Round Table
"Flexibility of Real Estate Securities in Europe"

Country Report Serbia•

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A. Is Non-Accessory Real Estate Security Used in Practice? Grounds?

Serbian private law, property law included, has until the Second World War been influenced by the tradition of the 1811 Austrian Civil Code [*Allgemeines Bürgerliches Gesetzbuch*] (hereinafter "ABGB"). The 1844 Serbian Civil Code [*Грађански законик за Кнежевину Србију*] (hereinafter "SGZ") has been prepared with the ABGB as its role model (especially in the area of property law)[1]. These two codes have been applied after the formation of the Kingdom of Serbs, Croats and Slovenes (as of 1931, the Kingdom of Yugoslavia) in the most of the territory of the modern day Serbia (only in some parts of the northern province of Vojvodina Hungarian uncodified law was applied, but it was also, in the area of property law, under the strong influence of the ABGB). The attempt to create a civil codification for the whole Kingdom of Yugoslavia never came to realization because of the breakout of the Second World War, but a pre-draft which was published in 1934 [*Predosnova Građanskog zakonika za Kraljevinu Jugoslaviju*[2]] has also been decisively influenced by the ABGB. This meant, when it comes to the real estate security, that Serbian law of that era recognized the traditional ABGB-type of hypothec as the sole type of real estate security. Moreover, the hypothec in Serbian law has been modeled along the original wording of the ABGB, without the amendments made in 1916 (the third "novella"), and was therefore dominated by the principle of accessority.

After the Second World War and the creation of the socialist Yugoslavia, the whole private law was abrogated, whereas some of the rules contained in the old codifications could have been applied if there were no new rules that should have replaced them and if the old rules were not in breach with the principles of the new social order[3]. The new social order,

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• As this is a text in English containing an analysis of the civil law jurisdiction, I deem it useful to make a few terminological notes at the very beginning. So, the term "real estate security" stands for the German "Grundpfandrecht" (in Serbian "*zaloga nepokretnosti*"), the term "property law" for "Sachenrecht" ("*stvarno pravo*"), and instead of using the common law term "mortgage" the term "hypothec" is used for "Hypothek" ("*hipoteka*"). "Real estate" is used as a synonym alongside the term "immovable" (rather than "fixture"), and "real estate law" means "Immobiliensachenrecht" ("*stvarno pravo na nepokretnostima*"). "Grundbuch" ("*zemljišna knjiga*") is translated as "land book(s)", and the term "receivable" is used to denote the German "Forderung" ("*potraživanje*"). Lastly, "Grundschuld" ("*zemljišni dug*") is translated as "land charge".

[1] See, instead of many, Stanković in Stanković-Vodinelić, *Увод у грађанско право* [*Introduction to Civil Law*], Nomos, Belgrade 1996, p. 30 ff.

[2] See *Предоснова Грађанског законика за Краљевину Југославију, Текст* [*Pre-Draft of the Civil Code for the Kingdom of Yugoslavia, Text*], Ministry of Justice of the Kingdom of Yugoslavia, Belgrade 1934.

[3] This was done by the 1946 Law on Non-validity of Legal Regulations Passed Before 6 April 1941 and During the Hostile Occupation [*Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. i za vreme neprijateljske okupacije*] (hereinafter: ZNPP), Official gazette of the FNRJ No. 86/1946.

[**NOTE:** Laws in Serbia are denoted by the number of the official gazette (which may itself be one of the former federations and state unions, i.e. DFJ – Democratic Federal Yugoslavia 1943-1946; FNRJ – Federal Peoples

however, influenced the property law heavily, because the Marxist ideological positions on ownership were not in line with the traditional legal construction thereof. Therefore, many rules of SGZ and ABGB could not have been applied, or were applied with serious limitations. Various modes of nationalization of real estate through confiscation, expropriation, forced purchases under very low prices, nationalization of companies and land in the cities led to state ownership over real estate, be it directly or through the form of the so-called "social ownership"[4] (it also led to *de facto* desertion of the *superficies cedit solo* principle, which is still a key characteristic of Serbian real estate law). Even though Yugoslav economy was, after 1948 and political break-up with the Soviet Union, never a typical command economy of the Soviet type (there was a commodities market, some elements of labor market, but never any capital market), the investment decisions ("allocation of resources") were neither profit-driven nor based upon market conditions. In a country where political leadership decides on the investments upon political reasons, the security rights are not of any material significance. When it comes to real estate security, its importance was additionally reduced by the fact that most of the land (and significant part of other real estate) was either state owned or socially owned. That, first, made the debt collection from the value of the real estate less feasible – the real estate would remain socially owned even after the sale in the execution procedure, only the user/bearer of the right of disposal would change. Second and more important, it led to reduced significance of the real estate registry (the land books) and questions whether the socialist state should finance an expensive real estate registry when almost all of the real estate is socially owned[5], which subsequently led to registries not being regularly updated (being outdated or obsolete, in fact). The neglected hypothec was, therefore, not changed in the new "socialist" legislation, and it remained an accessory right even after a partial codification of property law was passed in 1980, in a form of the Law on Basic Ownership Relations [*Zakon o osnovnim svojinsko-pravnim odnosima*] (hereinafter "ZOSPO")[6]. This law contained a mere seven articles dedicated to the hypothec, thus reflecting its diminished practical importance in that time. These seven articles structured the hypothec as a strictly accessory right[7].

Due to the unfortunate events of the nineties and the bloody breakdown of the Yugoslav federation, the transition in Serbia came somewhat belated. The beginning of the nineties was marked by a very specific "transition" which did not, in fact, aimed at transforming Serbia into

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Republic of Yugoslavia 1946-1963; SFRJ – Socialist Federal Republic of Yugoslavia 1963-1992; SRJ – Federal Republic of Yugoslavia 1992-2003 and SCG – State Union Serbia and Montenegro 2003-2006, or of the (Peoples 1946-1963, Socialist 1963-1990, no prefix from 1990-present) Republic of Serbia), year of its issue and the page number. The pattern is **number/year-page**. Where there is no data on the page, it is simply omitted.]

[4] "Social ownership" was a peculiarity of Yugoslav socialism, molded and caused by ever changing ideological positions of the Yugoslav communist party. It was called a "non-ownership form of ownership", whereas in practice the various powers contained in the right of ownership were divided between various subjects, the state always being one of them.

[5] See B. Blagojević, *Predgovor* [*Preface*], in Đ. Krstić, *Evidencija prava na nepokretnostima, uporednopravni prikaz* [*Records of the Rights on Real Estates, a Comparative Review*], Institute of Comparative Law, Belgrade 1972, p. IV ff.

[6] See Official gazette of the SFRJ Nos. 6/1980-180, 36/1990-1197, Official gazette of the SRJ No. 29/1996-41 and, especially, Official gazette of the Republic of Serbia No. 115/2005-10, by which its rules on hypothec were abrogated.

[7] See on this a short presentation in English – M. Živković, *Mortgage and Lien on Land* in *Property Law Amendments in Serbia*, Institute of Comparative Law, Belgrade 2004, p. 170 ff. of the English text (the book is bilingual, in Serbian and in English). The review of hypothec, as defined in the current property codifications in the two entities of Bosnia-Herzegovina (apart from Brčko District), by Meliha Povlakić in *Flexibilität der Grundpfandrechte in Europa Band I*, *Länderbericht Bosnien und Herzegowina* Schriftenreihe vdp Band 23, Berlin 2006, p. 33 ff. is in German and is fully applicable to the hypothec under the ZOSPO.

a political democracy and market economy but rather into a multiparty-masked political autocracy and market-masked planned war economy. The result of this distorted transition was that there was private ownership and rich individual entrepreneurs, but no genuine attempt to go for a real market economy. There were some changes in the nineties, but the genuine political (and thus economic) change came after the fall of autocrat Milošević in October of 2000. Once Serbia attempted to create a genuine market economy it became painfully obvious that the ZOSPO rules on hypothec are neither sufficiently complete nor appropriate in content. The practice relied on the so-called "court executable hypothec" provided in the Law on Enforcement Procedure[8] for it was more efficient in terms of collection (there was no need to go for a dispute proceedings first, for it enabled direct recourse to execution/enforcement proceedings), but the structural deficiencies of the legal institute of hypothec were not overcame by that particular type. The work on a new law which would regulate the hypothec in more detail was initiated under the auspices of the World Bank. However, the Law on Hypothec, passed in December 2005, did not introduce a non-accessory real estate security. What it did was it, in some respects, relaxed the strict accessority of hypothec which existed under the ZOSPO, as shall be presented later in this report.

The answer to the question posed in the title of this part of the report would, therefore, read that there is no non-accessory real estate security in Serbian law, but that the recent amendments of the legal framework allow more exceptions to the strict accessority of the existing hypothec.

[8] This type of security right over movables and immovables alike was in fact introduced during the former Yugoslav federation, in 1990, by amendments of the 1978 Law on Enforcement Procedure. Further amendments of that law, as well as new laws of the same name and contents which were passed in 2000 and 2004 respectively (the latter is the one currently in force) kept this form of hypothec, so it shall be presented later in this report.

B. Legal Grounds.

The main legal source for substantive regulation of hypothec in Serbian law is the 2005 Law on Hypothec [*Zakon o hipoteci*] (hereinafter: ZH)[9]. Given the fact that hypothec is, in almost all cases, established by registration, the legal sources related thereto are also of importance. These are the pre-World War II laws on land books[10] (hereinafter jointly referred to as: JZZK) and the 1992 Law on State Survey and Cadastre and on Registration of Rights On Immovables [*Zakon o državnom premeru i katastru i upisima prava na nepokretnostima*] (hereinafter: ZKN)[11]. The already mentioned "court executable hypothec" is still provided in the current 2004 Law on Enforcement Procedure [*Zakon o izvršnom postupku*] (hereinafter: ZIP)[12], and the ordinary court hypothec (in German, "*Zwangshypothek*") is also provided in this law. Lastly, the area of obligations, including the law of contracts (legal acts, *Rechtsgeschäfte*), is regulated in the 1978 Law on Obligation Relations [*Zakon o obligacionim odnosima*] (hereinafter: ZOO)[13].

The **Law on Hypothec** was passed on 27 December 2005, it came into force on 4 January 2006 and its implementation commenced on February 27, 2006. Speaking of its' subject-matter, the ZH itself, in Article 1, states that it regulates "hypothec for securing of receivable", which indicates that the accessory nature of hypothec has been preserved. The draft ZH has been prepared with ABGB rules (as amended by the three "novelles" of 1914-1916) as its role model[14], in keeping with the tradition and principles of civil law (continental European) systems. However, the final text has a few features that originate from the law on mortgage developed in the legal systems of common law tradition (the possibility of out-of-court collection, i.e. sale of the encumbered immovable) as well as some country-specific provisions developed for overcoming some of the biggest practical obstacles for the development of hypothec in practice, which were introduced as a consequence of World Bank experts persisting on it[15]. Not going into its details here, it should be pointed out that ZH has the main

[9] Official gazette of the Republic of Serbia No. 115/2005-10 of December 27, 2005.

[10] These are: Law on Land Books [*Zakon o zemljišnim knjigama*] (hereinafter: ZZK), Official gazette of the Kingdom of Yugoslavia Nos. 146/1930-53 and 281/1931-90, Law on Partition, Writing Off and Writing To in the Land Books [*Zakon o zemljišnoknjižnim deobama, otpisima i pripisima*] (hereinafter: ZZDOP), Official gazette of the Kingdom of Yugoslavia No. 62/1931, Law on Internal Organization, Establishment and Correction of Land Books [*Zakon o unutrašnjem uređenju, osnivanju i ispravljanju zemljišnih knjiga*] (hereinafter: ZUOIZK), Official gazette of the Kingdom of Yugoslavia No. 62/1931, as well as the Rulebook on Keeping the Land Books [*Pravilnik za vođenje zemljišnih knjiga*] (hereinafter: PZK), Official gazette of the Kingdom of Yugoslavia No. 64/1930. The abbreviation "JZZK" shall be used to denote this complete package of land book laws and regulations further in the text.

[11] Official gazette of the Republic of Serbia No. 83/1992-2897, significant amendments in Nos. 12/1996-328 (March 1996) and 25/2002-1 (May 2002). Other numerous amendments are of less importance, for they were restricted to changing the amounts of fines provided in the law, correction of technical errors of the text and erasing some less important parts.

[12] Official gazette of the Republic of Serbia No. 125/2004-33.

[13] Official gazette of the SFRJ Nos. 29/1978-1181, 39/1985-1129, 49/1989-1195, 57/1989-1438, Official gazette of the SRJ Nos. 31/1993-681 (these amendments were important for the law was cleaned from socialist ideology in its wording), 22/1999-2 and 44/1999-17 (two last amendments refer to application of this law during the state of war proclaimed in 1999).

[14] See draft published in Danas PravoPlus [attachment to daily newspaper Danas] of 3 June 2004 (*the first draft*) and enhanced *second draft* of 4 October 2004 published in *Pravni život* Nr. 10/2004, p. 39 ff. The author of these drafts was professor Miodrag Orlić from the Belgrade University Faculty of Law.

[15] The final text also spoiled some of the traditional civil law features from the earlier drafts, as shall be shown later on.

aim at establishing the primary market of hypothec, i.e. enabling its broader practical use by banks and its efficient realization in case of default by the debtor. Neither the original drafters nor the mentioned WB experts who participated in the subsequent drafting appeared to pay too much attention to the flexibility of hypothec and the requirements of the secondary hypothec market, in which hypothecs would be traded amongst credit institutions and refinanced. This is, though, quite understandable having in mind their starting position, for before the ZH was adopted Serbia was a country with very deficient legal framework on real estate security and an extremely underdeveloped primary market of hypothec in practice, which were the problems to be tackled with priority.

The **JZZK** and **ZKN** contain two different sets of rules on registration of real estate rights currently existing in Serbia[16]. The JZZK regulates the land books system, which is regulated along the Austro-German tradition (the JZZK set of regulations has been passed in the early nineteen thirties with the Austrian *Grundbuchgesetz* of 1871 as a role model[17]). The main characteristic of this system is the detachment of factual record of real estate data, kept in the land cadastre [*katastar zemljišta*] and legal record (record of rights) related to real estate, kept in the land books [*zemljišna knjiga*]. Land books are kept by municipal courts, according to the special non-contentious procedure. Registration of legal data in the land books depends upon the will of the right-holder (voluntary inscription, registration *ex privato* principle). Territorially, land books exist in the (northern) province of Vojvodina (which used to be a part of Austria-Hungary until 1918), in northern regions of inner Serbia (from Sava and Danube rivers southwards) and in the bigger cities (Belgrade, Kragujevac, Niš), for that was the order in which they were introduced in the nineteen thirties. They seem to be a very efficient system in areas where the cadastral changes have been notified to the land books and where land books were updated with the new cadastral data (new surveys etc). However, this is often not the case and the land books are not updated in many areas where they exist, especially regarding the record of the buildings erected from the nineteen sixties onwards and the rights thereon. Real estate cadastre [*katastar nepokretnosti*] (hereinafter: KN) is the register established by the ZKN. Its main characteristic is the unification of legal and factual information in the unified cadastre, which is kept by the Republic Geodetic Authority [*Republički geodetski zavod*] (hereinafter: RGZ) by applying the rules of administrative procedure. Even though ZKN provides an official duty to register one's rights in the KN (mandatory registration, '*ex officio* registration' principle), in fact the registration in the KN also follows the submission of the request of the right-holder, if for no other reason, than for the reason of payment of administrative fees for registration. Territorially, KN is gaining momentum, especially after the changes of ZKN of May 2002 (until those changes, in 10 or, more precisely, 14 years that the real estate cadastre system was established and developed in Serbia, a mere 10% of the territory was covered by the KN), and the RGZ now (Summer of 2007) claims that more than 80% of the state territory of Serbia (apart from Kosovo and Metohija region which is under international protectorate) is covered by the KN. However, some of the territorially smaller areas which are of great significance for the real estate related businesses, i.e. the developed urban areas of big Serbian cities, are not yet registered in the KN, due to the fact that such exercise requires more time, effort and skill than registration of the big surfaces in rural areas. Be it as it is, relying on the existing legislation one may only

[16] There is the third system, the 'deed system' [*tapijski sistem*] which was the oldest, inherited from the time of Turkish rule, but now it is almost extinct and the analysis thereof is therefore omitted in this report.

[17] See on that Ferdo Čulinović, *Komentar zemljišnoknjižnih zakona* [*Commentary of Land Books Laws*], Geca Kon, Belgrade 1931, p. VI (Introduction).

conclude that the KN is the system of the future, for land books are destined to be transformed into the KN. There are bitter disputes amongst the lawyers and surveyors regarding the issue of which system is better, and one cannot say with certainty that the KN has definitely won the battle, even though today it sure seems to be winning[18]. Not going into details nor taking sides in the dispute on which system is more appropriate for the registration of rights on real estate, here I can only stress that the rules on registration of rights, especially hypothec, are far less developed in the new system of real estate cadastre than in the JZZK[19], so if the KN system is to be preserved, significant alterations and additions to the registration rules of ZKN are required.

The 2004 **ZIP** is the existing law regulating the enforcement procedure (forced debt collection on ground of an executable document, *izvršni postupak*) as well as procedure for securing of receivables (*postupak obezbeđenja*) in Serbia. The arch-ancestor of all Serbian laws on enforcement procedure is the 1896 Austrian *Exekutionsordnung* (EO), which is the systematic basis of the 2004 ZIP as well. Regarding the real estate security, two types of hypothec are regulated in this act – 'court hypothec' (*sudska hipoteka*), which is in fact a hypothec based upon a court decision which is passed during the enforcement procedure, and the 'court executable hypothec' (*sudska izvršna hipoteka*), which is a hypothec based upon an agreement between the creditor and the owner of the real estate to be encumbered concluded in front of the enforcement court along the rules of the procedure for securing of receivables of the ZIP[20].

Finally, the **ZOO**, as the general source of law of obligations in Serbia, finds its application in the real estate security law given the fact it regulates the relations between any creditor and debtor, i.e. the receivable (obligation) which is being secured by the real estate security (hypothec). It also contains some provisions reaffirming the accessority of the hypothec (for example, Article 437 on assignment – *Zession* – which provides that the assignee receives all accessory rights along with the assigned receivable, such as, amongst others, hypothec). ZOO regulates the validity (*Gültigkeit*) and annulment (*Anfechtung*) of contracts, rights of creditor if the debtor is in default (*Nichterfüllung*) or in arrears (*Verzug*), etc.

The presentation of legal sources, however, would not be complete without mentioning two existing drafts of new legislation, which would fundamentally influence the flexibility of real estate securities in Serbia. The one is the **Pre-draft of Code of Ownership and Other Property Rights** [*Prednacrt Zakonika o svojini i drugim stvarnim pravima*], the publication of which in Serbian and German is to be expected very soon, and the other is the pre-draft of the **new Law on State Survey and Real Estate Cadastre** [*Nacrt Zakona o državnom premeru i katastru nepokretnosti*], the working version of which has been presented to the Government of Serbia by the RGZ in early 2007. Given the relatively early stage of these drafts it seems premature to analyze them in detail, but a general outline of their provisions

[18] See more on the issue of disputes between advocates of the two systems in M. Živković, *Real Estate Registers*, in *Property Law Amendments in Serbia*, Institute of Comparative Law, Belgrade 2004, p. 103 ff. and especially 110 of the English text (the book is bilingual, in Serbian and in English).

[19] See that comparison in more detail in M. Živković, *Upis hipoteke u zemljišne knjige i katastar nepokretnosti* [*Inscription of Hypothec in Land Books and in the Real Estate Cadastre*], in *Simpozijum u Cavtatu – Doprinosi reformi vanparničnog postupka u državama jugoistočne Evrope* [*The Cavtat Symposium – Contributions to the Reform of Non-contentious Procedure in Southeastern Europe*], GTZ Temmen, Bremen 2005, p. 169 ff. (Serbian version). The book is bilingual (Serbian and German), so German version of the same article (*Eintragung der Hypothek in die Grundbücher und in das Liegenschaftskataster*) is to be found at p. 182 ff.

[20] The same type still exists in Croatian law as well, see T. Josipović, *Länderbericht Kroatien* in *Flexibilität der Grundpfandrechte in Europa Band I*, , Berlin 2006, p. 162 (*die freiwillige gerichtliche Hypothek*).

may indicate the way in which the real estate security law could develop in Serbia[21]. As for the text of the Code of Ownership and Other Property Rights, it explicitly provides for a so-called real debt [*realni dug*] which is in fact a modified German land charge [*Grundschuld*], therefore an inherently non-accessory real estate security. This draft code also regulates hypothec, as an accessory real estate security, but much more along the line of traditional continental concept of hypothec, i.e. without the existing transplants from the common law of mortgages which exist in the ZH. As for the text of the new Law on State Survey and Real Estate Cadastre, related to the registry of rights it is much more molded along the role model of the land book rules, to the extent possible given the administrative proceedings have to be applied to the registration (rather than the non-contentious court procedure which is applied to the land books).

I Legal Character

1. Types of Real Estate Securities

As already stated, hypothec is an accessory real estate security (i.e. it serves for the securing a certain receivable of which it cannot be legally detached). It is, at present, the only type of real estate security in Serbian law. Hypothec is acquired by registration, which is deemed a mode of acquisition (*modus acquirendi*) – constitutive effect of registration – but only if there is a valid title (*iustus titulus*), and if the person establishing the hypothec on a certain real estate is authorized to do so (typically, if such person is the owner of the real estate to be encumbered with hypothec). The hypothec encumbers one or more specific real estates as its subject-matter, and it exists for securing one (or more, whereas this is not explicitly contained in the ZH but also not excluded[22]) receivable(s) of the secured ('hypothecary') creditor. The hypothec can secure the debt of the owner of the encumbered real estate, but may also be given for securing the debt of a third party[23]. Hypothec is a form of a letter [*Briefhypothek*, *hipotekarno pismo*] does not exist in Serbian law.

