

### Crna Gora / Fiducijarni prenos prava svojine kao sredstvo obezbeđenja potraživanja

Pravni sistem Republike Srbije ne reguliše institut fiducijarnog prenosa prava svojine, pri čemu i najveći deo sudske prakse je zauzeo stanovište da je ovakva vrsta obezbeđenja potraživanja zabranjena i ništava. Primera radi Apelacioni sud u Kragujevcu je u svojoj Presudi GŽ 228/2010 od 02. februara 2010. godine, zauzeo ovakav stav, navodeći između ostalog da „Fiducijarni pravni posao zaključen u cilju sticanja prava svojine ili prava korišćenja na nepokretnosti koja obezbeđuje ugovor o zajmu za sada nije dozvoljen, pa je takav ugovor zbog nedopuštenog osnova ništav“.

Za razliku od domaćeg pravnog sistema i sudske prakse zakonodavstva većine bivših jugoslovenskih republika (pre svih Crne Gore, Hrvatske i Slovenije) regulišu, kao posebno sredstvo obezbeđenja potraživanja, fiducijarni prenos prava svojine (kako na pokretnim, tako i na nepokretnim stvarima).

U ovom članku detaljnije će biti analiziran institut fiducijarnog prenosa prava svojine kao sredstva obezbeđenja potraživanja u pravnom sistemu Crne Gore („CG“).

CG je još 1996. godine u svoj pravni sistem uvela institut fiducijarnog prenosa prava svojine, donošenjem Zakona o fiducijarnom prenosu prava svojine<sup>1</sup>, koji je u međuvremenu zamenjen odredbama Zakona o svojinsko-pravnim odnosima CG („Zakon“)<sup>2</sup>.

#### Pojam

Zakon definiše fiducijarnu svojinu kao uslovno stečeno pravo svojine na pokretnoj ili nepokretnoj stvari radi obezbeđenja naplate potraživanja (i to kako postojećeg tako i budućeg i uslovnog), a koje ovlašćuje poverioca da pre ostalih poverilaca naplati svoje dospelu potraživanje, bez obzira kod koga se stvar nalazi. U slučaju namirenja potraživanja o dospelosti, fiducijar (tj. poverilac) je dužan da omogućiti fiducijantu (tj. dužniku) nesmetano vršenje prava svojine.

#### Forma

Ugovor o fiducijarnom prenosu prava svojine mora biti zaključen u pisanoj formi, pri čemu kada je

### Montenegro / Fiduciary Transfer of Ownership as a Mean of Securing of Receivables

The legal system of the Republic of Serbia does not regulate the institute of fiduciary ownership transfer and court practice has mainly held that this type of securing claims is prohibited and null and void. For example, the Appellate Court in Kragujevac took such a view in its judgement GZ 228/2010 of 2 February 2010. The court *inter alia* noted that “A fiduciary legal transaction concluded for the purpose of acquiring the ownership right or the right of use on immovable property securing a loan agreement, is not permitted at the moment, so such an agreement, due to a prohibited cause, is considered null and void”

Unlike the domestic legal system and jurisprudence, the legislation of most other former Yugoslav republics (primarily Montenegro, Croatia and Slovenia) regulate, as a special mean of securing claims, a fiduciary transfer of ownership rights (on movable and immovable property alike).

This article will provide a detailed analysis of the institute of fiduciary transfer of ownership right as a means of securing claims in the legal system of Montenegro (“MNE”).

In 1996, MNE introduced the institute of fiduciary transfer of ownership right in its legal system, by adopting the Law on Fiduciary Transfer of Ownership Right. In the meantime, this law was replaced by the provisions of the Law on Property Relations of MNE (the “Law”).

#### Definition

The Law defines fiduciary ownership as a conditionally acquired ownership on either movable or immovable property for securing the collection of a claim (existing, as well as future and conditional), by which a creditor is authorised to collect his receivables before any other creditor, regardless of a person being in possession of the property. In case of a settlement of his claim, the beneficiary (i.e. a creditor) must enable the fiduciary debtor to exercise his ownership right without interruption.

