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CONSEQUENCES OF AMBIGUOUS REGULATION OF THE CONTRACTUAL PLEDGE RIGHT IN MACEDONIAN PROPERTY LAW

Abstract: *In the legal system of the Republic of North Macedonia, the right of contractual pledge has been regulated since 2003 by a separate legislative act which includes detailed provisions on the acquisition and application of the contractual pledge right. The Contractual Pledge Act (2003) was intended to compensate for the lack of provisions on the right of contractual pledge in the Ownership and Other Real Rights Act. However, the regulation of the contractual pledge right in the Contractual Pledge Act has proven insufficient and, in certain situations, inadequate for application in legal practice. The Contractual Pledge Act contains ambiguous provisions that call into question the legal certainty in exercising the rights of the pledge creditor and the debtor. Some provisions violate the principle of party equality in favour of the pledge creditor, at the detriment of the rights of the pledge debtor. The authors critically analyse the ambiguous provisions on the contractual pledge right to demonstrate that the Macedonian legislator has opted for restrictive and somewhat controversial regulation that contemporary legal systems tend to abandon.*

Keywords: *property, contractual pledge, real property law, North Macedonia.*

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1. Introduction

In the Macedonian legal system, the pledge right is regulated as a *right in rem* by the Ownership and Other Real Rights Act of 2001[1] (hereinafter: the Ownership Act). By explicitly defining the pledge as a *right in rem,* the Ownership Act dismissed any possible dilemmas regarding the legal nature of the pledge right, even though there are various types of pledges regulated by separate legislative acts, such as the Contractual Pledge Act[2] and the Act on Securing Claims.[3] However, the Ownership Act contains only ten provisions regulating the pledge right. The few provisions in the Ownership Act regulate what can be an object of a pledge (Art. 228(1)), what types of claims can be secured by a pledge (Art. 230(2)), types of pledges (legal, judicial and contractual), and some characteristics of the pledge, such as its accessory nature and priority. Important aspects regarding the acquisition, exercise, protection and termination of the pledge right were left to be regulated in a separate (subject-specific) legislative acts. The lack of provisions in the Ownership Act impair the cohesion of pledge as a distinctive property law institute because special legislative acts have different approaches to regulating the particular types of pledge rights. Thus, the regulation of the contractual pledge in the Contractual Pledge Act is essentially different from the regulation of the judicial pledge in the Act on Securing Claims. The difference is not solely dependent on the fact that there are two types of pledge: one acquired by a contract, and the other imposed by a court decision; it is also due to the lack of a unified concept on how the pledge, as a *right in rem,* should be regulated. Looking into the regulation of different types of pledge, we note that contractual pledge is the only type of pledge precisely regulated. Provisions on the legal pledge are scattered in different legislative acts, and they only regulate different conditions and circumstances in which the legal pledge can be established. Judicial pledge is partially regulated by the Act on Securing Claims because it only regulates the procedure of imposing the right of judicial pledge with a court decision.

Unlike other legislative acts, the Contractual Pledge Act contains extensive regulation on the right of contractual pledge. It regulates important issues such as the manner of acquisition of the contractual pledge, the rights and duties of the pledge creditor and the pledge debtor, some provisions regarding the protection of the rights of the pledge creditor, and different ways in which the

1 *Закон за сопственост и други стварни права* (Ownership and Other Real Rights Act), *Службен весник на Република Македонија*, бр. 18/01, 31/08, 92/08, 139/09, 35/10.

2 *Закон за договорен залог (*Contractual Pledge Act), *Службен весник на Република Македонија*, бр. 5/03, 4/05, 87/07, 51/11, 74/12, 92/12, 115/14, 98/15, 215/15, 61/16

3 *Закон за обезбедување на побарувањата* (Act on Securing Claims), *Службен весник RM*, бр. 87/07, 31/16.

contractual pledge can be terminated. As a subject-specific legislative act, the Contractual Pledge Act is intended to be applied only to the contractual pledge; however, in practice, the Contractual Pledge Act provisions are often used to fill in the gaps in the regulation of other types of pledge: the judicial and the legal pledge. This broadens the impact of the Contractual Pledge Act in regulating pledge as a distinctive property law institute. As a result, any shortcomings in the regulation on contractual pledge in the Contractual Pledge Act affect the entire regulation of pledge right. In the text that follows, we will closely analyse the provisions of the Contractual Pledge Act, which we consider to be ambiguous, restrictive and/or controversial. Implementing these provisions in practice is deemed to bring unintended and undesired consequences.

