

УДК 34.01:349.4

**ЗАСТАВА ЗЕМЕЛЬНИХ ДІЛЯНОК:  
ОСОБЛИВОСТІ ДОГОВІРНИХ  
ПРАВОВІДНОСИН В УМОВАХ  
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Досліджено проблеми розвитку та становлення іпотеки земельних ділянок у порівнянні з нормами Цивільного кодексу Німеччини. Проаналізовано ризики, що виникають при іпотеці земельних ділянок. Надано пропозиції щодо вдосконалення вказаних питань.

Важливим етапом у розвитку інституту іпотеки землі стало прийняття Верховною Радою України Закону України «Про іпотеку», в якому визначено поняття іпотеки, іпотекодавця, майнового поручителя, іпотекодержателя. Загалом іпотека як правовий інститут склалася в рамках проведеної на початку 90-х років земельної реформи, спрямованої на формування нового земельного ладу. Протягом 1995–2000 років приймалися укази Президента України, якими передбачалася можливість передачі в заставу права оренди земельних ділянок несільськогосподарського призначення, земельних часток (паїв), земельних ділянок, що перебувають у власності громадян або юридичних осіб.

Йдеться про іпотеку, іпотечну заборгованість і заборгованість за оренду. Незважаючи на відмінності щодо різного ступеня прив'язки права іпотеки до передбаченої ним вимоги, для названих інститутів характерна одна спільна риса:

UDC 34.01:349.4

**PLEDGE OF LAND PLOTS:  
FEATURES OF CONTRACTUAL  
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CONDITIONS OF EUROPEAN  
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The problems of the development and formation of land mortgages in comparison with the norms of the Civil Code of Germany are studied. The risks arising from land mortgages are analyzed. Proposals for improvement of the specified issues have been provided.

An important stage in the development of the land mortgage institute was the adoption by the Verkhovna Rada of Ukraine of the Law of Ukraine "On Mortgages", which defines the concepts of mortgage, mortgagor, property guarantor, mortgagee. In general, the mortgage as a legal institution developed within the framework of the land reform carried out in the early 90s, aimed at the formation of a new land system. During the years 1995–2000, decrees of the President of Ukraine were adopted, which provided for the possibility of pledging the right to lease non-agricultural land plots, land shares (shares), land plots owned by citizens or legal entities.

These are mortgages, mortgage debt and rent arrears. Despite the differences regarding the different degree of attachment of the mortgage right to the requirement stipulated by it, the mentioned institutes have one common feature: in case of non-fulfillment of the obligation, the creditor has the right to demand

у разі невиконання зобов'язання кредитор має право вимагати задоволення його вимоги за рахунок земельної ділянки шляхом проведення її примусового продажу.

Проблема укладання іпотечних договорів полягає в тому, що предмет іпотеки регулюється багатьма нормативними актами, які також містять певні обмеження щодо об'єктів, які можуть бути передані в забезпечення виконання іпотечних договорів. У разі неврахування вимог законодавства такі договори можуть бути визнані судом недійсними.

В умовах євроінтеграції з одночасним утвердженням приватної власності на землю, бурхливим розвитком ринкових земельних відносин земля стала цінним капіталом (товаром), який з часом не тільки не втрачає своєї вартості, а навпаки, може значно зрости в ціна в залежності від місця розташування, функціонального призначення, розвитку інфраструктури, благоустрою території та ін.

Ключові слова: іпотека, застава, земельні ділянки, ризики, оренда, приватне, публічне, оборот, підприємництво, конкурентоздатність, інвестиції, співвласність, договір, судове врегулювання

satisfaction of his claim at the expense of the land plot by carrying out its forced sale.

The problem of concluding mortgage contracts is that the subject of mortgage is regulated by many regulatory acts, which also contain certain restrictions on the objects that can be transferred to secure the execution of mortgage contracts. If the requirements of the legislation are not taken into account, such contracts may be declared invalid by the court.

In the conditions of European integration with the simultaneous establishment of private ownership of land, the rapid development of market land relations, land has become a valuable capital (commodity), which not only does not lose its value over time, but on the contrary, can significantly increase in price depending on the location, functional purpose, infrastructure development, improvement of the territory, etc.

