

## MORTGAGE AS A MEANS OF GUARANTEE

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### Abstract

Among all real rights granted by way of security, mortgage, as the “King of Guarantee” has the special advantage. At the time with prosperous market economy, to maintain the speed and the safety of transactions is the essential task of civil and commercial law. The responsibility of maintaining the safety of transactions and decreasing the risks of transactions falls in the guarantee system (Guohua She, 2010). A mortgage is a security interest in real property held by a lender as a security for a debt, usually a loan of money. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower. In most jurisdictions mortgages are strongly associated with loans secured on real estate rather than on other property (such as ships) and in some jurisdictions only land may be mortgaged. A mortgage is the standard method by which individuals and businesses can purchase real estate without the need to pay the full value immediately from their own resources. The object and purpose of this article is to analyze and review development of Institute of Mortgage (Hypothec) - from the ancient Greek period till the present time, especially in those conditions, when Mortgage is real “King of Guarantee” in Georgia.

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**Keywords:** Mortgage, Hypothec, Pledge, Lender, Borrower

### Introduction

In comparative law, there are many situations where the same legal term has different meanings, or where different legal terms have same legal effect. This can often cause confusion to both lawyers and their clients. This confusion most often occurs when civil lawyers have to deal with common law, or vice versa, when common law lawyers deal with civil law issues. While there are many issues which are dealt with in the same way by the civil law and common law systems, there remain also significant differences between these two legal systems related to legal structure, classification, fundamental concepts, terminology, etc.

For example - the debt instrument is, in civil law jurisdictions, referred to by some form of Latin *hypotheca* (e.g., Sp *hipoteca*, Fr *hypothèque*, Germ *Hypothek*). A civil law *hypotheca* is exactly equivalent to an English mortgage by legal charge or American lien-theory mortgage.

A hypothec-Mortgage is a real right on immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whosoever hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking. A hypothec is merely an accessory right, and subsists only as long as the obligation whose performance it secures continues to exist (Cristea Silvia Lucia, 2012).

According to the Georgian Civil Code “an immovable thing may be used (encumbered) for securing a claim in such a manner as to grant to the creditor the right to

receive satisfaction out of this thing and to have priority over other creditors in receiving such satisfaction (mortgage).” (Article 286).

### **Historical Development**

The hypothec-mortgage-guarantee system is originated from ancient Greek. The term “hypothec” was first used by Archon Solon in 6-th century BC. During the reforms in 594, Solomon established the new rule, according which - the column was raised on the land of borrower and there was written “This Land is Guarantee for Obligation”. This column was called “Hypotheca”, which means - Base (Shengelia Tamar, 2002).

At the late Roman Empire, the Roman private law has been introduced and gained complete development, which has turned into the most popular guarantee mode. In Medieval European Law - Institute of Mortgage was formed in 8<sup>th</sup> Century and it wasn't different from the present one (Chechelashvili Zurab, 2009).

According to the old Georgian Legal History, Mortgage was not separated from Pledge and it was called Pledge – in Georgian “Giravnoba”, which is Persian word. According to Beqa-Agbuga Law, right of mortgage was very developed property right in old Georgian Legislation. The Object of mortgage could be both - movable and immovable property (Zoidze Besarion, 2003). But nowadays, after the serious reform of Georgian Civil Legislation, Georgia similar to other European Civil law Jurisdiction countries made differentiation between Mortgage-Hypothec and Pledge.

Under the imitation of other countries, the mortgage gains more attentions. Especially along with the development of modern market economy, its types and applications have been extended. The continental legal system differentiates the pledge and the mortgage. It adopts three standards to differentiate the two. The first standard is about whether transfer the possession of property or not. For example, the French Code Civil regulates that the mortgage is the real right of fixed assets for the sake of paying off debts. It is sorted into the legal mortgage, the judgment mortgage, and the agreement mortgage. The pledge includes the chattel pledge and the pledge of immovables. Japan Civil Code takes the transfer as the standard. Transferring the possession of property is the pledge, and if not, the mortgage. The second is to take the transfer and the nature of property as the standard. For example, German Civil Code regulates that for the immovables, there is only mortgage. And the mortgage does not transfer the possession of immovables. The pledge is to transfer the possession of property. The third is to take the nature of property as the standard. For example, German Civil Code regulates that the mortgage is for the immovables in guarantee and the pledge is for the movables, not matter whether transferring the possession or not. In contrast, the Anglo-American law system does not distinguish the pledge and the mortgage clearly. It lays stresses on mortgage (Kropholler Jan, 2014). The Anglo-American law system divides the mortgage into the mortgage in common law and the mortgage in equity law. In practice, any property can be used for the corpore of mortgage. Conditions in America are similar to that in British.

