**Kizlova E.S.**

Doctor of medical sciences, professor departments’ civil and economic law and process of International Humanitarian University

**PLEDGE AGREEMENT IN THE CIVIL LEGISLATION OF UKRAINE. FUNDAMENTALS AND LEGAL REGULATION.**

**Summary.** Fundamentals and legal regulation. - Article.  
This article deals with the issues of legal regulation of contractual relations collateral civil legislation of Ukraine. Analyzed legislation guidelines pledge agreement.

**Keywords:** contract, pledge, civil law, the terms of the mortgage contract.

**Formulation of problem.** Calling to research of institute of mortgage, regardless of or speech goes about the Roman law, or pre-revolution civil law, or about modern works of Ukrainian civilists, we necessarily run into one very important problem is determination of concept of mortgage, as it is very difficult to adhere to one some concept, characterizing this phenomenon. As a result there is an enormous amount of "side" concepts that sometimes it is difficult enough to attribute to the mortgage, although on the face of it there are characteristic limits in them.

Regulation of mortgage comes true according to a head 49ЦК of Ukraine, by Laws of Ukraine "On a mortgage", "About amortgage", "About the mortgage crediting, operations with the consolidated mortgage debt and mortgage certificates" and others like that.

According to the article 572 ЦК, as well as in the law of Ukraine "On a mortgage" "in force of mortgage a creditor (mortgagee) has a right in case of non-fulfillment the debtor of the obligation provided with a mortgage, to get pleasure due to the compelled property mainly before other creditors of this debtor", however now it is clearly indicated in Civil Code, that such repressing right can be limited to the law.

The traditional grounds of origin of mortgage are an agreement or law.

In ЦК of Ukraine under an agreement a "agreement understands two or more parties, sent to establishment, change or stopping of civil laws and duties"(ч. 1 century 626ЦКУ).

Adjustment of this article in a work of V. Oluh has the defined value for the agreement of mortgage, in particular, is, that "determination of agreement in new ЦК of Ukraine groundlessly narrows his maintenance and erects only to the consensus agreements, as to admit a term "agreement" the conclusive operating, or actions under the transfer of property it is impossible in the real contracts.

Determination of concept of agreement is therefore offered as a legal fact is a legal transaction two or more persons in a certain a legislation form, that sent to establishment, change or stopping of civil laws and duties" [1, p. 4].

A mortgage operation, as a rule, is recorded the written contracts, there are two varieties of writing form of agreement - simple writing and notaries, and sometimes needed and him state registration.

The article 577 of ЦКУ envisages the notaries’ certification of agreement of mortgage and his registration. If the article of mortgage is the real estate, and also in another cases set by a law, the agreement of mortgage is subject to the notarial certification. The pledge of real property is subject to state registration in cases and in order of set by a law; a chattel mortgage can be registered on the basis of statement of mortgagee or with bringing of record to the state register of burdens of the personal chattels.

In an agreement mortgages are determined essence, size and term of fulfilling commitment, provided with a mortgage, description of the article of mortgage is given, and also other terms concerted by parties of agreement(ч. 1 century 584ЦКУ) are determined.

A right for a mortgage arises up from the moment of conclusion of treaty of mortgage, and then, when an agreement is subject to the notarial certification - from the moment of his notarial certification. If the article of mortgage in accordance with an agreement or law must be in possession of mortgagee, a right for a mortgage arises upon the moment of transmission to him of the article of mortgage.

The real possibilities for the increase of function of mortgage on the basis of agreement are contained in further perfection of contractual practice of performers of entrepreneurial activities. Except Civil Code of Ukraine of adjusting of mortgage relations comes true by Law of Ukraine "About a mortgage", in that to the agreement of mortgage the devoted articles from 11 to 14, that regulate a question in relation to parties of agreement of mortgage, his maintenance, form, consequences of failure to observe of requirements in relation to the form of agreement of mortgage and him notarial certification.

Any of the stages of agreement of mortgage matters for further development of mortgage legal relationships, however a self appeal of penalty for the purpose a mortgage and realization of the article of mortgage are most essential, as exactly on them there is implementation from the cost of the article of mortgage of all losses and charges of creditor, related to violation of the obligation a debtor.

By grounds for the appeal of penalty for the purpose a mortgage non-fulfillment or improper implementations of the obligation provided by a mortgage can serve in connection with circumstances for that a debtor is responsible.

