

## **THE RIGHT TO MORTGAGE IN THE LIGHT OF EUROPEAN CIVIL CODES**

### **Abstract**

The most recent history of the development of the institution of mortgage began with the great modifications of the nineteenth century. The large codification activity realized through civil codes, such as the French Civil Code, the General Austrian Property Code, the German Civil Code, and the Swiss Civil Code, was undertaken with the aim of realizing the important reforms in the field of civil law. Within these codifications, the civil law is freed from feudal elements and takes the seal of the bourgeois civil law, the stratum law, which, regardless of the economic and political particularism, strengthened its positions in power through the triumph of the market economy. The article aims at throwing some light over the institution of mortgage, namely its position in European civil codes, including its notion, types, subject matter, establishment manner, functioning and its termination, as well as answer questions dealing with how mortgage is regulated and treated in bourgeois civil codes, along with similarities and differences that exist in this respect among the codes in question. In our attempts to encompass the dimensions of the institution of mortgage and to establish the framework upon which it has been created, the research will extend in time and space, by presenting theoretical and legislative references from the comparative viewpoint.

**Key words:** *Civil Code, institution, mortgage, Law.*

### **I. INTRODUCTION**

The mortgage law is a proprietary law referring to a security interest in real property held by a lender as a security for a debt. A mortgage in itself is not a debt, it is the lender's security for a debt. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower. The creation of mortgage as a special institution depended on the determined level of the development of proprietary relations during a certain

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historical development phase. It is therefore, natural, to assume a long developmental route of the institution of the mortgage law.<sup>1</sup>

Mortgage emerged in the post-classical period of the Roman law, exactly at the time when the slave economy began to shake. It was during this period when the weaknesses and flaws of the right of pledge (*pignus*) began to become evident, and they appeared as a result of the submission of an item to the creditor for possession. Since the pledge was transferred to the creditor's detention, during the period of the right of pledge, the debtor was denied the right to its utilization. The pledging of "*invecta et illiata*" working tools, the only property rent payers had, hindered land cultivation and tillage on one hand, whereas on the other, the debtor's position became more and more difficult. This is the reason why the owners of large *latifundia* were obliged to give their lands to the rent payers to till. Thus, the *pignus* law was replaced with another form of pledge, i.e. mortgage, as a pledge contract without the right to possessing the item itself.<sup>2</sup>

Based on what was said so far, we can conclude that, the fact was identified in the Roman law that, the criterion for sharing the pledge, in pledge and mortgage, is not only the character of the latter (in terms of being moveable or real estate), but also the question as to whom the possession of the item belongs, i.e. the creditor or the debtor.<sup>3</sup> The creation of the pledge law without transferring the item to possession (registered pledge), or the *mobiliary* mortgage as we will see later, is recognized by contemporary legal systems, including the Law on contracted pledge in the Republic of Macedonia.<sup>4</sup>

The etymology of the word originates from Greek, comprised of two words, *hypo* (*under*) and *tithemi* (*leave, put, lay*), meaning charging (loading) of an immoveable item. However, even though the word was of Greek origin, this does not mean that the institution of mortgage was transferred from the Greek law to Roman law. This also does not mean that Greek law did not recognize mortgage as such.<sup>5</sup>

In medieval German law, the division between the pledge law on moveable items (*pignus*) and the pledge law on immoveable items (mortgage) was made.

In addition, many contemporary principles on regulating pledge derive from the medieval German law: the principle of publicity, manifested through the engagement of the court of law and other state bodies in constituting the mortgage law, and registering it in land register; the principle of specialty; the principle of protecting trustworthiness and *non-accessority*.<sup>6</sup>

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<sup>1</sup>Statovci Ejup, E drejta e pengut, Aspekte komparative, p.25

<sup>2</sup>Puhan Ivo, E drejta romake, Prishtinë, 1980, p. 278

<sup>3</sup>Vedrish Martin-Klarić Petar, Gradjansko pravo, opći dio, stvarno, obvezno i nasljedno pravo, Zagreb, 1988, p.332

<sup>4</sup>Article 14, Zakon za dogovoren zalog („Official Gazette of RM“, br.5/2003)-ZDZ

<sup>5</sup>Statovci Ejup, E drejta e pengut, Aspekte komparative, p. 39, p. 262

<sup>6</sup>Çulinović Edita, vep e cit, p.8

In the later phases of the development of feudalism, the Roman law reception began; however, the process of grafting of the Roman and German law also occurred.<sup>7</sup>

