only from the encumbered asset, if he holds it in his hands or if his right is registered in the public registry. However, obsolete claims for interest and other occasional benefits cannot be settled even from the encumbered asset. "[9]

In accordance with *the principle of formality*, a pledge creditor can settle from the value of the pledged asset only through the proceeding of the public sale. Its essence is to eliminate the possibility of arbitrariness in the approach to the realization of the pledge rights. By consistently applying the principle of formality, the commission clause (*lex commissoria*) is prohibited. This is a provision which would stipulate that the pledge creditor will become the owner of the pledged asset if the debtor does not settle the debt on maturity, i.e. the clause that in that case the creditor will be able to sell the asset that is the subject of the pledge or keep it for himself (*pactuum marcianum*).[10]

The *principle of specialty* is the heritage of modern law; it is manifested through the definiteness of claims, on the one hand, and the definiteness of the pledged asset, on the other hand. In that sense, the pledge right can secure the pledge creditor's claim, which is precisely determined. A pledge right can arise on a specific asset or right, not on all assets or the rights of the pledger. The

[6] M. Živković, (2015), "*Обезбеђење и учвршћивање потраживања*", Beograd, 47.

[7] M. Lazić (2009), "*Права реалног обезбеђења*", Niš, 57.

[8] See more: S. Stošić (2017), 35.

[9] Law on contracts and torts, *Official gazette SFRJ,* no. 29/78, 31/93, *Off. Gazette RS, no.* 17/93 and 3/96 (hereinafter referred to: "**LCT**"), art. 368.

[10] See. art. 973 LCT.

essence of the pledge right is in the exclusion of the pledged asset from the fate of the remaining property of the debtor.[11]

Finally, a pledge right is indivisible: in respect of a claim secured by a pledge (the pledge secures the entire claim); in respect of the pledged asset (the whole pledged asset secures the claim).[12] Therefore, when the debtor partially fulfils the debt, the pledge right still exists, until the payment of the debt - in full. The stated rule applies, regardless of whether the subject of the pledge is a divisible or indivisible asset or several assets. Pledge right on movable assets and rights.

2. Pawn

The basic characteristic of pledging movable assets, i.e. pawn (*pignus*), is the handing over of assets into the possession of the to the pledge creditor - the pledgee. He is always the creditor of the claim that is secured by the pledge. The pledger does not have exclusive possession on the handed over asset. The pledger is usually the debtor of the secured claim. However, a third party may also appear in that role, outside the obligatory relationship, when he pledges his own asset in order to secure someone else's debt.

The Law on contracts and torts sets a wide range of possible pledge objects. These are all those movable assets on which there is a right of ownership.[13] The object of a pawn can be anything, which has property values and which allows permanent storage without danger to the existence of the asset.[14] In addition, the asset must be in circulation, i.e. it must have a market value since the pledge right is realized by selling the asset. In principle, the subject of pawn is an inexhaustible asset. Exceptionally, in the case of an irregular pledge (*pignus irregulare*), the object of the pledge may be a consumable item. In that case, the creditor acquires the right of ownership on the object of the pledge, with the obligation to return the same type and quantity of assets after the payment of the debt.

2.1. Legal relations between the pledgee and the pledger

The pledger does not have to be a debtor from the obligatory relationship, but also any other person (the real debtor) who pledges his own asset in order to secure someone else's debt. Other people's assets can also be pledged, under the conditions under which it is possible to acquire property from non-owners.

[11] I. Babić (2012), *Стварно право*, Beograd, 268.

[12] O. Stanković, M. Orlić (1999), *Стварно право*, Beograd, University of Belgrade Faculty of Law, 245.

[13] N. Tešić (2003), „О предмету заложног права", *Правни живот* 10/2003, 116.

[14] L. Marković (1927), *Грађанско право*, Beograd, 561.

As the pledge is constituted at the moment of handing over the asset, hence the handing over of the asset to the pledgee, or to a third party determined by agreement, is the only obligation of the pledger. After the handover, the pledger still remains the owner of the asset. He may exercise all powers arising from ownership. As he is deprived of possession, it cannot exercise de facto power over asset.

Unlike the pledger, who can be a debtor or some other person, the pledgee is always the creditor of a claim that is secured. His primary obligation is to keep asset, with the appropriate degree of attention. Otherwise, it bears the legal consequences of its damage. As the pledgee has a passive attitude towards the asset, he must refrain from any use and extracting the benefits from it.[15] After settling the claim, the pledgee has the obligation to return the asset.

