LEGAL CHARACTERISTICS OF A MAXIMUM MORTGAGE WITH AN ANALYSIS OF THE LATEST CASE LAW

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Abstract

The article examines the legal nature and transferability of the maximum mortgage under the Slovenian Law of Property Code (Stvarnopravni zakonik or in abbreviation SPZ), focusing on Article 146(4) and its interpretation in case law and theory. It first recalls the accessory nature of liens, which normally follow the secured claim as to creation, scope, transfer and extinction. Against this background, it shows how the maximum mortgage was designed to secure fluctuating or future claims arising from an ongoing creditor–debtor relationship, up to a registered ceiling amount. The authors reconstruct the prevailing Slovenian view that, in the case of a maximum mortgage, the accessory link exists not between individual claims and the mortgage but between the business relationship and the maximum mortgage as a protective right in rem. They contrast this functional understanding with the literal wording of Article 146(4) SPZ, which excludes the transfer of the mortgage when a secured claim is assigned, and with the conservative approach of the Supreme Court. According to its case law, an assigned claim secured by a maximum mortgage is transferred without security, which reduces its market value and narrows the practical usefulness of this instrument. Using German and Austrian law as key comparators, the article argues that the Slovenian solution is unnecessarily rigid and departs from models that allow, under certain conditions, the transfer or transformation of a maximum mortgage into a fixed mortgage when claims are assigned or when the credit relationship is reduced to a single outstanding claim. The authors endorse the more recent doctrinal position and the approach taken by the Higher Court of Ljubljana, under which individual

"sub-mortgages" arise within the maximum mortgage and accompany the assigned claim to the new creditor, creating a community of mortgagees governed by general rules of the Obligations Code. The general view that a maximum mortgage is more flexible than a fixed mortgage is, in the Slovenian context, undermined by the current statutory wording and restrictive case law, which call for a systemic and functional reinterpretation of Article 146 SPZ – or, failing that, for legislative reform.[1]

Keywords: *Maximum mortgage, accessory nature, transfer of the mortgage, individual mortgage, creditor-debtor relationship*

1. Introduction

The dogmatic concepts of property law and other areas of civil law were laid down as early as the time of Roman law. These legal and historical starting points underlie the regulations in many of the civil law codifications adopted by individual countries in the 19th century or early 20th century (e.g., the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch or in abbreviation ABGB)). In modern times, law must keep up with the needs of society and business practice. For this reason, it is necessary to check whether certain legal institutes still meet these modern needs. It is therefore inappropriate to regard certain cumbersome legal rules that were formed more than a hundred years ago as immutable in the sense that their suitability cannot be debated. One of the key aspects of the constitutional principle of the rule of law is the predictability of legal consequences. The predictability of legal consequences, as a value criterion included in the principle of the rule of law, requires that legal entities have the opportunity to clearly and unambiguously predict legal consequences at the time of entering a certain legal relationship. In this sense, only a clear and comprehensive legal regulation can ensure the predictability of consequences. Due to the principle of a limited number of legal positions or rights in real estate mortgage (hereafter referred to as rem) in property law, which is a fundamental principle of that law, clarity, internal consistency and transparency of the regulation in the area of property law are particularly important (Plavšak & Vrenčur, 2020, pp. 105-108).

Slovenian Law of Property Code (Stvarnopravni zakonik or in abbreviation SPZ) has been in use for more than 22 years. During this period, its use has shown that some legal rules do not meet the needs of modern business practice, while others should be revised due to their ambiguity. With the aim of preparing a clear, transparent and functional regulation of property law relations, a group

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of initiators submitted expert material to prepare amendments to SPZ to the Ministry of Justice of the Republic of Slovenia in 2016. In 2017, the same group of experts prepared a comprehensive proposal for amendments and additions to SPZ, which was not acceptable to the ministry (Plavšak & Juhart & Vrenčur, 2017). The proposal also included provisions relating to liens (especially mortgages). The Act on Amendments to the Property Law Code – SPZ-B, adopted by the National Assembly of the Republic of Slovenia in March 2020, does not contain any new provisions on mortgages (Vrenčur, 2019, pp. 1113-1126).

A mortgage is undoubtedly the most important security in property law, enjoying the greatest reputation in banking practice and occupying a central place among the securities for loans and other financial and business claims of creditors. It is therefore important that the law provides a clear and functional regulation of mortgagees, indeed for business in general, for the sake of legal clarity and predictability of legal consequences for participants in legal transactions. The drafter of the amendment to SPZ-B failed in their task to functionally regulate and update the legal rules of mortgage law despite an excellent opportunity. Furthermore, the drafter of the amendment to SPZ-B failed to regulate (correct) anything at all in Section 2, Part VI of SPZ, which regulates mortgages.

In this article, we will present the issue of inadequate regulation of maximum mortgage in Slovenian law. The first chapter will provide a general discussion of the accessory nature of land pledges, followed by a chapter on maximum mortgages, in which we will discuss the issue of transferability of maximum mortgages. We will compare the stances of case law and legal theory and present comparative law arguments that support the transferability of maximum mortgages. We will conclude with our own position on the issue at hand.