2. The Regulation of Contractual Pledge under the Contractual Pledge Act (2003)

The Contractual Pledge Act (2003) was the result of incorporating two separate legislative acts that regulated contractual pledge (the 1998 Act on Pledge over Chattels and Rights[4], and the 2000 Contractual Mortgage Act[5]) into a single legislative act. The primary reason for the integration of the two legislative acts into a single one was to unify the regulation on the contractual pledge and to facilitate its implementation in practice. The legislator also intended to update the regulation on the right of contractual pledge and make this right attractive for creditors to use as an instrument for securing claims arising from loans. It is indisputable that the Contractual Pledge Act made the pledge right as a real security very popular. As a result, nowadays contractual pledge is the most frequently used type of real security by creditors. As the popularity of contractual pledge grew among creditors, they started to push for amendments to the Contractual Pledge Act to improve their position as creditors and facilitate the exercise of their rights. Catering for the interest of the creditors, the legislators did not provide adequate protection for the rights of the pledge debtors. This created inequality between the two parties: the pledge creditor and the pledge debtor. The Contractual Pledge Act also accepts the concept of pledging a so-called "future thing", thus intending to expand the potential use of the contractual pledge as a real security. However, there are no specific provisions regulating the pledging of "future things", which to this day causes chaotic relations between creditors and debtors particularly in the real estate market, where putting mortgages over structures under con-

4 *Закон за залог на подвижни предмети и права* (Act on Pledge over Chattels and Rights), *Службен весник на РМ,* бр.21/98, 48/99, 86/00.

5 *Закон за договорна хипотека* (Contractual Mortgage Act), *Службен весник на РМ*, бр. 59/00, 86/00;

struction has become common practice. There is also a lack of comprehensive regulation regarding pledging shares in co-owned property. This often leads to the infringement of the rights of co-owners who have not pledged their share in the co-owned property. They have not been able to fully exercise their rights as co-owners as guaranteed by the Ownership Act, which stems from the fact that the Contractual Pledge Act gives preference to the rights and interests of the pledge creditors.

3. Inequality between the Pledge Creditor and the Pledge Debtor arising from the Contractual Pledge Act

As already noted, several provisions in the Contractual Pledge Act favour the rights and interests of the pledge creditor, at the expense of the pledge debtor. It is most evident in the part of the Contractual Pledge Act regulating the rights and duties of the pledge creditor and the pledge debtor. The disproportion is obvious as most provisions prescribe how pledge creditors can exercise their rights, while very few provisions focus on the pledge debtors.

The basic right of the pledge creditor is the right to demand the sale of the pledged object for payment of the secured claim from the market value of the pledged object. This can be achieved in two ways: by selling the pledged object or by transferring ownership over the pledged object to the pledge creditor (*lex commissoria*).

The sale of the pledged object is the most common way to discharge the creditor's claim. Pursuant to the Contractual Pledge Act, the manner of sale of the pledged object can be determined in the pledge contract (Art. 23). This provision allows the contracting parties to choose the best sale option considering the nature of the pledged object and their interests. However, although there are several options to choose from (sale by a notary public, real-estate agency, broker, enforcement officer), due to lack of precise regulation most of the options are not *de facto* available; as a result, most sales are done *via* enforcement officers. When conducting the sale of the pledged object, enforcement officers act in compliance with the Enforcement Act[6] which regulates the enforcement procedure. However, they do not account for the fact that it is not a regular type of enforcement proceeding for payment of debts but rather a form of exercise of the pledge creditor's right under specific conditions. For example, enforcement officers sometimes do not consider that they are not allowed to choose which part of the debtor's property is most adequate to be put up for sale in the enforcement proceedings, as they are obligated to put up for sale only the pledged object and nothing else. The rule that only the pledged object can be

6 *Закон за извршување* (Enforcement Act), *Службен весник на РМ*, бр.72/16, 142/16, 178/17, 26/18, 233/18, 14/20, 136/20, 154/23.

