About the Substantiation of the Security Interest

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Abstract: Unlike the Civil Code of 1864, the current Code includes norms of common law and some application in different fields. The current regulation is not beyond criticisms given that part of doctrine seems tributary to the opinions formulated according to the previous norms. Starting from general provisions, we would like to point out that the substantiation of the security interest, in this new configuration, expands beyond the existence of a material connection between the receivable and the asset and the lawmaker has, upon the preparation of the Civil Code, a broader vision.

Keywords: security interest; material connection; legal connection; connection *ex lege*

The Civil Code of 1864 did not offer any definition of the security interest or rules of common law, but only regulated some particular applications (Morozan ş.a., 2012, p. 910) in different fields. This omission was supplemented by the doctrine and juridical case law which formulated, among others, the following definitions:

- "*the right in rem which offers the creditor, at the same time debtor of the obligation to return or deliver the asset to another, the possibility to withhold such asset in their possession and to refuse to return it until its debtor, creditor of the asset, pays the debt in their charge in connection with such asset*" (Pop, 1998, p. 451);

- „*a measure to ensure the fulfillment of the principal, a payment guarantee, functioning as a case of special preference exercised over a determined individual asset*" (Adam, 2004, p. 637);

- „*a right in rem of imperfect guarantee according to which the person who has a movable or immovable asset of another person and which must return, has the*

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right to keep it, thus to refuse to return it, until the creditor – holder of the asset pays the amounts paid for the preservation, maintenance or improvement of such" (Stătescu & Bîrsan, 2008, p. 428),

However, the opinions above are not unitary. Thus, the security interest was seen either as a means specific to secure obligations, without representing an accessory right *in rem* (ÎCCJ, s. com., dec. no. 1916/2008) or an imperfect right of guarantee in rem (Stătescu & Bîrsan, 2008, p. 429; Stoica, 2008, p. 214) because it produces effects as long as the asset is in the hands of the proxy (Stoica, 2008, p. 214).

Art. 2495 of the Civil Code, marginally named "Notion", does not define the security interest (Vasilescu, 2012, p. 196), indicating: *„(1) The person who must return or give back an asset can withhold it as long as the creditor does not fulfill their obligation arising from the same legal relation or, as the case may be, as long as the creditor does not compensate them for the necessary and useful expenses made or such asset or for the damage the asset has caused. (2) According to the law, other situations can be established when a person can exercise a security interest.*

Under such conditions, the doctrine and case law have the role to define the security interest. Thus, we have noticed the following recent definitions: „*The subjective right in rem granting the holder-creditor of the debt arisen in connection to the asset – the power to withhold and to refuse to return an asset until its debtor settled the obligation in their charge in connection with such asset*" (Vidu, 2010, pp. 45-46; Pop; Popa & Vidu, 2012, p. 853); „*The refusal to return an asset of another person until and subject to the payment of the debt in connection with such asset that the person entitled to ask the return has*" (Vasilescu, 2012, p. 196).

Considering the provisions of art. 2495 of the Civil Code, an opinion (Pop; Popa & Vidu, 2012, p. 853) shows that they can be subject to criticism due to the following arguments:

- the term of creditor of the obligation to return or give back the asset does not cover the situations when such obligation is not part of mandatory juridical relations, such as the return as effect of an action for recovery of property which is admitted.
- the use of the phrase "*the same relation of right*" as sources of the obligation to return or give back the asset and of the receivable of the person who has the asset "sets the grounds for an inacceptable combination between the exception of non-fulfillment and the security interest";

- paragraph 2 can lead to the conclusion that the field of application of the security interest also comprises situations when the connection is different that the material one between the assets and the receivable.

Thus, we notice that, although an improvement can be noticed in the regulations, the doctrine, in the (objective) absence of the case law, is divided as regards the substantiation of the security interest. Thus, some (Vidu, 2010, pp. 29-44; Pop; Popa & Vidu, 2012, pp. 851-852) claim that such connection can be only material (or objective) – the right of receivable is "born in direct connection" or "its births is in close connection" to the asset, while others (Moise ş.a., 2012, p. 2495) accept the existence of both material and juridical connection (in case of the exception of non-fulfillment, the security interest being seen as its expression[1] (Stătescu & Bîrsan, 2008, p. 428)]. Moreover, the latter (Moise ş.a., 2012, p. 2495) indicate that paragraph 2 of art 2495 of the Civil Code does not refer to the application of the common law, but to the fact that, under the law, other situations of material or juridical connection can be established to represent, by exception, the grounds of the security interest for such cases.

