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MORTGAGE RIGHT AND ITS FUNCTIONS AS AN INSTRUMENT TO GUARANTEE THE PERFORMANCE OF OBLIGATIONS

ABSTRACT

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CONCEPTUAL MARKINGS OF THE RESEARCH

The topicality and importance of the researched topic lies, on the one hand, in the hard-to-underestimate importance of the mortgage right as one of the most significant instruments for guaranteeing the execution of obligations used predominantly in credit relationships, on the other hand - in the major changes in the legislation of the Republic of Moldova in the matter of mortgage law during the last decade.

From the beginning, mortgage law was conceived as a faithful companion of credit relations and always adapted to the evolution of the production process. The Republic of Moldova, once it has stepped on the path of implementing the economy based on commodity-money exchange, has experienced an increase in the role of credit instruments, especially those that involve the damage of an asset for the creditor's safety. Given the economic value of immovable property, namely real estate guarantees have aroused increased interest both from the participants in economic market relations and from the legislator.

The reform of the national economy was inevitably accompanied by a reform of the civil legislation, which materialized, first of all, in the adoption of the Civil Code in 2002, which included a summary regulation of the instruments that guarantee the execution of obligations, an important place being dedicated to real credit instruments – pledge and mortgage. The rules contained in the Code applied equally to these two forms of real guarantee, with some exceptions deriving from the specifics of each.

An important moment in the evolution of legislation dedicated to mortgage was the adoption of Law no. 142/2008 on the mortgage, which came up with some innovative views on how the rights and interests of the parties in a mortgage legal relationship are to be protected and realized. Through the amendments and additions made to Law 142/2008, the legislator sought to make the institution of the right of mortgage more efficient, in particular by introducing the rules regarding the mortgage contract vested with an enforceable formula and the procedure for exercising the subjective right of mortgage based on such a contract. The primary objective pursued by the legislator by adopting Law no. 142/2008 and the strict amendments was to ensure the stability and security of credit relations.

Finally, the reform of civil legislation resulted in the adoption of Law no. 133/2018 regarding the modernization of the Civil Code, which returned to the idea of unifying regulations regarding real guarantees. The mortgage law was repealed, part of the rules contained therein being incorporated into the Civil Code.

Despite a rich normative regulation, the rules of the legal institution of the mortgage did not enjoy a sufficient theoretical approach. The research of the local doctrine shows that there are practically no works dedicated specifically to the matter of mortgage law. Most of the time, the analysis of this legal institution is done within the courses of general theory of obligations, namely in the compartments reserved for guarantees of the execution of obligations. As an exception, a monograph in the field of real rights over another's property can be noted [31], where the right of pledge and mortgage is given a broader approach.

Moreover, there is a complete lack of works in which mortgage law is researched through the prism of the functions of this institution. I have identified only one doctrinal work, which has as its object the institution of the pledge, in which the functions of the right of pledge are reviewed [15], without theoretical depth on how the functions in question are performed.

The purpose of the research is to study the *effectiveness* of the mortgage right as a tool to guarantee the execution of obligations. In our view, the research and assessment of the effectiveness of the mortgage law can only be carried out if the rules governing the relations in question are passed through the filter of functions, that are assigned to the legal institution of the mortgage. Considering the multitude of functions of law, our scientific interest is exclusively focused on the specific functions of the guarantees of the execution of obligations – the actual guarantee function and the recuperative function. At the same time, we derive from the consideration that the functions in question refer primarily to the need to protect the rights and interests of the creditor, who is to be ensured the capitalization of the claim either through execution in kind (voluntary) or through forced execution. However, we must not forget to protect the rights and interests of the debtor or the guarantor, as the case may be. For this reason, a third "filter" is the function of reconciling the interests of the parties to the legal mortgage relationship, which ensures a balance of their interests.

Starting from the general purpose of the paper, I formulated a series of ***research objectives***, focused on studying the mortgage law institution through the lens of the stated functions, as follows:

1. Determining the genesis of the mortgage right and the evolution of mortgage relations regulations, in order to facilitate the understanding of the state of this institution at the day of this research.

2. The resolution of some theoretical controversies, but with important practical consequences, regarding the elements of the mortgage legal relationship, in particular, regarding: the object of the mortgage legal relationship, once there is no unanimity of doctrinal opinions regarding that object which is encumbered with subjective law of mortgage - is this the

immovable property itself or the ownership right or other real right over the immovable property; the elements of the content of the subjective right of mortgage in correlation with the content of the legal mortgage relation itself; the legal nature of the subjective mortgage right, or the controversies regarding its real, obligatory or other legal nature have not stopped even to this day; the parties to the mortgage legal relationship (the mortgage creditor and the mortgage debtor), in particular, the legal situation of the mortgage guarantor, who, being the subject of the mortgage legal relationship, is a third party to the main guaranteed legal relationship, but which affects a property from his own patrimony for the safety of the creditor.

3. Researching the functions of mortgage law and how they are achieved through the rules of the institution of mortgage law and the application of the rules in question. In particular, we set out to research: the effects of real estate advertising elements on the acquisition, preservation and exercise of the subjective mortgage right, but also on the accessory character of the mortgage to the secured debt; limiting the accessory character of the subjective right of mortgage in the interests of consolidating credit relations, or limiting this character in certain respects can offer the mortgage creditor additional security in the placement of financial means; the limitations and restrictions imposed on the mortgage debtor by encumbering his right to the immovable property with a mortgage, in particular, the degree of justification of these limitations and restrictions from the point of view of equity and the civil circuit of immovable property; the prospect of regulating the possibility of acquiring the rank of mortgage right by the mortgage debtor and the procedures by which this legal operation can be carried out; the means of protecting the interests of the mortgage debtor (guarantor) in the procedure for tracking the mortgaged property by the creditor; the effectiveness of some ways of exercising the subjective right of mortgage in order to satisfy the mortgage creditor's claim, especially those ways that simplify the procedure of tracking mortgaged real estate in the interests of the mortgage creditor; the effects of exercising the subjective mortgage right on third parties, who have a right or interest in the mortgaged property and its fate after the exercise procedure is completed.

The research hypothesis consists in verifying the extent to which the rules of the mortgage law institution and the practical application of the rules in question effectively perform the functions of the mortgage right (guarantee function, interest reconciliation function and recovery function). The choice of this hypothesis was determined by the role that the mortgage, as a real guarantee of the performance of obligations, has in the market economy, which is based on credit relations. In this sense, the role of this legal institution can be fully appreciated through its functions and the way they are performed.

It should be noted here that we proposed researching the functions of the institution of the mortgage right by referring to the phases of the mortgage legal relationship, namely the static phase, which takes place from the establishment of the subjective right of mortgage until the occurrence of a non-execution of the guaranteed obligation, a phase which they are characterized, in particular, by the functions of guaranteeing and reconciling the conflicting interests of the parties. And the dynamic phase, in which, following a non-execution of the obligation, the subjective right of mortgage is exercised by pursuing the mortgaged property and to which the recuperative function is assigned, achieved by satisfying the mortgage creditor's claim from the value of the property.

Synthesis of the methodology. We have identified as a fundamental methodological landmark of the present research some elements of historical materialism, whose value cannot be underestimated even today. The pioneers of this philosophical current formulated a concept that we share and that we consider as a cornerstone for any scientific research in the field of private law, namely that law cannot be understood either from itself or from the so-called evolution of the human spirit, but, on the contrary, it is rooted in the material conditions of life. In this context, we believe that the qualification of law as an element of the superstructure, located above the economic base of society, intended to support and serve this base, remains relevant. In the conception of historical materialism, the superstructure is a derivative of the economic base, but which not only reflects the economic conditions of social life, but also exerts an inverse influence on them.

