Theoretical and practical considerations regarding the right of retention

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Abstract

The right of retention has in the current legislation his own regulation, which finds its sources in jurisprudence and doctrine. The necessity of regulating this right comes from its practical utility, its efficiency as a legal mechanism being also taken into consideration. The present article follows general aspects and exceptions concerning the right of retention, aspects intending to draw the outlines of the meaning of the right of retention. Furthermore, the domain of enforcement of the right of retention has been taken into consideration, starting from specific legal disposition, which are derogatory from the ordinary law.

Keywords: *right of retention, guarantee, exception, abusive exercise*

JEL Classification: K11, K40

1. Introduction

Until the enforcement of the Law no. 287 regarding the Civil Code, the right of retention didn't have a regulation of its own, being a creation of the case law and of the doctrine. From a legal point of view, this right was acknowledged just in certain domains, as for example, that of the contract of mandate. The introduction of the right of retention as a guarantee of the fulfillment of the obligations is founded, among others, on the fact that, according to the Explanatory Statement of the Civil Code, 'the amendments reported to the present regulation, from the sources of obligations up to the forced execution of them and their way of being guaranteed are substantial and, concerning certain aspects, even radical'[3]. In this context it has been appreciated that 'the right of retention reveals itself today as an institution of which outlines are imprecise; to this situation massively contributed a regulation to whom it is to be reproached that it doesn't contain legal dispositions do draft the general application pattern of the right of retention'[4].

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[3] The Explanatory Statement of the Law no. 287/2009 regarding the Civil Code, available on http://www.cdep.ro/proiecte/2010/ 800/50/0/em850.pdf, consulted last time on February 1, 2017

[4] Stelian Ioan Vidu, *The right of retention in the legal civil reports*, Universul Juridic Publishing House, Bucharest, 2010, p. 12.

2. Notion

In the case law which existed before the enforcement of the Civil Code, it has been stated that 'this (the right of the retention) is a specific mean to guarantee an obligation residing in the right of the creditor do refuse the restitution of a good belonging to the debtor and which possession he has until the debtor pays off everything that he has to pay regarding that good'[5]. Furthermore, it has also been specified that 'the right of retention which gives to the beholder of a good belonging to another the possibility to refuse its restitution, until the creditor of the good fulfills his obligation to pay off the amounts spent with the good is not understated for it has to be acknowledged by the court, at the request of the interested parties'[6].

The Civil Code adopted in 2009 has distinctly regulated the right of retention; despite of this, although the article 2495 is named 'notion', it cannot be found a legal definition, for here it is mentioned that 'the one who is in debt to give back a good can retain it, as long as the creditor does not fulfill his obligation coming from the same legal report, or, according to the situation, it does not compensate him for the necessary and useful expenses'. So, the right of retention can be paragraph of the art. 2495 of the Civil Code it is started that 'by law can be settled other situations in which a person can exercise a right of retention. Departing from this provision it must be observed that the right of retention has a legal basis, strictly determined, a contractual settlement of it not being possible in a domain where it has not been reorganized by the law.

A controversial aspect of the right of retention is formed by its legal nature; the last one is hard to determine, even interpreting the provisions constructing the area of regulation, for the right of retention has been placed among the privileges and guarantees. In this matter of speaking, the doctrine has taken into account the fact the right of retention represents 'a mean to assure the fulfillment of the main obligation a guarantee of payment, also working as a special clause of preference which is exercised upon a certain good'[7]. Moreover, in order to clearly detach the right of retention of the mortgage or other privileges, it must be said that this one does not offer the retaining creditor the possibility of forced pursuit, nor the possibility to use the good during the period in which he keeps it. So, the one who exercises the right of retention is obligated to preserve the fruit of the retained good, which will be deducted, after the restitution, on his claim. As so, it has been established that 'this is an accessory real right, having the function of a guarantee and which can concern a movable good or on a real estate'[8].

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[5] The Supreme Court of Justice, *Decision no. 1916* from the 3rd of June 2008, the Commercial Department, available on www.scj.ro, consulted last time on February 1, 2017.

