MORTGAGE REGULATIONS IN THE NEW ROMANIAN CIVIL CODE. PRACTICAL ASPECTS

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Abstract

This study starts from an analysis of the juridical regime of the mortgage which "migrates" from the area of actual rights to the juridical regime of the debt rights! Legislative arguments sustain this idea, deriving from the regulations governing the mortgage in the new Romanian Civil Code (section 2), from the comparisons with other similar juridical institutions (section 3) and from practice (section 4). The conclusions explain the usefulness of the changing of the juridical regime of actual guarantees in international trade as well.

Keywords: *mortgage, new Civil Code, pledge, the patrimony of affectation, the fiduciary operation, the fidejussion*

JEL Classification: *K12*

1. Introduction

According to the new Civil Code, the mortgage is an actual right over movable or immovable property affected to the exercising of an obligation (art. 2343); it has an accessory and indivisible character (art. 2344). However, we consider that commercial practice has imposed the redefining of the concept in terms of its nature of being an actual right and its character of being an accessory. This is not new; the doctrine formulating the opinion regarding the mixed nature of the actual guarantee starts from the theory regarding the debt pledge.

According to this concept, regarding its mixed nature, the guarantee right is between the actual rights and the personal rights and it has characteristics belonging to each category[2].

In our opinion, the tendency of the mortgage to become an autonomous debt right can be sustained with new arguments. This study therefore shall firstly present the arguments formulated from the mortgage regulations (section. 2) and from regulations of new juridical institutions (section. 3). Then, the study shall present examples from practices of the commercial banks and of notaries public that confirm the trend to „transfer" mortgages into the category of loan securing forms.

2. Arguments pertaining to the current mortgage regulations

The New Romanian Civil Code unified the regulations of actual guarantees, including at least two aspects: in terminology, we differentiate between movable property mortgage and immovable property mortgage (the pledge shall define only the movable property guarantees achieved by the depossessing of the debtor); in terms of legislative technique, the law maker has stipulated a set of common provisions for movable property mortgage and immovable property mortgage before the articles dedicated exclusively to each form of guarantee.

2.1. Common regulations for the two forms of mortgage

a) Advance mortgage, before the debtor is assuming the obligation based on which a mortgage is established (according to art. 2371) is explained by the fact that, eventually, the creditor shall acquire a debt right over the debtor (when he fulfils the obligation).

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[2] See Alexandru Mihnea Angheni *„Unificarea reglementărilor privind garanţiile reale în cadrul Noului Cod civil"* in the volume of J.C.J. entitled „Justiţie, stat de drept şi cultură juridică – annual scientific session, 13 May 2011, Bucharest", Universul Juridic Publishing House, p. 715.

b) The mortgage can secure the accomplishment of all obligations (art. 2369), including **future obligations**, thus acquiring a preference status starting with the moment when it is registered in the publicity register (art. 2370).

As against the 1865 Civil Code, the new regulation admits the possibility to establish the mortgage over a **universality of assets**[3], including a universality of either present or future movable property and immovable property (art. 2350 para.1 and art. 2357); regarding the conventional mortgage, it can be established over a universality only in case of assets related to the activity of an enterprise[4] (art. 2368).

The mortgage established over a universality of assets creates encumbrances on immovable property only starting with the moment when the mortgage is registered with the Land Book for each real estate property (art. 2377); in case of competition between a mortgage over a universality of movable property and a mortgage over specific movable assets, the mortgage first registered or first concluded shall have the priority.

c) The competition between a movable property mortgage and an immovable property mortgage shall be settled as follows: if the dates are different, the creditors whose mortgages were made public in the publicity registers earlier shall be preferred; if the mortgages were registered on the same day, the immovable property mortgage shall be preferred (art. 2422).

d) The object of the movable property mortgage can be any movable asset, either tangible or intangible; examples are listed under art. 2389 in the new Civil Code. For the purpose of this article, we are interested in the list including the money debts resulted from an insurance agreement or arising from the assuming of an obligation or from the using of a credit card or of a debit card (according to art. 2389 letter a).

