

# THE SCOPE OF THE MORTGAGE CONTRACT (REAL ESTATE) AS A SECURITY INTEREST TO SECURE THE PERFORMANCE OF AN OBLIGATION UNDER THE CIVIL LAW OF PANAMA

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## ABSTRACT

It must be borne in mind that through the figure of the mortgage, the property on which it is imposed, whatever its owner, is directly and immediately subject to the fulfillment of the obligation for whose security it was constituted. More broadly, the mortgage can be understood as the contract by virtue of which a person called the mortgage debtor, constitutes a real right over a property, generally immovable, determined and alienable, in favor of the other party called the mortgage creditor, to guarantee compliance, of an obligation, without dispossessing the debtor of the encumbered asset and that gives the creditor rights, of persecution and in case of breach of the obligation, of alienation and preference to be paid with the proceeds of the alienation. In this context, according to Panamanian civil regulations, the following may be the object of a mortgage: real estate, alienable real rights, in accordance with the laws, movable property that can be determined or individualized. Now, being the solemn mortgage contract for its constitutive validity, in addition to the common requirements demanded of contracts according to the Civil Code, it is essential that the deed where it is constituted be registered in the Public Registry of the Republic of Panama or institution specific when it applies to goods not subject to registration in said registry entity.

**Keywords:** obligations, contract, guarantee, compliance, right, property, payment, possession, property, solemnity, public deed, creditor, debtor, priority of law.

## GENERAL

The contract is an agreement of wills between two or more persons to create or transmit rights and obligations; in addition, as a legal act it must contain elements of existence and validity. In turn, the legal act is the manifestation of the will with the intention of creating legal or legal consequences.

The contract as a legal norm must be considered one that generates obligations and rights for

the parties. As an instrument it is embodied in a document, that is to say, it is made in writing, in which the parties express their will by signing a signature, so they are aware of the scope of such document.

The Civil Code of Panama not only creates obligations and rights, but also transmits real rights. It has been mentioned that an agreement does not exist without a contract, since the agreement modifies or extinguishes previously created obligations; however, it must be taken into account that the agreement can also create obligations.

The contract as a legal act consists of the agreement of wills that will create legal consequences, desired by the author, consisting of creating or transmitting rights and obligations.

When speaking of the rules for interpreting contracts, this means whether it was entered into in accordance with the law, so that if it was done so, it will produce all its legal effects. Consequently, interpreting a contract means: whether the words used in the contract were understood, whether the parties actually wish to enter into that contract, whether the limits and scope of the clauses were specified and whether it conforms to the provisions of the civil code (Ayala, 2017, p.p.35-36).

### **THE CONTRACT OF GUARANTEE.**

Guarantee contracts are designed to provide security to the creditor to obtain payment in case of default, since this can be given by means of a bond, pledge or mortgage. Therefore, it gives certainty to the creditor, by virtue of the fact that he will not be defrauded in case of non-payment, by virtue of which the guarantee is made effective so that the creditor does not run any risk.

As far as Roman law is concerned, such contracts gave rise to a security interest or a personal guarantee. The security interest consists of one party transferring to another the ownership of certain property to secure the payment of the liability arising from the breach of an obligation, by means of a pledge (*pignus*) and a mortgage (*hypotheca*).

In turn, the personal guarantee includes the promise to pay within a certain period of time a sum of money or an amount of fungible things (which depends on the obligation) to a third party. This third party then undertakes to pay what the other party owed by means of the bond.

From the above it is inferred that the bond is a personal guarantee, while the pledge and the mortgage are real guarantees (Ayala, 2017, p.p.300-301).

## THE MORTGAGE.

The real estate mortgage is considered as a security interest that, without entailing actual dispossession of the owner of a property, allows the creditor, if it is not paid when due, the right to seize and auction that property in whatever hands it may be, and to collect with preference over the price (Mazeaud quoted by Valencia, 2006, p. 171).

It is also defined as the contract by virtue of which a person called mortgagor, constitutes a real right over a property, generally real estate, determined and alienable, in favor of the other party called mortgagee, to guarantee the fulfillment of an obligation, without dispossessing the debtor of the encumbered property and which gives the creditor rights of pursuit and, in case of breach of the obligation, of alienation and of preference to be paid with the proceeds of the alienation. The term mortgage designates both the contract and the security interest (Darlington, 2013, p. 161).

Javier Mitil Martínez, in his work “The Real Estate Mortgage Contract” (2015), cites a definition derived from the Civil Code, which indicates that the real estate mortgage contract is an act by which the principal debtor or a third party, in order to guarantee the performance of a principal obligation, undertakes to constitute on a real estate property owned by him that remains in his possession, by means of the registration in the Public Registry of the respective encumbrance, a real right of mortgage in favor of the creditor, by virtue of which the latter, upon maturity of the obligation, may request that the encumbered real estate property or properties be sold at public auction, whoever the person in whose possession they may be, and that his credit be paid with the proceeds of such sale, in preference to the other creditors (p. 17).

