GUARANTEE ON ALL THE ASSETS OF THE DEBTOR IN INSOLVENCY PROCEEDINGS

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Abstract

Unsecured creditors in the insolvency of the debtor's creditors are those who do not have collateral security against the debtor's assets and who are not accompanied by liens privileges whose claims are current at the opening proceedings and claims us for current activities during observation. In the matter of the bankruptcy secured creditors set for secured debts are claims receiving collateral on the debtor's property, whether it is the primary obligor or third party guarantee to persons benefiting from collateral. The secured creditor's secured claim in the insolvency procedure is given by the value of collateral assessment arising after the opening of insolvency proceedings the debtor. These special legal provisions contained in the bankruptcy, derogating from the common law, they often generate different practical situations and have created jurisprudence. In judicial practice of insolvency have encountered situations where the creditor security budget, which requires to be entered in the final table of the debtor in the category of secured creditors, the debt claim, warranty claims for his claim is the universality of the debtor's assets. The study on which we focused includes analysis of these categories of claims in insolvency proceedings and the solutions adopted in judicial practice.

Keywords*: insolvency, procedure, debtor, unsecured creditors.*

JEL Classification: *K22, K23*

1. The concept of patrimony

An analysis of the concept of *universitas facti* or *universitas juris* has the concept patrimony of as a starting point.

Patrimony is defined in literature[2], as the total of all entitlements with economic value[3] or of pecuniary nature[4] belonging to a real person or a juristic person.

One of the characteristics of patrimony is *universitas juris*[5].

The Civil Code[6] while not having defined the concept of patrimony, or that of *universitas juris* or *universitas facti*, references these in several of its provisions, particularly in succession matters.

The New Civil Code[7] has regulated both notions, of patrimony and *universitas facti*.

Thus, art.31 of the New Civil Code provides that "Any real or juristic person is the holder of patrimony that includes the totality of its rights and liabilities that can be appraised in money and belong to it."

Further, according to art.541 of the New Civil Code, *universitas facti* represents "the aggregate of the property belonging to one person and that have a common destination established by its will or by law. The property representing *universitas facti* can as a whole or separately be the object of distinctive judicial acts or relationships."

In legal practice related to insolvency frequently creditors occur, who by the claim (receivable) request require their being recorded in the preliminary table of the debtor's creditors, in

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[2] Ioan Adam, *Drept civil. Drepturile reale*, All Beck Publishing House, Bucharest, 2002, p.4;

[3] Ion Lulă, *Unele probleme privind noțiunea de patrimoniu*, in Dreptul Review no.1/1998, p.14;

[4] Constantin Hamangiu, Ion Rosetti – Bălănescu, Alexandru Băicoianu, *Tratat de drept civil român*, All Publishing House, Bucharest, p.522;

[5] Ioan Adam, *op. cit*., p.6;

[6] Decreed on 26 11 1864, promulgated on 04 12 1864 and enforced on 01 12 1865;

[7] Law no.287/2009 regarding the Civil Code, published in Monitorul Oficial [Official Journal] no.511/24 07 2009, republished in Monitorul Oficial [Official Journal] no.505/15 07 2011, modified by OUG [Government Emergency Ordinance] no.79/2011, published in Monitorul Oficial [Official Journal] no.696/30 09 2011 and by Law no.60/2012, published in Monitorul Oficial [Official Journal] no.255/17 04 2012;

the category of guaranteed claims (receivables), proving with several notes registered with the Electronic Archive of Real Security Interests[8] that their claim (receivable) is a guaranteed one, as guaranties or securities extend on the debtor's totality of property, or *universitas rerum*. In most cases insolvency practitioners[9], who upon initiation of the debtor's insolvency procedure have not identified property items of the debtor burdened by the real security invoked by the creditor, have recorded the creditor's claim (receivable) – via the filed claim (receivable) request – in the category of chirographary (non-privileged), budgetary or salary claims, as applicable.

2. The right of the non-privileged creditor

The preliminary table of claims (receivables) on the debtor's property, thus devised by the insolvency practitioner, is challenged by the unsatisfied creditor, who most often files a contestation as provided by art.73 par.2 of Law no.85/2006[10].

To date the judiciary practice of insolvency judges and courts of law applying the insolvency procedure[11], has not been consistent, as two opposite rulings were passed, one dismissing such a contestation and the other admitting it.