[6] The Supreme Court of Justice, *Decision no.6604* from the 25th of November 2004, available on www.scj.ro, consulted last time on February 1, 2017.

[7] Ioan Adam, *The general theory of obligations*, C.H. Beck Publishing House, Bucharest, 2004, p. 637.

[8] Paul Vasilescu, *Elementary Treaty of Obligations*, Hamangiu Publishing House, Bucharest, 2012, p. 196.

The accessory character of the right of retention is also a validity condition of it, for the right can exist only it is linked to an obligation. Regarding the guarantee role of this right, it must though be mentioned that it is a passive and imperfect guarantee due to the fact that 'it does not offer the possibility to pursue the good if it comes to another person, ceasing by self dispossession of the retaining creditor'[9].

The legal nature of the right of retention can also be regarded from the point of view of the possession which the retaining creditor exercises over the good. Thereby, as he is not allowed to execute the good being the object of the right of retention, nor to sell it or to use its fruit during the retention, for the possession exercised by the retaining creditor is similar to that of the keeper, not to mention the *ab initio* existing obligation to restitute the good.

The right of retention is distinguished from the regular possession given the fact that the first one has a legal source, as for the second one, the source is always contractual. In spite of this, the law does not prohibit the forced execution of an obligation resulting from a contract, even if a right of retention could be invoked. Therefore, the person who can use the right of retention as a guarantee concerning the fulfillment of the obligation, can renounce to this right and ask, on a judicial way, the forced execution of the obligation. Even so, the two legal mechanisms cannot be used simultaneously, but only alternative and respecting the principle *electa una via non datur recursus ad alteram*. As a consequence, if it has been chosen the path of forced execution, the one who demanded it cannot renounce to it in order to invoke the right of retention and vice versa, if it has been invoked the right of retention, there is no going back to the forced execution.

From the point of view of the procedural civil law, the right of retention is generally invoked as a processual exception[10]. Even so, the right of retention 'can be invoked by the contestation of a court's settlement regarding the restitution, if during the process the question of restitution or of evacuation has not been discussed between the parties'[11] (in other situation it can only be invoked as an exception, n.b.). Concerning the attribute of exception *in rem* of the right of retention, from the point of view of the civil process, it must also be said that this exception is a relative one, for on this way it is invoked the break of provisions defending mostly the parties' interests.

Furthermore, the right of retention can be qualified as being a real right (*ius in rem*), given the fact that it regards a certain good. Nevertheless, it must be kept

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[9] Ioan Adam, *Civil Law. The general Theory of Obligations*, 2nd Edition, C.H. Beck Publishing House, Bucharest, 2014, p. 819.

[10] According to the article 245 of the Code of Civil Procedure, 'the procesual exception is the mean by which the interested partie, the prosecutor or the court invokes, without discussing the right itself, procedural irregularities regarding the composition or the formation of the court, the jurisdiction of the court or the proceedings or lapses concerning the capacity to act, following the dismiss of the jurisdiction, the postponement of the trial, the correction of an act, or the cancellation, rejection or prescription of the application'.

[11] The Tribunal of Bucharest, *Decision no. 1027/1992*, available on www.portal.just.ro, consulted last time on February 1, 2017.

in mind that 'the right of retention has no self-existence, but it depends on a main legal report, therefore having an accessory character'[12].

Regarded as a guarantee, the right of retention 'has a statically effect, being a purely passive guarantee'[13]. This guarantee is still functional, as long as the good is in the possession of the retaining creditor, without offering him the right to use the good or to pursue it, should the good come to another creditor, who could have a previously written privilege to the right of retention. As, in a practical way, the right of retention materialises itself in the refuse of the retaining creditor to give back to the creditor of the good, in the doctrine has been mentioned the fact that 'it has the form of a negative guarantee'[14].

