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MORTGAGE OF SHARES AND SOCIAL PARTS – FROM CONSTITUTION TO CONCLUSION

Maria DUMITRU*

Abstract:

The entry into force of the new Civil Code1 generated many changes in private law regulations. Among those that are highlighted by their legal life implications include those generated by the introduction of mortgage securities.

This study does not aim to analyze mortgage securities as an institution. Being a vast subject, mortgage as an institution should be the subject of a monograph and its approach in a few pages could only be superficial. From the broader issue, our approach aims to draw a single aspect: the legal route of mortgage securities from constitution to conclusion.

Keywords:

mortgage, shares, social parts, limited company.

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[1] Law no. 287/2009 regarding the civil Code republished based on art 218 from Law no.71/2011 for implementing Law no. 287/2009 regarding the new civil Code, published in "Romanian official Monitor", part I, no.409 from 10 june 2011

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In order to proceed on recovering the value of mortgaged shares, in addition to fulfilling other conditions, it is necessary for the mortgage to be perfect. The steps to be taken to reach the possibility of enforcement for the mortgage of shares or social parts will exhibited in the following.

1.Constitution of mortgage on shares and social parts.

The New Civil Code expressly establishes that in addition to real property, movable propriety can also be mortgaged. In this case, in art. 2389 of the new civil Code, a series of movable goods that can constitute the object of a mortgage are enumerated. Letter d) of the up mentioned expressly provides that for guaranteeing the realization of a claim it is possible to mortgage "*shares, social parts, moving values and other financial instruments*".

In general, the movable goods mortgage is constituted by signing a mortgage contract. Contrary to real propriety mortgage that can be constituted only by an authentic act, the movable goods mortgage can also be made on private signature.

Considering the specificity of shares and social parts – to represent pieces of social capital for a company – the lawmaker establishes that the rules that constitute the movable propriety mortgage on social parts and shares will be consecrated to a special law.[2]

In applying this disposition by pct.10 from Law no. 71/2011 regarding the application of the new civil Code[3] it is stated in Law no. 31/1990 regarding companies[4] art. 99^{1}, article that modifies the procedure

[2] By the marginal call "Mortgage of financial instruments", art. 2390 of the civil Code stipulates that **"***(1)* The mortgage on financial instruments is constituted by the rules of the market on which they are transacted upon. *(2)* The mortgage on shares or social parts of a company is constituted regarding the rules established by special law."

[3] Law no. 71/2011 regarding the applying of the new civil Code, published in the Romanian official Monitor, par I, no. 409 from 10 june 2011, modified by Ordonanţa de urgenţă a Guvernului no. 79/2011, published in the Romanian official Monitor, part I, no.696 from 30 september 2011.

[4] Law no. 31/1990 regarding companies published in the Romanian official Monitor, part I, no. 126 from 17.11.1990, republished in the Romanian official Monitor, part I, no.1066 from 17.11.2004, modified by Law no. 302/2005 published in the Romanian official Monitor, part I, no. 953 from 27.10.2005, modified by Law no. 164/2006 published in the Romanian official Monitor, part I, no. 430 from 18.05.2006, modified by Law no. 441/2006 published in the Romanian official Monitor, part I, nr. 955 from

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of constitution of moving propriety mortgage when it has as an object shares[5]. Regarding the mortgage on social parts, at least until now, the lawmaker keeps its silence.

For the constitution of movable propriety mortgage on shares it is sufficient the writing of a document under private signature, being mandatory to state in its contents the amount of debt, value and category of shares with which the debt is guaranteed.

In addition, if the shares are emitted in material form it is necessary to mention the mortgage on title and the mention needs to be signed by the creditor and debtor shareholder or by his mandated delegates.

The mortgage constituted in this way will be registred in the shareholders registry, the creditor in whose favor the mortgage was constituted will receive a proof of mortgage registration.

2. Effectiveness of mortgaged shares and shares

Although constituted int a viable way the mortgage on moving propriety in general, including the mortgage on social parts or shares can not however produce effects every time.