sold when the pledge creditor is exercising his/her right to demand a sale derives from the Contractual Pledge Act provisions. Article 13 of the Contractual Pledge Act stipulates that, when a right of pledge is established, the pledge debtor is responsible for paying the claim only with the value of the pledged object. This provision is put in place to protect the right of the pledge debtor by limiting his/her responsibility for the secured claim when the pledge debtor and the debtor of the claim are not the same person. Enforcers tend to ignore this rule when a sale of a pledged object can be problematic if other parts of the debtor's property are not included. They consider that this rule does not apply because it is not found in the Enforcement Act, which they abide by during the enforcement proceedings. Their interpretation is that the Enforcement Act allows enforcers to choose the best way to conduct the enforcement proceeding. We disagree with this interpretation of the law and consider that the provisions of the Contractual Pledge Act need to be applied accordingly since this Act regulates the exercise and the termination of the contractual pledge. Furthermore, we consider that the Contractual Pledge Act, as subject-specific legislation, takes priority before the provisions of the Enforcement Act. This means that the Enforcement Act needs to be applied in a manner that does not contradict the regulation on contractual pledges in the Contractual Pledge Act. In the circumstances where the provisions of the Contractual Pledge Act are not followed by enforcers during the enforcement proceedings, the infringement of the pledge debtor's right may occur, especially when the pledge debtor and the debtor of the claim are two different persons. Considering the malpractice cases, it would be beneficial to enact precise provisions directing enforcers on how to adequately apply the rules of the enforcement proceeding when the pledge creditor initiates an enforcement proceeding while exercising his/her right to demand the sale of the pledged object.

As already mentioned, another way that the pledge creditor can get payment for the secured claim is by acquiring ownership of the pledged object (*lex commissoria*). There has been a debate among scholars on the issue of whether *lex commissoria* could be acceptable as a clause in a pledge contract. Most scholars agree that clauses such as *lex commissoria* and *pactum marcianum* lead to the violation of the rights of pledge debtors, and even the rights of pledge creditors (Popov, 2010: 84; Lazić, 2009: 116). In the Macedonian law, the *lex commissoria* clause is not explicitly prohibited. The Ownership Act (OA) states that the pledge creditor can discharge the secured claim by acquiring ownership over the pledged object (Art. 225 of the OA). Unlike the Ownership Act, the Contractual Pledge Act does not allow *lex commissoria* to be incorporated as a clause in the pledge contract. Instead, the Contractual Pledge Act (CPA) states that the pledge creditor can get payment of the secured claim via *lex commissoria* if the sale of the pledged object was unsuccessful and there

are not multiple pledges encumbering the same object (Art. 64-lj of the CPA). Under these conditions, the pledge creditor can acquire ownership over the pledged object as payment, in which case the secured claim is considered fully discharged. This provision is applicable if the sale of the pledged object is made by a notary public who conducts the proceeding in compliance with the provision of the Contractual Pledge Act. As this provision is envisaged in the Contractual Pledge Act, there is a dilemma as to whether this provision can be applied in the enforcement proceedings by the enforcers. Strictly speaking, the provision is envisaged in the part of the Contractual Pledge Act regulating the procedure for exercising the creditor's right to demand sale before a notary public. This is why we cannot say that this provision is intended to be generally applicable. However, as noted by some scholars, once the debtor has defaulted and the creditor has demanded the sale of the pledged object, the transfer of ownership to the pledge creditor (*lex commissoria*) should be permitted if the rights of third parties are not affected (Лазић, 2022: 20). We concur with this opinion and therefore consider that same conditions for *lex commissoria* should apply in the enforcement proceeding initiated by the pledge creditor demanding the sale of the pledged object, even though there is no precise provision on the matter in the Enforcement Act. However, in practice, since the provisions of Article 64-lj of the CPA are not directly applicable in enforcement proceedings conducted by enforcers, the pledge creditor cannot acquire ownership over the pledged object by *lex commissoria* under the conditions set forth in the Contractual Pledge Act. In the enforcement proceeding, the pledge creditor is allowed to participate in the bidding during the public auction of the pledged object (Article 183 of the Enforcement Act). If he/she gives the best bid on the auction, he/she will acquire ownership over the pledged object. This is a better option for the pledge creditor because if the pledged object is not sold at the first auction, in the subsequent auctions the starting bid can be lowered up to 1/3 of the appraised market values of the pledged object. This means that the pledge creditor as a bidder can acquire ownership of the pledged object below its market value without that being considered *lex commissoria*. When the sale price of the pledged object is lower than the value of the secured claim, the secured claim is considered partially paid. Even though the pledge creditor has acquired ownership over the pledged object as the best bidder, he/she can continue to demand payment of the unpaid part of the claim from the rest of the property of his/her debtor. As we can see, applying the Enforcement Act, without considering the lex *commissoria* rules from the Contractual Pledge Act can lead to a more favourable outcome for the pledge creditor, at the expense of the debtor. On the other hand, if the sale of the pledged object is conducted before a notary public, then the provisions of Article 64-lj of the CPA will apply;