The exercise of the right of retention is not compulsory; therefore, the right can be valued either in a court of law or out of a court of law. As the right of retention results *ex lege*, 'the courts of law do not give this right, they just acknowledge it'[15], the strengths of a judge being limited in this matter – he hasn't got the possibility to refuse the acknowledgement of the right of retention as a guarantee, he has but to settle if in the case brought to the court are being fulfilled the necessary conditions for the right of retention to exist, conditions regarding both the person who invokes it and the good upon it is invoked.

3. The right of retention and the exception for nonperformance

In the Civil Code from 1864 there was no regulation of the two mechanisms of guaranteeing the fulfillment of the obligations. Due to this fact, there have been numerous controversies in the doctrine, being also generated an uneven case law of the courts, case law according to 'the right of retention is a way of guaranteeing the obligations, sometimes representing a form of manifestation of the right of retention'[16]. The problem continues to exist even after the enforcement of the present Civil Code, fore 'the legislator understood to acknowledge the application of the right of retention not just in the case of material conjunction, but also in the case of a legal conjunction'[17].

In order to invoke the exception of nonperformance of the contract, it is necessary that the following conditions are cumulatively fulfilled: the reciprocal and interdependent obligations of the parties must find their origins in the same synallagmatical contract; there must exist a (partial or total) failure of performance of enough importance coming from the partie of the contract against the exception

[12] Ioan Adam, *Civil Law. The general Theory of Obligations*, 2nd Edition, C.H. Beck Publishing House, Bucharest, 2014, p. 820.
[13] *Idem*, p. 821.
[14] *Ibidem.*
[15] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Elementary Treaty of Civil Law. The Obligations*, Universul Juridic Publishing House, Bucharest, 2012, p. 855.
[16] The Court of Appeal Timișoara, *Decision no. 390 from 26.04.2010*, available on www.portal. just.ro, consulted last time on February 1, 2017.
[17] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Civil Law Cours. The obligations*, Universul Juridic Publishing House, Bucharest, 2015, p. 656.

it is invoked; the reciprocal and interdependent obligations must be both exigible; the nonperformance must not come from the action of the one who invokes the exception of nonperformance, action being meant to stop the other contractant to perform his own obligation and the contractual report must presume the rule of the simultaneous performance of the obligations of the two parties by its nature, an express provision in this matter not being necessary.

For what it concerns the right of retention, the conditions for it to be invoked must also be cumulatively fulfilled, this meaning that there must exist a material or a legal conjunction[18]; the guaranteed claim must be certain, liquid and exigible and there must exist a good upon which the right of retention can be exercised, not being of importance if it is corporal or noncorporal.

In spite of the mentioned aspects, the similarities between the exception of nonperformance and the right of retention must not be ignored. Both mechanisms have as a legal fundament the equity, 'no one being held to fulfill his own obligations toward the one who has not fulfilled his own'[19]. Furthermore, neither the right of retention, nor the exception of nonperformance cannot be acknowledged in those situations in which they are not founded or in which the acknowledgement of either one would take to the violation of the rights of the other person, good-faith being necessary indifferently from the used legal mechanism.

Analyzing the current legal provisions, in the matter of the exception of nonperformance the legal conjunction that must exist between the obligations of the parties is essential. In the matter of the right of retention, the current regulation has not yet clarified the domain of application of the right of retention, its acknowledgement being possible in both cases, those of legal conjunction or of material conjunction. This last aspect is the cause of the most confusions which are made between the right of retention and the exception of nonperformance.

De lege ferenda, we appreciate that the right of retention should be acknowledged and used just in the situations in which there exists a material conjunction between the good which restitution is refused of the retaining creditor and the not fulfilled obligation of the debtor.

4. Exceptions from the exercise of the right of retention

As any other right acknowledged to a subject of civil law, the right of retention has its own limitations. Moreover, the origin of this right being the law, according to the article 2495, the second paragraph, 'by the law can be established other situations in which a person can exercise a right of retention', it is also only

[18] 'The legal conjunction, as expression of the common origin of two obligations, explains the fact that these must be fulfilled together, at the same time. The right of retention appears as a consequence of the idea of interdependence, ensuring the equilibrium between the connected obligations' *apud* Liviu Pop, Ionuţ-Florin Popa, Stelian Ioan Vidu, *op. cit.* (*Civil Law Cours…)*, 2015, p. 657.