Art. 2389 from the new civil Code subjects the beginning of the production of the mortgage contract's effects by the cumulative realization of two other conditions: the guaranteed obligation needs to be

28.11.2006, modified by Law no. 85/2006 published in the Romanian official Monitor, part I, no. 359 from 21.04.2006, modified by Ordonanţa de urgenţă a Guvernului no. 82/2007 published in the Romanian official Monitor, part I, no. 446 from 29.06.2007, modified by Ordonanaţa de urgenţă a Guvernului no. 52/2008 published in the Romanian official Monitor, part I, no. 333 from 30.04.2008, modified by Law nr. 88/2009 published in the Romanian official Monitor, part I, no. 246 from 14.04.2009, modified by Ordonanţa de urgenţă a Guvernului no. 43/2010 published in the Romanian official Monitor, part I, no. 316 from 13.05.2010, modified by Ordonanţa de urgenţă a Guvernului no. 54/2010 published in the Romanian official Monitor, part I, no. 421 from 23.06.2010, modified by Ordonanţa de urgenţă a Guvernului. no. 90/2010 published in the Romanian official Monitor, part I, no. 674 from 04.10.2010, modified by Law no. 202/2010 published in the Romanian official Monitor, part I, no. 714 from 26.10.2010, modified by Ordonanţa de urgenţă a Guvernului no. 37/2011 published in the Romanian official Monitor, part I nr. 285 from 22/04/2011. , modified by Law no. 71/2011 published in the Romanian official Monitor, part I no. 409 from 10/06/2011.

[5] Art. 99.1 was introduced in the body of Law no. 31/1991 regarding companies by the dispositions of Law no. 441/2006 and was ruling in similar mode the constitution and publicity of mortgage guarantee contracts on shares.

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born and the mortgage constitutor needs to take rights on the goods that are mortgaged.

As it can be easily seen the text formulation is elliptical: the rights of the mortgage constitutor on the goods are not stated. In its interpretation we consider on one side, the specificity of the object of the mortgage and on the other side the ending followed by the parts at the signing of the mortgage contract.

The scope of constituting the mortgage is that of guaranteeing to the creditor the realization of the claim in last resort by executing the mortgaged good. In the matter of companies the possibility of capitalization in full or partial of shares or social parts with the respect of some supplementary conditions of transmission, belongs, in other words to the associate or shareholder. As a result we appreciate that the lawmaker conditioned the effectiveness of mortgages on social parts on the acquiring of rights that confer the constitutor the prerogative on the mobile good.

Social parts represent fractions of social capital of a company with limited responsibility. The *intuitu personae* character of this type of company gives a special judicial regime in the transmission and acquiring of social parts (for example, the approval of transmission of social parts to third parties by associates representing three quarters of the social capital, the possibility of formulating oppositions towards any prejudiced person by the transmission of social parts, etc.). Taking into consideration the restrictive regime of alienation for social parts towards third parties, in order to have real chances that the mortgage is effective, we appreciate that it would be in accordance to expressly state that it only has the capacity of mortgage constitutor only the person that at the date of the constitution has the quality of associate[6].

[6] Moreover, art. 2365 from the new civil Code with the marginal name ”The right to mortgage” shows that ”conventional mortgage can be constituted only by the owner of the right that will be mortgaged and has the capacity to dispose of it”.

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3. Advertising and enforceability of mortgaged shares and social

In principle, the publicity of moving propriety mortgages is assured by registering them on the Electronic Archive of Real Moving Guarantees.

Unlike the constitution the legislature did not consider necessary to comply with specific provisions on publicity of mortgage of social parts. The new civil Code requests for this type of mortgage only the publicity formalities stated in the old Code, applyable to any mortgage on moving propriety.