A ruling dismissing such a contestation[12] of the preliminary table of claims (receivables) was based on the following arguments: (1) the claimant invokes its claim (receivable) to be guaranteed one in relation to the existence of a note issued by the Electronic Archive of Real Securities, but the very name of this institution shows that the securities for which such notes are issued are real, that is, they include individually determined property; (2) art. 3.9 of Law 85/2006 provides that guaranteed or secured claims (receivables) are the claims of persons beneficiaries of a real security over the goods of the debtor's patrimony, regardless whether this is the principal debtor or the surety in relation to these beneficiaries of the real securities. (3) according to the general provisions on real securities included by the Civil Code these are: the mortgage (art.1742 and following of the Civil Code) and the collateral (art.1685 and following of the Civil Code); (4) according to the provisions of the New Civil Code real securities are the mortgage (art.2343), the collateral (art.2480) and the right of retention (art.2495); (5) concerning these real securities, viewed in the perspective of both Civil Code and the New Civil Code, these extend to one or more immovable or movable assets; (6) it follows that by the provisions of the special insolvency law completed, as far as compatible by the provisions of the Civil Code, in relation to the provisions of art 149 of Law no. 85/2006, real securities extend to individually determined goods; (7) the claimant's argument that its security extends over the totality of the debtor's property – *universitas rerum* – cannot be accepted; the claimant has not distinguished whether it refers to *universitas juris* what means the debtor's patrimony as the aggregate of rights and obligations with economic (pecuniary) value, or to *universitas facti*, that according to art.541 of the New Civil Code, but similarly defined by the relevant doctrine[13], previously to this regulation coming into force, namely the aggregate of property belonging to the same person and that have a common destination established by law or by the holder's will; (8) in both cases, for a security to qualify as real, this

[8] Established by Law no.99/1999 concerning measures for the acceleration of economic reform – Title VI, published in Monitorul Oficial [Official Journal] no.236/27 05 2013 and abrogated by Law no.71/2011 concerning the application of Law no.287/2009 concerning the Civil Code, published in Monitorul Oficial [Official Journal] no.409/10 06 2011 and by the New Civil Code, art. 18 par.2 and art.2413;

[9] See OUG no.86/2006 concerning organisation of the activity of insolvency practitioners, published in Monitorul Oficial [Official Journal] no.944/26 11 2006, with modifications;

[10] Published in Monitorul Oficial [Official Journal] no.359/21 04 2006;

[11] Art.5 par.1 of law no.85/2006 provides: "The authorities applying the procedure are: the courts of law, the insolvency judge, the judiciary administrator and the liquidator";

[12] Civil sentence no.580/sind/07 03 2013, pronounced by the Braşov county Court of Law in file no.693/62/2012/a1, unpublished; Civil sentence no.253/sind/31 01 2013, pronounced by the Braşov County Court of Law in file no.9938/62/2011/a1, unpublished;

[13] *Universitas facti* was defined by the doctrine previous to the coming into force of the new Civil code as "an aggregate of properties, elements the joining of which is not achieved by law but is based on a simple factual link in accordance with the holder's will, but that has no autonomous existence or a correlative past" – Ioan Adam, *op.cit*, p.9

needs to be regulated by general law, namely by the Civil Code, so that the creditor cannot invoke the existence of a real security not provided by law.

In relation to these arguments which we *second*, we *further add* that the security invoked by the creditor - that extends over the totality of the debtor's property, that is over its patrimony, should we consider the situation of *universitas juris*, according to art.1718 of the Civil Code that regulates the general collateral right of chirographary (non-privileged) creditors and according to art.2324 of the New Civil Code regulating the common security of the creditors, respectively – endows it with the quality of chirographary (non-privileged) or budgetary creditor, as applicable, within the insolvency procedure of a debtor.

According to art.41 par.2 of Law no.85/2006 secured (guaranteed) receivables are recorded in the final table at the *appraised* value of those securities, but not a value greater than the total value of the debt (receivable).

According to art.121 par.2 of Law no.85/2006, if the price received for the securities is smaller than the value of the secured debt (receivable), the creditor will benefit of a chirographary (non-privileged) receivable for the difference.

Consequently the legislator has established within the insolvency procedure in relation to the provisions of art.3.9, art.41 par.2 and art.121 par.2 of Law no.85/2006, that the secured creditor has a receivable that will be recorded in the final table of creditors only up to the appraised value of the security of the property that is the object of the real security.

A ruling admitting such a contestation[14] of the preliminary table of receivables, *only with respect to the budgetary creditor* who by the receivable request requires recording in the final table of the debtor's creditors in the category of secured receivables, it was retained that real securities are those accessory real entitlements (rights) typically extending over individually determined property, that confer the creditor the attributes of pursuit and preference, which category includes collaterals, mortgages, privileges and retention rights.

