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MORTGAGE IN INTERNATIONAL PRIVATE LAW

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ABSTRACT

The article discusses the law applicable to the determination of a property-secured right – i.e. a mortgage. Major reflections are preceded by the legal analysis of a mortgage, the concept of the Eurohypothec and the European Land Information Service – EULIS. What follows is a short review of mortgage regulations in selected legal systems (e.g. the French and German systems). The core of the article focuses on the rules for the search of the law applicable to a mortgage and related scope. The change of law governing mortgages (property), e.g. as a result of the change of borders, including a hostile incorporation (annexation), is also discussed.

Key words: a mortgage, conflict of law, conflict of law principles, Rome I regulation, connection of the laws of different countries

1. INTRODUCTION

This article discusses the issue of the cross-border determination of *in rem* rights and the law applicable to the establishment of a mortgage within conflict of law principles. It is a continuation of reflections on the determination of the law applicable to a pledge as a collateral security action[1].

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[1] As regards the concept itself, the catalogue of collateral security actions and the qualification of rights as *in rem* rights, see J. Widło, Zastaw rejestrowy na prawach, Warszawa: Lexis|Nexis, 2008, 160-162.

The analysis focuses on a mortgage in the sense of a pledge right – securing a claim on property or any component of property which does not require the subject of collateral security to be released. It is based on a limited *in rem* right or a similar construct. As part of it, there arises the right to satisfaction with priority over other entities – derived from the subject of collateral security. As a rule, the right applies to property or rights related to property, including those secured earlier with a mortgage (*subintabulat*). This right is effective with regard to other creditors, both unsecured and secured with a lower priority. It is effective with regard to third parties as well as the buyer of the encumbered item and ensures certain privileges in enforcement and bankruptcy proceedings.

The problem that arises is the application of the law applicable to the legal relationship and the rights arising from a cross-border mortgage, i.e. the one including an element of the legal relationship which goes beyond the legal system of one state (because the subject of *in rem* rights is located abroad, the state where the mortgage was established was different from the state where the ruling court is based, the parties are citizens of different states or the law applicable to the mortgage is different from the law applicable to the debt secured with it or the two are based in different countries).

2. REMARKS ON MORTGAGE QUALIFICATION

Private law of respective states usually has a territorial scope of application. Securing rights include in rem rights or obligation rights2. This division is also reflected in the Polish Act of 4 February 2011, Private International Law (PIL)[3]. If a given registered right is qualified as an *in rem* right, there are grounds for the application of the Law of Goods[4] (Art. 41 of PIL) as the proper law to evaluate this right. If a securing right is an ob-

[2] E. Drozd, Kompetencja statutów rzeczowego i obligacyjnego w zakresie praw podmiotowych, Studia cywilistyczne 30 (1979): 127.

[3] Act of 4 February 2011, Polish Private International Law (Journal of Laws from 2015, item 1792), hereinafter referred to as PIL.

[4] In this article the Law of Goods means lex rei sitae (law applicable to property and a mortgage in private international law).

ligation, the Law of Obligations (law applicable to contractual obligations) should be applied.

The question that arises is the one concerning a clear distinction between the scope of application of the Obligations and the Law of Obligations (law applicable to contractual obligations) as well as the premises for the qualification of a given registered right as an in rem right, which creates the foundation for the application of the Law of Goods (in the light of private international law provisions. In this respect, the reflections on a registered pledge should be consulted)5.

It should be repeated here that the concept of in rem rights used for defining the scope of the conflict of law principle in Article 41 of PIL is subject to the process of legal qualification6, which may be carried out according to a variety of criteria[7].

It should be reiterated that the majority of Polish researchers favour the view that the qualification method applied should be based on an autonomous theory, i.e. the concepts of in rem rights in various legal systems must be defined using the method of legal comparison in order to capture the common characteristics of in rem rights in the aforementioned systems (not just the Polish concept of in rem rights). This is done in separation from any specific system of rights8. Some followers of the doctrine also indicate that the qualification method of *lex rei sitae*[9] may be applied. In this method, the qualification of the *in rem* right concept precedes the indica-

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[5] See J. Widło, Zastaw rejestrowy na prawach, Warszawa: Lexis|Nexis, 2008, 556.

[6] The concept of qualification in the light of PIL denotes the interpretation of terms defining the scope of the conflict of law norm in order to determine the premises for the application of this norm, see Maksymilian Pazdan, Prawo prywatne międzynarodowe, Warszawa: LexisNexis 2002, edition 7, Warszawa 2003, edition 8, Warszawa 2011, 53.

[7] As regards the theory of qualification in PIL, see M. Pazdan, Prawo prywatne... , 54 and 55, which mentions: 1) the qualification according to the law in force at the seat of the ruling court, 2) the qualification according to legis causae, 3) the concept of autonomous qualification, 4) the qualification according to legis fori.

[8] Fryderyk Zoll Junior, Międzynarodowe prawo prywatne, Kraków 1947, 50 and the following, Kazimierz Przybyłowski, Prawo prywatne międzynarodowe. Część ogólna 1935,104, E. Drozd, Kompetencja statutów..., 127, M. Pazdan, Prawo prywatne... , 54 and the following.

[9] See a review of opinions in E. Drozd, Kompetencja statutów, 133, M. Pazdan, Prawo prywatne, 186.

tion of the applicable law. It is carried out according to the interpretation of the Law of Goods, i.e. the PIL provisions of the state where the property is situated [10] (and not the seat of the ruling court). The Law of Goods is the one that is effective *erga omnes* and offers privileges to the secured creditor (including enforcement privileges).