Most of the substantial rules regarding the hypothec are contained in the ZH, but other laws deviate from those rules at certain issues. Therefore there are several sub-types of hypothec, depending on the criteria for classification. So, related to the title upon which the hypothec is established, there are hypothec based upon contract or court settlement [contractual hypothec, *ugovorna hipoteka*], hypothec based upon declaration of owner of the real estate [unilateral declaration hypothec, *jednostrana hipoteka*], hypothec based upon the statute [statutory hypothec, *zakonska hipoteka*] and hypothec based upon the court decision [court hypothec, *sudska hipoteka*], whereas the statutory rules pertaining to the contractual hypothec apply to the other three types if nothing else is provided by law[24]. Regarding the enforceability, one may differentiate the two directly enforceable hypothecs: 'court enforceable hypothec' [*sudska*

[21] I have participated in preparation of both mentioned drafts, and therefore I am aware of the current versions of both texts. Also, I am fully aware of the discussions and the lines of thinking within the expert groups which prepared them, so I feel I can present the general directions these drafts aim to achieve for Serbian property law.
[22] See Art. 7 and Art. 12 Para. 1 Item 3 of the ZH. It is indicative that the law speaks of the secured receivable in singular, and of the encumbered real estate in singular and in plural.
[23] The ZH does not provide this explicitly, but, beyond any doubt, allows it– see Art. 29 Para. 1 ZH, which speaks of the notice that should be sent to the "debtor and the owner of the encumbered real estate (if they are different persons)…". This wording is repeated on several other places in the ZH. 2004 drafts ZH contained the explicit provision – see Art. 15 Para. 2 of the first draft, Art. 16 Para. 3 of the second draft. Same applies to the Montenegrin Law on Hypothec, Art. 12.
[24] See Art. 8 ZH.

izvršna hipoteka] provided by the ZIP, and the 'enforceable out-of-court hypothec' [*izvršna vansudska hipoteka*] as provided in Art. 15 of the ZH, from the basic model which is not directly enforceable. Regarding the encumbered real estate, there is the ordinary and the simultaneous/joint hypothec [*simultana/zajednička hipoteka, Simultan-, Gesamthypothek*], and the special hypothec on objects or parts of objects under construction [*hipoteka na objektu u izgradnji/na posebnom delu objekta u izgradnji*]. Lastly, Serbian law also recognizes the so-called 'overhypothec' [*nadhipoteka*, in German *Afterhypothek*].

It is interesting that, while allowing the hypothec to secure conditional or future receivables [*buduće ili uslovno potraživanje*, *künftige oder bedingte Forderung*], ZH **does not provide** the so-called 'highest amount hypothec' [*hipoteka na najviši iznos*, *Höchstbetragshypothek*], whereas the two were often related in the registration legislation – see, for example, § 14 of the ZZK, Arts. 130 and 131 of PZK, which provide for the highest secured amount to be denoted and not the precise amount, especially in cases of so-called cautionary and credit hypothec [*kauciona i kreditna hipoteka*, *Kaution- und Kredithypothek*]. This is even more perplexing bearing in mind the fact that the 2004 drafts of the ZH explicitly contained the provisions on the hypothec for the highest amount[25].

I shall start the presentation with the types related to the title of establishment:

- **Contractual hypothec** is a hypothec based upon the agreement between the creditor and the owner of the real estate to be encumbered (contract on hypothec)[26]. ZH regulates the contents and the form of the contract on hypothec, which may be a part of the contract by which a secured receivable is established (typically lending/credit contract) or a self-standing contract. The contract on hypothec is a contract between the owner of a real estate and a creditor by which the owner is obliged that the creditor may collect its receivable from the value of the encumbered real estate, if the secured receivable is not satisfied (paid) upon its maturity[27]. The contract must be concluded in written form, and the signatures must be verified by the court or other authorized body[28]. The contract on hypothec must contain: names and addresses of the debtor and the owner of the encumbered real estate (if they are not the same); *clausula intabulandi*, i.e. the unconditional declaration of the owner of the real estate that it

[25] See Art. 8 of the first draft of 3 June 2004 and Art. 9 of the second draft of 4 October 2004, Pravni život No. 10/2004, p. 42. Also, the 2004 Montenegrin Law on Hypothec, which was drafted along its Serbian counterpart by more or less the same experts, explicitly allows the 'highest amount hypothec' in its Article 7.

[26] The ZH in Art. 8 speaks also of court settlement as the basis for a contractual hypothec, which is in itself not a mistake because the court settlement is also a kind of contract (agreement), but I see no reason to mention this kind of agreement explicitly, especially bearing in mind that the hypothec based upon the agreement of parties in front of the enforcement court is not regulated by the ZH but by the ZIP. Also, such directly enforceable hypothec is commonly treated as a type of a court hypothec, because that is its decisive characteristic important for its practical use.

[27] See Art. 9 of the ZH. The wording of this Article is a bit perplexing, to say the least, because it seems as if the owners' obligation is that the creditor collects its receivable from the value of encumbered real estate, which looks a lot like an obligation for the performance of a third party (as if the owner overtakes the obligation that the creditor shall do something, i.e. shall collect, which would place him in default if the creditor does not do that). One could presume this to be a vagueness due to grammatical reasons, but the 2004 drafts are, even though also not fully correct themselves in my opinion, much more precise: they speak about the obligation of the owner to endure [lat. *pati*] that the creditor collects its secured receivable from the value of the real estate – Art. 15 of the first draft of 3 June 2004, Art. 16 of the second draft of 4 October 2004. In my opinion, the correct way to word this provision is simply that the owner undertakes the obligation to create a hypothec for the creditor.

[28] See Art. 10 of the ZH.

allows the registration of hypothec on his/hers real estate (it is rather strange that the ZH makes the *clausula intabulandi* a mandatory part of the contract on hypothec, because the very meaning and the reason of its existence suggest that it may, but need not be, the part thereof); precise data on the receivable that is being secured – currency of calculation and of payment (receivables in foreign currency are explicitly allowed), amount of each installment and time of maturity thereof, place and manner of payment, respectively data on principle sum, interest rate or the elements upon which it may be determined, place and manner of interest payment, as well as amount of other ancillary payments if they are agreed, and the maturity of the receivable, respectively the way by which the maturity is to be determined, if no deadline is foreseen; data on the encumbered real estate with the proof of ownership (this is also perplexing – presumably, reference to the documents that prove the ownership should suffice); and data on fixtures and other parts of the real estate that are encumbered with the hypothec[29]. Lastly, some of the provisions of the contract on hypothec, related to the case the secured receivable is not paid upon maturity, are forbidden, i.e. proclaimed null and void (ban on *lex commissoria*) – the creditor may not sell the encumbered real estate itself contrary to the provisions of the ZH; the creditor may not keep the encumbered real estate or transfer it to a third party at a previously determined or previously undetermined price; the creditor may not use the real estate nor collect its fruits (ban on *pactum de antichresis*); the creditor may not forbid the owner to sell the real estate after the hypothec is established nor can he forbid the owner to establish subsequent hypothecs[30]. Also, both directly enforceable types of hypothec are, by their nature, contractual ones. As for the scope of the provisions of the contract that established the secured receivable which should be repeated/denoted in the contract on hypothec, the above determination of secured receivable will suffice, whereas the referral to the contract that established the secured receivable for more details is allowed.

- **Unilateral declaration hypothec** is a hypothec based upon a unilateral declaration [*založna izjava*] of the owner of the real estate to be encumbered, in which the owner obliges himself that the creditor may collect its receivable from the value of the encumbered real estate, if the secured receivable is not satisfied (paid) upon its maturity. The unilateral declaration is, in fact, a unilateral legal act [*einseitiges Rechtsgeschäft*] for it produces legal effects. The contents of the unilateral declaration and its form mirror the ones provided for the contract on hypothec. Both the owner and the creditor may request the registration of hypothec based upon the unilateral declaration.[31]
- **Statutory hypothec** is a hypothec based directly upon the provision of a particular law. Traditional regulation related to acquiring the statutory hypothec, which was contained in the ZOSPO, provides that registration is not required for acquiring the statutory hypothec, for it is acquired "in the moment when the conditions foreseen by law are fulfilled"[32]. Under the ZH, there is no exception for the statutory hypothec, for it is acquired by registration based upon the statute[33]. Old, unregistered statutory

[29] See Art. 12 of the ZH.
[30] See Art. 13 of the ZH.
[31] See Art. 14 of the ZH.
[32] See Art. 64 Para. 2 ZOSPO, which was put out of force by coming into force of the ZH. The same provision exists in other countries influenced by Austrian tradition, for example the Croatian law – see T. Josipović, *op. cit.*, p. 163.
[33] Art. 14 Para. 1 Item 3.

hypothecs established under the ZOSPO do not exist anymore. The rules provided for the contractual hypothec apply to the statutory hypothec, if nothing else is provided in the law in which the statutory hypothec is regulated (so, as default rules). "Textbook examples" of statutory hypothec are: 1) the provisions by which the receivables related to the sale of the encumbered real estate (and some other privileged receivables) are the first ones to be settled from the amount achieved by such sale (expenses of sale procedure), which means that these receivables are in fact privileged, for even though they are created later, they enjoy the top priority over all other receivables to be settled from the amount achieved by the sale, and 2) the provisions on the real estate security the state has for securing the tax debts of its taxpayers. As for cases of the first group, they are regulated in Art. 41 Para. 1 Item 1 ZH for the case of an out-of-court sale of the encumbered real estate (the costs of sale including the costs and fees of third parties have the absolute top priority), and, for the case of the court sale of the encumbered real estate, in ZIP, Art. 140 (expenses of enforcement procedure, receivables based upon statutory alimentation if they are proved by an enforceable document and reported by the sale hearing at latest) and Art. 141 (tax and other levies burdening the real estate in the last year, compensation for the damages caused by damage to health, reduction or loss of the ability to work or loss of alimentation due to the death of its debtor, salaries in case the employer is an entrepreneur or other natural person including matured contributions for the social insurance, irrespective if all these are secured by a security right, but provided that all these receivables are proved by an enforceable document and reported by the sale hearing at latest). These receivables, also called 'privileges' because of their priority over even the earliest hypothec, still exist even without the registration, and even though they are referred to in the textbooks as a type of statutory hypothec[34] they may also be treated separately, because they are inherently attached to the process of forced collection from the value of the encumbered real estate (and therefore need not be treated as secured by hypothec). As for the cases of the second group, the rules of the Law on Tax Procedure and Tax Administration [*Zakon o poreskom postupku i poreskoj administraciji*] (hereinafter: ZPPPA)[35] are of importance. This law abolished the absolute privilege for the due tax, interest on that tax, costs of collection procedure and even the fines for tax-related misdemeanors which existed under the previous tax legislation[36]. It introduced a relatively complex system in which there is a statutory hypothec of the Republic of Serbia for the securing of tax receivables in the forced collection procedure over the real estate of the tax debtor, until all due taxes are collected[37]. The statutory hypothec is acquired based upon a decision of recording (*Inventur*, *popis*) the real estate of the debtor (as *iustus titulus*) and the registration thereof in the real estate records (as *modus acquirendi*)[38]. However, the ZPPPA statutory hypothec enjoys a limited privilege. Namely, ZPPPA allowed the Tax Authority to perform the forced collection procedure itself, even when it involves the sale of the tax debtor real estate (prior to this law, this has been an exclusively court entrusted task, so the Tax

[34] See M. Orlić in O. Stanković-M. Orlić, *Stvarno pravo* [*Property Law*], VI skraćeno i izmenjeno izdanje, NIU Službeni list, Belgrade 1993, p. 238

[35] Official gazette of the Republic of Serbia Nos. 80/2002-1, 84/2002-2, 23/2003-16, 70/2003-1, 55/2004-32, 61/2005-51, 85/2005-30 and 62/2006-12.

[36] In fact, that privilege existed from mid-nineteen nineties, see M. Živković, *Mortgage and Lien on Land* in *op. cit.*, p. 174 ff. (in English version).

[37] Art. 86 ZPPPA.

[38] Art. 87 ZPPPA.

Authority could only initiate court procedure in case it wanted satisfaction from the value of the debtors' real estate). Under the ZPPPA rules on enforced collection from the value of the debtors' real estate, only one third of the assessed initial value of the real estate encumbered with the statutory hypothec is exempt from the tax privilege[39]. Under the ZPPPA, statutory hypothec may also be established as a provisional measure aiming to secure future tax liabilities, in the same way as the one explained above[40].

- **Court hypothec** is a hypothec based upon a court decision. Typical court hypothec is regulated in Art. 102 Para. 3 ZIP, which pertains to the situation in which an unsecured creditor requests enforcement through the sale of the debtors real estate. By notification of the decision on enforcement (*Exekutionsbewilligung*) in the real estate registry, such creditor acquires a hypothec. In case of a creditor of a previously registered (contractual or unilateral declaration) hypothec, a notification of the decision on enforcement in the real estate registry provides a third party effect for that decision, and it becomes enforceable against any future owner of the encumbered real estate[41] (so there is no need to carry out new enforcement proceedings against such new owner). Apart from this type, the hypothec established upon the provisions of the ZIP on the procedure for securing receivables may also be deemed court hypothec[42]. This applies to the hypothec based upon agreement of parties recorded in the minutes of the court procedure ('court enforceable hypothec', Art. 268 ff. ZIP), even though it may also be treated by a contractual one (whereas the contract is concluded in front of the court and witnessed in the minutes from the court hearing).

Along the criteria of enforceability, one distinguishes the ordinary hypothec and the directly enforceable types of hypothec.

- **Ordinary hypothec** is not directly enforceable, which means that the creditor must first obtain an executable court decision, and only upon such a decision may initiate enforcement proceedings. In other words, the creditor must first take its debtor to court in civil proceedings, in which the court establishes whether the debtor really owes the performance provided in the secured receivable. Only after the court verifies the existence of the debt and obliges the debtor to pay it to the creditor in its final verdict, can the creditor initiate the enforcement proceedings. Moreover, if the *in rem* debtor (owner of the encumbered real estate) is not simultaneously the personal debtor, the creditor must file a special hypothecary action [*Hypothekarklage, hipotekarna tužba*] against the real debtor in order to be able to initiate enforcement procedure against him.
- **Court enforceable hypothec** is a hypothec which is based upon agreement of parties made in the securing of receivables procedure provided in ZIP, and recorded in the minutes of the court hearing. The parties to this agreement confirm the existence of a monetary receivable [*Geldforderung*], denote its maturity and agree that a hypothec shall be established to secure it. The signed minutes from the hearing are deemed, by operation of law, a court settlement, which is directly enforceable[43]. The registration of this hypothec is made upon the court decision which the court must pass after the

[39] See Art. 111 Para. 6 related to Art. 110 Para. 7 ZPPPA.
[40] See Art. 66 Paras. 3 and 4 ZPPPA.
[41] See Art. 102 Paras. 1 and 2 ZIP.
[42] See Arts. 274 ff. ZIP.
[43] See Art. 270 ZIP.

agreement is made[44], and such hypothec is directly enforceable, i.e. there is no need to carry out civil proceedings, for enforcement may be requested on the basis of the agreement alone[45]. However, the enforcement in this type of hypothec is performed by the court.

- **Enforceable out-of-court hypothec** is regulated in Art. 15 of the ZH. Given the fact that Serbia does not yet have public notaries, the ZH provided for a simulation of the notarial hypothec and went a step further, allowing the secured creditor to sell the encumbered real estate out-of-court, following the role model of the law of mortgage that exists in the common law systems. The fact that a hypothec is enforceable by out-of-court sale by creditor is specially noted in the land books, respectively KN, and the out-of-court sale is performed according to the rules contained in the ZH. The ZH requires that the contract on hypothec, respectively the unilateral declaration on establishment of hypothec, contains the following four special provisions in order to be deemed enforceable out-of-court: 1) a clear provision, i.e. statement, by which the owner of the real estate irrevocably authorizes the creditor to, if the debt is not duly paid, the creditor may sell the real estate in the proceedings provided by the ZH without having to revert to the courts, as well as that the real estate shall be evicted and transferred in possession of the buyer within 15 days from the day of sale; 2) explicit provision, i.e. statement of the owner that he has been warned on the consequences of failing to pay the debt upon maturity and that he, aware of those consequences, accepts the possibility of enforcement of the contract of hypothec by the sale of his real estate in keeping with the rules of ZH, without the right to initiate a lawsuit, and that the real estate shall be evicted and transferred in possession of the buyer by force if he does not do it voluntarily within 15 days from the day of sale; 3) a clear provision, i.e. statement, of the owner that he agrees that the creditor has the right of access to the real estate, included the entry therein, irrespective of the direct possessor thereof (owner, tenant), for the control of maintenance or for other justifiable reasons, as well as that he has the duty to co-operate with the creditor in the process of sale, especially to enable the access to the encumbered real estate (entry into the apartment etc.); and 4) explicit statement of the third party (apart from the owner) having direct possession (if there is such a third party) that it is aware of the consequences to which the contract on hypothec may lead, including the eviction from the real estate and the loss of possession thereof, as well as that it agrees with the access rights from point 3) above. In case these provisions are contained in the contract on hypothec, the enforcement is carried out in the special private (out-of-court) procedure provided in the ZH, and if not – in the court procedure provided in the ZIP. However, even though the rule is not explicitly contained in the ZH, the creditor which can enforce its right out-of-court can, if he so chooses, opt for court enforcement, because the one that is authorized to do more can also do less.

Depending on the number and nature of the encumbered real estate, the following special types of hypothec may be differentiated:

- **Simultaneous/joint hypothec** [*Gesamthypothek*] is a hypothec encumbering two or more real estate, irrespective of whether they are owned by the same person, for

[44] See Art. 271 ZIP.
[45] See Art. 273 ZIP. The enforcement is carried out by application of the standard rules of ZIP on enforcement by sale or administration of encumbered real estate (*Zwangsversteigerung* or *Zwangsverwaltung*].

securing one receivable. The creditor may seek satisfaction (enforcement) from one or more of the encumbered real estate, provided he makes his choice in good faith[46]. Even though the ZH is not completely clear on that, the essential characteristic of the simultaneous hypothec is that any encumbered real estate may be used for collection of the full amount of the secured receivable – figuratively speaking, the encumbered real estates are jointly liable for the whole secured debt. This type of hypothec, originating in the ABGB, also existed in the ZOSPO (Art. 63 Para. 3). The novelty of the ZH is the explicit provision that the encumbered real estates need not belong to the same owner (this was not explicitly put, but was implied in the ZOSPO), and that the creditor must make his choice in good faith (this was also implied before, for this provision is in fact a concretization of the ban on the abuse of rights – *Rechtsmißbrauchverbot*). It should also be said that Serbian ZIP does not contain the provision similar to the one in the §222 of the Austrian EO, so the collection from one of the encumbered real estate may come as a detriment to the subsequent creditors having hypothec on that particular real estate and an advantage to the ones having hypothec on the other real estates encumbered by the simultaneous hypothec.

- **Hypothec on objects under construction/hypothec on special parts of objects under construction**, as shall be explained more comprehensively below in the part of this report on the real estate that can be encumbered by hypothec, is a hypothec the subject-matter of which are buildings that are under construction, or parts of these buildings, irrespective of whether they are finished (provided they are not yet registered)[47]. This special type of hypothec was introduced because of the fact that many buildings are not yet registered in the real estate registries, with the purpose of enabling the establishment of hypothec over such real estate. It also should serve for securing the credits extended for the purpose of construction of a building by the value of the building that is being constructed (in order to boost the construction industry), as well as for enabling the buyers of apartments and business premises in the buildings which are still under construction to use those apartments/business premises as collateral for the bank which extends them credit for the purchase price (economically, the first case is meant to increase supply of new buildings, and the other demand). The main characteristic of these hypothecs is the special manner of enforcement in the period prior to the objects being registered, because an unfinished, more precisely unregistered object cannot be legally sold for it does not legally exist. Therefore the ZH provides that the collection of hypothec from the object under construction is performed by assigning the building permit to the buyer against compensation (price) and selling the things already built in the object under construction (the creditor collects from the price achieved for the license and built-in things)[48]. However, ZH does not speak of the collection of hypothec in case the object is a special part of the object under construction at all, at least for the case the default happens before the construction is finished and the building, as well as special parts thereof, registered.

Lastly, there is a special type of hypothec usually described “hypothec on hypothec”, as if the subject-matter of such hypothec is not a real estate, but rather the already existing hypothec.

[46] See Art. 4 ZH.
[47] See Art. 3 Para. 1 Item 6, Art. 11 Paras. 2-5 ZH.
[48] See Art. 39 ZH.

- **Overhypothec** [*Afterhypothek*, *nadhipoteka*] is, in fact, a pledge of receivable which is secured by hypothec[49]. Therefore, the subject-matter of overhypothec is not hypothec, but rather a receivable secured by a hypothec. Due to its accessority, the hypothec securing the pledged receivable by operation of law secures the secured receivable[50]. The general rules on pledge of receivables are contained in the ZOO[51]. ZH merely regulates the contract on overhypothec, requiring it to be in written form with verified signatures. Furthermore, the contract on overhypothec must contain *clausula intabulandi*. ZH also regulates that the debtor of the pledged receivable may not perform the pledged receivable to its original creditor, but to the pledgee (overhypothecary creditor) as of the moment he has been informed on the pledge in writing, and that overhypothec has third party effect as of the moment of registration in the real estate registry.

2. Legal Nature of Real Estate Security

It is common and it was until recently undisputed that the hypothec is a property (*in rem*) right [*stvarno pravo*, *dingliches Recht*], not an obligation (*in personam, ad rem*) right [*obligaciono pravo*, *personliches, obligatorisches Recht*], and the generations of Serbian law students learned so[52]. However, in his preface to the Law on Hypothec, Minister Milan Parivodić, PhD, former assistant for Introduction to Civil Law and Property Law at the University of Belgrade Faculty of Law who is considered the *spiritus movens* of the final text of the ZH, claimed that hypothec is in fact an obligation (has an obligatory nature)[53]. Given the fact that Mr. Parivodić is my acquaintance and that we were working together for some six years, I know both his motives to write such a claim and the logic behind it and I understand him. However, this does not mean that the claim he made is correct or, at least, not extremely dangerous for the legal profession, if it becomes an official position in law schools[54]. I shall omit going into detailed explanation of his motives here, restricting myself to saying that his claim that hypothec is not a property right [*dingliches Recht*] is caused by the understanding of property rights [*Sachenrechte*, *dingliche Rechte*] as rights which authorize their bearers to a certain extent of direct power over a thing [*određeni obim neposredne vlasti na stvari*, *Herrschenrecht über eine körperliche Sache*], advocated strongly by late Prof. Obren Stanković, Mr. Parivodićs' original mentor. However, Prof. Stanković never claimed that, if hypothec is not a clear property right under his definition, it has to be an obligation right, because he never claimed that all rights are either property or obligation rights [*Sachen- oder Obligationenrechte*][55]. That step belongs to Mr. Parivodić alone, even though he made a slight reservation by writing that hypothec is "rooted in thing" and therefore "nearing property rights" (this is in fact a reference to the right of suit, the *Folgerecht*, which is typical for property rights).