## **II. THE MORTGAGE LAW IN EUROPEAN CIVIL CODES**

At the beginning of the nineteenth century and later on, including the twentieth century as well, an overwhelming codification activity was undertaken and it was mainly manifested through the first European civil codes, such as the French Civil Code, the General Austrian Property Code, the German Civil Code, and the Swiss Civil Code. The myth of codification of the civil law has been supported by great reasons and causes, from the need of strengthening cooperation between various different nations to the economic and cultural prosperity. The codes tended to get rid of feudal institutions and establish new bourgeois ones, even though the institutions of feudal law would survive in certain areas due to the socio-economic reality.<sup>8</sup>

As regards the mortgage law, the above-mentioned codifications created a new synthesis of the Roman and German laws. The Austrian Civil Code remains closer to the Roman tradition, whereas the German Civil Code and the Swiss Civil Code moved away from the Roman tradition.<sup>9</sup>

### **1. The French Civil Code**

The French Civil Code (1804), introduced a new approach in the development of the civil law. The mortgage right within the provisions of the French Civil Code is considered a property right on a foreign item, of the mortgage debtor, that is created to secure a certain claim of the mortgage debtor.<sup>10</sup>

Having in consideration the way mortgage was created, the French Civil Code (1804) determined three types of mortgages: legal mortgage, judicial mortgage and contentional.<sup>11</sup>

The rights and claims to which a legal mortgage is granted are: (a) Those of one spouse, on the property of the other; (b) Those of minors or adults in guardianship, on the property of a guardian or legal administrator; (c) Those of the

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<sup>7</sup> Ibidem, p.9

<sup>8</sup> Gams Andrija, Hyrje në të drejtën civile, p.

<sup>9</sup> Gavella Nikolla, Zallozhno pravo, Zagreb 1992, p .22

<sup>10</sup> Zack Karsten, p.10

<sup>11</sup> Art. 2116 French Civil Code, BOOK III, TITLE XVIII.OF PRIVILEGES AND MORTGAGES.Decreed the 19th March, 1804 - FCC

State, of departments, of communes and of public institutions, on the property of collectors and accounting administrators.<sup>12</sup>

A judicial mortgage results from adversary or default judgments, final or provisional, in favor of the one who has obtained them.

It results also from arbitral awards provided with an enforcement order, as well as from judicial decisions handed down in a foreign country and whose execution has been authorized by a French court.<sup>13</sup>

A special form is required to conclude a mortgage contract. The code requires public verification of the debtor's statement, in front of at least two notary publics, or one notary public and two witnesses.<sup>14</sup>

The granting of a conventional mortgage is valid only where the authentic constitutive title of the claim or a subsequent authentic instrument declares in specific terms the nature and the location of each one of the immovables on which the mortgage is granted. Nevertheless, where existing and unencumbered property is insufficient to secure the claim, a debtor may, in admitting that insufficiency, agree that each property, which he may subsequently acquire, be specially allocated thereto as the acquisitions proceed.<sup>15</sup> Likewise, in case the existing immovable or immovables, burdened with the mortgage, have perished or suffered deteriorations, so that they have become insufficient for the security of the creditor, the latter may either enforce at once his reimbursement, or obtain an additional mortgage.<sup>16</sup>

Under the provisions of the French Civil Code, the mortgage right as the only right of pledge on the immoveable property, is followed by three characteristics: the mortgage is a property right, an accessory right and an immoveable property right.<sup>17</sup>

The mortgage is a property right, a security tool, which, unlike the servitude, does not have any direct contact with the immoveable property.<sup>18</sup>

The mortgage is also an accessory right. Its result is the fact that the mortgage shares the destiny of the main claim.<sup>19</sup>

All of the property goods are divided by the Code into moveable and immoveable items. In the past, different authors expressed the dilemma whether the mortgage was a moveable or immoveable right. For a given time period, it was consolidated as a right over the immoveable property,<sup>20</sup> but later, the French law recognized the non-possessive pledge, or the immoveable mortgage, the creation of

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<sup>12</sup>Ibidem, art. 2121

