

## Remarks on Mortgage Certificate Institute

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### Abstract

The presented article deals with the importance of mortgage certificate and the circumstances hindering its use in practice that very often occur in private law relations. Namely this determines topicality of the given issue. In 2007 amendments were made in the civil legislation of Georgia to simplify procedures of assignment of mortgage ensured claim. In particular, legal norms regulating the mortgage certificate were established. However, the mortgage certificate institute could not manage to find its niche in the private law relations. As a result, the norms regulating the mortgage certificate in legislative acts carry only informative character. Comparative-legal analysis of the abovementioned legal norms enables us to determine the reasons why establishment of Legal norms regulating mortgage certificate failed in 2007. Alongside with this, it is anticipated that there will be interpretations of legislative changes necessary for putting mortgage certificate into practice. It will also clarify goals and results of simultaneous existence of mortgage certificate and registry extract, possibility of replacement mortgage certificates with registry extracts.

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**Keywords:** Mortgage certificate, securities, registry extract

### Introduction

On May 29, 2007, in the civil legislation of Georgia amendments necessary for simplifying the procedure of assignment of mortgage secured claim were made. In particular, mortgage certificate regulatory legal norms were introduced.

The importance of the issue is determined by the fact that since 2007, the institute of mortgage certificate cannot be established in private law relations. As a result, regulations in legislation have only informative character.

Minding all this, the subject of the research is to determine the place and importance of mortgage certificate in private legal relations, study hindering circumstances of using a mortgage certificate. The main objective is to explore and analyze the reasons that cause similar results.

The article will discuss the possibility of using mortgage certificate in practice by detailed studies of national legislation and practice. We also intend to compare regulatory norms of mortgage certificate with legal standards of other countries. It can be said that we very often face the facts of replacing mortgage certificates with registry extracts which confirm that mortgage certificate regulatory norms only formally fill the legislative text. Ignoring mortgage certificate by the society indicates to the necessity of legislative changes and underlines the importance of the issue.

The process of mortgage origination consists of several stages. Firstly, it is necessary that the owner of the immovable property and the mortgagee sign a notarized contract. Legal interpretation of these words is the following: They need to have a notarized document stating that they reached the agreement and that the agreement ensures provision of basic relations.

However, it is also possible that certificate of indebtedness stating mortgage obligation be notarized (8, 68).

To avoid fraud in registration, it is necessary that the notarized documents indicate the owner immovable property, mortgagee, the third party debtor, as well as the amount of the secured claim, benefits, and terms of performance; secured obligatory relations can also be indicated (4, 331).

Legal doctrine generally considers three historical systems of claim assignment: the assignment of claim within contractual relations, assignment of mortgage claim by public register and assignment of claim through the mortgage act (6, 146).

From the explanatory note enclosed to the legislative draft of the Civil Code of Georgia in 2007 it becomes clear that the legislature intended to introduce a mortgage certificate with the following contents:

After the registration of the mortgage, in response to the creditor's requirement, the debtor shall issue a mortgage certificate i.e. negotiable and indorsed securities which, in turn, is a document that proves a principal and accessory right. The legal regime for securities established by the active legislation applies to the document.

The latter is a simple way to confirm the civil-legal relations that it contains. It also determines the possibility of its pledge. Mortgage program is registered in the public register. Revocation of the mortgage certificate is related to the requirements that the mortgage certificate contains or to the voluntary transmission of the mortgage certificate to the owner.

In German private law the mortgage certificate (Hypothekenbrief) is issued by the body providing the Estate Book if the parties did not rule out issuing it on the basis of a special agreement. In such cases mortgage is registered without issuing a certificate and it is so-called the Estate Book mortgage (Buchhypothek) (7).

Georgian private law evaluated introducing of mortgage certificate as an institution that is characteristic for common law, though it is familiar for a lot of countries with European legislation. In the given article I will discuss some issues of German civil law.