We proposed as a methodological benchmark and the unit of logical and historical research, starting from the premise: a phenomenon must be viewed from the point of view of its origin, the stages of its evolution and the physiognomy it has acquired at the present time. At the same time, the historical evolution of the phenomenon should not be looked at mechanically, but the qualitative changes of the phenomenon from one stage of its development to another should be observed.

Finally, I considered it useful to take into account the fact that the process of knowledge pursues two goals. On the one hand, there is the description, that is, the determination of the structure of the researched phenomenon, its component elements and the links between these elements. On the other hand, is explanation, that is, identifying how a phenomenon works and correlates with other phenomena. As will be seen below, the first two chapters of this work mainly refer to the description of the researched phenomenon, and the other two - to its explanation.

The stated methodological milestones are achieved by using a series of specific research methods, namely: the historical analysis method, the logical analysis method, the systemic analysis method, the comparative analysis method, the synthesis method, etc.

Summary of the paper. The doctoral thesis comprises the Introduction, four Chapters and general Conclusions and recommendations. *Chapter I* is dedicated to the analysis of the current scientific situation in the field. We opted for a specific way of approaching the current scientific situation, namely through the prism of the stages of evolution of the regulation of mortgage relations, considering that the current scientific situation in the matter of mortgage law is the result of a long evolution of the regulations, accompanied by the elaboration, modification and reconsideration of theoretical concepts.

Chapter II, entitled *Current trends regarding the elements of the legal mortgage relationship and the legal nature of the mortgage subjective right,* aims to analyze the elements of the legal mortgage relationship and the resolution of doctrinal controversies regarding the object of this legal relationship and the legal nature of the mortgage subjective right.

In *Chapter III,* entitled *Functions of the mortgage right within the statics of the legal mortgage relationship*, first of all we present some considerations regarding the role of the mortgage right as a real credit instrument, whose primary purpose is to ensure the stability and security of credit relationships, after which we proceed to the research of the guarantee function and of the reconciliation of the interests of the parties in the static phase of the mortgage legal relationship. We have carefully examined how to balance the interests of the parties in such a way that the security provided to the creditor is not too burdensome for the debtor. A special place in chapter III is reserved for the social utility function of the mortgage right, the analysis being focused on meeting the housing needs of citizens through mortgage lending.

Chapter IV, entitled *Functions of the mortgage right within the dynamics of the legal mortgage relationship*, is dedicated exclusively to the recuperative function, which is carried out when the mortgage right from its suspensive state passes into the dynamic phase and is intended to ensure the creditor the capitalization of the claim from the value of the asset mortgaged. The chapter in question begins with some considerations on mortgage-backed claims and continues with research into the ways of exercising the subjective right of mortgage. At the same time, the particularities of the exercise of the subjective right of mortgage in special situations are highlighted, such as in the case of the vesting of the mortgage contract with an enforceable formula or in the case of the mortgage debtor entering the insolvency procedure, as well as the effects of the exercise of the subjective right of mortgage on third parties.

1. Analysis of the current scientific situation through the prism of the stages of evolution of the regulation of mortgage relations

The genesis of the legal institution of the mortgage is to be identified in Romanian law, where it was born as a result of the development of economic relations within the transition from natural to market economic relations. The mortgage was widely regulated in Romanian law, and its principles and basic rules, formulated by Romanian jurisprudence, have maintained their relevance up to the present day and can be found in the legislation of the states of the continental law system.

At the same time, we can note that, despite the advantages it presented, the Romanian mortgage was not able to fully fulfill its function of guaranteeing the performance of obligations. Although this legal institution aimed to create a balance between the interests of the creditor and the debtor, to ensure equal conditions for the protection and realization of the interests of both parties, the regulation of a complex system of legal and conventional, general and special mortgages, in the absence of a real estate advertising system undermined the security and stability of credit relations.

Although during the early Middle Ages, original forms of pledge of real estate were born (*aeltere Satzung* and *neuere Satzung* in Germany, *Engagemen*t and *Obligation* in France), for which the condition of registration in a special register of the court or of the city council after a triple public announcement of the deed subject to registration, after which no contestation of the title of the guarantee was allowed, the mentioned forms of the pledge did not survive the reception of Roman private law, governed by the rule *nemo plus iuris transferre potest, quam ipse habet* (no one cannot transfer more rights than those at his disposal), from which no exceptions were allowed. Moreover, in Roman law, the institution of land registers or other similar registers, in which property transfers or the establishment of other real rights over immovables, were to be registered, was not known. The right of ownership over both movable and immovable assets was acquired by tradition, that is, the simple physical transfer of the asset from the seller to the receiver.

Under the influence of Romanization, any formalities, including those of advertising, necessary for the establishment of real rights over immovable property, including the right of pledge, were removed. The conclusion of the contract under a private signature was sufficient for the birth of the mortgage.

Despite the absolutely logical nature of the rule *nemo plus iuris*... from Roman law, it could not be maintained under the conditions of the development of exchange relations and the transition from the predominantly natural economy of the feudal system to capitalism. With the unprecedented development of the economy, in general, and the commercial circuit of goods, in particular, the need to ensure the security and stability of legal relations was felt.

The attention of European legislators was directed, first of all, to credit relations, without which an efficient and upward economic activity is impossible. Given that such relationships in the vast majority of cases were necessarily accompanied by guarantees, among which the most widespread and effective was the mortgage (pledge of immovable property), it was this guarantee that the legislators were primarily concerned with.

The lack of publicity of real real estate rights, caused by the reception of Roman law, affects first of all credit relations. A person granting a loan secured by a mortgage on real estate could never be sure that this real estate was not encumbered with other mortgages or real rights. Such credit presented risk for the creditor and, for this reason, was granted under burdensome conditions for the debtor. In order to ensure the interests of the creditors from this point of view, the land registers were introduced, in which all the mortgages established on the immovables were entered in order to guarantee the execution of the obligations. The mortgage, regardless of whether it was conventional or legal, was only valid if it was registered in the land register. The unregistered mortgage had no effect.

With the implementation of the land registers, the principle of the accessory of the mortgage right, consistently promoted by the legislative acts and the legal specialists who followed the process of reception the Roman law, was mitigated. This mitigation was manifested by the priority given to the formal aspect of the registration over the material aspect of the legal relationship reflected in the land register, due to the probative force of the entries in the land register.

In close connection with the principle of publicity, the principle of specialty was formulated and regulated, according to which only a specific real estate can be encumbered with a mortgage, general mortgages being inadmissible.

As a result of the legislative reforms at the end of the XVIII century - beginning of the XIX century, mortgage relations were regulated in a way that has not undergone essential changes until today. The given regulations were governed by the principle of publicity, that of specialty in both its meanings (in the sense that the mortgage is instituted only on real estate, if they are concretely individualized, general mortgages not being admitted), as well as that of accessory, although this principle was in many ways limited.