2. Accessory nature of land pledges

An important feature of liens is their dependence on the secured claim. It follows that a lien is a dependent (accessory) right in relation to the claim it secures. This means that a lien is not an independent derived right in rem and is also not an independently transferable right. The principle, or legal rule, of accessory nature was already known in Roman law. It stems from the broader principle of "*accessio cedit principali*", which means that accessory rights share the legal fate of the main right (Krajnc, 2020, p. 484). In the relationship between the lien and the secured claim, the lien is an accessory right, and the claim is the principal right to which the lien is subordinate (Tratnik, 2012, p. 27). Some other rights that do not have independent legal existence like the lien (i.e., they are dependent or accessory rights), also have the same relationship to the claim as the principal right. These are, in particular, the right arising from a surety, the right to interest, the right to a contractual penalty, forming rights and

the like (e.g., see Art. 418 of the Slovenian Obligations Code (Obligacijski zakonik or in abbreviation OZ)).

Upon examining the methods of exercising a lien, we can find that accessory nature is most evident in the transfer of a lien. An independent transfer of a lien is not possible. Its transfer to a new creditor is possible only if the lien creditor has transferred the claim, secured by the lien, to the new creditor. The term exercising a lien not only refers to its transfer, but also other forms of disposal. These are primarily the waiver of the lien and the encroachment of the lien. One of the methods of disposal that is no longer relevant today is the conversion of a mortgage into a land debt, due to the abolition of land debt with the amendment to SPZ-A in 2013 (compare Plavšak, 2012, pp. 58-59). These methods of disposal or exercising a lien belong only to the lien holder.

A lien depends on the secured claim in terms of its origin, scope, transfer, repayment and termination (Stöcker & Stürner, 2012, pp. 49-50). In short, we can say that the right of lien depends on the origin and existence of the secured claim (Hinteregger & Schwimann, 1998, p. 262). The principle of accessory nature thus defines the most important characteristic of the right of lien, regardless of the fact that there are some exceptions to this principle. A lien can also be established to secure a future or contingent claim (see Art. 129 SPZ; e.g., to secure a bank's recourse claim arising from the payment of a bank guarantee for rectifying defects during the warranty period or to secure a line of credit). The maximum mortgage, which is not a special type of mortgage at all, but has all the characteristics of a protective right in rem, holds a special place in the system of liens. We will discuss this in more detail later in the article.

If the legal transaction that was the legal basis for the creation of the secured claim is invalid, the lien is also invalid. A similar legal effect occurs when exercising the right of rescission. For example, if the creditor of the secured claim withdraws from a loan/credit agreement with *ex tunc* effects, the lien also ceases to exist due to its accessory status. However, such a legal consequence does not occur if the creditor of the secured claim recalls the claim. Such a recall is a unilateral entitlement to form or change the relationship that causes a change in the existing legal relationship, for example, an unmatured credit claim is converted into a matured claim. This means that when the lender exercises the right to recall the claim, due to the borrower's breach of obligation, all previously unmatured loan installments become due.

A mortgage is a derived right in rem that conditionally excludes ownership rights of real estate. If the mortgage is realized, through a forced sale of real estate carried out by the court, the owner loses ownership of the real estate. The mortgage is effective against the respective or current owner of the mortgaged real estate. This means that the respective owner of the mortgaged real estate is liable to fulfill the secured obligation up to the value of the real estate or up to the amount obtained from the sale of the encumbered property. This is particularly important in cases where the personal debtor, the borrower, is not

also the real debtor or the pledger. This usually occurs if the pledger pledges his real estate for another's debt or if the personal debtor, who is also the real debtor, after the creation of the mortgage, alienates/transfers the mortgaged real estate to a third party, who does not also assume the personal debt. A personal debtor, who is also a real debtor, is liable for both the obligation with their remaining assets, and with the real estate encumbered by the mortgage. This does not apply to the real debtor, who is liable only up to the value of the real estate or up to the amount that can be obtained from the sale of the encumbered property. The fact is that a mortgage provides the creditor with a favorable order of repayment from the value of the real estate, which the creditor normally does not have on the debtor's other assets. The absolute effect of a mortgage is also reflected in the priority rule, which states that earlier or older derived rights in rem take precedence over later or younger derived rights in rem (*prior tempore, potior iure*) (Plavšak, 2020, pp. 124-126, Juhart & Tratnik & Vrenčur, 2004, p. 79). Art. 6 SPZ inconsistently states: "If more than one right in rem exists over the same thing, the right in rem of the same type which was acquired first shall take precedence over the right in rem which was acquired later." The priority principle, or rule, not only applies to the competition of multiple rights of the same type, but also resolves the competition of different derived rights in rem, e.g., between a mortgage and a right of superficies (Vrenčur, 2016, pp. 32-42).

An older mortgage has an effect against the younger one in such a way that the holder of the older mortgage is repaid first from the proceeds of the sale of the encumbered real estate, followed by all the creditors whose claims are not secured by a mortgage. In other words, the pledgee enjoys the right of priority in repayment before all those who have acquired a lien after him or do not have a lien. Therefore, we say that the lien includes a preferential repayment entitlement, which is activated if the secured claim is not paid when it falls due. The order of priority of repayment rights depends on the creation of individual liens. This is of fundamental importance, as the subsequent mortgage creditors are exposed to the risk of not being repaid otherwise secured claims (see Art. 147 SPZ).