Keywords: mortgage, pledge, land plots, risks, lease, private, public, turnover, entrepreneurship, competitiveness, investment, co-ownership, contract, judicial settlement

Historically, an important role in the legal regulation of contractual land relations was played by the Law of Ukraine "On Property" dated February 7, 1991 (currently invalid), which proclaimed the right to private ownership, in particular to land.

Provisions that gave the right to every citizen of Ukraine to own, use and dispose of land individually or jointly with others became key. Land owners, including private individuals, were given the right to freely perform all actions not prohibited by law in relation to their property.

The acquisition of the right to private ownership of land, the formation and development of private business of various organizational and legal forms and, as a result, the freedom of contractual behavior of business entities in the mortgage lending market created the prerequisites for the legislative consolidation of mortgage relations

In general, the mortgage as a legal institution developed within the framework of the land reform carried out in the early 1990s, aimed at forming a new land system. During 1995–2000, decrees of the President of Ukraine were adopted, which provided for the possibility of pledging the right to lease non-agricultural land plots, land shares (shares), land plots owned by citizens or legal entities.

Mortgage legislation in the conditions of land and agrarian reforms should ensure freedom of agrarian entrepreneurship, freedom of land turnover for every land owner and entrepreneur. With the help of mortgage lending and the use of land pledges, it is possible to create the necessary conditions for the redistribution of land in favor of highly efficient and competitive farms [1, 2].

In the 2000s (after the adoption of the Land Code of Ukraine), land mortgages became one of the effective ways of attracting investments in the development of land plots and the development of agricultural and agrarian production.

In accordance with Article 133 of the Land Code of Ukraine, land parcels belonging to citizens and legal entities with ownership rights may be pledged. A plot of land in joint ownership can be pledged with the consent of all co-owners.

The pledge of a part of the land plot is carried out after its allocation in kind (on the ground) and only on condition that the land plot is assigned a cadastral number. Only banks that meet the requirements established by the laws of Ukraine can be pledge holders of land.

An important stage in the development of the land mortgage institute was the adoption by the Verkhovna Rada of Ukraine of the Law of Ukraine "On Mortgages", which defines the concepts of mortgage, mortgagor, property guarantor, mortgage holder.

The Law of Ukraine "On Mortgages" regulates the procedure for drawing up a pledge agreement, the transfer of rights under the mortgage agreement and the pledge. The legislator paid special attention to meeting the demands of the mortgagee at the expense of the subject of the mortgage. At the same time, there is a possibility of pre-trial settlement of this moment, as well as realization of the subject of the mortgage according to the court's decision. Progressive are the norms of the law regarding the conduct of public auctions.

The Law of Ukraine "On Mortgages" also defines guarantees regarding the rights of creditors, the interests of debtors and other persons who have legal claims to the pledged land plot, the establishment of transparent rules for the registration and execution of mortgage rights and obligations of the mortgagee and other persons on the pledged land plot, the introduction mortgage as a special type of securities, which allows introducing mortgage obligations into free economic circulation, as well as simplifying the procedure for foreclosure on a mortgaged land plot using extrajudicial methods of settlement.

The mentioned Law, along with the Land Code and other legal acts, is the basis for the pledge and further formation of the legal environment. The next legislative step should be a law on land or mortgage banks, which have already proven themselves in other countries [3, 4].

The concept of "mortgage", proposed by land law, actually does not reflect the main content of this concept, namely, that the subjects of mortgage relations operate with a specific object - land. A good definition is that a mortgage is a legal encumbrance for a certain period of time on a plot of land and other objects related to it, which remain in the possession and use of the mortgagor or an authorized third party, who, in cases specified by law, has granted the mortgagee the right to realize them with for the purpose of satisfying the requirements for the land plot [5].

The experience of Germany [6, 7] is interesting, where, in contrast to the requirements of Ukrainian legislation, which limits the mortgagee-owner of an agricultural plot of land in the choice of a mortgagee (Article 133 of the Land Code of Ukraine). In mortgage relations in Germany, lenders (creditors), in accordance with the requirements of the law, can be both private individuals and mortgage banks, savings banks, building savings banks, other credit institutions and official (public) institutions. According to statistics, specialized mortgage banks as financial institutions act as creditors much more often (compared to private individuals), which was caused by the tendency to strengthen the protection of debtors' rights and the increase in the cost of the forced sale procedure.