The principles and basic rules of mortgage law, as they were formulated in the literature and legislation of the XIX century - beginning of the XX century, remained practically unchanged, they succeeded from one legislation to another (including the states of the socialist camp) and are found in the legal systems of the majority of European states. The latter in some places only specify or detail the norms inspired by the legislative monuments of the modern era. The legal system of the Republic of Moldova is not an exception either. The Civil Code of the Republic of Moldova, as well as other normative acts, based on similar normative acts of states with developed economies, reproduce the legal institution of the mortgage in accordance with the traditions of the continental legal system. This fact, however, does not prevent the doctrine from critically evaluating the current regulation of mortgage law, as well as the dominant theoretical concepts.

In this sense, although the field of pledge and mortgage has seen an extensive approach in Romanian literature, as well as in foreign literature, a number of problems still remain unsolved, which we have formulated as research objectives. In particular, it should be noted that the functions of mortgage law are not the subject of study by doctrinaires, the elimination of this gap being the basic objective of this work.

2. Current trends regarding the elements of the legal mortgage relationship and the legal nature of the mortgage subjective right

The analysis of the aspects regarding the elements of the mortgage legal relationship, especially regarding the object of this legal relationship, elucidated the fact that a real right over another`s property encumbers the subjective right of ownership over the asset, and not the asset as such. The same conclusion applies to the subjective mortgage right. This subjective right encumbers the right of ownership of the immovable property.

At the same time, it must be taken into account that the object of the civil legal relationship is that phenomenon on which the legal relationship exerts its influence. And the civil legal relationship can exert its influence only on the behavior of the subjects. Respectively, affirming the idea of encumbrance through the mortgage subjective right of the ownership over the immovable property, we are going to remember the fact that the encumbrance of the right of ownership with a mortgage requires the owner to perform or refrain from performing actions for the benefit of the holder of the right of mortgage (insuring the mortgaged property, requesting consent to the conclusion of disposition documents on the mortgaged property, refraining from damaging the mortgaged property, etc.). Thus, the concept of encumbrance with a mortgage subjective right of the property over the asset, and not the asset as such, correlates perfectly with the theory of behavior as the object of the civil legal relationship, which demonstrates the correctness of the given concept.

However, despite the fact that the object of the mortgage legal relationship, like the object of any civil legal relationship, is the behavior of the subjects, the importance of the goods and their qualities should not be neglected. Although it is an external element of the legal relationship, the good and its qualities determine the way of regulating the behavior of the subjects regarding the good in question, including the behavior of the subjects of the mortgage legal relationship.

In addition, the object of the mortgage may be limited real estate rights, the mortgage of which is not prohibited by law. We assign here the superficies right and the right of usufruct over a real estate.

The effects of the creation of a mortgage on the superficies right are different depending on the prerogatives recognized by the superficies owner over the land and construction. If the owner of the superficies is the owner of the construction, the mortgaging of the land right has the effect of mortgaging the property right over the construction, once this is an essential component

of the superficies right. If the owner of the superficies is the holder of a *iura in re aliena* over the land and construction, this right is encumbered with a mortgage. Following the exercise by the mortgage creditor of the mortgage right over the superficies by selling it at auction, tender or through direct negotiations, the acquirer is transferred, in the first hypothesis, the superficies right over the land and the property right over the construction, and in the second hypothesis - the right of possession and use of the land and construction. In both cases, the acquirer becomes the successor of the tenant in his rights and obligations towards the owner of the immovable property.

With reference to the right of usufruct, it is essentially temporary. Consequently, the mortgage granted on the usufruct will also be a temporary one. It will be extinguished even before the end of the term of the usufruct established by legal act, in case of death or liquidation of the usufructuary. The usufruct mortgage does not terminate in the event of the usufruct being extinguished by consolidation, regardless of the fact of the person to whom the consolidation takes place (the usufructuary or the owner). The mortgage creditor will be able to pursue the usufruct as if the consolidation had not taken place. The mortgage of the usufruct shall not terminate even in case of its termination at the request of the owner for abuse of the property by the usufructuary. The mortgage creditor, in this case, retains his mortgage right as the cause of this extinguishment is a voluntary act of the usufructuary. The same rationale should also apply in case of termination of the usufruct by the usufructuary renouncing his right.

Also, the possibility of mortgaging a mortgage is admissible. In such a situation, the mortgage creditor in the legal mortgage relationship, conventionally called the primary mortgage creditor, can affect his subjective mortgage right to guarantee the performance of his own obligation to another creditor (secondary mortgage creditor).

With reference to the subjects of the mortgage legal relation, a substantial conclusion should be noted, according to which the debtor of the guaranteed obligation and the mortgage guarantor are two distinct debtors of the mortgage creditor, and not co-debtors jointly or severally. The debtor of the guaranteed obligation is the debtor of the mortgage creditor in the legal relationship from which the guaranteed obligation originates, the mortgage guarantor is the debtor of the mortgage creditor in the legal mortgage relationship. Thus, the debtor of the guaranteed obligation and the mortgage guarantor are not co-debtors, even if the obligation of the mortgage guarantor towards the mortgage creditor is accessory to the obligation of the guaranteed debtor.

The mortgage legal relationship, arising between two subjects (mortgage creditor and mortgage debtor (guarantor)), is a relative legal relationship. But, despite its relativity, a series of

prerogatives can be identified in the content of the mortgage legal relation, which are opposable to all third parties, not just the mortgage debtor. These prerogatives are:

- to pursue the mortgaged real estate, in case of non-execution by the debtor of the guaranteed obligation, as well as in other cases provided by law;

- to dispose of the mortgaged immovable property through sale at auction, tender or through direct negotiations, in order to satisfy his claim from the price obtained as a result of the sale;

- to satisfy his claim from the value of the mortgaged property;

- to benefit from priority over other creditors of the debtor when satisfying his claim from the value of the mortgaged real estate (priority right).

In our view, these four prerogatives form the core of the mortgage legal relationship are to be recognized as elements of the content of the subjective mortgage right. In this sense, even if the legal relationship of mortgage, due to its relativity, is an debt relationship, the subjective right of mortgage, by virtue of the content and the effects it produces, is to be qualified as an absolute right, once it is opposable not only to the mortgage debtor, but also to all third parties, who have the general passive obligation not to hinder the mortgage creditor in pursuing the immovable property. In this context, we consider that the relativity of the civil legal relationship does not predetermine the nature of the subjective rights that arise within it.

Regarding the legal nature of the subjective mortgage right in the doctrine, several conceptions have been outlined, namely that the mortgage right is a real right, that the mortgage right is a debt right, as well as the theory of mixed legal nature, which combines features of real right and debt right.

The doctrinal contradictions regarding the legal nature of the subjective right of mortgage are resolved through the prism of the concept presented in the local legal literature [31, p. 152], according to which, from the point of view of the content and legal effects, the subjective right of mortgage is to be assigned to the category of real rights, and from the point of view of the functions it must perform, this subjective right is attributed to the real guarantees of the execution of obligations.

Our analysis on this subject starts from the idea that the subjective right of mortgage is a unique phenomenon in which two contradictory tendencies are manifested, it is a kind of unity of contradictions. One trend moves the subjective mortgage right into the area of real rights, the other trend – into the area of obligatory (debt) rights. Both of these internal manifestations of this subjective right have a quantitative expression, a series of elements can be highlighted, some specific to the category of real rights, others - to the category of obligatory (debt) rights. Within

the mentioned unit of contradictions, some quantitative elements of a certain category will inevitably prevail over the quantitative elements of the other category, which will have the effect of transforming quantitative characteristics into qualitative characteristics. In our case, within the content, legal effects and methods of exercising and defending the subjective mortgage right, the specific elements of real rights prevail from a quantitative point of view.