<sup>13</sup>Ibidem, art. 2123

<sup>14</sup> Buçkovski Vllado, Rimskoto i sovremenoto zalozhno pravo, p. 72

<sup>15</sup> Art. 2129, 2130, FCC

<sup>16</sup> Art. 2131, FCC

<sup>17</sup> Zack Carsten , p. 10

<sup>18</sup> Ibidem, fq 11

<sup>19</sup> Ibidem, fq. 12

<sup>20</sup> Ibidem, fq 12

mortgage over moveable items (engine devices, tools, etc.) and industrial property rights.<sup>21</sup>

The object of mortgage includes immovable properties in circulation, their accessories, and servitudes.<sup>22</sup>

The French Civil Code relies mortgage on the principle of specialty. According to the French law, special mortgage is a creation of the revolutionary right that has dissolved the general mortgage. The specialty comes to expression in terms of the claim secured with e mortgage, meaning that the mortgage is created to secure a precisely determined claim, as well as in terms of the burdened object, i.e. an individually determined item is burdened with a mortgage.<sup>23</sup>

The French Civil Code provides for the priority principle as well (droit de preference), which appears as a consequence of qualifying the mortgage as a property right. Another consequence of this kind of qualification is the tracking right (droit de suite), which gives the mortgage creditor the right to realize his/her own right wherever the item may be situated.<sup>24</sup>

The principle of indivisibility has also been included in the French Civil Code. According to this principle, mortgage is indivisible and extends over the immovable property and all of its accessory parts.

Prior charges and mortgages are extinguished by extinguishment of the principal obligation; by the creditor's renunciation of the mortgage; by the fulfillment of the formalities and conditions prescribed to third parties in possession to redeem the property, which they have acquired; by prescription.<sup>25</sup>

## **2. The Austrian General Civil Code**

Allgemeines Bürgerliches Gesetzbuch (General Austrian Civil Code of Law, ABGB), Austrian codification of civil law, announced June 1, 1811, went into effect for the entire German-speaking realm of the Austro-Hungarian Empire on January 1, 1812. It is interesting that the strong impact of the principles of Roman law can be identified in this code, compared to the provisions of the French Civil Code.

Since in Austria there were no feudal relationships at the time of the Code approval, it also contains provisions from the feudal law and it is under clear and evident influence of the natural school.<sup>26</sup>

The Austrian General Civil Code defines the pledge law as well as mortgage law as a proprietary right to a foreign item, which authorizes the creditor to realize their claim from the value of the mortgaged item, if the main obligation is not

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<sup>21</sup> Herc Çulinoviç Edita, p. 69

<sup>22</sup> Buçkovski Vllado, Rimskoto i sovremenoto zallozhno pravo, p. 72

<sup>23</sup> Zack Carsten, p. 37

<sup>24</sup> Art. 2118, FCC

<sup>25</sup> Zack Carsten, p. 47

<sup>26</sup> Gams Andrija, Hyrje në të drejtën civile, p.32

accomplished in a timely manner.<sup>27</sup> The Austrian General Civil Code regulates the notion of pledge as a unique notion. The separation of the pledge into *pignus* and mortgage is made based on the moveable character of the item. If the item is moveable it is known as *pignus*; if it is not, then it is called mortgage (*grundpfand*).<sup>28</sup> This is a solution, which has also been accepted as such in the Law on contracted pledge in the Republic of Macedonia.<sup>29</sup>

The mortgage law is an absolute proprietary law; it traces the item and acts against everyone, including the mortgage debtor himself.<sup>30</sup>

Subject to mortgage can be real estate (immoveable items) that is currently in circulation.

According to the Austrian General Proprietary Code, the law, the court decision, the contract and the will can serve as judicial grounds for establishing a mortgage.<sup>31</sup>

The contracted mortgage is a rule in judicial circulation.

The contracted mortgage right is obtained upon the conclusion of the contract and its registration in the land register. The conclusion of the contract as a judicial title provides only a personal right to the item, and not a proprietary right to it.<sup>32</sup>

The mortgage creditor has the right to constitute the mortgage law on the item, upon which the mortgage law has already been constituted.<sup>33</sup> In this case, the mortgage debtor is obliged to fulfill his duty only with the consent of the person who has the right to over-mortgage.<sup>34</sup>

The mortgage law lies over the item as a whole, over its constitutive parts and pertinences. The mortgage law lies on fruits as well, if they have not been divided by the main item.<sup>35</sup>

If the item is not sufficient for fulfilling the obligation due to a fault, the mortgage creditor has the right to ask for another item.<sup>36</sup>

If the claim is not fulfilled even after the deadline, the mortgage creditor has the right to require legal sale of the estate, regardless if the estate has been transferred to another subject.<sup>37</sup>