A change in the owner of the encumbered real estate does not affect the existence and thus the legal effect of the mortgage, as the mortgage has effect as a derived or absolute right in rem in relation to an indefinite number of persons (*erga omnes*; Art. 5 SPZ) (Plavšak, 2020, pp. 115-119, Vrenčur, 2016, pp. 27-32).

3. Maximum mortgage

3.1. Legal characteristics of a maximum mortgage

In Slovenian law, the maximum mortgage is regulated in Art. 146 SPZ. The text of the cited provision of SPZ reads: "(1) A mortgage can also be established by determining the maximum amount for which an immovable property may be used as a guarantee for securing claims (maximum mortgage). (2) A

maximum mortgage may be used to secure individual claims or claims originating from a specific legal relationship, the amount of which is not determined at the moment when the mortgage is established. (3) A maximum mortgage shall also be used to secure all interest and costs with regards to the secured claims up to the maximum amount. (4) In the event of an assignment of a claim which is secured by a maximum mortgage, any transfer of the mortgage shall be excluded."

A mortgage is generally dependent (accessory) on the secured claim, both in terms of its origin, scope, transfer, repayment and termination (Plavšak & Vrenčur, 2020, pp. 970-971). Notwithstanding the above, a mortgage can also be established to secure a contingent and future claim (see Art. 129 SPZ). This provision represents a legal departure from the strict accessory nature of a mortgage to the claim. When securing contingent claims, claims that will arise under a suspensive condition are particularly relevant, for example, a recourse claim of a bank against the subscriber of a bank guarantee that has been cashed in by the beneficiary. These are claims the occurrence of which depends on the realization of an uncertain fact (compare Art. 59 OZ). Future claims, however, are considered for mortgage security in particular if they are likely to arise, but the moment when they will arise is uncertain, for example, a bank claim from a line of credit or a bank claim from a revolving credit. In case of a mortgage, the possibility of securing future and contingent claims is limited by the rules regarding the registration of a mortgage in the land register. Given the fact that a mortgage is registered with information on the amount of the secured claim, maturity, interest rate and any valuation clause, it is most often possible to establish only a maximum mortgage to secure future and contingent claims (due to the absence of information defining the claim). However, there are no obstacles to registering a fixed mortgage in the land register that secures future claims, provided that all the defining elements of this claim that need to be entered in the land register are known. Thus, even before the secured claim arises, a bank loan, including a line of credit or a revolving credit, can be fully determined as to amount, maturity, interest rate, and repayment terms, so this data can be entered in the land register (Plavšak & Vrenčur, 2020, pp. 1002-1005, Tratnik, 2016, pp. 734-735).

The legal effect caused by the statutory accessory nature of the mortgage is that the mortgage ceases to exist in the substantive legal sense upon the termination of the secured claim. This effect occurs regardless of the fact that the mortgage was originally established to secure a future or contingent claim. As mentioned, the establishment of a fixed mortgage is permissible both for securing an existing claim and for securing a future or contingent claim. In this fixed mortgage, for example, for securing a future claim. Later, when the claim arises, an accessory relationship is established between the claim and the mortgage and not between the business relationship and the mortgage. Due to accessory nature, the existing lien cannot be used to secure a new claim, though the exception applies to a maximum mortgage. It is therefore not possible to maintain the old lien to secure a new claim when the original claim, which was

secured by the same fixed mortgage, already ceased to exist. An accessory or fixed lien ceases to exist when the secured claim ceases to exist (see, e.g., second paragraph of Art. 154 SPZ, which regulates typical situations that are grounds to extinguish a mortgage in the substantive sense), and a new lien must be established to secure a new claim. The Supreme Court of the Republic of Slovenia emphasized that nowhere in the Slovenian legal system is there any provision that allows either transferring an already established mortgage, either due to payment or an exhausted mortgage, to a new claim or the replacement of the secured claim. According to the Supreme Court, this fact does not constitute a legal void, but rather indicates that the Slovenian regulation does not allow such transferability of a mortgage. The reason lies in the effect of the principle of accessory nature, i.e. the rule according to which ancillary things or rights share the legal fate of the main thing or right, in this case of a claim. If this claim does not exist, either because it did not arise at all or has ceased to exist, then the mortgage as a lien on the immovable property formally exists due to its entry in the land register, but it is a voided, vacated mortgage, one that no longer has content or meaning (see Supreme Court of the Republic of Slovenia Judgment II Ips 48/2012 of 11 April 2012). Austrian substantive mortgage law has more flexible rules for the transfer of a fixed mortgage. Slovene property law did not regulate these rules when SPZ was adopted. Under Austrian law, an existing vacated and not yet deleted mortgage can be used to secure a new claim that does not exceed the amount of the registered mortgage or secured claim. This is a special form of use of the mortgage by the owner, that is on the basis of a document that shows that the first secured claim ceased to exist (see paragraph 469 ABGB). The Austrian model of the transfer of a fixed mortgage was also adopted by the Croatian legislator. Accordingly, it is stipulated in the second paragraph of Art. 347 of the Croatian Act on Ownership and Other Real Rights (Zakona o vlasništvu i drugim stvarnim pravima) that "Before the mortgage is deleted in the land register, the owner of a piece of real property encumbered by the mortgage may transfer the mortgage to a new claim not greater than the one that is entered and that has terminated based on a certificate or another document proving the termination of the claim secured by the mortgage."