As for the Georgian private law, it considers the mortgage certificate as a kind of "card" mortgage, the alternative for "the book" Mortgage. It provides excessive turnover capacity of mortgage rights (9).

Although mortgage certificate was thought to simplify the process of determining and transferring mortgage rights, we can say that it could not manage to free itself from legislative requirements established for Estate Book mortgage, which is why it could not compete with a document such as the extract issued by the public registry.

According to the Georgian legislation issuing a mortgage certificate is preceded by the process of mortgage origination. Origination of mortgage rights depends on registering mortgage right in the public registry and not on issuance of mortgage certificate (7).

According to the paragraph 2 of the Article 289 of Civil Code of Georgia, on the basis of the parties' agreement and the creditor's request mortgage certificate is issued by Public Registry. Mortgage certificate is registered in the public register. It should be noted that "parties" in this case refers to the estate owner and the mortgagee.

According to the German Civil Code, mortgage right shall arise from the moment of registration. As the Article 1116 of the German Civil Code states, mortgage certificate is issued after the registration. To rule out issuing a mortgage certificate, it is necessary that the parties – owner and mortgagee agree and register mortgage at the estate registry (9).

In contrast with Georgian Civil Code, legislator of German Civil Code imperatively sets "issuance of mortgage certificate", though it allows exceptions in case agreement between parties is achieved. As for the Civil Code of Georgia, it does not imperatively demand issuing a mortgage certificate and it only considers issuing a mortgage certificate by a regulatory authority in case of agreement between parties and the creditor's request.

According to the Article 289, part 3 of the Civil Code of Georgia, the type of transaction on the basis of which a mortgage certificate shall be issued, namely, mortgage agreement, must be notarized. Considering the mortgage agreement all legal actions which require notarizing must be certified by the same notary who notarized the mortgage agreement (7). I believe that this legal requirement restricts the simple process of notarizing the agreement which contains the mortgage rights.

In Private legal relations a mortgage certificate is loaded with two meanings. The legislator explains that "the mortgage certificate is a security which confirms the right of its legal owner":

1. Demand fulfillment of the obligations under the mortgage contract;
2. In case of failure to fulfill the obligations, satisfy the requirement by the subject of mortgage (1).

However, the legislator did not specify to whom the primary mortgage certificate is issued, to the owner or the mortgagee.

Unlike the Georgian Civil Code, the German Civil Code considers issuing a mortgage certificate to an owner by the regulatory authority, in exceptional cases, to a creditor. According to the paragraph 3 of the Article 1117 of the German Civil Code, the creditor gains mortgage which is confirmed by the certificate by achieving agreement with the owner.

German Civil Code considers cases when a creditor receives a mortgage certificate from an owner on the basis of agreement between the parties. The creditor is given an opportunity to obtain a certificate from the regulatory body which will speed up receiving the mortgage attested by the certificate. According to German legislation a creditor can obtain mortgage if there is a corresponding record and a valid claim, in particular, "If the creditor holds a certificate, then it is assumed that the transaction has already been made"(9).

The fact that the mortgage certificate is drawn up in a single copy means that despite the content of the claim and multitude collateral subjects, the mortgage certificate is issued only as one document. Legislator considered issuing one copy of mortgage certificate on a general mortgage. However, attention should be paid to the fact that the German legislation considers it permissible to issue several "mortgage certificates", particularly, in case of partition of the claim to issue "partial mortgage certificate" for each part "which replaces the part of the original certificate it is related to.

Mortgage certificate has double legal nature which is given as one whole. It means that the document gives the property right and at the same time determines the obligations (6, 149).

The Article 289<sup>2</sup> of the Civil Code of Georgia determines the content of mortgage certificate and its requisites.

The requisite of security is its content and the content of the document – property right. Some scholars consider that the content of the document refers to the technical side of its provision, and the information given in the requisites differentiates securities from each other (5, 31).