The Austrian law proclaims the principle of *accessority*; therefore, the mortgage can be created only after the existence of the determined claim.<sup>38</sup>

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<sup>27</sup> Article 447, Allgemeines Bürgerliches Gesetzbuch ABGB (Kodi i përgjithshëm civil austriak)

<sup>28</sup> Article 448, ABGB

<sup>29</sup> Zakon za dogovoren zalog („Official Gazette of RM“, br.5/2003)

<sup>30</sup> Statovci Ejup, E drejta e pengut, Aspekte komparative, p. 85

<sup>31</sup> Article 449, ABGB

<sup>32</sup> Article 451, ABGB

<sup>33</sup> Article 454, ABGB

<sup>34</sup> Article 455, ABGB

<sup>35</sup> Article 457, ABGB

<sup>36</sup> Article 458, ABGB

<sup>37</sup> Article 461, 466, ABGB

<sup>38</sup> Buçkovski Vllado, Rimskoto i sovremenoto zalozhno pravo, p.75

In addition, the code recognizes the principle of publicity; according to it, the registration in land records is a way to gain the right to mortgage on the immoveable property. The acquisition of the right to mortgage on the immoveable property that has not been registered in land records is done through a document issued by the court of law, with which the establishment of the right to mortgage on the named estate is verified.<sup>39</sup>

The Code does not allow the contracting of (*lex commissoria*), i.e. the right which authorizes the mortgage creditor to be able to regain the right to property on the mortgaged estate in case of the failure of fulfilling the obligation before the expiration of the deadline by the mortgage creditor himself.<sup>40</sup>

The mortgage law ceases existing with the destruction of the item, with the expiration of its own expiry date, if the holder of the right abdicates from his right, or if the mortgage creditor returns it under no conditions. In these cases, the mortgage law become invalid, though not the claim.<sup>41</sup>

The debt remission in itself does not cause the termination of the mortgage law. The mortgaged item remains charged (loaded) until the debt from the land register is remitted.

The mortgage law ceases with the remission of the debt from land register. Until that time, the owner of the estate has the right to transfer his right to mortgage to another new claim based on evidence or another document, which confirms the dismissal of the claim provided with the mortgage; however, the condition is that its value cannot be higher than that of the registered claim.<sup>42</sup>

### 3. The German Civil Code

The German Civil Code (Bürgerliches Gesetzbuch), is the body of codified private law that went into effect in the German empire in 1900. Though it has been modified, it remains in effect. The code grew out of a desire for a truly national law that would override the often conflicting customs and codes of the various German territories.

The code is divided into five parts. The first is general, covering concepts of personal rights and legal personality. The subjects of the other four parts are: obligations, including concepts of sale and contract; things, including immovable and movable property; domestic relations; and succession.

Mortgage, as a pledge right to immoveable properties (*Grundpfandrecht*), is defined by Article 1113/1 BGB) where it states that: "A plot of land may be encumbered in such a way that the person in whose favour the encumbrance is created is to be paid

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<sup>39</sup> Ibidem, p. 75

<sup>40</sup> Ibidem, p. 75

<sup>41</sup> Article 467, 468, ABGB

<sup>42</sup> Bućkovski Vllado, p. 76

out of the land a specific sum of money to satisfy a claim to which he is entitled (mortgage)“.<sup>43</sup>

The German civil code recognizes the contracted mortgage, which represents a rule in the judicial circulation, legal mortgage, which has to be recorded in the land register, and it also recognizes a single case of legal mortgage without registration in land register, known as *Surrogationshypothek*.<sup>44</sup> Legal mortgage comes to expression in cases when, e.g. person A has a claim of 10,000 Euros against person B, which has been secured with the mortgage law on a certain claim of person B against person D, which has been secured with the mortgage law on an immoveable item. If person B obtains the right to property over person D's immoveable item, then person A's mortgage right over person B's claim transforms automatically in the right of securing mortgage on the immoveable item. The mortgage is created outside land register; later registration is a document with an argumentative force.