Thus, despite the importance of the functions performed by the mortgage right in terms of the obligation law, the legal nature of a subjective right can be fairly elucidated only from the point of view of its content, legal effects and methods of exercising and defending it. Through the prism of these characteristics, the subjective right of mortgage is to be recognized as a real right, with the specification that this subjective right encumbers not the immovable property as such, but the subjective ownership right over the immovable property.

With reference to the legal facts (grounds) for the emergence of the legal mortgage relationship, a significant conclusion must be noted. We consider it necessary to amend the legal provisions (art. 684 paragraph (1) of the Civil Code) regarding the form of the mortgage contract and the registration of the subjective right of mortgage, by introducing the registered form of the mortgage contract and by "tying" the moment of the establishment of the subjective right to mortgage from the moment of registration of the contract. The mortgage contract will be considered concluded at the time of its registration in the immovable property register, and the subjective mortgage right will be considered constituted at the time of the conclusion of the mortgage contract.

Also, with reference to legal mortgages, we retain the idea that, in addition to mortgages expressly qualified as legal, namely those set up to guarantee the state's claims for amounts owed according to fiscal and customs legislation and claims resulting from a court decision, we consider that the contractor's mortgage to guarantee his rights resulting from the construction agreement is to be recognized as legal mortgage.

3. Functions of the mortgage right within the statics of the legal mortgage relationship

In this chapter we have analyzed a number of aspects of performance of the functions of guaranteeing the execution of obligations and reconciling the interests of the parties to the mortgage legal relationship at the static phase of this legal relationship.

First of all, we have identified reasonings that justify the priority of the formal elements, related to the publicity and specialty of the mortgage through registration in the real estate register, over the material elements related to the debt guaranteed by the mortgage and the validity of the title that is the basis of the mortgage right established in favor of the mortgage creditor.

Taking into account the imperatives of the principle of publicity of real real estate rights, based on the *fides publica* of the land registers (real estate register), we welcome the introduction into the Civil Code of the rule on the acquisition of mortgage rights in good faith and, at the same time, we propose the rehabilitation of the former art. 497 of the Civil Code, which, following the example of other legislation (e.g.: art. 901 of the New Civil Code of Romania), grants protection to an assignee of the subjective mortgage right, i.e. to the one who acquires a subjective mortgage right in good faith from a mortgage creditor already registered in the real estate register. The protection granted to the assignee of a mortgage right would be a logical extension of the protection granted to a first mortgagee, who acquired the mortgage in good faith, by virtue of the fides publica character of the land registry.

The role of the principles of publicity and the specialty of mortgage law in the performance of the guarantee function can be explained starting from the premise that compliance with real estate advertising formalities with regard to a mortgage excludes the category of so-called tacit mortgages, known to Roman law and taken over from Roman law by some medieval and modern legal systems. The removal of tacit mortgages is a must, as they undermine the normal circuit of real estate and consequently affect the security of credit relationships. On the other hand, mortgage advertising offers the mortgage creditor an increased level of security in the validity and solidity of the guarentee he benefits. The public trust enjoyed by the entries in the real estate register, the probative force of the entries and the presumption of their veracity protect the mortgage creditor against claims related to the validity of the mortgagee's title or his right to establish a mortgage on the immovable property. The mortgage creditor thus acquires an indisputable right, which, notwithstanding the defects of the settlor's

title, will continue to exercise its stimulating effect on the debtor in terms of the proper performance of the secured obligation.

We have found that the pre-eminence of the formal aspect of the mortgage registration in the real estate register over the material law aspect exerts an enormous influence on the accessoryness of the subjective right of mortgage to the secured claim. Following the example of the Torrens Act, rules could be established to maintain the mortgage right and the mortgage creditor's capacity to hold it, regardless of the changes that may occur in the guaranteed debt legal relationship. By breaking the accessory relationship between the subjective right of mortgage and the secured debt, the possibility of paralyzing the mortgage action through the exceptions related to the secured debt, exceptions generated by some circumstances of which the mortgage creditor may not be aware, would be excluded. Creditors would be more certain of the placement of their capitals, and the guarantee constituted by a subjective non-accessory mortgage right would offer more security and stability to credit relations. The deviation from the accessory rule could thus contribute to the consolidation of real credit.

An independent subjective mortgage right would protect creditors from unforeseen circumstances that would affect the claim and which, under the conditions of accessory, would deprive them of the possibilities offered by the guarantee as secure as the subjective mortgage right is considered to be. If a possible nullity of the mortgage-secured claim would not affect the mortgage, the mortgage creditor would be entitled to recover at least the capital of the claim from the value of the mortgaged property, with priority over other creditors of the mortgage debtor, which would prevent considerable financial losses.

For the same reasons, we are of the opinion that the norm of art. 667 of the Civil Code, through interpretation, can obtain an application that would deviate from the accessory character of the mortgage right, following the agreement of the parties, which would limit the accessory connection of the mortgage with the secured claim.

The aspects of publicizing the right of mortgage through registration in the immovable property register also leave their mark on the protection of the mortgage debtor's interests, which, as is known, is limited by law to the prerogative of disposal over the mortgaged immovable property. The transfer of the mortgaged immovable property for use or its alienation, in the current regulations, is only allowed if the mortgage creditor consents to this.

By virtue of its publicity, the mortgage right has the ability to be maintained in case of transfer of the mortgaged asset from the mortgage debtor's patrimony to the third party's patrimony. Transferring the mortgaged immovable property into use or alienating it does not prevent the mortgage creditor from satisfying his claims from the value of the mortgaged

property. In the case of alienation of the mortgaged real estate, the acquirer will become a mortgage guarantor, will guarantee with the acquired real estate the execution of the obligation by the debtor and will be required to fulfill all the obligations imposed on the mortgage debtor by law or contract. The mortgage creditor will be entitled to exercise the right to verify the condition of the mortgaged immovable property and will have the possibility, in case of a reduction in the value of the immovable property, to demand the early execution of the mortgage-guaranteed obligation, as well as will be able to exercise other rights arising from the mortgage legal relationship, only that their exercise will take place against the acquirer of the immovable property.

In this way, we come to the conclusion that the transfer of the mortgaged immovable property in use or its alienation does not affect the subjective mortgage right and other rights of the mortgage creditor. Respectively, we consider that the provisions of the legislation in force by which the mortgage debtor is required to ask for the consent of the mortgage creditor when executing the acts of disposition regarding the mortgaged immovable property only limit the civil and commercial circuit of immovable property, are superfluous and must be excluded.

We consider that the consent of the mortgagee for the alienation of the mortgaged immovable asset would be necessary only if the legislation of the Republic of Moldova would provide that the alienation of this asset would also have the effect of the acquisition by the acquirer of the debt guaranteed by the mortgage, because for the mortgage creditor the person of the debtor is important. However, once the legislation in force does not contain such provisions, the rules by which the consent of the mortgage creditor is required for transactions regarding the mortgaged real estate are not justified from a legal point of view.

Regarding the transfer of the subjective right of mortgage or its elements from the mortgage creditor's patrimony to the patrimony of another, our attention was directed to the usefulness of the mechanism of succession to the rank of the mortgage right *(succesio hypothecaria*). And here the formal aspect of mortgage advertising leaves its mark, through the possibility of transferring the rank of the mortgage (also subject to advertising requirements) to the acquirer of the mortgaged immovable property, giving rise to a completely new procedure for our legal system - the mortgage on one's own property ("owner's mortgage ").

