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ZABEZPIECZENIE MAJĄTKU RUCHOMEGO ZGODNIE Z PRAWEM CYWILNYM UKRAINY I NIEMIEC: PARADYGMATY PORÓWNAWCZE

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Adnotacja. Artykuł poświęcono porównawczemu badaniu prawnemu zastawu majątku ruchomego zgodnie z prawem cywilnym Ukrainy i Niemiec. Autor stwierdził, że w Ukrainie zastaw jest uznawany za środek zapewniający spełnienie zobowiązania (część 1 art. 546 Kodeksu Cywilnego Ukrainy). Zastaw majątku ruchomego (Pfandrecht) w Niemczech jest prawem rzeczowym, które daje wierzycielowi gwarancje spłaty długu przez dłużnika (§1204 BGB). Ustawodawstwo Ukrainy charakteryzuje się naciskiem tylko na umowny składnik treści zastawu majątku ruchomego. Prawo rzeczowe Ukrainy obejmuje tylko jeden rodzaj zabezpieczenia – hipotekę. Jednocześnie nie można zaprzeczyć, że takie cechy zastawu, jak „podążanie" i „absolutność" ochrony praw zastawnika, świadczą o mieszanym (umownym) charakterze zastawu rzeczy ruchomych zgodnie z prawem cywilnym Ukrainy.

Słowa kluczowe: zastaw, majątek ruchomy, Kodeks Cywilny Ukrainy, Kodeks Cywilny Niemiec, prawa rzeczowe, zobowiązania, prawo własności.

SECURITY (PLEDGE) ON THE MOVABLE PROPERTY IN UKRAINIAN AND GERMAN CIVIL LAW: COMPARATIVE PARADIGMS

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Abstract. This article is devoted to the comparative legal study of security (pledge) on movable property under the legislation of Ukraine and Germany. It was investigated that in Ukraine the pledge is recognized as a means of ensuring the fulfillment of obligations (Art. 546(1) UKR-CC). Securities (Pfandrecht) are used in Germany as rights in rem allowing lenders to obtain guarantees for the repayment of debts (§ 1204 BGB). Legislation of Ukraine is characterized by emphasizing only the contractual component of the content of the pledge. Only one type of pledge – hypothec, is a proprietary security right. At the same time, it cannot be denied that such characteristics of the pledge right as the "principle of accession" and the "absolute nature" of the protection of the pledgee's rights indicate the mixed (contractual-real) nature of the pledge of movables in Ukrainian law.

Key words: security, pledge, movable property, Civil Code of Ukraine, German Civil Code, rights in rem, obligations, property rights.

ЗАСТАВА РУХОМОГО МАЙНА ЗА ЦИВІЛЬНИМ ПРАВОМ УКРАЇНИ ТА НІМЕЧЧИНИ: ПОРІВНЯЛЬНІ ПАРАДИГМИ

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Анотація. Статтю присвячено порівняльно-правовому дослідженню застави рухомого майна за цивільним правом України та Німеччини. Автором було встановлено, що в Україні застава визнається засобом забезпечення виконання зобов"язання (ч. 1 ст. 546 ЦК України). Застава рухомого майна (Pfandrecht) у Німеччині є речовим правом, яке надає кредиторові гарантії погашення боргу боржником (§ 1204 BGB). Для законодавства України характерним є наголошення лише на договірній складовій змісту застави рухомого майна. До речових прав законодавство України відносить лише один вид застави – іпотеку. Водночас не можна заперечувати, що такі характеристики заставного права, як "слідування" та "абсолютність" захисту прав заставодержателя, свідчать про змішаний (договірно-речовий) характер застави рухомих речей за цивільним правом України.

Ключові слова: застава, рухоме майно, Цивільний кодекс України, Цивільний кодекс Німеччини, речові права, зобов`язання, право власності.

A. Introduction

The centuries-old history of the development of the security (pledge) on movable property in Ukrainian and German civil law is an interesting legal model that has methodological significance. It allows us to trace, on the example of specific legal material, complex processes of formation and development of several interrelated and interdependent institutions of civil law in the context of the formation of legal systems of Ukraine and Germany, and the possibility of reception of German law provisions on security into Ukrainian legislation. The main categories and concepts of security (pledge) regulation were formed in Roman private law and borrowed by most modern European legal systems. For this reason, the comparative legal study of security (pledge) on movable property under the legislation of Ukraine and Germany is of great theoretical and practical importance for the improvement of civil legislation of Ukraine.