According to the German Civil Code, the proprietary character of the mortgage is unquestionable. Mortgage is a proprietary right that charges the immoveable item of the mortgage debtor, in favor of the mortgage creditor, who is authorized to liquidate it in the enforcement procedure. Immoveable property in the German law refers only to land and its belongings.<sup>45</sup> According to Article 94 of the BGB, (1) The essential parts of a plot of land include the things firmly attached to the land, in particular buildings, and the produce of the plot of land, as long as it is connected with the land. Seed becomes an essential part of the plot of land when it is sown, and a plant when it is planted; (2) The essential parts of a building include the things inserted in order to construct the building. Plots of land can be essential (*wesentliche*), whose separation from the item may cause a modification of its core, and as such they cannot be an independent object of the mortgage, and non-essential (*unwesentliche*), whose separation from the item does not change its core, and consequently can be an independent object of the mortgage.

The code proclaims the principle of officiality, according to which, if the pledged item has a stock exchange or market price, the pledgee may effect the sale privately at the current price through a commercial broker officially authorised to effect such sales or through a person authorised to sell by public auction.<sup>46</sup>

Mortgage is a pledge right, not a claim. It is therefore easy to make the distinction between debt and responsibility (*schuld und haftung*), i.e. between the personal debtor and mortgage debtor.<sup>47</sup> According to this, the mortgage creditor does not have the right to require from the owner of the immoveable property (mortgage debtor) obligation fulfillment, unless the fulfillment deadline by the personal debtor has expired; only in cases when the personal debtor (the person that

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<sup>43</sup> Article 1113, al.1,(BGB) Neueste Fassung Ausgabe, Köln, 2003

<sup>44</sup> Article 1287,(BGB) Neueste Fassung Ausgabe, Köln, 2003

<sup>45</sup> Article 1113, al.1,BGB, Neueste Fassung Ausgabe, Köln, 2003

<sup>46</sup> Article 1221, BGB

<sup>47</sup> Hans-Armin Weirich,Grundstücksrecht, München 1996, p. 394



owes to the creditor) does not fulfill his obligation within the set deadline, the owner of the immoveable property is obliged to endure forceful realization on the immoveable property.<sup>48</sup>

There are two types of legal relations between the mortgage creditor, the personal debtor and the debtor over whose immoveable property the mortgage has been constituted:

- The claim addressed to the personal debtor for paying a certain amount of cash e.g. from the borrowing (loan) contract (the law of obligations applies in this case - *schuldrecht*).
- The mortgage as a right of assessment (*verwertungsrecht*), a property right over the immoveable property of the mortgage debtor (these relations are regulated according to the property law - *sachen recht*).<sup>49</sup>

The practical meaning of this distinction comes to expression when the personal debtor and the owner of the mortgage item are different people, i.e. the husband gets a loan from the bank, whereas the wife constitutes a mortgage over her immoveable property to secure the loan. The husband is the personal debtor and his wife is the mortgage debtor. If the husband is not able to fulfill his obligation in cash as per the loan contract, the wife will respond through her immoveable property, i.e. she has to endure the enforcement procedure over her property.

(1) If a right has been entered in the Land Register for a person, it is presumed that the person is entitled to this right; (2) If a right entered in the Land Register is deleted, it is presumed that the right does not exist.<sup>50</sup>

Unlike the French, Austrian and some other legal systems, the principle of **accessority** in the German law does not have unlimited validity. That is, according to German law, the mortgage law is not always a conditioned **accessority** right.<sup>51</sup>

Apart from the traditional **accessority** right, the German Civil Code recognizes the possibility of creating mortgage with a lower **accessority** degree, or **accessority-free** mortgage. The independence of mortgage from the claim is expressed in the so called property mortgage (*Eigentümerhypothek*) which is created by the owner of the immoveable property itself to secure the claim which has not been created yet, whereupon it maintains the right to priority<sup>52</sup> and in the land debt (*Grundschuld*), which is created to secure cash claims that actually exist, i.e. the land debt (*Rentenschuld*).

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<sup>48</sup> Hans-Armin Weirich, Grundstücksrecht, München 1996, p. 394

<sup>49</sup> Ibidem, p. 394

<sup>50</sup> Article 891, BGB

<sup>51</sup> Mincke Wolfgang, Die Akzessorietät des Pfandrechts, Berlin, p.189

<sup>52</sup> Weirich Hans-Armin, Grundstücksrecht, p. 400

Property mortgage is one of the unique cases with which the need for a non-*accessority* independent right is realized;<sup>53</sup> in this context, the original and derivative property mortgages are known to exist.

