

## Considering mortgage as one of the means of securing the execution of obligations recognized in the current Albanian legislation

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### Abstract

The mortgage is one of the safest means to guarantee the execution of obligations. The definition of a mortgage is given in the article 560 of the Albanian Civil Code.

A mortgage is defined as concrete right placed on the wealth of a debtor or of a third party, on behalf of the creditor, in order to accomplish an obligation. Nonetheless, despite this initial definition seems to superficially imply that any wealth of the debtor or of a third party can be placed as a mortgage, this is not true because according to the article 561 of the Civil Code, the wealth or properties that can be used as mortgage are the following:

Immobile property;

Usufructs of these objects (of immobile property) apart from the legal usufruct of the parents, as well as other enphiteotic rights over these objects.

In any case, the person who places a mortgage on a property must be the owner or when this person is a third party, consent must be given so that a mortgage can be placed on a property to guarantee the accomplishment of obligations on behalf of the debtor. A mortgage can be placed on properties that are already existing at the time of the contract or properties that are about to exist in the future.

**Keywords:** The mortgage, Creditor, Debtor, Third Party, Obligation, Public register, Guarantee.

### Introduction

The mortgage is one of the safest means to guarantee the execution of obligations. The mortgage is related always to immobile property or mobile property registered in public registrars and also because the establishment of a mortgage requires a specific formalization which is the registration on public registrars or to be more precise on the registrars of immobile property. When this particular formalization is not followed then the mortgage contract becomes invalid because registering is considered as part of the judicial act and includes not only a notary part but it includes a registration as well as it stems from the article 562 of the Civil Code in which it is stipulated that:

*"Mortgage is placed on the basis of the contract or the law and registration is required. The contract needs to be based on a notary act."*

The same conclusion is reached based on the article 570 of the Civil Code, in which it is stipulated that:

*"The mortgage is registered in the registration office of the immobile real estate property where this property is situated."* Based on the above-mentioned statements, one can conclude that not breaching the formality of registering the contract of the

mortgage in the registrars of immobile real estate property brings about ex-post the invalid value of the mortgage contract and as a consequence the creditor cannot claim the existence of the mortgage as a means to ensure the fulfilment of obligations by the debtor part.

Henceforth, the mortgage becomes valid once it is registered in the registrars of immobile real estate property in which registration is considered as a form of publicity similar to the transcript that can be realized in the same registrars. Yet it is different from the transcript, which is publicly declared and that can be contravened by the third parties, the registration of the mortgage is a registration with valid effects because the mortgage exists only if it is registered in the property registration office and immediately once it is registered. Obviously, the registration of the mortgage at the immobile real estate property offices serves as well for any claim made by third parties interested in buying the property placed on mortgage. What needs to be emphasized is that such a formalization that involves not only a notary act but also the registration at the registrars of the immobile property is characteristic only of the mortgage and not of any other means of fulfilling the obligation be it of personal or real character. Moreover, this feature is one of the defining characteristics of the mortgage compared to other means of accomplishing the obligations. Let's take as an example of judiciary practice:

A leasing contract was signed between person A and person B. According to this contract, person A was the leaser whereas person B was the borrower. The object of this contract was a lease of 7000 USD with one year discharge period and 8 percent interest. Person B had placed an apartment on mortgage, who was the owner of this property, in order to guarantee the obligation towards person A. Both parties had prepared a mortgage contract in front of the notary office. However, creditor person A had not registered this contract at the Office for the Registration of Properties. Due to the expiry of the period for fulfilling the obligation, person B did not accomplish the obligation. Therefore, person A asks for the forced execution of the obligation demanding that person B sells the apartment that was placed on mortgage. At the meantime, person A is informed that person B had sold this property to person C. After knowing this fact, person A places an indictment in court demanding the invalidation of the judicial act of selling the property between B and C. What needs to be discussed is whether person A and person B have reached a mortgage contract between them prior to the examination of the issue regarding the judicial act between person B and person C. According to the verified facts, the mortgage contract between person A and person B was not registered at the Property Registration Office making this contract invalid. This fact has direct consequences on the guarantees to fulfill the obligation that person B had towards person A because the formal procedures were not respected by both person A and B. The procedures were partly respected because although the contract was based on a notary act it was not registered at the Property Registration Office making such a contract invalid and as a consequence person A cannot claim the existence of the mortgage contract on the apartment which person B sold to person C. What could be asked is whether an object can be placed on mortgage when it is under co-ownership? It is obvious that in this case all the co-owners need to give their consent whether the object will be placed as it is on mortgage or any of the