In summary, it may be noted that the main writers on the subject refer to an accessory contract and real guarantee, by means of which the debtor gives as guarantee a real property, without disposing of it, in order to ensure the performance of the obligation. Now, it must be kept in mind that the mortgage, in addition to being able to be constituted on real estate, can also be constituted on movable property; however, only with respect to those admitted by the law, in addition to this, through the same, an obligation of another party can be secured with the value of the thing.

## CHARACTERISTICS OF THE MORTGAGE.

The main characteristics of the mortgage are the following:

**It is an indivisible real right.** This characteristic is indisputable, since it grants the creditor, who does not acquire possession of the thing, a real right by virtue of which he has the pursuit of the encumbered property, in the possession of the person who holds it, and at the same time the preference to be paid with the proceeds of its auction (Valencia, 2006, p.172).

In this sense, the property - movable or immovable - is liable for the full performance of the obligation, unless there is a clause to the contrary that allows the release of the mortgaged property as the secured obligation is satisfied.

In this context, the mortgagee may not use or appropriate the property, since the essence of the contract is that, once the principal obligation has expired, the property may be disposed of to cover the debt. The mortgagee enjoys preference in relation to the other creditors of the debtor, with respect to the value of the mortgaged property (Román and Rojas, 2009, p.116).

**It is dressed in solemnity.** It must arise from a solemn act, with respect to which the requirements of authenticity and publicity have been met (Valencia, 2006, p.173).

Regarding the solemnity, our Civil Code is precise in its articles in categorically pointing out the solemnity of this contract, mainly because of the form it must take; in addition, because of the registration formalities.

Article 1131, ordinal 1 of the regulations governing this matter, establishes the obligation to record in a public instrument “the acts and contracts whose object is the creation, transfer, modification or extinction of real rights over real property”.

In the same context, this type of contracting is not perfected with the mere consent, since in this case it is almost perfected when it is recorded in writing, corresponding in the same way to the requirements established in articles 1129 and 1130 of the same legal text.

It is thus, then, that the public deed, comes to be constituted as a solemnity of the Real Estate Mortgage contract, in view that the law determines it as such, it is a requirement requested by the legal norm so that it can be registered in the Public Registry, as it is determined by article 1756 of the Civil Code, when it says: “Only the Titles that consist of public deed can be registered in the Registry” (Mitil, 2015, p.p.25-26).

In that order, precisely articles 1579 and 1595 of the Civil Code precept that the mortgage requires to be recorded by public deed and registered in the Public Registry in order to affect third parties. It must be constituted by the persons who, according to the Public Registry, are empowered to do so.

It may be a unilateral or bilateral right. In principle, the obligor is the mortgagor when the

contract is executed. Although it may be the case that an obligation appears on the part of the creditor (Valencia, 2006, p.173).

In this context, the Mortgage Contract will be unilateral “if the debtor grants the contract in guarantee of an already constituted obligation, it is free of charge since the constituent has been recorded for the benefit of the other contracting party without any encumbrance for the latter”. That is to say, the mortgage is constituted by the mere liberality of the debtor, to grant a greater guarantee to the creditor, of the real fulfillment of the principal obligation (Rojina quoted by Mitil, 2015, p.32).

On the other hand, this contract will be bilateral “when the creditor is obliged to pay the mortgagor a remuneration for such guarantee” (Arroyo Camacho quoted by Mitil, 2015, p.33). Regarding the bilateral nature of this contract, it must be seen from the point of view of its utility or benefit, since in such a way it will also be onerous. And this is so, when the owner of the property constitutes the mortgage at the moment of receiving the money, being this the case. This way, he benefits by obtaining the credit, which possibly, without this guarantee he would not have obtained it, while the creditor obtains as a benefit, a more effective guarantee for his credit. Because he obtains certainty that it will be satisfied. In this way we are in the presence of a mortgage contract, both bilateral and onerous.

**It is an accessory of the guarantee.** Therefore, its existence and validity depend on the existence and validity of the secured obligation (Darlington, 2013, p.p.161 - 162). The mortgage guarantees the creditor the payment of its credit, giving seriousness to the contract and confidence to the creditor that the loan - if any - that it has made to the mortgagor will not be paid off by the mortgagor. On the contrary, with the mortgage as a guarantee, the principal obligation will not be jeopardized (Mitil, 2015, p.22).

Like the pledge and the antichresis, the mortgage depends on the credit right to which it guarantees, that is to say that the accessory nature is in function of guarantee of the credit. Because of this, the mortgage can only exist as an accessory of a principal obligation to which it serves as a guarantee. Therefore, it is understood that the mortgage is accessory to the credit and that this accessory nature derives from its nature as a guarantee.

However, from the foregoing, this accessory characteristic of the real estate mortgage must receive some qualification. The accessory nature means that the two rights, the credit and the mortgage, remain as a whole and, in addition, by virtue of the registry nature of the mortgage,

the extinction of the credit does not always entail the extinction of the mortgage, especially with respect to third parties that are protected by the Public Registry.

