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## REALIZATION BY THE MORTGAGEE OF THE MORTGAGE RIGHT – CONSEQUENCES OF THE BREACH OF THE CONTRACT BY THE MORTGAGER

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#### SUMMARY

The article is devoted to the realization by the mortgagee of the mortgage right to real estate as a right of the mortgagee to satisfy his claims at the expense of the mortgaged property predominantly to other mortgagees of this mortgager in case of violation of the contract. The author proves that foreclosure on the property of the mortgagor is one of the most effective ways of protecting the mortgagee's violated rights, the legal consequence of the violation of the contract by the mortgager. Stands for the increasing, enshrined in Art. 611 of the Civil Code of Ukraine, the list of legal consequences of violation of the obligation, in particular, the contractual obligation, due to the realization of the right to mortgage. Considers the peculiarities of judicial and non-judicial procedures of foreclosure on the mortgaged real property as a consequence of a violation by the mortgagee of mortgaged contract.

**Key words:** mortgagee's rights protection, mortgage right foreclosure on the mortgaged property, legal consequences of the contract breach.

## РЕАЛИЗАЦИЯ КРЕДИТОРОМ ПРАВА ЗАЛОГА – ПОСЛЕДСТВИЕ НАРУШЕНИЯ ДОГОВОРА ДОЛЖНИКОМ

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#### АННОТАЦИЯ

Статья посвящена реализации залогодержателем права залога недвижимого имущества как права кредитора удовлетворить свои требования за счет заложенного имущества преимущественно перед другими кредиторами этого должника при нарушении договора. Автор доказывает, что обращение взыскания на имущество ипотекодателя выступает одним из наиболее эффективных способов защиты нарушенных прав кредитора, правовым последствием нарушения договора должником. Он выступает за расширение закрепленного в ст. 611 Гражданского кодекса Украины перечня правовых последствий нарушения обязательства, в частности договорного обязательства, за счет реализации права залога и рассматривает особенности судебного и несудебного порядков обращения взыскания на заложенное недвижимое имущество как последствия нарушения должником обеспеченного залогом договора.

**Ключевые слова:** защита прав кредитора, право залога, обращение взыскания на заложенное имущество, правовые последствия нарушения договора.

Breach of their obligations under the concluded contracts by the sellers and buyers, customers and contractors, tenants, borrowers and other obligated persons today, unfortunately, has become widespread. In connection with this, it is understandable that a mortgagee is interested in such legal instruments that will give the possibility to prevent a breach of the contract by the mortgager and, in the case that the breach still will take place, to protect his rights to the maximum, minimizing the negative consequences caused by the violation.

One of these “instruments”, certainly, is the right of mortgage, realization of which by the mortgagee is stipulated, exclusively, by the fact of the breach by the mortgager of the secured contract and it is implemented by the mortgagee with the aim to protect his violated rights.

For a long time, the right to protection in domestic civil law was seen as the right to apply for protection to the jurisdictional bodies. Over the past decade, scholars to the purview of the right to defense began to attribute the possibility to use the law enforce-



ment measures by the authorized person not only connected with the use of force of state enforcement, but also measures of self-defense, in particular, the realization of the right of the mortgage by a creditor as a mortgagee, which may take place as in a jurisdictional order, and through self-defense. Problems of realization by the mortgagee of the mortgage right were concerned by such scholars as Ch.N. Azimov, T.V. Bodnar, V.V. Vitryansky, O.A. Zagorulko, M.S. Karpov, O.S. Kizlova, R.A. Maidanyk, I.Y. Puchkovskaya, S.V. Sarbash, N.V. Sautenko, E.O. Kharitonov, L.S. Leonova, S.V. Nizhniy, I.V. Spasibo-Fateyeva, T.S. Scrum and others. And recently, more and more consistently is expressed by civilian scientists view as to the rethinking of the legal consequences of violations of the contractual obligation, in particular, concerning the realization of the mortgage right by the mortgagee-creditor and the extension of an exemplary list of legal consequences of violation of the obligation enshrined in Art. 611 of the Civil Code.

The concept of the mortgage right enshrined in Art. 572 of the Civil Code of Ukraine (hereinafter – the Civil Code) [1]. By virtue of a mortgage the creditor (mortgagee) has the right, in the case of failure to keep by the debtor (mortgager) of the obligation provided by the mortgage, to obtain satisfaction due to the mortgaged property mainly to other mortgagees of this mortgager, unless otherwise was not provided by law (right of mortgage). Taking into account that among the kinds of mortgage is the most effective and frequently demanded in practice the kind of pledge is mortgage – mortgage of the real estate, let's consider the realization by the mortgagee of the mortgage right as a mortgagee's right.

