

**Private Law**



**Obligation Guarantees in the New Romanian Civil Code**

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**Abstract:** This study starts from the analysis of the juridical regime of the mortgage that “migrates” from the sphere of the real rights towards the juridical regime of the receivables’ rights! The article contains an analysis of the legal regime of the mortgage according to changes made by the new Romanian Civil Code. This idea is supported by legislative arguments deriving from regulations of the pledge in the new Romanian Civil Code (sect. 2), of the mortgage (sect. 3), from the comparison with other similar juridical institutions (sect. 3). The conclusions explain how useful is to change the juridical regime of the real guarantees and the international dimension of trade. The study is one of the latest presentations doctrinal matter, with special insight into mortgage securities, legal institution whole new for the Romanian Civil Code. Despite the fact all the observations are theoretical, novelty approach makes reading not only addresses their academics, and practitioners: judges, lawyers, notaries.

**Keywords:** juridical regime; mortgage; New Romanian Civil Code

**1. Generalities on the Regulations to Guarantee the Obligations in the New Civil Code**

The unification of the private law, according to the modern theory, and mainly of the regulations pertaining to “commercial law”, influenced the matter of the obligation guarantees. According to the new Civil Code, to unify the legislation on obligation guarantees means to implement measures to speed up economic reform, and to modify and complete the current solutions in the Civil Code and in the special law aforementioned.

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The obligation guarantees are regulated by titles X and XI in the new Civil Code, and they are grouped in personal guarantees and privileges (title X), and real guarantees (title XI).

As a novelty, regarding personal guarantees, the lawmakers have completed the provisions existing in the 1864 Civil Code by introducing new “autonomous guarantees”, as well as other guarantees stipulated by the law. The autonomous guarantees are the guarantee letter and the comfort letter, legal instruments used in the banking practices that had been not regulated so far in the Romanian law. Some practical aspects shall be analyzed at the end of this article!

The real guarantees regulated in the new Civil Code are the mortgage, the pledge and the retention right. We shall present briefly how they are currently regulated.

## **2. The Pledge**

**Pledge:** the guarantee provided by the debtor regarding an asset of his, so that upon the due date, in case the debt has not been paid, the creditor could pay the receivable with the asset given as a pledge or by selling this asset (accessory real right).

**Object:** only movable assets susceptible of material detention; the following: incorporated assets, such as receivable rights or negotiable instruments issued in a materialized form, unless they are incorporated in a security, cannot be the object of a pledge (according to art. 2480 in the new Civil Code).

**Form:** *withies possession or without dispossession*; it is applicable even in case no document has been written, irrespective of its value; the obligation to advertise in the Electronic Guarantees Archive; thus, the creditor may either take in possession the guaranteed asset, *in a peaceful way*, or, when this cannot be done in a peaceful way, he can turn to the court enforcement officer or other enforcement bodies, or he can sell the asset.

The pledge has a limited application according to the regulations in the new Civil Code, indissolubly linked to the fact that it is constituted by the debtor's dispossession of the pledged asset. Consequently, the object of the pledge can be movable assets or negotiable instruments in a materialized form and it can be constituted by giving the asset to the creditor or the creditor may keep the asset with the consent of the debtor. The possession shall be public and non-equivoque.

The advertising of the pledge can be done by dispossession or by registering into the Electronic Archive. If the advertising of the pledge with the Electronic Archive has not been done, the creditor with the pledge shall have a rank that is inferior to the mortgage registered with the Electronic Archive, even if the creditor with the

pledge has obtained the detention of the pledged asset before the registering of the mortgage.

Based on the agreement of the parties, the possession of the asset by the creditor can be achieved through a third party. The creditor with the pledge, or the go-between, as the case may be, has the capacity of the manager of somebody's assets and he is subject to rules applicable to simple management.

Regarding advertising, enforcement and termination of the pledge, the new Civil Code stipulates the rules applicable to immovable mortgages.