In Poland, it is accepted (E. Drozd[11]) that a limited *in rem* right involves what is defined as such by an act of law. A. Wąsiewicz holds a different opinion. According to this author, it should be accepted that the *numerus clausus* rule makes it possible to include among (limited) *in rem* rights the rights listed in the Civil Code, Book II (…) or those that may not be denied such characteristics on the basis of the analysis carried out even though they are regulated in another book of the Civil Code or another act of law.[12] I. Ignatowicz[13] and S. Grzybowski[14] are also inclined to endorse this view.

According to the foreign doctrine, the constitutive quality of *in rem* rights is their absolute nature – effectiveness *erga omnes*[15]. The problem that arises is whether *in rem* rights should only be those that are characterised by multi-directional effectiveness as regards third parties (such as legal protection, protection against a breach, protection against the loss of a right and against the acquisition of a right by an unauthorised person), effectiveness as regards the purchaser and effectiveness in enforcement and bankruptcy proceedings or whether it is sufficient that those rights are characterised only by one-directional extended effectiveness[16].

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[10] The problem will arise for in rem rights on rights. The questions that need to be addressed here is the 'location' of the private law. Cf further deliberations.

[11] E. Drozd, Kompetencja statutów rzeczowego i obligacyjnego…, 128.

[12] Andrzej Wąsiewicz Prawo w*łasności i inne prawa rzeczowe*. In: System Prawa Cywilnego, ed. J. Ignatowicz. Vol. II . Wrocław 1977, 598.

[13] Jerzy Ignatowicz, Komentarz do kodeksu cywilnego, t.1, ed. Jerzy Ignatowicz, Krzysztof Pietrzykowski, Warszawa 1972, 669.

[14] Stefan Grzybowski, Zarys prawa rzeczowego, Warszawa: PWN 1976, 41.

[15] E. Drozd, Kompetencja statutów, 129, but the effectiveness of the law with regard to third parties may be analysed on many platforms. Detailed reflections may be found in *ibidem*, 130.

[16] E. Drozd, Kompetencja statutów..., 130 –131.

For the purpose of further deliberations, it needs to be indicated that considering the existing doubts, some rights are treated as irrefutable in rem rights in all legal systems, e.g. the right of ownership or a mortgage[17]. Pledge rights are also treated as typical *in rem* rights[18]. The reflections on the concept and legal nature of a mortgage in the Polish law will be disregarded here as the subject has been comprehensively discussed in the extensive literature on the subject which is part of the civil law canon[19].

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[17] E. Drozd, Kompetencja statutów... 132, J. Górecki, Hipoteka – aspekty kolizyjnoprawne, In: Rozprawy z prawa prywatnego. Księga pamiątkowo dedykowana profesorowi Aleksandrowi Oleszce, ed. Jerzy Jacyszyn, Anna Dańko-Roesler, Mksymilian Pazdan, Wojciech Popiołek, Warszawa: Stowarzyszenie Notariuszy Polskich, 2012, 144 and the German literature quoted herein which qualifies a mortgage in the same way in the light of Article 43 (1) of EGBGB.

[18] E. Drozd, Kompetencja statutów... , 153.

[19] There are many publications about a mortgage, including in particular those introducing its capped model to the amended Polish law, such as Pisuliński Jerzy, Hipoteka, In: System Prawa Prywatnego, vol. 4, ed. Edward Gniewek, Warszawa: CH Beck 2007, Pisuliński Jerzy, Hipoteka bankowa, In: Encyklopedia prawa bankowego, ed. W. Pyzioł, Warszawa: CH Beck 2001; Pisuliński Jerzy, Hipoteka kaucyjna, Kraków: Zakamycze 2002; Pisuliński Jerzy, Hipoteka na nieruchomości zabudowanej domem mieszkalnym. Uwagi de lege lata i de lege ferenda, In: Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego. Księga pamiątkowa dla Romualda Sztyka, ed. Edward. Drozd, Aleksander Oleszko, Maksymilian Pazdan, Kluczbork: Stowarzyszenie Notariuszy RP 2007; Pisuliński Jerzy, Hipoteka na udziale we współwłasności nieruchomości, KPP 1 (2002), Pisuliński Jerzy, O planowanej nowelizacji ustawy o księgach wieczystych i hipotece i wprowadzeniu długu gruntowego, KPP 3 (2005), Pisuliński Jerzy, Przedmiot i treść *hipoteki. Zagadnienia wybrane*, Rejent 9 (1992), Pisuliński Jerzy, Verfügung *über* frei gewordene Hypothekenstellen, In: Ius est ars boni et aequi. Festschrift für Stanisława Kalus, ed. Magdalena Habdas, A. Wudarski, Frankfurt am Main 2010; Pisuliński Jerzy, Zasada szczegółowości i akcesoryjności hipoteki po nowelizacji, In: Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci prof. E. Gniewka, ed. J. Gołaczyński, P. Machnikowski, Warszawa: CH Beck 2010; Pisuliński Jerzy, Hipotek, In: Hipoteka po nowelizacji, ed. J. Pisuliński, Warszawa: Lexisnexis 2011; Swaczyna Bartłomiej, Hipoteka *łączna* po nowelizacji - zagadnienia wybrane, Wrocławskie Studia Sądowe 2 (2012), Swaczyna Bartłomiej, Hipoteka umowna na nieruchomości, Kraków: Zakamycze 1999; Swaczyna Bartłomiej, Hipoteka umowna, Warszawa-Kraków: WoltersKluwer 2007; Swaczyna Bartłomiej, Rozporządzanie opróżnionym miejscem hipotecznym i hipoteka właściciela (uwagi na tle projektu Komisji Kodyfikacyjnej Prawa Cywilnego, KPP 1 (2003), Swaczyna Bartłomiej, W kwestii ustanowienia zabezpieczenia hipotecznego przy umowie ramowej, Prawo Bankowe 5 (2008),