In the event of a breach of a contractual obligation, the creditor (mortgagee) foreclose on the mortgage property. First of all, it is considered as a way to protect the rights of a creditor (mortgagee) the assignment of pledge (mortgage) including also the practice. Thus, the courts, when considering disputes that arise in course of the mortgage realization, it is used as the provision of law § 6 ch. 49 of the Civil Code of Ukraine – “Pledge” (furthermore – the CC) [1] and the Laws of Ukraine “On Pledge” [2] and “On Mortgage” [3], which established the peculiarities of foreclosure of the mortgaged property and satisfaction of claims secured by a mortgagee at the expense of the mortgaged property, and the provisions of Art. 16 of the Civil Code on the judicial remedies of civil rights

and interests protecting by the court after establishment of the fact of non-fulfillment or improper fulfillment by the mortgager of the main obligation, which serves as a prerequisite for foreclosure of the mortgaged property.

At the expense of the mortgage property, which is foreclosed, creditor's claims, as a mortgagee, are satisfied mainly to other mortgagees of the mortgager in full amount, that is determined at the time of actual satisfaction, including interest payment, forfeit, compensation for losses incurred by the violation of the obligation, necessary expenses for the maintenance of mortgage property, as well as expenses incurred in connection with the filing of the claim, unless otherwise is not provided by the contract (Part 2 of Article 589 of the Civil Code).

Protective mechanism of mortgage is distinguished among other ways of the mortgage's rights protection by its reliability, which is stipulated by its property character. It provides for a previously allocated real property of the mortgagor or property guarantor, the value of which exceeds, as a rule, the size of the debt on the secured obligation. And insurance of the mortgage property in the event of his death allows the mortgagee to obtain satisfaction of his claim at the expense of insurance compensation in the case of the occurrence of the insured event. Therefore, the material side of mortgage is justly separated by the researchers as the main factor in determining its goal – to minimize the risk of the mortgagee as a mortgagee.

According to Art. 33 of the Law of Ukraine “On Mortgage”, foreclosure of a mortgaged property is carried out on the basis of a court decision, an executive note of the notary or in accordance with the contract on the mortgagee's requirements satisfaction. Exclusively on the basis of a court decision there is a foreclosure on the property that is the mortgaged property and it is the state or communal enterprise or enterprise, that has more than 50 percent of stocks (fractions, shares) which is state-owned.

Thus, the law provides for both a judicial order of foreclosure on the mortgaged property, and extrajudicial one.

The judicial order of foreclosure on the mortgaged property provides for appeal by the mortgager to the court with a claim on the foreclosure of the mortgaged property; determination by the court of the method of the mortgaged property realization by the way of public auction or application of the sale procedure established by Art.

38 of the Law of Ukraine “On Mortgage”; compulsory procedure for realization of the mortgaged property that is performed by the state executor.

If the mortgagee-mortgager, taking into account the provisions of Articles 15 and 16 of the Civil Code on the choice of the method of protection of the violated right, decides to use his mortgagee's rights under the basic obligation secured by the mortgage and appeals to the mortgagor on recovery the debt under the main contract (usually credit one), his claim is subjected to satisfaction. The court has no right to change the claims being part of the statement of claim [4, p. 308].

At the same time, the procedure for the enforcement of court decisions approved on the basis of mortgagees' claims on the recovery of debt is different from the procedure for the enforcement of court decisions approved in favor of the mortgagee on foreclosure of mortgaged property. In the case that the mortgagee has not exercised his right to foreclosure on the mortgaged property in accordance with the provisions of Articles 12, 33 of the Law of Ukraine “On Mortgage”, and has received a court decision on monetary debt recovery, who is also a mortgagor, compulsory fulfillment of this decision should be carried out in the general order by the procedure established by the Law of Ukraine “On Enforcement Proceedings”, [5] Order for seized property realization [6], the Instruction on the organization of the enforcement of decisions [7], taking into account the peculiarities provided for by Art.51 of the Law of Ukraine “On Enforcement Proceedings”.

So, if there is a court decision on foreclosure of the mortgaged property, then the actions of the executor must comply with both special legislation on enforcement of proceedings and the Law of Ukraine “On Mortgage”. If the executor will execute the court decision on recovering from the mortgagor of the debt then the above-mentioned law is not applied. In this case, recovery is taken place by passing of the resolution on seizure of property (money) of a mortgagor or on estate inventory and seizure of property (money) of a mortgagor (Article 56 of the Law of Ukraine «“On Enforcement Proceedings”).