Regarding the enforcement of mortgages on debts, the new Civil Code stipulates the possibility of the creditor, when the conditions of enforcement are met, to choose between: the right to take over the secured debt, to request and to receive the payment, or to sell the debt and to keep the money (according to art. 2645 para. 1); in case of mortgage on accounts, the mortgage creditor can compensate the creditor account balance with the mortgage debt (the mortgage creditor being the loan institution where the account has been opened, under art. 2410 para. 2 letter. a) or can request the loan institution to release to him the money existing in the account (the mortgage creditor is another person who sends his instructions to the loan institution under art. 1410 para. 2 letter b or c).

Regarding the **quicker reimbursement** as a result of the fact that another guarantee has been established on the same asset already bearing a mortgage, the new Civil Code stipulates that all clauses in this respect shall be considered unwritten (according to art. 2384 para. 2).

In case of movable property mortgage, the creditor shall be entitled to quicken the reimbursement of the secured debt and to execute the mortgage, if the constitutor of the asset with encumbrances does not properly maintain the asset or if the execution of the mortgage becomes difficult or impossible as a result of the action of the debtor (according to art. 2396 para. 1).

The creditor is in principle protected against potential acts of depossessing by his right to trace the course of the mortgage asset, without taking into account the actual rights or the rights registered after the registering of his mortgage.

Art. 167 in the Law for the enactment of the new Civil Code stipulates that all acts whose effect is the impossibility to execute the mortgage for the creditor shall be annullable upon his request, except for the case where he approved those acts. The doctrine[5] formulated the opinion

[3] See the comparison with the patrimony of affectation in section 3.2 of this paper.
[4] Idem.
[5] See Mihai Dudoiu *„Garantarea obligaţiilor"* in Săptămâna financiară magazine, vol. II Civil Code art. 1164 – 2664, p. 203.

according to which this provision should be applicable both to movable assets and immovable assets.

The disposition right of the debtor shall be protected under art. 2376 in the new Civil Code, stipulating, under the title of **„inalienability clause",** the validity of the disposition acts over the mortgage asset, even if the acquirer knows about the provision in the mortgage agreement that forbids the transfer of the asset. The provisions of this article, applicable to both movable and immovable property, are stipulated under art. 2384 para. 1, and by art. 2433 under the title „interdiction of commissary pact".

As partial conclusions, it is to note the importance given by the Romanian law makers to the institution of the mortgage; we therefore consider useful to compare the characteristics of the mortgage with the characteristics of other similar juridical institutions.

3. Arguments pertaining to the comparison with other juridical institutions

3.1. Comparison with the pledge

Although the new Civil Code does not include a definition of the pledge, the pledge remains a form of actual movable guarantee which, unlike the movable property mortgage, can have as object only movable assets susceptible of material possessing. The object of the pledge, therefore, can be the tangible movable assets or the negotiable title in a materialized form (according to art. 2480).

While the mortgage can be established with or without depossessing, the **remittance of the asset** or of the bond is compulsory with the pledge, whether it means to return it to the creditor or to a third party in their account, or, in case of negotiable instruments, it means a „symbolic return", like for instance the pledge endorsement (according to art. 2481 para. 1 and 2).

Regarding the pledge **publicity**, it can be done either by the depossessing of the debtor, or by registering the pledge with the Archive of Actual Movable Securities.

Regarding the form, while for the pledge, the new civil regulations stipulate, unlike the 1865 Civil Code, total freedom regarding the form of the agreement, which shall be considered valid even if no written agreement has been concluded, the mortgage shall be accepted only if it has written form under private signature or an authentic written form.

To conclude, it is not possible to mistake the object of the pledge with the object of the movable property mortgage because the law makers excluded intangible assets from the pledge area, such as: debt rights or negotiable instruments (unless they are included in guarantees whose „symbolic remittance" becomes possible only by endorsement).