3. UNIFICATION ATTEMPTS – UNIFORM LAW. THE EUROHYPOTHEC. A MORTGAGE IN SELECTED LEGAL SYSTEMS

1.1. The Eurohypothec

It needs to be noted that there has been an attempt to unify the rights secured on property as part of the Eurohypothec.

There was a proposal to introduce a common mortgage for Europe, shaped as a relatively flexible right secured on property with an aim to strengthen integration with regard to mortgage lending (the freedom of movement of loans and collaterals) in the European Union.

The Eurohypothec was to become a general European non-accessory security instrument, an alternative to pledge rights on property governed by internal legal systems of respective Member States.

'Basic Guidelines for a Eurohypothec'[20], which were developed, made a comprehensive document defining rules, the legal nature and the way of creation, transfer and expiration of the Eurohypothec and, in particular, the application of that collateral security measure – related to the entry into a register as well as enforcement and bankruptcy proceedings[21].

Rudnicki Stanislaw, Rudnicki Grzegorz, Komentarz do kodeksu cywilnego. Księga druga. Własność i inne prawa, Warszawa: LexisNexis 2011; Maria Kaczorowska, Koncepcja Eurohipoteki na tle praw zastawniczych na nieruchomościach w Europie, Wrocław: Wydawnictwo Opole 2016, Paulina Armada-Rudnik, Prawo hipoteczne po nowelizacji z 26.6.2009 r., Monitor Prawniczy 1 (2010), 7-15; Edward Gniewek, Współczesny model hipoteki – zasadnicze zręby konstrukcji, Monitor Prawnczy 4 (2011), 181-188; Zaradkiewicz Kamil, Nowa regulacja prawa hipotecznego, Przegląd Prawa Handlowego 1 (2011), (supplement), Izabela Heropolitańska, A. Tułodziecka, Zagadnienia z praktyki bankowej i sądowej na tle znowelizowanego prawa hipotecznego – wnioski po X Ogólnopolskiej Konferencji Wieczystoksięgowej, part 1, Monitor Prawa Bankowego 9 (2012), 96-104; part 2, 10 (2012), 90-100; Barbara Jelonek-Jarco, Julita Zawadzka, Praktyczne problemy nowelizacji ustawy o księgach wieczystych i hipotece, Rejent 9 (2010), 33-56.

[20] Basic Guidelines for a Eurohypotec, Warsaw (2005).

[21] Maria Kaczorowska, Koncepcja Eurohipoteki na tle praw zastawniczych na nieruchomościach w Europie, Wrocław: Wydawnictwo Opole 2016, 77- 87 and the following, Wudarski Arkadiusz, W poszukiwaniu konstrukcji, KPP 1 (2009), 209, 233 and the following.

According to the definitions provided in Clause 2.1 of 'Basic Guidelines' hereinafter referred to as BG, the Eurohypothec is a non-accessory pledge right on property under which its holder may demand the payment of a specific account receivable secured on the property. As a rule, the Eurohypothec is applied in combination with a collateral security agreement[22].

The adopted concept of the Eurohypothec has three fundamental qualities determining the legal characteristics of the future common pledge law on a property:

– the collateral security-based function,
– flexibility,
– the European range[23].

The Eurohypothec may only be established by a property owner. The property owner does not need to be the creditor's personal debtor at the same time. The national law may introduce the requirement of concluding a contract between the owner and the future holder of the right to the Eurohypothec as a pre-condition for the establishment of the Eurohypothec (Clause 3.1 of Basic Guidelines).

According to Clause 3.2 of BG, the Eurohypothec should be entered into the relevant property register (land and mortgage register), following the national law regulation. Registration determines the effectiveness of the Eurohypothec as regards third parties[24]. Pursuant to Clause 3.3 of BG, there are two types of the Eurohypothec that may be governed by the national law: the Eurohypothec in the form of a letter right and the Eurohypothec in the form of a non-certified right (non-letter right). The Eurohypothec should guarantee the authorised party full satisfaction, also in the event of the owner's bankruptcy. It is inadmissible to change the priority of satisfaction to the detriment of the person authorised in the Eurohypothec with the exception of the expenses related to the bankruptcy proceedings (Clause 9.1 of BG).

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[22] M. Kaczorowska, , Koncepcja Eurohipoteki …, 108, Wudarski A., W poszukiwaniu konstrukcji…, 233.

[23] M. Kaczorowska, , Koncepcja Eurohipoteki … ,106 and the following;

[24] M. Kaczorowska, , Koncepcja Eurohipoteki …, 108.

Moreover, if the Eurohypothec is to be traded, a common European property register is required. The European Land Information Service (EULIS)[25], which is being currently developed, plays an important role here.