The original property mortgage is created when the valid mortgage for the creditor has been created but not the main claim, either due to the fact that the mortgage creditor has not paid the assigned cash amount for the loan, or because the loan contract is invalid.<sup>54</sup>

The derivative property mortgage is created when the claim for whose security the mortgage has been created terminates. A frequent case would be when the owner of the immoveable property (mortgage debtor) who is also a personal debtor, has fulfilled his obligation towards the mortgage creditor but has not claim remission of the mortgage from the land records; this means that he owns the mortgage creditor's position in the priority order.<sup>55</sup>

On the occasion of the fulfillment of the obligation towards one of the creditors, the other creditors do not move forward; the owner of the immoveable property keeps for himself the mortgage creditor's position in the priority order, so that the empty position can be left for a new creditor for securing an old claim. This enables the owner to get a loan and secure it with a mortgage without doing any harm to other creditors in this case.<sup>56</sup>

Other laws (rights) do not recognize property mortgage, or they do recognize it only in its transition phase, i.e. from the moment of fulfilling the obligation to its remission from the land records.<sup>57</sup>

Another form of non-accessority mortgage is the land debt (*Grundschild*), which is independent from the main claim. The land debt is created and exists regardless of the personal claim; it is registered in the land records and is transferred by submitting the written declaration on cession and the letter. This institution comes to expression when individuals or crediting institutions register mortgage over their immovability, before the debt itself exists, and they issue securities at the height of the mortgage value in circulation, known as mortgage securities (*inhaberbriefgrundschild*).<sup>58</sup> The owner of these securities has the mortgage over that immoveable property.<sup>59</sup>

German law does not recognize general law (right), but rather focuses on the mortgage specialty.<sup>60</sup> Moreover, the mortgage specialty comes to expression in

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<sup>53</sup> Weber Hansjörg, *Kreditsicherheiten*, Munchen 1997, p. 231

<sup>54</sup> Ibidem, p. 231

<sup>55</sup> Ibidem, p. 232

<sup>56</sup> Ibidem, p. 231

<sup>57</sup> Zack Carsten, p. 15

<sup>58</sup> Article 1116, 1154, 1192, 1195, BGB

<sup>59</sup> Gams Andrija, p.198

<sup>60</sup> Zack Carsten, p.43

relation to the claim, which has to be expressed in cash, to the mortgage creditor and debtor as well as to the mortgage object.

Securing a single claim through two independent mortgages over one or more pieces of immovable property (*doppelsicherung*) is forbidden.<sup>61</sup> In addition, the German civil code prohibits the application of the *lex commissoria* provision according to which an agreement made before the right to sell comes into existence by which the ownership of the thing is to pass or be transferred to the pledgee if he is not satisfied or is not satisfied in good time is void.<sup>62</sup>

The German law proclaims the principle of undivision. According to it, (1) The pledgee is obliged to return the pledged item to the pledgor after the pledge is extinguished; (2) The pledgor may demand the return of the pledged item in return for the satisfaction of the pledgee as soon as the debtor is entitled to perform.<sup>63</sup> Unlike the French law, in the German law a future conditioned claim can be secured with a mortgage.<sup>64</sup>

Apart from the securing **accessority** mortgage (*sicherungshypothek*),<sup>65</sup> which is created for securing a given claim, through registration in the land register, the German Civil Code recognizes many other types of mortgages, such as: commercial mortgage (*verkehrshypothek*), which also has an **accessority** character and can be constituted in the form of: (1) records mortgage (*buchhypothek*), registered in land register whereas in order to be able to transfer it, only the will agreement and registration in land register is needed (according to the legislative, this represents an exception),<sup>66</sup> and (2) mortgage certificate which the Code created for facilitating the legal circulation and as such it represents a rule in circulation. In order to create it, apart from the agreement between the parties and registration in the land register, the submission of the mortgage certificate, which has the power of a public document, has to happen as well.<sup>67</sup>

In order to facilitate circulation, the Code has also provided the possibility of creating the land debt (*grundschuld*), which can exist without the existence of the claim; this is how the mortgage on the immovable item is created before the debt itself exists as such.<sup>68</sup> The German Civil Code has also recognized the maximum amount mortgage (*höchstbetrag hypotheke*),<sup>69</sup> according to which: (1) A mortgage may be created in such a way that only the maximum amount to which the plot of land is to be liable is determined, and apart from this the stipulation of the claim is

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<sup>61</sup> Winter Gerd, p. 32