co-owners may place on mortgage only its part of the property. When the consent is given by a part of the co-owners, I would argue that the mortgage contract would be partly valid. Hence, this contract would have an effect only on the respective parts of the property placed on mortgage and not on the other co-owners who have not given their consent. Let's take another example from judiciary practice.

Person A has signed a leasing contract with person B regarding an amount of 100,000 Euro for a three year period. In order to accomplish the obligation person A had to person B, obtained the consent of the cousin C and his wife D and those latter from their mature children E, F, and G. On the other hand, persons C and D signed a mortgage contract with person B although it was termed as guarantee contract, a copy of which was registered to the Property Registration Office, where this object was. Due to the fact that person A had had financial difficulties and could not pay back the debt he got from person B, the latter initiated the procedures for the selling of the land put on mortgage by persons C and D, so that person A fulfills the obligation he had towards person B. The persons E, F, and G after learning that their parents C and D had signed a mortgage contract for an object on which they have a part of the ownership put a claimant on the court. These persons demand the invalidation of the mortgage contract signed between their parents C and D and person B on the other hand, because their parents did not obtain their consent on this particular object they shared property ownership with. When we discussed the concept of the mortgage we emphasized that the mortgage can be placed even on the property of a third party on behalf of the creditor in order to guarantee the fulfillment of the obligation that the debtor had on the creditor. In this concrete example, we face two persons C and D had put on object on mortgage that was also in their ownership to guarantee the obligation that person A had towards person B, for which a specific mortgage contract was signed. Such a contract, to my opinion, is invalid because persons C and D has placed an object on mortgage which was co-owned by their children E, F, and G without taking the consent of the latter for this particular act. This is related to the part of the property that belongs to their children E, F, and G whereas it is still valid for the part of the property that belongs to persons C and D whose judicial act of placing this object on mortgage because persons C and D have expressed their will to guarantee the obligation that person A had towards person B. Article 569 of the Civil Code foresees such a situation in this manner:

*"The mortgage placed on the part of one of the members of the co-owners has an effect on that object or on that part of the object that would be given to him after the separation..."*

What could be asked as a question is the fact whether the debtor could transfigure the property placed on mortgage?

Referring to a renowned Italian professor of civil law Francesco Galgano (Galgano, 1994, 385) he states in his book *Private Law* that the real feature of the mortgage and the pawn resides in the fact that both of them follow object in all the changes of their property ownership until the debt is not fulfilled. The consequence of this argument is that the debtor has the right to transform the object placed on the mortgage by third parties but the creditor has always the right in case of non-accomplishment of the obligation by the debtor to demand the forced execution on the property object towards the person who has bought it.

Even the Italian Civil Code in this case stipulates a rather specific arrangement in the articles 2808, 2858, 2861 and 2889 according to whose dispositions the third person who has bought the object placed on mortgage in order to avoid the forced selling of the material good has three options:

- 1) To pay himself the creditor or mortgage creditors by absolving the material good from the mortgage obligation and this would be profitable to him in those cases when the value of the credit is lower than the value of the material good;
- 2) To relinquish the material good that is placed on mortgage or to give up the legal ownership from the object placed on mortgage;
- 3) To separate the object placed on mortgage by making an offer to the creditor or creditors to buy the object placed on mortgage with the same price as the price that he has bought the object or with the same value that the object has currently. If none of the creditors does not buy the object with a price at least higher than 1/10 of his price the material object is taken from mortgage on the basis of the payment offered by a third buyer.