As justly В. В. notices Starlings, as founding for the appeal of penalty for the purpose a mortgage does not contain the breach of contract of mortgage, then it is expedient to plug in the agreement of mortgage such terms: a 1) position that provide for, that the fact of violation of obligation under an agreement on a mortgage means violation of basic obligation simultaneously.

In international contractual practice this position is named as "Сross default provisions" of position about cross non-fulfillment; 2) positions, that envisages a right for a creditor to require pre-schedule implementation of the obligation provided by a mortgage at violation of the obligations a debtor. Such position is especially effective at presence of credit agreement, grant or payment to the credit on that comes true.

These positions have a strong enough guard-educator function, as a debtor knows that if he it admits violation of one obligation, it will entail neglect of other his duties, that will be founding to require the advanced repayment of basic obligation, automatically. It is necessary also to take into account that the substantial conditions of the agreement, that served founding of origin of the basic obligation provided with a mortgage, understand under maintenance of the requirement provided by a mortgage.

For mortgage legal relationships the initial point of counting out of action of agreement has a practical value, as speech goes about time of conclusion of treaty.

In a theoretical plan an interesting question is about classification of agreement of mortgage within the framework of dividing of civil legal agreements by the real and consensus.

O Ercovich offers how to set a classification criterion moment of conclusion of treaty that is determined depending on legal description of agreement(agreement real or consensus). He marks that beginning of action of agreement - it and there is a moment of entry of agreement in an action - "beginning of action of agreement" and «moment of conclusion of treaty" are synonyms. If an agreement did not inure, then an agreement is not legally, accordingly to oblige not one of the parties envisaged by text of this agreement, it is impossible.

It is impossible by agreement that did not inure, to define his implementation [2, p. 24].

The agreement of mortgage it a mortgage operation, and thus a qualificatory moment is will of parties. For establishment of obligation by means of operation, and also for the change of maintenance of obligation necessary conclusion of treaty. Beginning from the Roman law, when due to economic development the amount of civil operations grew it was "necessary next to formal contracts (by agreements), to assume et al, force of that leaned against their essence and loyalty or honesty of contracts.

In course of time the dual founding of operations showed up: transmission of thing with the known aim and mutual agreement, that is why on the first plan agreements came forward real and consensus" [3, p. 226].

In basis of differentiation of agreements on real and consensus lies confession or agreement(consensus agreement) or basing a legitimate fact on the agreement of transmission of thing or other property(real contract). Both these moments have the defined value at the conclusion of mortgage treaty or agreement of mortgage, it is here necessary to bear in a mind, that at implementation of such agreement speech goes also about the protection of rights and interests of parties.

Often enough the matter of dispute between contractors is a question about implementation the obligation related to the choice of the article of mortgage, for example, when one of parties does not can or not the article of mortgage wants to turn in reality, and insists on payment of his cost.

Is there a disjunctive covenant in this case, but question – or it is possible at an agreement on a mortgage?

К.Бернштейн marked that some of agreements simply cannot have alternative maintenance to "pledge alternatively to the that or other action, to delivery of that or other action, to delivery of that or other object maybe, but to get and giving out is possible anything is exactly certain only ... in the real contracts a debtor pledged to return to the creditor that he got from him. Therefore on the nature the real contracts cannot have alternative maintenance" [4, p. 14].

He considered thus, that informal consensus agreements all could have alternative maintenance.

During a mortgage operation a statement about the choice of the concrete article of implementation is one-sided will that is directed to other side and does not fall to abolition.

In this plan it follows to agree with the look of Е. Bogdanova, that considers that a statement of debtor about the choice of the article of implementation is the one-sided operation sent to the change of disjunctive covenant, and during realization of the right for a choice a side a disjunctive covenant is transformed in a simple obligation with the certain article of implementation.

If a right for a choice belongs to the creditor, and realization of implementation one of object becomes impossible through his death, a creditor must take over a debtor an object that remained, if there is not guilt of the last in death article of obligation [5, p. 59-60].

Thus, for an origin between parties of legal (contractual) bond in the real contract, namely to such we take the agreement of mortgage, except the presence of fact of agreement there is a necessary presence of such lawmaking legal fact, as a transfer of property, the fact of transfer of property determines mutual intention of parties of the real contract to enter into an agreement finally, shown in their agreement. For the real contracts the initial achievement of agreement is important in relation to the substantial conditions of the agreement, related to the transfer of property.

