

**Issues of classification of pledge in civil legislation  
of Azerbaijan, Kazakhstan and Ukraine**

**Abstract:** Classification of types of collateral is important both theoretical and practical significance. It is proposed to classify the pledge according to the following criteria: a) on the grounds of the origin of the pledge - contractual pledge, normative pledge, pledge on the basis of a court decision; b) for the right to own the mortgaged property - hock and mortgage; c) for the subject of pledge - pledge of movable property (mortgage, pledge of securities, pledge of goods in circulation and processing, pledge of property rights, mortgage of movable property), pledge of real estate (mortgage). Undoubtedly, these criteria are not the only ones possible for the type classification of collateral, however, in connection with the lack of a single criterion for classification (and this is confirmed by the analysis of the scientific literature), they most fully determine the essential properties of the pledge.

**Keywords:** classification; legislation; pledge; mortgage; pawnshop; subject of pledge; pledge of rights.

In civil law, there are the following grounds for classification of the pledge, as: the subject of pledge, subjects of the pledge relationship, the basis for the origin of the security relationship. On the subject composition of the pledge classify: a) pledge of real estate (mortgage); b) pledge of movable property; c) pledge of rights [12]. Art. 300 Civil Code of Azerbaijan establishes that the pledge may be of the following types: a) mortgage; b) pledge of a thing in a pawnshop; c) pledge of rights; d) pledge of cash; e) a stable deposit; f) pledge of goods in circulation. It should be noted that the Civil Code does not attach much importance to the

---

\*Usub Elchin Arif oglu – PhD in Law, a member of the Bar Association of Azerbaijan Republic (Azerbaijan). E-mail: elchin.usub@roedl.pro

classification of the pledge, it is reflected in this article in an unclear form, although this should be important not only theoretical but also practical.

In the Civil Code of Ukraine, certain types of pledges have been identified that provide credit obligations: mortgage and mortgage (Article 575 GK). Rules on other separate types of pledge are established by special legislative acts (part 3 of article 576 of the Civil Code). Thus, we come to the conclusion that the Civil Code of Ukraine also does not attach much importance to classification of collateral. In general, it should be noted that imperfect regulation of collateral relations is very visible at the legislative level for creditors.

According to Art. 301 Civil Code AR, mortgage is a pledge, in which the subject of the pledge is transferred to the possession of the pledgee. According to Part 2 of Art. 575 of the Civil Code of Ukraine, a pledge is a pledge of movable property transferred to the possession of the pledgee or, by its order, to the possession of a third party. Thus, a mortgage is a type of collateral in which the pledged property is transferred to the pledger in the possession of the pledgee. With this definition, we agree, since it contains a classical understanding of the mortgage.

The classifying basis for the allocation of a mortgage is the transfer of pledged items into the possession of the pledgee (mortgage and equivalent types of collateral). Storage at the mortgage can be carried out by the pledgee or third parties by agreement with the latter. The subject of pledge can also be deposited with the mortgagor for mortgages. Examples of the abandonment of pledged items from the pledgor for storage when mortgaged by the legislation of the Republic of Kazakhstan are a pledge equivalent to the pledge with the pledgee left with the pledgee's consent with the pledgor under lock and seal of the pledgee or leaving the pledged items in possession (without the right to use) of the pledgor with the application of signs indicative of Pledge (a solid pledge).

In these cases, the pledgor, although he is the owner of the pledged items, acts as the custodian of the pledge property without the right to use and dispose of it. The construction of the contract of storage also confirms the right of the pledgee to

demand pledged items from someone else's illegal possession, including that of the pledgor himself in case of violation of the conditions for leaving the pledged items in his possession [5, p. 232].

