
МЕЖДУНАРОДНАЯ НАУЧНО-ПРАКТИЧЕСКАЯ КОНФЕРЕНЦИЯ «АКТУАЛЬНЫЕ ВОПРОСЫ ОБЩЕГО, ЕВРОПЕЙСКОГО И РОССИЙСКОГО ДОГОВОРНОГО ПРАВА»

15 апреля в рамках Дней науки МГИМО под руководством заместителя директора Международного института управления по научной работе Ю.А. Карауловой состоялась международная научно-практическая конференция на английском языке по вопросам договорного права «*Current Issues in Common, Civil and Russian Contract Law*» («Актуальные вопросы общего, европейского и российского договорного права»), в которой приняли участие бакалавры и магистранты Международного института управления, студенты программ бакалавриата Сеанс По (Франция) и представители других юридических вузов Москвы. В своих выступлениях участники конференции рассматривали вопросы частного права в контексте сравнительно-правового анализа, уделяя особое внимание различным видам договоров, существующим в системах общего, российского и европейского права, а также соответствующей судебной и арбитражной практике. Ниже публикуются материалы выступлений отдельных участников конференции, посвященные анализу договора залога в английском праве, понятие «возражения по договору», существующему в правовых системах Франции и Великобритании, а также концепции договора авторского заказа в соответствии с российским законодательством, регулирующим вопросы защиты интеллектуальной собственности.

INTERNATIONAL SCIENTIFIC CONFERENCE ON CURRENT ISSUES IN COMMON, CIVIL AND RUSSIAN CONTRACT LAW HELD AT MGIMO UNIVERSITY

The International Scientific Conference on Current Issues in Common, Civil and Russian Contract Law was held April 15, 2016 at MGIMO University under the guidance of Julia Karaulova, PhD (Law), deputy director of the International Institute of Administration. The Conference focused on private law issues in the context of law comparative analysis placing special emphasis on various types of contracts available at civil law and common law systems, including inter alia, the related judicial and arbitration practices. The articles given below cover the nature and scope of pledge agreement under English law, defenses to contracts existing in civil law and common law systems, the concept of "work for hire agreement" under the Russian Civil Code, and some others.

Ключевые слова:

договор, частное право, правовая компаративистика, общее право, европейское право, российское право, гражданский кодекс, договор залога, возражение по договору, договор авторского заказа.

Keywords:

contract, private law, law comparative analysis, common law, civil law, Russian law, civil code, pledge contract, defenses to contract, work for hire agreement.

ПРАВОВАЯ ПРИРОДА, ВИДЫ И СОДЕРЖАНИЕ ДОГОВОРА ЗАЛОГА В АНГЛИЙСКОМ ПРАВЕ

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В статье рассматриваются правовая природа договора залога по английскому праву, его виды и содержание существенных условий, а также различные обеспечительные права, возникающие по такому договору при заключении сделок кредитования. Кроме того, в статье содержится анализ структуры типового договора залога по английскому праву, а также статей, предусматривающих установление права залога, обращение взыскания на заложенное имущество и прекращение права залога.

Nature and Types of Pledge Contract in English Law

Currently in both established and emerging economies pledge contracts are widely used as security in finance transactions allowing lenders to obtain firm guarantees for the repayment of debts. Thus, in the course of business practices over recent decades the pledge agreement has elaborated a number of general indicia which will be focused on in this article.

The composition of loan documents required for lending facilities agreements includes inter alia a loan agreement per se, a pledge and (or) mortgage agreement, security (collateral) agreement, bank guarantee, assignment agreement (by English law), and any other documents as may be requested by creditors for the purposes of a transaction.

“Under English law a pledge is effectively the delivery of possession of an asset by one party (the pledgor) to the creditor (the pledgee) by way of security but with ownership of the asset remaining with the pledgor. Furthermore, delivery of the asset in question may be actual or constructive – e.g. handing over the keys to a warehouse where the pledged goods are located. Under the common law of England and Wales, the creditor (or pledgee) can sell the pledged asset if the pledgor defaults on making payment, provided the pledgee gives due notice to the pledgor. As the length of notice

will depend on the circumstances prevailing at the relevant time it is advisable that the pledgor and the pledgee enter into a letter of pledge or memorandum of deposit setting out the pledgee’s rights in respect of the pledged assets and dealing in particular with the length of notice to be given by the pledgee. Similarly, in the context of a pledge of shares, a share pledge agreement is usually executed between the registered owner of the pledged shares (the pledgor) and the individual or legal entity in whose favour the pledge is executed (the pledgee)” [10]

Thus, the types of pledge permitted under English law include the pledge of movables; pledge of immovables (mortgage); pledge of rights; pledge of securities; pledge of a bank account; pledge of revenues, and some others. For the purposes of a pledge agreement, the variety of pledge created over the property of a borrower under English law can be reflected in such contracts as a pledge agreement over rights, deed of assignment as to the pledged rights, pledge agreement over movable property, or pledge agreement over immovable property (mortgage agreement) [9].