Work on EULIS was inaugurated in 2002 as part of the eContent programme of the EU Directorate General for the Information Society. A portal offering access to the property registers of the countries that had joined the project was launched on 2006. Currently, the EULIS system includes Austria, Spain, the Netherlands, Ireland, Lithuania, Scotland, England and Wales, and Sweden[26] as the registers of those countries have been entirely included in the EULIS network[27]. EULIS is an initial platform, but if other EU Member States were to join it, there needs to be a uniform mechanism for obtaining information on encumbrance and a mechanism for a mortgage entry, e.g. into a European database. This would result in making this right public in a way accepted in a given state or - if there is no unified property registration – within the above mentioned platforms of law creation and information provision. An extremely important detail needs to be mentioned here, i.e. uniform property marking methodology and a uniform data catalogue which enables queries about property (e.g. numbers assigned to property, not land and mortgage registers). This would create a need for a property register including additional registration of property titles and their uniform marking.

3.2. Mortgage In Selected Legal Systems

Securing rights on property should be briefly mentioned here.

3.2.1. The French law. The Hypothec

In the French law a mortgage (hypothèque) is classified as collateral security, accessory security or as a securing in rem right of the second degree (sûretés réelles, droits réels accessoires, de garantie, du second degré). A securing in rem right of the second degree is one of the categories of in rem

[25] M. Kaczorowska, , Koncepcja Eurohipoteki … , 120.

[26] EULIS in total 21 countries, see www.eulis.eu [date of access: 12.08.2019].

[27] M. Kaczorowska, , Koncepcja Eurohipoteki …, 108.

rights, next to independent in rem rights or in rem rights of the first degree (droits réels principaux, du premier degré)[28]. Unlike independent *in rem* rights which apply to the substance of things, collateral security refers to the value expressed in financial terms and is not independent of the claim it secures. A mortgage is defined in Article 2393 of the French Civil Code from 1804 as an *in rem* right to a property for the purpose of paying off the financial liability.

A contractual mortgage (hypothèque conventionnelle) is governed in Articles 2413-2424 of the French Civil Code. A contractual mortgage is created as a result of the conclusion of a mortgage contract. A notary deed is required to declare the establishment of a mortgage, the creditor's declaration may be submitted in an ordinary written form. The entry of a mortgage into a property register is just a pre-condition for the effectiveness of the pledge right with regard to third parties[29].

3.2.2. The German Law. A mortgage, Land Charge And AnnuityFee

The rights of pledge in the German law include a mortgage and a land charge with the subcategory of an annuity. They are governed by § 1113-1203 of the German Civil Code (BGB from 1900). In trade, the land charge as a non-accessory right is of primary importance. Pursuant to § 1192 of the German Civil Code, mortgage regulations apply to a land charge[30].

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[28] The category of independent *in rem* rights includes ownership and *in rem* rights separated from ownership. See Ograniczone prawa rzeczowe w prawie francuskim, SPP 4 (2008), 20.

[29] Stéphane Glock, Real Property Law and Procedure in the European Union. France Report, http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/France, [date of access: 4.07.2019], A. Kaczorowska, Koncepcja Eurohipoteki, 156, see: Report Consumer Market Study On The Functioning Of Real Estate Services For Consumers In The European Union. https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/ZERP/TENLAW/FollowUp/real_estate_services_final_report_EU_october_2018.pdf , [date of access: 12.12.2019].

[30] Christian Hertel, Real Property Law and Procedure in the European Union. National Report. Germany, http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Germany.

Pursuant to § 1113 (1) of the German Civil Code, a mortgage is a right under which a creditor may demand the payment of a specified amount secured on the encumbered property to satisfy a claim. A mortgage may exist as an accounting right – entered into the land and mortgage register, or a letter of mortgage – defined in a separate document, a peculiar bearer's option of collateral security issued to the holder by a land and mortgage office (§ 1116 of the German Civil Code)[31]. Apart from an ordinary mortgage (traded), the German law includes a security mortgage (*Sicherungshypothek*), which has an accessory nature[32].

A land charge governed by § 1191-1198 of the German Civil Code is a stand-alone collateral security and may be traded independently. The right of pledge and a secured claim are linked by means of the so-called collateral security agreement. Pursuant to § 1191 (1) of the German Civil Code, a land charge is the right which encumbers property in such a way that the person for the benefit of whom the encumbrance has been established may demand the payment of a specified amount secured on the property[33]. It is of a non-accessory nature as it has been predicted to become entirely independent of the existence of the claim secured by it. The land charge is the so-called isolated or stand-alone land charge (*isolierte Grundschuld*, also referred to as *Primärgrundschuld*)[34]. In practice,

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PDF (2.09. 2019), A. Kaczorowska, Koncepcja Eurohipoteki … , 170, Report Consumer Market Study On The Functioning Of Real Estate Services For Consumers In The European Union. https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/ZERP/TENLAW/FollowUp/real_estate_services_final_report_EU_october_2018.pdf, [date of access: 12.12.2019].

[31] A. Kaczorowska, Koncepcja Eurohipoteki, 170.

[32] Jerzy Pisuliński, Hipoteka kaucyjna, Kraków: Zakamycze 2002, 23-24; Jerzy Pisuliński, O długu na nieruchomości, Transformcje Prawa Prywatnego 1 (2001), 15. Jerzy Pisuliński, Rys prawnoporównawczy. Hipoteka w zagranicznych systemach prawnych. Eurohipoteka, In: Hipoteka po nowelizacji. Komentarz, ed. J. Pisuliński, Warszawa: LexisNexis 2011, 51 and the following.