3.2. Comparison with the patrimony of affectation

According to the Emergency Governmental Ordinance 44/2008[6], the patrimony of affectation is the sum of assets, rights and obligations of the authorized physical person, of the holder of the sole proprietorship or of the members of the family owned and operated business related to the purpose of performing a certain economic activity, set up as a separate section of the assets of a physical person. It is, practically, the separation of the assets of the physical person into civil assets and commercial assets.

[6] The Emergency Governmental Ordinance 44/2008 regarding the activity of the authorized physical person, of the sole proprietorship or of the family owned and operated business, published in the Official Gazette no 328 of 25 April 2008, with further modifications and completions.

The usefulness of the institution is to create a specific guarantee for all commercial creditors that are preferred[7] in competition with civil creditors to reclaim assets from the patrimony of the physical person who set up, upon the opening of the business, a patrimony of affectation.

The object of the patrimony of affectation is, in the case of the mortgage, a universality of assets. The difference is that the patrimony of affectation can include both movable assets and immovable assets at the same time. No legal provision prevents the creditors of the business to establish movable or immovable mortgages in a conventional way; however, as long as an asset is identified in the list of the patrimony of affectation, it can be reclaimed by any of the commercial creditors, until the full payment of the debt.

Unfortunately, the Romanian law makers, unlike the French law makers, have not defined clear juridical regulations to protect the civil „side" of the patrimony of the debtor and according to art. 26 in the Emergency Governmental Ordinance O.U.G. 44/2008, when the patrimony of affectation is not sufficient to fully pay back commercial creditors, they shall be entitled to reclaim the civil assets of the debtor.

Regarding the form, the patrimony of affectation is a written document under private signature that shall be submitted to the Trade Register Office together with the registration documents.

Due to its form and registration, the patrimony of affectation is a simplified form of guaranty; unfortunately, given its incomplete regulation, we recommend mortgage because of the "safety" provided both to the debtor and to the creditor, ensured by the regulations in the new Civil Code.

The new Civil Code regulates the patrimony of affectation in art. 541 para. 1 according to which: „an actual universality is represented by the sum of assets belonging to the same person and having a common purpose established by the will of that person or by the law". Thus, the patrimony of affectation, together with the fiduciary, is an actual universality, while the assets making it up, together or separately, can make the object of distinct juridical acts or relations (para. 2).

3.3. Comparison with the fiduciary operation[8]

According to art. 773 in the new Civil Code, the fiduciary operation is the **legal operation by which one or several constitutors transfer actual rights, debt rights, securities or other patrimonial right or such rights, either present or future, to one or several fiduciary manages who manage them with a well-established purpose, for the benefit of one or several beneficiaries.** These rights make up an autonomous patrimonial mass that is distinct from other rights and obligations regarding the patrimony of the fiduciaries.

When we compare mortgage and the fiduciary operation from the point of view of the **object**, we notice that the object of both is immovable assets but only the fiduciary operation can have other patrimonial right as its object, like for instance actual movable rights, debt rights, guarantees and a distinct patrimonial mass. Both the fiduciary operation and the mortgage can have future assets as its object. The mortgage shall be established without **depossessing**, while no express stipulations are mentioned for the fiduciary operation in the new Civil Code.

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[7] See decision no 1072 of 31 March 2009 of the High Court of Justice. Commercial Section, reflecting the usefulness of the patrimony of affectation for the physical person entrepreneur.

[8] For details see S.Cristea «Institutii juridice noi: fiducia», in the volume: *"Justitie, stat de drept si cultura juridica"* published by the Institute of Juridical Research of the Andrei Radulescu Romanian Academy, Bucharest, 2011, p. 397.

Regarding the opposition between the characteristics: unilateral/bilateral and principal/accessory, and: for free / in exchange of a fee, the comments made in the section on the pledge shall remain valid.