B. The position of "security" ("pledge") within the overall structure of the Civil Code of Ukraine and the German Civil Code

In Ukraine, the classificational distinction between the law of rights in rem (proprietary rights, real rights) and the law of obligations has not been theoretically substantiated. The legal regimes of the law of rights in rem and the law of obligations are so closely connected that it is impossible to determine what a specific right is: a real right with elements of obligation, or, conversely, obligation with elements of a real right (right in rem).

The difference between the law of rights in rem and the law of obligations is that in connection with the law of rights in rem (absolute rights) own actions of the authorized person to satisfy his/her interests are crucial, while in the field of the law of obligations (relative rights) the satisfaction of interests occurs primarily because of actions of the debtor. At the same time, in both cases, the exercise of a subjective right, regardless of whether it relates to the law of rights in rem or the law of obligations, is legally ensured by the proper conduct of obligated persons (Malevsky, 1882: 37-46).

Many studies have been devoted to the division of rights into absolute and relative, so we will only briefly note that the law of rights in rem is absolute: if the thing belongs to this person, all other persons are obliged to recognize this affiliation and not violate it (Faber, Lurger, 2008). The opposite of the law of rights in rem is an obligatory right (relative), as the entitled person (the creditor) is protected only from violations by a specific person - the debtor (Ebke, Finkin, 1996: 227). Obligatory rights bind only the parties privy to the contract relation.

It is known how difficult to give an accurate definition of the law of rights in rem as a civil law category. It is no coincidence that in the civil law of most countries it is absent, existing only at the level of civil doctrine. Defining the law of rights in rem as direct domination of a person over a thing in relation to others, it should be emphasized that these legal relations arise only based on law, are determined by the rule of positive law, and the proprietary interests of participants in such legal relations are protected by law.

In modern Ukrainian doctrine, the law of rights in rem is understood as the law that ensures the interests of the authorized person by directly influencing the thing that is in the sphere of its economic domination (Kharitonov, Golubeva, 2009: 341).

In Ukrainian civil law, the Roman division of the law of rights in rem into rights on one"s own things (property rights) and rights on other people"s things (iura in re aliena) was adopted. The third book of the Civil Code of Ukraine (hereinafter – UKR-CC), entitled "Property rights and other real rights", in its logical and semantic interpretation concludes that all rights on a thing are actually the law of rights in rem, and iura in re aliena are only their variety. With such a construction, it is logical that the main right in such construction is property, and specific rights are the rights to other people's things (iura in re aliena). The essence of iura in re aliena under the CCU is that the right of ownership belongs to one person, while another person has the same (direct) law of rights in rem on the same property, only narrower in content. Thus, iura in re aliena are independent (but derived from the property right) real rights, which gives the person who has them the opportunity to directly use the certain property for a specific purpose and within certain limits.

Art. 395(1) UKR-CC provides a list of iura in re aliena: the right of possession, the right to use (servitude), the right to use the land for agricultural purposes (emphyteusis), the right to use someone else"s land for building (superficies). It should be noted that, however, Art. 395(2) UKR-CC provides that the law may establish other real rights to another's property (iura in re aliena).

Any possession by title is the law of rights in rem and may arise based on a contract. Thus, the rent creates not only an obligational legal relationship between the parties but also the law of rights in rem that arises between the lessee and an indefinite number of persons. Thus, because civil rights and duties arise not only from the grounds provided by law and other legal acts but also from the actions of persons and legal entities, these actions may give rise to special rights in rem. Such types of iura in re aliena which arise based on special legislation may include pledge (Law on Pledge,), mortgage (Law on Mortgage), retention (Art. 594 UKR-CC), the right of full economic management (Art. 136 of the Commercial Code of Ukraine), the right of operational management (Art. 137 of the Commercial Code of Ukraine), the rights of family members of tenants in state and public funds to use the housing (Articles 64, 65 of the Housing Code of Ukraine), the right of family members of the landlord to use the housing (Art. 405 UKR-CC), etc.

The differences between Ukrainian and German rights in rem were considered to be so large that convergence between the national systems was hardly conceivable. Such differences both are historical "accidents" and choices

reflecting national preferences and policy (Keirse, Veder, 2010: 43-44). The legislative history of the German Civil Code (Büergerliches Gesetzbuch, BGB) succinctly explains the characteristics of the rights in rem in contrast to the obligatory rights.