[19] Ioana Cristina Tița, *The Guarantees of the Fulfillment of the Obligations under the New Civil Code*, p. 38, available on http://studia.law.ubbcluj.ro/, consulted last time on February 1, 2017.

by the law that the limitations can intervene, respecting the principle of the legal symmetry.

In this matter of speaking, the article 2496, the second paragraph of the Civil Code states that 'the right of retention cannot be exercised if the detention of the good comes from an illegal act, it is abusive or illegal or if the good is not susceptible of forced pursuit'. It can be observed that the right of retention cannot be exercised in four situations outlined by the law, which must not be confounded among each other.

Another situation in which the right of retention cannot be exercised is described by the provision from the article 2496, second paragraph of the Civil Code, where is said that 'the right of retention cannot be invoked by the bad faith possessor but in the situations ruled by the law'. Therefore, article 629, third paragraph of the Civil Code states that 'the good for which it was stipulated the inalienability (on a conventional way, n.b.) cannot be the object of the forced pursuit, as long as the provision produces effects, if by law it is not otherwise provided'. As the clause of inalienability conventionally established has a temporal limitation set on 49 years, the good upon this clause refers to cannot be the object of the right of retention during this time. As follows, if the law states otherwise, the right of retention can be invoked, even by the bad faith possessor.

Even though there is no specific mention in the Civil Code, there also exists the situation of 'other situations provided by the law', in which the exercise of the right of retention is prohibited, even if the possession of the good has a legal character and the person who detains it is a good faith person. For example, in the matter of lease, the law establishes that the lessee cannot invoke under no circumstances the right of retention, if he carried out works for which he pretends to be compensated, if for these works he did not have the lessor**'s** consent previously.

Another situation is the one provided by the article 1308, third paragraph of the Civil Code, legal provision which states that 'the representant cannot retain this written act (the one who outlines his representation powers, n.b.) as a guarantee of his claims against the represented, but he can ask for a copy, certified by the represented, having the mention that the representation has ceased'. Even so, according to the article 2029 of the Civil Code, in the situation of the mandate, in order to have a guarantee of all his claims coming from the mandate, the mandatary has a right of retention on the goods he received as he was fulfilling the mandate from the mandator or on his account.

There are tough situations where the institution of the right of retention is demanded on a judicial path and this institution is left at the appreciation of the court, the request being able to be overruled even if the conditions provided by the law are fulfilled, but the request is without a sufficient justification. For example, by the civil settlement no. 251/C/30.01.2009[20], the Court of Mangalia partially admitted the request, as it has been rectified, pressed by the complainant D.D.

20 The Court of Mangalia, *Civil Settlement no. 251/C/30.01.2009*, available on www.portal.just.ro, consulted last time on February 1, 2017.

through his tutor and forced the defendants S.E., S.I., D.F. and D.N.to the solidary payment of the amount of 13.707,48 lei, representing the lack of use of the apartment for the period from 01.07.2003 – 09.05.2006; overruled as ungrounded the exception of inadmissibility formulated, by the defendants, even more the secondary and third request; partially admitted the counterclaim formulated by the defendants and forced the complainant to pay to the defendants the amount of 3.151 lei, representing the updated amount that the complainant promised to pay the defendants at 30.11.2006 . Also, the Court overruled as ungrounded the request concerning the institution of a right of retention upon the complainant's apartment and decided the compensation of the court's expenses.

5. The applicability of the right of retention

Excepting the general regulation behold by the articles 2495 – 2499 of the Civil Code, the right of retention is also to be found in other sections, the provisions thereby having a special character reported to the general corpus of law. As it will be seen, these mainly appear among the provisions that have been taken over from the former Commercial Code, as it is the contract of mandate or its species, as agency or consignment, species of whose nature is not the representation, element that is typical to the commercial law.