A specific example of a mortgage is the pledge of things in a pawnshop. Acceptance from individuals for movable property intended for personal consumption, for the provision of short-term loans can be carried out by way of entrepreneurial activity by specialized organizations - pawnshops, which have a special permit (license) for this. The pawnshop must insure in favor of the mortgagor the things taken in pledge in the full amount of their valuation, established in accordance with market prices for things of this kind and quality at the time of their acceptance as collateral. In this pawnshop as a pledgee is limited in their rights, he is not entitled to use and dispose of the pledged things. In addition, the pawnshop is responsible for the loss and damage of pledged things. In case of failure to return the amount of the loan secured by pledging items in the pawnshop within a specified period, the pawnshop has the right to sell (sell) this property from public auction. After this, the requirements of the pawnshop to the mortgagor (debtor) are repaid, even if the amount obtained from the sale of the mortgaged property is insufficient for their full satisfaction.

The rules of lending to individuals by pawnshops on the security of personal belongings are established by law. The pledgers for this pledge may be individuals, as pawnbrokers, that is, specialized organizations that have a license to engage in this type of entrepreneurial activity. The subject of pledge in such cases is a movable thing intended for personal consumption.

In the theory of civil law, there is a so-called solid pledge, where the subject of the pledge can be left with the pledger under lock and seal of the pledgee, or with the imposition of signs attesting to the pledge [2, p. 66]. However, it should be noted that in the Civil Code of the Republic of Azerbaijan it is regulated as a stable pledge. So, according to Art. 305 of the Civil Code of the Republic of Azerbaijan is stable, a pledge where the pledge subject remains with the pledger under the lock of the pledgee or with the imposition of signs indicative of the pledge. While

the Ukrainian legislator does not allocate in the Civil Code of Ukraine either a solid (Civil Code of the Republic of Kazakhstan) or a stable pledge (Civil Code of Republic of Azerbaijan).

One of the traditional institutions is the mortgage of goods in circulation, where the pledged goods remain with the pledgor with the grant to the pledgor of the right to change the composition and natural form of the pledged property (commodity stocks, raw materials, materials, semi-finished products, finished products, etc.) Their total value does not become less than that specified in the pledge agreement. Decrease in the value of pledged goods in circulation is allowed in proportion to the executed part of the obligation secured by the pledge, unless otherwise provided by the contract.

The wording of Art. 40 of the Law of Ukraine "On Pledge" allows you to distinguish two types of collateral, which are now united by the concept of "pledge of goods in circulation" - pledge of goods in circulation and pledge of goods in processing. This distinction contributes to a clearer definition of the essence of the pledge of goods in circulation and processing due to the analysis of the dynamics of quantitative and qualitative characteristics of the pledged property in the process of execution of the pledge agreement.

The essence of the pledge of goods in circulation or processing lies in the legitimate possibility of changing the composition of the pledged property by either changing the collateral mass upon admission, or reviving from it certain items of the generic characteristics without changing their quantitative and qualitative characteristics, or by changing the natural form of the subject of the pledge. In any case, the value of the pledged property, subject to the constant volume of the secured obligation, must remain unchanged, and in some cases, increase (Article 43 of the Law of Ukraine "On Pledge").

It should be noted that in the Kazakh legal literature there are opinions on the possibility of classifying a pledge of goods in circulation to a variety of mortgaged movable property. For example, A. Buldubaeva believes that general rules on pledge with the abandonment of mortgaged property in possession and use of the

mortgagor or a third person should be applied to it, since they do not contradict the special norms established for pledging goods in circulation, Article 327 of the Civil Code of the Republic of Kazakhstan [1, p. 9].

When pledging goods in circulation, the organization that received a bank loan allocates goods for the same amount that are placed separately from the other property of the pledgor by inventory and valuation. However, the pledgor has the right, within the range indicated in the inventory, to replace certain goods with others. This, in spite of the pledge, ensures the mobility of the property, since the pledgor can at any time withdraw the necessary goods from the pledge and within the limits of the established assortment, replace them with others that at the moment do not require implementation. The pledger is obliged only to maintain a special register of such transactions, and the bank has the right to control the quantity and value of the pledged product, as well as the conditions for its storage. If the pledger fails to comply with the above rules, the bank is entitled to recover the debt secured by the pledge ahead of schedule [9, p. 220-221].