In German civil law the term Sachenrecht can be translated as the "law of things" (the law of rights in rem). The system of civil law of Germany is based on a clear distinction between Sachenrecht and Schuldrecht, i.e., the law of obligations. Sachenrecht is wider than the law of property and covers possession (Besitz) and also limited rights in rem, mainly rights of use and object-bound securities.

It should be noted that in German civil law the number and content of rights in rem are controlled. The overriding right in rem is property. Possession and limited rights in rem are other types of rights in rem. Limited rights in rem can be categorized according to the particular right they bear: the right of alienation (Securities), the right of use, and the right of purchase.

An open list of rights in rem poses a risk to the public interests because it may interfere with the ability to settle one's affairs unimpeded by the rights of the third party. The content of rights in rem, regardless of their type, is based on the basic principle – domination over the thing. Since rights in rem can change qualitatively, manifesting themselves in various forms (use, management, disposal, etc.) and quantitatively, representing different degrees of completeness, it may seem that the list of the rights in rem should be open. However, in contrast to obligations (relative rights), which are valid only for the parties privy to the contract, rights in rem are absolute, and therefore binding for all persons. So, participants in civil proceedings cannot determine the scope and content of rights in rem at their own discretion. The list of rights in rem must be closed and established by law. In this regard, it is not appropriate to enshrine in the UKR-CC the principle of establishing rights in rem based on the law (Art. 395(2) UKR-CC).

In BGB an exhaustive list of rights in rem has been established. This principle is based on the reception of the provisions of Roman law on a limited (numerous clausus) range of rights in rem. The regime of a non-exclusive range of rights in rem proposed in the UKR-CC cannot be considered satisfactory, as the chaotic establishment of rights in rem based on law may have an impact on restricting the constitutional rights of citizens and civil turnover in general. Improving the system of rights in rem can only happen by making appropriate changes to the UKR-CC, and not by adopting special laws.

In connection with the above, in the framework of this study, we will try to determine on the basis of comparing the provisions of civil law of Ukraine on a pledge with the relevant provisions on securities of the German Civil Code, to improve Ukrainian law of rights in rem.

C. Definition and types of securities (pledge)

The regulation of security (pledge) in the legal systems of Ukraine and Germany has peculiarities. In Ukraine, the pledge is recognized as a means of ensuring the fulfillment of obligations (Art. 546(1) UKR-CC). According to Art. 572(1) UKR-CC under the contract of pledge the creditor (pledgee) has the right in case of non-performance of the obligation by the debtor (pledgor) secured by the pledge, as well as in other cases established by law, to obtain satisfaction at the expense of the property mainly before other creditors of this debtor, unless otherwise provided by law (right of pledge). By Art. 4(1)(4) of the Law on state registration of real rights to immovable property and their encumbrances only the hypothec belongs to the encumbrances of real rights to immovable property. Thus, according to the civil legislation of Ukraine, the pledge, except for hypothec, has an exclusive contractual nature and is not subject to the rules of property law, except for the provisions on the protection of real rights. It should be noted that the pledge of the movable property has only some features of property law, such as the right of succession (Art. 27 of the Law on Pledge) and the absolute nature of protection (paragraph 3 of Part 1 of Art. 51 of the Law on Pledge).

The distinction between movable and immovable property should be considered. According to Art. 181(1) UKR-CC, immovable property (real estate) includes land plots, as well as objects located on a land plot, the movement of which is impossible without their depreciation and change of their purpose. In addition, the regime of immovable property may be extended by law to aircraft and ships, inland waterway vessels, space objects, as well as other things, the rights to which are subject to state registration. In this case, it is not a question of changing the physical nature of things, but of giving them a certain legal regime. Registration of aircraft and ships, inland waterway vessels, space objects by authorized bodies does not replace the registration of rights to them as real estate (Art. 182 UKR-CC).

Things are considered movable property (Art. 181(2) of the Law on state registration of real rights to immovable property and their encumbrances) if they can be moved freely in space. In particular, the movable property includes things, including money and securities, which are not directly considered real estate by law.

In German law immovable property is a separate plot in the land registers (*Grundbuch*) conducted by the competent local courts. All accessory assets (*Zubehör*) of the land, any buildings and other permanently fixed parts (*wesentliche Bestandteile*) are the parts of such a plot. Tangible movables are things (assets) that cannot be treated as permanent parts or accessory assets of a land plot, i.e., cars, commodities, etc.