From the moment of origin of agreement of mortgage to the near-term tasks there is the "proper implementation of obligation".

M. Bodnar correctly accents attention on that "problems of fulfilling commitment, including maintenance, general conditions, principles of implementation were not the article of complex theoretical research in Ukrainian civil legal science neither in the days of the action of ЦК of UKRAINE in1963, nor now - in relation to new ЦК of Ukraine" [6, p. 169].

In the theory of civil law and in practice large attention is traditionally spared to the formal aspects of contractual relations of parties, today we, undoubtedly, distant from formalism peculiar to the Roman law, but sometimes and, foremost it touches a concept vehicle, such formalism is simply needed.

In home literature to the question about the use in legislative texts of legal definitions small attention is spared and mostly in sources he is examined only in the context of rules of legal technique.

In our view, this problem must be examined far wider, taking the new achievements of hermeneutics and synergetic on an armament, as "except the especially technical rules of constructing of definition, there is yet and a problem of expediency and necessity of legislative definitions, value of such definitions for effective realization of legal binding overs, role of normative definitions in providing of realization of principles of legal definiteness, stability of the legal system and simultaneously right and other questions".

The agreement of mortgage begins "from the moment of conclusion", and that exactly we understand under this term that is used in the different articles of ЦК of Ukraine : "about the general conditions of confession of agreement speech goes celled" to ч. 1 century 638; "about the moment of conclusion of treaty" in a century 640; the "law consequences of conclusion of treaty" are envisaged in p. 1century 585 and ч. 2 century 631 and еtc. This term is used in the Commercial and Economic procedure codes. In opinion of Т.В. procedure of entering into economic contracts, id est totality and sequence of certain a law executions of participants of economic relations are in relation to the concordance of maintenance of agreement and observance of other procedures (transferrableness of property, notarial certification, state registration), the result(by a consequence)of feasance of that and an own conclusion of treaty is, id estfrom one side, achievement parties in the proper form of consent from all substantial conditions of the agreement, and from other is a grant to him of character of legal fact that is founding of origin of contractual obligation [6, p.87].

After ГК of Ukraine an agreement is considered celled, if parties in the proper form attained a consent on all existent conditions of the agreement, under that terms understand about the subject of agreement, condition certain a law as substantial or such that are necessary for the agreements of this kind, and also terms in relation to that on a statement one of parties must make agreement even, an agreement consists by suggestion of one side to conclude a treaty(offer) and accepting(acceptance) other side(century638 ГКУ).

In relation to the form of agreement, then he can be celled in any form, if requirements in relation to the form of agreement are not set by a law.

On the basis of analysis of theoretical positions that exist in a modern civil law, judicial practice, positions of ЦК of Ukraine he marks the existent inconsistence of consequences in case of failure to observe of the form set by a law parties. From one side, an agreement is considered uncalled, and from other - he can be admitted by invalid. But to admit invalid what in general does not exist it is impossible from the legal point of view, as a construction of century

153 ЦК unambiguous: an agreement is considered celled from the observance of two terms : 1) substantial terms; 2)necessary form for a bilateral agreement.

Thus, "if parties agreed to conclude a treaty in a certain formhe is considered celled from the moment of giving him of this form, even if by a law this form for this type of agreements was not required" [187, p. 90].

The agreement of mortgage, as a rule, consists in writing. Legislation, as evidently, from aforesaid envisages cases, when the agreement of mortgage must be notarized notarial, but foremost it touches cases, in that it appears accsessive form of agreement, that is one of properties of obligations.

Except establishment of circle of subjects of mortgage legal relationships, the substantial conditions of the agreement must be clearly enumerated in the agreement of mortgage, although at his conclusion parties can not pay attention to it, stopped, as a rule, on the ordinary terms of agreement.

Interestingly, that in judicial practice and there were certain difficulties on this question, that is why the Higher economic court of Ukraine marked in the resolution, that ordinary terms are such terms that does not need the special including to text of agreement, as it is considered that they are obligatory for parties through the fact of conclusion of treaty. Similarly the ordinary conditions of the agreement are determined by legal science, ides as terms that is envisaged in a law orother normatively legal act and that is why become obligatory for parties through the fact of conclusion of treaty [7, p. 30].

In the same time a law determines the substantial conditions of the agreement (century 638 ЦКУ) thoroughly, but in this article the substantial conditions of the agreement are terms about the subject of agreement, terms, certain a law as substantial or such that are necessary for the agreements of this kind, and also those terms in relation to that on a statement even one of parties there must be the attained agreement.