As an absolute novelty in the Romanian law, it is the express regulation of the **retention right**, with the possibility of the holder of this imperfect real guarantee to formulate action for the restitution of the asset, in case where another person than the owner takes the asset to use it without the owner's being aware of this.

### **3. The Mortgage-a Revisited Institution**

According to the new Civil Code, the mortgage is a real right over movable assets or immovable assets related to the exercising of an obligation (art. 2343), with an accessory and indivisible character (art. 2344). However, we consider that the evolution of commercial practices requires a revisiting of the conception regarding the real right character of the mortgage as well as its accessory character. The idea is not new; the doctrine formulates the opinion on the mixed character of the real guarantee, starting from the example of the theory on the pledged receivables.

According to this conception, regarding the mixed nature, the guarantee right is placed among the real rights and the personal rights and it has characteristics that belong to both categories<sup>1</sup>.

In our opinion, the tendency of the mortgage to constitute itself as an autonomous receivable right can be supported by new arguments. We shall therefore analyse first the arguments formulated in the regulations on the mortgage (sect. 3a) and in the regulation of new juridical institutions (sect. 3b).

#### **Arguments in the Current Regulations of the Mortgage**

The new Civil Code unified the regulations on real guarantees, including at least two aspects: in terms of terminology, we differentiate immovable mortgages and movable mortgages (the pledge only defines the real estate guarantees achieved as a result of the dispossession of the debtor); in terms of legislative technique, the lawmakers stipulated a series of provisions that are shared by both the immovable mortgages and movable mortgages before writing articles exclusively dedicated to each form of guarantee.

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<sup>1</sup>In this respect, see (Angheni, 2011, p. 715).

### **Regulations Shared by the Two Forms of Mortgage**

a) The fact to constitute the mortgage in **advance**, even before the debtor receives the service out of which the mortgage arises (according to art. 2371) is explained by the fact that, eventually, the creditor shall acquire a receivable right over the debtor (when he executes the service).

b) The mortgage can guarantee the fulfillment of any obligation (art. 2369), including **future obligations**, and acquires the preference rank from the moment it is registered in the advertising registries (art. 2370).

Unlike the 1865 Civil Code, the new regulation admits the possibility to constitute a mortgage over a **universality of assets**<sup>1</sup>, including a universality of movable assets or immovable assets, either current or future (art. 2350 para. 1 and art. 2357); regarding the conventional mortgage, it can be constituted over a universality only for assets related to the activity of an SME<sup>2</sup> (art. 2368).

The mortgage constituted over a universality of assets is placed on the immovable assets only from the moment the mortgage is registered in the Land Register regarding each of the real estate asset (art. 2377); in case of competition between the mortgage over a universality of movable assets and a mortgage over specified movable assets, the mortgage registered or concluded first shall have priority.

c) **The competition between a movable mortgage and an immovable mortgage** shall be solved as follows: if they have different dates, the creditors whose mortgage was previously made public in the advertising registers shall be preferred; if they were registered on the same day, the immovable mortgage shall have priority (art. 2422).

d) The object of the movable mortgage can be any tangible or intangible asset; a list of examples is given in article 2389 in the new Civil Code. For the final sections of this article, we are interested in the list that refers to money receivables resulted from an insurance agreement or those arisen from assuming an obligation or from constituting a guarantee for using a credit card or a debit card (according to art. 2389 letter a).

Regarding the execution of the mortgage over receivables, the new Civil Code stipulates the possibility of the creditor, when the requirements of court enforcement are met, to choose between: the right to take over the receivable instrument, to request and to obtain the payment, or to sell the receivable and to receive the price (according to art. 2645 paragraph 1); in case of mortgage on account, the mortgage creditor may compensate the creditor's balance with a mortgage receivable (the mortgage creditor is the loan institution where the

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<sup>1</sup>See the comparison with the patrimony of affectation in section 3. 2. of this paper.