The form of the agreement is identical: both the fiduciary operation and the mortgage shall be written in an authentic form under the sanction of absolute nullity; regarding the **registration** with the National Register of Fiduciary Operations, the new Civil Code stipulates that the registration of immovable actual rights that are the object of the fiduciary operation shall be registered also with the specialized department of the local public administration authority where the real estate is located, and the stipulations regarding the land register that apply in the case of the mortgage shall apply in the case of the fiduciary operation as well.

In addition, it is compulsory in the case of the fiduciary operation to be registered with the competent fiscal body that manages the funds owed by the trustee to the general consolidated budget.

3.4. Comparison with the fidejussion

According to the new Civil Code, the bank guarantee is the agreement in which, on the one hand, the fidejussor, shall undertake the obligation, in front of the other party that has the capacity of creditor in another relation incurring an obligation, to execute, for free or in exchange of a fee, the obligation of the debtor, if the debtor does not execute it (according to art. 2280).

Unlike the mortgage whose object is an asset (hence, the name of actual / real guarantee, from Lain : res = asset, thing), the object of the fidejussion is the obligation of a third party, the fidejussor (hence the name of personal guarantee).

Like in the case of the mortgage, the obligation of the fidejussor is an accessory obligation, and it can exist only for a valid main obligation (art. 2288 para. 1). The accessory character is regulated also by art. 2293, according to which the fidejussor shall execute the obligation of the debtor only if the debtor does not execute it himself, and by art. 2294 – 2295 corroborated with 2298 – 2299 which regulate the benefits of excussion and division. These are characteristics related to the protection of the third party that undertakes an obligation for another person and are not present with the mortgage.

Like the mortgage, the fidejussion can guarantee the execution of a future obligation (art. 2288 para. 2). Regarding the form, the fidejussion, just like the mortgage, as an *ad validitatem* condition, shall have the form of an authentic written document or of a document under private signature, under the sanction of absolute nullity.

Although law makers regulates only the compulsory fidejussion, which, according to art. 2281, can be imposed under the law or decided upon by courts, we consider that the norm is the conventional one (no one can prevent the fidejussor to undertake the obligation of the main debtor, as long as he meets two requirements imposed under the law: to posses and to keep in Romania enough assets as to reimburse the debt, and to have one's residence in Romania, according to art. 2285).

Although the matter of the fidejussion publicity is not expressly regulated in the new Civil Code – unlike the mortgage – we consider that the explanation is the following: on the one hand, in the case of the legal and judicial fidejussion , the creditor knows/or must know about the

existence of the guarantor, and on the other hand, in the interpretation of the legal text[9], the fidejussor himself shall inform the creditor about the existence of the guarantee.

We consider that the reason for which the fidejussion is preferred to the mortgage in banking practices is its simplicity, quickness and usefulness which explain why fidejussion has been promoted to the „rank" of autonomous guarantee under the form of the letter of guarantee and letter of comfort, regulated by the new Civil Code.

4. Practical aspects

4.1. Expansion of the object of activity of banking institutions or adjustment to the market requirements?

We notice that, in their attempt to win new market segments, banks tend to expand their activity into new areas.

BCR-Life insurance promotes a product as a form of life insurance aiming at clients that have foreign currency deposits. If clients accept to make available to the bank a part of the deposit for a longer time (7 years), he will have an extremely convenient life insurance policy (covering the same period of time).

The client has the advantage that he can withdraw the amount made available (3,000 euro) before the deadline but it is not advantageous to do this because the amount stipulated in the contract are not attractive before the 4-year term. On the other hand, if the client complies with the requirements of the contract, he will receive an interest to the amount deposited that is almost double as against the normal interest on that deposit.

In exchange, the client shall not access the deposit during the 7-year period of time and shall limit his consumption by „ignoring" the amount deposited.

The bank's advantage is that it can use the amount as cash to its own interest.