A maximum mortgage (German: Höchstbetragshypothek) can be used to secure claims arising from a specific legal relationship, the amount of which is not specified at the time of the mortgage. SPZ stipulates that in the event of an assignment of a claim, secured by a maximum mortgage, any transfer of the mortgage shall be excluded (fourth paragraph of Art. 146 SPZ). This would suggest that in the case of a maximum mortgage there is no accessory relationship between the specific claim and the mortgage. The established position in literature and case law is that in the case of a maximum mortgage, there is accessory relationship between the business relationship and the maximum mortgage. If an individual claim within the maximum mortgage ceases to exist, the maximum mortgage itself does not cease to exist as well. If a claim, secured by a maximum mortgage, is assigned, the mortgage is not

transferred to a new creditor, not even partially. A more recent theory in this regard explains that a maximum mortgage is not a subtype of a mortgage at all but has the characteristic of a protective derived right in rem, such as the preliminary notes of the acquisition of a mortgage or the priority notice to acquire a mortgage. The maximum mortgage itself does not include a preferential repayment entitlement. Rather, this entitlement is granted to individual mortgages that arise within the maximum mortgage when an individual claim arises from a business relationship secured by the maximum mortgage. An individual mortgage, however, takes effect precisely when the maximum mortgage takes effect (Plavšak, 2016, p. 117, Vrenčur, 2019, p. 1121, Plavšak, 2018, p. 133, Plavšak, 2020, p. 1054). According to theory, this characteristic must be considered when interpreting the fourth paragraph of Art. 146 SPZ. The mentioned paragraph, which states, that "in the event of an assignment of a claim, secured by a maximum mortgage, any transfer of the mortgage shall be excluded, means that the assignment of an individual claim to a new creditor does not transfer the maximum mortgage as a security right in rem". This rule does not exclude the general rule according to which the transfer of a claim to the new creditor also transfers the individual mortgage, created within the maximum mortgage. If the holder of the maximum mortgage transfers to the new creditor a claim from a business relationship that is secured by a maximum mortgage, a situation arises that has the same characteristics as the situation that arises if the mortgagee transfers to the new creditor only part of the claim or some of the claims that are secured by the same ordinary, fixed mortgage. Thus, even in the case of the transfer of an individual claim secured by a maximum mortgage, the assignor and the new creditor become joint holders of the maximum mortgage (Plavšak, 2016, p. 118). This creates a situation, when a certain right belongs to several subjects, which is normatively regulated within the civil law framework in OZ (Plavšak, 2020, pp. 1010-1012). The same lien can therefore be acquired jointly by several persons, or such a situation can arise in the case of an assignment of part of the claim or individual claim, secured by a mortgage or maximum mortgage. By creating a situation, in which the holders of the same right are two or more persons, mutually obligatory rights and obligations arise between these persons in their internal relationship with regard to the exercise of the entitlements contained in this joint right. According to the general rule set out in the first paragraph of Art. 1004 OZ, it is presumed that the shares of individual holders of the same right are equal. Such a presumption is not appropriate for the community of several holders of the same lien. Therefore, the proposed third paragraph of the new Art. 136.a SPZ establishes a presumption that the secured claims of an individual creditor upon the exercise of such lien are repaid in a share that is equal to the ratio between the amount of the secured claims of this creditor and the total amount of the claims of all creditors secured by this lien. The Ministry of Justice of the Republic of Slovenia did not accept this proposal of the expert group when drafting its amendment to SPZ-B (Plavšak & Juhart & Vrenčur, 2017, p. 54).

3.2. Relevant comparative law perspective (German and Austrian maximum mortgage regulations)

When drafting the fourth paragraph of Art. 146 SPZ, which stipulates that in the event of an assignment of a claim which is secured by a maximum mortgage, any transfer of the mortgage shall be excluded, our legislature followed the German regulation of the fourth paragraph of Section 1190 of the German Civil Code (Bürgerliches Gesetzbuch or in abbreviation BGB), but did not take into account the entire context of the German regulation. According to the fourth paragraph of Section 1190 BGB, a claim, secured by a maximum mortgage, may be transferred in accordance with the general rules applicable to assignment (Section 398 BGB et seq.), and if the claim is transferred in accordance with these rules, the transfer of the mortgage is excluded. This means that in this case, only the claim is transferred to the new creditor (assignee), but not the maximum mortgage. A property encumbered by a maximum mortgage continues to guarantee up to the registered maximum amount for other claims that will arise from the business relationship with the previous creditor, the assignor (Dugar, 2020, p. 1058). A special feature of German law is that claims secured by a mortgage are not transferred under the rules on assignment, but instead under the rules that apply to the transfer of rights in rem in real estate. A claim that is merely secured, without a mortgage, cannot generally be transferred under German law (see Section 1153 BGB). This means that the fourth paragraph of Section 1190 BGB provides an exception to the general rule regarding a maximum mortgage by allowing the independent transfer of a claim, by assignment, without a mortgage. Only in this case is the transfer of the mortgage excluded, otherwise it is not. Thus, the maximum mortgage is generally transferred according to the rules that apply to the transfer of a mortgage-secured claim, i.e. on the basis of an agreement on the assignment of the claim (together with the mortgage) and the entry of the transfer in the land register (section 1054 BGB). Let us add that the issue of transferring a maximum mortgage is practically irrelevant, as mortgage has been completely replaced by land debt in German business practice (see also Wolf & Wellenhofer, 2015, pp. 449-460, Dugar, 2020, pp. 1057-1058).