#### Form

An agreement on fiduciary transfer of ownership right must be concluded in a written form. If the subject of

<sup>1</sup> „Sl. list RCG“ br. 23/1996. / “Official Gazette of RMNE“ no. 23/1996

<sup>2</sup> „Sl. list CG“ br. 19/2009. / “Official Gazette of MNE“ no. 19/2009

predmet fiducijarnog prenosa nepokretnost, takav ugovor mora biti overen kod notara, a nakon toga upisan u katastru nepokretnosti uz zabeležbu fiducijarnog prenosa svojine. Bez obzira na to koja stvar je predmet ovog prava (pokretna ili nepokretna), strane su (zajedno) dužne da svaki ugovor o fiducijarnom prenosu svojine registruju kod Uprave za nekretnine u roku od osam dana od dana zaključenja. U suprotnom takav (neregistrovan) ugovor će se smatrati ništavim.

#### Predmet

Predmet fiducijarnog prenosa prava svojine su pokretne i nepokretne stvari, pri čemu Zakon izričito propisuje posebna pravila za situacije kada se ovo sredstvo obezbeđenja ustanovljava na robnom lageru. Prilikom fiducijarnog prenosa svojine na robnom lageru gotovih proizvoda (mašine, automobili i druge robne zalihe), roba mora imati utvrđenu vrednost, biti markirana (što vrši Uprava za nekretnine) i smeštena u posebni prostor. Fiducijant može samo uz prethodnu saglasnost fiducijara da vrši zamenu opterećene robe u robnom lageru drugom robom iste vrednosti.

#### Odnos Fiducijant - Fiducijar

Fiducijar postaje formalno-pravni vlasnik opterećene stvari i to ograničenih ovlašćenja s obzirom da u trenutku nastanka fiducije, fiducijar ima pravo samo da raspolaže opterećenom stvari (nakon što njegovo dospelo potraživanje ostane nenamireno od strane dužnika), dok je fiducijant ekonomski vlasnik opterećene stvari, odnosno zadržava pravo držanja, upotrebe i ubiranja polodova na stvari koja je opterećena fiducijom. Međutim, i ovakvo ograničenje je uslovno, te su strane kod predmetnog pravnog posla ovlašćene da po isteku roka od osam dana od dana nastanka potraživanja ovlašćene i da ugovore drugačije.

Fiducijarni prenos svojine predstavlja oblik bezdržavinskog obezbeđenja poveriočevog potraživanja s obzirom da stvar koja je opterećena na ovaj način ostaje u državini fiducijanta, koji je dužan da je preda fiducijaru ukoliko ne izmiri svoj dug u roku. Takođe, Zakon daje slobodu stranama i da predmet fiducije predaju trećem licu na čuvanje. Za sve vreme dok se opterećena stvar nalazi u njegovoj državini, fiducijant je dužan da čuvati stvar sa pažnjom dobrog privrednika odnosno dobrog domaćina. Dakle, Zakon ustanovljava naročiti stepen pažnje kojim je fiducijant dužan da čuva opterećenu stvar. U prilog ovome govori i stav koji je zauzeo

a fiduciary transfer is immovable property, such agreement must be notarised by the notary public as well and then registered with the real estate cadastre. Regardless of whether the subject of this right is movable or immovable property, the parties (jointly) are obliged to register every agreement on fiduciary transfer of ownership with the Real Estate Directorate within 8 (eight) days from the date of its conclusion. Otherwise, such an agreement (unregistered) will be considered null and void.

#### Subject

The subject of fiduciary ownership transfer right is both movable and immovable property, whereby the Law explicitly prescribes special rules when such security is established on a stock. In this case (a fiduciary transfer of ownership on a stock of finished products such as machinery, cars and other stock), a stock must have determined value, must be marked (which is executed by the Real Estate Directorate) as well as placed in a separate place. A fiduciary debtor may exchange the encumbered goods in a stock with other goods of the same value only with prior consent of a beneficiary.

#### Relation Fiduciary Debtor – Beneficiary

The beneficiary becomes a formal legal owner of the encumbered property, but with limited powers: at the moment of the establishment of a fiduciary relationship, the beneficiary has only the right to dispose the encumbered property (after his due receivables remain unsettled by a debtor), while the fiduciary debtor is considered as an economic owner of the encumbered property, i.e. keeps the right of holding, using and collecting on the encumbered property. However, this restriction is conditional, considering that parties are authorised to agree differently upon the expiration of a period of eight days from the date of the arising of the secured receivables.