so, if the pledge creditor decides to acquire ownership over the pledged object, his/her claim will be considered as paid in full.

When the pledged object remains in possession of the pledge debtor, the Contractual Pledge Act also establishes other rights for the pledge creditor. Such are the rights to ask the pledge debtor to respect his/her pledge right, to supervise the condition of the pledged object, to demand that the pledge debtor maintain the value of the pledged object, to demand the removal of all damage caused to the pledged object, and to demand an anticipatory sale of the pledged object if the pledge debtor is devaluing the pledged object (Articles 25-39 of the CPA). Even though the Contractual Pledge Act establishes these rights for the pledge creditor, the possibility for the pledge creditor to exercise these rights is difficult. There are no legal instruments that the pledge creditor can use to effectively exercise his/her rights other than lawsuits before the courts, which entails a lengthy civil procedure that may not bring the desired result. This makes the afforded protection ineffective.

Under the Contractual Pledge Act, some rights are also granted to the pledge debtor when the pledge creditor has possession over the pledged object (pawn). In this case, the pledge debtor has the following rights: to demand that the pledge creditor diligently cares for the pledged object, to refrain from using the pledged object, to surrender the fruits of the pledged object to the pledge debtor, and to return the pledged object to the pledge debtor once the secured claim has been paid in full (Article 31 of the CPA). If the pledge creditor infringes upon the pledge debtor's rights, the pledge debtor can ask that the pledged object be taken from the pledge creditor and given to a third party for safekeeping. The pledge debtor can also sue for damages resulting from the infringement of his/her rights by the pledge creditor. As in case of protection of the pledge creditor's rights, the pledge debtor has no other legal instruments to protect his/her rights other than file a lawsuit against the pledge creditor.

It needs to be noted that the Contractual Pledge Act has an ambiguous position regarding the right of the pledge debtor to collect the fruits of the pledged object. Generally speaking, the fruits of the pledged object are considered to be encumbered with the pledge while they are part of the pledged object. This is clearly stated both in Article 230(1) of the Ownership Act and in Article 7(2) of the Contractual Pledge Act. On the other hand, even though it is not specifically stated, the Ownership Act allows fruits to be considered an independent object of pledge, once they are separated and collected (Article 127(2) of the OA). The Contractual Pledge Act does not state that the collected fruits can be a separate object of pledge. However, the Contractual Pledge Act does guarantee the right of the pledge debtor to collect and keep the fruits of the pledged object unless it was otherwise stipulated in the pledge contract (Article 127(2) of the OA). If the pledge debtor is permitted by law to collect

and keep the fruits of the pledged object, there is no legal impediment for him/her to freely use them in any way he/she sees fit after that. The pledge debtor can contractually agree to allow the pledge creditor to collect the fruits of the pledged object. In such a case, the value of the collected fruits is set off against the value of the secured claim. This is the so-called *pactum antichreticum* which originates from the Roman law period (Romac, 1975: 59; Horvat, 2007: 242). However, even though the Contractual Pledge Act guarantees the pledge debtor's right to collect the fruits of the pledged object, this right is guaranteed until the pledge creditor demands the sale of the pledged object. Pursuant to the Contractual Pledge Act, once the proceedings for the sale of the pledged object are initiated, all fruits are considered encumbered with the pledge right and therefore can be sold along with the pledged object, unless the pledge contract stipulates otherwise (Art. 27 (3) of the OA). This is very convenient for the pledge creditor because it immediately increases the value of the pledged object. The only way for the pledge debtor to protect his/her right to collect the fruits during the proceedings for the sale of the pledged object is if he/she insists on a clause to that effect to be entered into the pledge contract. This is highly unlikely considering the lack of leverage of the pledge debtor vis-à-vis the pledge creditor when negotiating the conditions of the loan, and the pledge contract. Having the upper hand, the pledge creditor is likely to refuse for such a clause to be entered into the pledge contract since it is not in his/her best interests.