Structure of Pledge Agreement

The basic structure of a pledge agreement comprises three parts being similar to the components incorporated into any contract under English law, i.e. “Introductory Part”, “Essen-

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tials and Boilerplate Clauses”, and “Signatures Block”.

Apart from a common introductory part, the core clauses of the pledge agreement include the “Definitions and Interpretation”, and three essential blocks of legal matters such as creating a pledge, levying execution upon the pledged property in the event of default, and releasing from pledge. [6] The essential terms of the pledge contract can also include the representations and warranties of the pledgor as to good title; good standing; no encumbrance, or dispute, or litigation, or contravention; validity; authorizations, etc; undertakings of the pledgor; responsibility of the pledgor for the breach of the agreement. The attachments to this type of contract usually involve the list of the pledged property together with the copy of a facility agreement, the form of a notice of execution, and some others as the case may be.

General Terms and Conditions of Pledge

The provisions governing the general terms and conditions of pledge in the pledge agreement commonly focus on precise matters underlying for the transaction. Such matters cover the establishment of the pledge, value and location of the pledged property, secured and irrevocable obligations, possession and control of the pledged property. Let’s give the brief description of each of them [4].

The clauses regulating the establishment of the pledge include the following:

(a) the provision indicating the purpose of the agreement (e.g. “This Agreement is made for the benefit of the Pledgee to secure the complete payment and performance by the Borrower and/or the Pledgor when due”);

(b) the stipulation reflecting the intentions of the contractors under the contract (e.g. “The Pledgor hereby pledges all the Pledged Property to the Pledgee for the duration of the Security Period”);

(c) the provision clarifying the procedure for the pledge establishment, including but limited to:

- the date on which the pledged property is pledged;
- the document describing the pledged property (e.g. schedule to a contract);
- the value of each item of the pledged property;
- location of the pledged property whether it shall be kept with the pledgee or the pledgor (e.g. “The Pledged Property shall be deemed to be located and being kept with the Pledgor”).

The value and location of the pledge property is another important clause providing that:

(a) the pledged property should be valued in a predetermined amount; (b) the value of the pledged property may change; (c) the pledged property must secure the full amount of the secured obligations; (d) upon levy of execution of the pledged property the pledgee may receive the full amount of the secured obligations out of the proceeds gained as a result of the collateral realization at public auction which amount should not be limited to the stated value of the pledged property; (e) the pledged property should be located and kept with the pledgor unless the parties otherwise agree [7].

Subject to the pledge agreement under English law, the concept of secured obligations includes all the monetary obligations (whether actual or contingent and whether past, present or future) of the borrower under the facility agreement, including inter alia:

- the loans borrowed by the borrower;
- all or any part of commitment fee, or administration fee, or arrangement fee;
- any break or mandatory costs as may be required under the facility agreement;
- all interest accruing on the outstanding loan and/ or default interest;
- any gross-up, any principal, or interest, or other amount due under the facility agreement or any other amounts due to the facility agreement. [1]

Of note that the clause describing secured obligations of the borrower can provide for the provision stating that the pledge created by the agreement of pertinence should secure monetary claims of the pledgee, which the pledgee may have against the borrower and/or the pledgor [8].

The clause focusing on irrevocable obligations states that the pledge of the pledged property and the obligations of the pledgor under the agreement at issue are irrevocable and remain in full force and effect without regard to any of the events that may include:

- (a) any amendment of the facility agreement or any other finance document or any waiver, consent or other action or inaction regarding any of them;
- (b) any furnishing of any additional security to or for the benefit of the pledgee;
- (c) any invalidity, irregularity or unenforceability of any part of the secured obligations or of any security for the secured obligations;
- (d) any reorganization of the pledgor; and any liquidation or insolvency (bankruptcy) of the pledgor.