<sup>62</sup> Article 1229, BGB

<sup>63</sup> Article 1223, BGB

<sup>64</sup> Winter Gerd, *vep e cit*, p. 32; Article 1113, BGB

<sup>65</sup> Article 1184, BGB

<sup>66</sup> Eickman Dieter and Pinger Winfried, *Sachenrecht, ein lehrbuch*, band II, *Immobiliarsachenrecht*, Heidelberg, 1988, p.380

<sup>67</sup> Article 1116, al. 1, BGB

<sup>68</sup> Winter Gerd, *Das recht der hypothecken und grundschulden*, Berlin 1983, p.33

<sup>69</sup> Article 1190, BGB

reserved. The maximum amount must be entered in the Land Register. (2) If the claim bears interest, the interest is included in the maximum amount. (3) The mortgage is deemed to be a debt-securing mortgage, even if it is not described as such in the Land Register. (4) The claim may be transferred in accordance with the general provisions applying to the transfer of claims. If it is transferred under these provisions, the passing of the mortgage is excluded.

This mortgage as a securing mortgage can be created only by being registered in land register, though it does not mean that only one claim can be secured by it. There may be more claims that can be secured, even those that have not been made at the time of the agreement on the mortgage; however, the maximum amount is limited and has to be registered in land register.<sup>70</sup>

The joint (simultaneous) mortgage (blanket mortgage) has been regulated with Article 1132 of the German Civil Code, according to which, if there is one mortgage on more than one plot of land for the claim (blanket mortgage), each plot of land is liable for the entire claim. The creditor may, at his discretion, seek satisfaction from each plot of land in whole or in part.

The German Civil Code recognizes the mortgage of securities (*Wertpapierhypothek*) §1187-1189, which secures the claims that derive from the securities and the forceful mortgage (*Zwangshypothek*), which in turn is a securing mortgage and is absolutely in line with the accessory principle.<sup>71</sup> Where the owner agrees in relation to another to have the mortgage deleted if it is merged with the ownership in one person, a priority notice to secure the claim for deletion may be registered in the Land Register, if the person in whose favour the registration is to be made:

1. holds another right having equal or lower priority as a mortgage, land charge or annuity charge on the plot of land, or
2. is entitled to the grant of another such right or to the transfer of ownership of the plot of land; the claim may also be future or conditional, etc.<sup>72</sup>

#### **4. The Swiss Civil Code**

The Swiss Civil Code (*Schweizerisches Zivilgesetzbuch*), body of private law was codified at the end of the 19th century; it was adopted in 1907 and went into effect in 1912, and it remains in force, with modifications, in present-day Switzerland. Although influenced by both codes, it included much material indigenous to Switzerland.

The Swiss civil code regulates separately the pledge on moveable items,<sup>73</sup> and the pledge on immoveable items (mortgage).<sup>74</sup>

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<sup>70</sup> Alpman Josef, *Sachenrecht*, Band 2, *Grundstücksrecht*, Münster 1994, p.77

<sup>71</sup> Alpman Josef, p.78

<sup>72</sup> Article 1179, 1180, 1181, BGB

One of the most important and difficult tasks of the codification in Switzerland was undoubtedly the regulation of the pledge right on immoveable properties.<sup>75</sup> This was so because there was a great division within the cantonal rights that prevented the unification of the legal regulation of mortgages. On one hand, there were forms inspired by the Roman law and on the other, forms inspired by medieval German law, parts of the remaining of the customary law, parts from the modern capitalist economy, etc. The Swiss legislation was not able to avoid this rich cantonal development; however, it could not depart from group interests, owners of immoveable properties, banks, entrepreneurs, etc. Finally, it had to create a new modern pledge law on immoveable properties.

The first question raised upon the regulation of the issue of mortgages was if it was possible for a single mortgage form to satisfy all the needs and interests. Based on the practical needs, the Swiss Civil Code did not focus on a single form only, but rather designed three main forms such as (1) the traditional mortgage (*Grundpfandverschreibung*),<sup>76</sup> (2) mortgage certificate (*Mobilisationsgrundpfandrech-gült*),<sup>77</sup> and (3) the interim, commercial and transferrable form (*schuldbrief*).<sup>78</sup>

