INSURER SEQUESTRATION OF THE DEBTOR'S IMMOVABLE PROPERTY IN BUSINESS

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Abstract

Insurer sequestration is the insurance measure that the creditor resorts to and that is applicable if the object of the litigation is the payment of a sum of money and that consists of the unavailability of the debtor-defendant's sequestrable movable or immovable property, until the final (irrevocable) decision given in the main trial in order to profit from the property when the creditor will obtain a writ of execution. In this regard, there are the provisions of Article 591 paragraph 1 thesis I of the Civil Procedure Code: "A creditor who does not have the writ of execution, but whose claim is proven by written act and is exigible, may request the setting up of an insurer sequestration of the debtor's movable and immovable property, if he proves that he took legal action". Thus, the provisions of article 907 are understood by reference to the provisions of article 591 paragraph 1 thesis I art.591 of the Civil Procedure Code, in that: in business, the insurer sequestration may also be set up on the debtor's immovable property.

Key words: *insurer, sequestration, exigible claim, appeals in the interest of the law.*

Introduction

Insurer sequestration is the insurance measure that the creditor resorts to and that is applicable if the object of the litigation is the payment of a sum of money and that consists of the unavailability of the debtor-defendant's sequestrable movable or immovable property, until the final (irrevocable) decision given in the main trial in order to profit from the property when the creditor will obtain a writ of execution.[1]

The interested party has the opportunity provided by law to require the court to order the taking of some precautionary measures, namely blocking and conservation measures to hinder the opposing party, during the process, to destroy or alienate his property or to diminish his patrimonial assets.

In the legal practice it was found that there is not a unitary point of view on the interpretation and application of the provisions of articles 907 and 908 from the Commercial Code, in relation to the provisions of article 591 of the Civil Procedure Code, relating to the setting up of the insurer sequestration and on the immovable property not only on the movable property of the debtor in commercial cases.[2]

By the appeal in the interest of the law, pronounced by the general prosecutor of the High Court of Cassation and Justice, it has been made obvious that in the legal practice there is no unitary point of view on the interpretation and application of those provisions.

Thus, some courts have considered that the insurer sequestration in business can only be ordered on the debtor's movable property, according to the provisions of article 907 of the Commercial Code.

In justifying this point of view it has been shown that the provisions of the Commercial Code have a waiver character to the rules set out in the Civil Procedure Code, so that in business the insurer sequestration is governed only by the provisions of articles 591 - 594 of the Civil Procedure Code. Other courts, on the contrary, have considered that the insurer sequestration may be set up also

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[1] V.M.Ciobanu, G.Boroi – Drept procesual civil (Civil Procedural Law,), Ed.All Beck, 2005. p. 219.

[2] Mihaela Tăbârcă – Drept procesual civil (Civil Procedural Law,), Ed.Universul Juridic, 2008, p.427-434.

on the debtor's immovable property; in this respect the provisions of article 907 of the Commercial Code being applicable, related to article 591 of the Civil Procedure Code.

Insurer sequestration of the debtor's immovable property in business

Thus, according to the provisions of article 907 paragraph 1 of the Commercial Code[3], any party interested in a commercial cause will be able, once with the suing, to request the setting up of the insurer sequestration of the debtor's movable property.

He will also be able to follow and to seize for the sums included in his writ or the sums or the effects owed to his debtor by a third party.

Regarding the other aspects of setting up the insurer sequestration in case of commercial litigations, the interested party may not be exempt from observing the provisions of the Civil Procedure Code concerning this insuring measure, provisions to which refers the regulation norm contained in article 907 of the Commercial Code, that is to say article 614 of the Civil Procedure Code.[4]

In case the ascertainment document is a writ of execution, the setting up of the insuring or protective measure lacks any interest, since the creditor can trigger the forced execution.

The insuring measure may be required when the document is not a writ of execution or when the claim is not established by a document.

In this context, there are the provisions of article 591 paragraph 1 thesis I of the Civil Procedure Code: "The creditor who does not have a writ of execution, but whose claim is proven by written document and is exigible, may request the setting up of an insurer sequestration of the debtor's movable and immovable property, if he proves that he took legal action.

He may be forced to pay a bail in the amount established by the court and that will be determined under the provisions of article 723^1 paragraph 2 the Civil Procedure Code.

The same right is held by the creditor whose claim is not ascertained in written, if he proves that he filed action and submits, together with the request of the sequestration, a bail of half the value claimed.