4.2. From notary public practices

In the 1865 Civil Code, the mortgaged asset was inalienable. Banks, as mortgage creditors, expressly mentioned the inalienability of the secured asset in their loan agreements. This clause was a substitute of the depossessing; the real estate guarantee was possible only without depossessing; thus, the guarantee was supposed to be certain, and the asset was supposed not to be sold before the reimbursement of the loan. The sale of the secured asset became a practice often used so that banks created a specialized mechanism, though banks executors. During the loan agreement, the bank had a debt right over the asset and property continued to be the prerogative of the debtor who had taken the loan. This is where, in our opinion, the new Civil Code, in art.2384, makes a salutary change. According to this provision, an inalienability clause shall be included in the loan agreement and considered unwritten; the owner shall be entitled to sell the mortgaged asset.

The practice of the notary public had to adjust itself to this new situation and combine the privilege of the bank over the mortgaged asset with the interest of the owner to sell the asset (guaranteed by the new Civil Code). The practical solution is the following: the notary public authenticates the sale of the mortgaged asset but stipulates in the contract the clause according to

[9] According to art. 2283 fidejussion can be contracted without the knowledge or against the will of the main debtor; according to art. 2284, a fidejussor can guarantee the obligation of another fidejussor. From these provisions, the obligation for the fidejussor to inform the creditor if the law makers expressly stipulates the obligation to inform (according to art. 2302) only for the creditor.

which the price shall be directly paid by the buyer into the account of the creditor bank and not into the account of the seller of the asset.

The advantages are many:

- for the bank: reduces the costs of the operation by avoiding expenses incurred with the civil enforcement procedure (including fees of the bank executors), especially because it was possible that the real estate could not be sold during the economic crisis that affected the real estate sector as well. With little effort, the bank registers in its own accounts the mortgage debt. There is only an apparent disadvantage of cashing in an amount that is smaller than the value of the debt written in the loan agreement;

- for the mortgager debtor, it is the saviour solution; the loan is considered to be paid back, even if for a smaller amount , and he can sell his asset to a buyer agreed upon according to his own requirements, not according to the preferences of the bank.

To clarify some subtleties of the operation:

- the meanness of the buyer, who accepts a price that is lower than the price of the asset when the asset is not mortgaged;

- the pressure of the bank which tries to get maximum of advantages due to its position, by delaying the conclusion of the agreement.

Conclusions

The domestic and international economic circuit witnesses a decline of the actual guarantees, especially immovable guarantees, explainable especially through issues generated by their selection, and by procedural complications of the civil enforcement procedure upon real estates.

Personal guarantees are preferred instead of actual guarantees, especially the autonomous bank guarantees, which are extremely diversified, due to their quality to adapt themselves quickly to the various needs of the participants in domestic and international trade and due to the possibilities to avoid delays and procedures resulting from actions of banks that are based on the relations between clients and foreign creditors.

Personal guarantees can be requested and issued for any situation, sometimes they are accompanied by other forms of guaranty[10].

Their acquiring of an autonomous, independent character, reflected also in the new Civil Code which introduces the letter of guaranty and the letter of comfort, is an evolution of the juridical regime of the mortgage as well.

Practice, at least in the cases presented in this paper, proves the need to adopt juridical institutions that are „classical" for the circumstances of an economy always under restructuring. Notary public solutions are found „as the time goes"; the combination banks – insurance proves not only profit-orientation but also the dynamics imposed by the need to adapt oneself to the market requirements.

We can always witness the „personalization" of the actual guarantees or their „autonomization"! It is imperative that, together with practitioners, doctrine experts and law makers, we should preserve an „open" view upon the juridical phenomenon which is so dependent on the economic phenomenon!

[10] See Rada Postolache *„Garanţii bancare în comerţul internaţional"* – unpublished PhD thesis, pg. 22 – 23. Actually, banks are not interested in actual guarantees and cannot „issue" them; they represent a new sense in relation with their object of activity. Se e Pierre – Alain Gourion, Georges Peyrard *„Droit du commerce international"* 2eme édition, L.G.D.J. Paris, 1997, p. 164.

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