Under Austrian law, in the event of the assignment of individual claims, secured by a maximum mortgage, the mortgage can be transferred, whereby the mortgage in respect of the amount of the assigned claims, with the debtor's consent, automatically converts into a fixed mortgage (Tratnik, 2008, p. 15). Dugar (2020, p. 1058) explains that in Austrian case law and legal theory, it is controversial whether a maximum mortgage is transferable. According to the prevailing view in theory, the transfer of a maximum mortgage is only possible if the transferee enters into a framework credit relationship on the basis of a contract transfer. The debtor must also consent to such a transfer of the contract. In case of an assignment of an individual claim arising from a business

relationship, the maximum mortgage is transformed into a fixed mortgage in respect of the amount of the assigned claim and is transferred to a new creditor in this form. The Austrian Supreme Court (Oberster Gerichtshof or in abbreviation OGH) has emphasized that a distinction must be made between the framework credit relationship and individual claims arising within the framework of this relationship. The transfer of a maximum mortgage is possible if, with the consent of the debtor, the entire framework credit relationship is transferred to the new creditor, which means that all rights and obligations arising from this relationship are transferred to the new creditor. An individual claim from the framework credit relationship, and with it the mortgage, can only be transferred if the framework credit relationship is reduced to one claim arising from this relationship and no further use of the credit line is envisaged in the future. In this case, the maximum mortgage may be transformed into a fixed mortgage and in this form is transferred together with the assigned claim to the new creditor (OGH Judgment, 3Ob218/11x of 14 December 2011). Only if the debtor agrees to the transfer of the entire business relationship, i.e. when it concerns the transfer of a contract, which is regulated in more detail in Art. 122 OZ, or if the credit limit is reduced to a single claim of the creditor and it is obvious that the limit will no longer be used, the mortgage with the highest amount can only be tied to this claim and no longer to the credit limit, so that the mortgage can also be transferred to a new creditor. In this case, the maximum mortgage is treated as a fixed mortgage upon transfer and, as such, is transferred to the transferee of the claim. Only if the debtor agrees to the transfer of the entire business relationship or if the credit limit is reduced to a single claim of the creditor and it is obvious that the limit will no longer be used, the maximum mortgage is only tied to this claim and no longer to the credit limit, so that the mortgage can also be transferred to the transferee. By reducing the maximum amount to a single outstanding claim, for example by removing the credit limit on the part of the existing creditor, the mortgage with the maximum amount at the time of the transfer of the claim, or purchase, is treated as a fixed-amount mortgage and, as such, is transferred to a third party, the transferee (OGH Judgment, 3Ob218/11x of 14 December 2011, point 37 of the reasoning).

Compared to the German regulation, which the Slovenian regulation was modeled after, Art. 146 SPZ represents a simplified version of the German regulation and, if read literally, does not meet the needs of business practice, as it reduces the turnover and thus the value of the creditors' claims, secured by the maximum mortgage (see also Kurzbauer, 1999, pp. 14-15, Tratnik, 2008, p. 15). The Slovenian regulation is stricter compared to the German and Austrian regulations, which are the most similar regulations, and in fact reduces rather than increases the flexibility of the maximum mortgage. Therefore, the provision of the fourth paragraph of Art. 146 SPZ must be interpreted systemically and functionally.

3.3. Slovenian case law

In the past, the Supreme Court of the Republic of Slovenia explained that a maximum mortgage represents a departure from accessory nature, as it does not protect individual claims, but instead only the fundamental debtor-creditor relationship from which the claims originate. The accessory nature of this mortgage is therefore lesser and different than that of a classic mortgage. Therefore, in the event of an assignment of a claim, secured by a maximum mortgage, the transfer of the mortgage is excluded (fourth paragraph of Art. 146 SPZ) (Supreme Court of the Republic of Slovenia Decision II Ips 407/2005 of 12 July 2007). Due to these positions of Slovenian case law, difficulties arise when applying or interpreting the fourth paragraph of Art. 146 SPZ, as it is not unambiguously clear whether, when transferring individual or collective claims secured by a maximum mortgage, the security (the individual mortgage that was created within the maximum mortgage) is also transferred to the new creditor. Therefore, the group of initiators of the proposal to amend SPZ-B envisaged certain changes. For instance, in paragraphs five to seven of Art. 146 SPZ, they envisaged the legal possibility for the holder of a maximum mortgage to transform this maximum mortgage into a regular, fixed mortgage (Plavšak, Juhart, Vrenčur, 2019, pp. 55-56, Vrenčur, 2019, pp. 1121-1123). The Ministry of Justice of the Republic of Slovenia did not take this proposal into account when preparing its proposal for the amendment SPZ-B.