Securities use in Germany as rights in rem allowing lenders to obtain guarantees for the repayment of debts. German law does not contain general provisions on the securities, but the BGB provides definitions for each of their types. The Pfandrecht is a security interest in moveable property (§§1204-1258 BGB) or rights (§§ 1273–1296 BGB). For other types of security, other special terms are used, in particular, the security of land (immovable) has the names: "Hypothek" (mortgage, §§1113–1190 BGB), "Grundschuld" (a land charge, §§ 1191–1203 BGB) and "Rentenschuld" (rent charge, §§ 1199–1203 BGB).

According to § 1204 BGB, Pfandrecht is set to establish the encumbrance of the movables to secure the creditor's monetary claims by obtaining satisfaction at the expense of the value of the thing according to the rules outlined in §§1233–1247 BGB.

Pfandrecht and Hypothek cannot be transferred without the obligatory creditor's monetary claim they secure ("principle of accession" (Akzessoritatsprinzip)). So, Pfandrecht may not be transferred without the claim and it expires in case the secured claim for money has been paid (§ 1250 BGB).

In case of non-performance of the contractual obligation secured by the pledge, or with the threat of loss or damage to the thing, it may be sold at public auction with the notice of the pledgor. If the pledge has an exchange or market value, the pledgee must sell it at current prices independently through a trade broker authorized to conduct such auctions (§ 1221 BGB).

Thus, it can be concluded that all rights of pledge under German law are formulated as proprietary security rights in assets, in contrast to Ukrainian civil law, where the pledge is a contractual obligation.

D. Grounds for the occurrence of the security (pledge) on movable property

In the law of Ukraine, the pledge arises based on a contract, law or court decision (Art. 1(3) of the Law on Pledge). The parties to the pledge agreement (pledgor and pledgee) may be individuals, legal entities and the state. The pledgor can be both the debtor and a third party (property guarantor). The pledgor can be the owner of the property, who has the right to alienate it on the grounds provided by law, as well as the person to whom the owner transferred the property and the right of pledge on this property.

The pledge agreement is concluded only in writing. In cases where the subject of the pledge is real estate or space objects, the pledge agreement must be notarized based on relevant legal documents (Art. 13 (1)(2) of the Law on Pledge). Failure to comply with the requirements for the form of the pledge agreement and its notarization entails the invalidity of the agreement with the consequences provided by the legislation of Ukraine (Art. 14 (1) of the Law on Pledge).

Ukrainian legislation is characterized by the attribution to the subject of the pledge of any property not excluded from civil circulation (movable, immovable, property rights) with the exceptions established by law. Thus, according to Art. 4 (4) of the Law on Pledge the pledge can"t be in respect of cultural values in a state or municipal property listed in the State Register of National Cultural Heritage; monuments of cultural heritage included in the List of monuments of cultural heritage that are not subject to privatization; requirements of a personal nature, as well as other requirements, the pledge of which is prohibited by law (for instance, right on the compensation of the pecuniary damages); objects of state property, the privatization of which is prohibited by law, as well as property complexes of state enterprises and their structural units that are in the process of corporatization; dormitories as real estate objects, residential complexes and/or their parts.

The law of Ukraine does not provide for the mandatory registration of a pledge of movable property. By Art. 15 (1) of the Law on Pledge, the pledge of movable property may be registered by the Law on securing creditors' claims and registration of encumbrances of 18.11.2003 № 1255-IV.

Regarding the moment of occurrence of the right of pledge, in Art. 16 of the Law on Pledge it is stated that the right of pledge arises from the moment of concluding the pledge agreement, and if the agreement is subject to notarization – from the moment of notarization of this agreement unless otherwise provided by law. If required by law or by the contract the subject of the pledge must be in the possession of the pledgee, the right of pledge arises at the time of transfer of the subject of the pledge. If such a transfer was made before the conclusion of the contract - from the moment of its conclusion. The registration of the pledge is not related to the moment of occurrence of the right of pledge and does not affect the validity of the pledge agreement.

By Art. 574 (2) UKR-CC, if the pledge arises on the basis of the law, the provisions of UKR-CC about the contract of the pledge are applied (another can be established by the law). Based on law the pledge may arise in the case of: 1) sale of goods in credit – Art. 694 (6) UKR-CC; 2) rent of land or another immovable property. The recipient of the rent acquires the right of the pledge on this property, i.e., hypotheca is formed (Art.735 (1) UKR-CC); 3) acceptance of goods for storage in the warehouse (pledge of property rights) (Art. 961 (2) UKR-CC), etc.