[49] See Art. 21 ZH.
[50] In case of pledge of receivable (*Forderungspfand*), there are two receivables – the secured one, and the pledged one. The pledged one serves as a security for the secured one.
[51] See Arts. 989 – 994 ZOO.
[52] See Stanković in Stanković-Orlić, *op. cit.*, p 1, especially for hypothec p. 4.
[53] See *Zakon o hipoteci, predgovor dr Milan S. Parivodić* [*Law on Hypothec, Preface by Milan S. Parivodić, PhD.*], Službeni glasnik, Belgrade 2006, p. 8. It is interesting that the claim is made along the claim that the ZH defines hypothec in a "traditional" way, whereas the claim that hypothec is in its nature an obligation is all but traditional.
[54] At a number of state organized trainings related to the ZH, Mr. Parivodić repeated his position on obligatory nature of the hypothec.
[55] For position on legal nature of hypothec as an atypical *in rem* right (*unechtes Sachenrecht*), which he appears to agree, see Stanković, in Stanković-Vodinelić, *op. cit.*, p. 110.

Notwithstanding this dissenting opinion, hypothec is unanimously regarded as a property right, and more importantly, it has the features of an *in rem* right under the ZH – the right of suite and the right of priority. It cannot fall under prescription (*Verjährung*)[56] and it is not a right to request something from a certain person (*Anspruchsrecht*) but rather a right to convert a real estate in money (*Verwertungsrecht*) and collect the secured receivable from that sum of money. There are some of the consequences of the misconception the authors of the final text had regarding the legal nature of hypothec – for example, the mentioned perplexing definitions of the contract on hypothec and unilateral statement on hypothec, in which it seems as if the owner of the encumbered real estate undertakes the obligation that the creditor shall collect his (creditors') receivable from the value of that real estate, are most probably due to an attempt to treat the hypothec as an obligation (obligatory right). Fortunately, these consequences do not appear to impede the genuine nature of hypothec in practice, leaving it amongst the *in rem* rights where it belongs since the Roman law.

Now, as for the treatment of hypothec within the boundaries of the property law, the Serbian doctrine is not unanimous – some simply mention it as one of the property rights[57], some treat it as one of the property rights on alien thing (*stvarno pravo na tuđoj stvari*, *iura in re aliena*), in the tradition of Roman law[58], but the most common conception is the one treating hypothec as one of the limited property rights (*ograničeno, sektorsko stvarno pravo*, *beschränktes dingliches Recht*)[59].

3. Subject-matter of hypothec (*predmet hipoteke*, *Hypothekgegenstand, belastbares Objekt*)

The ZH, in its Article 3, defines the subject-matter of hypothec relatively broadly:

- **Immovable (the ownership on land or an object and similar).** Here the authors of the final ZH text insist on a detail, leaving the more important issues unresolved – the insisting on the fact that the subject-matter of hypothec is, in fact, the ownership over a immovable thing and not the immovable thing itself is, to say the least, a theoretical detail[60] (which is not necessarily correct, depending on the broader theory of limited property rights), and the relation of the ZH to the *superficies cedit solo* principle,

[56] Moreover, it prevents the principal amount of the secured receivable to fall into prescription – see Art. 368 ZOO and Art. 26 ZH.
[57] So Stanković, in Stanković-Vodinelić, *op. cit.*, p. 109 ff, Stanković in Stanković-Orlić, *op. cit.*, p. 1 ff.
[58] So I. Babić, *Osnovi imovinskog prava* [*Outline of Proprietary Law*], Službeni glasnik, Belgrade 2006, p. 267.
[59] So A. Gams, *Osnovi stvarnog prava* [*Basics of Property Law*], Naučna knjiga, Belgrade 1968, p. 163, as well as D. Stojanović, *Stvarno pravo* [*Property Law*], Kragujevac 1998, p. 173. The references to the pre-WW II authors may be found in these two books, and the gist of their positions is the same – hypothec is one of the limited property rights.
[60] Presumably this wording is yet another homage of minister Parivodić to his mentor, Prof. Stanković, who originally pointed out his position on the verbal use of the term "thing" instead of the legally correct (according to his opinion) term "ownership over thing". So, when someone is buying a thing, it is the ownership on that thing that is being transferred (*in commercio*), and not the thing itself. See Stanković in Stanković-Vodinelić, *op. cit.*, p. 109. Practically the same see in Parivodić, *Preface*, p. 10, especially footnote 1. This position is certainly not immune to grounded theoretical criticism, but this report is not the place to do it – it is enough to say that also here Parivodić took the positions of Stanković a step further, convinced that he is following his mentor whereas he in fact claimed something his mentor never did – if the ownership over an immovable is subject-matter of hypothec, how come it survives the transfer of ownership, i.e. how comes it stays with the thing and not with the owner? In other words, why would only ownership have a thing as its subject-matter, and all other rights ownership over thing?

which is of essential importance for land law, the part of which is the law of hypothec, remains quite murky. The situation regarding the *superficies* principle in Serbia shall be explained below, in the part on objects under construction as subject-matter of hypothec;

- **Parts of immovables, in line with the decision on partition.** This is also a rather perplexing provision – in Serbian doctrine the common position is that a physical part of an immovable cannot be the subject-matter of hypothec until it is registered as a self-standing immovable in the real estate registry[61]. The 2004 drafts ZH had a provision that reflected this prevailing position – a part of an immovable may be subject-matter of hypothec only after it ceases to be that and becomes a self-standing immovable, registered as such in the land books (Art. 9 of the first draft, Art. 10 of the second draft). If the authors of the final text wanted merely to rephrase the provision of the two drafts, they have done so rather poorly, for instead of a clear-cut provision of the drafts, the final text contains a vague provision that may lead to misinterpretations. If this is a deliberate deviation from the former position[62], it is not quite clear how it would be possible to register a hypothec over a part of real estate without prior registration of the (physical) partition of that real estate in the registry.
- **Co-ownership stake in an immovable.** This is in line with the legal rules on co-ownership [*susvojina, Miteigentum*], because each co-owner may dispose of his/hers stake alone and without requiring consent from other co-owners[63]. However, the rules of ZIP regarding the collection from the co-ownership stake of an immovable may be interpreted so as to render this subject-matter of hypothec less attractive, at least for the types of hypothec which are enforced in the procedure provided in the ZIP. Namely, in case the debtor is a co-owner of an immovable, the consent of all other co-owners is required for enforcement against him related to that immovable, and only if all co-owners agree shall the court allow the enforcement by sale of the whole immovable[64]. Therefore the provision that the co-owner does not need the consent of other co-owners to burden his co-ownership stake with a hypothec appears not to be of much use for the creditor, if s/he requires this consent to enforce his right of hypothec. This problem was spotted by the practice, and there are published works explaining that the consent the ZIP is speaking about refers only to the situation where the whole immovable is to be sold, and if only the co-ownership stake is sold in the enforcement procedure no consent from other co-owners is required[65].
- **Special parts of buildings on which there is ownership or another right that authorizes its bearer to the right of disposal (apartment, business premises,**

[61] See instead of many Orlić in Stanković-Orlić, *op. cit.*, p. 271.

[62] For such interpretation see Dragoslav R. Živković, *Komentar zakona o hipoteci* [*Commentary to the Law on Hypothec*], Poslovni biro, Belgrade 2006, commentary to Art. 3, p. 12; opposite interpretation, that the partition must be registered first and then the hypothec, see Aleksandar Gloginić, *Komentar zakona o hipoteci* [*Commentary to the Law on Hypothec*], Službeni glasnik, Belgrade 2007, commentary to Art. 3, p. 23. For the record, both of these commentaries are extremely short and, with all due respect to their authors and publishers, prevailingly represent a mere restatement of the legal text, without any in-depth analysis or explanations of some of the legal provisions (and obviously no references to case law, for the ZH is rather new).

[63] Art. 14 Para. 2 ZOSPO.

[64] See Art. 101 ZIP.

[65] See Mladen Nikolić, Sporna pitanja u primeni novog Zakona o izvršnom postupku [Disputable Issues in Application of the New Law on Enforcement Procedure], in periodical *Izbor sudske prakse* [*Selected Court Practice*], No. 1/2007, p. 30 and 31. The author is a judge of the Commercial court in Belgrade. The similar text by the same author is published in N. Šarkić-M. Nikolić, *Komentar Zakona o izvršnom postupku* [*Commentary to the Law on Enforcement Procedure*], Službeni glasnik, Belgrade 2006, commentary to Art. 101, p. 289 ff.

garage, parking place and similar). The immovables mentioned here are the subject-matter to the condominium ownership [*etažna svojina*, *Wohnungseigentum*]. This type of ownership used to be regulated by the 1966 Law on Ownership on Special Parts of Buildings [*Zakon o svojini na posebnim delovima zgrada*][66], but that law was quashed by decision I U 95 of the Federal Constitutional Court in 1996 as not in keeping with the Constitution of the Federal Republic of Yugoslavia and the ZOSPO. Condominium is therefore one of the more significant lacunas in Serbian property law, because the ZOSPO only regulates that the self-standing right of ownership on a special part of the building may exist only on apartment [*stan*, *Wohnung*], business premises [*poslovne prostorije*, *Büroräume*], garage [*garaža*] or parking place [*garažno mesto*][67]. The rest of the condominium law [*pravo etažne svojine*, *Wohnungseigentumrecht*] is regulated very scarcely in the 1995 Law on Maintenance of Residential Buildings [*Zakon o održavanju stambenih zgrada*][68]. ZH goes a step beyond the ZOSPO, leaving open the possibility that some other special part of the building could become subject-matter of a self-standing ownership in the future. Special parts of the buildings are registered separately, in section V of the KN, or as a separate land book body in the land book insertion related to the building as a whole and the land beneath it. Generally, they must be registered in order to be eligible for encumbering with a hypothec (exceptions relate to special parts of buildings under construction).

- **Right on land containing the power of free legal disposition, especially right to build [*pravo građenja, Baurecht*], prior right of construction [*pravo preče gradnje*] or right of disposal over land in state ownership or socially owned.** Drafts ZH also contained this possibility[69], but the drafting technique was different, because the provision was a general one – it spoke of a right over an immovable that empowers the bearer to free disposition of that immovable, making an *exempli causa* list of such rights part of the provision (the list is longer, though, and includes the right of usufruct explicitly). These rights must be negotiable separately (not accessory in nature), they must have some market value and they must be eligible for registration[70]. As for the right to build [*Baurecht*], even though it is mentioned in some textbooks and lexicons of property law in Serbia, the modern Serbian lawyers lack even the basic concept of this right, given the fact that the *superficies* principle has been long abandoned, and that the existence of the right to build is tightly connected with this principle. Therefore some authors misunderstand the right to build referred to in this provision, understanding it as a right acquired in administrative proceedings in which the building permit is issued ('public' right to build) instead as a right to erect and have ownership over a building on somebody else's land[71]. The provisions under which the right to build is considered an immovable and is being registered as such (in a separate folio of land books), typical for countries under the influence of the ABGB, do not exist in Serbian law, not even in the JZZK (only PZK speaks of right to build in several of its Articles). Regarding the right of disposal over state and social ownership, it is a remnant from the socialist era, in which it was replacement for the right of ownership. Since social ownership, even though privatized to a significant extent, still exist, and

[66] Official gazette of the SFRJ Nos. 43/1965-1583, 57/1965-1902, Official gazette of the SR Serbia Nos. 29/1973-948, 52/1973-1578, Official gazette of SRJ No. 38/1996-1057.
[67] See Art. 19 Para. 1 ZOSPO.
[68] Official gazette of the Republic of Serbia Nos. 44/1995-1646, 46/1998-1119, 1/2001-3 and 101/2005-28.
[69] See Art. 4 of the first draft and Art. 5 of the second draft.
[70] So Parivodić, *op. cit.*, p. 9.
[71] See D.Živković, *op. cit.*, commentary to Art. 3, p. 13.

since there are no new regulations on state ownership, this provision continues to be required. Lastly, the prior right of construction [*pravo preče gradnje*] also originated during the socialist era. Given the fact that the construction land was until recently, by operation of constitution, owned by state or socially owned, whenever an urban plan provided for a surface to be dedicated for construction that land would be expropriated from its (private) owner. However, the owner would retain this "prior right of construction" on that land until it is "brought to its purpose" ['*privedena nameni*'] in the sense of urban planning. During the socialist period this right could not have been effectively used in most cases, because of various maximums of ownership over real estate for private individuals (so, if a 10 apartment building was planned to be erected on the expropriated land, the bearer of the prior right of construction could not effectively use that right because if s/he did, s/he would end up exceeding the maximum of 2 bigger or 3 smaller apartments which existed then). After 1990, when the restrictions and limitations of private ownership over real estate were abandoned, this right became valuable and thus eligible to be used as collateral by means of hypothec – and so it made its way into the ZH.

- **Object under construction and special parts thereof, irrespective whether it is already constructed, provided however that a final/irrevocable building permit has been issued in keeping with the law that regulates building (construction) of objects.** This particular subject-matter of hypothec, i.e. encumbrable immovable, is country specific and requires a more thorough explanation. In most countries which apply the *superficies* principle, there is simply no need for a special hypothec over an object under construction. Due to the elasticity of hypothec, i.e. the rule that it entails all subsequent increase of value of the encumbered real estate, and the *superficies* principle, in case someone wants to include an object under construction in hypothec one simply encumbers the land below the object under construction, and the hypothec automatically stretches over the unfinished building constructed thereupon. In case the owner of the land is not the owner of the building, i.e. the one performing the construction, the person performing construction must have a right to build on someone else's land and to own the building, typically for a certain period of time – the (private) right to build [*Baurecht*]. This right to build is legally considered an immovable itself, there is a separate folio for it in the registry (land books), so it is encumbered by hypothec by encumbering that separate folio, as if it is an immovable. Therefore there is no need for a special hypothec over an object under construction. However, the application of *superficies* principle in Serbia is very limited. Namely, the land designated for construction in the cities [*gradsko građevinsko zemljište*] was firstly nationalized in different ways and subsequently remained, by operation of constitution, state (earlier socially) owned[72]. Given the fact that private individuals and legal persons could have a (limited by quantity) ownership over buildings or special parts thereof (apartments, business premises, garages etc.), the legal unity between the land and buildings erected thereupon (i.e. the *superficies* principle) was broken – the

[72] See on the reach of *superficies* principle in Serbia Stanković in Stanković-Orlić, *op. cit.*, p. 28 ff. In detail and meticulously on the historical reasons and methods of abandoning the *superficies* principle see in study by B.Begović-B.Mijatović-D.Hiber, *Privatizacija državnog zemljišta u Srbiji* [*Privatization of State Land In Serbia*], CLDS, Belgrade December 2006, available at http://www.clds.org.yu/newsite/privatizacija_dr_zemljista.pdf (Serbian version only). The monopoly of state ownership over construction land in cities was abandoned only recently, in October 2006, when the new Constitution of the Republic of Serbia came into force.

state owned the land and private persons owned the buildings[73]. Therefore the owner of a building could establish a hypothec over the building in his ownership, but not on the land – owners of buildings have only the permanent right of use of the land below the building and land required for its regular use, which is permanent because it lasts for as long as the building exists, and which is accessory to the ownership on the building (as the main right)[74]. This did not create too much problems if the hypothec is established over the existing registered building or a part thereof, because these could be sold for satisfaction of the creditors, and the buyer would, along with the building/special part thereof acquire the right of use of the land. However, this prevented the classical way of establishing the hypothec over the object under construction, for the hypothec could not simply be registered over land and than extended to the building thereon as it is being finished, because the land did not belong to the future owner of the building, but to the state. On the other hand, the private right to build [*Baurecht*] gave way to the public rights by which the state granted the license to build on the land it owned, so encumbering the right to build in order to achieve the hypothec over object under construction was not an option anymore. Since objects under construction were not registered until they were finished, i.e. when the use license was issued, they simply could not have been encumbered by hypothec (moreover, they could not be subject-matter of ownership), and that created serious practical problems. Therefore the ZH introduced the special hypothec on the object under construction as its subject-matter. The conditions for the object under construction to be encumbered by hypothec is that there is a final building permit issued by the competent authority (most often municipality, for the larger buildings in Belgrade the City of Belgrade, and for capital objects the Republic). This hypothec is registered in a form of adnotation [*zabeležba*, *adnotatio*, *Anmerkung*] on the land on which the building is being erected, which is by operation of law transformed into full registration of hypothec (*uknjižba, intabulatio*, *Einverleibung*) on the building/special part thereof once it is finished and registered (and thus it is transformed into hypothec over on a building/special part thereof)[75]. This hypothec on building under construction (or special part thereof) may also be used for encumbering the buildings that are already finished, but are not yet registered, provided however that the final building license exists for these buildings[76]. This is very important for the practice, because it enabled immediate activation of the value of many unregistered objects/parts thereof as collateral, without having to wait for the slow process of establishment of KN, i.e. registration of buildings which shall last until 2010 the least[77]. The ZH provides that the risk of eventual demolition of the object (in case it was not been built according to the license) is divided between the investor, the debtor

[73] The only exception were the buildings in rural areas, because only the construction land in the cities was in state ownership, so in rural areas *superficies* principle is still applied.

[74] See Art. 83 of the Law on Planning and Construction [*Zakon o planiranju i izgradnji*] (hereinafter: ZPI), Official gazette of the Republic of Serbia Nos. 47/2003-1 and 34/2006-3.

[75] See Art. 11 Para. 2 ZH.

[76] See Art. 11 Para. 4 ZH. One should bear in mind that the factual situation with so-called illegal objects in Serbia is dramatic, for there is over 1 million various buildings which are built without the legally required licenses. That is why the problem of legalization of these buildings is one of the most pressing and complex tasks of the competent department of the Ministry of Infrastructure (earlier Ministry of Capital Investments) of Serbia. Fortunately, the ZH did not enable hypothec over illegal objects.

[77] See on registers being outdated and why above in the section on sources of law, in the part on the JZZK and ZKN.

and the creditor according to their internal relations (presumably, their agreement)[78]. The biggest structural weakness of the hypothec on object under construction, and especially of the hypothec on a special part of the building under construction, is the enforcement of those hypothecs prior to registration of the building/special part thereof (so, while the object are still 'under construction'). It has already been mentioned that the enforcement in case object under construction is the subject-matter of hypothec, under the ZH, is made by the sale of the unfinished building ('things incorporated in object under construction') and special assignment of the building permit[79]. The problem with this solution is the fact that building permits are generally not negotiable, and rightly so – the right of an 'investor'[80] is based upon a decision of the public authority, and public rights are not negotiable, i.e. only private rights [*subjektivna građanska prava*, *subjektive bürgerlihe Rechte*] are negotiable. Negotiability is pointed out as one of the immanent characteristics of the private rights and those rights alone[81]. The private right on the land which enables an 'investor' to build on that land[82] is only one of the preconditions for issuing the building permit – there is a number of other conditions related to the planned object, its keeping with requirements of urbanism (plans of regulation) etc. Therefore the exception provided in the ZH is a structural one, i.e. the one every legislator should try to avoid whenever possible because it undermines the very basics of the legal system. I believe the reasons for its' inclusion in the ZH justify it, but one should bear in mind that this solution is far from the regular one, and the sooner the Serbian law returns to the above presented classical solutions the better[83]. The ZH attempted to circumvent this problem by saying that the authority that issued the original permit shall issue the new permit, which is going to be the same as the original one in all aspects but one – it shall be issued to the name of the person who bought it in the enforcement procedure[84]. However, even though not capable of articulating their position legally, many municipalities rebelled against the negotiability of the building permit and refused to act in accordance with the ZH. However, the City of Belgrade, which is practically the most important, started to apply them in 2007, and thus the hypothec on object under construction started to be

[78] See Art. 11 Para. 5 ZH.

[79] See Art. 39 Para. 1 ZH.

[80] The term 'investor' is used by Serbian legislation on construction to denote the person who has the right to build, and in whose name the building permit is issued. That person is the original owner of the building once it is finished and registered. The 'constructor' is the company hired by the 'investor' carrying out the construction works – see Art. 2 Para. 1 Item 30 (for 'investor') and Art. 114 Para. 1 (for 'constructor') of the ZPI.

[81] See instead of many Stanković, in Stanković-Vodinelić, *op. cit.*, p. 6 (Rn 13), as well as Vodinelić, in Stanković-Vodinelić, *op. cit.*, p. 256 (Rn 769). The doctrine is quite equivocal and explicit on this issue – if a right is negotiable [*prenosivo*, *prometljivo*, *übertragbar*] than it is a private right.

[82] Which is in many cases itself non negotiable – for example, until recently, the prior right of construction [*pravo preče gradnje*], i.e. an exception to the principle of negotiability of private rights.

[83] I say this with authority of a person who, at the request of minister Parivodić caused by repeated pressures from the World Bank experts, gave the original idea for this solution. However, my idea was restricted to objects under construction, not the special parts thereof, and it did not include the objects that are already finished and used (the latter I deem an improvement of the original idea). It seems that my reservations regarding the existing impossibility of transfer of ownership on the object under construction (because the ownership does not exist until the object is registered) were disregarded by the authors of the final text of the ZH – see Art. 11 Para. 3.