The advantages of succession to the rank of mortgage are included in the mechanism for balancing the interests of the subjects of the mortgage legal relationship. On the one hand, this mechanism ensures increased protection of the mortgage debtor in terms of his ability to manipulate the value of the mortgaged property. On the other hand, the mechanism favors the interests of the senior mortgage creditor either by obtaining the payment of the secured debt or

by acquiring the property of the mortgaged asset, without affecting the rights and interests of the subordinate mortgage creditors, who remain in the same position in the chain of subsequent mortgages. In another vein, mortgage succession facilitates the circulation of mortgages, which can contribute to the development of the secondary mortgage market and the intensification of credit relationships.

In the context of the analysis of the assignment of the subjective mortgage right, I pointed out the need to introduce the authentic form of the act of assignment of this subjective right, motivating this by the very solemnity of the mortgage contract. In general, based on the principle of mortgage publicity, any act regarding the given right, especially its transfer, is to be subject to registration. The continued maintenance of the rule based on which the need to register the transfer of the subjective mortgage right in the immovable property register is excluded would mean that it is admitted from the start that the given register contains untrue data regarding the holder of the subjective mortgage right, which, on the on the one hand, would mislead the interested parties, on the other hand, would violate the principle of full publicity of the immovable property register.

I also indicated the lack of impediments for the regulation of the assignment of the subjective right of mortgage separately from the claim for which it was created, namely for the benefit of an unsecured creditor of the same debtor. Of course, in such a case, the assignment will only operate within the limit of the value of the mortgage claim, in order not to affect the rights of lower-ranking mortgage creditors, but also those of the mortgage debtor, once the claim of the assignee may be more onerous than that of the transferor.

Analyzing the functions of the mortgage right within the statics of the mortgage legal relationship, we approached some aspects of the use of the mortgage right to solve social problems. In this regard, we have identified a specific function of the mortgage law institution, namely the function of social utility. This function is mainly manifested in mortgage lending for the purchase of residential real estate, for the personal use of citizens and their families. The target group of mortgage loans of this kind are individuals with medium incomes, in whose support the state usually intervenes, by initiating projects and programs aimed at facilitating the accessibility of mortgage loans. In the Republic of Moldova, such a project is represented by the "Prima casă" Program, which has demonstrated its efficiency and potential in increasing the well-being of citizens.

4. Functions of the mortgage right within the dynamics of the legal mortgage relationship

The analysis of the mechanism for exercising the subjective mortgage right allowed us to highlight its role in the effective performance of the recovery function. Namely, the way the recovery function is carried out makes the mortgage right an effective credit instrument and exerts a particular influence on the security and stability of credit relations.

The mechanism for exercising the subjective mortgage right must be efficient at the same time, but also as simple as possible, free of formalities and impediments to the entry into possession of the mortgaged asset and its capitalization. But it is not always easy to find the so-called "golden mean", which combines these two substantial requirements - efficiency and simplicity. Moreover, in the trend of streamlining and simplifying the procedure for exercising the subjective right of mortgage, which of course concerns the interests of the mortgage creditor, we must not forget the interests of his opponent - the mortgage debtor, especially if he, being a third party of the guaranteed debt legal relationship and not receiving benefits from this legal relationship, puts himself in a disadvantaged position.

From the reasons set forth, I came up with the proposal to recognize a benefit of discussion in favor of the mortgage guarantor, not personally obligated to pay the debt, in the conditions that there are other properties mortgaged by the debtor of the guaranteed obligation, with the mortgage creditor following the properties mortgaged by the debtor first, and then those of the third party guarantor. The mortgage guarantor in the analyzed situation is assimilated to a personal guarantor, who asks the creditor to follow the debtor first. The similarity between the surety and the mortgage guarantor is explained by some by the fact that the mortgage would be a kind of real suretyship. This reasoning is the basis of the recognition of the benefit of discussion to the mortgage guarantor.

In this context, it should be mentioned that, in terms of the guarantor's liability, the Civil Code distinguishes between the ordinary guarantor and the consumer guarantor, i.e. the natural person guarantor, the one who acts for purposes unrelated to entrepreneurial or professional activity. According to the general rule, the guarantor's liability can be subsidiary only if this has been agreed between the creditor and the guarantor. In other words, the guarantor can invoke the benefit of discussion only if this right of the guarantor is provided for in the suretyship contract. In the case of the consumer guarantor, the presumption is reversed. The liability of such guarantor is subsidiary, unless otherwise agreed between the parties.

The considerations set out in the field of suretyship could be transposed in favor of the non-professional mortgage guarantor, to whom the legislator, following the example of the consumer guarantor, could recognize the benefit of discussion: in case of real estate mortgage both by the debtor of the guaranteed obligation and by a third party , the mortgage creditor would be obliged to first pursue the properties mortgaged by the debtor, and, in case of their insufficiency to cover the debt, those of the mortgage guarantor.

In the context of the correlation between the mortgage action, through which the mortgaged goods are pursued, and the personal action, through which the unmortgaged immovables of the debtor can be pursued, I considered it useful to recognize an *exceptio excusssionis realis*, by virtue of which the debtor can object to the pursuit of the unmortgaged immovables from his patrimony. Their pursuit is only allowed if the mortgaged real estate is not sufficient to cover the mortgage creditor's claim.

This exceptional situation can be explained by the fact that the debtor in particular has affected one or more properties to guarantee his creditor's claim, and they must be pursued as a matter of priority. The unrestricted possibility of the creditor who has the mortgage to pursue the unmortgaged real estate puts the other creditors of the debtor (unsecured creditors) in an unfavorable situation.

Regarding the direct capitalization of the object of the mortgage in order to satisfy the mortgage creditor's claim, I considered that the purchase of the mortgaged asset by the creditor as a way of effectively exercising the subjective mortgage right is objectionable. We opt for maintaining this possibility only for the cases of the sale of the mortgaged property at public auction, as well as in case of insolvency of the debtor. That proposal comes in unison with art. 684 para. (7) Civil Code that declares the nullity of the clause of the mortgage contract by which the mortgage creditor becomes the owner of the mortgaged property in case of non-execution or improper execution of the obligation assumed by the debtor. This is necessary to exclude abuses on the part of the mortgage creditor, who is, as a rule, a commercial bank or other financial institution and predominates, as a professional, in relation to mortgage debtors.

The trend of simplifying the procedure for exercising the subjective right of mortgage has materialized in our legislation by introducing rules regarding the mortgage contract vested with an enforceable formula, the execution of which does not require an address to the court to obtain a judicial act. The creditor has the right to appeal based on such a contract directly to the bailiff.

At the same time, the regulation of such a simplified procedure for tracking the mortgaged property was accompanied by the limitation of the mortgage debtor's possibilities of invoking substantive defenses against the conclusion of the bailiff's initiation of the enforcement

procedure based on the mortgage contract vested with the enforceable formula, which does not seem fair. If there are grounds to invoke the nullity of the mortgage contract or the legal act from which the secured claim originates, or objections regarding the volume of the claim, the satisfaction of which is claimed from the value of the mortgaged property, or other relevant objects, the mortgage debtor cannot invoke them, once the law deprives him of this possibility. The limitation in question is not justified from the point of view of the rights and interests of the mortgage debtor, but also of social equity, as well as it may contribute to abuses on the part of mortgage lenders, this is why we opt for the expansion of the grounds of defense in substance, to which the mortgage debtor can appeal, especially those related to the volume of the debt, the satisfaction of which is claimed from the value of the mortgaged asset.