Therefore, the article 2029 of the Civil Code states that 'the mandatory has a right of retention upon the goods received during the fulfillment of his mandate from the mandatory or on his account, in order to have all his claims coming from the contract guaranteed'. In the former regulation, the article 387, first paragraph of the Commercial Code stated that 'the mandatory has a special privilege, for all that it is owed to him from the fulfillment of the mandate and even for its retribution. This privilege is exercised upon the goods belonging to the mandator that the mandatory has received in order to fulfill the mandate or which are to be found at his disposition, in his stores, in a public deposit or which have been shipped to him, for which he can prove the legitimate possession by an embarkation document or a transport contract'. It can thereby be observed that, even if it did not exist a general regulation of the right of retention, they were legal acknowledgements on the level of legal matter, having the character of a special provision. The status of the right of retention, as a special privilege and guarantee belonging to the mandatory is unchanged in the present regulation.

Departing from the provisions of the former Commercial Code, the Supreme Court settled that 'during the exercise of the right of retention the mandatory cannot use the goods received from the mandatory or from third parties in the name and on the account of the mandatory, for the retention does not offer him a right of use'[21].

In the present regulation, although the right of retention does not offer the mandatory the right to use the retained good, he must behave himself toward the

[21] The Supreme Court, *Decision no. 857/1968*, Repertoire of Civil and Commercial case law 1969-1975, p. 195.

good as an administrator, having the obligation to collect and preserve the fruits; the Supreme Court of Justice settled that 'as soon as the court's settlement is indefeasible regarding the institution of the right of retention, the relisted debtor does not benefit any longer of the fruit coming from the retained good, being therefore instituted a civil sanction towards him, for a part of the prerogatives of the right of property are not acknowledged any more. But, the use of a good unaffected by a guarantee such as the right of retention, without the consent of its owner represents an illegal act, which creates a prejudice in the patrimony of the owner, which is to be measured though the lack of use'[22].

Also in the domain of the mandate, but departing from the provisions of the Commercial Code, the Supreme Court of Justice settled by a decision that, the right of retention, which gives to the possessor of a good belonging to another the possibility to refuse its restitution, until the creditor of the good fulfills his obligation to refund the costs issued by the good is not understated, but it has to be acknowledged by the court, at the request of the interested parties'[23]. As the distinction civil law – commercial law is not used any more by the law, the settlement of the Supreme Court may seem to lack actuality, for the present Civil Code acknowledges the right of retention of the mandatory without further ado's. Even so, we appreciate that in the relations occurring among the professionals, the institution of a right of retention should be judicial acknowledged or it should be registered in a public register, for the opposability *ex lege* of the right to produce fully effects and in order to guarantee the security of the civil circuit, so as not to come to the abusive exercise as it is described by the article 15 of the Civil Code.

In spite of this, there must not be forgotten that the right of retention of the mandatory is limited by the dispositions of the article 1308, second paragraph of the Civil Code, where it is stated the fact that 'the representant cannot retain this written act (the one who outlines his representation powers, n.b.) as a guarantee of his claims against the represented, but he can ask for a copy, certified by the represented, having the mention that the representation has ceased'. However, even if the mandatory gives back this written act to the mandatory, this remission does not equal a renunciation at the possibility to prevail himself of the right of retention, when in the legitimate possession of the mandatory are to be found goods resulting from the fulfillment of the mandate.

The right of retention has a special regulation also in the domain of the agency contract. As opposed to the ordinary mandate, the agency is without representation. Even more, the agent can act only as a professional, his retribution having a legal basis.

According to the provisions of the article 2053, first paragraph of the Civil Code, 'the agent has a right of retention upon the goods to be found in his

[22] The Supreme Court of Justice, *Decision no. 3610 from the 11 of November 2011*, The Civil and Intellectual Property Department, available on www.scj.ro, consulted last time on February 1, 2017.

