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**ENFORCEMENT OF THE PLEDGE:
SALE OF A PLEDGE'S OBJECT
IN DUTCH AND UKRAINIAN CIVIL CODES**

1. Introduction

It is impossible to disagree with prof. H. Snijders and prof. J. Hijma, that an important legal effect that pledge has in common, even though it has not been arranged in general provisions, may be described as the right of immediate execution [1, p. 130]. It is followed from the main purpose of all security rights – to ensure due performance of obligation, normally repayment of the loan plus interests, as it was definitely mentioned by prof. B. Rudden [2, p. 134]. That is why questions, which deal with regulation of enforcement of the pledge, are one of the most important for the practical and theoretical issues.

In this essay we will present a brief overview of Ukrainian and Dutch law in regard to sale of a pledge's object as a form of enforcement of the pledge. We will discuss the provisions of Dutch law and compare those provisions with provisions of Ukrainian law in the same area. It shall be mentioned that in this essay we will deal only with the pledge which, according to rules of both mentioned legal systems and definition which was made by prof. J. H. M. van Erp and L. P. W. van Vliet, is a limited real rights, intended to provide recourse

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against the property subjected to such right and with preference over other creditors, for the payment of a sum of money, which is established upon non-registered (movables) property [3].

2. General provisions of enforcement of the pledge

According to the regulations of articles 226 and 327 Dutch Civil Code [4] there are two forms of pledge establishment:

1) possessory pledge (*vuistpand*) – established by bringing the thing under control of the pledgee or of a third person agreed upon by the parties [5, p. 127];

2) non-possessory pledge (*bezitloos pand*) – established by deed (notarial or registered) under private writing without bringing the thing under control of pledgee or a third person agreed upon by the parties [5, p. 127-128].

Ukrainian legislation establishes the same forms of pledge: *заклад* – possessory pledge according to art. 44 para. 1 of Act of Ukraine on pledge and *застава* – non-possessory pledge according to art. 575 para. 2 of Civil Code of Ukraine.

Pursuant to this division of pledges three types of enforcement exist in Ukrainian legislation. The main type of enforcement is sale of pledge's object through the public auction (public sale) (art. 591 of Civil Code of Ukraine; art. 21 of Act of Ukraine on pledge). This form of enforcement is mandatory for sale of pledged property of state companies and stock-companies which were created during a corporatization of state companies (art. 21 of Act of Ukraine on pledge). In addition to this form of enforcement Ukrainian legislation also contemplates other forms of enforcement:

- 1) assignation the property right for the pledged thing to the pledgee, and
- 2) assignation the right to sale the pledged thing for third person to the pledgee (private sale).

According to the provisions of Dutch law 3 forms of enforcement exist:

- 1) a public auction (art. 250 of Civil Code);
- 2) a court authorised private sale (art. 251 (1) of Civil Code);
- 3) private sale (the pledgor and the pledgee can agree upon the right of pledgee to sale the pledged thing to third person) (art. 251 (2) of Civil Code).

Also by virtue of the provision of art. 250 (2) “the sale of pledged property which can be traded in a market or at an exchange may take place in a market”. This form of enforcement is a special form of public sale, which can take place only in well-defined circumstances: i) the pledged goods can be traded; ii) existence of market where goods can be sold. This special form of public sale is not established in Ukrainian law, nevertheless it could be applied to private sale according to an agreement between pledger and pledgee.

3. Grounds for the enforcement of pledge

Under the aim of pledge as a form of security the grounds of enforcement could be divided into 2 groups: substantive ground and formal grounds. In both Dutch and Ukrainian jurisdiction the substantive ground of enforcement is the same: a pledge can be enforced if the pledgor is in default with respect to the fulfilment of the obligations that are secured by the pledge, i.e., the payment obligations secured by the right of pledge [6]. This rule is allocated in the art. 248 (1) of Dutch Civil Code and art. 589 (1) of Ukrainian Civil Code. In particular Dutch Civil Code in art. 248 (1) proclaims that where the debtor is in default of paying that for which the pledge serves as security, the pledgee is entitled to sell the pledged property and to take recourse against the proceeds for what is owed to him. Wording of Ukrainian Civil Code is different, in particular art. 589 (1) says that in case of default of obligation, which is pledged, pledgee obtains the right of enforcement (foreclosure) on the pledged object.

Consequently if the debtor did not pay his debts, the rules on pledge apply as far as possible to any forced sale of the goods or claims [7].