Regarding the issue of the fruits of the pledged object, scholars agree that (due to the elasticity of the pledge right) all that is attached to the pledged object is considered to be part of that object and consequently encumbered with the pledge right (Kovačević-Kuštrimović, Lazić, 2004: 278-280; Rašović, 2005: 438). Scholars also agree that, once they are separated and collected, the fruits become independent and, as such, they can be a separate object of property rights. As for the possibility of the collected fruits being pledged separately, scholars consider that it is possible if the conditions for establishing a pledge right are met (Kovačević-Kuštrimović, Lazić, 2004: 279). In comparative law, there are different legal solutions on the fruits of the pledged object. The Croatian Ownership and Other Real Rights Act[7] states that the collected fruits can be pledged independently (Art. 298). Under the Slovenian Property Code[8], fruits separated from the pledged object become ownership of the pledge debtor, unless otherwise specified in the pledge contract (Art. 159). The German Civil

7 *Zakon o vlasništvu i drugim stvarnim pravima* (the Croatian Ownership and Other Real Rights Act), *Narodne Novine, Službeni list Republike Hrvatske*, 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17.

8 *Stvarnopravni zakonik* (the Slovenian Property Code) Uradni list Republike Slovenije, št.87/02, 91/13, 23/20.

Code (BGB)[9] states that the pledge right extends to all products of the pledged object (Art. 1212 BGB). Consequently, under the German Civil Code, the pledge creditor can collect the fruits if he/she has sole possession of the pledged object (Art. 1213 BGB). The Serbian Act on Pledge over Movable Chattels and Registered Rights[10] states that the pledge debtor has the right to collect the fruits of the pledged object unless he/she has agreed to cede that right to the pledge creditor (Art. 21). The Serbian Contractual Pledge Act envisages perhaps the most unfavourable provision for the pledge debtor. Article 23 (6) of the CPA which states that:

The pledge right is established over all assets of the pledge debtor, inducing future assets that the pledge debtor will acquire if the contracting parties have not made it clear that the pledge right encumbers only the assets that the pledge debtor has at the moment of the conclusion of the pledge contract.

According to the wording of this provision, it is possible for the (current and future) assets to be generally pledged in favour of one pledge creditor who will have priority to get payment of the secured claim from all the assets belonging to the pledge debtor. This provision not only blurs the differences between real and personal securities but it is also detrimental to the credit rating of the pledge debtor. One can argue that the pledge debtor may insist on the pledge contract specifying that only current assets are pledged but, as already said, the bargaining position of the pledge debtor vis-à-vis the pledge creditor is quite weak; so it is unlikely that the pledge creditor will agree to such specification. By allowing for the pledge to be established on an unspecified part of the pledge debtor's property (current and future), this provision contradicts the entire concept of the pledge right as a real security. In our opinion, this provision of the Contractual Pledge Act disproportionally favours the pledge creditor at the expense of the pledge debtor, thus creating party inequality unacceptable in civil law relations (Пржеска, 2024: 119).

Another provision of the Contractual Pledge Act that undermines the rights of the pledge debtor is contained in Article 69 (3) of the CPA:

If the sale price of the pledged object is not sufficient for the pledge creditor's claim to be paid in full, the pledge creditor may ask for further compensation from the pledge debtor.

When drafting Article 69 (3) of the CPA the legislator seems to have neglected that the pledge debtor and the debtor of the secured claim can be two different persons. Considering that, and the fact the pledge debtor who is not

9 *Bürgerliches Gesetzbuch* BGB (the German Civil Code), gesetze-im-internet.de (acessed on 24 August 2024)

10 *Zakon o založnom pravu na pokretnim stvarima i pravima upisanim u registar* (Act on Pledge over Movable Chattels and Registered Rights), *Službeni glasnik Republike Srbije*, br. 57/03, 61/05, 64/06, 99/11, 31/19.