It is said then that the mortgage cannot exist without the credit for being this one accessory; and although the main obligation hangs on a condition, it will be understood that the mortgage guarantees the fulfillment or the birth of this one.

In cases where the mortgage is extinguished indirectly, e.g., by payment, it will be understood that the mortgage as such does not guarantee the fulfillment of any obligation. And therefore, the mortgage or lien on the property will exist until it is cancelled by the mortgagee or, failing that, by the person who has registered the real right in its name in the Public Registry, or by judicial means (Mitol, 2015, p.p. 19-21).

**It may be free of charge or onerous.** The perspective of gratuity is given by virtue of the fact that it only generates benefits for the creditor consisting of the security, from the economic point of view, that the debtor's obligation will be fulfilled in his favor or fully indemnified in case of default (Darlington, 2013, p.162).

The determination of the onerous nature of the mortgage has its basis when it is constituted by a third person, totally alien to the principal obligation, and it is so provided in the contractual bond, since our Civil Code in its article 1548, last paragraph recognizes the validity of mortgages constituted by third persons, alien to the principal obligation.

And in this context, if the mortgage constituted by the third party is constituted with the purpose of obligating the debtor of the principal obligation to do, give or not do something, the mortgage will be onerous.

Likewise, as indicated above, a mortgage may be considered onerous when the creditor is obliged to pay the debtor or the third-party mortgagor a remuneration for such guarantee.

**It does not imply dispossession.** Another of the fundamental characteristics of the mortgage is that the owner of the encumbered property does not lose its possession, this characteristic comes from the pledge, which with the passage of time acquired a conventional form, that is, the parties agreed to the permanence of the pledged thing in the possession of the debtor. It was this type of pledge that was later given the name of mortgage (Pérez, 1990, p. 89).

**It is nominated.** By the regulation that the Civil Code makes of this contract (Darlington, 2013, p.p. 161 - 162).

**It is of a mercantile nature.** The mortgage contract is mercantile, as is the surety and the pledge, when the principal obligation is of such nature. It is sufficient to define the commercial nature of the loan, the purchase and sale, the mandate, the commission, whose performance is guaranteed with the mortgage, to conclude that it is also mercantile (Román and Rojas, 2009, p.117).

## **RIGHTS AND OBLIGATIONS DERIVED FROM THE MORTGAGE**

The mortgage contract generates a series of rights and obligations among its participants, let us see which ones stand out in this respect.

**Rights of the Mortgagee.** The mortgagee has the right to request that the mortgaged property be sold, so that he may be paid with the proceeds; he has the right of pursuit against whoever constitutes the mortgage, that is to say, he enjoys preference over the debtor's credits, whether on the mortgaged property or on other property (Valencia, 2006, p. 175).

**Rights of the Mortgagor.** The mortgagor, upon being in possession of the mortgaged property, undoubtedly has all the rights derived from the domain, i.e., use, enjoyment, etc. (Valencia, 2006, p.176).

The debtor likewise has the right to administer the property, to receive fruits, and to dispose of it, either to alienate it or to impose another real right; however, these last acts cannot harm the mortgagee, due to the erga omnes opposability of its real right (Darlington, 2013, p. 165).

**Obligations of the Mortgagee.** The obligation per se arising from the debtor's performance of the principal obligation, that of canceling the mortgage (Valencia, 2006, p. 175).

**Obligations of the Mortgagor.** Among the obligations that the mortgagor may have is the obligation to take care of the real estate with all the diligence of a good father of a family, that is to say, to take care and attend to it properly (Valencia, 2006, p.176).

## **TYPES OF MORTGAGES**

According to the national legislation -Civil Code-, the following mortgages are established:

**The Voluntary Mortgage and the Legal Mortgage:** It is voluntary when it results from

agreement of wills of the parties or from a unilateral declaration of will, it is legal when it arises by ministry, by mandate of Law, by disposition of this one. Within the classification of the voluntary mortgage, we have the unilateral mortgage, when a person unilaterally constitutes a mortgage on its own real estate, and the contractual or bilateral mortgage as a result of an agreement of wills, which requires a contract. The only example of unilateral mortgage contemplated in our legal system is the mortgage of a bond (Espinosa, 2019, p.p.50-51).

Legal mortgages are constituted because the law grants the right to obtain them (article 1566 final paragraph and 1617). The will of the mortgagor is not the determining factor in the constitution of this mortgage. The mortgage is forced if its constitution can be legally demanded: because it is so determined by law independently that the mortgagor voluntarily concurred to provide the goods for such guarantee, it is the law who provides that it is constituted in certain cases and circumstances, taking place the same by virtue of a judicial diligence of the respective court officialized to the Public Registry for its inscription (Espinosa, 2019, p.102- 103).