According to art.1722 of the Civil Code "a privilege is a right that confers the creditor the quality of its receivable of being preferred to the other creditors, even mortgage holders."

Art.2333 of the New Civil Code provides that "a privilege is the preference granted by law to a creditor considering its receivable (claim)."

Consequently *we appreciate* that privilege is a creditor's right to be paid with priority in relation to other creditors, due to the quality of its receivable, meaning the judicial cause or fact underlying that receivable.

3. Creditors' budgetary privileges

Both the Civil Code and the New Civil Code have regulated two large categories of privileges, namely general and special privileges, while the former category includes general privileges extending upon movable and immovable assets[15].

By this classification state privilege for receivables arising from taxes, fees and fines is included in the category of general privileges over all movable assets.

The receivable held by such budgetary creditor is subject to the provisions of art.1725 Civil Code[16], or to those of art.2328 of the New Civil Code[17], as applicable[18], according to that the

[14] Civil decision no.989/R/10 05 2013 of the Appeal Court of Braşov, unpublished; Civil decision no.740/R/09 04 2013 of the Appeal Court of Braşov, unpublished

[15] See art.1728 and following Civil Code and art.2338 and following New Civil Code

[16] Art.1725 of the Civil Code provides: "The privileges of the public treasury (state receivables) and the order of their execution are regulated by special laws. The public treasury cannot obtain a privilege against the rights of third persons, previously gained."

[17] Art.2328 of the New Civil Code provides: "The preference granted to the state and administrative territorial units for their receivables is regulated by special laws. Such preference cannot affect the rights previously gained by third parties."

[18] Art.6 of the New Civil Code titled "Enforcement in time of civil law" provides:

"(1) Civil law is applicable for the duration of its being in force. It has no retroactive power.

privileges or preference of state receivables and the order of their execution are regulated by special laws.

Within this context it needs mentioning that while the Civil Code regulated at art.1725 "the privileges of public treasury", qualified in doctrine[19] as the privileges of state receivables, the New Civil Code establishes at art.2327 that "the causes for preference are the privileges, mortgages and collaterals", and further provides at art.2328 that "preference of the state" for its receivables is regulated by special laws.

The privilege of budgetary receivables in the insolvency procedure is in essence awarded by effect of law, under the condition stipulated by art.142 par. 7 of the Code of Fiscal Procedure[20], that "in relation to third parties, the state included, a real security and the other real burdens on property have a degree of priority to be established at the time of their being made public by any of the methods provided by law".

In the same sense provide also the dispositions of art.171 of the Code of Fiscal Procedure, according to which "fiscal creditors holding a privilege by effect of law and who satisfy the condition of publicity or possession of that movable, under the conditions of art.142 par.7 are granted priority in the distribution of the amount received upon selling in relation to other creditors holding real securities over that property.

Art.1 par.4 of the Regulations concerning the organising and operation of the Electronic Archive of Movable Real Securities[21] states expressly that "privileges, final decisions of courts of law, deposit certificates as well as the obligations related to taxes and fees can be recorded in the archive based on a note of security".

In this context in cases where the provisions of the Civil Code are applicable, also the provisions of Title VI of Law no.99/1999[22] have to be considered, which represent the special law concerning movable real securities. These legal provisions are applicable to all real burdens on the debtors' movable property. Thus, chapter 3 of this title regulating the publicity and order of preference of real securities, art.36 par.1 expressly mentions that "any creditor who is not a party in a security contract, enjoys privilege by simple effect of law, including the privilege of state or administrative-territorial units for receivables arisen from taxes, fees, fines and other amounts representing public income owed to them, has priority over the real security of the creditor concerning certain property, only when the privilege satisfies then condition of publicity by recording in the archive or by possession".

Art.2413 of the New Civil Code provides that "the recording of operations concerning mortgages over movables and of other rights provided by law is conducted only in the Electronic Archive of Movable Real Securities, if not otherwise provided by law. The organisation and operation of the archive is regulated by special law". It needs pointing out that to date this law has not been adopted.

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(2) Any judicial acts or deeds closed, or, as the case may be, committed or produced prior to the coming into force of the new law cannot generate other judicial effects than those provided by the law in force at the date of the closing, or as the case may be, of their committing or producing.

(3) Judicial deeds that are void, annullable or affected by other causes of ineffectiveness at the date of coming into force of the new law, are subject to the provisions of the old law, and cannot be deemed valid or effective by the provisions of the new law.

(4) Prescription, termination and adverse possession procedures initiated but not completed at the date of coming into force of the new law are subject to the legal provisions that have underlain them.

(5) The provisions of the new law are applicable to all acts or deeds closed, or, as the case may be, committed or produced after its coming into force, as well as to judicial situations arisen after its coming into force.

