

The Some Challenging Issues in Immovable Property Law of Mongolia

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몽골의 부동산법에는 여러 가지 어려운 문제가 있다. 아마도 가장 중요한 어려운 문제는 몽골의 부동산법에 대한 기본적인 이해에서 논의되어야 한다는 점이다. 더욱이 몽골 부동산법과 독일의 부동산법, 부동산담보법과 몽골 민법과의 관계, 부동산법상 등록 및 부동산 관계에 대한 공증인 참여 등의 차이점들을 또한 다루어져야 한다. 이 논문에서는 이러한 문제를 강조하고 가능한 해결책을 제시하려 한다. 일부 다른 나라의 부동산법과는 달리 토지 자체가 아닌 토지의 건축물이나 건물은 몽골의 부동산법에서 더 논의된다. 이 논문은 또한 이 문제를 다룰 것이다.

[주제어] 토지, 토지의 건축물 또는 건물, 부동산, 부동산 담보, 부동산 등록

I. Historical Overview

Immovable property law is a sub-branch of civil law, in particular, property law. The first of all, the paper summarizes its developments in legal system of Mongolia. In 1992, the first democratic Constitution was adopted in Mongolia. After that, projects for privatizing state properties were commenced, and the Law on Privatization of Apartments was enacted in 1996.¹⁾ As a result of free privatization of the State Apartment Funds to its resident people, buildings or constructions on land was started to circulate in the market for the first time. Furthermore, the Law on Registration of Immovable Property and the Law on Notary were adopted in 1997.²⁾

Historically, any building which are registered separately from the land, was started to circulated in the market process (before starting to circulate the land in market) and it was disposed (sold, purchased and pledged) by citizens. Until now, the land is not the basic concept of immovable property law in our legal system. Thus, the land cannot be understood as the main object of private law in Mongolia. This argument is discussed in some of provisions in the revised Civil Code.

In this regard, the revised Civil Code was adopted in 2002. It contains the following provisions:

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- 1) The law is available at <<http://www.legalinfo.mn/law/details/438>>, as well as State Bulletin (1997/№3).
 - 2) Yanjinkhorloo Dambadarjaa, “Legal Environment and Historical Issues of Registration on Immovable Property Pledge of Mongolia”, in Yanjinkhorloo Dambadarjaa, *Civil Law of Mongolia: Immovable Property Law* (Collections of Academic Papers), Ulaanbaatar, 2015, p.278.

1. Components that cannot be destroyed or separated without losing their original designation shall be independent objects of civil legal relationship if it is prescribed in the law³⁾; and

2. Houses, constructions, installations and other things that are constructed for permanent purposes but not to meet temporary needs and inseparably attached to the land shall be main components of land.⁴⁾

The law in the first part is the Law on Registration of Immovable Property. Constructions or buildings on land can be separate objects under this law. Pursuant to the second part, it can be assumed that other objects which are not subject to the first part are main components of the land.

II. Overlaps between the Civil Code and the Law on Land

Regulating the land by both of the Civil Code and the Law on Land is a special feature in legal system of Mongolia. As the Law on Land, and the Law on Allocation of Land to Mongolian Citizens for Ownership were adopted lately, and they regulate this matter in more details,⁵⁾ these laws can prevail over the Civil Code. The legal basis for this prevalence is stated in Article 102 of the Civil Code. Therefore, invalidating this provision may

3) Article 85.1 of the Civil Code.

4) Article 85.2 of the Civil Code.

5) Article 3.3 of the Civil Code states that if laws other than the Constitution and this Law contradict each other, the provisions of the law, which regulates this matter in more detail, or in case of absence of such provisions, the lately adopted law shall apply.

be a better solution. Article 102 of the Civil Code contains the following provisions on land ownership:

- ✓ Land, other than the one in private ownership of citizens of Mongolia, shall be in state ownership;
- ✓ While exercising rights, landowners shall not cause damages to the environment or violate rights and legitimate interests of other persons;
- ✓ If landowners transfer land for others' use, they shall instruct on its utilization. Land transferred for concrete purposes shall be prohibited to use for other purposes;
- ✓ The term "land owner" in this Law shall mean the State until the procedure for private ownership of land by citizens of Mongolia is legalized; and
- ✓ Relations with regard to privatization, possession and use of State-owned land shall be regulated by law.⁶⁾

In contrast, land ownership, possession and utilization are only regulated by the German Civil Code.⁷⁾

Indeed, the Law on Land, which refers to public law, regulates civil law relationship regarding land, such land ownership, possession and utilization by citizens. This is main source of the problem discussed in this section.