**Mortgages on Movable and Immovable Property:** This classification is based on the property on which the mortgage is taken. It is real property if it falls on real property or rights in rem constituted thereon, it is governed by the rules of the Civil Code in this respect, it is formal and must be recorded in a public deed and registered in the Mortgage Section of the Public Registry; and movable property if the collateral is movable. The chattel mortgage is governed by the provisions of Law 129 of December 31, 2013 (Espinosa, 2019, p.51).

### **SCOPE OF THE MORTGAGE**

Doctrinally and according to the main legislations that regulate this matter, the mortgage extends mainly over real estate, movable property (automobiles, ships, boats and aircrafts), and real rights susceptible to it.

In that order of ideas, with respect to real estate, the mortgage extends to natural accessions, improvements, pending fruits and rents not received at the expiration of the obligation.

With respect to the accessions or accessory and improvements, the following may be noted:

- Accessories to the real estate. When a real property is mortgaged, the mortgage affecting the main thing affects at the same time all those considered accessory to it.
- Improvements. When the real estate is mortgaged, the mortgage established on it extends in an inevitable manner to all the improvements of which it is the object. It is not a question here of a simple increase in the commercial value of the property resulting from



a rise in rents; it is absolutely normal for the creditor to benefit from this purely economic increase, in the same way as he would suffer the effect of a decrease in value (Planiol and Ripert, 1997, p.1189).

Also, to the amount of compensation granted or due to the owner by way of insurance or expropriation in the public interest.

A mortgage on several properties is feasible in order to secure a claim in whole or in specific parts. In the first case, the mortgage on the properties subsists until the total fulfillment of the obligation. In the second case, assets may be progressively released, as the parts of the obligations that each one guarantees are satisfied (Román and Rojas, 2009, p.118).

Regarding the real rights susceptible of Mortgage, the main treatises highlight the following:

- **The property.** In principle, it is the owner of the real estate who mortgages; however, the fact is so normal that the law does not refer to it expressly, therefore, the mortgage encumbers the property right that a person possesses over the real estate. Therefore, it is the property right that is mortgaged, in the ordinary cases, when it is said that a mortgage exists on such and such house or on such land.

In that sense, the property may be dismembered. If a right of usufruct exists over the real estate, in which case the owner is reduced to the bare ownership, the mortgage constituted by him alone encumbers his right, in the state in which he is the holder of it. Consequently, the mortgage on the bare ownership leaves the usufructuary right intact. The same is true, a fortiori, when there are easements on the property, since the mortgagees are obliged to respect the rights in rem acquired by third parties (Planiol and Ripert, 1997, p.p.1185-1186).

- **On usufruct.** The usufructuary may mortgage his right, when the usufruct has been established on things susceptible of mortgage. The usufruct and the bare ownership arise from the partition of the rights that constitute the full ownership; both must confer the power to mortgage as fully the thing, as if they were gathered in the power of a single person. The guarantee established on the usufruct is impractical since it only grants the creditor a fragile and temporary guarantee. Therefore, one sees few conventional mortgages on usufructs; it is frequent, on the contrary, to see legal mortgages encumbering usufructs: it is sufficient to suppose a general mortgage affecting the assets of someone

holding a usufruct on a thing susceptible of mortgage (Planiol and Ripert, 1997, p.1186).

- **On easements.** It is commonly said that easements cannot be mortgaged; this is true; Now, in this point of view, it is perfectly susceptible to be mortgaged and is even necessarily included in the mortgage the dominant property, of which it is inseparable. It is mortgaged and auctioned at the same time as it (Planiol and Ripert, 1997, p.1187).

## **LEGAL BASIS**

It corresponds to describe the main normative aspects of the figure under study.

### **Panama Civil Code.**

Since the central object of the article is based on the scope of the mortgage contract, according to the civil legislation of Panama, let us see the main elements that the Civil Code of Panama regulates in this respect.

### **Essential requirements of the Mortgage.**

“**ARTICLE 1548.** The following are essential requirements for pledge and mortgage contracts:

1. That it be constituted to secure the performance of a principal obligation;
2. That the thing pledged or mortgaged belongs in property to the one who pledges or mortgages it;
3. That the persons constituting the pledge or mortgage have the free disposition of their property or, in case they do not have it, are legally authorized to that effect.

Third parties who are strangers to the principal obligation may secure the latter by pledging or mortgaging their own property”.

In view of the foregoing, the first requirement derives from the object or purpose to which the contract responds and from the accessory character that distinguishes it, because the mortgage cannot exist without a principal obligation - in principle - prior or contemporaneous, to whose fulfillment it serves as a guarantee; from which it follows that without such principal obligation the contract cannot subsist and does not take place. Therefore, even if there is a promise to constitute the mortgage, this promise is not enforceable as long as the obligation to be secured does not exist or is not constituted.

With respect to the second, we can say that the mortgage ordinarily responds to a real credit

or to a principal obligation whose fulfillment is guaranteed by any of said means and, therefore, it is of the essence of this contract that in the event that the principal obligation guaranteed is not fulfilled, the guarantee may be proceeded against, applying the proceeds thereof to the satisfaction of said obligation, which could not have effect if the mortgaged good or goods did not belong to the mortgagor.