In its latest decision, the Supreme Court of the Republic of Slovenia once again took a conservative position regarding the transferability of the maximum mortgage (Supreme Court of the Republic of Slovenia Decision II Ips 43/2024 of 7 February 2025). This position was taken in connection with the challenged decision of the Higher Court in Ljubljana (VSL Decision I Cp 836/2022 of 28 November 2023). The Supreme Court has once again clarified that under SPZ, in the event of an assignment of a claim secured by a maximum mortgage, the transfer of the mortgage is excluded (fourth paragraph of Art. 146 SPZ). In case of a maximum mortgage, there is no accessory relationship between an individual claim and the mortgage, but rather an accessory relationship between the business relationship and the maximum mortgage. Should an individual claim within the maximum mortgage cease to exist, so does the maximum mortgage itself. If a claim, secured by a maximum mortgage, is assigned, the mortgage is not transferred to the new creditor, not even partially. In its reasoning, the Court explained (points 12 to 19 of the reasoning of the Supreme Court decision, decision II Ips 43/2024 of 7 February 2025) that a maximum mortgage is a subtype of mortgage regulated in the first paragraph of Art. 146 SPZ. This stipulates that "a mortgage can also be established by determining the maximum amount for which an immovable property may be used as a guarantee for securing claims (maximum mortgage)". A maximum mortgage can be used to secure an individual claim or claims that arise from a specific legal relationship, the amount of which is not determined at the time the mortgage is established. A maximum mortgage is therefore, in its content, a

form of a lien that is registered in the land register and allows the lien creditor to also secure claims that will arise and are not yet known, in terms of amount, at the time the security is established. The security is enabled by entering the maximum amount up to which the mortgage still provides security in the land register. SPZ, in the fourth paragraph of Art. 146, explicitly stipulates that in the event of an assignment of a claim secured by a maximum mortgage, the transfer of the mortgage shall be excluded. Since the maximum mortgage provides a so-called "open" of security, the legislature's intention with this provision was to exclude competition between creditors in the same priority order that could occur upon the transfer of an individual claim. This means that when an individual claim arises from a business relationship secured by a maximum mortgage, no individual ordinary mortgage is created within the maximum mortgage, as advocated by the more recent theory. If a new ordinary mortgage were to automatically arise with the emergence of each new claim, this could lead to competition between the original and the new creditor. This is precisely what the legislature wanted to prevent with the fourth paragraph of Art. 146 SPZ. In case of a maximum mortgage, there is therefore no accessory relationship between an individual claim and the mortgage, but rather an accessory relationship between the business relationship and the maximum mortgage. If an individual claim within a maximum mortgage ceases to exist, the maximum mortgage does not cease to exist as well. If a claim, secured by a maximum mortgage, is assigned, the mortgage is not transferred to the new creditor, not even partially. This is the essential message of the fourth paragraph of Art. 146 SPZ. It is an exception, *lex specialis,* to the general rule in Art. 148 SPZ, according to which the ordinary mortgage, unless otherwise agreed, follows the claim.

A further question is whether a maximum mortgage can be assigned by a special contract. This is not expressly prohibited by the fourth paragraph of Art. 146 SPZ, but the restrictions are dictated by the internal characteristics of the maximum mortgage. A maximum mortgage may not be divided, as division would circumvent the purpose of the rule from the fourth paragraph of Art. 146 SPZ described above. Another effect to be avoided is that the transferred maximum mortgage would serve to secure newly arising claims in the relationship between the mortgage debtor and the new mortgage creditor, since the mortgage debtor never agreed to such security. A maximum mortgage can therefore only be transferred if the new creditor, with the debtor's consent, assumes the entire legal relationship that is the basis for the creation of the claim. A special situation arises if the creditor-debtor relationship is reduced to a single, or perhaps a few, claims and the fundamental relationship between the pledgee and the principal debtor ends and it is clear to all participants that new claims from this relationship will no longer arise. In this case, the maximum mortgage is limited to the remaining claim. In all other cases, the transfer of the maximum mortgage is excluded. The Supreme Court found that the court of second instance, due to an incorrect substantive assessment of the maximum mortgage and its consequences, in the case of the transfer of claims to a new

creditor, did not exhaust the defendant's appeal and did not take a position on all of the defendant's appeal statements in the revision challenging the legally decisive factual findings of the court of first instance. Therefore, it found that the contested judgment had no grounds in this regard due to the incorrect application of the fourth paragraph of Art. 146 SPZ. The defendant's revision was found well-founded, which is why the Supreme Court overturned the judgment of the court of second instance in the contested part relating to the validity of the transfer of the maximum mortgage as it concerned the decision on the counterclaim in points 2, 3 and 4 of the claim, in accordance with the second paragraph of Art. 380 of the Slovenian Civil Procedure Act (Zakon o pravdnem postopku or in abbreviation ZPP). Consequently, it also annulled the decision on the costs of the appeal proceedings.