The right to possess the asset derives from the nature of a pawn and is primarily the right of the pledgee. The possession does not have to be direct and exclusive. The pledge agreement is a burdensome legal business because due to the accessory nature, it is considered that the value of the pledged asset is "compensation" for the loan.[16] Therefore, in the event of a material or legal defect in the subject of the pledge, the pledge creditor is authorized to request from the pledger another adequate pledge.[17] The right to be settled from the value of the pledged asset is the basic right of the pledger, in case his claim is not settled upon maturity. At the same time, he is the holder of the right to follow, and he can ask for the return of the asset from anyone who has the asset. If there is a phase of settlement, i.e. liquidation of the subject of the pledge, the pledgee has the right to collect the secured claim, before the chirographic creditors, i.e. before the later pledge creditors. This is especially important in the case of multiple pledges of the same asset, when the order of settling pledge creditors is determined according to the rule of *prior tempore potior iure.*

2.2. Disposal and termination of pawn

As the right of pledge is secondary, it cannot be transferred without the transfer of the secured claim. Thus, in the case of the assignment of the secured claim, the pledge as an accessory right passes to the receiver. However, having in mind the personal character of the pledge agreement, "the assignor may hand over the pledged asset to the receiver only if the pledger agrees to it,

[15] With the pledge agreement, it is possible to envisage the possibility of usage of the asset (antichresis). If the pledgee uses the asset, or if he acts with it contrary to the agreement, the pledger may initiate court proceedings to confiscate the asset from the pledgee, while simultaneously handing it over to a third party, who will hold the asset for him.

[16] M. Lazić, M (2009), *Стварно право*, Niš, 235.

[17] Art. 979 LCT.

otherwise it remains with the assignor to keep it in the behalf of the receiver".[18] A special case of disposing of a pledge right is a sub-pledge. It occurs when the pledge creditor pledges the secured claim to his creditor. According to our law, the consent of the pledger is a precondition for constituting a sub-pledge relationship.[19]

Pursuant to the principle of accessory, with the termination of the secured claim, the pledge right as a secondary right also ceases. As a consequence of the principle of indivisibility, only the extinguishing of the claim as a whole can lead to the termination of the pledge. As the acquisition of the state is in fact a precondition for the creation of a pawn, hence the loss of the possession leads to the termination of the pledge right. The short-term loss of the possession cannot be a reason for termination, but it is necessary for the pledgee to lose the state permanently on the asset. pawn also ceases due to the collapse of the pledged asset, when the pledge creditor waives his right, if it is agreed for a certain period of time – by the expiration of the term, confusion (when in the same person the properties of the debtor and the pledge creditor are acquired), by acquiring ownership title and the pledge right on the same asset and finally, by selling the pledged asset by public sale.

3. Registry pledge – right on movable assets

3.1. Concept and subject of pledge

It is indisputable that the principle of deprivation of possession of the pledger, on which the pawn is based, economically liquidates the asset. It cannot be used, i.e. it cannot be exploited economically. Hence, for not legal but economic reasons, we can justifiably conclude that the concept of a possessory pledge has been overcome. A registered pledge is a form of property collateral, which has a movable asset for the object. Unlike a pawn, it is created without handing over assets to the possession. Instead, the way to obtain a pledge is to register the right in the public register. In our law, a registered pledge is regulated by the provisions of the Law on Pledge on Movable Assets and Rights in the pledge Registry.[20] The legal basis for the constitution is a contract. It is concluded by the pledger, who can be a debtor or a third party and the pledgee, as the creditor of the secured claim. After concluding the contract, the pledge creditor may register the pledge right in the pledge registry. The registration itself has a

[18] Art. 472 LCT.

[19] LCT, art. 976, para. 1.

[20] Law on Pledge on Movable Assets and Rights in the pledge Registry, *Official Gazette RS*, no. 57/03, 61/05, 64/06, 99/11 and 31/19 (hereinafter referred to: "**LPMA**").

constitutive character. From the moment of registration, the creditor acquires the right of priority in the settlement, when cashing the subject of the pledge.

The secured claim must first of all be valid[21], otherwise if it is not legally valid, then the pledge itself does not produce a legal effect - the principle of accessory in the creation of the right of collateral. Also, the claim must be nominal, i.e. expressed in monetary currency (foreign or domestic). The principle of specialty dictates that only a certain claim of one creditor can be secured by a pledge (and not an indefinite number, or an indefinite amount of claims).[22] On the contrary, all mutual claims between creditors and debtors cannot be secured in this way.

In principle, statements on the subject of a pawn may also refer to the matter which is the subject of the registered pledge. In order to avoid unnecessary repetitions, here we shall analyse some features of the registered pledge asset, which are a consequence of abandoning the principle of deprivation of possession of the pledger. Thus, a pledge right can be based not only on an individually determined but also on a generic asset, on a certain set of movable assets, as well as on a future asset.