Other substantial terms are as though "individual" for each of contractual kinds, and even in relation to each of agreements...

Complication of determination of "substantial conditions" of the agreement of mortgage, undoubtedly, foremost related to the enormous amount of possible for a mortgage objects, as in every special case there are "substantial to the condition". In the same time A. Luts specifies on that determination in the law of list of terms that are substantial or necessary for the agreements of this kind represents the specific of concrete type of agreement and assists dissociation of him from other, near(family) after legal nature types of agreements [8, p. 8].

In relation to the substantial and ordinary conditions of the agreement of mortgage, then there is a point of view, that ordinary terms differ from substantial terms that they do not need a separate concordance and about them not necessarily to caution in text of agreement.

The table of contents of agreement of mortgage is certain tithe century 584 ЦКУ, according to that, essence, size and term of fulfilling commitment, provided with a mortgage, is determined in the agreement of mortgage, description of the article of mortgage(what can be presented in a general form) is given, and also other terms concerted by parties of agreement are determined.

In other words, an agreement is considered celled, if between parties it is attained agreement on all substantial conditions of the agreement, under that understand and those that is adopted in a law or other legal acts as substantial or necessary for an agreement mortgages.

By law "About the mortgage" of century 12 envisages maintenance of agreement of mortgage : in the agreement of mortgage it must be the name(last name, name and patronymic), place of being(residence) of parties, essence of the requirement provided with a mortgage, her size and term of fulfilling commitment, description of the article of mortgage, and also any other terms, is marked in relation to that on the statement of one of parties there must be the attained agreement(part is the first century 12 in the release of Law № 583/97 is SR from 21.10.97).

At the conclusion of treaty of mortgage on the consent of parties or on call of one of parties public accountant verification of authenticity and plenitude of balance or financial state of corresponding side of agreement of mortgage(century 12 complemented by part second by law№ 90-95-ВР from 14.09.95) can be conducted.

On the whole the substantial conditions of the agreement are the article of mortgage and his estimation; essence, size and term of fulfilling commitment; that from parties has terms about that, mortgagee there is the stopped up property.

A. Vishnevskiy accents attention on that the list of substantial conditions of the agreement of mortgage(and it touches CC of Russian Federation) does not have absolute character, in relation to some types of mortgage the additional list of terms that must be in an agreement is set, it can belong, for example, to the agreement on the mortgage of commodities that must contain information about the type of the stopped up commodity, other him generic features, total worth of the article of mortgage, place in that he is and others like that [9, p. 40].

In a theoretical plan not clear or it is possible to attribute these additional to "other terms".

So, for example, E. Michurin next to substantial terms defined "other conditions" of the agreement, that straight does not influence on the fact of conclusion of treaty, but also can fold his maintenance

In our view, a term "other terms" for the additional of agreement of mortgage is not possible, as complements some vagueness that and so sufficiently in a term "additional".

ЦКУ governed about a mortgage through an agreement are accordingly used to the mortgage that arises up on the basis of law, if a law is not set other(ч. 2 century 574 Civil Code of Ukraine). In practice, a mortgage rarely enough arises up on the basis of law, in a corresponding law must be indicated: legal facts, at presence of that automatically through a law there is a right for a mortgage, article of mortgage; obligation provided by a mortgage.

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**Кізлова О.С. Договір застави за цивільним законодавством України. Основні положення та правове регулювання. -Стаття.**

**Анотація.** Дана стаття присвячена розгляду питань правового регулювання договірних відносин застави за цивільним законодавством України. Аналізується законодавчі положення щодо основних положень договору застави.

**Ключові слова:** договір, застава, цивільне законодавство, умови договору застави.

**Кизлова Е.С. Договор залога в гражданском законодательстве Украины. Основные положения и правовое регулирование. – Статья.**

**Аннотация.** Данная статья посвящена рассмотрению вопросов правового регулирования договорных отношений залога в гражданском законодательстве Украины. Проанализированы законодательные положения основных положений договора залога.

**Ключевые слова:** договор, залог, гражданское законодательство, условия договора залога.

**Kizlova E.S. Pledge agreement in the civil legislation of Ukraine. Summary.** Fundamentals and legal regulation. - Article.  
This article deals with the issues of legal regulation of contractual relations collateral civil legislation of Ukraine. Analyzed legislation guidelines pledge agreement.  
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