The Supreme Court did not accept and rather ignored, the position that individual fixed mortgages arise within a maximum mortgage with the creation of individual claims, which take effect from the moment the maximum mortgage takes effect as a security right. A new creditor of an individual claim who becomes a co-holder of a maximum mortgage does not compete with the assignor of this claim any differently than a new creditor in the assignment of part of a claim or only certain claims secured by a fixed mortgage. The same lien may be acquired jointly by several persons, or such a situation may arise in the assignment of part of a claim or individual claim secured by a mortgage or maximum mortgage. When a situation arises where two or more persons are holders of the same right, mutual(obligational rights, and obligations of these persons arise in the internal relationship between these persons regarding the exercise of the entitlements contained in this joint right and the fulfillment of any obligations related to the ownership or exercise of the right. These relationships are regulated by the general, dispositive rules in Chapter XXVIII of the Special Part of OZ. For these internal relationships, we use the term legal community (Art. 1003 OZ). A lien is a dependent accessory right in relation to a secured claim. Therefore, it can only arise and exist if a secured claim exists. The situation of a community of several lien holders can arise when the holders of a claim secured by a lien are two or more creditors, or when several claims are secured by the same lien, the holders of which are different creditors, for example, in the case of a syndicated bank loan (Plavšak & Juhart & Vrenčur, 2017, p. 54, Vrenčur, 2019, p. 1121).

In addition, it depends on the will of the assignor whether he will assign an individual claim or not and thereby voluntarily agree to the legal position of the creation of joint ownership of the maximum mortgage. Therefore, the Supreme Court’s argument, stating that ″if a new ordinary mortgage was automatically created with the creation of each new claim, this could lead to competition between the original and new creditor", is questionable. Another weak argument is the Court's assertion “that a maximum mortgage may not be divided, since division would circumvent the above-described purpose of the rule from the fourth paragraph of Art. 146 SPZ. Another effect that we must absolutely avoid is that the transferred maximum mortgage would serve to

secure newly created claims in the relationship between the mortgage debtor and the new mortgage creditor, since the mortgage debtor has never agreed to such security". The mortgage debtor, pledgee, guarantees the value of the real estate for the payment of the claim or claims up to the maximum amount (first paragraph of Art. 146 SPZ). If the value of the real estate is not sufficient, the pledgor, who is also a personal debtor, guarantees the payment of the claim with his remaining assets. If the pledgor is not also a personal debtor, his guarantee is limited to the value of the real estate, or to the credit, obtained through the forced sale of the encumbered real estate. In addition, the legal position of the debtor may not be impaired in any way due to the assignment of the claim. The transferee has the same rights against the debtor as the assignor had against him before the assignment. In addition to the objections the debtor has against the transferee, the debtor may also assert against him all of the objections he could have asserted against the assignor until he learned of the assignment (Art. 421 OZ). A detailed analysis of the described legal situations shows that the assignment of individual claims, secured by a maximum mortgage, does not in any way worsen the legal position of the debtor. With the assignment of an individual claim, which, on the basis of Art. 418 OZ and Art. 148 SPZ, means an automatic transfer of the individual fixed mortgage, which arose at the moment of the creation of this individual claim based on a business relationship,and which has a secured priority order from the moment at which the maximum mortgage takes effect as a security right, joint ownership of the maximum mortgage arises. When a situation arises where two or more persons are the holders of the same right, mutual obligational rights, the obligations of these persons arise in the internal relationship between these persons, which are regulated by the Obligations Code in the context of the legal community (Arts. 1003 to 1011 OZ).

The basic purpose of the maximum mortgage is in its more flexible legal concept compared to the fixed mortgage and not vice versa. With the interpretation offered by the Supreme Court, the maximum mortgage becomes more fixed in this respect than the fixed mortgage. This was certainly not the legislature's intention, but rather a lapse of the legislature in summarizing the German regulation (Tratnik, 2008, p. 14-15). Therefore, Art. 146 SPZ must be interpreted systematically and thus functionally.

In the contested judgment (VSL Judgment I Cp 836/2022 of 28 November 2023), the Higher Court of Ljubljana applied the position of more recent legal theory (Plavšak, 2020, p. 1054), which is the position that we also advocate in this article. It explained that "SPZ awkwardly stipulates that in the event of the assignment of a claim, secured by a maximum mortgage, the transfer of the mortgage is excluded. According to more recent positions in theory and case law, this rule only states that the transfer of an individual claim to a new creditor does not transfer the maximum mortgage as a protective right in rem. However, it does not exclude the general rule, according to which, with the transfer of a claim to a new creditor, the individual mortgage that arose within the maximum mortgage is transferred to secure this claim". The Higher Court in Ljubljana

then points out that the fundamental rule of civil procedure is that a judgment is effective between the parties.