Goods in circulation, alienated by the pledgor, cease to be the subject of pledge from the moment of their transfer to the ownership of the acquirer, and the goods acquired by the pledgor, indicated in the pledge agreement, become the subject of pledge from the moment of the origin of the property rights of the pledgor.

If the pledgor violates the terms of pledge of goods in circulation, the pledgee has the right to suspend operations with them by imposing his own signs on the pledged goods until the breach is eliminated.

In practice, there are often problems associated with determining the procedure for controlling the mortgage lender for property that is the subject of a pledge contract for goods in circulation or processing. The fact is that the current legislation does not establish a specific specific form of the document for processing the procedure for controlling the pledge holder for the availability, quantity, condition and conditions of keeping the mortgaged property. In the opinion of the author, banks should determine this in the contract, where they indicate that the mortgagee bank has the right to check the documents on the actual

availability, quantity, condition and conditions of storage of the mortgaged property held by the mortgagor.

The document fixing the results of the control of the pledgee, as a rule, can be the act of the results of the corresponding audit, which is signed by the parties in the appropriate agreement form.

Analyzing the possibility of pledging goods in circulation or processing, it can be summarized that this kind of collateral is one of the promising forms of securing obligations. On the one hand, it does not bind the hands of the mortgagor, giving it the opportunity to freely withhold, use and dispose of the pledged commodity, replacing it with another. On the other hand, the interests of the creditor are also secured fairly reliably, since any goods received by the pledgor become the subject of a pledge. Therefore, even the loss or destruction of the subject of pledge does not mean the termination of the pledge, because such an item becomes the goods received or which the mortgagor can replace the damaged one.

The development of civil turnover has entailed the emergence of new types of collateral. Considering that Azerbaijan and Kazakhstan are the world's largest oil suppliers, and Ukraine is actively buying and processing this raw material, we will touch upon the issue of the pledge of oil. So, the issues of practical application of oil pledge do not leave doubt, and may well become the subject of enforcement of obligations, due to the specific legal regime, consumption, high cost, etc. Analyzing the questions connected with the possibility of pledging oil, first of all, we need to find the answer to the question, at what point in principle the pledge of oil is possible: a) when concluding a pledge of oil pledged for transportation before it is transferred to the oil pipeline system; B) when concluding a pledge of oil pledge from the moment of its transfer to the oil pipeline system and until the transfer of oil to its recipient (hereinafter - the pledge of oil in the pipeline); C) when concluding a pledge of oil after its transfer to the recipient of the oil upon completion of the transportation process.

In our opinion, here there may be a problem of determining the identity of the mortgagor. It is not unreasonable to consider the pledge of oil as a pledge of goods

in circulation. Considering this problem, S. Sitnikov believes that it is necessary to determine who exactly is the owner of oil until the conclusion of the pledge agreement, since not only the rights and obligations under the transportation contract depend on the relevant decision, but also the entire contractual arrangements consisting of From a number of contracts and involving significant financial investments [10, p. 22].

Closely related to the issue of pledge of the subsoil use right is also the issue of pledge of property law. In the practice of subsoil use, there are often difficulties in fulfilling one of the essential conditions of the pledge agreement - a proper valuation of the collateral (clause 1, Article 307 of the Civil Code of the Republic of Kazakhstan). As an example, we cite the case of belonging and assessment of subsoil use rights in the property complex, which was heard by the presidium of the Regional Court of the Republic of Kazakhstan. Briefly the essence of the matter. A well-known Kazakhstan company has pawned one of its oil enterprises to a foreign investor. The cost of the enterprise was confirmed by an audit report with a detailed list of objects to be pledged as part of the enterprise. And the auditor estimated each such object separately. The right to extract oil was not included in the list, nor was its cost specified. In the contract of pledge there was a reference to paragraph 1.2. Auditor's conclusion that the subject of the pledge is the property complex belonging to the Pledgor on the right of ownership. The co-founder of the pledger company has stated to the court a demand to confirm the composition of the subject of the pledge. Referring to the disclaimer clause 2 of Art. 119 of the Civil Code of the Republic of Kazakhstan ("The enterprise as a property complex includes all types of property intended for its activities, ... unless otherwise stipulated by legislative acts or agreement"), the applicant reasonably assumed that the right to use subsoil was not laid. He also drew the attention of the court to the following circumstance: if the lender wishes to take the subsoil use right in addition to the other components of the enterprise as collateral, the collateral transaction at the expense of the added value of the law becomes large (clauses 1, clause 1, article 76 of the RoK Law of 10.07.1998 "On Joint Stock