(6) The provisions of the new law are also applicable to the effects and future effects of judicial situations arisen prior to its coming into force, derived from the state and capacity of the persons, from marriage, filiation, adoption and legal obligation of raising, from property relationships, the general regimen of property included, and from neighbourhood relationships, if such judicial situations subsist after the coming into force of the new law."

[19] E.D. Crișu, Ștefan Crișu, *Codul civil român*, Argessis, Curtea de Argeș, p.171 ;

[20] OG no.92/2003 privind codul de procedură fiscală [Government Ordinance 92/2003 concerning the Code of Fiscal Procedure], published in Monitorul Oficial [Official Journal] no.941/29 12 2003, with amendments;

[21] Government Decision no.802/1999 published in Monitorul Oficial [Official Journal] no.499/15 10 1999

[22] Published in Monitorul Oficial [Official Journal] no.236/27 05 2013 and abrogated by Law no.71/2011 concerning the application of Law no.287/2009 concerning the Civil Code.

The category of real securities includes all types of securities that grant a creditor preference in relation to other creditors.

Thus, according to the provisions of art.1720 Civil Code "the legitimate causes for preference are the privileges and mortgages", meaning evidently, that the category of secured or guaranteed creditors includes also the privileged creditors, like the state and administrative – territorial units holding receivables arising from taxes, fees, fines and other amounts representing public income for which the above mentioned formalities of publicity were completed. In the same sense provides also art.2327 of the New Civil Code mentioned above.

Art.98 par.1 and 2 of Title VI of Law no.99/1999 expressly provides, that "privileged creditors, including the state and administrative – territorial units holding receivables arising from taxes, fees, fines and other amounts representing public income are granted priority in relation to creditors holding real securities only if they have recorded their receivables in the archive, or, as the case may be, in real estate publicity documents, prior to the recording of those receivables by the secured or guaranteed creditor. Within the debt enforcement procedure of the budgetary receivables, should the state not have recorded its receivables according to the provisions of par.(1), the creditors holding movable or immovable real securities are entitled to be paid from the selling price of the property representing the security immediately following payment of the claims resulting from expenditure of any kind arising from pursuing and conservation of the property the selling price of which is being distributed, even if the rest of the debtor's pursuable property and income do not cover payment of the remaining receivables".

Examination of these legal texts allows for the conclusion that under the provisions of the civil code only those budgetary receivables are guaranteed or secured, for which the above mentioned formalities of publicity have been completed, as only in this case the budgetary creditor is granted preference in relation to the other creditors of the debtor, including creditors holding real securities extending over property of the debtor's patrimony.

It can be observed that under the provisions of the New Civil Code, according to art.2334 privileges are binding for third parties without the requirement of their being recorded in publicity registers, and according to art.18 par.2 such publicity is performed by means of the Electronic Archive of Movable Real Securities,

From the layout of the above analysed legal texts *we consider* that while according to the New Civil Code the priority of the state or an administrative-territorial unit is established by a privilege as the cause for its preference, according to art.2327 it is binding to third parties without recording in the Electronic Archive of Movable Real Securities, only under the conditions stipulated by special law at art.2334 with application of art.2328. If the preference of the state an administrative-territorial unit arises from a movable mortgage or collateral, these become binding to third parties by means of the Electronic Archive of Movable Real Securities, according to art.2413 and art.2482 of the New Civil Code.

In insolvency law the category of real securities includes all types of securities that grant the creditor preference in relation to the other creditors.

Thus, as discussed above, according to the provisions of art.1720 Civil Code "the legitimate causes for preference are privileges and mortgages", meaning evidently that the category of guaranteed or secured creditors includes also the privileged creditors, like the state and/or administrative-territorial units holding receivables arising from taxes, fees, fines and other amounts representing public income, for which the above mentioned formalities of publicity have been completed. Art.2327 of the New Civil Code mentioned above provides in the same sense.

The provisions of art.36 of Law no.99/1999 establish the order of preference of real securities, including the priority of the privileged creditor over the guaranteed or secured creditor, provided that privilege satisfies the condition of publicity by recording in the archive or by possession of that property. This provision is to be applied to judicial situations requiring application of the civil code, according to art.6 of the New Civil Code, considering that by the law concerning the application of the New Civil Code, Title VI of Law no.99/1999 was abrogated.

For budgetary creditors invoking within the insolvency procedure their quality of guaranteed or secured creditors in relation to the existence of a general real security extending to the totality of the debtor's property, creditors who have not recorded a security relating to a certain property in the Electronic Archive of Movable Real Securities but enjoy only the privilege of state granted by law, the possibility exists of receiving their claim before any other creditor who has recorded a security at a later time.