The court may allow the insurer sequestration even if the claim is not exigible in the cases in which the debtor has reduced by his deed the assurances given to the creditor or did not give the promised assurances or when there is the danger for the debtor to avoid surveillance or to hide or to dissipate his assets. In these cases, the creditor must prove that the fulfillment of the conditions: the claim is ascertained by written document, he proves that he sued and he pays a bail whose value shall be determined by the court.

The provision of article 591 of the Civil Procedure Code, "the creditor who does not have the writ of execution, but whose claim is ascertained by written document and is exigible, may request

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[3] Article 907 of the Commercial Code

The interested party in a business cause will be able, together with suing, to put insurer sequestration of the debtor's movable property according to article 614 and the following from the civil procedure according to the differences stated below.

He will also be able to follow and to seize for the sums included in the writ or the sums or the effects owed to his debtor by a third party, complying with the provisions of article 456 and the following of the Civil Procedure Code.

Article 908

The sequestration or the seizure will not be set up unless there is payment of the bail, except when the request for sequestration or seizure is made under a bill of exchange or other commercial effect to order or to bearer, protesting for non-acceptance or non-payment.

Judecătoria se va pronunța asupra sechestrului în camera de consiliu fără prealabilă chemare a părților.

The insurer sequestration can only be released if the debtor deposits the sum, capital, interests and costs for which the sequestration was set up.

[4] The provisions of article 614 and the subsequent ones of the old Civil Procedure Code, to which reference is made by article 907 paragraph 1 from the Commercial Code, are found in article 591-596 of the current regulation.

the setting up of an insurer sequestration of *the debtor's movable and immovable property*", thus imposes to implicitly consider modified the content of article 907 paragraph 1 of the Commercial Code as well, which refers only to the insurer sequestration of the debtor's "movable property", in the context in which, under the current legislation the insurer sequestration can be ordered both of movable and immovable property.

Therefore, in the event of failure or improper fulfillment of the commercial obligations incumbent on the parties of the agreements concluded, because the debtor's fault or because of other causes, the creditor must be enabled to gain access to such guaranties to insure both the full fulfillment of the obligations taken by the debtor, and his efficient protection against the risks that could prevent his wealth.

The creditor who does not have a writ of execution, but whose claim is ascertained in writing and is exigible, may request the setting up of an insurer sequestration of the debtor's movable and immovable property, if he brings evidence to prove the start of the litigation[5]. If the request to set up the insurer sequestration is submitted together with the request for suing which initiates the litigation, the creditor must enclose the ascertaining document of the claim, for the situation stipulated in paragraph 1 of article 591, it may be required to pay a bail of a sum determined by the court.

The court may allow the insurer sequestration if the claim is not exigible, in the cases in which the debtor has reduced by its deed the assurances given to creditor or did not give the assurances promised or when there is the danger for the debtor to avoid the surveillance or to hide or to dissipate his assets. In these cases, the creditor must prove that the fulfillment of the other conditions stipulated by paragraph 1 and to deposit a bail whose value shall be determined by the court.

The same right is held by the creditor whose claim is not ascertained in written, if he proves that he filed action and submits, together with the request of the sequestration, the document to prove the deposit of half of the value claimed in the litigation, for the situation provided by paragraph 2 of article 591 of the Civil Procedure Code.[6]

In case the request for setting up the insurer sequestration is made after recording the request for suing, the evidence which shows the initiation of the litigation must be enclosed.

Concerning the bail and the court's sentence on the insurer sequestration there are also the provisions of article 908 paragraph 1 of the Commercial Code, which require that the sequestration

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[5] V.M.Ciobanu, G.Boroi – Drept procesual civil (Civil Procedural Law,), Ed.AllBeck, 2005. p. 218-224.

[6] Decision no.886/2007 of the Constitutional Court published in the Official Gazette no.785/20.11.2007.

The provisions of article 591 paragraph 2 of the Civil Procedure Code concerning the sum of the claim deemed excessive of the creditor who does not have a written ascertaining record of his claim, has been the object of the unconstitutionality plea, settled by the Constitutional Court by Decision no.886/2007, by rejecting plea.

Thus, the provisions of article 591 paragraph 2 of the Civil Procedure Code, which establishes the payment obligation of a bail, aim at protecting the interests of the debtor against exercising in bad faith by the creditor of his procedural rights. The payment of the claim is not an admissibility condition of the action through which the creditor pursue the fulfillment of his rights, but only one condition for the setting up of the insurer sequestration of the debtor's movable and immovable property, in the context in which the claim is not ascertained in written and the creditor proves that he has filed civil action. Therefore, the guaranty granted to the debtor of the obligation, justified by preventing the abusive exercise of some procedural rights by the creditor, can not be regarded as a means of preventing free access to justice.