Should be mentioned that the occurrence of a pledge by a court decision belongs to the precautionary measures applied by the court and arises based on a court decision in a criminal case, and therefore is not a civil law construction, as it has no accessory (additional) nature.

BGB calls the contract and the law as the grounds for the security establishment (§§ 1205, 1257). In some cases, under the provisions of § 1257 BGB the pledge can be established by law (ex lege). There are Pfandrechte ex lege in certain commercial contracts which provide for rights of retention.

According to § 1205 BGB, to establish security, the owner must transfer the thing to the creditor, and they should agree to grant the right on the security to the creditor.

If the thing is already in the possession of the creditor, then only an agreement to establish the security is needed. In the case of indirect possession, the transfer of the thing may be conducted by notifying the owner about the transfer of the thing as security.

The security arises based on a special realty transaction. It is important to note that the term "realty contract" is not used in BGB. Instead, German law has developed two special concepts: "die Einigung" (agreement on the transfer of movable property) in § 929 BGB and "die Auflassung" (agreement on the transfer of immovable property) in § 925 BGB.

Such common concepts as contract (der Vertrag) and transactions (das Rechtsgeschaft) are not used by German law regarding security. This emphasizes the importance of distinguishing between a realty contract and an obligatory

agreement (schuldrechtlicher Vertrag) in German law, which is carried out to introduce a clear classification (Typenzwang) and specialization (Spezialitatsgrandsatz) of rights to limit the principle of freedom of contract and choice of contractual forms of contractual rights (Baldus, Muller-Graff, 2011: 270). According to the typology (or classification) in German civil law, there are contractual, realty, family and inheritance transactions. Due to the principle of specialization, only an individually determined thing can be the object of a realty transaction. For this reason, for example, the property complex cannot be the object of a realty transaction (Kohler, 2004: 49-50; Heim, 2016: 58; Schreiber, 2018: 93).

This is based on a strict distinction in German law between a contractual obligation for the transfer of a right in rem and a transaction for its performance to transfer ownership of the thing. Therefore, the contract is a causal transaction, which gives rise to binding rights and responsibilities, and the transfer of ownership of the thing is a separate realty transaction. It is important to note that German civil law does not require the form of such a realty transaction and, usually, the provisions on the transfer of ownership are contained in the contractual obligation itself. Additionally, § 854 (1) BGB contains a requirement for the actual transfer of the thing to transfer possession to the purchaser under the contract (Realakt). Thus, a real transaction (die Einigung) is an abstract agreement aimed at fulfilling a contractual obligation. The principle of abstraction (Abstraktionsprinzip) means that realty transactions are valid irrespective of the existence or validity of any underlying obligation (Ebke, Finkin,1996: 230). The principle of abstraction is unique to German law which modeled a non-accessory security right. Being non-accessory means that the security right can be transferred separately from the claim it secures (Ramaekers, 2013: 284).

The practical significance of abstraction of the transaction means that the invalidity of the contract of alienation does not affect the validity of the realty transaction and the right of ownership of the purchaser under the contract, provided that the parties intended to transfer ownership ("animus transferendi") and intention to acquire ownership ("acquirendi domini"). This is a positive invention of the German legislator, which eliminates the possibility of vindication of the thing in the future from a good-faith purchaser if the contract of alienation of the thing is invalid.

Also, it should be noted that under German law in respect of immovable property realty transaction of property does not cause the transfer of ownership without an entry in the land register (Grundbuch) (§ 873 (1) BGB). For this reason, transactions concerning the transfer of ownership of the immovable property have a special title "die Auflassung" and requirements for the content, procedure and form of its conclusion, non-compliance with which leads to its invalidity (§ 925 BGB).

Therefore, under German law, a realty transaction on the transfer of property performs its function only in relation to movable property and property rights. According to §90 BGB, only tangible (corporeal) things are recognized as things, while the definition of the concept of "object" is not provided by law. However, it is clear from §90 BGB that the concept of "object" is wider than the concept of "thing" and includes tangible as well as intangible objects. Thus, under German law, the object of property rights is everything that may belong to the person – tangible and intangible objects (Brehm, Berger, 2006: 2).