[84] See Art. 39 Para. 2 ZH. This is an attempt to mask the transfer of building permit by, formally, revoking the first and simultaneously issuing the new one to the new 'investor', under the same conditions. It is revealed in Art, 39 Para. 3, in which the ZH provides that the new 'investor' acquires all rights and obligations of the previous investor by operation of law, even before the new permit is issued. Paragraph 3 was included because the authors of the ZH feared that the municipalities will refuse to issue new building permits instead of old ones.

practically applied[85]. Even bigger problem relates to the enforcement of hypothec on a special part of object under construction. As it was mentioned above, ZH is completely silent on this. Building permits are not issued for special parts of buildings but for buildings as a whole, which is logical, so there is no possibility to enforce the hypothec on a special part of object under construction by assignment of the building permit. Therefore, the only legally possible solution is to consider the hypothec on a special part of object under construction as a pledge right on a receivable (*založno pravo na potraživanju*, *Forderungspfand*), the receivable being the claim towards the 'investor' to finish the object, register it and transfer ownership on the special part to the creditor (the creditor being the buyer of the special part of object under construction), which by operation of law transforms into hypothec on a special part of building once the building is registered and divided to special parts in the registry.

4. Securing the Ancillary Payments [*obezbeđenje sporednih davanja*, *Sicherung von Nebenforderungen*].

Under the ZH, the hypothec secures the principle amount, the due interest and the costs of enforcement (Art. 7 Para. 2). As it was mentioned above, in the part on the contents of the contract on hypothec, the ZH requires the contract to contain, among other elements, the details of the principle amount, interest and other ancillary payments [*sporedna davanja*, *Nebenforderungen*][86]. Therefore, the only requirement for the ancillary payments to be secured along the principle debt is for them to be entailed in the contract/unilateral declaration on hypothec and registered. This applies also to costs incurred by the creditor which are not directly related to enforcement (say, costs of repair of encumbered immovable, or costs of initial value assessment). According to the provision of ZIP, the receivables related to interest and costs of enforcement enjoy the same priority as the principle amount, but only if they relate to the period of 3 years prior to passing of the decision of transfer of real estate to the buyer and if they are determined in an executable document[87]. This means that, in case of court execution of hypothec, if nothing special is agreed in the contract by which the receivable is established, typically the loan agreement (say, payment in installments, or maturity of interest simultaneously with the maturity of the principle, or the like), only the interests for the last three years and the enforcement costs incurred in that period shall enjoy the priority of the principle amount. Also, if in case of cancellation of the long-term loan with fixed interest rate the bank wants to secure the claim for damages caused by premature cancellation, it would be wise to stipulate this explicitly because it is not certain these claims would be covered by a hypothec securing the loan by operation of law.

5. Limitation for the Groups of Creditors [*Beschränkung des Personenkreises*]

There are no limitations whatsoever in Serbian law related to the capacity of any person to be a creditor secured by hypothec – physical (natural) persons and legal entities, domestic and foreign alike may become creditors secured by hypothec. As for advantages for some hypothecary creditors, they are primarily related to the privileged status of the secured receivables, and not to the personal characteristics of the creditor (see above on statutory

[85] There is a danger that this hypothec will be misused to achieve negotiability of objects under construction, which normally cannot be sold – the provision of Art. 11 Para. 3 which speaks about the change of ownership on object under construction seems to overlook this fact.
[86] Art. 12 Para. 1 Item 3 ZH.
[87] Art. 141 Para. 3 ZIP.

hypothec and privileges). However, there is one exception hidden in the regulations of foreign exchange operations [*devizno poslovanje*]. Namely, a domestic (Serbian) company cannot provide security (hypothec included) for the debt that exists between two foreign entities, except in case a foreign (personal) debtor is a subsidiary of the Serbian company providing security (hypothec)[88]. Therefore, in structures involving international real estate financing, the borrower should always be a local entity in Serbia, for in that case there are no impediments for establishment of hypothec on real estate in Serbia for securing the loan facility.

II Requirements of publicity

1. Land Books and Real Estate Cadastre; Construction of Real Estate Registries

As it has already been explained above, there are two main systems of real estate registries in Serbia (and the third, the deed system, which is almost extinct but may still appear in some areas of the country). This makes it more complicated to present the publicity requirement as it exists in Serbia. Fortunately, the new system, the one that "seems to be winning" – unified cadastre (KN) – tries to copy as much of the land books rules on registration of rights as possible, so the current text of the ZKN after amendments of 1996 (and even more the mentioned pre-draft of new such law), contains some rules that are similar to the well known rules of the land books system. Therefore, even though the land books are also destined to be extinct in Serbia in not more than a decade, this presentation shall, in each individual issue, start from the land book rules and than present the KN rules which deviate from them (and to the extent of such deviation). I hope this methodology shall enable a clear presentation of an issue that is otherwise unnecessarily very complicated in Serbian law.

Land book exists on the basis of JZZK, which was heavily influenced by the Austrian land books system. The JZZK applies not as rules of law, but as "legal rules" [*pravna pravila*], which in the context of the mentioned ZNPP[89] could have been applied in two cases: if there is an explicit decision that some particular rules shall apply[90] and if the rules are in line with the new social order, and no new rules are passed to replace them[91]. This means that, apart from the rules entailed in an explicit decision on their applicability, the courts did not have the obligation to apply these "legal rules", for they were not 'rules of law' which the courts mandatory apply, but could apply them appropriately, if and to the extent they found them in line with the new social order (in practice, the deviations from the "legal rules" were made where appropriate, even if it had nothing to do with the 'new social order'). It is interesting that some rules of the JZZK were among the only recorded two cases the competent body (Presidium of the National Assembly) of the socialist Yugoslavia explicitly decided that the "legal rules" should be applied in the changed social order as rules of law[92]. Generally, JZZK

[88] See Art. 23 Para. 2 of the Law on Foreign Exchange Transactions [*Zakon o deviznom poslovanju*], Official gazette of the Republic of Serbia No. 62/2006-57. Even though this paragraph explicitly speaks only of guarantee (*Bürgschaft*), which is a personal security, in practice it extends to hypothec and other *in rem* securities based upon the definition contained in Art. 2 Para. 1 Item 21, Subpara. 5, Item 2.
[89] See footnote Nr. 3 above.
[90] See Art. 3 ZNPP.
[91] See Art. 4 ZNPP.
[92] These are the two Decrees of the Presidium of the National Assembly of FNRJ, dated 17 January 1947 and 2 March 1949 respectively, on the application of rules forbidding the ownership on physical parts of buildings contained in the ZUOIZK as the rules of law. See A. Gams, *Увод у грађанско право (општи део)* [*Introduction to Civil Law (General part)*], Naučna Knjiga, Beograd 1952, p. 107.

applies as a kind of 'soft law', which does not help the unified application of rules which are mostly procedural in nature, and therefore (among many other reasons) the system started to decline after 1945 and the end of the Second World War.

The land book consist of four parts: a) the main book [*glavna knjiga*, *Hauptbuch*] which consists of all land book insertions [*zemljišnoknjižni uložak, Grundbucheinlage*] in the relevant cadastral municipality; b) the collection of documents [*zbirka isprava, Urkundensammlung*], which consists of all documents based upon which the entries into land books have been made; c) the collection of cadastral maps [*zbirka katastarskih planova*, *Katastralmappensammlung*], which contains the cadastral plans upon which the land books is based; and d) registries and other ancillary books [*registri i druga pomoćna evidencija*, *Hilfsverzeichnissen*] which contain useful data on contents of the main books (for example, real registry [*stvarni registar*], which connects the number of a cadastral parcel with the land book insertion in which it is inscribed, or the personal registry [*imenik*], which contains the list of all owners of real estate in particular cadastral municipality). Each land book insertion has 3 sections – section A, in which the cadastral parcels and buildings, to which the insertion relates, are noted; section B, in which the right of ownership (co-ownership, joint ownership, right of disposition in case of social or state ownership) is registered, and section V (in Serbian alphabet, V is the third letter, not C), in which the rights burdening the real estate/ownership thereon (hypothec, servitudes, real encumbrances [*realni tereti*, *Reallasten*], lease, pre-emption rights etc.) as well as some facts of relevance for the real estate rights or transfer thereof are registered[93]. The types of entries in the land books are transplanted from the Austrian system: there is intabulation/extabulation [*uknjižba*, *Einverleibung*], by which the effects of registration are finally produced, then prenotation [*predbeležba*, *Vormerkung*], by which the effects of registration are produced conditionally, and adnotation [*zabeležba*, *Anmerkung*], by which facts of relevance to the real estate rights are registered.

Land books are public records of rights over real estates (publicity principle, *načelo javnosti*], because every interested party, without having to prove its interest in any way, has a right to the insight of the land books (in practice, however, some manifestation of interest could be required for the insight into the collection of documents, which is one of the consequences of the fact that land book rules are 'legal rules', not 'rules of law', so the courts could deviate from strict JZZK rules). Land books are based upon a complete cadastral state survey [*državni premer*], which provides information on land parcels and buildings erected thereon, they are kept by the courts, separately for each cadastral municipality (decentralized register), with implementation of real folio principle, meaning that the basis for the record is the land parcel, more precisely one or more land parcels that create one land book insertion. Land books are kept manually, in the written form, so not with the use of electronic data processing.

The Real Estate Cadastre ('unified cadastre', KN) consists of: a) working original plan [*radni original plana*], which contains the copy of the archived original for the purposes of maintaining the survey and the real estate cadastre; b) the collection of documents [*zbirka isprava*], which is more or less the same as in land books: and c) the 'cadastral operate' [*katastarski operat*], which consists of real estate sheets [*listovi nepokretnosti*, *Immobilienbläter*], based upon which some ancillary registries are established and maintained.

[93] There are some less important deviations from this partition of data that go into certain sections, but they are omitted in this presentation for they are deemed less important and their detailed presentation would burden the text unnecessarily.

Each real estate sheet consists of four sections (as opposed to three sections of land book insertions): section A, listing the cadastral parcels (land), section B, containing data on owner of the land, section V (third letter in Serbian alphabet), containing data on buildings erected on the cadastral parcel listed in section A, special parts of those buildings and owners thereof, and section G (fourth letter in Serbian alphabet), containing data on encumbrances and limitations, presumably both on the land and on the buildings/parts of buildings[94]. The amendments of the ZKN made in 1996 introduced the same three types of entries that exist in the land books[95].

The KN, as opposed to the land books, is kept by an administrative body – the RGZ, also in a decentralized form, whereas under the ZH there is a centralized registry of hypothecs kept by the RGZ for all hypothecs in Serbia, i.e. for the ones registered in the KN as well as for the ones registered in the land books. The KN is organized on the principle of personal foils, for the real estate sheets, as opposed to their name, contain the data on all real estate owned by the same owner in one cadastral municipality (they are in fact 'sheets of owners of real estate' rather than the 'real estate sheets'). However, the KN is kept in an electronic form, so the fact that the database is primarily organized on personal principle does not prevent the search of the base according to other criteria, for example the number of cadastral parcel or street name and number of a particular building.

As for the speed of registration proceedings, it depends on the concrete land book court or office of the RGZ, but generally, and oddly enough, (if the documentation is complete) the average in Belgrade is two weeks for land books and a month and a half for KN (this is a huge improvement from an average of six months in 2004). This, however, does not influence the priority of the registered right, for it is acquired in the moment the request for registration reaches the competent authority, not in the moment such authority actually allows registration by its decision.

2. Mirroring of Legal Situation (The Mirror Principle) [*Wiederspiegelung der Rechtslage*]

Both the land books and the KN should provide the full picture of rights over a particular real estate, which is in line with the publicity function of both registers. Moreover, due to the rule on fiction of absolute correctness [*fikcija apsolutne tačnosti*], which in land books appears three years after an entry, and in KN two years (the regulation in KN is somewhat faulty, for it turns out that the fiction is effective after two years even in case of a manifestly wrong entry, which is not the case in the land books), an entry that has been registered three, respectively two years ago may be treated as correct by a bona fide acquirer.

The principle applied in the land books, which is a consequence of the fact that (mostly) private rights are being registered therein, is the fact that registration takes place upon request of the interested party (most often, the right acquirer) – *ex private* registration. This, on the other hand, may impede the mirror principle, because in some cases it may lead to the situation in which the registered legal situation does not reflect the actual situation (this is possible in cases where the entry does not have a constitutive effect, see below). Therefore the JZZK contained the rules that enabled *ex officio* registration in some cases[96], and that

[94] See Arts. 38 to 42 ZKN.
[95] See Art. 58g ZKN.
[96] See § 84 ZZK, where *ex officio* registration was enabled in case of inheritance proceedings, if the decision on inheritance suffices for the registration or if all documents necessary for such registration are available in the

authorized the land book judge to intervene and request a registration of right from the right bearer, under threat of a fine[97]. The obsoleteness of land books in mid-nineteen seventies was mainly attributed to this rule (this is only partly true), so the unified cadastre system adopted the principle of *ex officio* registration along with the registration upon request, with the pretext that it should lead to the new registry being up-to-date at all times[98]. One of the consequences of the application of this principle is the obligation of users of real estate[99] and state entities[100] alike to submit the evidence on acquisition of rights over real estate to the RGZ for registration. As it has already been said above, in practice the RGZ does not register the rights *ex officio*, but merely invites the acquirer to request the registration (given the fact it is his obligation), the main reason being the wish to collect the registration fee prior to registration.

As it has already been presented above in the section on various types of hypothec, the traditional main type of "hidden" hypothec – the statutory hypothec for the securing of taxes burdening the owner – does not exist in Serbian law without registration, which is a significant improvement from the earlier situation. However, there are some receivables covered by the value of the real estate even without registration – the mentioned 'privileges' that relate to the costs of sale including the costs and fees of third parties (in case of out-of-court sale for satisfaction of hypothec), i.e. expenses of enforcement procedure, receivables based upon statutory alimentation if they are proved by an enforceable document and reported by the sale hearing at latest as well as tax and other levies burdening the real estate in the last year, compensation for the damages caused by damage to health, reduction or loss of the ability to work or loss of alimentation due to the death of its debtor, salaries in case the employer is an entrepreneur or other natural person including matured contributions for the social insurance, irrespective if all these are secured by a security right, but provided that all these receivables are proved by an enforceable document and reported by the sale hearing at latest (in case of court sale). Economically speaking, the statutory hypothec for securing of taxes burdening the owner of the real estate is also important, for even after registration it is a privilege, with the exception related only to the first third of the assessed value of the real estate (as explained above in the section on types of hypothec). These privileges are, or better said may be exceptions to the mirror principle, which are far less significant than they used to be, but which still makes it prudent and reasonable to accept hypothecs only up to the one third of the value of the encumbered real estate, which most of the banks attempt to do (but in practice up to a half of the value is acceptable).

Apart from the "hidden" encumbrances mentioned in the preceding paragraph, there are cases of so-called "extra-tabular" ownership [*vanknjižna svojina*], i.e. the cases where the actual owner is not registered as such in the relevant registry. In most cases this is due to the fact that the subject-matter of ownership (say, a building) is not registered as such in the registry, thus making the registration of ownership thereon impossible, but it may also happen in case of acquisition through adverse possession [*održaj*, *Ersitzung*] because such acquisition takes

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inheritance proceedings, and if the same court that keeps the land books carried out the inheritance proceedings (if not, the inheritance court may request registration from the land book court).

[97] See §§ 85 and 86 ZZK. Also, see on that Ferdo Čulinović, *Zemljišnoknjižno pravo* [*Land Books Law*, *Grundbuchrecht*], Planeta, Beograd 1933, p. 31.

[98] See Art. 5 Para. 4 ZKN. See also Orlić in Stanković-Orlić, *op. cit.*, p. 365.

[99] See Art. 99 Para. 1 ZKN.

[100] See Art. 14 Para. 1 ZKN.

place automatically after the required term expires (*ipso iure*), and the registration is merely a declaration (not constitutive)[101].

3. Constitutive or declaratory registration

Both systems of registration recognize the principle of intabulation [*načelo upisa*, *Eintragungsgrundsatz*], under which the rights over real estate are acquired (as well as amended, transferred and cease) by registration – § 4 Para. 1 ZZK; Art. 5 Para. 1 ZKN – so the registration is, in principle, constitutive. However, this principle has its exceptions, firstly related to the rights which exist prior to registration and are only publicized thereby (say, contractual pre-emption right or right of lease), and secondly related to some types of acquisition of rights that are generally acquired by registration – say, acquisition of ownership or servitude by adverse possession. Therefore the effect of registration depends upon two factors – type of right to be registered, and the basis for acquisition of right, whereas the registration may be constitutive as well as declaratory.

4. Ranking System [*prvenstveni red*, *Rangsystem*]

Both registration systems in Serbia are organized on the basis of the so-called sliding rank [*klizni rang*, *gleitenden Rangordnung*] – the priority of a certain registered right depends upon the time the request for registration was received by the competent authority (naturally, provided that the request was followed by successful registration)[102]. In case of hypothec, this rule is reiterated in the ZH (Art. 40), under which the exact day, hour and minute of the establishment of hypothec determines its priority[103]. If the highest ranking hypothec ('first rank hypothec', *hipoteka prvog ranga*) seizes to exist by extabulation (erasure from the registry), the hypothec of second rank moves up and becomes the first rank hypothec, and all subsequent hypothecs move up in their rank. Even though the rule is not explicitly contained in either of the laws regulating both systems of registration it is beyond any dispute that it is applicable.

As for the possibility for disposal of the rank, i.e. the possibility of the owner of real estate, in case of so-called 'owners hypothec' [*svojinska hipoteka*, *Eigentümerhypothek*], or the hypothecary creditor to keep or change the rank of their hypothecs by their legal acts, the situation before coming into force of the ZH was different depending on the type of register used in particular case. Namely, the JZZK contained provisions on the assignment of rank [*ustupanje prvenstvenog reda*, *Rangabtretung*][104] and the adnotation of prior rank [*zabeležba prvenstvenog reda*, *Anmerkung der Rangordnung*], along the role model of Austrian law, and ZKN did not have any rules on either of those, which were therefore impossible in that registration system.

[101] See Arts. 21 and 28 ZOSPO.
[102] See § 29 ZZK and Arts. 5 Para. 2 and 106d ZKN.
[103] It is self-understood that the moment of establishment is, in fact, the moment the request for registration of subsequently registered hypothec was submitted to the competent authority (land book court or RGZ).
[104] See §§ 30 to 35 ZZK. These paragraphs are an almost literal translation of §§ 45 to 50 of the third novella of the Austrian GBG of March 1916.

The ZZK rules on assignment of rank were applicable generally to all registered rights which could exist on one real estate simultaneously[105] (this excludes ownership, because only one ownership right can exist over one real estate, and the registration of new ownership means that the old one seizes to exist), and not only to hypothecs (as opposed to original, pre novellas XIX century text of Austrian GBG, which restricted it to hypothecs). Generally, a bearer of higher ranking right could agree an exchange of rank with a bearer of lower ranking right. In case the right moving backward in rank is hypothec, the owner of the real estate must also give approval, and if there is a right of third party burdening the backward moving right (say, an overhypothec on the backwards moving hypothec), such third party must also consent to the adverse exchange of rank. In case the rights exchanging rank are one after the other directly, than the exchange is, as for its scope, complete, because it does not interfere with any third party rights. The same applies in case that the rights exchanging rank are not immediately after each other in the registry, but the right holders of the rights ranked between the rights exchanging rank consent to the complete exchange. However, if such 'in-between' right holders do not consent to complete and full exchange of rank, than the exchange could be only partial, because the forward moving right can take the rank of the backward moving right only to the extent of the backward moving right, so in case the backward moving rank has a lesser extent (say, a hypothec for a smaller amount), only a part of the forward moving right (equal to the backwards moving right) shall take its rank, whereas the remaining part shall keep its original rank (and the backward moving right shall rank after that remaining part). However, if the backward moving right is under condition or is limited by time [*uslovno ili oročeno pravo*, *bedingtes oder befristetes Recht*] the forward moving right shall retain its original rank in enforcement procedure until the condition is fulfilled or the time is elapsed. The same applies if the buyer in enforcement must retain the backward moving right in its original rank, even after the purchase and without including its value in the purchase price. In case there is more than one forward moving rights coming to the position of one backward moving right, and the advance of all those rights is intabulated simultaneously, the forward moving rights retain the mutual relation of their ranks existing before the exchange of rank. Lastly, subsequent changes in existence or scope of the backwards moving right do not impede the right that has moved forward in rank. I am not aware of any recent case of application of these ZZK rules by the courts that keep the land books, but there is no doubt that they would be applied if so requested by right holders.

Regarding the adnotation of prior rank the ZZK rules (§§ 60 to 65) were modeled along the text of the original July 1871 text of the Austrian GBG (§§ 53 to 58), in other words the possibilities of keeping the rank through the ownership hypothec (introduced in Austria in 1916) are not possible according to ZZK. However, it seems that these rules of ZZK do not apply when it comes to adnotation of prior rank for future hypothecs, because the ZH contains rules on that issue, which makes the 'legal rules' contained in the ZZK inapplicable according to Art. 4 of the ZNPP. Therefore the short presentation of these rules is omitted in this report[106].

[105] Basically, these rights must be burdens [*tereti*, *Lasten*] which can be effected by sale of the real estate and division of achieved price, because only in that case the assignment of rank makes sense and produces effects – see Čulinović, *Komentar zemljišnoknjižnih zakona*, p. 123 ff, commentary to § 30 ZZK.

[106] However, the presentation contained in, for example, T. Josipović, *Länderbericht Kroatien* in *Flexibilität der Grundpfandrechte in Europa Band I*, , Berlin 2006, p.175 (under the heading *Anmerkung der Rangordnung*) is fully applicable to the JZZK rules as well. Same applies to appropriate parts of the Austrian *Länderbericht* by N.J. Sadjadi and M. Thurner in the same book, p. 215.

After the ZH came in force in February 2006 the possibility to dispose of the rank of hypothec was enabled in the KN system as well, and the modalities of such disposal were broadened by adopting the rules of the 1916 amendments of the Austrian law (ABGB and GBG). In the second chapter of its fifth part, headed "Establishment of New Hypothec", the ZH provides for three possibilities of influencing the rank of a hypothec: the "disposing with the non-erased hypothec" (*raspolaganje neispisanom hipotekom*, Arts. 53 and 54), adnotation of prior rank (Art. 55) and prenotation of a new hypothec (*predbeležba nove hipoteke*, Art. 56).