For comparison, in the case of enforceable titles that do not come from the jurisdictional bodies, the debtor has the right to invoke, by way of appeal to the execution, all substantive defenses related to the existence, extent and validity of the claim. The mortgage contract vested with the enforceable formula also does not originate from a jurisdictional body and, for the reasons set forth, it must be recognized the possibility of the mortgage debtor to invoke, by contesting the decision to initiate the enforcement procedure, any substantive defenses.

In the context of the pursuit of the mortgaged property based on the mortgage contract vested with the enforceable formula, I pointed out the lack of exceptions in the national legislation, which would require the creditor to appeal to the court, despite the mortgage contract being vested with such a formula, especially if the object of the mortgage is a house, which belongs to a natural person with property rights, who does not have other houses in the property.

This is explained by the fact that the exercise of the subjective mortgage right has very serious consequences for the mortgage debtor, namely the deprivation of the only housing space. That is why a judicial control of the conditions for exercising the subjective right of mortgage and the conviction of the court for the evacuation of people from the residential space and the transmission of the home into the possession of the mortgage lender are necessary.

Finally, we mention the need for increased protection of the interests of the mortgage guarantor, since he is a third party to the relations between the creditor and the debtor and does not have anything to gain from the legal debt relationship established between them. For this reason, we consider the rule of inadmissibility of partial execution by the mortgage guarantor of the guaranteed obligation to be too restrictive, except with the creditor's consent, in order to avoid some unfortunate consequences of the exercise of the mortgage right towards him. Partial payment by the mortgage guarantor does not prevent the mortgage creditor from pursuing the

mortgaged property for the remaining part of the obligation. Respectively, the mortgage lender's interests remain unaffected.

The regulation of an efficient mechanism for exercising the subjective right of mortgage represents that substantial element through which the social value of the mortgage institution can be assessed. Or the raison d'être of the mortgage resides precisely in the possibility offered to the mortgage creditor to obtain preferential satisfaction of the claim from the value of the mortgaged property. The mortgage would provide the mortgage creditor with illusory protection if he cannot properly realize this possibility.

But the considered mechanism must not be regulated unilaterally. A balance must be ensured between the interests of the mortgage creditor and the interests of the mortgage debtor, as well as those of other persons who have certain rights over the mortgaged real estate. Such a balance can contribute to solving some substantial economic objectives in the field of credit relations: on the one hand, ensuring the recovery of the creditor's capital through the possibilities of capitalizing the mortgaged real estate, on the other hand - facilitating access to credit sources that the debtor requires.

The successful achievement of the mentioned objectives requires a systematic improvement of the legal norms, in order to satisfy the constantly developing social needs.

CONCLUSIONS AND RECOMMENDATIONS

Following the complex study of the institution of mortgage right, through the lens of its functions, aimed at strengthening credit relations, we will draw some conclusions and make some recommendations.

1. The analysis of the historical evolution of the regulations of mortgage relations suggests the conclusion that the contemporary institution of mortgage right represents a combination of the principles of the Roman mortgage and the medieval pledge of immovable property. The latter represents an original phenomenon of medieval legal culture, which, however, did not survive the reception of Roman law. Following the process of receiving Roman law, the rules of the Roman mortgage became deeply rooted in the European legal system, but they had an unfortunate consequence on economic relations, in general, and on credit relations, in particular. The consequences in question were due to the occult and general character of Roman mortgages.

In search of solutions to stabilize the economic situation, the European legislators of the modern era turned their eyes to the past and revived the principle of publicity and specialty characteristic of the early medieval pledge. The constitutive nature of the mortgage registration in the land register was proclaimed. And as a consequence of the publicity, the mortgage specialty was promoted in two indissoluble manifestations. The specialty of the encumbrance, which may have as its object an individualized real estate, as well as the specialty of the guaranteed claim, which must be reflected in the land register.

The physiognomy acquired by the mortgage institution in the legislation and doctrine of the modern era is kept almost unchanged until today, which denotes its practical efficiency.

2. The Roman concept regarding the mortgage as an encumbrance of the asset (*iura in re aliena*), although it is shared by the majority of the doctrine and supported by contemporary legislators, is contested from the positions of the theory of behavior as an object of the civil legal relationship. It is rightly stated that the object of the civil legal relationship is that phenomenon on which the legal relationship exerts its influence, and the civil legal relationship can only exert its influence on the behavior of the subjects. The influence in question cannot be exercised over things. Along with affecting an asset to guarantee the performance of an obligation, the behavior of the owner in relation to the asset in question is influenced. Consequently, the object of the mortgage is nothing but the ownership over the asset. The mortgage encumbrance of limited real rights must be viewed from the same positions.

3. Another theoretical aspect, but significant for the correct understanding of the mortgage mechanism, refers to the correlation of the content of the legal mortgage relation with what we call the subjective right of mortgage. In solving this issue, we start from the premise that the mortgage legal relationship, arising between two concretely determined subjects with certain correlative rights and obligations, is a relative legal relationship, but within which an absolute subjective right, opposable to third parties, arises. The prerogatives that make up the content of the subjective right of mortgage are: the right of pursuit, the right of preference, the right to satisfy the claim from the value of the mortgaged immovable property and to dispose of the property in this sense under the conditions established by law. The other rights recognized by law to the mortgage creditor represent elements of the content of the legal mortgage relationship, but are not to be included in the content of the subjective mortgage right.

We mention that in the specialized literature, the issue of delimiting the content of the civil legal relationship from the content of subjective civil right, in general, and the content of the mortgage legal relationship from the content of subjective mortgage right, in particular, has never been formulated. We believe that such a delimitation is of scientific importance, which contributes to a better understanding and application of the concept of subjective civil right, of the ways of exercising, defending and transferring subjective civil rights.

4. We have undertaken an attempt to resolve one of the longest standing controversies in the matter of real rights, namely the controversy over the legal nature of the subjective right of mortgage. The solution I proposed is based on delimiting the functions of the mortgage right from the content and legal effects of the subjective mortgage right. Despite the role of the functions performed by the mortgage right in the plan of the obligation law, the legal nature of a subjective right can be fairly elucidated only from the point of view of its content, legal effects and methods of exercising and defending it. Through the prism of these characteristics, the subjective right of mortgage is to be recognized as a real right, with the specification that this subjective right encumbers not the immovable property as such, but the subjective right of ownership over the immovable property.

The solution of the scientific problem regarding the legal nature of the subjective right of mortgage puts an end to long theoretical disputes. The author's personal contribution to this subject is revealed by the application of the principle of the unity of contradictions, as a result of which the quantitative predominance of either the elements specific to real rights or the elements specific to debt rights gives the analyzed subjective right a specific quality (legal nature).

5. In researching the aspects related to the performance of the guarantee function through the prism of the principle of mortgage publicity and the accessory nature of the subjective right

of mortgage to the guaranteed claim, we identified the reasonings that justify the priority of the formal elements, related to the publicity of the mortgage through registration in the immovable property register, over the material elements, regarding the claim secured by the mortgage and the validity of the title underlying the mortgage right established in favor of the mortgage creditor.

The formalism of real estate advertising, which has its own principles, such as the principle of the presumption of the veracity of the registration in the real estate register and the probative force of the data contained in the register, exerts a strong influence on the security with which the mortgage lender is to be invested in terms of the solidity of his guarantee. A relevant example in this sense offers us the acquisition of the mortgage right in good faith, in the conditions where the originator of the mortgage appeared in the real estate register as the owner of the mortgage right, and the creditor did not know about the shortcomings of the originator's title.