However, in both cases, the state executor conducts the auction. According to Part 1 of Art.41 of the Law of Ukraine “On Mortgage” the realization of the mortgaged property – real estate, which is levied by court decision or by a notary's executive signature, is carried out by the way of selling at public



auktion, including in the form of electronic tendering. Article 61 of the Law of Ukraine “Enforcement Proceedings” provides for the realization of seized property through electronic tendering or at a fixed price.

The foreclosure of a mortgaged property on the basis of a notary’s executive signature is carried out in accordance with Ch. 14 of the Law of Ukraine “On Notary”, Resolution of the Cabinet of Ministers of Ukraine “On approval the List of Documents for which Debt Recovery is Carried out Indisputably on the Basis of the Notary’s Executive Inscription” [8], Order of the Ministry of Justice of Ukraine “On Approval of the Order of the Commencement of Notarial Acts by Notaries of Ukraine” (Ch. 16, Section II of the Order [9]. Notary pursues executive inscription in the case of the provision of: a) the original notarized mortgage contract; b) documents confirming the mortgagor’s indisputability of the mortgagor’s debt to the claimant and provided that no more than three years have passed since the day the claim was filed. By Article 3 of the Law of Ukraine “On Enforcement Proceedings” the notary’s executive inscription is assigned to executive documents, which are subject to enforcement. Submitted for enforcement executive inscription may be within three years from the date of its commission (Article 12 of the Law of Ukraine “On Enforcement Proceedings”).

Taking into account that foreclosure on the mortgaged property on the basis of an notary’s executive inscription is, by itself, satisfaction of the requirements of the mortgagee through an out-of-court settlement, and at the same time the notarial order, as well as the court one (on the basis of a court decision), in contrast to the contract one (on the basis of the contract on satisfaction of the mortgagee’s claims) is a compulsory enforcement order, in practice from time to time there are certain difficulties with its application with the aim to protect the mortgagee’s rights. Taking into account the latter, I.V. Spasibo-Fateyeva pays attention to the name “foreclosure” by itself indicates the compulsory process of depriving mortgagee of the ownership on the mortgaged property [10, p. 76]. In this case, enforcement can be applied only by certain persons and in the established order. This order is enshrined in Art. 20 of the Law of Ukraine “On Pledge”, Art. 33 of the Law of Ukraine “On Mortgage” Art. 48 of the Law of Ukraine “On Enforcement Proceedings” According to these laws, foreclosure is enforcement that is carried out by a state executor after court decision

or implementation by a notary of the executive inscriptions. Instead, there is a third way of foreclosure on the mortgaged property – providing by the contract on satisfaction of mortgagee’s claims. So, beside of the foreclosure enforcement order, there is a contractual arrangement .

Consequently, in the case when the mortgagor fails to fulfill the main obligation secured by the mortgage, there is a foreclosure on the subject of the mortgage, which may be carried out using one of the three versions: a) in the court order (on the basis of the court decision); b) notarially (on the basis of the notary executive inscriptions); в) on a contract order (on the basis of the contract on satisfaction of the mortgagee’s requirements). When applying the first two versions, a compulsory procedure is executed by the state executor. In the application of the third version the parties to the contract provide one of the two ways: the transfer of ownership to the subject of mortgage to the mortgagee or giving the mortgagee the opportunity to sell the subject of mortgage (to conclude a contract of sale). Consequently, the enforcement is carried out by the state executor, but he acts on the basis of the certain legal facts. This may be either a court decision or notary’s executive inscription. That the foreclosure is carried out by the state executor does not exclude the fact that foreclosure is preceded by notary’s executive inscription of the [10, p. 77].

It is given the special attention to the foreclosure of the mortgaged property on an out-of-court basis by the way of conclusion of the contract on satisfying the mortgagee’s claims (contractual procedure), taking into account the interest of potential creditors to influence independently on the process of foreclosure in the case of mortgagor’s breach of the obligation.