Disposing with the non-erased hypothec is in fact the so-called *forderungsentkleidete Eigentümerhypothek* from §§ 469 and 469a ABGB (as amended from 1916). Under ZH, the owner of the encumbered real estate can, within 3 years from the day the receivable secured by a registered hypothec has ceased to exist, give the non-erased hypothec to a new creditor for securing his receivable, or to the same creditor but for securing a new receivable, up to the amount of the registered hypothec. The transfer is made on the basis of a request of an owner accompanied with the proof that the original secured receivable does not exist anymore. The owner of the encumbered real estate may not forfeit the right to dispose with the non-erased hypothec, unless there is a contract with a third party to such effect and if such forfeiture is adnotated in the registry. The subsequent hypothecary creditors may not object to such disposal of the owner, and they retain their original rank – therefore this rule is in fact a concession to the system of fixed rank, though limited in time to three years from the day the original secured receivable ceased[107]. It is very indicative that both short commentaries of the ZH simply fail to understand the theoretical (exception of accessority principle) and practical (more flexible real estate security, rank disposal) significance of these provisions – one of the commentaries simply restates the legal text very shortly[108], and the other does even worse, trying to explain the whole institute by "process economy", as if the reason for this provision is to avoid the parties having to go through procedures of extabulation and subsequent intabulation by enabling simple transfer of hypothec[109]. This is straight forward wrong, because it misses the rank aspect and making the hypothec non-accessory, which were the original reasons for inclusion of these provisions in ABGB in 1916. This fact is pointed out here just to illustrate how some of the old institutes of the law of hypothec are misunderstood and falsely understood even by authors of commentaries in Serbia, which leaves little hope that ordinary practicing lawyers will understand them correctly. It is yet another testimony of the low awareness and expertise in the law of hypothec, due to the (earlier mentioned) neglecting that this area of law suffered in Serbia in last several decades.

As for the adnotation of prior rank from Art. 55 of the ZH, it is in fact adnotation of retaining the prior rank [*zabeležba zadržavanja prvenstvenog reda*, *Rangvorbehalt*] from § 37 of the III novella of the ABGB of March 1916 (currently contained in § 58 of the Austrian GBG[110]),

[107] It is interesting that both original drafts ZH, like the §§ 469 and 469a ABGB, did not contain the 3 years preclusive period, but simply provided the possibility of disposal until the owners hypothec is erased – see Art. 54 of the first draft and Art. 66 of the second draft. Limiting this possibility by the 3 years deadline makes the concession to the system of fixed rank a little smaller. The reason is most probably mirroring the rules on adnotation of (retaining the) prior rank, which contain the 3 years deadline, and avoiding the permanent discrepancy from the mirror principle, where a hypothec that is in fact not existing is registered, thus making the situation in the registry incorrect.

[108] See Gloginić, *op. cit.*, p. 82 and 83, commentaries to Arts. 53 and 54 ZH.

[109] See D. Živković, *op. cit.*, p. 69 *in fine*, commentary to Art. 53 ZH.

[110] See Koziol-Welser, *Grundriß des bürgerlichen Rechts* [*Basics of Civil Law*], 10 Aufl., Band II, Manz, Wien 1996, p. 141.

which contain additions to §§ 469 and 470 ABGB[111]. The owner of the encumbered real estate may, along with the request for extabulation of hypothec, request the adnotation of prior rank of a new hypothec, with the same rank and up to the amount of the erased one. New hypothec must be intabulated within three years from the adnotation. In case the owner of the real estate changes, the registered adnotation continues to be in effect in the interest of the new owner. This provision is applied accordingly in case the new hypothec should come at the place of more than one old, erased hypothecs, which are ranking directly one after another.

Lastly, the prenotation of a new hypothec is in fact the *bedingte Pfandrechteintragung* of the Austrian law, provided in §§ 38 to 40 of the III novella of the ABGB of March 1916 (currently contained in § 59 of the Austrian GBG). So, a new hypothec can be prenotated with the same rank and up to the amount of an existing intabulated one, in which case it shall become final (i.e. intabulated, effective) if the existing hypothec is erased within one year from the day of such prenotation. The extabulation of the existing hypothec may be requested both by the owner of the real estate and to the creditor secured by the prenotated (new) hypothec. In case the existing hypothec is burdened with an overhypothec, in order for the prenotation to become final the overhypothec must be erased within one year along with the existing hypothec it burdens, or the creditor secured by the overhypothec must agree with the creditor of the prenotated hypothec that his overhypothec shall continue to burden the prenotated hypothec once it becomes final. In case of joint hypothec being the existing one, it must be erased from all real estates it burdens in order to make the prenotated hypothec final. Lastly, this provision is also applied accordingly in case the prenotated hypothec should come at the place of more than one existing hypothecs, which are ranking directly one after another.

Short recap of the possibilities for rank disposal in Serbian law would therefore read: owners hypothec, as a possibility to dispose with the hypothec after the receivable it secured has ceased, adnotation of retaining the prior rank and prenotation of new hypothec, in a form which is based upon Austrian law with some discrepancies, exist under ZH and are applicable in both registration systems, whereas only the land books system recognizes the possibility of assignment (exchange) of rank, which is not possible in unified cadastre system. The adnotation of prior rank is inapplicable in both registration systems, at least related to the real estate security (hypothec).

5. Protection of Reliance [*zaštita pouzdanja*, *Vertrauensschutz*]

The principle of reliance [*načelo pouzdanja*, *Vertrauensgrundsatz*] means that a bona fide third party may rely in correctness and completeness of the data contained in the real estate register. The "negative aspect" of this principle reads: if a right is not registered on a particular real estate, it does not exist on that real estate ("*quod non est in tabulae, non est in vitae*"). It

[111] It is interesting that the original drafts of ZH spoke of adnotation of **retaining** the prior rank – Art. 55 of the first draft and Art. 67 of the second draft, but the final text of ZH simply omitted the word 'retaining' from the heading of its Art. 55 and its text (Para. 1), and therefore caused a consequence that the authors of the final text may not have wanted – the inapplicability of the JZZK provisions on adnotation of prior rank, at least related to hypothec, because the ZH contains this provision and JZZK rules cannot apply under Art. 4 of the ZNPP. This is, naturally, wrong, because the adnotation of retaining the prior rank and adnotation of prior rank are two separate types of adnotation with different fields of application (in German, this is the difference between *Anmerkung der Rangordnung* and *Rangvorbehalt*). This illustrates that even the authors of final ZH text were not always aware of all consequences of their drafting decisions, and that the drafts of professor Orlić were often amended unwillingly and due to the poor understanding of his work by the final drafters.

has been pointed out that there are some exceptions, i.e. some rights over real estate that may exist outside the register, but in case of competition between such (unregistered) rights and the reliance of a bona fide acquirer of a registered right, the bona fide acquirer shall win because he is protected in his reliance[112] – this is the consequence of the "negative aspect". The negative aspect effects are produced in the moment the relying party register its right, falsely convinced that the prior legal situation was complete. The "positive aspect" of the reliance principle means that all data inscribed in the register is correct, so if a bona fide person relies on such correctness, it must be protected in its reliance, even if the data was incorrect in a particular case. The positive aspect effects are produced in case the predecessor of the relying party was registered for some time himself, i.e. after elapse of some time.

The principle of reliance exists in both systems of registration in Serbia, because it is inherent to systems in which some rights are acquired by registration (as *modus acquirendi*) and in which the registers are public[113]. As for the land books system, the JZZK did not contain any explicit provisions on the reliance principle, but earlier as well as the contemporary doctrine had no doubt that it is implied in the ZZK[114]. As for the unified cadastre, the ZKN in its Art. 6 contain a provision that "The data on real estate and rights thereon registered according to Article 5 of this Act are considered correct **and third parties can not suffer adverse consequences** in transfer of real estate and other relations in which these data are used" (emphasis mine). The action for erasure and adnotation of dispute, usually quoted as basis for reliance principle in land books, are explicitly regulated in the ZKN as well (Art. 106e), though a bit more rudimentary compared to the JZZK, and the absolute deadline for action for erasure is shortened to 2 years from 3 years provided in the ZZK (Art. 106ž ZKN). The regulation of the action for erasure in the ZKN is problematic not only because of the shortened period, but in some other aspects as well, however here I shall restrict myself to pointing out that the two years in unified cadastre are effective not only towards bona fide third parties who relied in the registered legal situation regarding a particular real estate, but also toward the falsely registered right holder directly, which is not the case in land books system (there it works only towards the bona fide third party, protecting such parties' reliance[115]). Be this as it is, it must be pointed out that the **reliance principle**, due to the data in the registries being obsolete for past few decades, **was softened up** in the court practice in Serbia **to the level of extinction**. Namely, according to the Conclusion of the highest courts in former Yugoslavia[116] (which is still valid in Serbia today), in order for a party to be

[112] This does not pertain to rights that have direct *erga omnes* opposability based upon the explicit provision of the law, because in that case it is presumed that the acquirer knows the law, i.e. is not bona fide. The main scope of application of the 'negative aspect' is unregistered ownership acquired via adverse possession.

[113] So Orlić in Stanković-Orlić, *op. cit.,* p. 333, paragraphs 1055 and 1056.

[114] See F. Čulinović, *Zemljišnoknjižno pravo*, p. 32. The reliance principle, in this opinion, derives from §§ 68 to 78 and § 60 ZZK, which contain rules on action for erasure [*tužba za brisanje*, *Löschungsklage*] and adnotation of dispute [*zabeležba spora*, *Anmerkung der Streitanhängigkeit*], as well as on adnotation of prior rank (§ 60). Derivation of reliance from the action for erasure and the adnotation of dispute, especially in case of adverse possession, is common in Austrian doctrine as well – see Kletečka in Koziol-Welser, *Bürgerliches Recht* [*Civil Law*], 13. Aufl., Band I, Manz, Wien 2006, p. 364 ff.

[115] See Čulinović, *Komentar zemljišnoknjižnih zakona*, p. 240, commentary to § 71 ZZK. As for the falsely registered right holder directly, see p. 235, commentary to § 69 ZZK – the rule is that the deadline is as long as the prescription period, or period required for acquisition by adverse possession. Same rules exist in modern Austrian land books law – see Kletečka, *op.cit.*, p.363 – and laws that follows that model – for example, for Croatia see T. Josipović, *Zemljišnoknjižno pravo* [*Land Books Law*, *Grundbuchrecht*], Informator, Zagreb 2001, p. 133-134, 235-236 and especially 272 ff; however not in Bosnia-Herzegovina, see Povlakić, *op. cit.*, p. 59.

[116] See Conclusion from Council of Civil Law and Trade Law Departments of the Federal Court, Supreme Courts of Republics and Autonomous Regions and the Supreme Military Court, held in Belgrade in 28 and 29 May

considered 'bona fide', such party must check the situation in the register, the situation related to the possessor of the real estate, and also must not know or have to know under the circumstances for the existence of a previous contract (*Titelgeschäft*), which its acquisition of a registered right would breach, i.e. it must make sure there is no earlier contract. This rule leaves almost no room for reliance in the registered data, because there is an obligation to check whether the unregistered (possessory) legal situation matches the registered (in other words, to check if the registered legal situation is accurate), and even knowing that there is a contract, the fulfillment of which would render the registered situation incorrect, would make a person 'mala fide'[117]. The annihilation of reliance principle was justified by the obsoleteness of the registries – the registered data were often blatantly incorrect, and no reliance could be justified. However, such rule further contributed to deterioration of registries related to their completeness and correctness, because registry is in fact without any sense if one cannot rely in what is registered. A vicious circle leading to the death of registries was thus created, and only adopting adequate draft new legislation can change the twenty year old position of the courts – and such change is a must if Serbia wants to have decent real estate registers. Therefore the actual situation today is that the reliance principle, even though provided by the law, is not applied in the practice.

III Effects of Accessority

The accessority itself may be subdivided is several different ways, depending on the criteria for subdivision[118]. For the purposes of presentation of the effects of accessority, the subdivision into five different subtypes, as devised by Medicus[119], shall be used. Therefore the effects of the following types of accessority shall be presented separately: 1) accessority in establishment of real estate security ('establishment accessority', *Entstehungsakzessorität*); 2) accessority in the scope of real estate security ('scope accessority', *Umfangsakzessorität*); 3) accessority related to the right-bearer ('right-bearer accessority', *Zuständigkeitsakzessorität*); 4) accessority in realization of real estate security ('realization accessority', *Durchsetzungsakzessorität*); and, finally, 5) accessority in extinction ('extinction accessority', *Erlöschensakzessorität*).

The hypothec in the form existing in Serbian law, as it has already been explained, is an accessory real estate security, with some exceptions to the full application of the accessority principle. Therefore these exceptions shall be presented for each of the sub-types of accessority stated above.

1. **Establishment accessority**. In principle, hypothec cannot be established prior to establishment of the secured receivable, because its purpose is to secure such receivable. However, the ZH allows the establishment of a hypothec for a future or conditioned receivable[120], which is usually seen as a deviation from the strict application of accessority

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1986, published in *Bilten sudske prakse Vrhovnog suda Srbije* [*Bulletin of Court Practice of the Supreme Court of Serbia*], No. 3/1987, p. 5; also in Stanković-Orlić, *op. cit.*, p. 75 ff. The Conclusion relates to acquiring ownership and reliance in the registry related to that, but it is applicable to other rights as well.

[117] See with indication of court practice Orlić, *op. cit.*, p. 334 ff.

[118] See presentation of different subdivisions of accessority in Mincke, *Die Akzessorität des Pfandrechts* [*Accessority of Real Estate Security*], Berlin 1987, p. 18.

[119] See Medicus, *Die Akzessorität im Zivilrecht*, [*Accessority in Civil Law*] JuS 10/1971, p. 497 ff.

[120] Art. 7 Para. 1 ZH.

principle related to the establishment[121]. It is true that in this case the hypothec may be formally established even prior to (full) establishment of the secured receivable. However, such formally existing hypothec does not produce any effect (it does not materially exist) until the future, respectably conditioned receivable comes to existence, because the hypothec can not be realized (collected upon) nor transferred if the secured receivable does not exist (save for the possibility of treating it as an owners hypothec, see immediately below). Therefore it may be said that, practically, hypothec in Serbian law has no effect until the future or conditioned receivable for the securing of which it has been established comes to existence. On the other hand, if such secured receivable is established, the hypothec produces full legal effect with the priority determined by the moment of its formal establishment. The purpose (and sole effect) of registering hypothec for the securing of future/conditioned receivable is thus providing the priority (better rank) of that hypothec.

As for the formal establishment of the hypothec, due to the causality principle which exists in Serbian property law, the requirements for it are: the valid grounds for establishment (typically, contract or declaration on hypothec), authorization of the person granting hypothec to do so (typically, that the person granting hypothec owns the real estate to be encumbered), and successful registration as the mode of acquisition.

The legal destiny of this 'formally existing' hypothec in case the future/conditioned receivable never comes to existence is not regulated explicitly, nor has the Serbian doctrine dwelled over this issue. From the wording of the entire ZH, it is my opinion that such hypothec should be treated in the same way as a hypothec for the securing of a receivable that existed but ceased to exist (for example, was extinguished by payment of the debt). That means that it should be treated as owners hypothec without secured receivable ('*forderungsentkleidete Eigentumerhypothek*'), which further means that the owner of the real estate may dispose of it according to appropriate provisions of the ZH (i.e. give it for securing a new receivable, or register an adnotation of preserving the priority rank, or register a prenotation of the new hypothec), or the owner may request its erasure form the registry. The argumentation of this position would be that there is obviously enough ground for broadening the field of application of the provisions pertaining to owners hypothec without secured receivable by analogy, because there is no material difference in the two situations – the first, in which hypothec is registered prior to establishment of secured receivable which was never established, and the second, in which the hypothec remained registered after the secured receivable ceased to exist. In both of these situations there exists a formally valid registered hypothec which lacks the secured receivable. Therefore, if the law allows the disposal of such hypothec in one case, it must allow it in another. The only difference is that, in the first case, the owner must prove that the condition by which the secured receivable was conditioned has finally failed, respectively that the future secured receivable never came to existence, and in the second that the secured receivable was fully settled (or ceased to exist in another way).

2. **Scope accessority**. The meaning of scope accessority is that the amount secured by the hypothec is always equal to the amount of the secured receivable. In other words, the amount of hypothec must equal the amount of the secured receivable, and if such receivable diminishes (say, by payment in installments), the hypothec diminishes together with it. There are some additions to the scope accessority that should be borne in mind.

[121] See for example Orlić in Stanković-Orlić, *op. cit.*, p. 240.

First, the scope accessority must be complemented by the rule that interest and other ancillary payments as well as expenses of realization are entailed in the hypothec, which therefore, in its very notion, always exceeds the secured receivable a little bit. *Second*, the decrease of amount of secured receivable (and hypothec) due to payment of some installments is not registered in the appropriate registry, and under the principle of indivisibility the hypothec burdens the encumbered real estate in full until the last portion of the secured receivable is paid. Therefore the mirror principle (of the registry) is distorted, because the registered amount of hypothec, even if it equals the original amount of secured receivable at the beginning, soon exceeds it if the secured receivable is repayable in installments. *Third*, and this is deemed a relative exception of the scope accessority, there is a possibility to register the highest amount up to which the secured receivable is covered by hypothec, which is usual in case of a hypothec for a future/conditioned receivable. As it has been explained above, the ZH does not explicitly recognize the existence of the highest amount hypothec as a special type of hypothec, but the situation in which a secured receivable is in fact smaller than the registered amount of hypothec (which is the maximum amount covered by the hypothec) is common whenever a payment in installments is stipulated, as well as in case the secured receivable is a future or conditioned one.

As for the possibility of change of the secured receivable covered by the hypothec, it is possible only after the original receivable ceases to exist, by virtue of disposal over the owners hypothec. Apart from this, the change of receivable requires a new hypothec, which in effect means that the rank of the original hypothec cannot be preserved. In case the secured receivable ceases by novation, under the ZOO the hypothec could remain valid in case the owner of the encumbered real estate agrees to that, but the consent of subsequent ranking hypothec bearers seems inevitable for that as well[122].

3. **Right-bearer accessority**. The right-bearer accessority means that the bearer of the hypothec is always the creditor of the secured receivable. This derives from the very essence of hypothec as an accessory right, i.e. as a right aimed at securing a receivable as a main right. For the whole time the secured receivable exist, the hypothec shall belong to its creditor, and this rule have no exceptions in Serbian law. Hypothec may gain its relative independence only after the secured receivable is extinguished. Also, there is no possibility of turning the hypothec into a form of negotiable security (no *Verbriefung*). Therefore, the hypothec may only be transferred along the receivable it secures.

As for the question of assignment of the secured receivable, it is regulated in the ZOO [*cesija*, *Zession*] in a way that hypothec is assigned *ipso iure* together with the secured receivable[123], as well as the ZH, which explicitly regulates that hypothec cannot be assigned without the secured receivable[124] and that the hypothec is transferred by the assignment agreement itself (such agreement having to be in written with verified signatures of parties thereto), whereas the subsequent registration of the new hypothecary creditor has only declaratory (third party)

[122] See Art. 350 ZOO. This provision, however, seems to refer to guarantee [*Bürgschaft*] and pledge [*Faustpfand*] only, and it does not speak of hypothec explicitly. Whether or not it can simply be applied to hypothec by analogy is, to say the least, questionable, especially in case there are lower ranking hypothecs after the one being extinguished by novation. It seems that the hypothec can survive the novation if not only the owner of the real estate, but also all subsequent bearers of hypothec, agree to that. Apart from that, there is always a possibility to transfer the original hypothec to secure the novated receivable by disposal with the owners hypothec.
[123] See Art. 437 Para. 1 ZOO, which mentions hypothec explicitly.
[124] See Art. 20 Para. 2 ZH.

effect[125]. The hypothec does not loose its rank by assignment of secured receivable because the receivable (and the hypothec) remain the same, only the creditor is changed. These rules, provided for the case the secured receivable is assigned by agreement, are applied accordingly in other cases of change of creditor (inheritance, fulfillment with subrogation etc.).

4. **Realization accessority**. The effect of the realization accessority is that the hypothec may be collected upon only in case the secured receivable is due and free of any objections, which also derives from the very fact that the sole purpose of hypothec is to secure payment of the secured receivable. The reason for it is that the ordinary hypothec can not be realized without a court decision in which it is determined that the secured receivable exists and is due for payment ('executable document'), so any objection related to secured receivable preventing passing of such court decision prevents the realization of hypothec as well. As for the two directly enforceable types of hypothec (court and out-of-court enforceable hypothec, see above B, I, 1), they are as a rule based upon agreements made in front of court or verified by the court, which makes such agreements directly enforceable, but in practice they quite often lead to situations which are in fact exceptions to the realization accessority[126]. The other commonly stressed exception to the realization accessority is the prescription of the secured receivable, because it does not prevent the creditor to collect the principle amount (not the interest and other occasional payments, [*Zinsen und andere wiederkehrender Anspruche*, *kamate i druga povremena davanja*]) out of hypothec securing such receivable[127]. Lastly, even though this is not stressed in the existing doctrine, there is an exception of realization accessority in cases of reduction of the secured receivable in insolvency (bankruptcy) [*Konkurs*] or similar proceedings and situations, because hypothec enables separate and full realization from the encumbered real estate[128]. This exception is in line with the purpose of the hypothec – securing the full realization of the secured receivable.

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[125] See Art. 20 Para. 3 ZH.

[126] The realization accessority is a weakness of these directly enforceable hypothecs, for in practice the parties either 1) claim that the secured receivable is already due even though it often does not even exist in the moment of conclusion of the directly enforceable agreement (which is a risk for the debtor, i.e. owner of encumbered real estate, this is typical for the court enforceable hypothec), or 2) set a precise due date of the secured receivable in the agreement itself, after which the hypothec is enforceable but the enforcement may be prevented by decision based upon the appeal of the owner of the encumbered real estate, if that owner can prove by 'indisputable written evidence' that the secured receivable is in fact not due yet – Art. 31 Para. 6 Item 3 ZH (thus again overburdening the debtor with the burden of proof, this is typical for the out-of-court enforceable hypothec). In both of these cases the debtor is an obvious underdog and the creditor is, practically, in position to collect on hypothec even though he could not collect on secured receivable.