the debtor of the secured claim is only responsible for payment of that claim with the value of the pledged object, we can conclude that this provision is not applicable in full. It is debatable whether this provision can be applied if the pledge debtor and the debtor of the secured claim are the same person. One can argue that this will allow the pledge creditor to continue to seek payment from the debtor for the part of his/her claim that has been left unpaid after the sale of the pledged object and the termination of the pledge right. However, one must consider that, once the pledged object is sold and the pledge right terminated, the pledge creditor whose claim has not been paid in full becomes a "regular" creditor, meaning that he/she no longer has any priority to demand payment from a particular part of the debtor's property. Once the pledge creditor becomes a "regular" creditor, there is no justification why he/she should get preferential treatment before other "regular" creditors that seek payment of their claims from the debtor. We consider that, once a pledge right is terminated with the sale of the pledged object, the pledge creditor should look for payment of the unpaid part of his/her claim under the same condition as other creditors without priority. Thus, an unfair advantage will be avoided.

4. Pledging "future things"

The Contractual Pledge Act regulates the possibility of pledging "future things" (Art. 7 (1) of the CPA). However, the CPA does not specify what "future things" are, and under which condition they could be pledged. We can stipulate that so-called "future things" are things in the process of becoming real things which are part of the material world (fruits, crops, structures under construction, etc.). Provisions on pledging "future things" may be also found in other special subject-specific regulations. For example, the Macedonian Inland Sailing Act[11] states that boats under construction can be pledged as future things (Art. 111(1)). The Macedonian Act on Obligations and Property Relations in Air Traffic[12] states that an aircraft under construction can be mortgaged (Art. 142). Comparatively, the Serbian Act on Pledge Over Movable Chattels and Registered Rights states that future things can be pledged (Art. 13), whereby it should be noted that this Act refers only to movable property. The Italian Civil Code[13]

11 *Закон за внатрешна пловидба* (Inland Sailing Act), *Службен весник RM*, бр. 55/07, 26/09, 22/10, 23/11, 53/11, 155/12, 15/13, 137/13, 163/13, 42/14, 166/14, 146/15, 193/15, 31/16, 64/18, *Службен весник на РСМ* 122/21.

12 *Закон за облигационите и стварноправните односи во воздушниот сообраќај* (Act on Obligations and Property Relations in Air Traffic), *Службен весник на РМ*, бр. 85/08, 59/11, 148/11, 10/15, 150/15.

13 *Codice Civile Italiano* (the Italian Civil Code), Codice Civile online, updated in August 2024; https://www.codice-civile-online.it/en (accessed on 24 August 2024)

states that future things can be mortgaged (Art. 2823). Similarly, the French Civil Code[14] states that future things can be pledged (Art. 2333)

Even though the subject-specific regulation accepts the possibility of pledging "future things" it needs to be pointed out that the concept of a "future thing" as an object of rights *in rem* is not accepted in the Macedonian Ownership Act. Pursuant to Article 12 of the Ownership Act, only things that are part of the material world, that are specified and eligible to be possessed by individuals can be the object of rights *in rem*. The definition of things provided in the Ownership Act excludes the possibility for rights *in rem* to be established over "future things" because they are not yet part of the material world and, consequently, they cannot be possessed by individuals. Despite the provision of the Ownership Act, the subject-specific regulation that allows for pledge rights to be established over future things has opened the door to the widespread practice of mortgaging structures under construction. This practice has boosted the construction industry, making construction projects much easier to fund with bank loans. That was the upside, but there was a huge downside as well. Given that pledging of future things is completely unregulated, many fraudulent practices emerged. These practices have left lenders and potential buyers of structures under construction with no possibility of getting a return on their loans and investments, and without the possibility of seeing the initiated construction projects finished. Once the consequences of the unregulated practice of pledging "future things" have become evident, the legislator has attempted to resolve some of the more pressing issues by mandating that structures under construction be registered in the Real Estate Cadastre in a special sheet called the pre-registration sheet. The provisions that mandate the registration of structures under construction in the Real Estate Cadastre are envisaged in Article 157 of the Real Estate Cadastre Act.[15] According to the Real Estate Cadastre Act, structures under construction are registered in a pre-registration sheet that holds data about the investor, the building permit, established mortgages over the structure under construction, and the pre-sale contracts for the structure under construction. If the construction is halted, Article 205-a of the Enforcement Act states that the structure under construction could be sold and the building rights transferred to the buyer. These provisions are controversial and difficult to apply if the structure under construction has been pre-sold to potential buyers who had already paid most or the entire sale