[33] Adam Bieranowski, Dług gruntowy (uwagi na tle projektowanej regulacji), Rejent 10 (2004), 76 and the following, Arkadiusz Wudarski, Umowa zabezpieczająca jako surogat akcesoryjności długu gruntowego, Kwartalnik Prawa Prywatnego 2 (2010), 435 and the following; A. Kaczorowska, Koncepcja Eurohipoteki…, 170.

[34] A. Kaczorowska, Koncepcja Eurohipoteki… , 173-174, Pisuliński J., Rys prawnoporównawczy. Hipoteka w zagranicznych systemach prawnych. Eurohipoteka,… , 51 and the following.

the right of pledge which is under consideration, takes the form of the so-called securing land charge (*Sicherungsgrundschuld*) used for securing the existing or future claims. The regulation of a securing land charge as a statutory subtype of the land charge was envisaged in the amendment to the German Civil Code of 2008 which introduced the legal definition of a securing land claim in § 1192 (1a) ('a land charge established to secure a claim')[35].

The establishment of a securing land charge is accompanied by the conclusion of a collateral security agreement by the parties defining the purpose of the security, which links the right of pledge and the secured claim.

3.2.3. The English and Scottish law. Mortgage

The regulations of the property law, including a property-based collateral security, in force in the United Kingdom of Great Britain and Northern Ireland are different. There are differences, in particular, between the English law and the Scottish legal system[36]. The right that corresponds to the mortgage in England and Wales is a *mortgage,* while in Scotland[37] it is a *standard security* (*right in security*). In its content and purpose, a mortgage initially corresponded to the transfer of ownership as a debt collateral security[38].

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[35] A. Wudarski, Umowa zabezpieczająca, 436-437.

[36] Paweł Blajer, Historyczny rozwój angielskiego modelu rejestrowania praw do nieruchomości, In: Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi, ed. Marlena Pecyna, Jerzy Pisuliński, Małgorzata Podrecka, Warszawa: Lexisnexis 2013, 275; M. Kaczorowska, Koncepcja Eurohipoteki… , 193.

[37] Along with fixed security, the English and Scottish law distinguishes the so-called floating security or floating charge, which is a kind of a general pledge encumbering the components of the assets of an active company. See Jacek Gołaczyński, Zastaw na rzeczach ruchomych, Warszawa: CH Beck 2002,110 T. Stawecki, Zastaw , In: Ustawa o zastawie rejestrowym. Warszawa 1998 , 193 and the following, Report Consumer Market Study On The Functioning Of Real Estate Services For Consumers In The European Union. https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/ZERP/TENLAW/FollowUp/real_estate_services_final_report_EU_october_2018.pdf, [date of access: 12.12.2019] .

[38] T. Stawecki, In: T. Stawecki, M. Tomaszewski, F. Zedler, Ustawa o zastawie, 194 and the following

The English mortgage is governed by the act on *in rem* rights of 1925 (*Law of Property Act*) and may take two forms: *a legal mortgage* and *an equitable mortgage*. Historically, the *legal mortgage* provided for an automatic transfer of the right to the property upon the creditor, which could subsequently be transferred back upon the debtor after the expiry of the secured claim, hence its nature was close to the transfer of ownership as a debt collateral security. The debtor was unable to establish another mortgage for the benefit of another creditor. Because of the limitations following from the regulation of a *legal mortgage*, an alternative security measure was introduced – an *equitable mortgage*. Under the English *in rem* right there was a change in the legal mortgage regulation which excluded the transfer of the right to property upon the creditor and admitted the possibility of establishing many mortgages by a debtor[39].

A special form of a *deed*[40] is reserved for the contract which establishes a mortgage in the form of a *legal mortgage*. The mortgage thus established, which encumbers a property entered into a property register, is subject to registration, which makes the mortgage effective with regard to third parties. In the case of a freehold, property ownership unlimited by time, the first mortgage is established for 3000 years and each next one for the period longer by one day. The mortgage encumbers the property together with its components and attachments[41]. The mortgage has a strictly accessory nature. It may secure claims of a defined value and credits on a current account[42].

3.2.4. Mortgage In the American Law

Regardless of what is secured, securing rights in the US are called *security interests*. What they share is the function – the security of a claim – and the content according to which priority is given to the satisfied

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[39] M. Kaczorowska, Koncepcja Eurohipoteki…, 193., J. Pisuliński, Rys prawnoporównawczy…, 50.

[40] M. Kaczorowska, Koncepcja Eurohipoteki… ,194.

[41] J. Pisuliński, Rys prawnoporównawczy, p. 51.

[42] J. Pisuliński, Rys prawnoporównawczy... , 51.

creditor in the event of security performance and in simplified satisfaction procedures.

Each state has its own legislation governing property encumbrance.

There are two kinds of contractual mortgages in the US: a *mortgage* and a *deed of trust.* Moreover, the American law also provides for an *equitable mortgage*[43]. State legislatures admit the existence of statutory mortgages (e.g. for the benefit of the seller – a *vendor's lien*). The difference between a *mortgage* and a *deed of trusty* boils down to the fact that a *deed of trust* is a contract concluded by three parties: a property owner, creditor and a trustee [44]. Under the contract, the trustee becomes the property owner and the transfer of ownership occurs in order to secure a claim. If the secured claim is not paid off, the trustee has to sell the property. If the obligation has been fulfilled, the trustee has to transfer the ownership back to the person who established the security.

An entry into a property register (*county recorder*) is not required to create a mortgage. The entry is important for the priority of rights encumbering the property and the effectiveness of the mortgage as regards third parties[45].