Law no.85/2006 reveals the legislator's intent of including into this category of guaranteed creditors all those creditors who hold a right of preference in relation to the remaining creditors over the debtor's property.

In this sense art.39 par.1 of the Insolvency Law enumerates in the category of guaranteed or secured receivables the ones secured by mortgages, collaterals or any other movable real security or any kind of retention right. Similarly, art.65 par.1 provides that in their application for the admission of receivables, the creditors are to indicate in addition to other mentions also possible preference rights or securities.

Consequently, in the sense of Law no.85/2006 the category of guaranteed or secured receivables includes also privileged receivables, as is the state's receivable arising from taxes, fees, fines or other amounts representing public income for which the above mentioned formalities of publicity have been completed, regardless if at present the debtor's patrimony includes no more property upon that the privilege would extend, as long as the note of security has not been cancelled.

Also the template form for recording notes of security for budgetary receivables, as outlaid in Annex 9 to the Regulations of organisation and operation of the Electronic Archive of Movable Real Securities, at chapter 6 relative to the description of the property put up as a security recommends the mentioning of the nature of the budgetary receivable, of its code, of the amount owed by the debtor, of the number and issuer of the enforcement title, and not the obligation of describing the actual property put up as security.

The privilege (or degree of priority) is gained subsequently to its publicity completed by the budgetary creditor by any of the legal means, thus such privilege not being required to extend over a certain property, as it burdens the debtor's entire movable patrimony.

In cases where the provisions of the New Civil Code are not applicable, art.2342 establishes combining or the privileges and combining of privileges and mortgages. Thus, in the case of combined privileges or privileges and mortgages the receivables are satisfied in a pre-set order, namely: (1) the special privileges provided by art.2339; (2) the receivables secured by mortgages or collaterals. The creditor who benefits from a special privilege is preferred to the holder of a definitive movable mortgage if it records its privilege in the archive prior to the mortgage becoming final. The privileged creditor is preferred to the holder of an immovable (real estate) mortgage if it records its privilege in the Real Estate Record prior to the recording of the mortgage.

According to art.103 of Government Emergency Ordinance (OUG) no.91/2013 concerning insolvency prevention and insolvency procedures[23], the receivables benefitting from cause for preference are recorded in the final table up to the market value of the security established by evaluation requested by the judiciary administrator or liquidator and conducted by an expert evaluator. In case that the assets affected by the cause for preference are alienated for an amount exceeding the one recorded in the final table or in the consolidated final table, the favourable difference will be granted also to the guaranteed or secured creditor, even if part of its receivable had been recorded as a chirographary (non-privileged) receivable, up to complete covering of the main receivable and accessories to be calculated based on the deeds underlying the receivable, until the date of alienation of the property.

[23] Published in Monitorul Oficial [Official Journal] no.620/04 10 2013

4. Conclusion

According to art.159 par.1 of Government Emergency Ordinance (OUG) no.91/2013 the funds obtained from selling of the property and entitlements from the debtor's patrimony burdened in favour of the creditor by causes for preference will be distributed in the following order: (…) 3. The receivables of the creditors benefitting from cause for preference, including the entire capital, interests, increases or penalties of any kind, including expenditure. According to par.2 of this article, in case that the amounts obtained from the selling of this property are insufficient for fully covering those receivables, for the remaining difference the creditors will have chirographary (non-privileged) receivables that are to be combined with the others of that category, according to their nature.

In relation to these new legal provisions with regard to insolvency, considering the Government Emergency Ordinance (OUG) no.91/2013 is to come into force at 25 10 2013[24], *we consider* that the legislator has established the judicial approach to "creditors beneficiary of a cause for preference", such as to eliminate the controversy arisen in judiciary practice with regard to the guaranteed or secured nature of budgetary creditors who benefit from special privileges pursuant to the provisions of the Code of Fiscal Procedure.

Thus, *we consider* that upon the coming into force of Government Emergency Ordinance (OUG) no.91/2013 to be applied also to insolvency procedures pending in courts of law[25], the privileged receivables will be recorded as such in the final table of creditors at the appraised value of the receivable.

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[24] Art. 348 par.1 provides: "The present emergency ordinance comes into force on 25 October 2013."

[25] Art.348 par.2 of Government Emergency Ordinance (OUG) no.91/2013 provides: "The present emergency ordinance is applicable also to insolvency prevention and insolvency procedures on going at the date of its coming into force, the provisions of art.183 – 203 excepted, that are applicable only to requests filed after the date of its coming into force."