[23] The Supreme Court of Justice, *Decision no. 6604 from the 25 of November 2004*, The Commercial Department, available on www.scj.ro, consulted last time on February 1, 2017.

legitimate possession belonging to the principal, for the claims he has against him'. It must be observed that also in this situation, the right of retention works on a legal basis, not being necessary a contractual clause for that matter. Moreover, it is legally acknowledged the quality of legal possessor of the agent.

Furthermore, the article 2053, second paragraph of the Civil Code states that 'the agent will have priority towards the vendor who has not been paid'. Still, 'the privilege exists as long as the goods find themselves in the agent's possession'[24]. If the obtained goods are given to third parties, on the contractual basis of the agency contract, the agent cannot pursue these goods in order to obtain the fulfillment of his claims towards the principal. The advantage of the agent consists though in the fact that, by exercising a right of retention upon a good received during the performance of the contract of agency, he has a preference to the vendor who has sold the good to the principal and has not been yet paid. In this situation, the agent is paid with priority, the essential condition remaining that of the exercise of the right with good faith. The agent looses though this preference by exercising the right of retention upon the good for other purpose than the one provided by law, as the settlement of his claims against the principal.

As the object of the agency contract is, according to the law, 'the acquisition or the selling of goods or services', it can be said that the right of retention can be exercised only in the situation of the acquisition or selling of goods. The legislator does not prohibit the exercise of this right when it comes to services, but in the contracts between professionals it is unlikely that the obligations coming from the services performed by the agent on behalf of the principal are extinguished (by the third party) through a commissioning payment, so as the agent receives goods (movable goods or real estates) who could be object of the right of retention.

The contract of consignment is a specie of the agency and an under specie of the mandate without representation, article 2054, first paragraph of the Civil Code stating that 'it is a variety of the agency having as an object the sale of movable goods which the consignor has given the consignee in this purpose'. As the agent, the consignee must be remunerated for his activity, which is developed with a professional title. In this matter of speaking, 'the good are provided to the consignee, but the propriety of the goods is not being transferred towards him'[25].

All aspects concerned, the right of retention of the consignee is different from that belonging to the agent; for this matter, the article 2062, first paragraph of the Civil Code states that 'the consignee has no right of retention upon the goods received under contract or upon the amounts of money belonging to the consignor, for his claims, as long as there does not exist an opposed contractual provision for that matter'. So, in order to exercise a right of retention upon the goods he receives from the consignor, there must be a contractual clause stating it, in the benefit of

[24] Flavius-Antoniu Baias (coordinator), *The New Civil Code – Commentary on articles*, C.H. Beck Publishing House, Bucharest, 2012, p. 1596.

[25] Dan-Alexandru Sitaru, *The intermediary in the commercial activity*, Hamangiu Publishing House, Bucharest, 2012, p. 12.

the consignee. In a contrary situation, 'for the payment of the claims belonging to the consignee (outgoings, advances, remunerations for the already sold goods, if there have been given banks of goods and not just individual goods), he has no right of retention upon the goods received under the consignment'[26]. Regarding the goods that can be the object of the right of retention, it must be said that those can be just movable goods.

An application of the right of retention of the consignee is the one beheld in the article 127, first paragraph of the Law no. 85/2014 regarding the proceedings of preventing the insolvency and insolvency, where it is stated that 'if a debtor possesses merchandise, or any other goods that belong to another when the procedure it opened, as a consignee, the owner will have the right to recover his good according to the provisions of the article 2057, fourth paragraph of the Civil Code, except for the situation in which the debtor has a legitimate cause of preference upon the good'. As so, if the debtor-consignee (being in insolvency) is the beneficiary of a clause which acknowledges the possibility of exercising the right of retention upon the goods received under consignment or upon the amounts received by selling the goods, the can retain the goods until the extinguish of the debt of the consignor. In this way it has also been settled by the Supreme Court of Justice that 'the request of the consignor for the consignee to be forced to pay the price of the goods received under consignment is not founded, because the goods have not been sold and the consignor has been notified by the consignee to take them over, what he did not do. The goods remained in the propriety of the consignor and the obligation of the consignee to pay the price exists only after the goods have been sold'[27]. As in the consignment had been expressly mentioned the right of retention of the consignee, this one correctly retained the goods received under contract until the payment of the commission, not having how to retain the price for those, for the goods had not been sold. Conclusively, 'the owner of the good will be able to recover it, excepting the situation in which the debtor has a legitimate right of guarantee upon the good'[28].