### **Participants**

Legal systems in different countries, while having some concepts in common, employ different terminology. However, in general, a mortgage of property involves the following parties. The borrower, known as the mortgagor, gives the mortgage to the lender, known as the mortgagee.

A mortgage lender is an investor that lends money secured by a mortgage on real estate. Typically, the purpose of the loan is for the borrower to purchase that same real estate. As the mortgagee, the lender has the right to sell the property to pay off the loan if the borrower fails to pay. The mortgage runs with the property, so even if the borrower transfers

the property to someone else, the mortgagee still has the right to sell it if the borrower fails to pay off the loan. So that a buyer cannot unwittingly buy property subject to a mortgage, mortgages are registered in Public registry or recorded against the title with a government office, as a public record. The borrower has the right to have the mortgage discharged from the title once the debt is paid.

A mortgagor is the borrower in a mortgage - he owes the obligation secured by the mortgage. Generally, the borrower must meet the conditions of the underlying loan or other obligation in order to redeem the mortgage. If the borrower fails to meet these conditions, the mortgagee may foreclose to recover the outstanding loan. Typically the borrowers will be the individual homeowners, landlords, or businesses who are purchasing their property by way of a loan.

Because of the complicated legal exchange, or conveyance, of the property, one or both of the main participants are likely to require legal representation. The agent used for convincing varies based on the jurisdiction. In the English speaking world this means either a general legal practitioner, i.e., an attorney or solicitor, or in jurisdictions influenced by English law, including South Africa, a (licensed) conveyancer. In the U.S., real estate agents are the most common. In civil law jurisdictions convincing is handled by civil law notaries.

The debt instrument is, in civil law jurisdictions, referred to by some form hypotheca and the parties are known as hypothecator (borrower) and hypothecatee (lender).

### **Types and Legal aspects of Mortgage**

Common law and Civil law jurisdictions have evolved two main forms of mortgage: the mortgage by demise and the mortgage by legal charge.

#### **Mortgage by demise**

In a mortgage by demise, the mortgagee (the lender) becomes the owner of the mortgaged property until the loan is repaid or other mortgage obligation fulfilled in full, a process known as "redemption". This kind of mortgage takes the form of a conveyance of the property to the creditor, with a condition that the property will be returned on redemption. Mortgages by demise were the original form of mortgage, and continue to be used in many jurisdictions, and in a small minority of states in the United States. Many other common law jurisdictions have either abolished or minimised the use of the mortgage by demise.

For example, in England and Wales this type of mortgage is no longer available in relation to registered interests in land, by virtue of section 23 of the Land Registration Act 2002 (though it continues to be available for unregistered interests).

#### **Mortgage by legal charge**

In a mortgage by legal charge or technically "a charge by deed expressed to be by way of legal mortgage", the debtor remains the legal owner of the property, but the creditor gains sufficient rights over it to enable them to enforce their security, such as a right to take possession of the property or sell it.

To protect the lender, a mortgage by legal charge should be recorded in a public register. Since mortgage debt is often the largest debt owed by the debtor, banks and other mortgage lenders run title searches of the real estate property to make certain that there are no mortgages already registered on the debtor's property which might have higher priority.

Laws of few civil law jurisdiction countries also regulate that the mortgage appears naturally as there is certain relation according to the needs of some relations instead of agreements of parties. It is the essential difference between legal mortgage and common mortgage. Take French Civil Code for example. The legal mortgage includes: the wife has the legal mortgage right to husband's property; the ward has the legal mortgage right to

guardian's property; the state, public community, and state-operated enterprise have legal mortgage right to receiving teller and accountant's property; creditors have the legal mortgage right to debtors' property; tax authority has the legal mortgage right to tax payers' property; the exchequer has the legal mortgage right to special taxation for the sake of insuring the success of wars. The legal mortgage right happens due to laws' Articles. The special rules in laws will enjoy the priority in practice. If there are no special rules, relevant regulations on common mortgage right are effective. Besides the legal mortgage right, there is a judgment mortgage, which happens due to the judgment of court.