The term "pledged right" (regarding immovable property) is unknown in German law. In scientific research, it is used as a generalized and simplified name, which in its general sense unites the essence of the three institutions of real estate pledge known to German legislation, which have long been used in binding relations between citizens and received legal consolidation with the adoption of the German Civil Code of 1896.

It is about mortgage, mortgage debt and rental debt. Despite the differences regarding the different degree of attachment of the mortgage right to the claim it provides, one common feature is characteristic of the named institutions: in the event of non-fulfillment of the obligation, the creditor

has the right to demand satisfaction of his claims at the expense of the land plot by carrying out its forced sales.

A plot of land as a means of liability to a creditor and an object of encumbrance is considered in economic unity with other things and rights related to it. In § 14 of the Federal Law "On Mortgage Securities" to protect the rights and legal interests of the creditor, a percentage of the value of the land plot is defined, within which the owner can encumber his land plot, or "loan limit" - the security of the first rank cannot exceed three p' from the value of the land plot [7].

Over time, in Ukraine, the definition of real estate given in Art. 181 of the Civil Code of Ukraine, in addition to ensuring the universality of its use, was expanded by indicating the registration of real estate objects, in particular land plots, in the State Register of Real Property Rights and their restrictions.

Similarly, in Germany, a plot of land as the subject of a mortgage (including all components and things belonging to it) is registered under a special number in the Land Register, where other encumbrances, in addition to the mortgage, are also registered. At the same time, it should be emphasized that those components (belongings) which, as a result of the legitimate use of the land by a third party within the scope of ordinary economic activity, become the property of this person, are not the subject of a mortgage.

Contractual agreements on the limits of mortgage liability are valid only for the parties to the contract and do not apply to legal relations between all other persons. At the same time, the scope of powers of the mortgage creditor does not include the right to dispose of the products obtained on the land plot, although he still has the right to claim rent for the use of the land plot. These requirements can be implemented exclusively through the forced management of property (sequestration).

The problem of concluding mortgage contracts is that the subject of mortgage is regulated by many regulatory acts, which also contain certain restrictions regarding the objects that can be transferred to ensure the execution of mortgage contracts. If the requirements of the legislation are not taken into account, such contracts may be declared invalid by the court.

Article 1 of the Law of Ukraine "On Mortgage" and Art. 575 of the Civil Code of Ukraine allow the subject of a mortgage to include immovable property, as well as movable things, which are equated with immovable property, or property rights. But can any real estate be the subject of a mortgage. According to Art. 5 of the Law of Ukraine "On Mortgages" the subject of a mortgage can be one or more real estate objects, and according to Art. 181 of the Civil Code of Ukraine, immovable property (real estate) includes land plots, as well as objects located on the land plot and inseparably connected with it, the movement of which is impossible without their depreciation and changing their purpose. Article 191 of the Civil Code of Ukraine also recognizes a special object of civil rights - a single property complex - as real estate. This is essentially the same definition given in Art. 2 of the Law of Ukraine "On State Registration of Real Property Rights and Their Limitations".

The issue of distinguishing between movable and immovable objects of civil legal relations acquires practical importance. The legislator proposes the following criteria for classifying objects of civil rights as immovable property: natural properties of objects (land plots, subsoil plots, isolated water bodies), physical properties of objects (close connection with the land, impossibility of movement without depreciation and changes in their purpose — forests, buildings, constructions and other objects), objects specified in the law (according to the law). In addition to the above criteria, Art. 376 of the Civil Code of Ukraine allows to highlight the presence of not only a physical, but also a legal connection between the specified real estate objects and the land plot on which this object is located.

Land plots as the subject of a mortgage are characterized by a number of restrictions that must be paid attention to when concluding mortgage contracts. First of all, it is necessary to take into account the presence of nine categories of land by purpose (including land for development, agricultural purpose, etc.) - Art. 19 of the Land Code of Ukraine. This circumstance can significantly affect the liquidity of the subject of the mortgage in the future. Secondly, only the

owners of the land can be mortgagors. As for the possibility of transferring the right to lease land as a mortgage, provided for in Art. 5 of the Law of Ukraine "On Mortgages", today in the practice of concluding mortgage contracts it is considered quite risky. The risk is related to the fact that a new lease of land is required for a new tenant (mortgagor) in order to register the right of lease for the mortgagee. Thirdly, only banks can be pledge holders of agricultural plots of land. Fourth, the presence of requirements for the content of contracts on the transfer of ownership rights to land plots (location, purpose, composition, legal regime, information on the absence of prohibitions, etc.). Fifth, an expert monetary valuation of the land is mandatory.