That is to say, the mortgage responds for any eventuality suffered by the principal obligation, whether the mortgagor does not comply with it; this is where it arises from its own nature to be a guarantee for the mortgage creditor or creditors. Regarding the last requirement, the law establishes it as one of the essential ones, in view of the fact that, as a principle, nobody can offer in mortgage guarantee, what does not really belong to him, since nobody can grant more rights than he has.

It must be kept in mind that this contract is an accessory contract, constituted to guarantee a principal obligation, for the fulfillment of which it responds, and that therefore it is of essence in this contract that, once the insured obligation has expired, the things given in mortgages can or may be alienated, which requires not only that the person who encumbers them in such concept, has the ownership of them, but also that he enjoys the free disposal of his goods, because the act he performs constitutes a true alienation or transfer, as it has already been indicated.

If the principal obligation, secured by mortgage, has expired without having been fulfilled in the stipulated manner, the creditor has the right to proceed against the assets that constitute the collateral in order to enforce the obligation with the proceeds thereof.

#### **Right of Sale proceeds of the Mortgage:**

“**ARTICLE 1549.** It is also of the essence of these contracts that, once the principal obligation has expired, the things in which the pledge or mortgage consists of may be alienated to pay the creditor.”

“**ARTICLE 1550.** The creditor may not appropriate the things given in pledge or mortgage, nor dispose of them”.

Once the principal obligation secured by mortgage has expired without having been fulfilled in the stipulated manner, the creditor has the right to proceed against the assets that constitute the guarantee in order to make effective with its proceeds the indicated obligation, this is what is legally called the right of pursuit or sale, with respect to the mortgaged assets in order to comply with the payment of the debt.

Now, in our positive law, the commissory agreement is prohibited, as determined by the aforementioned article 1550.

Once the secured obligation has expired without being paid by the debtor, the creditor has the right to proceed to its realization; but until such time, the creditor has no right whatsoever to appropriate the mortgaged property, nor to dispose of it or it for any other purpose.

This is a precept aimed, as of course it is understood, to avoid the many frauds that in other cases could be carried out, for being in the generality of the times superior in value to the debt the goods in which the guarantee is constituted.

**Indivisible characteristic of the Mortgage:**

**“ARTICLE 1551.**

The pledge or mortgage is indivisible, even if the debt is divided among the successors of the debtor or the creditor.

The heir of the debtor who has paid part of the debt may not, therefore, request that the pledge or mortgage be proportionally extinguished as long as the debt has not been fully satisfied.

Nor may the heir of the creditor who received his part of the debt return the pledge or cancel the mortgage to the detriment of the other heirs who have not been satisfied.

An exception to these provisions is made in the case in which, being several things given in mortgage or pledge, each one of them guarantees only a determined portion of the credit.

The debtor, in this case, shall have the right to have the pledge or mortgage extinguished as he satisfies the portion of the debt for which each thing is specially liable.”

As can be appreciated, the mortgage is indivisible, even if the debt is divided among the successors of the debtor or the creditor.

It follows then, that the thing object of this contract does not lose its condition of mortgaged until the total extinction of the principal obligation insured in some of said forms, even if the greater part of it is paid, being, therefore, the price for the mortgage to cease to have its effects the full payment of the debt, without it being an obstacle for this that this has been divided among several successors of the debtor or the creditor.

The partial extinguishment of the credit does not imply the release of a proportional part of the mortgaged property. The debtor does not have the right to request the reduction of the mortgage, since its indivisible character prevents it.

### **Scope of the Mortgage to types of obligations:**

#### **“ARTICLE 1552.**

The contracts of pledge and mortgage may secure all kinds of obligations, whether pure, or subject to suspensive or resolutive condition.”

Generally, the mortgage secures the performance of an obligation consisting of a performance to deliver money; however, in accordance with the aforementioned article 1552, it may secure any kind of obligation, therefore, it could be said that the secured obligation may also consist of a performance to give a specific thing that is not money, as well as to guarantee a performance to do or not to do.

However, when the performance does not consist of giving money, but something else, or when it is only to perform an act or omit to perform it, as long as its non-performance can be translated into money, the mortgage will only indirectly ensure the specific performance of these obligations, since in a direct and immediate manner it can only guarantee the receipt of an amount.

In this sense, in these obligations to give things other than money -to do and not to do- where there is an immediate non-existence of a pecuniary debt, when the mortgage is constituted on these benefits, the maximum amount up to which the mortgage liability may rise in the event of noncompliance with the obligations must be determined preventively.

### **Direct Effect and Classes of Mortgages:**

**“ARTICLE 1566.** Mortgages directly and immediately subject the property on which they are imposed, to the fulfillment of the obligations for whose security they are constituted, whoever the holder may be.

Mortgages are voluntary or legal”.