[127] See Art. 368 ZOO and Art. 26 ZH. Even though the ZH obviously aimed at simple restating the ZOO provision, it may be interpreted as if it has (most probably unintentionally) deviated from it, because the ZOO excluded the prescribed interest and other occasional payments [*zastarela potraživanja kamata i drugih povremenih davanja*], meaning that the ones that are not themselves prescribed are within the exception, and the ZH simply excluded the interest and other occasional payments [*kamate i druga povremena davanja ne mogu se namiriti...*] irrespective of whether they are prescribed themselves. This, depending on the interpretation of the Art. 369. ZOO, which says that the ancillary claims are prescribed together with the principal claim, can be understood as a change (on the other hand, if the existence of the hypothec does not prevent the prescription of the principal but merely enables collection of the prescribed receivable from the value of the encumbered real estate, than there is no change, because the ancillary payments prescribe together with the principal). It should be noted that professor Orlić, who drafted the original two drafts of the ZH, did not change the wording of the ZOO related to this issue (Art. 45 of the first draft, Art. 55 of the second draft).

[128] See Art. 42 ZH and Art. 38 of the Law on Insolvency Procedure [*Zakon o stečajnom postupku*], (hereinafter: ZSP), Official gazette of the Republic of Serbia Nos. 84/2004-1 and 85/2005-30.

In all of these cases, the owner of the encumbered real estate is liable, on the basis of hypothec, only with the encumbered real estate and not with his other personal property – the broad liability happens in case the owner is also the personal debtor, though not on the basis of hypothec, but on the basis of the (secured) receivable.

As it has been stressed, realization [*Durchsetzung, Durchfürung*] of hypothec can be performed either in a procedure performed by an official authority (court in case of individual enforcement as well as in case of insolvency, and tax authority in case of tax debts) or in a private, out of court procedure. The rules for each of these modes of realization differ, and shall be shortly presented here.

A. *Court enforcement*. The court enforcement is, in a way, a default type of enforcement of hypothec – it happens if the conditions for the other two "special" types are not fulfilled. Until rather recently it was the only way of realization of hypothec, but the legislative changes first enabled the administrative enforcement, and afterwards private enforcement. The court enforcement is carried out according to the ZIP provisions on enforcement of monetary receivables by sale of real estate (Arts. 98 to 153), as well as according to the relevant provisions of the Law on Insolvency Procedure (hereinafter: ZSP).

The individual court enforcement is made on the basis of an enforceable (executory) document [*vollstreckbare Urkunde*, *izvršna isprava*]. In case of an ordinary hypothec, it is a final and enforceable court decision allowing the collection of secured receivable from the proceeds of sale of the encumbered real estate, and in case of (practically most often used) directly enforceable court hypothec it is an agreement made in front of the court. The specifics of the enforcement over real estate is that it is carried out by adnotation of enforceability in the registry, determination of value of the real estate, sale of real estate and satisfaction of creditors from the proceeds[129]. The effect of the adnotation of enforceability [*Anmerkung der Vollstreckung, zabeležba izvršenja*], which is in fact an adnotation of the decision on enforcement [*Exekutionsbewilligung*] passed in the enforcement procedure, is that the creditor may collect its receivable from the value of particular encumbered real estate directly, even in case the owner of such real estate changes after the adnotation[130]. Without such adnotation, in case of change of the owner, the creditor would have to obtain an enforceable document against the new owner prior to enforcement. In case the enforcement is requested by a creditor whose receivable was secured by a hypothec, this is the only effect of such adnotation, and in case an ordinary, non-secured creditor requests enforcement, the adnotation creates a court hypothec (see above chapter B, I, 1) for such creditor[131]. Hypothecary creditors are satisfied in the procedure of court enforcement over the encumbered real estate even if they did not request enforcement[132], and hypothec ceases to exist after the enforcement procedure is over, irrespective of whether the hypothecary creditor(s) are fully satisfied or not, except in case the

[129] See Art. 99 ZIP.
[130] See Art. 102 ZIP. The same effect is achieved in case the court hypothec is established in the procedure for securing the claims foreseen in Arts. 277 and 278 of ZIP, after the court hypothec is registered, because the enforceability [*Vollstreckbarkeit*, *izvršivost*] of the secured receivable is registered simultaneously – this is the so-called adnotation of enforceability [*Anmerkung der Vollstreckbarkeit*, *zabeležba izvršivosti*].
[131] See Art. 102 Para. 3 ZIP. This is the usual construction of the ordinary court hypothec, see instead of many Orlić in Stanković-Orlić, *op. cit.*, p. 236 and 237. However, there are opinions that ordinary creditor does not acquire hypothec by this adnotation – see Šarkić-Nikolić, *op. cit.*, p. 291, commentary to Art. 102 ZIP. The usual construction seems much more appropriate and correct.
[132] See Art. 105 ZIP.

buyer in the enforcement procedure agrees with the hypothecary creditor to take over the secured debt[133]. Agricultural land up to 10 ares (1000 square meters) is, generally, exempt from enforcement, but not in case of receivable secured by hypothec over such land[134]. It is interesting that there is no similar explicit exception for hypothec related to the possibility of the court to, upon request of the debtor, determine that the enforcement shall be performed over another real estate of the same debtor or over other property of such debtor, which is introduced to prevent the sale of (valuable) real estate for satisfaction of relatively small (personal) debts which can easily be satisfied by sale of other property of the debtor[135]. Even though the existing commentators seem to omit this issue[136], it seems that this possibility should be excluded in case of hypothec existing over the real estate which is subject-matter of enforcement, especially in case the real estate owner is only *in rem* debtor, not the personal one, because in that case the real estate owner is quite obviously not liable for the secured receivable with his other property. As for the sale itself, it is as a rule performed in form of an auction, but if all parties to enforcement procedure agree it may be performed in direct negotiations. The sale is based upon an estimated price as the opening price in an auction, and in case it is not achieved in the first auction it may be reduced, but not less than to ⅔ of the original estimated price, except if all parties agree to bigger reduction. In case the sale is unsuccessful, there is a possibility of transferring the real estate to the creditor for his use, which is made at a certain price as determined by the court, for a period required for the price of use (i.e. rent) to equal the receivable of the creditor that has not been satisfied in enforcement (a type of *Zwangverwaltung*)[137]. As for the satisfaction of creditors, it should be noted hat hypothecary creditors are satisfied from the proceeds of sale even in case they did not request collection in the enforcement procedure (did not 'report their receivables')[138], according to the rank of their hypothecs. Receivables secured by a hypothec have the priority immediately after the existing privileges (see chapter B, I, 1 on statutory hypothec above), but only if they 'were reported at latest by the hearing for the sale of real estate and if they are accompanied by a enforceable document'[139]. This requirement of 'reporting' the secured receivable in Art. 141 ZIP seems to be in direct contravention of provision that secured creditors are satisfied from the proceeds of sale 'even if they did not report their receivables' contained in Art. 139 ZIP. The standard commentary by Šarkić and Nikolić is silent on this issue[140], not even noticing the antinomy of the two provisions. It seems that the correct solution would be that no 'report of receivable' is required for creditors already having the registered hypothec (simply because their right is visible from the registry, and therefore there is no need for 'report'), leaving only the eventual creditors that have the 'invisible' statutory hypothec, which may exist without registration (this used to be hypothec for the securing of tax-related receivables towards the state, but not any longer – see on statutory hypothec in B, I, 1 above), with the requirement to 'report' their receivables by the hearing for the sale of real estate. As for the secured receivables which have not matured yet, they shall be satisfied from the sale proceeds according to their rank despite the fact that they did not yet mature, whereas the ones that bear no interest shall be discounted for the statutory interest for the period from

[133] See Art. 106 ZIP.
[134] See Art. 111 ZIP.
[135] See Art. 104 ZIP.
[136] There is no reference to this issue in commentary to Art. 104 in Šarkić-Nikolić, *op. cit.*, p. 293 ff.
[137] See Arts. 136 and 137 ZIP. This is a new possibility in Serbian law of enforcement, introduced by the 2004 ZIP, and is therefore not yet used in practice.
[138] See Art. 139 Para. 1 ZIP.
[139] Art. 141 Para. 4 ZIP.
[140] See commentary to Arts. 139 and 141 in Šarkić-Nikolić, *op. cit.*, p. 321 to 323.

the satisfaction to the maturity, and the ones bearing interest shall be paid with the interest only until the day of payment[141]. In case the receivable secured by hypothec is under a condition precedent or condition consequent [*aufschiebende oder auflösende Bedingung*, *odložnim ili raskidnim uslovom*], as well as in case of prenotation of hypothec (which equals receivable under condition precedent) or in case of adnotation of lawsuit for erasure of hypothec or adnotation of lawsuit (which equals receivable under condition subsequent), the amount required for satisfaction is placed into deposit (escrow) until it becomes certain whether the condition is fulfilled or not (in other words, for the period in which the condition is pending)[142].

In the insolvency procedure, as it was mentioned earlier, the receivable secured by hypothec is eligible for separate and full enforcement despite insolvency (hypothecary creditors are not deemed as insolvency creditors), in case the statutory conditions listed in the relevant provisions of the ZSP are fulfilled. These conditions are: 1) that the hypothec has been established prior to the deadline of 60 (sixty) days before insolvency procedure was initiated; 2) that the enforcement of the right of separate enforcement is not temporarily suspended, which is possible in case of a moratorium, when the insolvency council orders that measure to prevent enforcement of all debts towards the insolvent debtor, which may be done in a decision to initiate a preparatory insolvency proceedings [*prethodni stečajni postupak*] if there are grounds for a suspicion that the insolvency debtor may reduce its property or destroy documents before the (main) insolvency proceedings are initiated[143] (this moratorium may be challenged in certain circumstances), or in case of the ban on enforcement and satisfaction, which *ipso iure* comes into force after the insolvency procedure is initiated, in which case all the individual enforcement procedures which are still pending are interrupted[144] (this ban may be challenged in individual case under the same conditions as the mentioned moratorium). Under Art. 66 Para. 2 ZSP, once the (main) insolvency proceedings are initiated, the rights of separate enforcement are carried out exclusively within that procedure. However, under the ZSP, hypothecary creditors may not request or achieve the sale of encumbered real estate themselves, for the property of an insolvent debtor is sold only in case the insolvency judge passes a conclusion on sale of (all or part) of the assets of the insolvent debtor, whereas the insolvency manager performs the sale[145]. This provision leaves the hypothecary creditor in a disadvantageous and dangerous position, for he can neither request the enforcement in a separate procedure, nor can he request/achieve the sale of the encumbered real estate in insolvency procedure, which, especially in case of reorganization, may last for years. Therefore the hypothecary creditor is left 'at the mercy' of the insolvency judge and insolvency manager, which is even less understandable bearing in mind that hypothecary creditor, not deemed as an insolvency creditor, may not affect the insolvency procedure through his participation in the creditors assembly. As for the priority of claims secured by hypothec, it exists in the insolvency as well – only the costs of sale of real estate in insolvency procedure are privileged, and once these are paid the hypothecary creditors are satisfied in the order of the rank of their hypothecs[146]. In case of sale of the insolvency debtor as a legal entity (meaning that it is sold as such, i.e. as a company, as opposed to selling its assets

[141] See Art. 145 ZIP.
[142] See Arts. 147 and 148 ZIP.
[143] See Art. 47 ZSP.
[144] See Art. 73 ZSP.
[145] See Arts. 109 and 110 ZSP.
[146] See Art. 111 Para. 10 ZSP.

individually), all hypothecary creditors, irrespective of the concrete real estate upon which they had the hypothec, have priority 'as defined by the law'[147].

B. *Administrative enforcement*. Administrative enforcement was introduced in 2002, when the ZPPPA was enacted, for it enabled the tax authority to enforce tax debts through sale of real estate[148], which was not possible prior to that (before ZPPPA, tax authority had to turn to court for enforcement by sale of real estate[149]). Obviously, this type of realization of hypothec can not be initiated by the creditor of the secured receivable (i.e. bearer of hypothec), but if a hypothec exists over a real estate of a taxpayer who is subject to enforcement of his tax debts by the tax authority from the value of that real estate, the creditor may find himself in a situation where he is a party to administrative enforcement. Administrative enforcement over real estate of tax debtor is performed by seizure, determination of initial value and sale[150]. The satisfaction of tax-related receivables is performed in the following order: 1) expenses of enforcement, 2) fines for tax misdemeanors, 3) interest, 4) principle amount of tax debt[151]. There is a special provision for the case the enforcement is performed by transfer of ownership over the real estate to the state as creditor, in which case the tax debt is deemed to be settled in the amount of ⅓ of the estimated initial value of the real estate, and in case a prior hypothec of another creditor that has to be satisfied exists over the same real estate, the prior creditor shall be satisfied first, up to the amount of ⅓ of the estimated initial value of the real estate[152]. The specific provisions on enforcement by sale of tax debtor's real estate are contained in Arts. 105 to 112 ZPPPA. The legal ground [*Titel*] for this sale is the decision on forced collection of tax debt passed by the tax authority. Estimated initial value is determined by a decision of the tax authority, 3 days after the decision of forced collection becomes final in administrative proceedings, in a way determined by the minister of finance. Eight days after this decision on determination of initial value becomes final in administrative proceedings, or earlier if the tax debtor agrees, sale of the real estate takes place. The sale is performed, primarily, by public auction. At the first public auction, the price of the real estate may not go below 75% of the estimated value, and at the second below 50%, except if the tax debtor agrees. After that, the price at any subsequent auction(s) may not fall below ⅓ of the estimated value. If the real estate is not sold within 3 months from the first auction, the tax authority shall order the sale by direct negotiations, in which case the price can not be lower than ⅓ of the estimated initial value. In case the real estate cannot be sold in subsequent three months, the state acquires ownership over it at a price of ⅓ of the estimated initial value. The tax authority shall satisfy the prior hypothec, i.e. receivable secured by prior hypothec up to the value of ⅓ of the estimated initial value. After that, the hypothec shall be erased from the registry (though, the wording is not clear whether this shall also happen irrespective of whether the secured receivable has been satisfied in full, see Art. 110 Para. 8 ZPPPA, but it is more likely that this

[147] See Art. 113 Para. 2 ZSP. However, there are no explicit definition for determining this priority, which means that the hypothecs have the priority defined by the date of their establishment, and that the privileges (say, for the collection of taxes) are valid in this procedure as well. This, however, defies the specialty principle under which hypothec burdens only the real estate over which it exists and not the whole property of the (real) debtor, but the deviation is justified by the benefits of the possibility of sale of the insolvency debtor as such.

[148] See Art. 84 Para. 1 Item 6 ZPPPA.

[149] The traditional reason for such solution is the fact that the tax authority, on the one hand, passes the decision on the taxpayer debt (title for execution, i.e. enforcement), and enforce that decision, which, generally, leaves less space for impartiality. Therefore, when it comes to real estate, which are traditionally seen as more significant than other assets, traditional rule left the enforcement to the courts, as independent and impartial.

[150] See Art. 92 Para. 1 Item 6 ZPPPA.

[151] See Art. 70 Para. 1 ZPPPA.

[152] See Art. 94 ZPPPA.

rule applies here as well as in court enforcement). As for the sale proceeds, in case a receivable of another creditor secured by a prior hypothec exists, that creditor is satisfied first, up to the amount of ⅓ of the estimated initial value (so, even in case the price is far higher of the estimated value, only ⅓ of the estimated value is exempt from the tax privilege of the state). The decision on paying out the prior hypothecary creditor, once it is final in the administrative procedure, along with the proof of payment is forwarded to the registry which than erases the hypothec. Finally, the ZPPPA provides that the rules of ZIP on enforcement over real estate of the debtor are to be appropriately applied to all issues which are not explicitly regulated in the ZPPPA. As it could be seen, the ZPPPA rules are stricter towards the hypothecary creditor than the rules of ZIP, exempting only ⅓ of the estimated initial value from the privilege the state reserved for itself.

C. *Private enforcement*. Private enforcement, which is quite atypical for the continental law of hypothec, has been transplanted from the common law of mortgage and incorporated in the ZH, which means that it is available in Serbia from February 2006 onwards. Only the out-of-court enforceable hypothec (see chapter B, I, 1 above) may be enforced by private sale of the encumbered real estate (the ZH speaks also of a receivable from 'trustorthy document' [*verodostojna isprava*], see more on that below). The second chapter of the fourth part of the ZH (Arts. 29 to 38) deals with the procedure for private enforcement of hypothec. In case the debtor does not pay the secured receivable upon maturity, the creditor shall send to him and to the owner of the real estate, in case it is not the same person, the **first notice**, containing the following elements: 1) data on the contract on hypothec and the encumbered real estate, 2) description of default triggering the realization of hypothec as provided in the contract on hypothec, 3) actions to be taken by the debtor in order to pay the debt and avoid the sale of real estate, 4) deadline within which the debt must be paid to avoid the sale of real estate, 5) warning that in case such activities/payment are not performed the creditor shall collect his receivable from the value of encumbered real estate, the possession over which shall be lost for the debtor[153], 6) name and necessary data on representative of the creditor which shall provide further information upon debtors' request, and 7) other information the creditor deems relevant. The first notice must be written. In case the debtor does not pay the secured receivable within 30 days from the day it receives the first notice, the creditor shall send the **notice of sale** to the debtor and the owner of the encumbered immovable, which must contain: 1) data on the contract on hypothec and the encumbered real estate, 2) description of default triggering the realization of hypothec as provided in the contract on hypothec, 3) notification that the whole debt is due (has matured), 4) the amount of the due debt, 5) actions to be taken by the debtor in order to pay the debt and avoid the sale of real estate, 6) deadline within which the debt must be paid to avoid the sale of real estate, 7) warning that in case such activities/payment are not performed by the debtor/owner, the creditor shall interrupt the possession of real estate by sale thereof, 8) notification on choice of manner of sale of the real estate, 9) name and necessary data on representative of the creditor to which the debtor may turn for a meeting, and 10) other information the creditor deems relevant. Simultaneously with this notice of sale, the creditor shall request the **adnotation of hypothecary sale** in the competent registry. Along with the request for registration of such adnotation, the creditor shall submit: 1) copy of the notice of sale, 2) copy of the contract on hypothec, 3) his statement that the debtor has not paid his debt by that date, and 4) proof that the first notice and the notice of sale have been dispatched to the debtor and the owner of encumbered real

[153] Here, even though the ZH does not say it explicitly, the law has in mind the real, *in rem* debtor, not the personal one.

estate. The registry shall, within 7 days from the day it received the request, register the adnotation and disclose the **decision on adnotation of hypothecary sale** to the creditor, the debtor and the owner of the encumbered real estate. The adnotation, respectively decision on that adnotation contain: 1) explicit authorization that the hypothecary creditor, once the decision becomes final but not before 30 days from the day the decision has been passed, may as a hypothecary creditor, in his name, sell the immovable, according to the provisions of the ZH; 2) ban of sale of the encumbered immovable by its owner. The decision on adnotation of hypothecary sale may be appealed by the creditor, the debtor and the owner of the encumbered real estate within 15 days from the day they received it. The second instance decision must be passed within 15 days from the day of submission of the appeal. The appeal shall be granted if the debtor or the owner of the encumbered real estate submit undisputable written evidence that: 1) the secured receivable does not exist; 2) the hypothec does not exist; 3) the secured receivable is not yet due; or 4) the debt has been paid. The second instance decision is final and enforceable, moreover it cannot be disputed by a lawsuit or any legal remedy (!). The debtor, respectively the owner of the encumbered real estate may request a meeting within 10 days from the day of receipt of the notice of sale, and the creditor, respectively his representative has an obligation to enable such meeting in its business premises during working hours. However, if the parties do not agree to settle the debt in a way proposed by the debtor at this meeting, the right of creditor to continue with the sale of immovable shall not be impeded. There is also a special provision that, contrary to the general rule of contract law and procedural laws existing in Serbia, adopts the mailbox rule (receipt by dispatch) for the mutual correspondence between creditor, on the one hand, and debtor and owner of immovable, on the other. In case the debtor does not pay the secured receivable by the time the decision on adnotation of hypothecary sale becomes final (provided, however, that at least 30 days have elapsed from the day that decision was passed), the creditor may sell the immovable either by auction or by direct negotiations. However, choosing one of the two manners of sale does not prevent the creditor to use the other, if the first failed. Before commencing the sale procedure, the creditor must determine an **approximate market value** of the immovable by hiring an authorized court expert. This value is for the purposes of 'orientation' only, and is not deemed the genuine value of the real estate. The **auction sale** may be performed either by the creditor himself or by a professional hired by the creditor, and it is based on the public advertisement that must be published in a daily newspaper which is sold in the region in which the real estate is situated at least 45 days prior to planned auction. The public advertisement contains: 1) description of immovable; 2) name of creditor; 3) contact data of creditor; 4) initial auction price; 5) time and place of the auction; 6) other information the creditor deems of relevance. Simultaneously, the creditor shall send the information on the public advertisement to the debtor, the owner of the immovable and to any and all third persons that have a right over the immovable. The initial auction price may not be below 75% of the estimated value, and should the first auction fail, the price at the second auction can not be lower than 60% of the estimated value, all that except the creditor and the owner explicitly agree in written that the price may go below the mentioned thresholds. The creditor may participate, i.e. place his bid at the auction. The **sale by direct negotiations** must be agreed at the price that is "near to market price", whereas the creditor sells the real estate in his own name. The market price is, by wording of the ZH, the usual price that may be achieved by sale of such immovable in good faith in the time of hypothecary sale. Here also the creditor may sell himself, but may also hire an attorney or a real estate agency to do it for him, in which case the attorney's fees, respectively agency's commission may be included in the price. The creditor shall, at latest 15 days prior to closing of sale, inform the debtor, the owner of the immovable and any and all third persons that have a right over the immovable on the sale, whereas the notice shall