The mortgage on social parts is opposable to third parties only in the day it was submitted to the Electronic Archive of Real Moving Guarantees. Also, in the case of mortgage on shares the dispositions of alin. 3 of art. 99.1 from Law no. 31/1991 regarding companies limits to stating the general rule:*"the mortgage becomes opposable to third parties and gets rank in the order of preference of creditors at the date it is registered in the Electronic Archive of Real Moving Guarantees".*

Surprisingly neither Law no. 31/1990 regarding companies, nor the new civil Code and mostly not the Law no. 26/1990 regarding the commercial registry (modified by the Law for applying the new civil Code with the occasion of it entering in force) does not state the necessity of registering the mortgage in the Commercial Registry.

In the scope of information it would have been desirable to register the mortgage in the Commercial Registry. We consider that the constitution of a mortgage on social parts is a judicial act with implications (possible) different on the judicial status of the trader. Also, the constitution of such a mortgage is of great interest for the third party trader that contracts with the company of whom parts or shares are mortgaged. The registering of the mortgage in the commercial Register with the scope of informing and not opposing or acquiring a rank of preference is recommendable also because the mortgage does not indispose social parts or shares, the associate being free to sell them after the constitution or the perfection of the mortgage.

The Register of commerce is the register of publicity in the area of traders and when it is needed to know the judicial situation of a company, information on it are taken from the Office of Commercial Registry and not from the Electronic Archive of Real Moving Guarantees.

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The lawmaker just introduced through the Law of application for the new civil Code the fact that in the submissions in the Registry of commerce should state, by consequence of the entering into force of the new *corpus* of private law, only the marriage conventions signed during marriage, including it's modification and also the court rulings regarding the judicial modification of the marriage regime or the observation or declaration of the nullity of marriage convention. The registry of marriage convention in the Registry of commerce is made only for information purposes, publicity in the view of opposability of marriage convention being assured by other publicity registers.

Some of the reasons that stayed at the basis of the obligation of registering the marriage conventions by which the commercial husband or wife are regulating their economic relations (including regarding social parts and shares that they have on companies) should suggest the registering of mortgages on social parts or shares in the Registry of commerce for information purposes.

4. Perfection for mortgage securities

Another milestone in the evolution of moving propriety mortgage from constitution to execution is that of registration and perfection of the mortgage.

The art. 2409 alin.1 of the new civil Code states that "the mortgage is perfect when it produces effects according to art. 2.387, and the formalities asked by the law for publicity have been realized".

The mortgage is perfect in the moment when there is a contract of mortgage signed, the guaranteed obligation is born, the constitutor of the mortgage gets the rights on the mortgaged goods and the formalities for publicity have been made for the opposability of the mortgage.

The starting point of this judicial course is the singing of the mortgage contract that marks the constitution of the mortgage. Reaching the final point of perfecting the mortgage can be realized by different means, the order of realizing the above mentioned conditions is random.

The moment of perfection for the mortgage represents great importance also because of the fact that only the mortgage is opposable to other creditors of the constitutor, the ones that get rights on the mortgaged good after the perfection, and to other persons. On the other side it is not less true that the rank of the mortgage and the order of

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preference are given by the moment at which the formalities of publicity have been finalized, even though the mortgage is perfect later on.

The characteristic of moving propriety mortgage to become perfect is of most importance because only a perfected mortgage can be executed in the case the debtor does not execute his obligation.

The executing of the mortgage made on a moving propriety by imposed sale must be approved by the executing court. At the request for approval of execution the creditor will attach documents that state the existence of the mortgage debt and the mortgage itself, along with the proof of perfection for the mortgage. The court will approve the sale only if it will realize form the written proof that there is a guarantee for the debt[7] and the mortgage is perfected.

Conclusions

Our approach has sought to highlight the legal landmarks in the evolution of mortgage securities to up to perfect, when you acquire the ability to be enforced. Inaccuracies or omissions that I noticed in the analysis performed can be covered in a future regulatory. Through legislation we can find solutions to remove obstacles that exist and put into practice, not to jeopardize the operation and, moreover, the very existence of a limited liability company

[7] The civil Code in art 2445 is referring to the fact that the court will check only the existence of a claim and its perfection. But with all this in the general part of the section reffering to the execution of mortgages, in art. 2430 it is stated that the execution is made only *„for a certain claim, liquid and exigible"*.

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