In a broad sense, upon analyzing the law, several effects are derived, among them: the right to sell the mortgaged property, since this is an element of the definition of the mortgage by granting the mortgagee the right to sell in order to obtain the payment of its credit with the proceeds of such operation; therefore, the right to sell is an effect of the mortgage that may arise as a consequence of the exercise of the action and the foreclosure, or by virtue of a covenant in which the extrajudicial sale of the property is agreed upon.

The right of sale that the mortgagee has over the property that is the object of the lien is granted by law, which is immersed in the contract; and said right of sale is known to the debtor.

Thus, upon signing the mortgage contract, the mortgagor accepts all the clauses -as long as they are not contrary to the law, morality or public order-, rights and obligations arising therefrom.

In the same sense, the creditor also has the right of pursuit of the mortgaged property, in the hands of the holder.

This right of pursuit is the necessary complement to the right of first refusal; it is its extension, since it allows the creditor to exercise its right of first refusal on the price of the property, even if the property has left the patrimony of the debtor and become the property of another person.

This right of pursuit may be exercised by the mortgagee or the assignee of the claim, provided that the mortgage is registered, as well as the transfer or assignment of the claim.

Once the obligation becomes due, the mortgagee will exercise this right of pursuit if the encumbered property has passed into the hands of third parties.

The last paragraph of the aforementioned article highlights the types of mortgages recognized by civil law, whether voluntary or legal.

**Assets that may be subject to Mortgage:**

**“ARTICLE 1567.** They may only be mortgaged:

1. Real property;
2. Rights in rem which may be alienable, according to the law, imposed on real property of that kind;
3. Movable property susceptible of being specifically determined or individualized and of being sufficiently described”.

The aforementioned article does not limit itself to say that only real property and the alienable rights in rem imposed thereon may be subject to mortgage; but also, movable property susceptible of being specifically determined or individualized, and of being sufficiently described, as is suggested in the third paragraph of this article.

In this context, the aforementioned only demands requirements of alienable to the real rights and to the movable goods susceptible of being determined, individualized, on the other hand, it does not put any limit for the real estate.

### **Assets subject to mortgage, but with restrictions:**

In the previous point, we could notice, as the general rule, establishes in a wide form and without any restriction, the real estate, real alienable rights and movable goods susceptible of mortgage; meanwhile articles 1568 and 1570, contemplate as an intermediate assumption between the goods that can be mortgaged with certain restrictions those that cannot be mortgaged.

Let us see what they indicate in this respect.

“**ARTICLE 1568.** They may be mortgaged, but with the following restrictions:

1. The building constructed on another’s land, which, if mortgaged by the person who constructed it, shall be without prejudice to the right of the owner of the land, and it shall be understood that only the right that the same person who constructed the building has over the building shall be subject to such encumbrance;
2. The right to receive the fruits of the usufruct, but the mortgage shall be extinguished when the usufruct is terminated by an event beyond the control of the usufructuary. If the usufruct is terminated by his will, the mortgage shall subsist until the secured obligation is fulfilled, or until the expiration of the time in which the usufruct would have terminated naturally if the event that terminated it had not occurred;
3. Mere ownership, in which case, if the usufruct is consolidated with it in the person of the owner, not only shall the mortgage subsist, but it shall also extend to the usufruct itself unless otherwise agreed;...”

As it has been noted, in our positive law a multiplicity of goods and rights are susceptible to mortgage; nevertheless, some of them present certain restrictions, among them: The building constructed on another’s land, the right to perceive the fruits in usufruct, mere ownership, previously mortgaged goods, surface rights, pastures, water, firewood and other similar rights of a real nature, works destined for public or private service, concessions for construction or exploitation of such works made by the government or municipalities for ten years or more, and litigious goods. Each particular case establishes its own restriction in this respect.

### **Assets not subject to mortgage:**

Now we will develop, the goods that cannot be encumbered with mortgage, either by their nature or their specialty or by the state in which they are.

Our Civil Code, in its article 1569, in its seven ordinals, indicates those assets that are not subject to taxation, not being really exhaustive said article, any asset may be mortgaged, as long as it meets the requirements the Law determines. This article establishes the following:

**“ARTICLE 1569.** The following may not be mortgaged:

1. Outstanding fruits and rents, with separation of the property producing them;
2. Movable objects permanently placed in buildings, either for their adornment or comfort, or for the service of some industry, unless they are mortgaged together with the said buildings;
3. The debt securities of the State, of the Municipalities, and the obligations and shares of banks, enterprises or companies of any kind;...”.

In this respect, the Civil Code classifies fruits as natural and civil; natural fruits are those given by nature with or without the help of human industry and civil fruits are those that come from the rental of buildings, the price of land leases and the amount of rent, to name a few.