Starting however from the provisions of art 2495 of the Civil Code, in our opinion the field of application of the security interest is delimited, given its substantiation, on the one hand, by the connection which can be generated – "the same juridical relation" is the source of the right of the person who has the asset and the person entitled to return – or special – when the right of the person who has the asset has as object the return of the useful and necessary expenses made for the asset or compensation for the damage caused by such asset (Vasilescu, 2012, p. 198) and, on the other hand, the situations when the law determined the existence of the security interest in other cases of connection than those indicated above, as well as the cases when, although applicable the provisions of paragraph 1 of art 2495 of the Civil Code, the law expressly forbids such right.

Starting from such disputes, we will refer below to some situations when security interest is recognized.

A. If the common creditor has not fulfilled the receivable in its entirety from the common assets of the spouses, the creditor can pursue their common assets and the spouses' responsibility is common. If one of the spouses pays the common debt (or

[1] For example, it was shown (Stoica, 2008, p. 56) that "*... the seller is not obliged to teach while working if the buyer does not pay the price. The seller has a lien on the property sold, which is an application that exception for nonperformance*".

the part uncovered from the receivable by pursuing common assets) from their common assets, paragraph 2 of art 35 of the Civil Code recognizes to their benefit a security interest "over the assets of the other spouse up to the full coverage of the receivable due". Thus, the paid debt was a common one and the assets making object of the security interest are common assets, even acquired before the conclusion of the marriage, which entitles us to affirm that it is not an application of the common law and the existence of a connection between those stipulated in paragraph 1 of art 2495 of the Civil Code (Nicolescu ş.a., 2012, p. 375), but one of the situation allowed by paragraph 2 of the same article, respectively a extra-contractual juridical connection *ex lege*.

B. A Similar situation is regulated by art 365 of the Civil Code which indicates: "*at the end of the separation of goods, each of the spouses has a security interest over the assets of the other one until the full coverage of the debts they have one to each other*", irrespective if the debts of one of spouses to the other one without any connection to the regular obligations of the marriage or those related to the support and education of children.

Considering these two cases, the literature indicated that the "*physiognomy of the security interest seems to be special, with a larger sphere than the one shaped by the provisions of the common law*" (Nicolescu ş.a., 2012, p. 375; Nicolescu, 2012, p. 198), „*the receivable for whose execution the security interest is recognized is not born in direct relation to the asset*" (Dobre, 2010, p. 27). Starting from these arguments, it has been asserted that "*in the common law the security interest is specialized and in the case of spouses is general*" (Bodoaşcă, 2010, p. 67), its birth being outside any connection between the receivable and the asset.

C. According to the general rule, the fruits and products belong to the owner if the law does not stipulate otherwise (art 550, paragraph 1 of the Civil Code) and the person who, without the consent of the owner, pays the expenses necessary to produce and take the fruits or products can ask the reimbursement of such expenses (paragraph 4), having a security interest over such products or counter-value until the reimbursement of the expenses, save for the case when the owner provides sufficient guarantee (paragraph 5). According to the doctrine (Chelaru ş.a., 2012, p. 598, we face here an application of art 2459, paragraph 1 of the Civil Code.

However, the wording of paragraph 4 and 5 of art 550 of the Civil Code raises some questions: thus, there is spoken about the "person who, without the consent

of the owner, pays the expenses (paragraphs 4 and 5, 1st thesis) – who can be both the owner and the custodian, but also about the owner (paragraph 5, 2nd thesis).

On the one hand, the good faith owner, as per the provisions of art 948 of the Civil Code, acquires the ownership right over the fruits of the held asset and if the asset is movable as per art 937, paragraph 1 of the Civil Code, that person becomes owner not only of the fruits, but of the asset itself. On the other hand, the person who withholds the asset is not always the custodian, but can be the owner and, important being for the existence of the possession, save for the actual possession (*corpus*) the intention to act as owner (*animus*) (Ionaşcu & Brădeanu, p. 167; Boar, 1999, p. 35; Pop, 2001, p. 222; Ioan, 2011, p. 65; Bîrsan, 2013, p. 333), the qualification being made according to this second element and not to the existence of the obligation to return.

According to the wording, it seems that the only difference of juridical regime appears in the case of the settlement of the security interest following the supply of sufficient guarantee, which solution would be unjustified in our opinion (creating for the owner an unfavorable situation not related to their person). Therefore, we suggest the amendment of the 2nd thesis of paragraph 5 of art 550 of the Civil Code, namely: "however, if the owner *provides sufficient guarantee, they can ask for the person entitled to the reimbursement of the expenses to be compelled to deliver the products or their counter-value*".

D. According to art 566 paragraphs 3 and 4 of the Civil Code, following the admittance of the action for the recovery of property, the owner can be compelled, on request, to return to the holder the necessary expenses made by them and the useful expenses, within the limit of the value threshold, if the law does not provide otherwise. This is an application of the rules of common law in the field of the security interest. The possessor does not enjoy this right if the asset produces return or if the possession of the asset has been violent or (paragraph 7).