There are difficulties with the mortgage of certain types of land plots. So, if an object of unfinished construction is located on the land plot that is mortgaged, then it is also considered the subject of the mortgage regardless of who is the owner (Part 6, Article 6 of the Law of Ukraine "On Mortgages"). In this case, a conflict may arise with the owner of the unfinished building, who was not a party to the mortgage agreement.

In the case of foreclosure on a land plot on which a building is located, which is owned by another person, the mortgagor is obliged to provide the owner of the building with the same conditions of use that the mortgagor had.

The presence of restrictions in the case of alienation does not contribute to the realization of the possibility of concluding mortgage contracts, the subject of which are agricultural lands.

Property rights to real estate (completed or unfinished), which are also classified by the legislator as the subject of a mortgage, require separate consideration. According to Art. 3 of the Law of Ukraine "On Valuation of Property, Property Rights and Professional Appraisal Activities in Ukraine" property rights are recognized as any rights that differ from the right of ownership. The grounds for the mortgagor's property rights may be various contracts.

Part 2 of Art. 16 of the Law of Ukraine "On Mortgages" contains a special case of a mortgage of an object of unfinished construction, according to which it is transferred through the transfer of ownership rights to a land plot. In this case, it must be remembered that only land owners can be mortgagors, and only banks can be mortgage holders of agricultural land. Such restrictions are provided for in Article 15 of the Law of Ukraine "On Mortgages" and Article 133 of the Land Code of Ukraine, and Art. 132 of the Land Code of Ukraine contains requirements for the content of contracts on the transfer of ownership rights to land plots (location, purpose, legal regime, information on the absence of prohibitions). In addition, it is worth paying attention to such aspects of the mortgage, which are provided for by the relevant law.

The value of the subject of the mortgage is determined by agreement between the mortgagor and the mortgagee or by carrying out the assessment of the subject of the mortgage (when this is provided for by law or contract).

Jointly owned property can be mortgaged only with the notarized consent of all co-owners. A co-owner of real estate has the right to mortgage his share in the joint property without the consent of other co-owners, provided that it is allocated in kind and the ownership of it is registered as a separate real estate object.

If the mortgaged building (structure) is located on a land plot owned by the mortgagor, such building (structure) shall be mortgaged together with the land plot on which it is located. If this land plot belongs to another person and was leased (use) to the mortgagor, after foreclosure of the buildings (structures), their new owner acquires the rights and obligations that the mortgagor had under the deed, which established the terms of the lease of this land plot (use her).

If a land plot on which buildings (structures) owned by the mortgagor are located is mortgaged, such land plot shall be mortgaged together with the buildings (structures) on which they are located. After foreclosure on the mortgaged land plot on which buildings (structures) belonging to a person other than the mortgagor are located, the new owner of the land plot is obliged to provide the owner of the building (structure) with the same conditions for using the land plot as the mortgagor had.

It should be noted that those prohibitions and restrictions on the alienation and targeted use of land plots, which are established by the Land Code of Ukraine, are valid under the terms of their mortgage.

Realization of mortgaged land plots for agricultural purposes in case of foreclosure on the subject of the mortgage is carried out at public auctions. Buyers of agricultural plots of land can be persons defined by the Land Code of Ukraine (except for plots of land that are in state and communal ownership).

The right to own land established by the Constitution of Ukraine provides for the possibility of disposing of a plot of land, alienating it, limiting it with other rights, pledging it, etc.

Ensuring in this way the parity of economic and ecological interests, which is the basis of the principle of sustainable development, requires the consideration of these features in the further reform of the economy, taking into account the continuation of the land reform in Ukraine, one of the directions of which is the development of lending secured by land plots.