6) See <<http://www.legalinfo.mn/law/details/299>>.

7) Yanjinkhorloo Dambadarjaa, "Legal Environment and Historical Issues of Registration on Immovable Property Pledge of Mongolia", in Yanjinkhorloo Dambadarjaa, *Civil Law of Mongolia: Immovable Property Law* (Collections of Academic Papers), Ulaanbaatar, 2015, p.282.

III. Overlaps between the Law on Immovable Property Pledge and Chapter on Pledge in the Civil Code, and some critics in this field

Codifying immovable property pledge in an independent chapter in the revised Civil Code is a significant achievement of the systematization in the Civil Code of Mongolia. Before that, it was included in the Law of Obligations. Moreover, an independent law that regulates immovable property pledge⁸⁾ was adopted by the Parliament on 9 July 2009.

Although the Law on Deposits, Loans and Transactions of the Bank and Authorized Legal Person⁹⁾ regulates this matter to a certain extent, legal grounds for both of substantive and procedural laws are based on these two laws. It can be assumed that prescribing all of immovable property pledges as hypothecs is the main challenging issue in this field. To date, the majority of bank pledge agreements, which are registered in state registration office, are hypothec agreements. Unlike this practice in Mongolia, the German law separately regulates immovable property pledges and hypothecs, most of pledges under state registration are ordinary pledges or Grundschuld.¹⁰⁾ To analyze the Law on Immovable Property Pledge, there are certain provisions which are overlapped or contradicted with those of the Civil Code.¹¹⁾

8) This law is the Law on Immovable Property Pledge (2009).

9) See <<http://www.legalinfo.mn/law/details/106?lawid=106>>.

10) D. Yanjinkhorloo, *Doctoral Dissertation on the Challenging Issues to Immovable Property Pledge in Mongolia*, Ulaanbaatar, 2016, p.85.

11) The Civil Code of Mongolia (2002), Article 3.3.

1. Firstly, an inclusion of a number of provisions, which are also included in the Civil Code and are applied in publicly-understandable manner, in the Law on Immovable Property Pledge, causes to legal overlaps, thereby it leads to non-application of the same law by applying the Civil Code in accordance with the rules for civil legislation. Contrarily, as the Law on Immovable Property Pledge regulates pledge matters in more details, it is likely that this law prevails over the Civil Code. Due to this situation, there is an emerging risk of non-application of the Civil Code. It contradicts with the fundamental principle of the Civil Code.

2. It is generally recognized that the Civil Code is the second main law which ranks after the Constitution, and pledge relationship is regulated by the Civil Code. It is also possible to provide theoretical correct interpretations in order to resolve any doubt or dispute in connection with pledge regulations in the Civil Code. But there are many provisions, which are overlapped with those of the Civil Code, in the Law on Immovable Property Pledge. Some of examples are Articles 4, 5, 9.2, 9.4, 9.5, 10, 11, 12, 21, 22, 25.3, 27, 28, 29.1, 30.1, 35, 36, 37, 38, 41, 42, and 54 of the same law.

On the basis of requests from banks, the Law on Regulation for Non-Judicial Sale of Hypothecs was adopted by the Parliament in 2005. It was stated in background for adopting this law that court system caused to increase imperfect loans in banking sector by slowing sales of immovable property pledges, and loan interests are decreased if banks can immediately sell pledged properties. The seventeen commercial banks as well as many non-banking financial institutions provide over 90 percent of total financial service in Mongolia.¹²⁾

According to Article 5.2 of the revised Law on Competition, it is considered as dominant entity when a single person acting alone or in a group of business persons or related parties acting together, account for over one third of the manufactures, sales and purchases of certain kind of products in the market.¹³⁾ Financial institutions are loan and insurance bodies, and professional brokers and dealers. Products can be understood as all types of things, which are provided in the market, instruments of payment, services, and transferrable rights. Loan service is service in which citizens and legal entities pay interests. Basically, banks and non-banking financial institutions together are dominant entities in the financial market. According to Article 189.4 of the Civil Code, a person dominating the market for a particular product or service is obliged to enter into a contract with a person who engages in this activity and does not have the right to refuse any offer or offer a contract in unequal terms.