Companies") and must be carried out in strict accordance with the procedure provided for in Art. 76-79 of the Law of the Republic of Kazakhstan "On Joint Stock Companies". Thus, the applicant only clarified the terms of the security transaction by ably using errors made when concluding a pledge agreement.

In the current situation, the creditor did not have any grounds for terminating the credit and collateral transactions (clauses 1 and 2 of article 401, clause 3 of article 720, article 722 of the Civil Code of the Republic of Kazakhstan), nor for an application for the early fulfillment of the main obligation 1 item 321 of the Civil Code of the Republic of Kazakhstan), nor for foreclosure on pledged property (clause 2, Article 321 of the Civil Code of the Republic of Kazakhstan) [53].

Thus, the interest of the pledgor's party to retain the right to subsoil use is understandable: if the debt is not returned or the debt is delayed, the creditor would certainly have problems with foreclosure to the oil enterprise and its sale. Who wants to invest money in the property complex, if it is not used to its intended purpose, until the right to oil production is re-registered to a new owner, and there are no sufficient grounds for re-registration.

A similar problem of securing at the legislative level only general rules of pledge, which cannot fully ensure the implementation of collateral relations in practice, is inherent in Ukraine, since today the legislator, despite the existence of § 6 Ch. 49 of the Civil Code of Ukraine and Section 3 of the Law of Ukraine "On Pledge", in our opinion, still pays little attention to the specifics of the execution of the pledge for certain types of collateral. This gap is trying to fill the executive bodies of state power by adopting by-laws that expand the scope of collateral by expanding the list of types of collateral, at the same time this practice is unlikely to justify itself in the future.

Equally problematic in practice is the pledge of rights. Speaking today about the pledge of rights, we, of course, speak primarily about property rights. At their pledge the mortgagor can conclude a pledge agreement on the right of claim, which belongs to him at the time of the conclusion of the contract, for obligations in which he is a creditor, and for those requirements that may arise in the future.



In accordance with the provisions of the Civil Code of Azerbaijan, with the pledge of the right, the subject of the pledge is the right that can be alienated, including the right to lease a land plot, a building, a structure, a residential house (premises), the right to a share of property, a debt claim. Urgent right can be pledged only until the expiration of its validity. The pledge of the right, subject to state registration, is valid from the moment of its registration in the state body that carries out its registration. In the legal literature there are also skeptical views on the possibility of a pledge of rights. To confirm this thesis, the following arguments are given. First, the pledge of rights is applied in those areas that are associated with legal restrictions for those or other objects (examples of this are the rights of land use and subsoil use). Secondly, it is almost universally recognized that when collateral is secured, the exchange value of something acts (for example, the subject of pledge may be the right of subsoil use of a certain entity to which the state has provided one or another subsoil plot based on the contract. His pledge, as well as a possible alienation to another person, must necessarily be agreed with the authorized state body). Thirdly, the pledge of any property rights is a quasi-mortgaging structure, and it can be easily transformed (or better - especially legislatively settled) either into a session with a deferred period of its execution, or, more justifiably, considered through the prism of a factoring contract. Naturally, the exclusion of quasi-mortgages will eliminate the existing regulatory obstacles to the recognition of a pledge as a full real right [11]. It should be noted that this opinion is not devoid of meaning. As a rule, in practice, very often they face the problem of realizing the institution of pledge of rights.

Thus, it can be concluded that the legislation of Azerbaijan, Kazakhstan and Ukraine contains norms that significantly expand the content of the pledge as a way of ensuring the fulfillment of obligations, the norms that determine the provision of certain types of pledges, establish new grounds for the creation of mortgage relations. However, all the same, outside the regulation of the norms of the Civil Code of the Republic of Azerbaijan, the Republic of Kazakhstan and Ukraine, there are a number of issues that need either to amend the codified acts

already adopted, or to adopt new normative acts.