In that order of ideas, the natural fruits can be found pending, perceived and consumed. They are called pending while they are still attached to the things that produce them, such as plants that are rooted to the ground, or the products of plants while they have not been separated from them. Perceived natural fruits are those that have been separated from the productive thing, such as cut timber, harvested fruits and grains, etc., and consumed fruits when they have been truly so, or have been alienated. The civil fruits are called pending while they are owed, and perceived since they are collected, all this in accordance with articles 366 and 367 of the cited legal text.

These fruits, both natural and civil, are not susceptible to be mortgaged, for the simple reason that they cannot be sufficiently described and can only enter into legal life by extension when the property producing them is mortgaged.

On the other hand, the debt securities of the State and of the municipalities cannot be mortgaged, since this would go against the public order, and therefore against the Nation.

In another order of ideas, it is clear that the mortgage may guarantee future obligations, but future assets cannot be subject to mortgage, since the debtor may never acquire them, and there is no real certainty that they will enter as such under the full dominion of the person who intends to mortgage them. For this reason it is difficult and offers difficulty the designation of a future good, not recognizing the Law to him mortgageable character to the future goods, in order not to denaturalize juridically to this contract.



**Extension of the Mortgage:**

**“ARTICLE 1571.**

The mortgage extends to the natural accessions, to the improvements, to the pending fruits and rents not received at the expiration of the obligation, and to the amount of the indemnifications granted or owed to the owner by the insurers of the mortgaged property, or by virtue of expropriation due to public utility, both in the case of the property remaining in the possession of the mortgagor and in the case of it passing into the hands of a third party”.

Regarding the extension of the mortgage, it is extended to natural accessions, which is everything that is joined or incorporated to a property or estate in a natural way.

It is therefore established that any increase coming from the parties or by other means than the aforementioned, cannot be considered for the purposes of the objective extension of the mortgage. This extension of the mortgage does not require an express agreement, but rather, by operation of law, the mortgage includes the natural accessions, as expressed in the first section of this article under analysis.

Our Code also establishes that the mortgage will be extended even when the property has been expropriated for public utility reasons, both in the case of the property remaining in the possession of the mortgagor and in the case of it passing into the hands of a third party.

**Applicability of several estates to mortgage a single credit:**

**“ARTICLE 1572.**

When several estates are mortgaged at the same time for a single credit, the amount or part of the lien for which each one is liable may be determined. If this determination is not made, the creditor may repeat for the totality of the sum secured against any of the estates, or against all of them”.

If two or more properties are mortgaged for a single credit, the debtor must voluntarily agree with the creditor on the distribution of the credit, on which each property will be liable in case of default, otherwise, if the parties do not agree on the matter, the indivisibility of the mortgage will then be determined as to the encumbered properties, and the mortgagee may, in case of default, request the sale of any of the encumbered properties to pay his credit.

**Integrity of the mortgage:**

**“ARTICLE 1575.**

The mortgage shall subsist in its entirety as long as it is not cancelled on the totality of the mortgaged property, even if the obligation guaranteed is reduced, and on any part of the same property that is preserved, even if the remaining part has disappeared; but without prejudice to the provisions of the following two articles.”

According to the above, the creditor cannot cancel the mortgage, even in parts, as long as its co-creditors have not been eternally satisfied. It is a matter of giving the greatest security to the credit of the other heirs of the creditor, who have a real right over the mortgaged property.

**Claims before the third-party possessor of the mortgaged property:**

**“ARTICLE 1580.**

The creditor may claim from the third-party holder of the mortgaged assets the payment of the part of the credit secured with the assets in his possession, if at the expiration of the term the debtor does not make the payment after having been judicially requested to do so.”

As it can be appreciated, if the maturity of the obligation is reached and the debtor does not verify the payment after having been judicially requested, the mortgagee may claim from the third-party holder of the mortgaged assets, the payment of the part of the secured credit with those that the third party holds.

Once the third-party possessor has been requested, it must verify the payment of the credit with the corresponding interest or abandon the mortgaged goods.

**Voluntary Mortgage:**

**“ARTICLE 1588.**

Voluntary mortgages are those agreed between parties or imposed by disposition of the owner of the property on which they are constituted”.

According to the aforementioned article, voluntary mortgages are those in which there is a manifestation of the will between the parties in order to constitute the same with the purpose of guaranteeing an obligation. In that order of ideas, the person who has the power to constitute the mortgage may do it by himself or through an attorney-in-fact with special power to mortgage.

**The mortgage on future obligations or obligations subject to conditions:**

**“ARTICLE 1591.**

A mortgage constituted for the security of a future obligation or subject to registered suspensive conditions, shall take effect against a third party, as soon as it is registered, if the obligation is contracted or the condition is fulfilled.

If the secured obligation is subject to a registered resolutive condition, the mortgage shall have effect as to the third party, until the fulfillment of the condition is recorded in the Registry”.

In the first paragraph, that is, when the mortgage has been constituted for the security of a future obligation, or subject to condition, we say that the credit is in a potential state, although the security has already been born; in this initial period, the guarantee constituted is close to the figure called caution, surety, maximum or security mortgage, because it assures the preferential payment of obligations that may or may not be born, so that in such phase the mortgage security exists and prejudices the acquiring third parties.