However, calling all of immovable property pledge agreements as hypothecs makes impossible to implement and register other types of immovable property pledge agreements. What can be the solution to this problem is that, like the Civil Code of the Federal Republic of Germany and that of the Republic of Korea, separations between mortgages and hypothecs are inevitably necessary instead of applying the name “hypothecs” to all of immovable property pledges.

Unlike other immovable property pledges, hypothec is inseparable from the right of ownership. In this way, when courts settle disputes, separation of the hypothec agreements from other immovable property pledge

12) This information is available at <<http://www.frc.mn>>, which is official web site of the Financial Regulatory Committee of Mongolia.

13) See <<http://www.legalinfo.mn/law/details/12>>.

agreements will be a right step for appropriate law application. In this regard, I agree with the argument of civil law scholar B. Buyankhishig: "The right to pledge is the concept for expressing the right to entitle to issue a demand from value of pledge. In European countries, it is used in the context of pledging movable properties or their related rights, and hypothec was developed independently from this concept. Regulating movable and immovable property pledges, and their related rights under common provisions for pledges is a very rare phenomenon or exception to the general rule".¹⁴⁾ Therefore, the immovable property pledge should be codified in the Law of Property, in particular, the independent chapter of the immovable property law.

Both laws of registration and the Law on Notary¹⁵⁾ have been discussed to make amendments in connection with needs for electronic certification and electronic registration. The registration laws may be completely revised, and the Law on Notary (2011) will be amended.¹⁶⁾ It is quite controversial whether the electronic declaration is to be transmitted to the state registration office by a notary,¹⁷⁾ or other persons. In general, as over 50 percent of the Law on Property Ownership Rights and Other Related Rights has been invalidated, its revised version has been submitted to the Parliament (State Great Hural).

According to public information from Intellectual Property and State Registration Office,¹⁸⁾ the fact that there is no quantitative survey on transfers

14) B. Buyankhishig, *Civil Law: A Special Part*, 4th edition, Ulaanbaatar, 2015, p.134.

15) The Law on Notary is available at <<http://www.legalinfo.mn/law/details/400>>.

16) This information is available at <www.parliament.mn>, which is an official website of the Parliament (State Great Hural) of Mongolia.

17) Obvious example is in the German legal system.

18) This information is available at <www.burtgel.mn>, which is an official website of the

of pledge rights shows that this type of registration is not done under the Civil Code. The reason for non-registering transfer of pledge rights is arisen from Article 5.5 of the Law on State Registration, which prescribes limited types of state registration. This provision limits the scope of the relevant provisions of the Civil Code. According to Article 5.5 of the Law on State Registration, registration for property rights has the following types: property ownership rights, property possession rights, pledge, guarantee, rent, servitude, usufruct, right to build buildings and installations on others' land and leasing. This is related to the same provisions in the Regulation for Registration of Property Ownership Rights.¹⁹⁾

Under Article 6.1 of this regulation, registration of other property rights should be satisfied with the requirement: a contractual right, which is intended to register, must be one of the rights in Article 5.5 of the General Law on State Registration.²⁰⁾

In contrast, there are certain provisions which prescribe transfers of hypothecs in the Civil Code. Moreover, Although Article 7 of the Regulation for Registration of Property Rights states that immovable property pledge rights is registered under the Article 166.²²¹⁾ of the Civil Code, the related provisions in Chapter 4 of the Law on Property Ownership Rights and Other Related Rights, and the Law on Immovable Property Pledge, such regulation

General State Registration Authority of Mongolia.

19) The Regulation for Registration of Property Ownership Right is available at <<http://www.legalinfo.mn/annex/details/6965?lawid=11469>>. The Regulation was adopted by State Registration Authority in 2011.