contain: 1) the full amount of receivable; 2) estimated value of the immovable; 3) essential elements of the sale and purchase agreement; 4) the date of the planned closing; 5) the way of distribution of the sale proceeds; 6) the date by which the immovable must be evicted; 7) statement on the deadline within which the debt may be paid in order to avoid the sale. The creditor shall have full police assistance in case the owner or other possessor [*Besitzer*, *držalac*] of the immovable refuse to grant access to the potential buyers or evict the immovable within the deadline provided in Art. 15 ZH, respectively the contract on hypothec (15 days from the day of closing). Lastly, if the secured receivable is not fully satisfied from the sale proceeds, the personal debtor remain indebted for the difference between the achieved price and the secured receivable. However, if the achieved price is below 75% of the estimated price, the remaining debt shall be reduced for the amount of difference between the 75% of the estimated price and the achieved price. In case the hypothecary creditor is satisfied by acquisition of ownership over the encumbered immovable, the satisfaction is perfected in the moment of acquisition. In case the achieved price exceeds the secured receivable, the remaining amount belongs to the 'hypothecary debtor' (presumably, former owner of the real estate, *in rem* debtor). The distribution of sale proceeds in case of private sale is determined in Art. 41 ZH in the following way: first the costs of sale are paid, including the fees and expenses of third parties, then the secured receivable of hypothecary creditor, afterwards secured receivable of hypothecary creditor with a lower rank or other creditor with the same rank, and lastly the eventual leftover belongs to the debtor (here also, presumably, real debtor, even though the wording indicates the personal one – as it has been said before, the authors of the ZH have not understood the legal nature of hypothec quite correctly, and therefore have made some strange provisions which do not adequately differentiate personal and real debtor). The distribution shall be made within 7 days from the day of collection of purchase price, and the final calculation must be disclosed to the debtor and all third parties that have the right over the immovable within 7 days from the day of distribution. However, as opposed to provisions of Art. 41, the ZH in its Art. 49, which pertains to extinction of hypothec in case of private enforcement sale, provides that the hypothec is extinct only if the creditor is satisfied, and, even more oddly, provides that "the rights of subsequent hypothecary creditors remain reserved", which would indicate that the subsequent ranking hypothecs survive the private enforcement of prior ranking hypothec. This, on the other hand, should make the buyers of the encumbered real estate, especially if it is "over-encumbered", very scarce, for no one shall buy a real estate at a market price in order to get an encumbered real estate. Not to go further into details, one may say that the rules on private enforcement of hypothec certainly look a little rough, as if the drafters only had a case in which a bank is creditor to an individual buying a flat in which to live in mind, and that many problems may be expected once these provisions start being applied in practice. However, the most perplexing issue regarding the private enforcement is the already mentioned possibility of private enforcement of the hypothec other than the 'out-of-court executable hypothec' – the ZH speaks in Art. 29 of 'hypothecary creditor from a trustworthy document' [*hipotekarni poverilac iz verodostojne isprave*]. Art. 24 Para. 3 ZH explicitly enables the private enforcement 'when the contract on hypothec is made in a form of a trustworthy document *or* enforceable document from Art. 15 of this Act…'. The 'trustworthy document' [*verodostojna isprava*] is one of the grounds for enforcement [*Exekutionstitel*, *Zwangvollstreckungstitel*] of monetary claims [*Geldforderungen*, *novčana potraživanja*]. It is defined in Art. 36 Para. 2 ZIP, but for the purposes of that law (that restricts the definition), in the following manner: 1) bill of exchange or check [*Wechsel oder Scheck*, *menica ili ček*], with protest and return invoice if that is required for establishment of a claim; 2) bond [*Schuldverschreibung*, *obveznica*] or other security issued in a series that empower the bearer to payment of nominal value; 3) invoice, including the calculation of

interest; 4) excerpts from business books for the price of communal services, delivery of water, heating, transport of waste ant similar services; 5) public document that establishes an executable (directly enforceable) monetary obligation, except foreign public documents; 6) bank guarantee; 7) letter of credit; 8) verified statement of debtor that authorizes the creditor to transfer of monetary means (sum of money). The trustworthy document must contain data on debtor, creditor, subject-matter, type, scope and time of fulfillment of obligation. If due date is not visible in the trustworthy document, the enforcement is ordered if the creditor submits written statement that the receivable is due and denotes the day of maturity. If the trustworthy document is simultaneously a means of payment (say, in case of bill of exchange or check), abbreviated enforcement procedure is carried out upon request of the creditor. The enforcement on the basis of a trustworthy document is an exception to the rule that enforcement is based upon the executory (enforceable) document, aimed at enabling swift enforcement of monetary claims. However, in case the debtor lodges an objection to enforcement on ground of a trustworthy document, the enforcement procedure turns into a classical civil procedure (dispute procedure, *Zivilprozeß*)[154]. The ZIP broadens the definition of trustworthy document in its Art. 253, in which it defines the types of trustworthy documents that may be ground for the abbreviated enforcement procedure [*skraćeni izvršni postupak*], which is possible only if both debtor and creditor are commercial entities or businessmen. Along some of the documents mentioned in Art. 36, it adds "all contracts in commerce" [*ugovori u privredi*], which are, under ZOO, contracts between commercial entities and businessmen[155]. However, this 'broadening' of the definition is also provided for the purpose of defining the possible grounds for the abbreviated enforcement procedure, which also restricts the application of the definition. Be it as it is, if the authors of the ZH had the definition of trustworthy document contained in the ZIP in mind, than it seems they wanted to make all contracts on hypothec which qualify as 'contracts in commerce' to be enforceable by private enforcement, under the rules contained in the ZH. However, the Law on Civil Procedure [*Zivilproceßordnung*, *Zakon o parničnom postupku*] (hereinafter: ZPP)[156] also contains a definition of trustworthy document, that is even broader than the 'broadened' ZIP definition. It is contained in Art. 453, which pertains to the procedure for issuing a payment order [*Erlassung des Zahlbefehles*, *izdavanje platnog naloga*], in which the following documents are, especially, deemed as trustworthy documents (this means the list is not exhaustive): 1) public documents; 2) private documents in which the signatures were verified by competent authority; 3) bills of exchange and checks with protest and return invoices in case they are required for establishment of claim; 4) excerpts from verified business books; 5) invoices; 6) documents which are, under other laws, deemed as public documents. These documents are deemed trustworthy documents if they contain evidence on monetary claim that has matured. It is less likely that the authors of the ZH had this definition of a trustworthy document in mind, for it will render all contracts of hypothec directly enforceable by private enforcement, because they fall within item 2) of the definition. However, introduction of a claim from trustworthy document in private enforcement is perplexing, not only because different definitions of trustworthy document in ZPP and ZIP, but also because the meaning within ZIP (which the authors of the ZH most probably had in mind) is hidden into a labyrinth of ZIP rules – none of the trustworthy documents mentioned in basic Art. 36 can be a form for

[154] See Art. 21 related to Art. 258 ZIP.
[155] See for precise definition Art. 25 Para. 2 ZOO.
[156] Official gazette of the Republic of Serbia Nos. 125/2004-1 and 106/2006-58.

contract on hypothec[157], so one has to dig deeper into the ZIP to see that the definition of trustworthy document is expanded in Art. 253 in a way that enables including a contract on hypothec as a type of trustworthy document. It is therefore no wonder that the existing commentaries to the ZH do not explain this possibility of private enforcement in case of trustworthy document, if they notice it at all[158]. Finally, the very inclusion of the 'creditor from trustworthy document' into possibility of private enforcement defies the explicit provision of Art. 15 Para. 4 ZH, which provides that, in case the contract, respectively declaration on hypothec does not contain the elements stated in that Article (see B, I, 1 above on 'out-of-court executable hypothec'), the enforcement is made according to the ZIP. Therefore, it seems that a trustworthy document, in order to be eligible for private enforcement, must have all the elements provided in Art. 15 ZH, but in that case, there is no difference from the enforceable (executory) document the contract on hypothec from Art. 15 ZH in fact is. That, on the other hand, makes the mentioning of the trustworthy document in Arts. 24 and 29 superfluous and senseless. Therefore I have labeled this characteristic of the provisions on private enforcement the most perplexing of all.

Lastly, it should be noted that Serbian law does not recognize fiduciary real estate securities, i.e. treats the nominal right-bearer as the beneficial right-bearer, thus making the insolvency-remoteness of real estate security through a fiduciary relation impossible.

5. **Extinction accessority**. The meaning of the extinction accessority is that the hypothec cannot survive the extinction of the secured receivable, i.e. that it ceases to exist together with the receivable it secures[159]. The hypothec, however, formally survives the extinction of the secured receivable for as long as it remains registered, but it can not produce any effect after the secured receivable is extinct – it does not exist materially (substantially), only formally. However, there is a case in which this hypothec, that is only formally existing, may 'resurrect' to full effect. This case is known as owners hypothecs without secured receivable[160], and under the ZH there is a possibility of the owner to dispose of such hypothec within three years from the day the original secured receivable was extinguished. The details of this possibility

[157] Except maybe the one defined in Item 8 - verified statement of debtor that authorizes the creditor to transfer of sum of money, but even such statement is in no way contract on hypothec (may be declaration on hypothec, though).

[158] See Gloginić, *op. cit.*, commentary to Art. 24 ZH, p. 57 and 58; commentary to Art. 29 ZH, p. 61 – this commentary does not even notice that private enforcement may be carried out outside of the 'out-of-court executable hypothec' provided in Art. 15 ZH, even though it restates the legal text which explicitly mentions 'trustworthy document **or** enforceable document from Art. 15…'; D. Živković, *op. cit.*, commenatry to Art. 24 ZH, p. 42 notices the difference and mentions trustworthy document from Art. 36 Para. 2 Item 8 ZIP (verified statement of debtor that authorizes the creditor to transfer of sum of money), but without any further explanations, and commentary to Art. 29 ZH, p. 47, where the possibility was also noticed but not further explained. D. Živković fails to stress that the definition of trustworthy document from Art. 36 Para. 2 ZIP is explicitly restricted to „the meaning [of the term 'trustworthy document'] within this law".

[159] See Arts. 43 and 44 ZH. The ZH provides that hypothec ceases by erasure in the registry based upon the extinction of the secured receivable, but such wording is aimed at formal, not material extinction of the hypothec.

[160] There is also owners hypothec with secured receivable [*forderungsbekleidete Eigentümerhypothek*], but in this case the secured receivable still exists, it is only that the owner of the encumbered real estate became its creditor (creditor of the secured receivable). The hypothec therefore can not serve for securing the receivable, because the security exists over the property of the creditor, for as long as this situation exists. However, should the creditor/owner of the encumbered real estate assign the secured receivable to a third party, the hypothec shall re-activate, and secure the new creditor. It is disputable whether this type of owners hypothec may be used for exercising the priority right of the creditor/owner of the encumbered real estate in case some lower ranking creditor of his initiate enforcement from the same real estate, but it seems that the affirmative answer can be better substantiated.

are set forth in chapter B, II, 4 of this report on the rank disposal and shall therefore not be repeated here.

IV Owner Protection from Unjustified (Double) Collection [*doppelter Inanspruchnahme*]

This protection is realized through the possibility of the owner of the encumbered real estate to make objections related to the secured receivable to any hypothecary creditor who seeks collection thereof, particularly to object by proving the secured receivable has been settled by payment. Given the fact that there are no exceptions to right-bearer accessority (see B, III, 3 above), the risk of unjustified double collection, in which both personal and real creditor, as different ones, would collect the secured receivable, is practically excluded. Since the hypothec in Serbian law is a counterpart of German "*Sicherungshypothek*", not the "*Verkehrshypothek*", the rule contained in §1138 BGB does not apply in Serbian law, i.e. a *bona fide* third party cannot acquire a hypothec without the secured receivable through rules on reliance in the registry.

In case of assignment of secured receivable [*Zession*] the debtor may make, towards the new creditor, all the objections it could have made to the former creditor up to the moment he found out of the assignment (apart from the strictly personal ones), along with any objections it has towards the new creditor personally[161]. In principle, the owner of the encumbered real estate can make these objections only when he is simultaneously the personal debtor.

V Costs

The costs related to the establishment, transfer and extinction of hypothec depend on the legal ground upon which it is established and the registry in which it is registered. I shall present these costs for the situation in which the secured receivable is around 100,000.00 Euro (approximately 8,100,000.00 RSD, 1€ is around 81 RSD for the last few years), because some of the costs depend upon the value of the secured receivable.

So, in case the hypothec is grounded on the declaration or contract on hypothec, the documents containing such declaration/contract must be verified by the court. The cost of such verification, in case of a declaration, is significantly less, which is the main reason for its very broad use in practice, and depends upon the number of verified copies. Contract verification is more expensive, and depends upon the value of the contract. Concretely, for the verification of declaration on hypothec, court fee would be RSD 32.50 + RSD 65.00 for each copy of the declaration, which is, for say 3 copies, still under € 3.00 (three euros)[162]. For the verification of contract on hypothec, for which the amount of the cost depend on the value of the contract, the court fee would be RSD 32.50 + RSD 26,000.00 (some € 321 at current exchange rate), which is the maximal value[163]. As for the court executable hypothec, it is grounded on the

[161] See Art. 440 ZOO.

[162] See Tariff No. 13 Paras. 1 and 2 of the Law on Court Fees [*Zakon o sudskim taksama*] (hereinafter: ZST), Official gazette of the Republic of Serbia Nos. 28/1994-762, 53/1995-1999, 16/1997-288, 34/2001-1, 9/2002-20, 29/2004-1 and 61/2004-4.

[163] The full formula for this fee is calculated upon the following formula: for contract value up to 10,000 RSD, fee is 650 RSD; for contract value from 10,001 to 100,000 RSD, fee is 650 RSD + 1% of value, for contract

basis of an agreement concluded in front of the court in procedure for securing the claims provided in the ZIP. The value of the court fee depends on the value of the claim that should be enforced or secured. The costs of this procedure are: for the proposal by which the procedure is initiated, RSD 32,500 (approximately € 401) if the municipal court is competent, and RSD 58,700 (€ 725) if the commercial court is competent[164] and for the court decision the same amount – RSD 32,500 (approximately € 401) if the municipal court is competent, and RSD 58,700 (€ 725) if the commercial court is competent[165]. Both amounts (for proposal and for decision) are paid simultaneously, upon submitting the proposal.

Apart from the costs related to the legal ground of hypothec, there are costs related to its registration, which differ depending on the registry in which it is to be inscribed.

For the **land books**, the court fees are determined in the Law on Court Fees [*Zakon o sudskim taksama*] (hereinafter: ZST), tariff Nos. 14 and 15. The court fee for the request for registration (inscription) or erasure would in our case be 2,600 RSD (€ 32)[166], but it is not paid if the request is made in a court procedure (as it is the case with the court hypothecs). The court fee for intabulation and prenotation (this one is not paid in case the right is erased) is 650 RSD (€ 8), and if hypothec is established by adnotation (say, ordinary court hypothec), also 650 RSD (€ 8). This registration fee is also paid when the registration occur within existing court procedure, or if it is requested *ex officio*. Both of these taxes are paid together, at the beginning of the land books procedure (along with the request for registration). As for the registration of changes of the existing hypothec, there are no explicit provisions in the ZST on that. There are two possibilities – either the registration of change is not subject to payment of court fees, or the same fee is paid for each change. The practice in Serbia is rather scarce so there is no reliable position of land books courts on this issue, but it seems that in case of registration of changes of existing hypothec, no court fee for request for registration is paid, and the fee for registration (not partial or full erasure) should be paid.

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value from 100,001 to 1,000,000 RSD, fee is 1,950 RSD + 0.5% of value, for contract value over 1,000,000 RSD the fee is 8,450 RSD + 0.25% of value, whereas RSD 26,000 is set as maximum. See Tariff No. 13 Paras. 1 and 4 ZST.

[164] See Tariff No. 1, Para. 3 related to Paras. 1 and 2 ZST. For the fees for **courts of general jurisdiction (Tariff No. 1 Para. 1)**, the full formula is as follows: up to 10,000 RSD dispute value, the fee is 1,300 RSD, from 10,001 to 100,000 RSD dispute value, the fee is 1,300 RSD + 4% of dispute value, from 100,001 to 500,000 RSD dispute value the fee is 6,500 + 2% of dispute value, from 500,001 to 1,000,000 RSD dispute value, the fee is 19,500 RSD + 1% of dispute value, lastly for dispute value over 1,000,000 RSD, the fee is 32,500 RSD + 0.5% dispute value, but not more than 65,000 RSD (note that for enforcement only ½ of this fee is paid). For the fees for **commercial courts (Tariff No. 1 Para. 2)**, the full formula is as follows: up to 10,000 RSD dispute value, the fee is 2,600 RSD, from 10,001 to 100,000 RSD dispute value, the fee is 2,600 RSD + 6% of dispute value, from 100,001 to 1,000,000 RSD dispute value the fee is 10,400 + 2% of dispute value, from 1,000,001 to 10,000,000 RSD dispute value, the fee is 36,400 RSD + 1% of dispute value, lastly for dispute value over 10,000,000 RSD, the fee is 166,400 RSD + 0.5% dispute value, but not more than 260,000 RSD (note here also that for enforcement only ½ of this fee is paid). All court fees in dispute and enforcement procedure are calculated based upon these amounts.

[165] See Tariff No. 2, Para. 5 ZST.

[166] This is the maximum amount. The full formula reads as follows: up to 5,000 RSD value of right to be registered/erased, the fee is 260 RSD, from 5,001 to 20,000 RSD value of right, the fee is 260 RSD + 1% of right value, over 20,000 RSD value of right, the fee is 520 RSD + 0.5% of right value, but not over 2,600 RSD.

The fees of the **unified cadastre** (KN) are determined in the Law on Administrative Fees [*Zakon o republičkim administrativnim taksama*] (hereinafter: ZRAT)[167] and the Decree on the Amount of Fee for Using the Data of Survey and Cadastre and Provision of Services by the Republic Geodetic Authority [*Uredba o visini naknade za korišćenje podataka premera i katastra i pružanje usluga Republičkog geodetskog zavoda*] (hereinafter: UVNKN)[168]. The administrative fee for request for registration (including change or erasure) is 150 RSD (€ 1.85), and administrative fee for any decision on change in the KN (this includes establishment of hypothec, any change thereof as well as erasing it) is 300 RSD (€ 3.7)[169]. The fee for the RGZ service is determined in points, the value of which is corrected each month by the index of retail prices published by the Republic Statistical Authority [*Republički zavod za statistiku*]. For the registration of hypothec it is 425 points[170], whereas the current value of a point is some 18.64 RSD, the fee therefore being in the vicinity of 7,923 RSD (€ 98). This fee is paid for establishment, it is explicitly excluded for erasure, and whether it is paid for the change of an existing registered hypothec is not clear from the regulations. In practice, the RGZ charges its fee with the explanation that "there are no grounds for exemption", as a high legal officer of the RGZ has put it when asked about the grounds for charging this fee. Therefore every change is associated with the full fee, as if the establishment of hypothec is at hand.

The costs of realization (enforcement) depend both on the type of hypothec (directly enforceable – ordinary; court enforcement – private enforcement) as well as of the circumstances of each individual enforcement, so they can not be presented in a general way.

[167] Official gazette of the Republic of Serbia Nos. 43/2003-9, 51/2003-1, 53/2004-10, 42/2005-6, 61/2005-60, 101/2005-28, 42/2006-20 and 47/2007-85.
[168] Official gazette of the Republic of Serbia No. 45/2002-8.
[169] See Tariff Nos. 1 and 130 ZRAT.
[170] See Tariff No. 17 Para. 1 Item 10 UVNKN. For secured receivable up to 5,000 RSD, the fee is 30 points, for secured receivable from 5,001 to 20,000 RSD the fee is 30 points + 1% of receivable value, but not over 200 points, and for secured receivable over 20,000 RSD the fee is 425 points. Since in real life there are no hypothecs for only 20,000 RSD (€ 247), in practice the 425 points fee is applied in every case.