<sup>2</sup>See (Postolache, 2012, pp. 298-307).

account has been opened, according to the requirements under art. 2410 para. 2 letter a) or he can order the institution to release the remaining money to his benefit (the mortgage creditor is a different person who sends instructions to the loan institution under the art. 1410 para. 2 letter b or c).

Regarding the **speeding up of the reimbursement** as a result of the constituting of another guarantee over the same mortgaged asset, the new Civil Code stipulates that any clauses in this respect shall be considered as unwritten (according to art. 2384 para. 2).

In case of mortgaged movable assets, the creditor shall have the right to speed up the reimbursement of the secured receivable and to execute the mortgage, if the mortgage constitutor does not maintain properly the asset on which the mortgage has been placed, or if the execution of the mortgage can become difficult or impossible as a result of the action of the debtor (according to art. 2396 para. 1).

The creditor is, in principle, protected against potential acts of sale through the right to follow the mortgaged asset, no matter who the owner may be, without taking into account the real rights or the rights registered after the registration of the mortgage.

Art. 167 in the Law to enforce the new Civil Code stipulates that all disposition acts whose effect is the impossibility to execute the mortgage for the creditor shall be annullable upon his request, except for the case when he approves these acts. The doctrine<sup>1</sup> formulated the opinion according to which this provision should be applicable both in case of movable assets and immovable assets.

The disposition right of the debtor is protected under art. 2376 in the new Civil Code and the **“inalienability clause”** stipulates the validity of the disposition acts over the mortgaged asset, even when the acquiring party knows the provision in the mortgage agreement that forbids the transfer of the asset. The provisions of this article, applicable both to movable assets and immovable assets, are repeated under article 2384 para. 1, and article 2433 under the title “interdiction of the commissary pact”.

As a partial conclusion, we can note the importance given by the Romanian lawmakers to the institution of the mortgage; we, therefore, consider as appropriate to compare its features with the characteristics of similar juridical institutions.

### **3.1. Aspects Regarding the Coverage of the Mortgage:**

a) Mortgage over nude property covers the full property until the termination of the lease agreement when the tenant no longer uses it;

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<sup>1</sup>In this respect, see (Dudoiu, p. 203).

- b) The mortgage on indivisible share lots is transferred by law over the material asset resulted from division and belonging to the constitutor of the mortgage;
- c) The mortgage guarantees with the same rank the capital, the interests, the commissions, the penalties and the reasonable expenses incurred during the recovery or conservation of the asset;
- d) The mortgage covers assets that unify by extension with the asset on which a mortgage is placed;
- e) The movable mortgage is maintained over the asset resulted from the transformation of the assets upon which the mortgage is placed.

The mortgage is transferred on amounts owed as a result of the insurance or the expropriation of the mortgaged asset or as a result of restrictions of the ownership right as established under the law. These amounts shall be entered in a bank account in the name of the debtor, at the disposal of the registered creditors. The debtor shall be entitled to receive the interests but he cannot use these amounts before all secured receivables are paid unless he has the approval of all privileged creditors or of the mortgage creditors that are registered in the advertising registers. In case of lack of approval of the parties, the creditors can recover their receivables only according to the provisions regarding the court enforcement.

Under the insurance agreement, the insurer can reserve himself the option to repair or replace the asset, and he shall have the obligation to notify the creditors. The creditors can ask the insurer to effect the payment within 30 days from the receipt of the notification.

The new Civil Code assimilates the mortgages, from the point of view of their advertising requirements, preference order and execution, with agreements whose effect is the conservation or the constituting of a right to ensure the execution of an obligation. Examples of operation assimilated with mortgages: the reserve of ownership clause, the redemption pact and the transfer of the receivable with the purpose of guarantee.