20) See <<http://www.legalinfo.mn/law/details/511>>.

21) Article 166.2 prescribes that owner, debtor and creditor of immovable property shall make a document certifying the amount of demand secured by hypothec, its interest, and period of performing the demand. The owner and creditor of the immovable property shall have hypothec registered in conformity with procedures set forth in the law.

seems to limit the scopes of above-mentioned laws.

Furthermore, Article 7.6 of the Regulation for Registration of Property Rights states that transfers of hypothecs and demands are registered by making additional declaration under Article 27.2 of the Law on Property Ownership Rights and Other Related Rights²²⁾ in compliance with Article 27 of the same law and Article 172 of the Civil Code.²³⁾ Therefore, the question of whether transfers of hypothecs should be registered in additional declarations or independent rights is arisen.

The Regulation for Registration of Property Rights creates negative consequences by registering only ten rights prescribed in the General Law on State Registration²⁴⁾ in accordance with common provisions, in particular, registering pledge rights as only newly arising pledge rights. The Commercial banks accepts to transfer pledge to others in the case of terminating pledge rights of previous debtor or completely exempting from loan obligations. There is an increasing limited trend that competent bodies do not directly register transfers of pledge rights, and they register only pledge rights after transferring pledge rights and obligations of previous owner to new owner. In short, commercial banks do not recognize transfers of pledge rights, and they require that previous debtor must completely perform its pledge obligations.

Pledging immovable property is a beneficial to state economy.²⁵⁾ The principle of integrity of the state registration for hypothecs indicates that

22) See <<http://www.legalinfo.mn/law/details/87>>.

23) Article 172, which regulates transfer of hypothec and demand, does not contain answer that whether the bank can demand performance of obligation from previous or new owners if owner of immovable property under pledge is changed.

24) See <<http://www.legalinfo.mn/law/details/511>>.

25) Verner Shaller, *Law of Court Decision Enforcement*, GTZ, 2005, p.54.

only state registration offices exercise the activities of state registrations. This principle has exercised completely, and there have been sub-organs under the General Authority of State Registration. However, recently (in 2016), the General Authority of State Registration was merged to the Statistical Office. It is legally significant to guarantee rights of owner by registering immovable property.²⁶⁾ After registering immovable property, its owner's rights are legally protected. If immovable property rights are registered in the competent state authority, owner has the right to protect its legal interest. The registered immovable property cannot be transferred to possession and utilization of others without participation of owner. Currently, there is no case for registering ordinary or guaranteed hypothec as above-mentioned. Quantitative surveys have been conducted on the basis of pledge agreement with collateral or pledge agreement without collateral.²⁷⁾

IV. Conclusion

The most significant challenging issue has been whether the Law on Land should determines three forms for disposing land as owning, possessing or using it, thereby the Civil Code should regulates only owning the land and building on the land, or only the Civil Code should codify such land rights by the way of ceasing to regulating them under the Law on Land and other public laws. Therefore, legislators have needed to resolve this problem.

It is also important to increase types of immovable property pledge, and

26) D. Zundui, *Civil Law of Mongolia: General and Special Parts*, Ulaanbaatar, 2001, p.124.

27) This information was taken from the Intellectual Property and State Registration Office of Mongolia on 11 December 2017.

register each type separately. Moreover, in order to seek electronic registration, its declaration should be made by impartial lawyers or notaries. In doing so, possible risks may be avoided.

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[Abstract]

The Some Challenging Issues In Immovable Property Law of Mongolia

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There are a number of challenging issues in immovable property law of Mongolia. Perhaps, the most important challenging issues should be discussed in basic understandings of immovable property law of Mongolia. Furthermore, it will also cover difference between immovable property law of Mongolia and that of Germany, the relationship between the Law on Immovable Property Pledge and the Civil Code of Mongolia, registration for immovable property law, and participation of notary in the relation of immovable property. This paper will emphasize such issues and recommend their possible solutions. Unlike immovable property laws of some other countries, constructions or buildings on land rather than land itself are more discussed in immovable property law of Mongolia. The paper will also address this issue.

[Key Words] land, constructions or buildings on land, immovable property, immovable property pledge, registration for immovable property

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