> "The constitutional requirement for an adversarial procedure and the right of a party to be heard also implies the requirement that a judgment may only bind those persons who had the opportunity to participate in the procedure in which it was issued. The expansion of the subjective limits of finality is an exception to the general rule, permissible only in specially justified cases, e.g. in the case of legal succession, single co-litigation, in judgments regarding the challenge of legal acts and the determination of the (non)existence of disputed claims in bankruptcy, in status disputes, etc. The defendant in that case was a mortgage debtor because his property right was registered after the registration of the maximum mortgage, but this does not mean that he is bound by a final judgment on the existence and amount of the claim issued in a procedure in which he did not participate. SPZ awkwardly stipulates that the transfer of the maximum mortgage is excluded. But according to recent theoretical and case law, this rule only states that the transfer of an individual claim to a new creditor does not transfer the maximum mortgage as a security right in rem as well. However, it does not exclude the general rule according to which the transfer of a claim to a new creditor transfers the individual mortgage that was created (within the maximum mortgage) to secure this claim" (Higher Court in Ljubljana, Judgment I Cp 836/2022 of 28 November 2023).

4. The formative effect of the mortgage transfer

With the assignment of a secured claim to a new creditor, the lien is also transferred to him (Art. 418 OZ, Art. 148 SPZ, Art. 1018 OZ). Since the lien has a protective function, it is understandable that it can generally only be transferred together with the secured claim. It is emphasized that the independent existence of a lien is already conceptually excluded if the pledge is not intended for security (Kundi, 2003, p. 76). The general rule in assignment is that the new creditor acquires the same rights as the assignor had before him. This means that he enters into the position of the creditor both with regard to the claims and with regard to other accessory rights, with the transfer of a secured claim, the mortgage is also transferred, unless otherwise agreed (first paragraph of Art. 148 SPZ, see also Hinteregger, 1998, p. 264). Even in comparative legal systems, the transfer of a mortgage takes effect with the assignment (by mortgage) of the secured claim and not only with the entry in the land register, as incorrectly stated in the second paragraph of Art. 148 SPZ The entry of the transfer of a mortgage does not have a formative effect, but

only a publicity effect (see also: Supreme Court of the Republic of Slovenia, Judgment III Ips 131/2005 of 23 May 2007 and decision II Ips 75/2009 of 11 June 2009). Since the mortgage is transferred to the new creditor automatically, due to the assignment of the claim secured by the mortgage, a special transaction for the transfer of the mortgage is not required. However, since the new creditor can only register the transfer of the mortgage on the basis of a document, suitable for registration, according to the rules of land registry law, such a document, referred to in the third paragraph of Art. 40 of the Slovenian Land Register Act (Zakon o zemljiški knjigi or in abbreviation ZZK-1) will be required to harmonize the land registry status, with regard to the change of the mortgage holder. If the assignor refuses to issue such a document, the basis for registering the transfer of the mortgage will be a final declaratory judgment by which the court establishes the transfer of the mortgage (Plavšak, 2012, pp. 63-64).

The lien is also transferred to the new creditor due to the effect of subrogation, *cessio legis*. For example, if the guarantor fulfills the obligation of the principal debtor that is secured by a mortgage on real estate owned by the principal debtor, he takes the place of the lien creditor both with regard to the secured claim and the lien (Art. 1018 OZ, see also Art. 275 OZ, which is the general rule for *cessio legis*). The latter is also true for contractual subrogation (see Art. 274 OZ). Here too, for the same reason as in the case of contractual assignment, publicity must be ensured regarding the change in the mortgage creditor. A land registry permission is not required to reconcile the land registry status; the registered owner's consent (see third paragraph of Art. 40 ZZK-1) in which the old creditor acknowledges the transfer of the mortgage, is sufficient. When we say that no land registry permission is required, we want to emphasize that the new creditor has acquired the mortgage directly on the basis of the law, which is why the old mortgagee does not have the right to dispose of the mortgage in the sense of its transfer. Nevertheless, due to the rules of land registry law, a suitable registered owner's consent is required for recording the transfer of the mortgage. In fact, the situation is the same as in the contractual assignment of a claim secured by a mortgage.

In accordance with these rules, an individual mortgage that was created within the maximum mortgage, is also transferred.

5. Conclusion

The general view that a maximum mortgage is more flexible than a fixed mortgage, which is also established in comparative legal systems, has been called into question due to inadequate stances taken in the Slovenian case law. According to the position of the Supreme Court of the Republic of Slovenia, it is possible to assign a claim, secured by a maximum mortgage, only without a mortgage, i.e. without security, which is of key importance for the enforcement

of the preferential right to repayment provided by the mortgage. This means that such an unsecured claim is practically uninteresting for potential buyers of claims, as no one wants to take over or acquire a claim without mortgage security. For this reason, experts have already proposed amendments to SPZ in the past, specifically with regard to the maximum mortgage, following the example of the German and Austrian regulation of the maximum mortgage, where this type of mortgage is regulated much more flexibly. This means that comparative law arguments confirm our efforts for a more appropriate regulation of the maximum mortgage in SPZ. The fact is that SPZ inadequately stipulates that in the event of assignment of a claim, which is secured by a maximum mortgage, the transfer of the mortgage shall be excluded (fourth paragraph of Art. 146 SPZ). The theory therefore attempts to interpret this inadequate provision systematically, since otherwise the regulation of the maximum mortgage would prove to be completely dysfunctional.

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