Regarding the violation of the provisions of article 16 paragraph (1) of the Constitution, the Court finds that to the extent to which the regulation deduced to the control applies to everybody in the situation stipulated in the hypothesis of the legal norm, law without any discrimination, on arbitrary grounds, the criticism as such an object is unfounded.

The Court can not hold either the criticism according to which the provisions of article 591 paragraph 2 of the Civil Procedure Code would contravene the principle of guaranteeing private property, so long as, according to article 723^1 paragraph 3 of the Code, "The bail is issued to the person who has deposited it as far as the one entitled to it has not made a request for payment of the due compensation, within 30 days from the date on which, by irrevocable decision, the cause has been settled".

or the seizure can only be set up by release of bail, except when the request for sequestration or seizure is made by virtue of a bill of exchange or of another commercial effect to order or to bearer, protested by non-payment.

The court competent to hear the case is competent to settle the request for setting up the insurer sequestration, so it will settle the request for setting up the emergency insurer sequestration on the Council premises without prior calling of the parties, pronouncing a closure execution. The sentence may be delayed up to 24 hours and the drawing up of the closure must be drawn up within 48 hours from the pronunciation.

Therefore it has been appreciated that article 907 of the Commercial Code was implicitly amended by the provisions of article 591 paragraph 1 of the Civil Procedure Code.

In this respect article 889 of the Commercial Code, provides that "the exercise of commercial actions is regulated by the Civil Procedure Code, except the provisions of the present code".[7]

The applicability also in business of the regulation in article 591 paragraph 1 of the Civil Procedure Code is also required by the provisions of article 721 of the Civil Procedure Code, according to which the provisions of this code "form the common law procedure in civil and commercial matters." Such an interpretation is also required by the peculiarity of legal relationship of commercial law, which is characterized by swiftness so that the closure of its amendment or cessation can be done with maximum efficiency and in good faith, so that the final reason of such a legal relationship is its just fulfillment.

The proper settlement of this situation of maximum importance for ensuring the effectiveness of the trade relationships has imposed examining the evolution of the existing legislation and the adoption of Decision no.84/2007[8] by the High Court of Cassation and Justice, which allowed the appeal in the interest of the law, in that sense that the provisions of article 907 are interpreted by reference to the provisions of article 591 paragraph 1 thesis I of the Civil Procedure Code, in that: in business, the insurer sequestration can also be set up on the debtor's immovable property.

Conclusion

Insurer sequestration is the insurance measure that the creditor resorts to and that is applicable if the object of the litigation is the payment of a sum of money and that consists of the unavailability of the debtor-defendant's sequestrable movable or immovable property, until the final (irrevocable) decision given in the main trial in order to profit from the property when the creditor will obtain a writ of execution.

The interested party has the opportunity provided by law to require the court to order the taking of some precautionary measures, namely blocking and conservation measures to hinder the opposing party, during the process, to destroy or alienate his property or to diminish his patrimonial assets.

The insuring measure may be required when the document is not a writ of execution or when the claim is not established by a document.

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[7] G.C.Frenţiu, D.L.Băldean – Codul de procedură civilă comentat şi adnotat (The commented and annotated Civil Procedure Code), Ed.Hamangiu, 2008, pp 1408.

[8] Decision No. 84 of December 10, 2007 of the High Court of Cassation and Justice, published in the O.G. no.697 of 14/10/2008.

It allows the appeal in the interest of the law declared by the general prosecutor of the High Court of Cassation and Justice.

The provisions of article 907 of the Commercial Code shall be interpreted by reference to the provisions of article 591 paragraph 1 thesis I of the Civil Procedure Code, in that:

In business, the insurer sequestration may be set also up on the debtor's immovable property.

The court competent to hear the case is competent to settle the request for setting up the insurer sequestration, so it will settle the request for setting up the emergency insurer sequestration on the Council premises without prior calling of the parties, pronouncing a closure execution. The sentence may be delayed up to 24 hours and the drawing up of the closure must be drawn up within 48 hours from the pronunciation.

Referances:

- V.M.Ciobanu, G.Boroi – Drept procesual civil (Civil Procedural Law,), Ed.All Beck, 2005. p. 219.
- G.C.Frenţiu, D.L.Băldean – Codul de procedură civilă comentat şi adnotat (The commented and annotated Civil Procedure Code), Ed.Hamangiu, 2008, pp 1408.
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