The peculiarity of the object of the registered pledge is the possibility of pledging assets that have not yet been created. Since a pawn is constituted by handing over, a pledge right could not be constituted on a future asset, because an asset that does not yet exist cannot be handed over. According to Article 13 of the LPMA, a pledge right on a future asset arises at the moment of the constitution of the title of ownership by the pledger on the subject of the pledge. However, by interpreting the stated norm, we can notice illogicality. Namely, how can a creditor request the registration of a pledge right on a future asset, if it is prescribed that the pledge right is constituted only when the pledger acquires the title of ownership over the asset? It follows from the above that the creditor can request registration in the register of rights that do not exist i.e. that is yet to be constituted. However, in the mentioned case, the creditor does not acquire a pledge right by registration. Registration, therefore, does not have a constitutive character for the constitution of a pledge. Therefore, we believe that the *de lege ferenda* solution would be the one according to which, on the basis of the concluded contract, the creditor could request annotation of the first rank priority of registration of the pledge right on the future asset.[23] The views of the case law also go in that direction.[24]

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[21] If it is void, the pledge will be valid if the claim is not declared null and void.

[22] N. Tešić (2007), *Регистрована залога,* Beograd, 115.

[23] S. Stošić (2017), 66.

[24] Judgment of the Commercial Court of Appeal, Pž. 9243/2012 of 31 January 2013, available in the database *PropisiSoft Online*.

3.2. Legal relations arising from the constituting of a registered pledge

The title holder of the property collateral is the creditor, to whom the collateral rights provide security that he will settle from the object on which there is a right of pledge and which serves as a guarantee in case the debtor does not fulfil his obligation upon maturity.[25] The pledge creditor is exclusively the creditor of the claim secured by this right. The debtor from the main relationship, or a person who pledges his own asset for someone else's debt, can appear as the pledger. Registration of a contract concluded with a pledger who is not the owner of the asset in the register does not produce the legal effects.[26]

The basic characteristic of a registered pledge is that the pledged asset remains in the possession of the pledger. However, if he does not fulfil the secured obligation upon maturity, he loses the right of possession. The pledger has an obligation to keep and maintain the asset in good condition. Acting contrary to this is a breach of contractual obligations and is the basis for termination of the contract. If the actions of the owner or holder of the asset reduce the value of the pledged asset, we believe that the pledge creditor should be granted the right to request additional collateral or the possibility of judicial protection.[27]

The pledger can dispose of the pledged asset - legally and factually. With regard to legal disposal, the pledger may perform a translative or constitutive transfer of rights to the subject of the pledge. In the first case, the acquirer acquires the title of ownership encumbered by the registered pledge right. The pledger is obliged to immediately submit a request for the registration of the pledge right in the pledge register in favour of the new owner, and the new owner has this obligation.[28] In the case of a constitutive transfer, a narrower right in favour of a third party is constituted on the subject of the pledge, e.g. when leasing the pledged asset.

The settlement phase occurs if the debtor does not settle the debt upon maturity. From that moment, the pledge creditor acquires the right of possession

[25] V. Vodinelić (2014), *Грађанско право*, Beograd, 246.

[26] In the doctrine, we come across opposite views. Thus N. Tešić, (2007), 152. The said author considers that a pledge constituted by a non-owner produces the same legal effects as the one constituted by the owner of the encumbered property. The owner of the property is obliged to suffer compulsory settlement from the object of the pledge, but this does not affect his right to compensation in relation to the person who without authorisation constituted the pledge.

[27] Such solutions are adopted by the Law on Mortgage, *Off. Gazette RS*, no. 115/2005, 60/2015, 63/2015-OUS and 83/2015, art. 18 and 19.

[28] Z. Petrović, V. Kozar (2009), *Средства обезбеђења потраживања из уговора у привреди*, Beograd, 46.

of the pledged asset, i.e. the right to settle from the value of the subject of the pledge right, namely: the main claim, interest and costs incurred in connection with the collection of claims. Upon the maturity of the secured claim, the creditor acquires the right of possession. The right of possession can be enforced, if the debtor, i.e. the pledger, does not voluntarily hand over the pledged asset. It can be done in two ways: by himself, by taking the asset through self-help, or, through court, by submitting a motion for execution by which he will ask for the pledged asset to be taken away from the person with whom it is.[29] The territorial jurisdiction of the court is determined in that case according to the place where the movable asset is located. The creditor constitutes, compulsory, the possession on the asset in the enforcement proceeding. The goal of that procedure is for the creditor to establish possession of the asset, and his reach in that sense is limited.[30]