The analyzed formalism also removes a series of effects of the accessory nature of the subjective mortgage right to the guaranteed claim. In another order of ideas, by way of interpretation, we have identified the possibility of applying the rules regarding the mortgage in a way that would deviate from the accessory nature of the mortgage right. Such an application of the mortgage rules is of significant practical value. In this sense, breaking, under certain conditions, the accessory relationship between the subjective right of mortgage and the guaranteed debt can instill confidence in creditors in the placement of their capital. The deviation from the accessory rule could thus contribute to the consolidation of real credit.

By virtue of its publicity, the mortgage right has the ability to be maintained in case of transfer of the mortgaged asset from the mortgage debtor's patrimony to the third party's patrimony. In this way, the transmission of the mortgaged immovable property in use or its alienation does not affect the rights of the mortgage creditor. Respectively, we consider that the provisions of the legislation in force by which the mortgage debtor is required to request the consent of the mortgage creditor when executing the acts of disposition regarding the mortgaged immovable property are not justified. In this context, we opt for the exclusion from the legislation of the restrictions imposed on the mortgage debtor when executing acts of disposition on the mortgaged property, a fact that, on the one hand, does not affect the rights and interests of the mortgage creditor, on the other hand, it streamlines the civil and commercial circuit of the real estate.

The formal aspect of mortgage advertising also leaves its mark on the transfer mechanisms of the subjective mortgage right or its elements from the mortgage debtor's

patrimony to another's patrimony. In this context, we point out a mechanism unknown to our legislation, but analyzed by the author as a new theoretical concept for the doctrine of the Republic of Moldova, namely the succession to the rank of the mortgage right, including in favor of the owner of the mortgaged property. The mechanism of succession to the rank of mortgage is of double practical importance. On the one hand, it provides increased protection to the mortgage debtor in terms of his ability to manipulate the value of the mortgaged asset. On the other hand, it allows the mortgage creditor to manipulate his right of priority, which gives him the possibility to dispose of the subjective right of mortgage in a flexible manner, and not only through classic mechanisms of alienation, such as assignment of rights.

In the context of the formulated conclusions, we come up with the following *lege ferenda* proposals.

5.1. Regarding the form of the mortgage agreement.

We propose the exposition of the second thesis of the paragraph (1) from art. 684 Civil Code in the next version:

The mortgage agreemnt is concluded in authentic form and is considered validly concluded from the moment of registration in the real estate register.

5.2. Regarding the form of the agreement of assignment of the subjective mortgage right.

We propose the addition of par. (4) from art. 738 Civil Code with the following sentence:

The mortgage assignment contract is concluded in authentic form.

5.3. Regarding the protection of the bona fide mortgage assignee.

We propose the completion of art. 686 Civil Code with par. (3) with the following content:

(3) The provisions of this article are applied accordingly to the transferee who has acquired a right of pledge over the object registered in the constitutive advertising register provided by law.

5.4. Regarding the restrictions imposed on the mortgage debtor.

We propose the exclusion of the mortgage right from the action of the restrictions contained in art. 727 par. (3) and (4) Civil Code, which prohibit the mortgage debtor from selling or otherwise alienating the mortgaged property, as well as from transferring the mortgaged property for free or onerous use, without the consent of the mortgage creditor. In this sense, art. 727 is to be completed with para. (4^1) with the following content:

(4^1) In the case of a mortgage, the mortgage debtor is free to use, manage and dispose of the mortgaged property, provided it does not prejudice the rights of the mortgage creditor.

5.5. Regarding *succesio hypothecaria*.

As a matter of principle, we consider it appropriate to include the mechanism of succession to the rank of the mortgage either by a third party who pays the senior creditor or buys the mortgaged property with the price adjustment for the payment of the senior creditor, or by the mortgage debtor, who pays the senior creditor. We believe that this mechanism would contribute to the dynamism of credit relations. At the same time, making some *lege ferenda* proposals in the context of this legal operation would take up too much space and exceed the research scope of this paper, which is why we reserve the possibility to carry out an extensive analysis in other scientific papers.

6. Within the research of the aspects related to the recovery function, we highlighted the effectiveness of the mortgage right as a credit instrument, which exerts a special influence on the security and stability of credit relations.

The role of the function in question consists in the effective satisfaction of the mortgage creditor by recovering the claim from the value of the mortgaged immovable property, in the conditions where the mortgage debtor fails to honor his obligation. The central element of the function in question is the procedure for exercising the subjective mortgage right.

At the same time, the regulation of an effective mechanism for the exercise of the subjective right of mortgage requires the observance of certain conditions and formalities, which are intended to order the mortgage creditor's actions aimed at satisfying his claim, as well as to exclude possible abuses and violations of the mortgage debtor's rights. In this sense, the regulation of an effective mechanism for the exercise of the subjective right of mortgage should take into account the rights and interests of the mortgage debtor. In this way, it is necessary to ensure, within the procedure for exercising the subjective right of mortgage, a balance between the interests of the mortgage creditor and the interests of the mortgage debtor, but also those of other persons who can justify an interest in relation to the mortgaged immovable property.

The analysis carried out resulted in a series of recommendations from the author. First of all, I criticized the purchase of the mortgaged asset by the creditor as a way of effectively exercising the subjective right of mortgage and opted to maintain this possibility only for the cases of selling the mortgaged asset at public auction. Secondly, in the context of the exercise of the subjective right of mortgage based on the mortgage contract vested with an enforceable formula, I pointed out the need to expand the mortgage debtor's possibilities to raise objections on the way of exercising the subjective right of mortgage. Thirdly, we proposed the recognition of some defenses (exceptions) in favor of the passive subject of the mortgage legal relationship, such as *exceptio excusssionis realis* and the benefit of discussion. All the recommendations considered have a special practical significance, aiming to ensure the balance of the interests of

the parties to the mortgage legal relationship in its dynamic phase and to exclude possible abuses on the part of the mortgage creditor.

In the context of the formulated conclusions, we come up with the following *lege ferenda* proposals.

6.1. Regarding the possible exceptions.

We propose the regulation of the benefit of discussion in favor of the mortgage guarantor by completing par. (2) from art. 669 Civil Code with the following sentence:

The consumer mortgage guarantor, not personally bound to pay the guaranteed obligation, can ask the mortgage creditor to first track the immovable property or assets mortgaged by the mortgage debtor, who is also the debtor of the guaranteed obligation, unless it is obvious that the immovable property mortgaged by the debtor is not sufficient to satisfy the creditor's claim.

We propose the *exceptio excusssionis realis* regulation by completing art. 888 with par. (4) in the following wording:

(4) The creditor can pursue the unmortgaged immovables of his debtor only if it is evident that the immovables mortgaged by the debtor in favor of this creditor are insufficient to satisfy the claim.

6.2. Regarding the purchase of the mortgaged property by the mortgage creditor.

We propose the completion of art. 772 Civil Code with par. (7) with the following content:

(7) In the case of a mortgage, the mortgage creditor can purchase the mortgaged property only if the property is sold at a public auction.

6.3. Regarding the procedure for exercising the subjective mortgage right based on the mortgage contract vested with an enforceable formula.

We propose the completion of art. 759 Civil Code with par. (5) with the following content:

(5) The provisions of this article do not apply if the object of the mortgage is a home owned by a natural person who does not have other real estate in the property.