### **3.2. Regulations Regarding the Constituting of the Mortgage**

The Law enforcing the new Civil Code brings regulations that shall be taken into account when mortgages are constituted, as follows:

- a) The movable mortgage can be constituted in favour of a third party designated by the mortgage creditor. The third party shall exercise all rights and shall bear the obligations of the mortgage creditor;
- b) The movable mortgage can be constituted in favour of a third party or of several beneficiaries who shall have the same rank, by simultaneous registering in the

advertising registers;

c) There is a possibility to designate a guarantee agent who shall exercise all the rights of the creditors who designated him, including the conclusion of the mortgage, the maintaining or the modification of the mortgage (unlike the provision indicated in paragraph (a) above, in this case we speak of the exercising of the rights only, but not of bearing all the obligations of the creditors as well);

Regarding the amount guaranteed in the mortgage agreement, the new Civil Code stipulates that the amount for which the mortgage is constituted shall be reasonably established under the mortgage act. On the other hand, the mortgage right or its rank can be transferred separately from the secured mortgage only if the secured amount is defined in the mortgage agreement.<sup>1</sup>

### **3.3. The Immovable Mortgage - A Real Right (Accessory) Over Immovable Assets that are Subject to Payment of an Obligation**

**Object:** immovable assets (or universalities of immovable assets), including future buildings that are not subject to being entered into the Land Register and are only temporarily written in the Land Register.

**Form:** authenticated, constitutive effect, namely the real right shall be constituted only at the moment when it is entered in the Land Register.

### **3.4. The movable mortgage (only in the Commercial Code for ships and aircrafts)**

**Object:** according to art. 2389 in the new Civil Code – tangible and intangible assets (money receivables: from the sales-purchase agreement, bail, insurance, bank accounts, shares, movable assets and other financial instruments, and from the intellectual property right).

**Form:** only *without dispossession*, valid as a written document under private signature.

#### **3.4.1 The object of the Movable Mortgage**

In the legal provisions (art. 2389 in the new Civil Code), the list of assets over which the movable mortgage can be constituted is not limited but only given as an example.

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<sup>1</sup>Marin Dudoiu, Garantarea obligatiilor/Guaranteeing the obligations. *Saptamana financiara/Financial Week magazine*, “Civil Code” adopted by the Law no 287 of 17 July 2009, in force since 1 October 2011, volume II, art. 1. 164-2. 664-annotated by experts of the law firms, p. 203.

According to article 2389 in the new Civil Code, the object of the immovable mortgage can be both tangible and intangible assets, starting with the intangible assets, that is: a) money receivables resulted from the sales agreement, the bail agreement or any other document concluded for an asset, receivables resulted from an insurance agreement, receivables resulted from an obligation taken, or from the constituting of a guarantee, from the use of a credit card or of a debit card, or from a prize won with a lottery or gambling organized under the law.

Regarding the money receivables, the lawmakers has had into account that fact that any subjective patrimonial right can be seen as intangible asset, less the obligation “to give” a real estate asset that represents immovable assets due to the object to which it applies.

Another category of intangible assets stipulated by the lawmakers as a potential object of immovable mortgage is the bank accounts. In fact, bank accounts are also receivable rights that the depositor has against the bank or another financial institution and these rights represent the restitution of an amount of money.

The law maker also takes into account the shares, the movable assets and other financial instruments as intangible assets.

While regarding the shares issued by joint stock companies there were no controversies because their shares are negotiable and transmissible instruments, regarding the shares issued by companies with limited liability there are different opinions, whether their shares can be the object of a real security guarantee or they are a “movable mortgage”. The controversies related to the “shares”- object of the “movable mortgage” are based on the fact that the limited liability companies are companies characterized by a personal character (“*intuitu personae*”) like in the case of partnerships and the “shares” or the “interest shares” are in principle, not transmissible.

In an exceptional way, the transfer of the shares to third parties can be done if there is the approval of the shareholders that represent at least  $\frac{1}{4}$  of the equity (art. 202, para. 2 in the Law no 31/1990 republished, with further modifications and completions). Under these consequences, at least in theory, it would not be possible that a third person- constitutor of the guarantee – to acquire the capacity of shareholder by taking over the object of the guarantee (equity shares) in case the debt is not paid by the debtor- shareholder.