The right of retention has not been regulated only in the domain of the professional contracts (the former commercial contracts), but also in other domains of the Civil Law. An example in this manner is represented by the deposit with an innkeeper. Therefore, according to the article 2053 of the Civil Code, 'the innkeeper is entitled to retain, as security for payment of the cost of lodging and the services and prestations actually provided by him, the goods and baggage brought to the hotel by the guest, with the exception of his personal papers and effects that have no commercial value'. The goods of the guest can be also retained only if he does not pay the price of the lodging and services who were provided to him. As

[26] Flavius-Antoniu Baias (coordinator), *op. cit.*, p. 1601.

[27] The Supreme Court of Justice, *Decision no.2549* from 9 of April 2002, Commercial Department available on www.scj.ro, consulted last time on February 1, 2017.

[28] Ion Turcu, Andreea Szombati, *The Insolvency Law – the rebel daughter of the Civil Law, The 'Phoenix' Magazine of the National Union of the Insolvency Practicioners,* no. 40-41, p. 8, available on http://www.unpir.ro/phoenix/pdf/articol_dreptul_ insolventei.pdf, consulted last time on February 1, 2017.

so, 'the fulfillment of the obligation of the guest to pay the costs of the lodging and the services is guaranteed by the right of retention belonging to the innkeeper upon the goods of the guest'[29]. The legislator excluded though personal papers and effects that have no commercial value form the domain of the right of retention. The right of retention does not lose on this way his primarily function, that of being a guarantee. The retention of the documents or of the personal effects belonging to the guests still represents an abusive exercise of the right of retention and the innkeeper can be held to pay damages, should the guest suffer a prejudice for this reason.

As opposed to the right of retention on the consignee, the right of retention of the innkeeper must not be expressly mentioned in the contract existing between him and the client, being acknowledged by the law. Another particularity of the right of retention is the one mentioned in the article 2136 of the Civil Code, which states that 'the innkeeper can request for the goods to be valued, according to the regulations provided by the Code of Civil Procedure regarding the forced pursuit'.

It must though be said that both in the situation of the inn keeping and consignment, the object of the right of retention can be just the movable goods, being excluded real estates.

The domain of application of the right of retention coming from the in keeping is extended by the provision of the article 2137 of the Civil Code, according to 'the provisions of the present section are to be applied to the goods brought into sanatoriums, hospitals, motels, sleeping cars and other similar places', not being therefore excluded the possibility of regulating the right of retention by a special law, in domains which are similar to the inn keeping.

6. Conclusions

In a general way, the real privileges and guarantees are meant to ensure the fulfillment of the civil, commercial or other kinds of obligations, contributing as a consequence at the security of the civil circuit. Though, as a general law rule, in order to be opposable to third parties, real guarantees must be written into the Land Registry, if they have real estate as an object and into the Electronic Archive of Security Interests, if they have movable goods as an object. As an exception, the category of privileged claims has the advantage of opposability, without any form of publicity.

As we have shown, the right of retention has been used as a guarantee mainly in the reports between the professionals (former merchandisers), due to the fact that the regulations of the right of retention were known mainly in the domain of commercial contracts. The most situations when the right of retention could be exercised have been brought in the present Civil Code; it must be observed that this provisions with a derogatory character from the general regulation of the right of

[29] Flavius-Antoniu Baias (coordinator), *op. cit.*, p 1647.

retention appear in the domain of professional contracts, the most frequent being those of mandate.

In the context of the unification of the Civil Code with the Commercial Code and of the legal acknowledgement of the right of retention, it remains to be seen if it will be invoked and used in the domain of the civil law and of the contracts between nonprofessionals or without a professional title or if it will remain one of the guarantees mainly seen in the activity of production, trade or services.

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