The presented *lege ferenda* proposals are intended to increase the efficiency of the mortgage right as a real credit instrument, which may have the consequence of increasing the social value of the institution of mortgage right.

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ADNOTARE

Tarlapan Artur, „Dreptul de ipotecă și funcțiile acestuia ca instrument de garantare a executării obligațiilor”, teză de doctor în drept, Chișinău, 2024

Structura tezei: introducere, patru capitole, concluzii generale și recomandări, bibliografie din 203 de titluri, 181 de pagini de text de bază. Rezultatele obținute sunt publicate în 16 lucrări științifice.

Cuvinte-cheie: ipotecă, funcții, relații de credit, drept subiectiv, prioritate, rang, accesorietate, creditor ipotecar, debitor ipotecar, garant ipotecar, bun imobil, registrul bunurilor imobile, creanță, fapt juridic, contract de ipotecă.

Domeniul de studiu: drept civil.

Scopul lucrării: cercetarea eficienței dreptului de ipotecă ca instrument de garantare a executării obligațiilor, prin prisma funcțiilor specifice garanțiilor executării obligațiilor – funcția de garantare, funcția de conciliere a intereselor părților și funcția de recuperare.

Obiectivele cercetării: studierea instituției dreptului de ipotecă prin prisma funcțiilor acestuia, a modului în care normele instituției dreptului de ipotecă și practica aplicării lor contribuie la realizarea funcțiilor în cauză; soluționarea controverselor teoretice; elaborarea recomandărilor de aplicare corectă a normelor legale și a propunerilor de *lege ferenda*.

Noutatea și originalitatea științifică: este o cercetare fundamentală a dreptului de ipotecă ca instrument de garantare a executării obligațiilor, a cărui menire este asigurarea stabilității și securității relațiilor de credit. În lucrare sunt formulate concluzii de ordin teoretic şi practic şi sunt înaintate propuneri de *lege ferenda*, pentru îmbogăţirea doctrinei și perfecţionarea legislaţiei în vigoare.

Problema științifică soluționată: constă în *elucidarea* eficienței dreptului de ipotecă ca instrument de credit real, ceea ce *conduce la remodelarea* mecanismului de funcționare a acestei instituții juridice, *în vederea creării* unei baze teoretice pentru îmbunătățirea legislației și a jurisprudenței.

Semnificația teoretică: constă în cercetarea complexă a instituției dreptului de ipotecă prin prisma conceptelor teoretice, a aspectelor de aplicare practică a normelor legale din domeniu, a elementelor de drept comparat.

Valoarea aplicativă: cercetarea este efectuată în lumina Codului civil modernizat și pune în evidență interpretarea și aplicarea corectă a normelor cu privire la ipotecă. Teza poate servi drept suport didactic pentru studenții, masteranzii şi doctoranzii facultăţilor de drept.

Implementarea rezultatelor științifice: rezultatele cercetării pot fi utilizate pentru perfecționarea cadrului legislativ existent, a practicii judiciare și a Hotărârilor Explicative ale Plenului Curții Supreme de Justiție.

АННОТАЦИЯ

Тарлапан Артур, «Право ипотеки и его функции как инструмент обеспечения исполнения обязательств», диссертация на степень доктора права, Кишинэу, 2024

Структура диссертации: введение, четыре главы, выводы и рекомендации, библиография из 203 наименований, 181 страниц основного текста. Результаты исследования опубликованы в 16 научных работах.

Ключевые слова: ипотека, функции, кредитные отношения, субъективное право, приоритет, старшинство, акцессорность, ипотечный кредитор, ипотечный должник, ипотечный гарант, недвижимость, реестр недвижимого имущества, право требования, юридический факт, договор ипотеки.

Предмет исследования: гражданское право.

Цель диссертации: исследование эффективности ипотечного права как инструмента обеспечения исполнения обязательств, посредством функций, специфичных для способов обеспечения исполнения обязательств – обеспечительная функция, функция согласования интересов сторон и функция взыскания требования.

Задачи исследования: изучение института ипотечного права в свете его функций и того, как нормы об ипотеке и практика их применения способствуют выполнению соответствующих функций, решение теоретических контроверз, разработка рекомендаций по правильному применению правовых норм и предложений по улучшению законодательства.

Новизна и научная оригинальность: это фундаментальнное исследование права ипотеки как инструмента, обеспечивающего исполнение обязательств, направленное на стабильность и безопасность кредита. В работе сформулированы теоретические и практические выводы и сделаны предложения для обогащения доктрины и совершенствования законодательства.

Решенная научная проблема: заключается в *выяснении* эффективности ипотечного права как инструмента реального кредита, что *приводит к ремоделированию* механизма функционирования этого правового института *с целью создания* теоретической основы для совершенствования законодательства и судебной практики.

Теоретическое значение: состоит в комплексном исследовании института ипотечного права, с точки зрения теоретических концепций, практического применения правовых норм в данной области, элементов сравнительного правоведения.

Прикладное значение: исследование проводится в свете модернизированного Гражданского кодекса и подчеркивает правильное толкование и применение норм об ипотеке. Диссертация может служить дидактическим материалом для юридических факультетов.

Внедрение научных результатов: результаты исследования могут быть использованы для совершенствования нормативной базы, судебной практики и Разъяснительных Постановлений Пленума Высшей Судебной Палаты.

ANNOTATION

Tarlapan Artur, PhD thesis entitled "Mortgage right and its functions as an instrument to guarantee the performance of obligations", Chisinau, 2024

Thesis structure: introduction, 4 chapters, conclusions and recommendations, bibliography of 203 titles, 181 pages of basic text. The results are published in 16 scientific works.

Keywords: mortgage, functions, credit relations, subjective right, priority, seniority, accessory, mortgage lender, mortgage debtor, mortgage guarantor, real estate, real estate register, right of claim, legal fact, mortgage contract.

Field of study: civil law.

The purpose of the thesis: study of the effectiveness of mortgage right as a tool to ensure the fulfillment of obligations, through functions specific to the means of ensuring the performance of obligations.

Research objectives: a study of the institution of mortgage right in the light of its functions and how the rules on mortgage and the practice of their application contribute to the performance of relevant functions, the solution of theoretical controversies, the development of recommendations for the correct application of legal norms and for improving the legislation.

Novelty and scientific originality: this is the first fundamental study of the right of mortgage as a tool to ensure the fulfillment of obligations aimed at the stability and security of a loan. The thesis formulates theoretical and practical conclusions and offers *lege ferenda* to enrich the doctrine and improve the current legislation.

The scientific problem resolved: is to *ascertain* the effectiveness of mortgage right as a tool for real credit, which leads to *remodeling* of the mechanism of functioning of this legal institution *in order to create* a theoretical basis for improving legislation and judicial practice.

Theoretical significance: consists in a comprehensive study of the institution of mortgage law, in terms of theoretical concepts, the practical application of legal norms in this field, elements of comparative law

Applicative value: the research is carried out in the light of the modernized Civil Code and highlights the correct interpretation and application of the mortgage rules. The thesis can serve as a teaching support for students, master students and doctoral students of law faculties.

Implementation of scientific results: the results of the research can be used to improve the existing legal framework, judicial practice and Explanatory Decisions of the Plenum of the Supreme Court of Justice.

TARLAPAN ARTUR

MORTGAGE RIGHT AND ITS FUNCTIONS AS AN INSTRUMENT TO GUARANTEE THE PERFORMANCE OF OBLIGATIONS

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