Now, with respect to the second paragraph of Article 1951, which refers to the fact that if the insured obligation is subject to a registered resolutive condition, the mortgage will take effect, as to a third party, until the fulfillment of the condition is recorded in the Registry.

In this order of ideas, once the future or principal obligation has been contracted, the security mortgage is transformed into a normal mortgage. In other words, the real lien is condensed, and hence the relevance of the registration note.

In this way the third parties that try to acquire the property know with certainty the responsibility that corresponds to it, for the expressed reason; in the same way the acquirers of the credit will be able to avail themselves of the public faith of the Registry, to safeguard their respective rights.

**Assignment of the Mortgage:**

**“ARTICLE 1598.**

The mortgage credit may be alienated or assigned to a third party, in whole or in part, provided that it is made in a public deed, of which the debtor is notified and which is recorded in the Registry.

The debtor shall not be bound by such contract to a greater extent than he is bound by his own. The assignee shall be subrogated to all the rights of the assignor.

If the mortgage has been constituted to guarantee obligations transferable by endorsement or bearer instruments, the mortgage right will be understood to be transferred with the obligation or with the instrument, without the need to inform the debtor, nor to record the transfer in the Register.

Another of the rights that the mortgagee has before the debtor fulfills the principal obligation is the right to assign the mortgage credit to a third party, as determined by articles 1598, 1599, 1600 of the Civil Code.

### **The Forced Mortgage:**

#### **“ARTICLE 1617.**

Forced mortgage established:

1. In favor of all those persons to whom any indemnity is judicially secured, in the cases of constitution and lifting of sequestrations, costs and the like;
2. In favor of children whose parents administer their property;
3. In favor of minors or incapacitated persons whose property is administered by their guardians or curators, for those received from them and for the liability incurred by them.

#### **“ARTICLE 1618.**

In order for forced mortgages to be understood as formalized, the registration of the deed by virtue of which they are constituted is required...”.

The mortgage is compulsory if its constitution can be legally required: since it is so determined by law independently of the fact that the mortgagor voluntarily agrees to provide the goods for such guarantee, it is the law that provides that it be constituted in certain cases and circumstances, taking place by virtue of a judicial proceeding of the respective court officialized to the Public Registry for its inscription.

### **CONCLUSIONS**

- The purpose of guarantee contracts is to provide security to the creditor to obtain payment in case of default, since this can be given by means of a bond, pledge or mortgage. Therefore, they give certainty to the creditor, by virtue of the fact that he will not be defrauded in case of non-payment by virtue of which the guarantee is made effective so that the creditor does not run any risk.
- The Mortgage is defined as the contract by virtue of which a person called mortgagor, constitutes a real right over a generally real property, determined and alienable, in favor of the other party called mortgagee, to guarantee the fulfillment of an obligation, without

dispossessing the debtor of the encumbered property and which gives rights to the creditor, of pursuit and in case of breach of the obligation, of alienation and of preference to be paid with the proceeds of the alienation.

- In attention to the Panamanian civil law, the scope of the mortgage contract as a security interest to guarantee the performance of the obligation, is very good for such purpose.
- The real right that is generated over the affected property, by reason of the mortgage contract executed, is effective to guarantee the fulfillment of the obligation, as a support in favor of the creditor of the contractual bond.
- After the analysis of the legal norms that regulate the diverse components of the mortgage contract, according to the Civil Code of the Republic of Panama, it is concluded that this presents a sufficiently clear and comprehensive normative development for its due application, to produce the effects for which this figure of guarantee was created.

#### **BIBLIOGRAPHIC REFERENCES:**

- Ayala Escorza, M. (2017). *Contratos Civiles*. IURE Editores.
- Darlington, K. (2013). *Los Contratos Civiles*. Editorial Cultural Portobelo.
- Espinosa, J. (2019). *Los Derechos Reales en el Ordenamiento Jurídico Panameño*. Centro de Investigación Jurídica. UP
- Mitil, M. J. (2015). *El Contrato de Hipoteca Inmobiliaria. A la luz del Derecho Positivo Panameño*. Cultural Portobelo.
- Mizrachi & Pujol, S.A. (2020). *Código Civil de la República de Panamá*. Editorial M&P.
- Pérez V. A. (1990). *Garantías Civiles (Hipoteca, prenda y fianza)*. Editorial Temis. Bogotá, Colombia.
- Planiol, M. y Ripert, G. (1997). *Derecho Civil. Parte C. Clásicos del Derecho Civil Harla*. México: D.F.
- Román, A. y Rojas, K. (2009) *Contratos Accesorios y de Garantía. El contrato de fianza y los contratos de prenda e hipoteca en el Código Civil y Código Mercantil*. Cultural Portobelo.
- Valencia, M. A. (2006). *Los Principales Contratos Civiles*. 2da Edición, Universal Books.