- *Grundpfandverschreibung* represents the original Roman mortgage, which survived in Switzerland's French section (*l'hypothèque*). Its aim was claim security. It has not been planned for the market and has not been incorporated in securities.<sup>79</sup>
- *Grundpfandverschreibung* is the **non-accessority** mortgage (*gült-la lettre de rente, la rendita fondiaria*). It is of German origin. *Gült* conditions the mobilization of the land value. Through it, a portion of the land value becomes a circulation object. Its value is incorporated in a single document.<sup>80</sup> Immovability is charged with *gült*, but not the debtor.
- *Schuldbrief* (*la cédula hypothécaire*) is placed between *grundpfandverschreibung* and *gült*. It combines the elements of both the former ones and it fulfils the objectives of both of them to some extent. The common element with *grundpfandverschreibung* is that the debtor is

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<sup>73</sup> Article 884 – 906; ZGB- Das Schweizerische Zivilgesetzbuch, Peter Tuor, Elfte auflage, bearbeitet und ergänzt von Bernhard Schnayder und Jörg Schmid, Zürich 1994. në vazhdim do ta citojmë vetëm si –ZGB-

<sup>74</sup> Article 793 – 893, ZGB

<sup>75</sup> Article 801, ZGB

<sup>76</sup> Article 824- 841, ZGB

<sup>77</sup> Article 842-846, ZGB

<sup>78</sup> Article 847- 853, ZGB

<sup>79</sup> Article 824, ZGB

<sup>80</sup> Article 856, ZGB

personally responsible here too.<sup>81</sup> On the other hand, like the *gült*, it has been planned for circulation and has been incorporated in securities.<sup>82</sup>

The Swiss Civil Code proclaims the principle of specialty in terms of the claim and the object secured by a mortgage.<sup>83</sup> The mortgage secures a precisely determined claim, so that the secured amount is registered in the land register.<sup>84</sup> Individualized immovability can be charged with a mortgage.<sup>85</sup> The Code makes space for a mortgage right to be able to charge one or more precisely determined immovables.<sup>86</sup>

The principle of publicity is of special importance for the Swiss legislation. Publicity eliminates possible anomalies, as if the right had not been registered.<sup>87</sup> The Swiss Civil Code pays special attention to the principle of the safe place as well, in cases when more rights compete over an immovable. The owner of the immovable, however, has the right to leave the empty space in the priority order for possible future mortgages (*anticipirter ruktrit*).<sup>88</sup> The Code, in principle, does not recognize the property mortgage; however, after the fulfillment of the obligation by the debtor, the latter has the right to create a new mortgage in line with the old priority order in the empty space of the priority order.<sup>89</sup>

The Swiss Civil Code, along with other codes, prohibits the application of *lex commissoria*, i.e. the right of the creditor to keep the item if the claim is not fulfilled in a timely manner.<sup>90</sup>

### III. CONCLUSION

The type of security that the mortgage law provides is of special importance for the contemporary market economy because it increases the loan offers as a crucial segment in the economic development, both at a national and international level.

The contracted mortgage is established to secure certain claims in cash as well as those that can be translated into cash, which the mortgage creditor has made to his debtor. The secured claim has to be precisely determined; however, the mortgage law can be established for securing a future claim or a conditioned one;

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<sup>81</sup> Article 842, ZGB

<sup>82</sup> Article 856, ZGB

<sup>83</sup> Article 797, ZGB

<sup>84</sup> Article 794, ZGB

<sup>85</sup> Article 595, ZGB

<sup>86</sup> Article 797, ZGB

<sup>87</sup> Article 799, ZGB

<sup>88</sup> Article 813, ZGB

<sup>89</sup> Article 814, ZGB

<sup>90</sup> Article 894, ZGB

this opportunity represents an exception from the principle of *accessority*, which derives back from the Roman law.

*Non-accessority* is being accepted in various different contemporary systems. The need for making mortgage independent from the claim is more than evident; therefore, the jurists need to undertake some measures in this respect. The German law has responded positively towards these claims; *Non-accessority* has found some firm and solid foundations in this legal system. Such *non-accessority* mortgage in the German law is able to respond to everybody's needs for a loan. Until the attitudes of the judicial practice and the professional one are not crystallized, it would be better that the legal system in Macedonia followed the example of the German law, in which independent right has been incorporated in debt securities, so that the owner of the security is considered the holder of the mortgage right.

The object of a mortgage can include a given real estate together with all of its compound parts, as well as other items equaled to that specific real estate. The mortgage law can be created over a foreign real estate. The exception would be the German law which norms the mortgage on its item (property mortgage) in accordance with the non-accessority principle and is different from the Roman principle of *-jura in re aliena-*.

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