In the American law, a mortgage is of accessory nature. It is also admissible to secure a claim which is to arise in the future (an *open-end mortgage* is established).

4. CONFLICT OF LAW PRINCIPLES APPLICABLE TO MORTGAGE

Article 41 of the Polish Private International Law of 4 February 2011, currently in force, which regulates the law applicable to a mortgage applies

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[43] J. Pisuliński, Rys prawnoporównawczy.., 52 and the literature quoted herein.

[44] J. Pisuliński, Rys prawnoporównawczy... , 52.

[45] As regards the scope of encumbrance, a mortgage may encumber a property (*fee simple*) together with its fixtures but it may also encumber some rights to a property (e.g. perpetual usufruct). In most states, a mortgage is executed by the public sale of the encumbered property (*foreclosure by sale*) and the payment of the secured debt (*strict foreclosure*), J. Pisuliński, Rys prawnoporównawczy... , 53.

a general territorial jurisdiction rule to the location of an *in rem* right, including a mortgage[46].

Pursuant to Article 41 (1) of the Private International Law, ownership and other *in rem* rights are subject to the law of the country in which the item they apply to is located. (2) The purchase and loss of property as well as the purchase, loss and change of the content or priority of other *in rem* rights are subject to the law of the country in which the subject of those laws was located at the moment when the event entailing the legal consequences occurred.

In general, the rules for establishing a mortgage are identical regardless of the subject to mortgage, i.e. whether it involves immovables or rights (Article 41 (1) of the Private International Law). In such a situation the *lex rei sitae* of the subject to mortgage location is usually applied. What must be considered is the so-called *situs naturalis*, i.e. the real location of the subject to mortgage. It refers to the physical location of the property, property titles such as perpetual usufruct or rights (a mortgage on a claim secured by a mortgage). It should be accepted that the Law of Goods of the *subintabulate* - i.e. a mortgage on a claim encumbered by a mortgage – will be the location of the property that secures the claim secured by a mortgage. Such a solution makes it possible to take into account both the application of the *subintabulate* in general and the mechanism of its establishment or the system of transfer for such a claim (e.g. the system of mutual legal dependence between the claim and the mortgage securing it). It is relatively easy to determine in which country the property is located because of national borders and the external marking of the territory of each

[46] There are relatively few remarks on the law applicable to a mortgage, see Jacek Górecki, Hipoteka –aspekty kolizyjnoprawne…, 143, and the following, Jacek Górecki, Prawo rzeczowe, In: System Prawa Prywatnego. Prawo Prywatne Międzynarodowe, T 20B, ed. Maksymilian Pazdan, Warszawa: CH Beck 2015, 933 and the following. Jacek Górecki, Umowy dotyczące nieruchomości w prawie kolizyjnym, In: Z zagadnień prawa rolnego, cywilnego i samorządu terytorialnego. Księga pamiątkowa profesora Stanisława Prutisa, ed. J. Bieluk, Białystok 2012, M. Kaczorowska, Koncepcja Eurohipoteki… , 79, 87, and the following, Arkadiusz Wudarski A., W poszukiwaniu konstrukcji , KPP 1 (2009), 209, 233 and the following.

state. Additionally, a land register system makes it possible to identify the property using a land and mortgage register, land register, cadastre, etc.[47]

The selection of the law applicable to a mortgage is not admissible as an *in rem* right[48]. A problem arises when a right is mortgaged. It should be assumed that in such a situation it is necessary to seek the location of the right[49].

The Law of Goods must change when the law applicable to the mortgage subject changes.

In theory, there may be two reasons for it. The first is a change in the relevant conflict of law principles and the second - a change of the national borders of the state where the property is located.

The first situation will not occur in the case of property because according to the universal rule applied across the world, the law applicable to property is determined on the basis of *lex rei sitae*.

The second may arise when there is a change of national borders.

In general, the change of national borders falls into one of the two categories: 1. A voluntary arrangement between states, and 2. a result of annexation, in particular aggression. In the second category, it is important that the change of borders is recognised by respective states and in terms of the international relations.

Paradoxically, the first situation did arise in Poland's recent history, which was one of the most extensive border corrections in contemporary rope. It was performed under the agreement on the change of borders of 15 February 1951[50] (the area was similar in size to the city of Warsaw). The agreement was published in the Journal of Laws from 1951, no 11, item 63 (hereinafter referred to as the agreement on BC).

It applied to the area of 480 km² exchanged between Poland and the USSR (Article 1 of the agreement on BC). The USSR transferred immov-

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[47] As regards property registration systems see M. Kaczorowska, Eurohipoteka… , 138 and the following, *passim*.

[48] J. Górecki, Hipoteka –aspekty kolizyjnoprawne.., 144, footnote 7.

[49] As regards detailed rules for the search of the location of the law applicable to a pledge which will be applied here see J. Widło, Zastaw… , 556 and the following.