It should be emphasized that the right of security in Germany arises based on both contractual and realty agreements to ensure the monetary claims of the possessor of such a right. The pledge is an accessory (in the sense of its occurrence only in case of the existence of the right of claim under a contract) and remains in force until the termination of the main monetary obligation.

It should be noted that the accessory nature of security in German law does not provide for the invalidity of the security in case of invalidity of the main contract. However, in contrast to German law, where the abstract nature of the realty transaction means that the validity of the contract does not depend on the validity or invalidity of the main contract, in Ukrainian legislation the invalidity of the contract on the basis of which the transfer of property took place imposes on each party the obligation to return to the other all received under the contract (restitution). Art. 548 (2) UKR-CC explicitly states that the invalidity of the main obligation (right of claim) causes the invalidity of the security transaction (another can be provided by UKR-CC). This situation significantly affects the stability of civil turnover in Ukraine and the ensuring the rights of the participants in the pledge relationships.

Such a feature of security under German law as the right of succession means that the right of a claim secured by the security can pass to a new creditor only simultaneously with the security. At the same time, since only the right of claim is transferred, German law does not provide special requirements for the form of the security transfer (**Bachner,** 2020: 53-61). Similarly, under the law of Ukraine, a pledge remains in force if the property or property rights that are the object of the pledge become the property of another person.

The pledge remains in force even in cases when in the manner prescribed by law the pledgee assigns the pledged claim to another person, or the debtor transfers the debt arising from the pledged claim to another person (Art. 27 of the Law on Pledge).

Pfandrechte are used very rarely due to the overly complicated nature of this right. German law (§§1205-1206 BGB) demands to transfer the possession from the owner to the titleholder in whole or part. The "principle of accession" (Akzessoritatsprinzip) of a Pfandrechte makes it impractical for commercial use. The requirement of law about the connection between Pfandrechte and a claim to be secured is also inappropriate in cases of long-term credit relations. And, of course, very strict rules governing the sale of the thing as an object of pledge make it difficult to obtain satisfaction from the pledged property at market price. So, de facto in business relations another construction of Pfandrecht is used – *Sicherungsübereignung* (transfer of title for security purposes).

Since the invention of *Sicherungsübereignung German law had derogated from the principle of publicity.* A security transfer (*Sicherungsübereignung*) allows the transferor to retain possession of the security assets and therefore

continue to run its business as usual. The transferee receives legal title (*Eigentum*) to the assets and is contractually obliged not to make use of such legal title until a defined in contract event occurs. *Sicherungsübereignung* has been modeled as a non-accessory security interest and regarding its flexibility can serve the interests of business.

According to §930 BGB securing of the debt may be created without an actual transfer of possession by replacement of actual transfer by an agreement between the owner and the acquirer by which the acquirer obtains indirect possession. Because of the passing of title on the property to the creditor using a contractual agreement (*Sicherungsvertrag*) the property can be sold by him. German law has no requirements for the form or registration of a pledge of movable assets or a security transfer. After fulfillment of a contract of loan, the creditor is bound to return the title to the debtor on the basement of a provision in a contract about an experiment of fiduciary security after full payment.

E. Parties to legal relations of the security (pledge)

According to the legislation of Ukraine, the pledgor can be the owner of the property, as well as the person to whom the owner duly transferred property and the right to transfer this property (Art. 11 (3) of the Law on Pledge). The pledge may be in respect of the property that will become the property of the pledgor after the conclusion of the pledge agreement, including products, fruits and other profits (future harvest, livestock, etc.) (Art. 4 (3) of the Law on Pledge). Therefore, the object of the pledge may be the thing that is not the property of the pledgor.

Under German law, a creditor can acquire a pledge in good faith from an unfair seller, i.e., who is not the owner of the property, under the rules of §§ 932, 934, 935 BGB on the acquisition of property (§ 1207 BGB), but not a contractual right of claim. This is the reason for the existence of the property nature of the German pledge law, which allows protecting a bona fide purchaser of the thing, regardless of the invalidity of the main obligation between, for example, the buyer and seller of the thing. Therefore, the seller and the former owner of the thing can claim the return of the thing to a good faith purchaser (third party) only based on § 812-822 BGB on unjust enrichment. However, the rules of § 935 BGB do not apply to the return of bearer securities or items that have been alienated by public auction.

