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The difference between individual lien and separated mortgage

One of the momentous amendments of the new Civil Code was the introduction of separated mortgage to replace individual lien regulated by the previous Civil Code. In these days, the absence of individual lien has been felt. Therefore, more and more news articles are published in connection with the re-regulation of individual lien in the new Civil Code.

In order to comprehend the purpose of the re-regulation, the two most important differences between the two forms of lien are going to be presented in this article.

First of all, a difference between the two forms of lien lies in transferability. In the regime of the new Civil Code, the separated mortgage is created in such a way that the mortgagee transfers the mortgage established on his claim against the mortgager to the beneficiary of the claim against him.

In the practice of banks, the borrower of home loan and the commercial bank establish a mortgage on the apartment of the borrower. In order to finance the loan to be granted by it, the commercial bank takes out a loan from a mortgage bank, and the commercial bank transfers the mortgage established on the borrower's apartment to the mortgage bank as a collateral security.

However, the mortgage bank cannot transfer this mortgage individually as a separated mortgage; it can only be transferred as combined with the claim designed to secure it. The individual lien regulated in the previous Civil Code was much more flexible because the opportunity of transferring the mortgage to another mortgagee by the mortgage bank was given in case of individual mortgage. The limitation of the transferability in the new Civil Code leads to a problem in the lending practices that behind home loans taken out for a term of ten to twenty (10-20) years, the mortgage bonds of much shorter terms of three to five (3-5) years cannot be transferred individually. As a consequence, the individual lien regulated in the previous Civil Code was more liquid than the separated mortgage provided by the new Civil Code.

The bigger liquidity deriving from individual lien rendered possible the trading of credit products of lower interest rates, so assured a cheaper credit for the population. In accordance with this, several analysts state that the success of CSOK (Family Home Allowance) also depends on the reintroduction of individual lien. The non-transferability of separated mortgage can also raise concerns when during the term of home loans granted for decades, one of the mortgage banks financing the commercial bank decides to merge into another mortgage bank. No clear explanation has been provided so far as to how portfolios are transferred in such a case.

Another considerable difference between individual and separated mortgage is shown in the context of satisfaction from the pledged property. In case of individual lien, the right of satisfaction of the holder of individual lien was not automatically conferred when the secured claim fell due.

The termination of the individual lien was necessary for such purpose, the period of which – unless otherwise agreed – was six (6) months as regulated by the previous Civil Code.

On the other hand, according to the new Civil Code, the separated mortgagee can exercise his right of satisfaction when the initial claim secured by the separated mortgage falls due.

Meanwhile, if the legal relationship between the holder of the original mortgage and the holder of the separated mortgage becomes due earlier than the legal relationship originally secured by the separate mortgage, the satisfaction from the pledge cannot be enforced. This problem can particularly cause disadvantage to the holder of the separated mortgage in case of winding-up proceedings of the initial mortgagee.

Those arguing for the reregulation of individual lien in the Civil Code also refer to the incompliance of the regulation of separated mortgage in the new Civil Code with the rules of Hungarian and European finance laws. In this regard, we would like to draw attention to a problem of interpretation. It can happen that during the winding-up proceedings opened against the original mortgager the holder of the separated mortgage and the holder of the original mortgage would also like to enter into the winding-up proceedings.

The problem is that the holder of the separated mortgage has no claim against the mortgager, while the original mortgagee has no lien since he has transferred it but then again he has a claim. In accordance with the rules in force, the separated mortgage cannot be enforced in winding-up proceedings, since it is a mortgage of ancillary nature rather than an individual lien.

This raises the question whether the holder of separated mortgage, who doesn’t hold a claim, can enter the winding-up proceeding. A similar problem can also occur in the execution against the mortgager.

Those arguing against the reintroduction of individual lien state that enough time has to be given for the courts to give answers to these issues of legal interpretation. In this context, the simple question arises whether the investors are going to wait for these answers?