Pledge of land plots as a legal phenomenon is implemented in land and mortgage legal relations, the presence of an effective mechanism of legal regulation of which is one of the conditions for the functioning of the mortgage system in general. But as evidenced by the analysis of the current legislation of Ukraine in the field of mortgage of land plots, despite the supposedly significant number of legal norms dedicated to the regulation of this phenomenon, there are a number of problems that negatively affect the application of legal norms in the field of mortgage of land plots and lead to their absence in practice implementation of the legal institution of pledge of land plots. First of all, there is no final solution in the legal doctrine of the concept of the pledge of land plots, the relationship between the right of pledge and the rights to land, the object-subject structure of these legal relations, the state registration of the pledge, the grounds, methods and procedure for foreclosure on pledged land plots, protection of the rights of mortgagors of agricultural land, etc. In addition, the legal nature of land mortgage relations remains undefined neither in jurisprudence nor in legislation, which is evidenced by the fact that land mortgage relations are regulated by the norms of various branches of law.

In essence, the right to pledge a land plot in a subjective sense is a set of legal possibilities of the pledgee, which allow him to realize the rights to the value of the land plot owned by another person, which are burdened in terms of the right to land by special land and environmental legal requirements regarding the targeted and rational use of the land plot, as well as regarding its protection and reproduction (subjective right).

The set of legal norms that determine such possibilities, as well as other legal means that allow regulating the system of mortgage relations, act as the right to pledge a land plot in its objective sense, a complex legal institution of land law, which can be defined as a land mortgage right.

A pledge of a plot of land is a limitation of the mortgagor's ownership right to a plot of land, which is established on the basis of a contract or by virtue of the law, and consists in the prohibition of the landowner to exercise authority to dispose of the plot of land without the consent of the pledgee (that is, the obligation of the landowner is to obtain the consent of the pledgee to exercise the right disposition of a land plot), caused by the need to protect the property interests of the mortgagee.

A pledge of a plot of land is an encumbrance of the plot of land with the right of the pledge holder to satisfy his property claims regarding the sale price of the plot of land in the event that the debtor fails to fulfill the main obligation. The concept of land mortgage legal relations is already traditionally defined as social relations regulated by the norms of land law, which mediate the emergence, change and termination of the right to pledge a land plot, which are formed between the owner of the land plot (the mortgagor), the creditor of the obligation secured by the land pledge (the pledgee) and others by subjects of land law (state registrar of rights, subject of evaluation activity, control bodies, etc.) in connection with the implementation by the mortgagor of the ownership right to the land plot and in connection with the implementation by the mortgagee of all legal options aimed at encumbering the land plot of the mortgagor by the right of pledge, by foreclosure on the land plot in case of non-fulfillment of the main obligation secured by the pledge, as well as in connection with the mortgagor's observance of the legal regime of use and protection of the land plot encumbered by the right of the pledge holder.

In fact, the legal relations that arise in connection with the transfer of a land plot as a pledge, by their legal nature, are not land relations, which, in order to achieve the greatest effectiveness of legal regulation, can be regulated mainly by the methods of land law as an independent branch of law, because, in our opinion, and the conclusion of the pledge agreement itself, and further compliance with its terms, as well as most of its requirements are mainly civil in nature.

The legislator provided that the pledge contract must be concluded in writing. This is mandatory. Moreover, in cases where the object of the pledge is real estate (primarily land plots), the pledge agreement must be notarized on the basis of relevant legal documents.

The parties may provide notarization of the pledge agreement in cases where it is not mandatory by law, but one of the parties insists on it.

The right of lien arises from the moment of conclusion of the contract, and in the case when the contract is subject to notarization - from the moment of notarization of this contract. If, according to the law or contract, the subject of the pledge must be with the pledgee, the right of pledge arises at the moment of transferring the subject of the pledge to him. If such a transfer was made before the conclusion of the contract, then from the moment of its conclusion. The registration of the pledge is not related to the moment of the right of pledge and does not affect the validity of the pledge agreement.

In the conditions of the establishment of private ownership of land, the rapid development of market land relations, land has become a valuable capital (commodity), which not only does not lose its value over time, but on the contrary, can significantly increase in price depending on its location, functional purpose, infrastructure development, improvement of the territory, etc.

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Статтю було подано	05.12.2022	The article was submitted
Статтю було доопрацьовано	11.12.2022	The article was revised
Статтю було прийнято	15.12.2022	The article was accepted