The matters related to the possession and control of the pledged property are common-

ly treated in the pledge contract in the eyes of English law, and are reflected in the provisions specifying that the pledgor retains possession of the pledged property and may use, and exercise other rights with respect to such pledged property. In the event of default all proceeds of whatever nature payable to the pledgor in respect of the pledged property should be paid to the pledgee for discharge of the secured obligations and the pledgor may not use the pledged property without the prior written consent of the pledgee. It is expressly stipulated that the pledgor is not entitled without prior written consent of the pledgee to sell, assign, transfer or subsequently pledge the pledged property [5].

Levy of execution upon the pledged property constitutes the second block of issues that are typically fixed in the pledge contract and may have material effect on finance transactions. The procedures for the realization of the borrower's pledged property are triggered by an event of default upon the occurrence of which the pledge has become entitled to levy execution upon the pledged property of the borrower (the pledgor) whereby all the pledgee's claims against the pledgor may be satisfied by means of the sale of the pledged property at public auction to be held in compliance with the manner provided by the pledge contract. Therefore, the section of the pledge agreement termed as "levy of execution upon the pledged property" normally involves the provisions regulating (a) the notice of execution to be given by the pledge to the pledgor within specific period of time; (b) manner in which the auction should be organized subject to applicable law; (c) determination of the starting sale price; (d) compensation of all reasonable costs and expenses incurred by the pledge in the course of organizing and holding such public auction; (e) payment of proceeds gained as a result of the sale of the pledged property, (f) termination of the enforcement procedure, and some others [4].

The pledge contract can *mutatis mutandis* contemplate further undertakings of the pledgor in addition to those stipulated in the clause "Representations and Warranties". These undertakings relate to the record of pledge and its registration with the relevant authority if required by applicable law (e.g. "The Pledgor shall establish and at all times maintain at its own cost and expense a record of pledges, in such form as may be required from time to time under Applicable Law, or if no such form

is specified under Applicable Law in the form accepted by the Pledgor according to its internal rules and regulations"); the preservation of pledge (e.g. "The Pledgor shall at its own expense properly and timely do all things, take all such action and execute all such other documents and instruments as may be reasonably requested by the Pledgee from time to time to the extent they are required by Applicable Law in order to perfect, protect or preserve the rights and powers granted to the Pledgee in this Agreement, or for the purpose of enforcing the Pledgee's rights under or in connection with this Agreement"), and finally, the insurance of the pledged property (e.g. The Pledgor shall maintain insurance of the Pledged Property in accordance with the Facility Agreement) [2].

Release from pledge is the final (third) stage described by the pledge contract. It is the stage at which pledge ceases to exist, subject to the unconditional and final discharge of all the secured obligations, and thus, the pledge agreement is terminated. It should be provided by the relevant section of the contract that in the event of release, the pledgee must notify the pledgor of the termination of the pledge under the specific agreement and upon the pledgor's request, should undertake such actions and execute such documents as may be required by applicable Law to evidence and effect termination of the agreement and the pledge created hereby and to effect the release of the pledged property. If the pledgee incurs costs or is required to pay duties and fees (as the case may be), in connection with the fulfillment of its obligation, established in the contract, unless otherwise provided for by Applicable Law, then the pledgor should bear all costs and expenses or pay the duties and fees itself or (upon agreement with the pledgee) reimburse the pledgee upon demand all such expenses, costs, amounts, duties and fees [9].

To summarize, it should be stated that as an integral part of loan documents which are prepared by the bank and the borrower for the purpose of securing loans, the pledge contract reflects the variety of security interests that can be created over the assets under English applicable law. Moreover, the key sections incorporated in the body of the document in question govern three main stages of the collateral cycle, including, *inter alia*, establishment of the pledge, enforcement in the event of default, and finally, release from pledge.

NATURE, TYPES AND SCOPE OF PLEDGE AGREEMENT IN ENGLISH LAW

The article covers the nature and scope of a pledge contract being an integral part of loan documents to be prepared by the lender and the borrower in order to secure the repayment of loans. The article identifies the variety of security interests existing under applicable English law which give rise to different types of a pledge contract whereby pledge can be created over the rights, securities, movable and immovable property of the pledgor. The article also focuses on the typical structure of a pledge agreement outlining three essential blocks

that govern the main stages of the collateral cycle, including without limitation, the establishment, enforcement and termination of security interest.

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Ключевые слова:

зalog, предмет залога, залогодатель,
залогодержатель, установление
права залога, обращение взыскания,
прекращение права залога, статья.

Keywords:

pledge, pledged property, pledgee, pledgor,
establishment of pledge, levy of execution,
release, clause.

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