In those cases, when the third party buyer, who is obliged to undergo the enforcement procedure and released from the mortgage obligation on the object by paying the creditor or by giving up on the object placed on mortgage has the right of regressive indictment towards the debtor. Even in the Italian Civil Code article 2871 there is a specific arrangement for the third person that has placed its material good on mortgage in order to guarantee the obligation to the debtor. In case of avoiding the forced selling of the material object that he owns, this person could pay the mortgage creditors. Even in those cases when the third party is obliged to follow the necessary enforcement or when he pays the creditor, he has the right of regressive indictment towards the debtor. In the Albanian Civil Code there is no legal arrangement in any of the provisions of the code regarding the mortgage institution if the debtor has the right or not to sell the object placed on mortgage.

If we refer to the article 560 of the Civil Code, in which a definition of the mortgage is given, it is stipulated as well that:

“Mortgage is a concrete right that is placed on the property of the debtor or of a third party, to the advantage of the creditor, in order to fulfill an obligation.”

Based on the substantial meaning of this provision it seems that the alienation of an object placed on mortgage by the debtor or a third party is forbidden because the mortgage is placed on an object that is owned by the debtor or by a third party who has given his consent to place the object he owns on mortgage in order to guarantee the fulfillment of the obligation of a debtor. Placing the object on mortgage requires that the object remains under the ownership of the debtor or the third party person until the debto fulfills the obligation.

I personally think that even though there is no legal provision in the Civil Code of 1994, the debtor and the third party person that has placed an object of his ownership on mortgage, in order to guarantee the fulfillment of the obligation, have the right to sell the object even without the approval of the creditor based on the well known principle of the civil law, that which is not forbidden is allowed. However, the creditor has always the right, in case of the lack of complying with the obligation on the part of the debtor, to demand the compliance and enforcement of his right on the object

placed on mortgage regardless of the fact that object is alienated to other persons. The reason is that the real feature of the mortgage and of the pawn, as it is mentioned above, is that both of them follow the object regardless of the later changes that transpire on the object placed on mortgage, as it is the case of the buyer who might lose his ownership on the property that he has bought from the debtor. This type of ownership is rather vulnerable due to the lack of fulfilling the obligation by the debtor making the creditor demand the selling of the property that is on mortgage regardless of the fact that this object is not owned by the debtor or the third party who placed the object on mortgage but it is owned by other persons. When we discussed the importance of registering the mortgage we emphasized that what distinguished the registering of the mortgage in the registries of immobile property from the transcript of a property is that the transcript is a publicly declared act that is useful to make this act contravened by third parties, whereas the registration of the mortgage serves the aim to make it possible to third parties who want to buy the object placed on mortgage the real existence and the objective of placing this object on mortgage that might place the third parties at the risk of losing their ownership on the object that have bought from the debtor or the third party that had guaranteed the fulfillment of the obligation by placing this object on mortgage. In this case, it would be useful to ask the question whether the position of the buyer could be amended when the object that he has bought would undergo enforced execution by the creditor in order that the creditor accomplishes his right. I would argue, that one can solve this case by referring to the Civil Code which does not explicitly offer a solution in this manner:

- a) The buyer may choose to pay himself the creditor and other mortgage creditors, by excluding the material good from the mortgage in those cases when the value of the credit is lower than the value of the material good, making him the owner of the bought object;
- b) The buyer may relinquish his ownership right on the object placed on mortgage;
- c) The buyer may exclude the material good from mortgage when he offers the creditor or creditors the same price of the object with the price he bought the object or with the same value of the object.

However, the third buyer that undergoes enforced execution and that relinquishes on the mortgage on the subject by paying the creditors' or relinquishing the right on the object placed on mortgage has the right of regressive indictment towards the debtor or the third person that had placed the object on mortgage in order to be indemnified by them.

### **Types of mortgages**

Based on the meaning of the article 562 of the Civil Code it appears that the types of the mortgages can be divided in:

1. Legal mortgages, whose establishment is stipulated by the law as an obligation for placing an object on mortgage to ensure an obligation. This type of mortgage can be placed even against the will of the debtor in those cases foreseen in the law but always by the consent of the person concerned, in this case the creditor. Hence such

a mortgage cannot be placed apriori but based on the request of the person involved.

2. Voluntary mortgage or contractual mortgage according to the Civil Code. This type of mortgage is due to the will of the parties, which agree to place a property on mortgage to ensure an obligation.

3. Court mortgage is created by a court decision in order to have a large amount of money be paid, as a consequence of fulfilling the assessed obligations or for the assessment of the damage that would result. Of course, these cases include final court decisions which have an executive title.