[50] International agreement between Poland and the Soviet Union on the exchange of borders of 15 February 1951, was published in the Official Journal of 1951, no 11, item 63

ables to Poland within the-then Oblast of Drohobych, a part of the USSR, which at present includes the town of Ustrzyki Dolne (*Устрики Долішні*) and the villages of Czarna (*Чорна*), Lutowiska, Krościenko, Bandrów Narodowy, Bystre and Liskowate together with the adjacent land. Poland transferred the following immovables to the USSR – a part of the Lublin Province with the town and villages of Bełz (currently *Белз*), Uhnów (*Угнів*), Krystynopol (*Червоноград*), Waręż (*Варяж*), Chorobrów (*Хоробрів*) and the left-bank part of Sokal – Żwirka (*Жвирка*) together with the railway line between Rawa Ruska and Krystynopol. Currently, those towns and villages are located within the region of Sokal in the Oblast of Lviv (*Сокальський район, Львівська область*). Out of the seven municipalities, the borders of which were corrected (Bełz, Chorobrów, Dołhobyczów, Krystynopol, Uhnów, Tarnoszyn and Waręż), only the municipality of Krystynopol was transferred to the USSR in its entirety.

Pursuant to the international agreement, the entire movable assets (buildings, kolkhozes, infrastructure, railway lines) were transferred, together with the territory, to the new owner. This is why the transferring state could not demand any compensation for it. The transferring state retained its right to the movable assets (agricultural equipment, rolling stock, livestock) on the condition that they would be transported from the other state. This entailed the displacement of the population and the transfer of movable assets within the period of 6 months[51].

It is unfortunate that the second situation also arose in the history of contemporary Europe as an unlawful invasion and annexation of the Crimean Peninsula, a part of Ukraine, by the Russian Federation.

It should be assumed that if the change of borders occurs and is recognised internationally or, at least, by the state of *legis fori*, a new law of goods should be applied. Problems arise when a part of the territory of a foreign state is unlawfully annexed, which is not recognised in terms of international relations.

The situation when one property is located within the territories of two states should be excluded. In principle, each state shapes the terri-

[51] As a result of this 'contractual' change of borders Poland lost populated and developed areas rich in coal deposits which extended all the way to the coal mine of Bogdanka near Lublin.

torial boundaries of property exclusively within its own borders. It has the necessary powers, the land and mortgage register system or the cadastre within its own territory[52]. Problems may arise when a part of the property encumbered with a mortgage prior to the change of borders becomes, as a result of it, transferred to another state. In general, in individual legal systems property may be encumbered with the equivalent of a mortgage in terms of its content or purpose.

5. THE SCOPE OF THE LAW OF GOODS APPLICABLE TO MORTGAGE

As regards the scope of the Law of Goods applicable to the mortgage – i.e. the circumstances in which the applicable law is applied, it involves:
1. The determination of the claim that may be secured with a mortgage.

It must be determined whether it is an existing claim or a future claim; whether the claim is exclusively monetary or non-monetary; whether it is one claim or a set of claims; whether the claim is an amount in a nominal value or the highest security amount. The currency of the mortgage and the securing claim needs to be indicated, too[53].
2. The subject of a mortgage and its definition (identification).

The relevant "lex rei sitae" defines whether the subject of a mortgage is property or something that may be treated as property, e.g. a dwelling or an air column above the property, a separate physical part of the property, a share in a property right, a mortgage on a mortgage claim or, possibly, other items of this non-possessory right. It also defines to what extent the related rights and appurtenances are encumbered with the mortgage[54].
3. The way of creating a mortgage and the kinds of mortgage.

The relevant "lex rei sitae" defines the way of creating a mortgage, in particular whether it is exclusively a contract, whether a unilateral declaration of the property owner is sufficient and whether an entry into a land

[52] As regards the possibility of the creation of a collective mortgage on a property located in the territory of more than one state see J. Górecki, Hipoteka –aspekty kolizyjne…, 145.

[53] J. Górecki, Prawo rzeczowe, In: System Prawa Prywatnego. Prawo Prywatne Międzynarodowe, T 20B, Warszawa 2015, 967 and the following.

[54] J. Górecki, Hipoteka –aspekty kolizyjne…, 146.

and mortgage register is required. Moreover, it defines whether it is possible to create a statutory or compulsory mortgage. It also specifies whether it is possible to create an aggregate mortgage or a general mortgage, just like in the French law, and whether it is necessary to obtain an approval of a national body to create a mortgage[55].

4. The content of a mortgage.

The scope of a mortgage. The relevant "lex rei sitae" indicates the mortgage content, whether other ways of satisfaction than enforcement are admissible, whether a mortgage includes limitations with regard to the disposal of the encumbered property, the priority of mortgages and the admissibility of disposing of an emptied mortgage entry. It specifies whether the mortgage secures the principal amount or accessory liabilities, accessory claims and the costs of satisfaction. It also defines the way of satisfaction for the encumbered property[56].

5. The accessory nature of a mortgage.

The law of goods makes it possible to determine whether a mortgage is an accessory one with regard to three aspects: the creation of a claim, its further existence, including the transfer of the secured claim and the claim expiry. It makes it possible to determine whether a mortgage may exist without a claim[57].

6. THE LEGAL NATURE AND CONSEQUENCES OF AN ENTRY INTO A LAND AND MORTGAGE REGISTER (PROPERTY REGISTER).

The relevant "lex rei sitae" defines the nature of a mortgage entry into a land and mortgage register. This issue is related to the premises of mortgage creation in the situation when a mortgage entry is a premise of its creation and has a constitutive nature[58]. The entry is made by the court (body) with jurisdiction over the property location. Those issues

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[55] J Górecki, Prawo rzeczowe…, 968.

[56] J Górecki, Prawo rzeczowe…, 968.

[57] M. Pazdan, Prawo Prywatne…, 268, J Górecki, Prawo rzeczowe…, 969.