A fiduciary transfer of ownership is a form of non-possessional security of a creditor's claim, given that the property burdened in this manner remains at the possession of fiduciary debtor, who must hand it over to the beneficiary in case of failing to settle the debt within the provided deadline. Also, the Law provides the possibility to the parties to hand-over the object of the fiduciary to the third party for the purpose of safekeeping. For the entire period while burdened property is in its possession fiduciary debtor is obliged to keep that property with a due care of a prudent businessman or a good host. Therefore, the Law establishes a specific standard of care by which the

Vrhovni sud CG u Presudi Rev 551/2016, u kojoj je između ostalog navedeno:

*„Otuda, ako je zbog njegovog nemara oštećeno dobro na kome je prenjeto pravo svojine na povjerioca, dužnik se ne može pozivati na to da je sa jednakom pažnjom čuvao svoje stvari i obezbijedeno dobro na kome je prenio fiducijarno pravo svojine na povjerioca.“*

Fiducijant je dužan da obavesti fiducijara o svim promenama koje se dogode na opterećenoj stvari. U suprotnom, odgovara za prouzrokovanu štetu fiducijaru. Takođe, fiducijant nema pravo da opterećenu stvar preda trećem licu na upotrebu bez dozvole fiducijara. U suprotnom, biće odgovoran fiducijaru i za slučajnu propast ili oštećenje opterećene stvari.

Za razliku od pravnog sistema Republike Srbije u kojem je komisorna klauzula<sup>3</sup> apsolutno ništava, zakonodavac u CG nije zauzeo ovako strog stav. Naime, članom 358. Zakona propisana je ništavost komisorne klauzule ukoliko se ona ugovora u trenutku zaključenja ugovora o fiducijarnom prenosu prava svojine. Međutim, stavom 2. predmetnog člana 358. Zakona dozvoljeno je ugovaranje predmetne klauzule nakon isteka roka od osam dana od nastanka potraživanja.

#### Namirenje fiducijara

Ukoliko fiducijant propusti da ispuni svoju obavezu prema fiducijaru o dospelosti, fiducijar nakon tog trenutka stiče pravo da stvar koja je opterećena fiducijarnim prenosom svojine proda po ceni koja je utvrđena procenom za stručnog lica (i to po isteku roka od osam dana od dana kada je dostavio odgovarajuće upozorenje dužniku i fiducijantu) ili da je po odnosnoj ceni zadrži za sebe. Iz cene dobijene prodajom stvari fiducijar namiruje svoja potraživanja prema fiducijantu i to kako glavno potraživanje tako i dospelu kamatu i troškove naplate potraživanja.

Eventualnu razliku u ceni koja preostane nakon namirenja svog potraživanja fiducijar je dužan da vrati fiducijantu. Nasuprot tome, u slučaju kada cena po

fiduciary debtor is obliged to keep the encumbered property. This was also confirmed by the Supreme Court of MNE in its judgement Rev 551/2016, in which, inter alia, is stated:

*“Hence, if due to his negligence the property, on which the ownership is transferred to the creditor, is damaged, the debtor cannot rely on a circumstance that he kept his other property with the same care as encumbered property on which he transferred the fiduciary ownership to the creditor.”*

The fiduciary debtor is obliged to inform the beneficiary on any change which occurs on the encumbered property. Otherwise, he is liable for the damage caused to the beneficiary. Also, the fiduciary debtor is not entitled to hand over the encumbered property to a third party for use without approval of the beneficiary. Otherwise, he will be liable to a beneficiary for the accidental ruin or damage of encumbered property.

Unlike the legal system of the Republic of Serbia where the *lex commissoria* clause is considered null and void, the legal regime in MNE did not take such a strict stand. Specifically, Article 358 of the Law prescribes nullity of the respective clause in case it is agreed in the moment of conclusion of agreement on fiduciary transfer of ownership. However, Paragraph 2 of the said Article 358 of the Law allows such a clause after the expiration of eight days from the moment when the claim arises.