3.3. Encashment of the subject of the pledge and termination of the registered pledge

After constituting the de facto authority over the object of the pledge, the pledgee can settle from its value. At the same time, he has at his disposal two legal ways of liquidating the pledged asset - court or out-of-court sale. The court sale is initiated by submitting a request for the court to sell the subject of the pledge right at a public sale.[31] The LPMA refers to the procedure of court sale, however, it does not prescribe which specific court proceeding it is. The lack of clear wording in practice is confusing.[32] We can solve the problem of the mentioned legal gap in such a way that we will view the LPMA as a *lex specialis*, in the proceeding of selling the asset, and the law that regulates the enforcement proceeding, as a procedural law which regulates public sale as a *lex generalis*. According to the provisions of the law governing the enforcement procedure, in fact it is enforcement for the purpose of realizing a non-monetary claim - the claim of handing over individually determined asset.[33]

An out-of-court sale is conducted as a public one, through bidding, organized by a creditor or a person who professionally organizes it. An excerpt from the Pledge Register with a registered annotation of settlement authorizes the creditor to conclude, in the name and on behalf of the owner of the pledged

[29] S. Stošić (2017), 69.

[30] See more: Ibid, p. 69 and further.

[31] LPMA, art. 43.

[32] See more: D. Hiber, M. Živković, 204.

[33] J. Stamenković (2012), *Реализација заложног права на покретним стварима уписаног у регистар залоге после почетка примене новог Закона о извршењу и обезбеђењу*, Beograd, 347.

asset, a contract on the sale of the subject of the pledge right in the out-of-court settlement proceeding.[34]

With the termination of the claim, due to the accessory, the right of pledge also ceases. The statute of limitations of claims does not interfere with the right of the creditor to settle from the value of the pledged asset. The right of pledge ceases and is deleted if the object of the pledge right is destroyed, however, "If the object of the pledge right has been insured, the pledge right is constituted, by force of law, on the claim of the amount (or compensation) of the insurance".[35] So, without any statement of the will of the creditor or the pledger, there is a property subrogation. In addition to the above, the registered pledge ceases due to confusion, consolidation or waiver of the pledge right by the creditor. In any case, formally and legally, the registered pledge always ceases by deleting, i.e. deregistration from the pledge register. Consequently, it seems that the registered pledge constituted by registration in the register is much closer to the mortgage, the termination of which requires the action of deregistration, deletion from public registers.[36]

4. Concluding remarks

Deprivation of the possession of the pledger is one of the basic principles on which the pawn is based. Despite the fact that he is still the owner, he has no right to use the asset. The pledgee constitutes possession of asset, but with the obligation of passive behaviour. Hence, it can be reasonably concluded that the asset is economically unusable, and as such, represents a burden for both contracting parties. While on the one hand, the pledger cannot reap the fruits of the asset and thus increase the ability to pay the debt, on the other hand, the pledgee must engage in keeping the asset, which often creates separate costs. Hence, we can justifiably conclude that possessory forms of pledge do not represent a modern concept of securing claims. Pledge without handing over the asset to the possession, eliminates the stated shortcomings and affirms itself as a more adequate form of guarantee, especially in the conditions of modern economic activity. This, above all, because the pledged asset can be used, and exploited, and is no longer in the economic vacuum and as such becomes. Only in the settlement phase, in case of the debtor's delay, the creditor constitutes the possession on the asset, voluntarily if the debtor hands it over, or by force in the enforcement proceeding. We consider that the inaccuracy of the legislator regarding the exact determination of the court proceeding in which the object of the pledge is sold is one of the basic shortcomings of the law which regulates

[34] LPMA, art. 44, para. 2.

[35] LPMA, art. 52.

[36] N. Tešić (2007), 157.

this area. Certainly, the pledgee has at his disposal the possibility of an out-of-court settlement, which in modern collateral law is an increasingly common proceeding in which creditors exercise their rights on the object of the pledge.

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PRAVNI ASPEKTI ZALOGE POKRETNIH SREDSTAVA

Rezime

Zalog bez davanja imovine u posed, otklanja nedostatke i afirmiše se kao adekvatniji oblik garancije, posebno u uslovima savremene ekonomske aktivnosti. To je, pre svega, zbog toga što se založena imovina može koristiti i više nije u ekonomskom vakuumu. Samo u fazi namirenja, u slučaju kašnjenja dužnika, poverilac uspostavlja vlasništvo nad imovinom, dobrovoljno ako ga dužnik preda, ili silom u postupku izvršenja. Smatramo da je netačnost zakonodavca u tačnom određivanju sudskog postupka u kojem se predmet zaloga prodaje jedan od osnovnih nedostataka zakona koji reguliše ovu oblast. Dakako, založni poverilac ima na raspolaganju mogućnost vansudske nagodbe, što je u savremenom zakonodavstvima sve češći postupak u kojem poverioci ostvaruju svoja prava na predmetu zaloga.

Ključne reči: zalog, pokretna imovina, upisana zaloga