[58] As regards some exemplary property registers, see the reflections above and M. Kaczorowska, Eurohipoteka… [The Eurohypothec…], 138 and the following, passim.

are governed by the public law provisions (*lex forii – loci processus* with regard to the grounds for an entry, the form and contents of documents, fees, etc.)[59].

Article 25 of the Private International Law, which provides that the form of a legal transaction is subject to the law applicable to this transaction, governs mortgage forms. As an exception from this rule – the requirements concerning the form of a legal transaction are satisfied if they were fulfilled pursuant to the law of the state where the transaction was executed. It is assumed that this exception does not apply to the regulations concerning properties, which includes mortgages[60]. For a mortgage, it is assumed that the form of its establishment is determined by the law applicable to the act of its establishment, i.e. the relevant "lex rei sitae" for the property location (Article 41 of the Private International Law)[61]. Separate conflict of law aspects should be examined in order to determine the law applicable to the contracts creating an obligation of establishing a mortgage. They include the application of Rome I from 2008[62], which provides for the possibility of the choice of law (Article 3 of Rome I), or, in the absence of the choice of law, the law of the state where the property is located (Article 4 (1) (c) of Rome I).

The form of the contract imposing an obligation to establish a mortgage will be evaluated according to Article 11 (5) of Rome I (which had its equivalent in the Rome convention) [63].

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[59] J. Górecki, Hipoteka –aspekty kolizyjne…, 147.

[60] J. Górecki, Hipoteka –aspekty kolizyjne … , 147 and the literature quoted herein in footnote 13.

[61] J. Górecki, Hipoteka –aspekty kolizyjne… , 148.

[62] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations,. O. J. EU L 177, hereinafter referred to as regulation Rome I or Rome I.

[63] J. Górecki, Hipoteka – aspekty kolizyjne… 148, Jacek Górecki, Umowy obligacyjne dotyczące nieruchomości w konwencji rzymskiej, Europejski Przegląd Sądowy 4 (2009), 5 and the following.

5. MORTGAGE-SECURED CLAIM TRANSFER

The determination of the law applicable to the transfer of a claim secured by a mortgage deserves a separate explanation.

As a rule, a claim secured by a mortgage is subject to another law than the one applicable to the securing act – a mortgage. It may be a separate legal system. The mortgage is established pursuant to the Law of Goods of the state of the property location and it may secure a monetary claim that is subject to the law of another state.

The law applicable to the transfer of claims was governed as part of Rome I. It was defined in Article 14 of Rome I. It should be assumed that it also applies to the claim secured by a mortgage. Pursuant to Article 14 of Rome I, the law applicable to the transfer of the claim secured by a mortgage should be determined separately from the law applicable to a mortgage, which is governed by Article 41 of the Private International Law. The law applicable to a mortgage may also require that special mortgage disposal mechanisms be applied and determine the premises for the disposal of a mortgage claim. It means that the provisions of the law applicable to the claim secured by a mortgage and to a mortgage should be applied jointly as the absence of their joint application and the failure to fulfil the requirements of both laws may result not only in the failure to transfer a mortgage but also in the failure to transfer the claim secured by it (Article 79 of the Act on Land and Mortgage Registers and on Mortgage[64] in its previous wording established the principle of strict mutual dependence between a mortgage and the claim secured by it). A mortgage alone without the claim secured by it will not be transferred in the systems that recognise its accessory nature. The systems that envisage a non-accessory security (e.g. a land charge which is equivalent to the Eurohypothec in its contents) govern the possibility of trading in an autonomous way, by means of securing rights.

Pursuant to Article 79 (1), in the event of a mortgage claim transfer the mortgage is also transferred upon the purchaser unless the law provides for otherwise. An entry into a land a mortgage register is necessary

[64] The Act on Land and Mortgage Registers and on Mortgage of 6 July 1982 published in the Journal of Laws from 2019, No 2204.

to transfer a mortgage claim. According to (2), a mortgage may not be transferred without the claim it secures. Article 79, amended on 20 February 2011, provides that a mortgage claim transfer results in the automatic transfer of a mortgage upon the assignee. The legal effect of a mortgage claim transfer is the transfer of a mortgage on a new mortgage creditor. There is no legal requirement of entering into a separate contract with an *in rem* effect, which was mandatory prior to 20 February 2011, but the constitutive nature of the entry of a mortgage claim transfer has remained valid. Along with the conclusion of a transfer contract, the Law of Goods defines an additional prerequisite for the effectiveness of a transfer which is the constitutive entry of the claim purchaser into a land and mortgage register[65].

7. CONCLUSIONS

Concluding, it should be indicated that pursuant to Rome I (Article 14), the law applicable to a secured claim should be determined separately from the law applicable to a mortgage, which is governed by the rule of Lex rei sitae. A mortgage should be treated as an in rem right (Germany, France, England). The selection of the law applicable to a mortgage is inadmissible. Those are the rules commonly applied across the world. It should be remembered that the Eurohypothec could become a common cross-border mortgage in Europe. Its regulation would be the same in all the EU Member States. The Eurohypothec should be based on the concept of a German land charge entered into the European property register according to uniform rules. Currently, it should be postulated that uniform rules for the registration of property and mortgages in national property registers be adopted as this will strengthen the principle of the transparency of property rights and facilitate the creation of the European property register in the future by transferring data from national registers to one European register.

[65] The sentence of the Court of Appeal in Białystok of 16 June 2016, I ACa 159/16, LEX no 2080322: 'an entry into a land and mortgage register with a constitutive effect is required to transfer a claim secured by a mortgage'.

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