First of all, it should be pointed out that the possibility of the mortgage contract parties to use their own discretion to determine the way of property foreclosure that is a mortgaged property, by the way of extrajudicial settlement, provided by Art.36 of the Law of Ukraine “On Mortgage”. According to this article, an out-of-court settlement is carried out in accordance with the warning in the mortgage contract or by the way of celebration of a separate contract on satisfaction of the mortgagee’s requirements and provides for the possibility of: 1) transference to mortgagee of the ownership right to the mortgaged property for the performance of the main obligation (Article 37 of the Law), or 2)

the rights of the mortgagee to sell the mortgaged property on its own behalf to any person on the basis of the contract of sale (Article 38 of the Law).

The contract on satisfaction of the mortgagee’s requirements can be concluded in the form such as: 1) a separate contract. In this case, it ought to have a reference to the mortgage contract, and the latter – to the contract of the main obligation; 2) the warnings on satisfaction of the requirements of the mortgagee contained in the mortgage contract. In this case, the mortgage contract ought to refer to the contract of the main obligation; 3) the warnings that are in the mortgage contract, which is the contract stipulating the main obligation, legalized in the form of one document (for example, a loan contract or a credit contract). Any of these mentioned above contracts is a legal basis for the registration of the mortgagee’s right to real estate, which is the mortgaged property, in accordance with Part 1 of Art. 37 of the Law of Ukraine “On Mortgage”.

The foreclosure by the mortgagee to the mortgagor’s property, in practice, for a long time has found its place among the legal consequences of violations of the contracts secured by mortgage. It is considered as a method of protection, appropriated by the mortgagee as a creditor under the secured mortgage contract, in the case of a possible violation by the mortgagor of the secured contract and acts exclusively in connection with this violation. If the mortgagor observes the obligation secured by mortgage in a proper manner, the creditor – mortgagee will not have grounds for foreclosure of the mortgaged property. The right to foreclosure is granted by the law to the mortgagee as a mortgagor for the secured mortgage contract exclusively in connection with the violation, in order to satisfy his claims caused by this violation. Foreclosure to the mortgage property is by itself realization of the right of mortgage by the creditor-mortgagee of real estate, the legal consequence of violation of the secured by the mortgage contract.

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## ДУАЛЬНАЯ СИСТЕМА ПОДГОТОВКИ КАДРОВ – ПУТЬ К КАЧЕСТВУ ВЫСШЕГО ОБРАЗОВАНИЯ (ОРГАНИЗАЦИОННО-ПРАВОВОЙ АСПЕКТ)

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#### АННОТАЦИЯ

В статье рассматриваются вопросы, связанные с определением сущности, значения дуального образования, особенностями его организационно-правового обеспечения как в Украине, так и в некоторых других странах. Осуществляется анализ научной литературы и законодательных актов по вопросам дуальной системы образования, рассмотрена практика реализации модели дуального образования в Украине, Германии, Молдове, Казахстане и некоторых других странах.

**Ключевые слова:** высшее профессиональное образование, дуальное образование, дуальная модель образования, компетентность, профессиональное образование.

## DUAL SYSTEM OF TRAINING OF PERSONNEL – WAY TO THE QUALITY OF HIGHER EDUCATION (ORGANIZATIONAL AND LEGAL ASPECT)

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#### SUMMARY

The article deals with issues related to the definition of the essence, the value of dual education, the features of its organizational and legal support both in Ukraine and in some other countries. The analysis of scientific literature and legislative acts on the dual education system is carried out, the practice of implementing the dual education model in Ukraine, Germany, Moldova, Kazakhstan and some other countries is considered.

**Key words:** higher professional education, dual education, dual education model, competence, vocational education.

**Постановка проблеми.** Рассматриваются вопросы о сущности дуального образования, особенностях его организационно-правового обеспечения с использованием опыта Украины и других стран.

**Актуальность темы исследования** подтверждается новизной проблемы дуального образования и ее недостаточной научной и практической разработанностью.

**Состояние исследования.** В современных условиях вопросы дуального образования, особенности его организации и правового обеспечения получают все более активное обсуждение на страницах научной литературы. При этом особое внимание уделяется раскрытию отдельных аспектов зарубежного

опыта. Эти вопросы рассматриваются в работах С. Амелиной, И. Бойчевской, К. Булах, Т. Козак, Б. Тидеманн, Т. Постоян, В. Приходько, Е. Яковенко и других авторов. Однако целостной характеристики проблема внедрения дуального образования, его организационно-правового обеспечения, в том числе в Украине, пока еще не получила.

**Целью и задачей статьи** является рассмотрение особенностей развития системы дуального образования как в Украине, так и в других странах, ее организационно-правовых основ, значения и возможных перспектив развития.

**Изложение основного материала.** Одной из актуальных проблем современного общества