According to the Article 289<sup>2</sup> of the Civil Code of Georgia, mortgage certificate should contain the following information: "mortgage certificate" as a title, mortgagee's name and address, debtor's name and address, immovable property owner's name and address, mortgaged property registration code and the address of the collateral subject, information about registration of mortgage certificate in the public registry indicating appropriate requisites, information whether the subject of mortgage or its

part is loaded with other mortgage or property or obligatory right, date and time of drawing up mortgage contract, terms of obligation fulfillment, date of issuing mortgage certificate.

Mortgage certificate gives information about one kind of right, public registry extract gives the full legal information about the property. It states property rights, obligations and the facts of public restrictions, particularly, the following information: “extract from the public registry” as a title, the unique cadastral code of the estate, date and time of preparing a registry extract, ground for preparing and extract, requisites of the application, address of the estate, type and function of the immovable property, the owner’s name, last name and ID, requisites of the ownership document, mortgagee’s name and address, requisites of the mortgage agreement, requisites of the mortgage agreement registration, information about tax lien, information about other obligations: seizure/injunction, information about debtors’ registration in the registry.

While exercising registering procedures, public registry creates and updates each registry extract on the basis of registration requirements. Extract as a single document, gives information on the legal status of the object of registration (3). Functions, which the legislator linked to a mortgage certificate, are successfully fulfilled by the document issued as an extract. The exception is a mortgage opportunity. Obviously, only transaction of the mortgage certificate to a new creditor cannot clarify the type of legal load that the collateral subject carries.

The legislator did not consider setting restrictions on the following: If a mortgage certificate is issued on the property, all further origination of a mortgage should be based on a transaction of a mortgage certificate and the previous mortgagees should be legally guaranteed.

It is important that according to the paragraph 2 of the Article 289<sup>2</sup> of the Civil Code of Georgia, authenticity of mortgage certificate is proved by a seal of the Public Registry. And this happens when the seal as the requisite of authenticity of the document issued by the Public Registry, is removed from the registration circulation. Obviously, the seal cannot be granted force of compulsoriness exceptionally for a mortgage certificate (3).

All this indicates that amendments in legislation of the Civil Code of Georgia regarding the authenticity of the mortgage certificate are necessary.

## **Conclusion**

According to the considerations, it is available to point out some important thesis.

First of all, it should be noted that in practice of regulatory norms usage of mortgage certificate is related to some problems that requires appropriate actions from legislator.

I believe that the current legal form of a mortgage certificate does not ensure its exercising in practice and requires necessary legislative amendments. Mortgage certificate could not manage to establish itself in private law relations. It is conditioned by the fact that the Civil Code of Georgia does not state how mandatory it is to issue mortgage certificate after its registration. I believe that the legislator has to set its compulsoriness and the paragraph 2 of the Article 289 of the Civil Code of Georgia formulated as follows: “Arising of mortgage should be attested by a mortgage certificate. Issuance of a mortgage certificate should be ruled out in case of the agreement between the parties”.

I suppose that the Civil Code of Georgia should consider that one mortgage certificate be issued per item of property what will make it possible to issue a mortgage certificate in compliance with multiplicity of collateral subjects.

I consider it is expedient to abolish the paragraph 2 of the Article 289<sup>1</sup> of the Civil Code of Georgian which states that the mortgage certificate should be issued in a single copy. Based on this, amendments should be entered in the paragraph 4 of the Article 289 of the Civil Code of Georgia and formulated as follows: "If the claim is secured by a mortgage on several items of real property, a partial mortgage certificate is issued for each item”.

The conducted research gives us the opportunity to say that mortgage certificate regulatory norms in the legislative acts carry only informative character. It is necessary to make legislative amendments in the norms which will establish usage of mortgage certificate in private legal relations. While mortgage certificate and registry extract competition their simultaneous existence should be justified

Otherwise it would be better if the Civil Code does not contain stagnant norms and the regulatory norms of mortgage certificate be abolished and mortgage certificate be replaced by registry extract at the legislative level.

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