Instead, according to the legislation of Ukraine, if the pledgor who is in possession of the thing transfers it to the use or ownership of another purchaser without the consent of the pledgee (Art. 586 (2) UKR-CC), the pledgor can apply to the court with the requirement to declare such an agreement on the transfer of property for use or the transfer of property invalid. In this case, the contract on the transfer of the property may be declared invalid in any case, even if it is proved that the acquirer did not know and should not be aware of the restriction of the owner"s rights to dispose of the property.

The legislation of Ukraine contains quite controversial provisions regarding the transfer of movable property that is the object of the pledge. In particular, by Art. 9 (1) of the Law on the satisfaction of creditors' claims and registration of encumbrances the object of encumbrance, the ownership of which belongs to the debtor, may be alienated by the latter unless otherwise provided by law or contract, object to mandatory written notice of the pledgee. If the law or contract provides for the pledgee's consent to the alienation of the debtor's movable property, which is the object of the encumbrance, such consent is not required in the case of transfer of ownership of movable property by inheritance, legal succession or allocation of shares in the common property.

According to Art. 10 of the Law on the satisfaction of creditors' claims and registration of encumbrances, in the case of alienation of the movable property by a debtor who had no right to alienate it, the person who acquired the property under a payment agreement is considered a good faith purchaser if there is no information on the encumbrance of this movable property in the State Register of Encumbrances of Movable Property. A good faith purchaser acquires ownership of such movable property without encumbrances. In the case of the transfer of movable property as security by a debtor who was not entitled to it, such security is valid if the State Register does not contain information on the previous encumbrance of the relevant movable property. The encumbrancer, whose rights have been violated because of the actions of the debtor, has the right to demand from the debtor compensation for damages.

F. Satisfaction of the creditor's claims from the security (pledge)

In Ukraine according to Art. 20 (1) of the Law on Pledge, the pledgee acquires the right to apply for foreclosure on the subject of the pledge if at the time of performance of the obligation secured by the pledge, it was not performed, unless otherwise provided by law or the contract.

German law uses another approach in § 1228 (1) BGB – "satisfying the creditor's claims by selling the thing". The creditor may sell the object of the pledge with the expiration of the period of fulfillment of the claim in full or in part (§ 1228 BGB (2)).

A court decision is not required to satisfy claims at the expense of the movable property. Regarding the land plot and the items covered by the hypothec, according to § 1147 BGB, the satisfaction takes place by way of enforcement by a court decision.

In Ukraine, foreclosure on the pledge is carried out by court or arbitration, based on a notary's notice, unless otherwise provided by law or pledge agreement (Art. 590 (1) UKR-CC, Art. 20 of the Law on Pledge).

Thus, in Ukraine, a court decision is a condition for the creditor to exercise the right to obtain foreclosure on the pledge, but in Germany a court decision is only the form of control over the legality of the realization of rights arising from the pledge.

G. Protection of rights of the titleholder (pledgee)

Common in the legislation of Ukraine and Germany is the absolute nature of protection of the pledgee's rights. According to Art. 51 (1)(3) of the Law on Pledge in case of breach by the pledgor of obligations to take measures

necessary to protect the right of pledge from violation by third parties, the pledgee has the right to take all measures necessary to protect the right of pledge against violations by third parties. Also, under German law (§ 1227 BGB), in the event of a breach of the pledgee's rights, they are protected in the same manner as property rights.

H. Conclusions

1. Under German law, the security on movables is a proprietary security right in assets, when the pledgee has a restricted real right to sell the pledged property. This right of claim of the creditor arises based on the actual structure – a set of contractual and realty agreements to establish the security.

Legislation of Ukraine is characterized by emphasizing only the contractual component of the content of the pledge. Only one type of pledge – hypothec, is a proprietary security right. At the same time, it cannot be denied that such characteristics of the pledge right as the "principle of accession" and the "absolute nature" of the protection of the pledgee's rights indicate the mixed (contractual-real) nature of the pledge of movables in Ukrainian law.

2. Ukrainian law, unlike German law, does not provide a clear possibility for a creditor to acquire the pledge in good faith from an unfair seller, which is a significant shortcoming but cannot be remedied because of the non-recognition of realty transactions in Ukraine.

3. Undoubtedly a positive feature of the legal regulation of the security on movables under German law is the ability to satisfy the interests of the pledgor both before (§ 1281 BGB) and after the expiration of the term of the main contractual agreement (§ 1282 BGB). Therefore, it is proposed to provide for a similar right in the legislation of Ukraine.

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