## References

1. Buldubaeva A. Vidy zaloga po zakonodatel'stvu Respubliki Kazakhstan [Kinds of pledge under the legislation of the Republic of Kazakhstan]. *Predpriminatel' i pravo* [Entrepreneur and law]. 2008, no. 18, pp. 1-10.

2. Vyazovskaya T.N. Grazhdansko-pravovaya priroda zalogovykh otnosheniy [The civil-law nature of collateral relations]. Dis. kand. jurid. nauk [PhD in Law Diss.]. Krasnodar, 2004, 215 p.

3. Grazhdanskiy kodeks Respubliki Azerbaijan (Utverzden Zakonom Azerbaijanskoy Respubliki ot 28 dekabrya 1999 g. No. 779-IQ) [Civil Code of the Republic of Azerbaijan / (Approved by the Law of the Republic of Azerbaijan, no. 779-IQ of December 28, 1999)]. Available at: <http://qanun.narod.ru/codes.html>

4. Grazhdanskiy kodeks Respubliki Kazakhstan (Obschaya chast') [Civil Code of the Republic of Kazakhstan (General part)]. Available at: // [http://online.zakon.kz/Document/?doc\\_id=1006061&sublink=1190000](http://online.zakon.kz/Document/?doc_id=1006061&sublink=1190000).

5. Grazhdanskiy kodeks Respubliki Kazakhstan (Obschaya chast'). *Kommentariy (postateyniy) v 2 knigakh, kniga 2 pod red. M.K. Suleimenova* [Civil Code of the Republic of Kazakhstan (General part). Commentary (article by article). In 2 books. - 3rd ed., rev. and suppl., with the use of judicial practice. Book. 2 / Ed. by M.K. Suleimenov]. Almaty, 2007, 178 p.

6. Grazhdanskiy kodeks Rossiyskoy Federatsii. Sost. D.V. Murzin, 3 izd. pererab. i dopol. [Civil Code of the Russian Federation. Ed. by. D. V. Murzin. 3rd ed., rev. and suppl.]. *Grazhdanskiy kodeks v deystvii: Kommetarii, praktika i problem* [Civil Code in Action: Comments, Practice and Problems]. Moscow, 2003, 1024 p.

7. Grazhdanskiy kodeks Ukraini - 29. 11. 2003 p. [The Civil Code of Ukraine – 29.11.2003]. *Vedomosti of the Verkhovna Rada of Ukraine*. 2003, no. 40-44. Art. 356.

8. Delo No. 1243-12 Almatinskogo oblastnogo suda [Case no. 1243-12 of the Almaty Regional Court]. Available at: <http://profit.kz/news/7016>.

9. Ioffe O.S. Izbrannie trudy: v 4 t. T. III. Obyazatel'noe pravo [Selected works: in 4 volumes T. III. Liability law]. S. Petersburg, 2004, 835 p.

10. Sitnikov S.L. Zalog nefti, transportiruemyy posredstvom sistemy nefteprovodov [The Pledge of Oil Transported via the Oil Pipeline System]. Neft', gaz i pravo [Oil, gas and law], no. 1. 2005, pp. 15-25.

11. Scriyabin S. V. Primenenie kazakhstanskogo zakonodatel'stva ob ipoteke: nekotorye teoreticheskie i prakticheskie problem [Application of the Kazakhstan legislation on the mortgage: some theoretical and practical problems]. Available at: <http://www.zakon.kz/204201-primenenie-kazakhstanskogo.html>.

12. Shukurov N., Rakhmanova L. Nekotorye voprosy pravovogo regulirovaniya zalogovykh pravootnosheniy v RT [Some issues of legal regulation of mortgage legal relations in the Republic of Tajikistan]. Available at: // <http://xn--90ardsr6d.xn--p1ai/docs/civil/article171.html>.