A decision ruled by a court of arbitration is the same as a decision ruled by a court, which according to the article 510 of the Code of Civil Procedures constitute an executive title for placing the wealth or property on mortgage as it was mentioned above.

### **Cases in which legal mortgage functions**

Cases in which legal mortgages are used are stipulated by the article 563 of the Civil Code in which it is foreseen that those who possess a mortgage are :

- the buyer and any other person who alienates the immobile objects alienated due to the fulfillment of the obligation that follow from the alientation.

In this case the mortgage is placed on the sold object and guarantees the payment of the price on behalf of the buyer. For example, when we sell an appartment and the buyer has not paid the whole value immediately, but he needs to pay by installment and the parties have not created another ownership contract but the object has become a property of the buyer even if he has not paid the whole price. Therefore the object subject to selling is placed on mortgage due to the demand of the creditor who in this case is the seller until the whole price is paid by the buyer.

We could ask the question whether in the case of the selling contract, with regard to the property on reserve (article 746 of the Civil Code) in which the buyer appropriates the object by paying the last installment of the price, the buyer can demand that based on the article 563 of the Civil Code the object is placed on mortgage until the ownership of the object goes to the buyer in order to fulfill the obligations that the seller has towards the buyer and as a consequence the buyer is similar to the creditor towards the seller because the former has already paid the latter an installment of the price of the object for which the parties have agreed in the contract despite the fact that the ownership has not been transferred yet. This could be the case in order to guaratnee the part of the price that the buyer has paid to the seller in case the contract cannot be fulfilled or until the end of the contract henceforth until the final installment for which the parties have agreed in the contract. Can the buyer demand that the object part of the contract be placed on mortgage based on what we discussed above and on the article 563 of the Civil Code?

According to the article 563 point a of the Civil Code it appears that the buyer cannot demand that the object be placed on mortgage because such a privilege is given to the seller or any person who alienates the immobile properties to fulfill the obligation that follow from the alienation.

It appears that the buyer in the selling contract regarding the property on reserve

does not possess legal support to place the object on mortgage. Therefore, such as case does not constitute a case for using a legal mortgage. However, I think that the parties based on their will could decide that the object be placed on mortgage. Thus the position of the buyer in this case could be defended only through the voluntary mortgage, which we will discuss below.

- Co-inheritors, members of associations that have economic activities and co-partners on immobile objects and property, in those parts that belong to them in order to pay the obligations.

When an immobile real estate object becomes a property of co-inheritors due to the legal inheritance case, any of them could demand that this object is divided but it might appear that division in nature, in totally equal parts, could be very difficult if not impossible because such a division would make the object useless or not functional. Therefore in these cases, the court could decide as well as an agreement between parties could do to recompensate financially the parts of the object. However, in order to ensure the payment of such recompensations the law has foreseen the placement on mortgage of the object or a part of it that shall be divided, which corresponds to the amount of money dedicated for compensation. In the case of a company or association a similar situation is applied by treating all the parts of the object as equal and the division of an immobile object is considered. The same legal practice is followed in the case of co-owners of an object which is divided, but whose division in nature is impossible.

-The same applies to the lenders that obtain a credit from bank institutions, in order to ensure the payment of the credits taken from the banks at the right time and according to the right amount.

### **Voluntary mortgage or according to an agreement**

According to the article 562 of the Civil Code, the mortgage can be considered a voluntary mortgage when it is established through an agreement between parties. This contract is a formal one and it needs to be established by a notary act and registered at the property registration offices in which the property is placed on mortgage. The contract for the establishment of the mortgage, as an auxiliary contract may be included in the same document that defines the main obligation it ensures or in a separate document. Henceforth, it is up to the parties involved to decide whether the agreement on the mortgage shall be included in the same documentation that defines the main obligation or a new contract will be devised. It should be mentioned that when the same documentation is used regarding the mortgage agreement, this contract needs to obtain a notary approval.

The mortgage is invalid if in the content of the contract, where the mortgage is foreseen, or even in the request to establish a mortgage (as in the case of a legal mortgage), there are uncertainties with regard to the creditor or the debtor, or with regard to the general features of the owner of the object, with the object itself or with the amount of the credit that has been ensured on mortgage (Article 572 of Civil Code).