However formal grounds of enforcement are rather different in Dutch and Ukrainian law. Specifically, art. 248 (2) of Dutch Civil Code proclaims that the parties may stipulate that no sale will take place until after the judge, upon the demand of the pledgee, has determined that the debtor is in default. It appears that judge's resolution which determines default of pledger is mandatory only in the situation if parties agreed that beforehand. Nevertheless in practice, pledgee as a lender will generally not agree to such a limitation of his right of foreclosure [8, P. 196]. According to Ukrainian law (art. 590 (1) of Civil Code; art. 24 (1) of Act of Ukraine on security of creditor's and registration of burdens; art. 20 (6) of Act of Ukraine on pledge) court decision which establish default of debtor is sine qua non. It shall be mentioned that till the 2010 court practice in this question was not clear, because Highest Economic Court of Ukraine in some cases construed the provisions of art. 20 of Act of Ukraine on pledge in the way that if the default of pledgee was established by executive inscription of notary, court decision is not bidding for enforcement [9]. But Supreme Court of Ukraine in the decision in the case Naola LLP vs PJSC Raiffaisen Bank Aval stipulated that court decision which establish default of debtor is plainly required, the exceptions can be adjusted only by strict provisions of law, inter alia by Act of Ukraine on security of creditor's and registration of burdens as special law according to the wording of mentioned decision [10]. Nowadays there is only one exception which is established by this act: formal ground for private sale of pledge is agreement between pledgee and pledger. If the sale has been agreed between parties the formal ground is agreement itself.

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Also by virtue of art. 249 of Dutch Civil Code unless otherwise stipulated, in order to proceed to a sale, a pledgee must, to the extent that this is reasonably possible, give at least three days notice of the intended sale with mention of place and time to the debtor and the grantor of the pledge. The notice must also be given to seizers of the property and to holders of dismembered rights. The manner in which notice is given is provided for by regulation. The notice must indicate, as accurately as possible, the sum for which the pledge may be redeemed. Redemption can take place up to the time of sale, provided that the costs of execution which have already been incurred are also paid. Thus notice of the intended sale is subsequent formal ground of enforcement. Ukrainian legislation also has corresponding provisions. But according to Ukrainian legislation the notice is plainly required only in the case of not-judicial enforcement, which is conducted under provisions of party's agreement. So, due to art. 27 of Act of Ukraine on security of creditor's and registration of burdens pledgee is obliged to register an enforcement notice in State register of statements about enforcement on object of burden and in the same time send this notice to pledgor and other pledgees. Enforcement notice shall include the next information:

- i) nature of default,
- ii) amount of not-paid debt,
- iii) description of pledged goods,
- iv) reference to the right of other pledgee to perform the obligations before moment of enforcement,
- v) specification of form of non-judicial method of enforcement which pledgee will apply,

vi) order to perform the obligation or to pass the pledged goods into possession of the pledgee during 30 days from the date of enforcement notice registration.

The rules of Ukrainian legislation about registration of enforcement notice correspond to the provisions of Model Law on Secured Transactions issued by European Bank of Reconstruction and Development. In particular, such registration is essential even in the case of an unpaid vendor's or possessory charge to ensure that third parties can become aware of the enforcement proceedings [11].

Dutch law establishes an exception when notification is not mandatory which is not common for the Ukrainian law. As such art. 255 of Dutch Civil Code adjusts that: "Where the pledge consists of money, the pledgee is entitled to take recourse against it according to article 253 without previous notification as soon as his debt has become exigible. He must do so if the grantor of the pledge so demands and if the latter has the right to pay the debt in the pledged currency. Article 252 applies *mutatis mutandis*".

4. Procedure of sale of pledged goods

As it was already mentioned if all substantive and formal grounds of enforcement are fulfilled pledgee has the rights to off-load pledged goods through public or private sale or on the base of agreement to obtain the property right for the pledged goods. Both Dutch and Ukrainian legislation proclaim that public sale is main form of enforcement, but rules of such public sale are rather different in both legal systems. It should be borne in mind that there are no specific rules for organization of private sale in both systems. And that is quite reasonable because procedure of this type of sale should be determined by agreement according to the principle of freedom of contract.

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Pursuant to art. 250 (1) of Dutch Civil Code public sale takes place according to local customs and upon the usual conditions. As a consequence procedure of public sales as a form of pledge's enforcement in Dutch legislation does not have specific characteristics vis-à-vis ordinary the side of usual public sales. Another specific feature of Dutch regulation that could be pointed is the source of regulation – local custom. It is not typical in the context of Ukrainian legislation.

Specific rules are established also for the sale of pledged property which can be traded in a market or at an exchange. In particular art. 250 (2) sets out that those kinds of enforcement may take place in a market through the intervention of an appropriate broker or, at an exchange, through the intervention of a qualified intermediary, according to rules and usages in force for an ordinary sale at such market or exchange. As it is seen those procedures provide special subjects of enforcement appropriate broker and qualified intermediary.

According to the provisions of art. 250 (3) of Dutch Civil Code the pledgee has the right to bid.

However the procedure of sale which is established by rules of art. 250 of Dutch Civil Code might be changed by the decision of president of the district court. As art. 251 (1) of Dutch Civil Code says unless otherwise stipulated, the president of the district court may determine, at the request of the pledgee or the grantor of the pledge, that the pledged property will be sold in a manner which deviates from the described above; at the request of the pledgee, the president of the district court may also determine that the pledged property will remain with the pledgee as buyer for an amount to be determined by him. Aside from that the pledgee who has become entitled to proceed to a sale may agree with the grantor to a manner of sale which deviates from the preceding article. Where the

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pledged property is encumbered with a dismembered right or is under seizure, the cooperation of the holder of the dismembered right or of the seizer is also required.