E. If the action for the recovery of property is admitted, as per art 566, paragraphs 2, 5 and 6 of the Civil Code, the owner can be compelled, on request, to reimburse the expenses necessary for the production and gathering of the fruits (if there has been requested the return of the fruits produced by the asset) or products, the defendant having a security interest over the products until the reimbursement of the expenses made for their production and gathering, save when the owner provides sufficient guarantee to the defendant.

Unlike the situation above, object of the security interest makes the fruits or products and not the claimed asset. Moreover, it is one of the exceptions indicated in art 2496, paragraph 2 of the Civil Code, the security interest being acknowledged for the bad faith possessor (Chelaru ş.a., 2012, p.633). The withholding cannot be exercised if the products are perishable or subject, following the passing of a shorter period of time, to a significant decrease of its value (paragraph 7).

F. As per the provisions of art 856 paragraph 2 of the Civil Code, the administrator has a security interest over the managed asset until the full payment of the remuneration due by the beneficiary or fiduciary. The literature (Constantinovici & Mitu et al., 2012, p. 874) indicates that the security interest arises from any debt to the administrator, solution which, in our opinion, infringes the systematic construal and the grammatical one. Thus, the security interest is regulated in art 856 of the Civil Code marginally named "Deduction of remuneration" and paragraph 2 uses the phrase "full payment of the debt" not of debts.

G. According to art 937 paragraph 3 of the Civil Code, "if the lost or stolen asset is bought from one place or from a person who usually sells similar goods or is adjudicated in a public auction and the action for the recovery of property is filed within the 3 years term, the good faith possessor can hold the asset until its full compensation for the price paid to the seller". Based on the common error regarding the capacity of owner of the person who sells the asset and the good faith possession, a receivable appears for the defendant, having a object the price paid for the claimed movable asset (Stoica, 2009, pp. 394-395) which has as accessory a security interest over such claimed asset.

H. In case of donations in kind, the grantee can hold the asset until the effective payment of the amounts due for the reasonable expenses made for the added works and necessary and useful autonomous works until the date of the relation, save when the receivable is compensated with the compensation owed for the deteriorations decreasing the value of the asset following their culpable deed (art 1154 paragraph 3 of the Civil Code). In such case, we face a material connection between the receivable and the asset, application of the general rule indicated in paragraph 1 of art 2495 of the Civil Code.

I. A situation of juridical connection is regulated by art 2029 of the Civil Code in the field of mandate. Thus, to secure all the receivables against the principal arising

from the mandate, the proxy has a security interest over the assets received during the fulfillment of the mandate from the principal or in their behalf.

J. According to art 2053 of the Civil Code, the proxy has a security interest over the assets of the principal, in their possession, and a preference right towards the unpaid seller. The provisions of art 2053 of the Civil Code are justified by the "protection that the proxy must enjoy" (Stănciulescu, 2012, p. 229), who, in the fulfillment of the contract sometimes "*pays money for the price of the merchandise bought for the principal or to cover the transport, storage, preservation or expedition expenses in case of sale of the principal's merchandise*" (Moţiu, 2011, p. 251)

K. According to the *per a contrario* construal of art. 2062 paragraph 1 of the Civil Code, by means of the parties' consent, the consignee can have a security interest over the assets received in consignation and over the amounts due to the consignor for their receivables towards the latter. Thus, the security interest appears conventionally, through exception.

L. According to art 2135 of the Civil Code, failure of the client to pay the price of the room and hotel services leads to the security interest of the hotel-keeper over the assets of the client, save for the documents and personal object without commercial value. There are considered assets of the client, as per art 2127, paragraphs 2-4 of the Civil Code: assets which are in the hotel during the client's accommodation; assets outside the hotel for which the hotel-keeper, member of their family or representative of the hotel-keeper undertake to monitor during the client's accommodation; assets in or outside the hotel for which the hotel-keeper, member of their family or representative of the hotel-keeper undertake to monitor during a reasonable period of time, before or after the client's accommodation; vehicles of the clients left in the hotel's parking and assets which are usually thee; pets if there is a stipulation that they are considered assets brought by the client in the hotel.

However, the security interest does not have as object the vehicles of the clients left in the hotel's parking and the assets which, usually, are found within, paragraph 3 of art 2127 of the Civil Code expressly indicating the responsibility of the hotel-keeper for them.

In conclusion, the substantiation of the security interest is not strictly found in the case of the material solution, solution which arises both from the general norms and from the applications and exceptions from the common law in the field.

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*** ÎCCJ, s. com., dec. nr. 1916/2008, on http://www.scj.ro/SE%20rezumate%202008/SE-1916-2008.htm and *Dreptul* nr.6, 2009.