The registration of a mortgage property corresponds to an ordinal number. When for the same object, and for the same property there is the same request to register the property on mortgage then the registration shall proceed based on the same ordinal number, which shall be written down in each certificate, that the registrar gives to each of the claimants (article 575 Civil Code).

The mortgages that are registered with the same ordinal number compete with each other proportionally to their respective value (Article 576 of the Civil Code). The registration expenses belong to the debtor, but if the parties agree these expenses can be paid by any interested party or person.

When the mortgage is established by a person who is not the owner of the object, the registration is valid if this object is gained by him (article 566 of the Civil Code).

The servitudes, usufructs, or the right of use and of lodging, which are related to a immobile real estate property, have no effect if they are registered after the registration of a mortgage (article 564 Civil Code).

The mortgage on a prospective object can be registered only when the object exists.

### **The effects of the mortgage and its registration**

The mortgage ensures the credit as long as this shall be within the time limits of its indemnity including the usury, recompensation for the damage due to the postponement of the enforcement, as well as the expenses made for the approval of the credit.

The mortgage placed on a part of the object by one of the co-owners brings about an effect on the object or that part of the object that would be given after the division. If during the division of the shares one of the co-owners obtains another object which is not placed on mortgage, the mortgage passes on this object with the same registration degree as the original within the confines of the value of the object placed on mortgage earlier, on the condition that the mortgage be registered again within 90 days after the registration of this division.

Other property titles or bearer's titles could be guaranteed through mortgage. The effects of the mortgage become valid since the day of its registration and when the mortgage is dependent on a future credit (article 574 of the Civil Code).

According to the article 578 of the Civil Code, the registration of a mortgage has an effect of 20 years since the first registration. In case there is no renewal before this deadline, the mortgage shall have no effect.

After this 20 year deadline, the creditor may ask for a new registration, but in this case the mortgage registration takes time and has effects towards third parties, according to the date of the new registration.

The placement of the ensured credit via mortgage to another person and the expropriation of this credit have effects only if it would be written down in the mortgage registry (article 579 of the Civil Code).

If the creditor that has placed more than one property on a mortgage is damaged due to the use of the property price to pay a previous creditor, whose mortgage includes other properties of the same debtor, can be replaced by the registered mortgage so that he could exercise his mortgage claim or indictment over these properties taking

priority compared to the other creditors that follow after him in the registration. The same obligation applies to the creditors that have been damaged due to the above-mentioned replacement.

If the value of the obligation ensured via the mortgage is lower or when the value of the object placed on mortgage has changed in such a way that to ensure the credit it is necessary only a part of the object, then the creditor has the right to demand the reduction of the mortgage. This is foreseen in the article 582 of the Civil Code, in which the reduction of the mortgage is done through a certain part of the property that is registered or by reducing the amount for which the registration is valid.

The request regarding the reduction of the mortgage is not accepted by the registration clerk if the amount of the property and the value has already been defined in the agreement or by a court decision. However, when partial installments have already been paid that cover at least one fifth of the initial obligation, the debtor may demand proportional reduction of the object placed on mortgage. For example, when the object that is placed on mortgage is a building and the mortgager has made changes to the building after the registration date, then the debtor has the right to demand the reduction of the mortgage in order to exclude the modifications from the mortgage.

### **The cancellation of the mortgage**

The article 583 of the Civil Code stipulates the conditions when the mortgage gets cancelled:

- 1- When the obligation is cancelled;
- 2- With the loss of the object placed on mortgage.
- 3- When the creditor gives up his right.
- 4- When the sale-price is paid through enforced obligation to the creditors that have been ensured in the mortgage, according to their registration priority.
- 5- When the time period after the mortgage registration has already passed.

### **The cancellation of the mortgage registration**

- 1- When the creditor gives his consent through a notary act;
  - 2- When the court rules with a final decision in favor of the cancellation;
- The cancellation of the registration cancels the mortgage. When the cause of the cancellation of the obligation is considered invalid, the mortgage is established and registered again. However, in this case the registration gets another ordinal number.

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