In modern time, in order to guaranteeing the trading safety, many countries set strict limits on legal mortgage. For example, Georgian Civil Law, similar to the German law recognize the legal mortgage right to the debts generated only from construction contracts. Japanese laws replace legal mortgage system with first-get priority system and unmovable pledge right. Only France recognizes the legal mortgage right to a wider scope and regulates the judgment mortgage right.

### **Equitable mortgage**

Equitable mortgages don't fit the criteria for a legal mortgage, but are considered mortgages under equity (in the interests of justice) because money was lent and security was promised. This could arise because of procedural or paperwork issues. Based on this definition, there are numerous situations which could lead to an equitable mortgage (Davis G, 1956). As of 1961, English law required the consent of the court before the equitable mortgagee was allowed to sell (Hannigan ASJ, 2014).

When the borrower deposits a title deed with the lender, it has historically created an equitable mortgage in England, but the creation of an equitable mortgage by such a process has been less certain in the United States.

### **Differentiate the combined mortgage and the common mortgage**

The common mortgage is in contrast to the single mortgage. The single mortgage is only for certain special property. The common mortgage is based on several different properties. The meanings for differentiating the single mortgage and the common mortgage are: as the mortgages include several different properties, the mortgagee has the mortgage right. The mutual relations of several properties should be dealt with properly. Otherwise, it will hurt others' interests, whose interests relate with the common mortgages. The common mortgage is based on parties' contracts that agree to take several properties as the mortgage. In another condition, the common mortgage happens because of the separation of mortgages after the mortgage.

### **Foreclosure and nonrecourse lending**

The civil law hypothec differs from the common law mortgage, particularly, that it confers on the hypothecary creditor no immediate right to possession of the property, but only a right against the proceeds of sale of the property after enforcement of the right in judicial proceedings. The common law mortgage, on the other hand, gives an immediate right of property to the mortgagee, who can take possession of the property by a simple notice, without the necessity of taking suit, as well as a right of foreclosure at law.

Under common law, when foreclosure process is completed and the mortgagor failed to pay his debt to the mortgagee, from that moment the mortgagor has lost his property right and the mortgagee obtains the absolute control of the property. As a consequence, the mortgagor's right to recover his property is extinguished and the mortgagee can exercise all property rights. On the other hand, under civil law the mortgagor remains the owner of the property until the purchaser obtains ownership, and the mortgagee acquires property only of

the money paid by the purchaser in the amount of his claim plus interest (Caslav Pejovic, 2001).

In most jurisdictions, a lender may foreclose on the mortgaged property if certain conditions – principally, nonpayment of the mortgage loan apply. Subject to local legal requirements, the property may then be sold. Any amounts received from the sale (net of costs) are applied to the original debt. In some jurisdictions, for example in the United States (Ghent Andra C., 2011), mortgage loans are nonrecourse loans: if the funds recouped from sale of the mortgaged property are insufficient to cover the outstanding debt, the lender may not have recourse to the borrower after foreclosure. It's same regulation in Georgian Civil Code. According to article 301 of Georgian Civil Code, if the funds recouped from sale of the mortgaged property are insufficient to cover the whole debt, borrower is n't responsible for any remained debt and obligation is considered to be fulfilled, unless otherwise is considered by agreement.

In other jurisdictions, the borrower remains responsible for any remaining debt, through a deficiency judgment. In some jurisdictions, first mortgages are nonrecourse loans, but second and subsequent ones are recourse loans.

Specific procedures for foreclosure and sale of the mortgaged property almost always apply, and may be tightly regulated by the relevant government. In some jurisdictions, foreclosure and sale can occur quite rapidly, while in others, foreclosure may take many months or even years. In many countries, the ability of lenders to foreclose is extremely limited, and mortgage market development has been notably slower. The relatively slow, expensive and cumbersome process of judicial foreclosure is a primary motivation for the use of deeds of trust, because of their provisions for non judicial foreclosures by trustees through "power of sale" clauses.

## **Conclusion**

In this article, we tried to overview the development and importance of Mortgage, as a mean of guarantee from the ancient Greek period till the present time. We discussed types and legal Aspects of Mortgage and difference of them between Common Law and Civil Law Jurisdictions, as well as between Civil Law Jurisdiction Countries. The aim of this article was not to judge which type of Mortgage is better. The task of lawyers should not be to defend their legal systems, but to improve them. Each legal system may have some advantages and deficiencies. If a foreign legal system has some advantages, why not incorporate them in the domestic legal system? In that way the resulting convergence of the different legal systems can only contribute to their common goal of creating a fair and just legal system which can provide legal certainty and protection to all citizens and legal persons.

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