Art. 591 (1) of Ukrainian Civil Code established that sale of pledged goods in case of enforcement shall be done through the public sale. All exceptions shall be specified in agreement or regulation. This article also proclaimed that conditions of public sale of pledged goods shall be established by the law. Currently Act of Ukraine on enforcement proceeding and Resolution of Cabinet of Ministers of Ukraine # 1448, 22.12.1997 On confirmation of Regulation about procedure of holding the auctions (public sales) of off-load (sales) of pledged goods are to regarded to be this "law".

We have already mentioned that exclusive formal ground for public sale of pledged goods in Ukraine is judicial decision. In compliance with provisions of procedural rules of Ukrainian legislation judicial decision usually is not enforcement document itself. After judicial decision enters into force at the request of pledgee court shall issue either the executive writ in civil procedure (art. 368 of Ukrainian Civil Procedural Code) or order of enforcement in economic procedure (art. 116 of Ukrainian Economic Procedural Code). Thereupon pledgee shall submit executive writ or order of enforcement to the district agency of State Enforcement Service of Ukraine. State Enforcement Service of Ukraine is exclusive agency which has the right to enforce judicial decisions in civil and commercial matters and organize public sale of pledged goods. According to the provisions of Resolution of Cabinet of Ministers of Ukraine # 1448, 22.12.1997 On confirmation of Regulation about procedure of holding the auctions (public sales) of off-load (sales) of pledged goods State Enforcement Service of Ukraine shall engage special organization which will organize public sale in the form of auction.

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Art. 25 of of Act of Ukraine on security of creditor's and registration of burdens govern that opening price of sale shall be determined by court. But according to the provisions of art. 591 (2) of Civil Code of Ukraine court has the right to determine opening price of sale for another thing the opening price could be determined by agreement or law. The court practice in this area is not clear at the moment. And Supreme Court of Ukraine still does not mention its own clear position in this particular question [12]. But inasmuch as Act of Ukraine on security of creditor's and registration of burdens is a special law (*lex specialis*) and Civil Code of Ukraine is considered to be a general law (*lex generalis*) according to the principle *lex specialis derogate generali* rules of Act of Ukraine on security of creditor's and registration of burdens shall be applied. Nevertheless if pledgee and pledgor agreed upon the opening price court shall adjudge such agreement and determine the opening price according to this agreement.

Ukrainian legislation proclaimed that in a case of invalidity of public sale or lack of buyer the pledged goods might be conveyed to the pledgee thru the opening price in mutual consent of pledgee and pledgor (art. 591 (3) of Civil Code of Ukraine). However according to the agreement of pledgor and pledgee manner of action in such situation might deviate from the preceding. Where after sale of pledged goods the debt will not be extinguished the pledgee has the right to receive deficient amount of debt from other debtor's property in a way of common priorities (art. 591 (4) of Civil Code of Ukraine).

David Viëtor points out that the length of the process of enforcement depends on the situation and form of enforcement (private or public sale), but there should be a possibility to complete this process within two to three months [6]. At the same time in Ukraine this process demands much more time (within two months to one year), because of rather wide rights which pledgor has

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according to civil substantive and procedural legislation and also as a party of enforcement procedural.

5. Summary

Dutch and Ukrainian legal systems have a similarity in regulation of process of enforcement of pledge. Nevertheless rules which are established by the provisions of Dutch law appear as more flexible and give the parties of enforcement more capacities for quick and full enforcement.

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Філіп'єв А. О.

Накладення стягнення на предмет застави відповідно до цивільного законодавства Королівства Нідерланди та України: продаж предмету застави рухомого майна

В статті проведено порівняння правового регулювання інституту реалізації предмета застави рухомого майна (закладу) відповідно до цивільних кодексів Королівства Нідерланди та України

Ключові слова: застава рухомого майна, накладення стягнення на предмет застави, продаж заставленого майна, реалізація предмету застави, заклад

Филипьев А. А.

Взыскание предмета залога в соответствии с гражданским законодательством Королевства Нидерланды и Украины: продажа предмета залога движимого имущества

В статье осуществлен сравнительно-правовой анализ института реализации предмета залога движимого имущества (заклада) в соответствии с гражданскими кодексами Королевства Нидерланды и Украины

Ключевые слова: залог движимого имущества, взыскание предмета залога, продажа заложенного имущества, реализация предмета залога, заклад

Filipiev A. O.

Enforcement of the pledge: sale of a pledge's object in Dutch and Ukrainian Civil Codes

In that essay rather-legal analysis of the regulation of the institution of pledge of movable goods in Dutch and Ukrainian Civil Codes was made

Key words: pledge of movables, enforcement of pledge, sale of pledged goods, pledge