14 *Code civil* (the French Civil Code), Code civil - Légifrance (legifrance.gouv.fr); acessed on 24 August 2024)

15 *Закон за катастар на недвижности (*Real Estate Cadastre Act), *Службен весник RM*, бр. 55/13, 41/14, 101/14, 115/14, 116/15, 153/15, 192/15, 61/16, 172/16, 64/18, 124/19, *Службен весник на Република Северна Македонија,* бр. 155/24.

price for the structure. So, instead of offering a solution, the Enforcement Act has further complicated the issue.

The concept of pledging "future things" is debatable among scholars as well. Most scholars consider that so-called "future things" are not eligible to be the object of a pledge right or any other *right in rem* (Kovačević-Kuštrimović, Lazić 2004: 279, Rašović 2005: 386-387). Under the prevailing opinion, pledge rights, or other rights *in rem,* are established after "future things" become real. There are many valid arguments about why rights *in rem* cannot be established over "future things". The main one is that it contradicts the nature of rights *in rem*. Exercising rights *in rem* effectively by possessing and using the object of such rights is virtually impossible if the object does not yet exist. In addition, if we consider that the pledge right is intended to serve as a real security, we cannot deny that a "future thing" which is not yet real cannot provide the pledge creditor with a real security for his/her claim. Security-wise, the pledge over "future things" is weaker than personal guarantees (Пржеска, 2024: 151). Since rights *in rem* cannot be established over "future things", it is our opinion that the concept of pledging "future things" is just a way for the pledge creditors to obtain priority in establishing their pledge rights at the moment when the "future thing" becomes real. However, there is always the risk that the "future thing" will not be created, which leaves pledge creditors with no possibility to establish their pledge right.

5. Pledging shares in co-owned property

According to Article 14 (5) of the Macedonian Ownership Act, the share in a co-owned property is considered to have an independent value. This allows the co-owner to manage his/her share of the co-owned property independently without asking the other co-owners for consent. As a result, a co-owner can pledge his/her share of the co-owned property.

The pledging of shares in co-owned property entails establishing the pledge solely on the share in question. Consent of the co-owners is not necessary because their shares are not encumbered with the pledge right. The Contractual Pledge Act is not clear about how the pledge over shares in co-owned property is established but it stands to reason that the share is encumbered separately. Even in case where the pledge right is over a share in the co-owned property, when the debtor defaults on the payment of the secured claim, the pledge creditor may demand that the entire co-owned property be sold (Art. 11 of the CPA). This allows the pledge creditor to circumvent the provisions in the Ownership Act regulating the different ways that co-owners may divide the co-owned property for best results, including the right to buy out the share of the pledge debtor to avoid the public auction of the entire property. The

provisions of the Ownership Act regulating the division between co-owners are not considered because that could delay the exercise of the pledge creditor's rights. As it can be seen, this is yet another example of how a priority is given to the pledge creditor's rights by the Contractual Pledge Act, in this case at the expense of the rights of third parties.

6. Conclusion

In the Macedonian legal system, the pledge right is regulated as a *right in rem* by the Ownership and Other Real Rights Act, which contains only ten provisions regulating the pledge right and determining what can be an object of a pledge, what types of claims can be secured by a pledge, the type of pledges (legal, judicial and contractual), and some of the characteristics of the pledge right. The specific regulation of various types of pledges was left to subject-specific legislative acts, such as the Contractual Pledge Act and the Act on Securing Claims. The lack of general provisions in the Ownership Act impairs the cohesion of the pledge as a distinctive property law institute and enables special legislative acts to adopt different approaches in regulating particular types of pledge rights.

The contractual pledge is the only type of pledge right precisely regulated by the Contractual Pledge Act, which regulates important issues such as the manner of acquisition of the contractual pledge, the rights and duties of the pledge creditor and the pledge debtor, a few provisions on the protection of the rights of the pledge creditor, and the different ways the contractual pledge can be terminated. Even though the regulation on the contractual pledge is more precise than the regulation on other types of pledges, many disputable issues lower the quality of that regulation. The Contractual Pledge Act includes provisions that excessively favour the rights and interests of the pledge creditor, at the expense of the pledge debtor, thus creating party inequality. The Contractual Pledge Act makes it possible for the pledge debtor's assets (current and future) to be generally pledged in favour of one pledge creditor, which contradicts the entire concept of the pledge right as a real security. When the sale price of the pledged object is insufficient for the pledge creditor's claim to be paid in full, the pledge creditor may ask for further compensation from the pledge debtor, which is controversial if the pledge debtor and the debtor of the secured claim are different persons.