C. Practical Application.

1. Change of the Receivable (Creditor and Debtor Remain the Same)

a. Exchange of Receivable and Increase of Loan [*Forderungsauswechslung und Kreditaufstockung*]

Generally, since the hypothec is accessory in nature, the secured receivable cannot simply be replaced without influencing the hypothec. The only way to do it is through the *forderungsentkleidete Eingentümerhypothek*, i.e. by the disposal of the hypothec in case the secured receivable ceased to exist, as was explained above. As for the increase of loan for this case in which the exchange of receivable is possible, it is not possible to exceed the limit of hypothec that has been registered simply by attaching it to a new secured receivable that is of higher amount. In other words, rank may be preserved and owners hypothec given for securing of another receivable only up to the registered value. In case the value of new receivable is bigger, there are two options – either the increase shall not be covered by the hypothec, or a new registration of hypothec, with a new rank, is required.

b. Bridging Finance and Final Financing and Other Changes of Purpose [*Zwischen- und Endfinanzierung sowie weitere Zweckänderungen*]

In principle, the hypothec that is securing a certain receivable cannot be used for securing other receivables of the same or any other creditor, because the ZH defines it as a means of securing certain receivable, the elements of which must be determined. As it has been already said, it is questionable whether one hypothec can initially be established to secure more than one receivable (the wording of ZH does not seem to allow that possibility, but other interpretation may also be well substantiated), and subsequent inclusion of a new secured receivable into existing hypothec is not possible. Therefore the short term loans (bridging finance) cannot simply be secured by the existing hypothec, which already secure the long term loans (final financing) and vice versa, without the change of rank of the hypothec. Many see this as a consequence of the specialty principle, but this is in fact a consequence of accessority, because adding a receivable to the one secured by hypothec would breach it. This effect could only be achieved by the use of instruments provided in the law of obligations, that is by partial assignment or pledge of initial secured receivable to the providers of the bridging finance, which would practically enable them to use the existing hypothec for securing their receivables. On the other hand, if the existing hypothec secures the short-term bridging loans, it can be used for securing the subsequent long term loan (final financing) through the use of one of the three possibilities for disposing of the hypothec (*forderungsentkleidete Eigentümerhypothek*, adnotation of retaining the prior rank and prenotation of new hypothec), whereas the use of owners hypothec without recurred receivable would be the most cost efficient.

c. New Credit as a Replacement [*Neuvalutierung*]

The *Neuvalutierung* – the replacement of an old settled receivable secured by hypothec with a new one by the same creditor – is possible only by assignment of owners hypothec, which requires formal proceedings in front of the competent registry[171]. Therefore it cannot be achieved by informal agreement between the creditor and the (personal and real) debtor.

d. Lines of Credit [*Kreditlinien*]

Given the fact that the maximal amount hypothec does not explicitly exist as a special type of hypothec under the ZH (see B, I, 1), it is not certain whether a hypothec could be used for securing a revolving credit. From the point of view of strict application of the ZH, it seems that this would not be possible, because the amount of the secured receivable, once determined and registered, may only decrease, and once it decreases it could not be increased again. However, even though the ZH does not explicitly mention the maximal amount hypothec, in case the revolving credit is based upon one contract as legal ground [*Rechtstitel*], I believe that in practice a hypothec for securing a certain maximal amount of the outstanding credit could be registered, i.e. that the registry official would accept it despite the lack of the explicit wording of the ZH. This opinion, however, is based not upon the interpretation of ZH, but on the knowledge of practice and the reasoning of the registry officials. However, in case a subsequent hypothecary creditor objects to such arrangement the matter would have to be resolved in court, and it is impossible to conclude how the court would decide. This would have been much easier if the authors of the final text of ZH had kept the wording of both drafts of ZH, which explicitly mentioned the maximal amount hypothec, for this type of hypothec is, actually, designed for securing the revolving credit (credit lines).

e. Change of Terms [*Änderung der Bedingungen*]

In case the terms and conditions related to the secured receivable are changed without changing the receivable itself (without *novatio*)[172], the existing hypothec shall apply to the amended secured receivable, provided however that the amount of the secured receivable (interest included) is not increased over the registered level. As for the increase of interest, see immediately below on phase financing.

f. Phase (Stage) Financing [*Abschnittfinanzierung*]

Basically, since the subsequent agreement on interest does not constitute a novation, it is possible to change the interest rates during the period of a long term credit while preserving the identity of the secured receivable, that is without influence to the existing hypothec securing it. However, the interest rate agreed subsequently may not exceed the level of registered interest rate, more precisely – the part of the interest rate increased over the registered level would not be covered by the existing hypothec. Moreover, each change of interest rates should be subject to registration, because interest rate is an element of the

[171] See Art. 53 ZH.
[172] See on *novatio* Art. 348 ZOO. Paragraph 2 of that Article explicitly exclude changes or additions related to time, manner and place of fulfillment, as well as subsequent agreement on interest, conventional penalty, securing the fulfillment or any other ancillary provision from novation.

secured receivable which is specifically entered into the registry. However, I think that it would be possible in practice to register the maximal amount of interest rate, which would than cover not only the level of interest in the initial phase, but also subsequent changes, all provided that the maximal registered interest rate is not exceeded. This is due to the strict interpretation of the ZKN, which requires registration of interest rates[173], but does not specify that maximal amount of interest cannot be registered, i.e. that only the fixed interest must be registered. The maximal amount hypothec would also ease the uncertainty regarding this possibility, for it would enable a hypothec which would easily include potential changes of interest rate in its value, but since it is not explicitly provided in the ZH it cannot be used to cover the situation of phase financing.

2. Change of Creditor [*Veränderung auf der Gläubigerseite*]

a. Bridging Finance, Securing Other Loans [*Zwischenfinanzierung, andere Darlehen absichern*]

In case the commercial bank has financed (as a short term loan) a construction project, and a real estate bank provided the money for repayment of such debt after the construction was finished (as a long term loan), the hypothec that was established to secure the receivable of the commercial bank may be used to secure the new receivable by the real estate bank in several ways, provided in the section of the ZH on the establishment of a new hypothec (Arts. 53 to 56 ZH). These possibilities were presented in detail above in relation to the ranking system (B, II, 4), and therefore are only briefly mentioned here. There are three possibilities: disposal of the registered hypothec after the secured receivable ceased to exist ('owners hypothec without secured receivable'); adnotation of (retaining of) prior rank and prenotation of a new hypothec. So, the hypothec that used to secure the short term loan may be 'assigned' to the long term loan after the short term loan is repaid, the rank of the hypothec for securing the long term loan may be retained so that a new hypothec for securing the long term loan could have the same rank, and lastly the hypothec for a long term loan may be prenotated over an existing hypothec that secures the short term loan, so that it is deemed as intabulated once the existing hypothec is erased, with the same rank the existing hypothec has. In all three cases, the 'new' hypothec may not exceed the 'old' one in scope (in amount). Also, in all three cases a formal procedure with the registry is required.

As for the possibility of a hypothec that secures the long term loan to be used for securing the short term loans as well in the meantime (during the period of the long term loan), see above III, 1, b on bridging finance.

b. Initial Loan Syndication, Change of Syndicate Members, Outsourcing the Credit Risk and Subsequent Establishment of Syndicate Stake [*anfängliche Konsortialbildung, Austauch von Konsorten, Ausplatzierung, Neubilding der Konsortialanteile*]

aa. Initial Loan Syndication

[173] See Art. 58ž Para. 2 ZKN.

One hypothec may secure a receivable belonging to more than one creditor, whereas the creditors may be either in position of joint and several creditors [*solidarnost poverilaca*, *Gläubigersolidarität*], which must be specifically stipulated by agreement, or in the position of divided, separate creditors[174]. The requirement of this possibility is that there is a unique receivable as the subject-matter of security, which would in practice mean that it derives from one agreement as its legal ground [*Titel*], that it matures on the same date or in a same way etc. As for the rights of the creditors, they depend on their internal relations – in case of joint and several creditors, each creditor may request the full amount of secured receivable, and in case of divided creditors, each may request only its respective part thereof. In both cases, the hypothec secures the part a creditor may request, whereas in the case of divided creditors the realization of hypothec requested by one necessarily includes all other creditors. Due to the non recognizing of fiduciary relationship, there is no possibility that one syndicate member acts as a trustee (fiduciary agent, *Treuhänder*) for all of them. That means that the fiduciary agent would be deemed as if it really is the only creditor, and the other syndicate members would not have any claims toward the debtor or the hypothec, but only to the fiduciary agent.

bb. Subsequent Loan Syndication

The subsequent syndication of a loan is possible in case the original creditor assigns parts of the secured receivable to new creditors, which is possible if assignment was not excluded in the original loan agreement. Together with the assigned receivable, the new creditor *ipso iure* obtains the hypothec that secures it. In spite of that, in order to be able to realize its hypothec, the subsequent creditor must register its right – the registration is declaratory in nature, but must be performed in order to enable the creditor to be deemed as 'hypothecary' one. Once the new creditor is registered, its position is the same as if he was syndicate member from the beginning. Regarding the possibility of trade with the stakes in syndicated loan amongst the syndicate members themselves, it is free and may be achieved without the registration of the change of stake, save in case some members leave the syndicate altogether, in which case they should be erased as hypothecary creditors from the registry.

c. Sale of a Loan [*Verkauf des Kredits*]

The sale of a loan is performed by assignment of secured receivable against consideration. The debtor need not agree to the assignment, but the assignor has an obligation to inform him on the assignement, and until the debtor finds out of the assignment he may validly pay to his original creditor, i.e. the assignor. This renders the sale of loan too complicated in cases the subject of assignment is the whole portfolio of loans. The hypothec, as it has been mentioned a few times above, is transferred along with the sold receivable *ipso iure*, but the new creditor (assignee) must register it in his name in order to be able to realize it. However, the declaratory nature of the registration of change of creditor renders the consent of the owner of the encumbered real estate not required.

d. Exchange of Creditor for Refinancing (in Concern, MBS) [*Austausch des Gläubigers zur Refinanzierung (im Konzern, MBS)*]

[174] See Arts. 412 Para. 3 and 425 to 434 ZOO.

There are no specific provisions for the change of creditor in case of concern (group of affiliated companies). Therefore, what was said for the case of bridging finance and securing other loans (C, II, a) pertains to this case as well.

As for the mortgage backed securities, they do not yet exist in Serbian law, because the development of hypothecary credits commenced rather recently, and there is not yet enough pressure from the banks for refinancing.

3. Change of Debtor [*Veränderung auf Schuldnerseite*]

a. Refinancing (Rescheduling) [*Umschuldung*]

There is no possibility to replace a secured receivable against one debtor with a secured receivable against another debtor without impeding the hypothec. This effect, however, may be achieved through the possibilities provided in the ZH related to "establishment of a new hypothec" (Arts. 53 to 56, see above C, 2, a). Through these possibilities the secured receivable may be effectively replaced without loosing rank, provided, however, that the new receivable must be registered and that the amount of the new secured receivable can not exceed the amount of the old one.

As for the possibility of change of debtor in the same secured receivable [*Schuldübernahme*, *preuzimanje duga*], it is possible but the consent of the creditor is required[175]. However, special provision pertains to the case the buyer of the encumbered real estate takes over the secured debt, because it is deemed that the creditor consented if he does not object within three months from the day he was informed of the taking over of debt[176]. In case the real debtor (owner of the encumbered real estate) does not agree to secure the debt of the new debtor, the hypothec ceases[177].

b. Construction Financing [*Bauträgerfinanzierung*]

The hypothec which secured the credit extended to a sponsor of construction (the initial owner of constructed real estate), that existed at a construction as a whole, burdens *ipso iure* all the parts of that construction (immovable) established by its division[178] (say, flats in an apartment building). Therefore, if the purchaser of the individual part (say, a flat) wants to encumber his part with the hypothec of prior rank, the hypothec of the construction sponsor must cease to exist over that part, which, in case the creditor is willing to do so (presuming that the secured receivable is not yet paid, because if it is the creditor has no further say in this), may be achieved by his forfeiting [*Verzicht*, *odricanje*] his hypothec. By disposing of the remained

[175] See Art. 446 ZOO and Art. 22 ZH.
[176] See Art. 447 ZOO. It is not clear whether this provision was made ineffective by Art, 22 ZH (as *lex posterior*), which contains a vague provision that seems to pertain only to the case where takeover of debt happens along the purchase of the encumbered real estate, and does not provide the exception for the requirement of consent.
[177] See Art. 449 ZOO. Even though it speaks of guarantees and pledges, it is indisputable that it pertains to hypothec, as a type of pledge right [*Pfandrecht*], as well.
[178] See Art. 23 ZH.

owners hypothec, the hypothec can subsequently be granted to the creditor of the owner of the flat.

c. Alienation of Immovable [*Veräußerung der Immobilie*]

The acquirer o the encumbered real estate may use the existing hypothec(s) that burdens it only after they become owners hypothecs, in which case he can give them for securing new receivables, provided however that the registered amount of owners hypothec is not exceeded.

d. Survival of Hypothec [*Liegenbelassung*]

Generally, as it has been explained in B, III, 4 above, in case of enforcement the hypothecs burdening the immovable that is forcedly sold cease to exist and are erased from the registry (there is an uncertainty related to that in case of private enforcement, as had been noted above). In case of court enforcement, there is a possibility of the buyer and hypothecary creditor to agree on the survival of hypothec, in which case the buyer takes over the debt and the purchase price is reduced for the amount that hypothecary creditor would get if his hypothec would have been realized in that enforcement procedure[179]. After the secured receivable is settled, the owner of the real estate may dispose of his owners hypothec i.e. give it for securing a new receivable.

4. Change of Subject-matter of Hypothec [*Wechsel des Sicherungsobjekts*]

Hypothec is an *in rem* right, and therefore it is tied to the real estate it encumbers. Therefore the change of the real estate which is the subject-matter of hypothec is not possible, save in the cases of so-called real subrogation [*Realsubrogation*], in which the law itself orders that the hypothec, which existed over one real estate, shall be transferred to another. For example, Art. 47 ZH provides that, in case the expropriation compensation was in a form of ownership over another real estate, the hypothecs which existed on the expropriated real estate shall be transferred to the new one. Or, in case the subject-matter of hypothec is object under construction, immediately after it is finished and registered as a building, the hypothec shall burden the building (Art. 11 ZH). Apart from this cases, the change of subject-matter of hypothec is not possible – even is a different real estate is encumbered for the securing of the same receivable, that new hypothec would not have anything to do with the existing one, especially the rank.

[179] See Art. 106 ZIP.

LIST OF REGULATIONS/DRAFT LEGAL TEXTS QUOTED (chronologically)

1. Law on Land Books [*Zakon o zemljišnim knjigama*] (abbreviation: ZZK), Official gazette of the Kingdom of Yugoslavia Nos. 146/1930-53 and 281/1931-90;
2. Law on Partition, Writing Off and Writing To in the Land Books [*Zakon o zemljišnoknjižnim deobama, otpisima i pripisima*] (abbreviation: ZZDOP), Official gazette of the Kingdom of Yugoslavia No. 62/1931;
3. Law on Internal Organization, Establishment and Correction of Land Books [*Zakon o unutrašnjem uređenju, osnivanju i ispravljanju zemljišnih knjiga*] (abbreviation: ZUOIZK), Official gazette of the Kingdom of Yugoslavia No. 62/1931;
4. Rulebook on Keeping the Land Books [*Pravilnik za vođenje zemljišnih knjiga*] (abbreviation: PZK), Official gazette of the Kingdom of Yugoslavia No. 64/1930;
5. *Предоснова Грађанског законика за Краљевину Југославију, Текст* [*Pre-Draft of the Civil Code for the Kingdom of Yugoslavia, Text*], Ministry of Justice of the Kingdom of Yugoslavia, Belgrade 1934;
6. Law on Non-validity of Legal Regulations Passed Before 6 April 1941 and During the Hostile Occupation [*Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. i za vreme neprijateljske okupacije*] (abbreviation: ZNPP), Official gazette of the FNRJ No. 86/1946;
7. Law on Ownership on Special Parts of Buildings [*Zakon o svojini na posebnim delovima zgrada*], Official gazette of the SFRJ Nos. 43/1965-1583, 57/1965-1902, Official gazette of the SR Serbia Nos. 29/1973-948, 52/1973-1578, Official gazette of SRJ No. 38/1996-1057;
8. Law on Obligation Relations [*Zakon o obligacionim odnosima*] (abbreviation: ZOO), Official gazette of the SFRJ Nos. 29/1978-1181, 39/1985-1129, 49/1989-1195, 57/1989-1438, Official gazette of the SRJ Nos. 31/1993-681, 22/1999-2 and 44/1999-17;
9. Law on State Survey and Cadastre and on Registration of Rights On Immovables [*Zakon o državnom premeru i katastru i upisima prava na nepokretnostima*] (abbreviation: ZKN), Official gazette of the Republic of Serbia No. 83/1992-2897, significant amendments in Nos. 12/1996-328 (March 1996) and 25/2002-1 (May 2002);
10. Law on Court Fees [*Zakon o sudskim taksama*] (abbreviation: ZST), Official gazette of the Republic of Serbia Nos. 28/1994-762, 53/1995-1999, 16/1997-288, 34/2001-1, 9/2002-20, 29/2004-1 and 61/2004-4;
11. Law on Maintenance of Residential Buildings [*Zakon o održavanju stambenih zgrada*], Official gazette of the Republic of Serbia Nos. 44/1995-1646, 46/1998-1119, 1/2001-3 and 101/2005-28;
12. Decree on the Amount of Fee for Using the Data of Survey and Cadastre and Provision of Services by the Republic Geodetic Authority [*Uredba o visini naknade za korišćenje podataka premera i katastra i pružanje usluga Republičkog geodetskog zavoda*] (abbreviation: UVNKN), Official gazette of the Republic of Serbia No. 45/2002-8;
13. Law on Tax Procedure and Tax Administration [*Zakon o poreskom postupku i poreskoj administraciji*] (abbreviation: ZPPPA), Official gazette of the Republic of Serbia Nos. 80/2002-1, 84/2002-2, 23/2003-16, 70/2003-1, 55/2004-32, 61/2005-51, 85/2005-30 and 62/2006-12;
14. Law on Administrative Fees [*Zakon o republičkim administrativnim taksama*] (abbreviation: ZRAT), Official gazette of the Republic of Serbia Nos. 43/2003-9,

51/2003-1, 53/2004-10, 42/2005-6, 61/2005-60, 101/2005-28, 42/2006-20 and 47/2007-85;
15. Law on Planning and Construction [*Zakon o planiranju i izgradnji*] (abbreviation: ZPI), Official gazette of the Republic of Serbia Nos. 47/2003-1 and 34/2006-3;
16. Law on Insolvency Procedure [*Zakon o stečajnom postupku*], (abbreviation: ZSP), Official gazette of the Republic of Serbia Nos. 84/2004-1 and 85/2005-30;
17. Law on Civil Procedure [*Zivilproceßordnung*, *Zakon o parničnom postupku*] (abbreviation: ZPP), Official gazette of the Republic of Serbia Nos. 125/2004-1 and 106/2006-58;
18. Law on Enforcement Procedure [*Zakon o izvršnom postupku*] (abbreviation: ZIP), Official gazette of the Republic of Serbia No. 125/2004-33;
19. Law on Hypothec [*Zakon o hipoteci*] (abbreviation: ZH), Official gazette of the Republic of Serbia No. 115/2005-10;
20. Law on Foreign Exchange Transactions [*Zakon o deviznom poslovanju*], Official gazette of the Republic of Serbia No. 62/2006-57;

BIBLIOGRAPHY/LITERATURE USED

Textbooks:

1. Ferdo Čulinović, *Zemljišnoknjižno pravo* [*Land Books Law*, *Grundbuchrecht*], Planeta, Beograd 1933;
2. A. Gams, *Увод у грађанско право (општи део)* [*Introduction to Civil Law (General part)*], Naučna Knjiga, Beograd 1952;
3. A. Gams, *Osnovi stvarnog prava* [*Basics of Property Law*], Naučna knjiga, Belgrade 1968;
4. Stanković-Orlić, *Stvarno pravo* [*Property Law*], VI skraćeno i izmenjeno izdanje, NIU Službeni list, Belgrade 1993;
5. Stanković-Vodinelić, *Увод у грађанско право* [*Introduction to Civil Law*], Nomos, Belgrade 1996;
6. Koziol-Welser, *Grundriß des bürgerlichen Rechts* [*Basics of Civil Law*], 10 Aufl., Band II, Manz, Wien 1996;
7. D. Stojanović, *Stvarno pravo* [*Property Law*], Kragujevac 1998;
8. T. Josipović, *Zemljišnoknjižno pravo* [*Land Books Law*, *Grundbuchrecht*], Informator, Zagreb 2001;
9. I. Babić, *Osnovi imovinskog prava* [*Outline of Proprietary Law*], Službeni glasnik, Belgrade 2006;
10. Kletečka in Koziol-Welser, *Bürgerliches Recht* [*Civil Law*], 13. Aufl., Band I, Manz, Wien 2006.

Monographs:

1. Đ. Krstić, *Evidencija prava na nepokretnostima, uporednopravni prikaz* [*Records of the Rights on Real Estates, a Comparative Review*], Institute of Comparative Law, Belgrade 1972;
2. Mincke, *Die Akzessorität des Pfandrechts* [*Accessority of Real Estate Security*], Berlin 1987;

3. Meliha Povlakić, *Länderbericht Bosnien und Herzegowina* in *Flexibilität der Grundpfandrechte in Europa Band I*, Schriftenreihe vdp Band 23, Berlin 2006;
4. T. Josipović, *Länderbericht Kroatien* in *Flexibilität der Grundpfandrechte in Europa Band I*, , Berlin 2006;
5. B.Begović-B.Mijatović-D.Hiber, *Privatizacija državnog zemljišta u Srbiji* [*Privatization of State Land In Serbia*], CLDS, Belgrade December 2006, available at http://www.clds.org.yu/newsite/privatizacija_dr_zemljista.pdf.

Commentaries:

1. Ferdo Čulinović, *Komentar zemljišnoknjižnih zakona* [*Commentary of Land Books Laws*], Geca Kon, Belgrade 1931;
2. N. Šarkić-M. Nikolić, *Komentar Zakona o izvršnom postupku* [*Commentary to the Law on Enforcement Procedure*], Službeni glasnik, Belgrade 2006;
3. Dragoslav R. Živković, *Komentar zakona o hipoteci* [*Commentary to the Law on Hypothec*], Poslovni biro, Belgrade 2006;
4. Aleksandar Gloginić, *Komentar zakona o hipoteci* [*Commentary to the Law on Hypothec*], Službeni glasnik, Belgrade 2007.

Articles:

1. Medicus, *Die Akzessorität im Zivilrecht*, [*Accessority in Civil Law*] JuS 10/1971;
2. M. Živković, *Mortgage and Lien on Land* in *Property Law Amendments in Serbia*, Institute of Comparative Law, Belgrade 2004;
3. M. Živković, *Real Estate Registers*, in *Property Law Amendments in Serbia*, Institute of Comparative Law, Belgrade 2004;
4. M. Orlić, Nacrt Zakona o hipoteci [Draft Law on Hypothec], *Pravni život* [*Legal Life*] Nr. 10/2004, p. 39 ff.;
5. M. Živković, *Upis hipoteke u zemljišne knjige i katastar nepokretnosti* [*Inscription of Hypothec in Land Books and in the Real Estate Cadastre*], in *Simpozijum u Cavtatu – Doprinosi reformi vanparničnog postupka u državama jugoistočne Evrope* [*The Cavtat Symposium – Contributions to the Reform of Non-contentious Procedure in Southeastern Europe*], GTZ Temmen, Bremen 2005;
6. *Zakon o hipoteci, predgovor dr Milan S. Parivodić* [*Law on Hypothec, Preface by Milan S. Parivodić, PhD.*], Službeni glasnik, Belgrade 2006;
7. Mladen Nikolić, Sporna pitanja u primeni novog Zakona o izvršnom postupku [Disputable Issues in Application of the New Law on Enforcement Procedure], *Izbor sudske prakse* [*Selected Court Practice*], No. 1/2007.