Another category of intangible assets over which a “movable mortgage” can be constituted is the rights of intellectual property and any other intangible assets [art. 2389 letter e)]. The wording of the lawmakers is very general -“intellectual property rights”, unlike the detailed list drawn up by the lawmaker in the Law no 99/1999 (Title VI) consecrated in the doctrine as the “Law of movable guarantees”.



In our opinion, the only issue related to the general wording of the lawmaker in the new Civil Code, refers to some rights that, in a general sense, are considered “imperfect intellectual property rights”.

It is the case of the “Know-how” or “savoir faire” that does not give the holder (provider) or the beneficiary an exclusive right over the object of the Know-how. In principle, in our opinion, the Know-how could not represent the object of a “movable mortgage”, except the case when such an agreement would be subject to advertising.

The other categories of assets covered by article 2389 in the new Civil Code are tangible assets, either current or future, namely: oil, natural gas and other material resources that are to be extracted; animal stock, the crops that are to be harvested, the forests that are to be cut, equipment, installations etc.<sup>1</sup>

The rights of the creditor regarding the movable mortgage include:

- a) the right to inspect the asset (without disturbing the activity of the constitutor);
- b) if it has been stipulated in the mortgage agreement, the right to harvest the crop of the asset that has been mortgaged for the secured receivable, with the obligation to stipulate the conditions and the proportion to reduce the receivable;
- c) the right to speed up the paying back of the secured receivable and to execute the mortgage, if the constitutor does not maintain the asset on which the mortgage has been placed or if the execution of the mortgage may become difficult or impossible as a result of the act of the debtor.

On the other hand, the constitutor is entitled to obtain from the creditor the confirmation of the value of the secured receivable, of the assets that are the object of the guarantee or the identity of the creditor's successor in rights. The answer shall be issued by the creditor within 15 days without claiming costs from the debtor if the request is addressed every 6 months. The constituting of the movable mortgage is done by concluding the mortgage agreement but it causes effects from the date when the generated obligation arises and the constitutor acquires rights over the mortgaged assets. Regarding the form of the agreement, article 2388 stipulates that the written form is a “*ad validitatem*” condition, whether it is a written document under private signature or an authentic written document. (Dudoiu, pp. 202-203)

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<sup>1</sup>See (Angheni, 2011, pp. 712-718)

#### 4. Conclusion

There is a decline in real guarantees in the domestic and international economy, especially in immovable guarantees, which can be explained especially by the issues generated by their selection and by the procedural complication of the court enforcement of an immovable asset. Personal guarantees, mainly the autonomous banking guarantees, extremely diversified, are preferred instead of real guarantees, due to their ability to adjust quickly and without limitation to the varied needs of the participants in domestic and international trade and of the possibilities to avoid delays and procedures resulting from actions of the banks based on the relations between their client and the foreign creditor. Personal guarantees can be requested and issued in any case and they may be accompanied by other forms of guarantee<sup>1</sup>.

The gradual acquiring of an autonomous, independent character of the bank guarantees, proved by the guarantee letter and the comfort letter in the regulations of the new Civil Code, is the evolution that we believe the juridical regime of the mortgage will have. Practice, at least in the cases presented in this paper, shows the need to adapt “classical” juridical institutions to an ever-restructuring economy. The solutions of the notary offices are achieved “under the circumstances”; the union between the banks and the insurance prove their orientation towards profit but also the dynamics imposed by the need to adjust to the market requirements. We can witness, at any time, either the “personalization” of the real guarantees or their “autonomization”! It is important that all practitioners, doctrine-makers and law-makers together keep an “open” view upon the regime which is so dependent on the economic regime!

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<sup>1</sup>See (Postolache 2012, pp. 22 – 23) Moreover, banks are not interested in real guarantees nor may they “issue” them, they represent a non-sense in relation to their activity. See (Gourion & Peyrard, 1997, p. 164)