The Contractual Pledge Act also regulates the possibility for future things to be pledged, thus opening the door to the widespread practice of mortgaging structures under construction. This practice has boosted the construction industry by making construction projects much easier to fund with bank loans but, due to the underregulation of this matter, fraudulent practices emerged.

The fraudulent practices left many lenders and potential buyers of structures under construction with no possibility of receiving a return for their loans and investments or seeing the initiated construction projects finished.

The pledge on the co-owned part is also insufficiently regulated in the Contractual Pledge Act. The key issue is how the pledge creditor can exercise the right to demand the sale of the pledged object when the debtor fails to fulfill obligations. Under the CPA, the pledge creditor who has pledge on the co-owned part may demand that the entire co-owned property be sold without considering the rights of other co-owners guaranteed by the Ownership Act.

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ПОСЛЕДИЦЕ НЕЈЕДНОСНОГ УРЕЂЕЊА УГОВОРНОГ ЗАЛОЖНОГ ПРАВА У МАКЕДОНСКОМ ИМОВИНСКОМ ПРАВУ

Резиме

У македонском правном систему, право залоге је регулисано као стварно право Законом о својини и другим стварним правима из 2001. године. Закон о својини садржи само десет одредби којима се регулише право залоге, утврђује шта може бити предмет залоге, које врсте потраживања могу бити обезбеђене залогом, одређују врсте залоге (законска, судска и уговорна) и неке карактеристике права залоге. Ближе регулисање различитих врста залога препуштено је посебним законима као што су Закон о уговорној залози и Закон о обезбеђивању потраживања. Недостатак општих одредби у Закону о својини нарушава кохезију залоге као јединственог института стварног права, остављајући простор да се у посебним законима на другачији начин приступи регулисању одређених врста заложних права.

Уговорно заложно право је врста права залоге које је детаљно регулисано Законом о уговорној залози. Овај Закон регулише важна питања као што су начин стицања уговорне залоге, права и дужности заложног повериоца и заложног дужника, заштита права заложног поверилаца, као и различити начини за окончање уговорног заложног права. Иако је регулатива о уговорној залози прецизнија од регулативе о другим врстама залоге, многа спорна питања умањују квалитет тог закона. Закон о уговорној залози садржи одредбе које фаворизују права и интересе заложног

повериоца, на штету заложног дужника, што доводи до неједнакости странака. Закон о уговорној залози омогућава да се имовина заложног дужника (садашња и будућа) генерално заложи у корист једног заложног повериоца, што је у супротности са читавим концептом права залоге као стварног обезбеђења. Када продајна цена заложеног предмета није довољна да се потраживање заложног повериоца плати у потпуности, заложни поверилац може тражити накнаду од заложног дужника, што је контроверзно ако су заложни дужник и дужник осигураног потраживања различита лица.

Закон о уговорној залози такође регулише могућност стављања залоге на будуће ствари, отварајући тиме врата широко распрострањеној пракси стављања хипотеке на објекте у изградњи. Ова пракса је подстакла развој грађевинске индустрије, јер омогућава да се грађевински пројекти много лакше финансирају банкарским кредитима, али због недовољне регулације ове материје долази и до преварних радњи. Преваре су многе зајмодавце и потенцијалне купце објеката у изградњи оставиле без могућности да поврате своје кредите и инвестиције или да виде завршетак започетих грађевинских пројеката.

Залога на сувласничком делу је такође недовољно регулисана Законом о уговорној залози. Главно питање је како заложни поверилац може да искористи своје право да захтева продају заложеног предмета када дужник не испуни обавезе. Према Закону о уговорној залози, заложни поверилац који има залогу на сувласничком делу може захтевати да се целокупна имовина у сувласништву прода без разматрања права других сувласника гарантованих Законом о власништву.

Кључне речи: *имовинско право, уговорна залога, стварно право, Северна Македонија.*