#### Settling of Beneficiary

If a fiduciary debtor fails to timely fulfil his obligation to the beneficiary, the beneficiary thereafter acquires the right to sell the property burdened with the fiduciary transfer of ownership, at the price determined through an expert assessment (after the expiration of eight days from the date when the beneficiary delivered an adequate notice to the debtor and the fiduciary debtor) or keep it for itself at the same price. From the price obtained by selling the property, the beneficiary settles its claims towards the fiduciary debtor – the main claim as well as the accrued interest and the costs of collection.

The beneficiary must return to the fiduciary debtor any price difference which may remain after settling his own claim. If the price at which the encumbered

<sup>3</sup> Lex commissoria – odredba po kojoj ukoliko dug ne bude isplaćen u celosti stvar koja je opterećena zalogom prelazi u svojину založnog poverioca ili trećeg lica po neodređenoj ili unapred određenoj ceni. / Lex Commissoria – a provision by which if a debt has not been totally repaid, then a pledged property is automatically transferred to ownership of a pledgee or a third party under undetermined price or price determined in advance.

kojoj je prodana opterećena stvar nije dovoljna za namirenje fiducijarovog potraživanja, fiducijar se za preostali iznos svog potraživanja namiruje iz imovine fiducijanta kao običan poverilac.

Imajući u vidu da se ugovor o fiducijarnom prenosu prava svojine koji je overen pred notarom smatra izvršnom ispravom u smislu člana 18. Zakona o izvršenju i obezbeđenju, fiducijar je ovlašćen da po propuštanju fiducijanta da o dospelosti ispuni pokrene postupak izvršenja na osnovu izvršne isprave. Ovakav stav je zauzeo i Viši sud u Bijelom Polju u svom rešenju br. GŽ 281/2018 u kojem je između ostalog navedeno:

*„S obzirom da je u konkretnom slučaju potraživanje tužioca obezbijeđeno Ugovorom o fiducijarnom prenosu prava svojine i Notarskim zapisom Aneksa ugovora o fiducijarnom prenosu prava svojine, to i prema stanovištu ovog suda ne postoji pravni interes za podnošenje ove tužbe. Ovo iz razloga što tužilac može na osnovu Ugovora o fiducijarnom prenosu prava svojine tražiti odmah izvršenje, pa se ne vidi njegov pravni interes jer ga nije ni naveo da tužbom pokreće parnicu i stekne novu izvršnu ispravu kako bi na kraju opet realizovao svoje potraživanje po pravilima ZIO.“*

Jedan od nedostataka ovog sredstva obezbeđenja jeste svakako što u slučaju da fiducijant odbije da preda stvar fiducijaru kada se za to stvore svi preduslovi, fiducijar ne može samostalno oduzeti stvar fiducijantu, već je dužan da podnese tužbu kojom će tražiti predaju opterećene stvari.

property is sold is insufficient to cover the beneficiary's claim, the beneficiary may settle the remaining amount from the assets of the fiduciary debtor as an ordinary creditor.

Bearing in mind that an agreement on fiduciary transfer of ownership notarized by a notary public is considered as an enforceable document in the sense of Article 18 of the Law on Enforcement and Security, the beneficiary may use this document to initiate the enforcement procedure. This was also confirmed by the High Court in Bijelo Polje in its decision no. Gz 281/2018 in which it, inter alia, stated:

*“Considering that in this particular case the claimant's receivables are secured by an Agreement on Fiduciary Transfer of Ownership and Notary record of Annex to the Agreement on Fiduciary Transfer of Ownership, according to the opinion of this court there is no legal interest for filing this claim. This is since the claimant may, on the basis of the Agreement on Fiduciary Transfer of Ownership, immediately request enforcement. Therefore, it is not clear what is the legal interest of the claimant to initiate a litigation procedure and to acquire a new enforceable document in order to again collect its receivables based on the rules of the Law on Enforcement and Security.”*

One of the disadvantages of this means of security is that in the event that a fiduciary debtor refuses to hand over the property to the beneficiary when all preconditions are fulfilled, the beneficiary cannot seize the property from the fiduciary debtor, but is obligated to file a lawsuit demanding the handover of the encumbered property.

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